THE COMPLEX COMMERCIAL LITIGATION LAW REVIEW

THIRD EDITION

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Steven M Bierman
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I am privileged, once again, to be the editor of *The Complex Commercial Litigation Law Review*, now in its third edition. This expanded 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. This reality has only come into sharper focus in a year when the global covid-19 pandemic not only has ravaged public health and private lives but also has profoundly unsettled a vast array of commercial relationships, with as yet uncertain ultimate consequences.

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 centres, 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 third edition, which expands once again the range of jurisdictions from those covered in earlier editions. 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, contemplating how best to prevent, manage, or resolve disputes, 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 2020
Chapter 1

AUSTRALIA

Kenneth P Hickman, Annie E Leeks, Prudence J Smith and Douglas G Johnson

I OVERVIEW

Australia is a common law jurisdiction with highly developed courts and arbitral institutions. The country’s economy is dominated by large financial services, energy, resources and construction industries, which have given rise to some of the world’s most complex mega-disputes.

Litigation remains the primary method for resolving commercial disputes in Australia. Almost all of the country’s superior courts have adopted streamlined processes and specialised lists to actively manage complex cases. Increasingly, class actions and representative proceedings have also become a prevalent feature of the litigation landscape in Australia, particularly with respect to continuous disclosure obligations (market announcements by listed companies) and mass tort litigation. Many Australian courts utilise specialist docket judges to manage these multi-claimant proceedings.

Methods of alternative dispute resolution continue to remain a common feature of Australian commercial contracts. For example, contracts on major projects involving offshore parties frequently provide for the resolution of disputes by way of international arbitration. Federal legislation establishes a framework for international arbitration proceedings with a connection to Australia through the modified adoption of the UNCITRAL Model Law.

The emergence of the global covid-19 pandemic has dramatically altered the way that complex commercial cases are heard in Australia, at least temporarily. All major Australian courts have adopted procedures for conducting hearings and taking evidence remotely through the use of ‘virtual court rooms’. While these procedures generally existed previously, in one form or another, the pandemic has placed a particular emphasis on remote case management. This had led to the adoption of flexible rules aimed at ensuring the quick resolution of disputes in a way that does not compromise due process. For example, some specialised lists in the Supreme Court of NSW have introduced new processes to triage interlocutory motions through the exchange of short position papers before any hearing is ordered. While these specific measures are temporary, increased flexibility around the use of technology is likely to remain a permanent fixture of the Australian court system going forward.

1 Kenneth P Hickman and Annie E Leeks are partners, Prudence J Smith is of counsel and Douglas G Johnson is an associate at Jones Day.
II  CONTRACT FORMATION

Australian contract law consists of a combination of common law and statutory principles. While written contracts are the norm for complex commercial arrangements in Australia, there is no general requirement that all contracts be in writing. They may also be formed orally or by conduct. A legally enforceable contract in Australia simply requires that the following elements be satisfied:

a the existence of an offer;

b acceptance of the offer;

c consideration; and

d intention to create legal relations.

i  Offer and acceptance

For a binding contract to exist there must be a meeting of the minds (agreement) between the parties. This requires that one party make an offer that is been accepted by the other party. An offer may be made in writing, orally, or implied through conduct, provided it is sufficiently clear and brought to the notice of the other party. In addition, an offer must be distinguished from a mere ‘invitation to treat’ or statement of price.

Acceptance can be express or implied through conduct. However, it is only effective where it is unequivocal, communicated to the offering party, made with knowledge, and the accepting party holds a clear intention to accept the offer.

ii  Consideration

Consideration is an essential requirement for a binding and enforceable contract except in circumstances where the parties have entered into a formal agreement under seal, such as a deed.

Consideration must be sufficient but it need not be adequate. It does not need to be proven that the degree of consideration given forms a proportionate or fair exchange for the promises made under the contract. Valuable consideration may consist of any 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 party.

iii  Intention to create legal relations

Australian law requires that the parties to a contract hold an intention to create legal relations. In the context of commercial agreements, this is typically a non-issue, as the parties will be presumed to have intended to create legal relations. This is not the case for agreements in a family, social, or domestic context where there is a presumption against intention. If the element of intention is in issue, it 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 There are some exceptions to this general rule, such as contracts for the sale of land, which must be reduced to writing.

3 Principles of agency are also able operate in these circumstances: Wilson v. Winton [1969] Qd R 536.


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iv  Certainty and completeness of terms
The core terms of a contract (such as identification of the parties and the subject matter and price of their agreement) must generally be agreed upon and sufficiently certain for the contract to be enforceable. The contract must also be substantially complete; that is, it must involve an agreement that is capable of performance. However, Australian courts tend to seek to uphold agreements, and as such, can be inclined to imply reasonable terms to preserve the validity of the contract and give effect to intention of the parties.5 Australian courts will readily do so for commercial agreements by seeking to give commercial efficacy to their terms.

v  Conditional contracts
Contractual terms may be conditional under Australian law. 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-related stipulations in commercial contracts, are presumed to have been given essentiality by the parties.6

Agreements made ‘subject to contract’ have received considerable judicial consideration in Australia. The existence of a binding contract and whether the parties are immediately bound to some or all of its terms, is subject to the courts’ characterisation of the factual circumstances.

vi  Forms of pre-contractual liability
If the legal requirements for the formation of a contract are not strictly satisfied, pre-contractual negotiations and representations may still give rise to enforceable rights or obligations under Australian law. Pre-contractual liability can arise in a number of ways, including:
a through an implied contract;
b in tort (such as negligence or fraud);
c under the law of equity (such as promissory estoppel); and
d by restitution or under statute (such as liability for misleading or deceptive conduct during pre-contractual negotiations under Section 18 of the Australian Consumer Law).

III  CONTRACT INTERPRETATION
i  Interpretation of commercial contracts
Australian courts adopt a common-sense approach to the interpretation of commercial contracts. The terms of a contract will be construed objectively to determine 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 known to them and the commercial purpose or objects to be secured by the contract.7 The courts

6  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].
undertake the task of contractual interpretation pragmatically on the basis that the parties intended to produce a commercial result, and will, therefore, construe a contract’s terms so as to avoid a commercially nonsensical or inconvenient interpretation.\textsuperscript{8}

To appreciate the commercial purpose of a contract, Australian courts look to understand of the origin and background of the transaction and the context and market in which the parties are operating.\textsuperscript{9} The context of a contract is derived from its entire text as well as any contract, document, or statutory provision referred to in the contract.\textsuperscript{10} These factors are not considered to be ‘extrinsic’ to the contract, and may be taken into account without offending common law or statutory rules of evidence discussed below.

\textbf{ii Admissibility of extrinsic evidence in contractual interpretation}

Where a contract has been reduced to writing, ‘extrinsic’ material such as evidence of the parties’ prior negotiations, is generally inadmissible for the purpose of contradicting the plain meaning of a contractual provision.\textsuperscript{11} 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.\textsuperscript{12} 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, as observed by the Court of Appeal of Western Australia:

\begin{quote}
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.\textsuperscript{13}
\end{quote}

However, there are a number of exceptions to this general prohibition against the admissibility of extrinsic evidence. 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,\textsuperscript{14} 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.\textsuperscript{15} Extrinsic evidence may also be admissible to assist in the interpretation of

\begin{itemize}
\item\textsuperscript{8} Electricity Generation v. Woodside, [35]; Mount Bruce Mining v. Wright, [51]; Simic v. NSWLHC, [78].
\item\textsuperscript{9} Electricity Generation v. Woodside, [35].
\item\textsuperscript{10} Mount Bruce Mining v. Wright, [46]; Technomin Australia Pty Ltd v. Xstrata Nickel Australasia Operations Pty Ltd (2014) 48 WAR 261 (‘Technomin v. Xstrata’), [45]–[47].
\item\textsuperscript{11} 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].
\item\textsuperscript{12} Byrnes v. Kendle (2011) 243 CLR 253, [17], [53], [98]–[99]; Simic v. NSWLHC, [18].
\item\textsuperscript{13} Technomin Australia Pty Ltd v. Xstrata Nickel Australasia Operations Pty Ltd [2014] WASCA 164, [175].
\item\textsuperscript{14} Hatcock Prospecting Pty Ltd v. Wright Prospecting Pty Ltd (2012) 45 WAR 29, [78]; Technomin v. Xstrata, [135]; Ryledar Pty Ltd v. Euphoric Pty Ltd (2007) 69 NSWLR 603, [108], [109]; see, for example, Dimmi v. RestaurantDiary.com [2018] NSWSC 846, [121].
\item\textsuperscript{15} Electricity Generation v. Woodside, [35]; Mount Bruce Mining v. Wright, [49], [108]; Simic v. NSWLHC, [78].
\end{itemize}
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 that are reasonably open on 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 as a superior court of record reposed with general and unlimited jurisdiction within its state or territory. Each has also created various intermediate and lower courts with jurisdiction over either a specified subject matter or general jurisdiction in civil claims up to a monetary jurisdictional limit.

Federal jurisdiction is primarily exercised by the Federal Court of Australia and the supreme courts of the states and territories. The High Court of Australia is the final appellate court for both federal and state matters. The High Court is also vested with original jurisdiction in relation to certain matters, such as those arising under treaty, cases to which the Commonwealth of Australia is a party and matters as between states, and generally hears matters that involve questions relating to the application and interpretation of the Australian constitution.

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.

Australian courts will typically 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 submitting 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

c 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.

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

17 Mount Bruce Mining v. Wright, [49], [113], [118].
21 Reinsurance Australia Corporation Limited v. HIH [2003] FCA 56, [343]–[346].
proceedings. If no express choice of law is made 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’.22

ii Alternative dispute resolution

Methods of ADR (alternative dispute resolution) such as arbitration, mediation, conciliation, and expert determination, are frequently employed by commercial parties in Australia. Parties may also agree upon mandatory contractual dispute resolution processes, which can comprise any number and combination of these forms of dispute resolution.

Arbitration

Australia is considered to be a pro-arbitration jurisdiction with established mechanisms to support the conduct of arbitration proceedings and the enforcement of arbitral awards.23 As with other common law jurisdictions, arbitration in Australia is typically viewed as a flexible process in which parties are free to agree upon the rules of evidence and procedure that will apply to the resolution of their dispute.

At a federal level, the International Arbitration Act 1974 (Cth) (IAA) provides the legal framework for international commercial arbitrations with a connection to Australia. Domestic arbitrations are governed by separate legislation within each state and territory based upon a uniform framework.24 Both of these levels of legislation adopt a modified version of the United Nations Commission on International Trade Law (UNCITRAL) Model Law, and as a result, Australia’s arbitration framework is generally consistent with the framework applicable in other Model Law states. These statutes provide Australian courts with a wide range of powers to oversee and support the conduct of arbitration proceedings, such as:

a staying court proceedings when there is a valid arbitration agreement governing a dispute;

b providing parties with interim measures of protection;

c assisting with the appointment of a tribunal;

d determining the jurisdiction of a tribunal;

e recognition and enforcement of awards and interim measures issued by an arbitral tribunal subject to a number of grounds for resistance; and

f assisting in taking evidence.

The High Court recently confirmed Australia’s pro-arbitration approach in a decision concerning the construction of arbitration agreements.25 The court held that the scope of an arbitration agreement will be construed liberally (as opposed to narrowly) and by reference


23 For example, Australia has ratified the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards.

24 See the 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); and Commercial Arbitration Act 2017 (ACT).

to the surrounding circumstances of the agreement.\textsuperscript{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 can, therefore, expect Australian courts to generally look unfavourably 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.\textsuperscript{27}

There are, however, areas where Australian courts have restricted the latitude for parties to gather evidence in Australia to support arbitral proceedings seated in foreign jurisdictions, such as by way of subpoena.\textsuperscript{28} 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 in international arbitration 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.\textsuperscript{29}

\textbf{Mediation}

Mediation in Australia usually entails a structured process in which an independent mediator assists the parties to negotiate the resolution of their dispute. Unlike litigation or arbitration, a decision determining the merits of the dispute is not made at mediation. Instead, 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 case-management procedures that require parties in complex commercial cases to submit their dispute to mediation at an early stage. These procedures are designed to encourage the early resolution of disputes before parties become entrenched in the litigation process.

Australia is yet to adopt the recent United Nations Convention on International Settlement Agreements Resulting from Mediation (the Singapore Convention on Mediation), which came into force on 12 September 2020. However, the convention is still likely to play a role in simplifying the direct enforcement of cross-border settlement agreements resulting from mediations that take place in Australia. It provides an avenue for parties to pursue the offshore enforcement of a mediated outcome concluded in Australia in any jurisdiction that has ratified the convention.

\textbf{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:

\begin{itemize}
  \item \textit{a} binding on the parties;
\end{itemize}

\textsuperscript{26} Rinehart v. Hancock Prospecting Pty Ltd [2019] HCA 13, [16]–[17].
\textsuperscript{27} See, e.g., Fiona Trust & Holding Corporation and others v. Privalov [2007] 4 All ER 951; [2007] UKHL 40.
\textsuperscript{28} Samsung C&T Corporation, in the matter of Samsung C&T Corporation [2017] FCA 1169.
\textsuperscript{29} UDP Holdings Pty Ltd v. Esposito Holdings Pty Ltd [2018] VSC 316, [8].
b non-binding, meaning that the determination will generally serve only as a tool to assist parties in facilitating a negotiated outcome;

c binding or non-binding up to certain monetary limits; or

d 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.30

Parties entering into complex or long term contractual relationships may also adopt mechanisms that enable disputes to be resolved by reference to a standing board of experts. These boards are generally known as dispute avoidance boards (DABs) (but can also be referred to as dispute resolution boards, dispute review boards or dispute adjudication boards). DABs typically remain established throughout the life of a contract, and the specific powers of a DAB to resolve a dispute is provided for by the parties’ agreement. In a typical example, either party will usually be provided with a right to refer a dispute to the DAB, which is then 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 that require them to participate in specific dispute resolution procedures before commencing formal legal proceedings. Those procedures can include negotiations, senior representative meetings, or other forms of alternative dispute resolution. For example, parties to a contract may agree upon a multi-tiered dispute resolution clause providing for the following process:

a first, the parties’ senior, or authorised, representatives negotiate in good faith with a view to resolving the dispute;

b second, if those senior representative negotiations are unsuccessful, refer the matter to a mediator for mediation with a specified period; and

c third, if the mediation is unsuccessful, refer the matter to the courts or to arbitration.

Dispute resolution clauses will be strictly enforced where they provide for a mechanism that is sufficiently certain and identifiable, and drafted so as to reflect a mandatory process rather than one that is optional or discretionary.31

The need for parties to draft multi-tiered dispute resolution clauses in precise terms, to ensure clarity between disputes that fall inside and outside of the regime, was recently reinforced in the appellate decision of *Inghams Enterprises Pty Limited*.32 While the court

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32 Inghams Enterprises Pty Ltd v Hannigan [2020] NSWCA 82.
construed the dispute resolution provisions broadly, it was held that a particular claim did not attract the operation of the clause because it was not (as required under the contract) a claim for an ‘amount payable and/or owed under the agreement’. Thus, if parties intend for all or a specific species of dispute to be captured by a contractual dispute resolution process in Australia, clear drafting should be included to that effect.

V BREACH OF CONTRACT CLAIMS

A cause of action for breach of contract in Australia 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 that is foreshadowed by a party's actions or inaction). The burden of proof lies with the party alleging the breach of contract, regardless of whether the breach is said to have constituted a failure to perform or an anticipatory breach.

i Failure to perform

A failure to perform can occur by non-performance, defective performance, late performance (where time is of the essence) and by a breach of a contractual warranty.

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. 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. 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.

ii Anticipatory breach or repudiation

An anticipatory breach occurs where a party repudiates one or more of its obligations under the contract. This can arise where a party indicates that it is either unwilling or unable to perform the terms of the contract, and the other party consequently terminates the contract prior to performance.

35 See, e.g., Chanter v. Hopkins (1838) 4 M & W 399, 404.
36 See, e.g., Grant v. Australian Knitting Mills Ltd [1936] AC 85; (1935) 54 CLR 49.
37 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.
39 Associated Newspapers Ltd v. Bancks (1951) 83 CLR 322, 339.
An anticipatory breach arises at law at the time the non-breaching party terminates the contract based on an anticipated non-performance.\textsuperscript{42} Unlike a failure to perform, if a party repudiates its obligations under a contract, the non-breaching party has an automatic right to termination.\textsuperscript{43} 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 the failure to perform.\textsuperscript{44}

The test for repudiation in Australia involves a very high threshold. The courts have made clear that it is ‘is not to be lightly found’\textsuperscript{45} 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.’\textsuperscript{46}

VI DEFENCES TO ENFORCEMENT

There are a number 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 limitations, 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 common defences to enforcement raised in Australia.

\textbf{i Statutes of limitation}

Strict time limits apply in Australia for the commencement of proceedings for breach of contract, and most other causes of action. A party is precluded from raising a cause of action that is filed after the expiration of the statutory limitation period.

In Australia, the general rule is that a cause of action in contract arises immediately upon the breach of contract occurring, even if the breach is unknown to the prospective plaintiff until a later point in time.\textsuperscript{47} Pleading that a claim is validly time-barred by a statute of limitations is perhaps the simplest means by which a party can resist a breach of contract claim.

The limitation periods applicable in Australia can vary from state to state. 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.\textsuperscript{48} For breach of a deed proceedings must be commenced within 12 years of the breach occurring.\textsuperscript{49}

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{42} Ogle v. Comboyuro Investments Pty Ltd (1976) 136 CLR 444, 450.
\item \textsuperscript{43} See, e.g., Ogle v. Comboyuro Investments Pty Ltd (1976) 136 CLR 444, 450.
\item \textsuperscript{44} Foran v. Wight (1989) 168 CLR 385.
\item \textsuperscript{46} Koompahtoo Local Aboriginal Land Council & Anor v. Sanpine Pty Ltd & Anor (2007) 233 CLR 115, 135 [44].
\item \textsuperscript{47} See, e.g., Hawkins v. Clayton (1988) 164 CLR 539.
\item \textsuperscript{48} 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).
\item \textsuperscript{49} See, e.g., Limitation Act 1969 (NSW) Section 16.
\end{itemize}
\end{footnotesize}
ii Force majeure and frustration

Australian contract law is very familiar with the doctrines of force majeure and frustration, particularly in the context of supply and energy agreements.

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. Contracts can differ on the rights and liabilities arising from a force majeure event, but the affected party is often entitled to additional compensation or time for performance, excused from non-performance or even entitled 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.

iii Duress, undue influence and unconscionable conduct

If it is established that a contract was entered into by a party under duress, undue influence or unconscionable conduct, Australian law provides that the contract may be voidable by the party subjected to this conduct. In the event that the innocent party is 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 can potentially also counterclaim for damages. A successful claim for ‘ rescission ’ results in the contract being treated as if it never existed.

iv Mistake

Where both parties have entered into a contract on the basis of a shared misapprehension of the facts or of their rights under the contract (a ‘common mistake’), Australian law holds that contract void or voidable. A common mistake between all parties to a contract rarely occurs in practice, and thus, the more typical situation is 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.

50 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).

VII FRAUD, MISREPRESENTATION AND OTHER CLAIMS

i Fraud, misrepresentation, and misleading or deceptive conduct

In Australia, the Australian Consumer Law (ACL) has largely simplified the elements that have to be proved in most actions for misrepresentation. While similar legislation in other common law jurisdictions is directed towards ‘consumer’ protection, the ACL in Australia operates more broadly and can also be invoked in a large commercial disputes. 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. Contravention of this prohibition can give rise to a right to damages and other remedies under the ACL, such as injunctive relief.

In addition to claims under the ACL, parties to a contract may pursue a common law claim for negligent misrepresentation. This alternative cause of action requires that the court be satisfied that a false representation is made with the requisite element of negligence. The difficulty associated with establishing this element has meant that the common law action is generally only argued in circumstances where Section 18 of the ACL is not applicable (such as a non-commercial context).

The tort of deceit also forms part of the law in Australia and provides a common law action for fraud, often referred to as fraudulent misrepresentation. Such an action requires proof of two additional elements that, again, can be difficult to establish; 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.52 Rescission for fraud may also be available in equity. Establishing fraud in equity does not require an actual intention to defraud to be proven.53

ii Unconscionable conduct

Section 21 of the ACL imposes a broad contractual standard of behaviour by prohibiting unconscionable conduct in commercial dealings.

The recent decision of ACCC v Get Qualified Australia Pty Ltd provides a helpful summary of the approach the courts will generally adopt in applying Section 21.54 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 whether the conduct within its context as a whole, and generally speaking, involves a high degree of ‘moral obloquy’.55

iii Good faith

The concept of good faith in Australia is an area of law that continues to develop. There is currently no general implied contractual obligation of good faith that applies to the negotiation or performance of contracts in Australia. Australian law will generally only recognise an obligation of good faith where it rises on the express terms of a contract, or if the factual matrix of a particular contract is such that a term of good faith should be implied.

52 Commercial Banking Co of Sydney Ltd v. Brown & Co (1972) 126 CLR 337.
54 ACCC v. Get Qualified Australia Pty Ltd (in liq) (No. 2) [2017] FCA 709, at [59]–[66].
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 found to require that the parties:

- cooperate in achieving the objects of the contract (loyalty to the promise itself);
- comply with recognised standards of honesty; and
- comply with standards of conduct that are reasonable having regard to the respective interests of the parties to the contract.\(^{56}\)

### iv Promissory estoppel

The equitable doctrine of promissory estoppel applies in Australia.\(^{57}\) This equitable remedy may arise in circumstances involving a future contractual relationship, or some future relationship or course of conduct between the parties. If an estoppel is established on the facts, equity may intervene to enforce a promise, or restrain a party from enforcing its strict legal rights where the enforcement of those rights would be contrary to its promise.

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 cause of action (that is, whether an estoppel is actionable in its own right as opposed to operating defensively). 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 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.

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56 See, e.g., *Burger King Cor v. Hungry Jacks Pty Ltd* [2001] NSWCA 187, [171].


60 *Ryan and Briggs (as executrices of estate of late Donoghue) v. Wikramanayake* [2013] NSWSC 115.

61 *LED Technologies Pty Ltd v. Road Vision Pty Ltd* [2012] FCAC 3.
VIII REMEDIES

Monetary damages are the most common form of remedy for breach of contract in Australia. 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. Orders for accounts of profits or restitutitional damages, which can be viewed as more punitive in nature, are not generally available for breach of contract.

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.

Liquidated damages

It is permissible in Australia for parties to seek to codify the payment of a fixed amount, such as a debt due, as part of their contract by way of liquidated damages. 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 a certain obligation, such as delivery by a specified date. 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.

It should be noted that provisions of this nature are subject to the doctrine of penalties. As such, terms that 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. However, following the decision in Paciocco v. Australia and New Zealand Banking Group Ltd,
it is difficult to prove that liquidated damages are out of all proportion to a party’s legitimate commercial interests where there is at least some basis in fact for the amount sought to be levied under the contract.

**Specific performance**

If damages would provide an inadequate remedy for breach of contract, the court may order the breaching party to perform particular duties or obligations under the contract.

**Injunction**

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 the circumstances, it would be just for a non-breaching party to be ‘confined to his remedy in damages’ 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.

**Quantum meruit**

Under Australian law, if a party provides goods or services in circumstances where a right of payment is either not provided for in the contract, or no contract is on foot (either because it was not formed or termination has occurred), the remedy of quantum meruit can be available to provide a means of compensation. A successful claim in quantum meruit entitles the party to a ‘reasonable amount’ for those goods or services. This remedy is often raised in complex construction cases where a contractor claims to have undertaken additional works outside the scope of the construction contract.

Until recently, it was thought that, if a construction contract was terminated due to repudiation by the project owner, the contractor would be entitled to elect between pursuing damages for breach of contract or a claim in quantum meruit. However, the availability of this relief has been narrowed significantly by the High Court in *Mann v. Paterson Constructions Pty Ltd*. The ruling, in effect, means that a claim for quantum meruit only arises for construction work carried out prior to termination to the extent that the contractor has not accrued a right to payment for that work under the contract at the time of termination. If a right to payment has accrued, only a claim for damages will be available.

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68 See, e.g., *McIntosh v. Dalwood* (No 4) (1930) 30 SR (NSW) 415, 419.
72 *Mann v Paterson Constructions Pty Ltd* [2019] HCA 32.
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 defences 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.

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. This can generally be made out by establishing that the loss or damage would not have been suffered ‘but for’ the breach of contract. 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. 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.

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 Hadley v. Baxendale as follows:

- 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;
- 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.

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.

77 [1854] EWHC J 70.

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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. 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’.

**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’. 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 proportionate liability regimes 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;
- 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.

Proportionate liability broadly operates to apportion a plaintiff’s loss between any ‘concurrent wrongdoers’ that are each liable for the same loss. This extends to both parties joined to the proceedings, and non-parties. 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. Where a party is found to be a concurrent 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.

**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 be 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, statutory principles applicable in all states and territories require that the court reduce any award of damages to the plaintiff to the extent that it is ‘just and equitable’ to do so.84 This generally involves:

\begin{quote}
\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.}\end{quote}

IX CONCLUSIONS

As discussed above, Australia offers a sophisticated legal system and remains a strong choice of law or forum for the resolution of complex international disputes. All major Australian courts have adopted specialised methods of case management to meet the increasing complexity of modern commercial disputes, and the remedies available under Australian law are both robust and founded in the nation’s English common law lineage. Australia has also established a familiar and well recognised framework for international arbitration.

\textsuperscript{84} See, e.g., the Law Reform (Miscellaneous Provisions) Act 1965 (NSW), Section 9(1).

\textsuperscript{85} Podrebersek v. Australian Iron and Steel [1985] HCA 34.
Chapter 2

AUSTRIA

Sara Khalil and Andreas Natterer

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 ABGB governs legal relationships between consumers as well as consumers and companies. Similarly, the Austrian Commercial Code (UGB), which regulates business relationships between companies and entrepreneurs, and amends and expands the ABGB 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 are comprehensive codifications of substantive law as they regulate the rights and duties 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 the Supreme Court’s case law, which interprets and substantiates the codified provisions.

II  CONTRACT FORMATION

The ABGB 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 ABGB 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. 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.

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1 Sara Khalil is an attorney-at-law and Andreas Natterer is a partner at Schoenherr Attorneys at Law.
2 Eschig/Pircher-Eschig, Das österreichische ABGB – The Austrian Civil Code, 206.
Consent to a contract must be declared freely, seriously, in a determined fashion and clearly as per Section 869 of the ABGB. 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. 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, must be conducted by 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.

Contracts may benefit a third party who is not party to the contract, but third parties must not be burdened with any duties. 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.

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 (which is often the case), 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. 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.

If interpretation cannot solve the vagueness of the contract, Section 915 of the ABGB stipulates that if contracts are only obligatory for one party, it is assumed in doubt that the

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5 Perner in Schwimann/Kodek, ABGB Praxiskommentar Fourth Edition Section 936 ABGB Rz 21 ff.
7 OGH 05.12.2000, 10 Och 310/00m.
8 Section 914 of the ABGB.
9 Section 915 of the ABGB.
10 Perner/Spitzer/Kodek, Bürgerliches Recht Sixth Edition, 61 f.
11 Perner/Spitzer/Kodek, Bürgerliches Recht Sixth Edition, 63 f.
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 interpreted to 
the detriment of the party who used such expression.\textsuperscript{12} 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 court cannot unequivocally determine the contract’s meaning, the contract is void.

\textbf{IV \hspace{1em} DISPUTE RESOLUTION}

\textbf{i \hspace{1em} 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 for cases with the amount in dispute exceeding €15,000 as 
well as marital and family law disputes, property disturbance disputes and disputes regarding 
immovables or properties.\textsuperscript{13}

Regional courts are competent for an amount in dispute exceeding €15,000, as 
well as unfair competition claims and intellectual property disputes (such as copyright 
infringements).\textsuperscript{14}

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.\textsuperscript{15}

A Supreme Court appeal is entirely inadmissible if the amount in dispute (in second instance) 
does not exceed €5,000 (with exceptions, e.g., in family law matters).\textsuperscript{16}

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 payment order. The defendant may pay the claimed amount within 14 
days of service or object to the payment order within four weeks of service. If the defendant 
does not object, the payment order is 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.\textsuperscript{17} 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.

\textsuperscript{12} Eschig/Pircher-Eschig, Das österreichische ABGB – The Austrian Civil Code, 222.
\textsuperscript{13} Section 49 of the Jurisdictional Rules.
\textsuperscript{14} Section 51(2) of the Jurisdictional Rules.
\textsuperscript{15} Kodek/Mayr, \textit{Zivilprozessrecht} Fourth Edition, margin 1089 ff.
\textsuperscript{17} Kodek/Mayr, \textit{Zivilprozessrecht} Fourth Edition, margin 216 ff.
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.

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.18 Furthermore, Regulation (EU) No. 1215/2012 (‘Brussels 1a’) must be taken into consideration.19

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.20

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 administrate any ADR proceedings supported by a neutral third party.21 The parties may also agree on a multi-tiered dispute resolution clause, as long as the multi-tiered clause is precise

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18 Section 14 of the Consumer Protection Act.
19 As this chapter only covers Austrian law, we will not go into the EU Regulations.
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.22

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 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
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 are based on a fault-based liability system. A claimant generally must prove that 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 must be proven; in contractual matters slight negligence of the defendant is assumed; if liability for slight negligence is contractually excluded, the defendant must prove that he or she did not act in a grossly negligent way (Section 1298 ABGB). The defendant thus carries the burden of proof with regards to culpability.23

Contractual damages claims are privileged compared to tort claims (delict). First, Section 1313a of the ABGB 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.

Second, the injured party usually must 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).

Third, pure pecuniary loss is generally not compensated in tort.

22 Knoetzl/Schacherreiter, ‘Schlichtungsvereinbarungen: Gültigkeit, Wirkung und Musterschlichtungsklausel’ in AnwBl 2016, 445 [446 f].
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.24

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).25 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 ABGB 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.26 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 ABGB, it is assumed that any defects appearing within six months of 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.

25  Gruber in Kletečka/Schauer, ABGB-ON1.06 Section 918 margin 5 ff.
26  Eschig/Pircher-Eschig, Das österreichische ABGB – The Austrian Civil Code, 224.
In recent years, the Supreme Court has ruled that a party repairing or replacing 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.\textsuperscript{27}

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{28}

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{29} 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{30}

\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{31} 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{32}

\textbf{ii Subsequent impossibility}

See above (non-performance).

\textsuperscript{27} Perner/Spitzer/Kodek, \textit{Bürgerliches Recht} Sixth Edition, 188 ff.
\textsuperscript{28} Kramer/Martini in Straube/Ratka/Rauter, UGB I\textsuperscript{4} § 378 margin 1 ff.
\textsuperscript{29} Perner/Spitzer/Kodek, \textit{Bürgerliches Recht} Sixth Edition, 195 ff.
\textsuperscript{30} Hausmaninger, \textit{The Austrian Legal System} Fourth Edition, 256.
\textsuperscript{31} Hausmaninger, \textit{The Austrian Legal System} Fourth Edition, 251.
\textsuperscript{32} Perner/Spitzer/Kodek, \textit{Bürgerliches Recht} Sixth Edition, 84.
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 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 contact. The objective value at the time the contract was concluded is relevant. This principle only applies to contracts with a certain consideration (e.g., not donations). Entrepreneurs may contractually exclude this provision at their own expense.

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 ABGB 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 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.

33  Perner/Spitzer/Kodek, Bürgerliches Recht Sixth Edition, 106.
34  Section 934 of the Austrian Civil Code.
35  Section 351 of the Commercial Code.
36  Graf in Kletečka/Schauer, ABGB-ON1.06 Section 879 margin 303 ff; Apathy in Schwimann/Kodek, ABGB: Praxiskommentar, Section 6 Consumer Protection Act margin 41ff.
37  Section 1489 of the Austrian Civil Code.
38  Perner/Spitzer/Kodek, Bürgerliches Recht Sixth Edition, 223.
VII FRAUD, MISREPRESENTATION AND OTHER CLAIMS

i Illegality and immorality

Section 879, Paragraph 1 of the ABGB 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:

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.39

Contractual penalties are immoral if they unduly impair the debtor's economic freedom of movement or clearly favour the creditor without cause.40

Risk transfer clauses are ineffective if they pass on an unforeseeable or nevertheless incalculable risk to the opponent without corresponding compensation.41

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.42

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.43

iii Error

Error is a misconception of reality. According to jurisprudence, a material error is an error concerning 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:

a the error was caused by the other party to the contract;
b the error should have been noticed by the other party by taking into the account the specific surrounding circumstances; or
c 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).44

39 Bollenberger in Koziol/Bydlinski/Bollenberger, Kurzkommentar zum ABGB Sixth Edition, Section 879 ABGB margin 5; OGH 29.11.2013, 8 Ob 112/13y.
40 OGH 20.06.2006, 4 Ob 113/06f; Bollenberger in Koziol/Bydlinski/Bollenberger, Kurzkommentar zum ABGB Sixth Edition, Section 879 ABGB margin 7.
42 OGH 22.02.2001, 6 Ob 322/00x; OGH 20.01.2016, 3 Ob 132/15f; Bollenberger in Koziol/Bydlinski/Bollenberger, Kurzkommentar zum ABGB Sixth Edition, Section 879 ABGB margin 7.
43 Section 870, 1487 Austrian Civil Code.
Entrepreneurs 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.\(^{45}\)

**VIII REMEDIES**

There are no punitive damages. Damages should compensate actual losses suffered and not serve as a punishment for wrongful behaviour.

Section 1323 of the ABGB 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.\(^{46}\)

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.\(^{47}\)

Non-material 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 ABGB 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 non-material damage claims in connection with wrongful birth and mourning losses.\(^{48}\) Since Art 82 GDPR provides for possible compensation for non-material damages, claims for non-material damages have been filed. A recent decision of the Innsbruck Higher Regional Court held that ‘actual impairment of the emotions of the injured party’ is required.\(^{49}\)

Parties can provide for 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

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\(^{46}\) Hinteregger in Kletečka/Schauer, *ABGB-ON1.06* Section 1323 margin 9-11.

\(^{47}\) Perner/Spitzer/Kodek, *Bürgerliches Recht* Sixth Edition, 305.

\(^{48}\) Hinteregger in Kletečka/Schauer, *ABGB-ON1.06* Section 1325 margin 1ff.

\(^{49}\) OLG Innsbruck 13.02.2020, 1 R182/19b.
of a non-culpable breach of contract if the parties provide for it.\textsuperscript{50} If the actual damage exceeds the contractual penalty, the excessive amount may be claimed among entrepreneurs. A mandatory judicial right of moderation exists.\textsuperscript{51}

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 ABGB 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.

\textsuperscript{50} Danzl in Koziol/Bydlinski/Bollenberger, \textit{Kurzkommentar zum ABGB} Sixth Edition, Section 1336 ABGB Rz 3.

\textsuperscript{51} Pernet/Spitzer/Kodek, \textit{Bürgerliches Recht} Sixth Edition, 161.
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:

- the parties must be capable of contracting by themselves or through their duly empowered legal representatives;
- 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
- 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. Notwithstanding the above, 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.

A valid contract will generally be effective as from the execution date until a certain or indefinite date, or its effectiveness may be deferred in time or subject to conditions precedent or subsequent or up until the occurrence of a fact.

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 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 contractual 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.

The recent pandemic due to covid-19 – declared as a public health emergency by federal government (Provisional Measure 921/2020), may be considered as force majeure (as an event beyond human capacity or predictability) to stay or release certain duties, but Brazilian courts are reluctant to fully exempt parties from fulfilling any contractual obligation.
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.

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 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:

- 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;

- 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; and

- 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 Code of Civil Procedure provides 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.

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

b 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:

a. 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

b. 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 apostilation, 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, 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 limitations, \textit{lis pendens} and \textit{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:

\begin{itemize}
  \item [a] a three-year period to claim for indemnification arising out a civil liability;
  \item [b] a five-year period to collect a debt under a private instrument (even if it is not an extrajudicial enforcement instrument); and
  \item [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).
\end{itemize}

It is worth noting that, due to the covid-19 pandemic, Federal Law 14,010/2020 stayed the course of all statute of limitations periods between 12 June and 30 October 2020. 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 \textit{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.
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 centres in the US. 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. 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.\footnote{Cal. Civ. Code § 1550; Stewart v. Preston Pipeline, Inc. 134 Cal. App. 3d 1565, 1585 (Cal. App. 1985).}

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.\(^4\)

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 pre-existing 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.\(^16\)

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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).

iii Modifications

Any contract may be subsequently modified by agreement of the parties, provided the same elements required for validity of the original contract are present.17 Except in those circumstances where the statute of frauds applies, parties to a written contract in California do not need a new written agreement to modify an existing one. It is enough that both parties fully perform in a manner that is consistent with the new understanding or that the modification is supported by additional consideration.18 However, if parties to an oral agreement in California modify the original contract in writing, there is no need for new consideration.19

If a contract has a term requiring that all modifications be made in writing, California will generally enforce it.20 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.21 According to the court, by repeatedly approving billing contracts orally, the shareholders ‘orally amended’ the agreement to allow ‘oral approval’.22

III CONTRACT INTERPRETATION

Fundamentals of contract interpretation

California law requires that unambiguous contractual terms be applied as they are written.23 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.24 The subjective state of mind of a party entering into a contract is generally irrelevant, however.25 What matters is what they said or did, and what those words or actions would lead a reasonable person to believe about their intentions.26

As an initial matter, the judge, not the jury, will decide whether a contract’s terms are clear or need clarification.27 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.28 This extrinsic evidence, which is called parol evidence, is not admitted formally until the court determines that the contractual term is ambiguous.29 But a California court will provisionally consider

18 Cal. Civ. Code § 1698(b) and (c); Kroepsch v. Muma, 272 Cal. App. 2d 467, 473 (Ct. App. 1969).
21 id.
22 id.
parol evidence in the course of deciding whether the contract’s meaning is ‘reasonably susceptible’ to the interpretation being urged.\textsuperscript{30} This is unlike some other jurisdictions in the U.S., which decide whether a term is ambiguous with reference to the contractual language alone.\textsuperscript{31}

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 popular’ meaning, unless they are used in a special or technical sense,\textsuperscript{32} in which case those terms will be interpreted as understood by persons in the relevant field.\textsuperscript{33} 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{34} California law also prefers that courts interpret contracts in a manner that gives each term effect, rather than rendering it superfluous or void.\textsuperscript{35} 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{36} 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{37} 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{38}

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{39}

**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 jurisdiction’.\textsuperscript{40} For

\begin{enumerate}
\item See, e.g., \textit{Davis v. G.N. Morg. 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’).
\item 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).
\item Cal. Civ. Code § 3541.
\end{enumerate}
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’. 41 When a forum selection clause is mandatory, it will be enforced unless the unwilling party can show that enforcement would be unreasonable. 42 However, a California court will ‘refuse to defer to the selected forum’ if doing so would ‘substantially diminish the rights of California residents in a way that violates’ California public policy. 43 For example, a court recently refused to enforce a mandatory New York forum selection and choice of law clause, because the contract contained a jury trial waiver that would likely be upheld in a New York court, but which was unenforceable under California law. 44

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 ‘shall have jurisdiction over the parties’. 45 In such instances, California courts have held that the parties ‘had not ruled out other jurisdictions’. 46 Such a clause will not automatically be enforced, but is subject to a forum non conveniens analysis. 47 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’. 48

**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. 49 But California law has codified at least two exceptions to this principle: arbitration and judicial reference. 50

**Arbitration**

Under California law, courts will generally honour provisions calling for a non-judicial means for resolving disputes arising out of or relating to an agreement. 51 Arbitrations are generally subject to limited discovery rules, and awards provided for in contractual arbitration are governed by rules of the parties’ own selection. 52 Interpretation of an arbitration clause in

41 id. at 197.
42 id. at 198.
45 *Hunt Wesson Foods, Inc. v. Supreme Oil Co.*, 817 F. 2d 75, 76 (9th Cir. 1987); see also *Intershop Comm'tns*, 104 Cal. App. 4th at 197.
47 id. at 196.
50 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.
a contract – including which, if any, of the disputed issues are arbitrable – is subject to standard rules of contract interpretation and defence.\textsuperscript{53} Due to the public policy favouring arbitration, however, such clauses are to be read broadly so as to resolve any doubt in favour of arbitration.\textsuperscript{54} This presumption in favour of arbitrability is stronger when the arbitration clause uses broad language, such as a clause covering ‘any dispute regarding the contract’.\textsuperscript{55} An arbitrator’s award is subject to judicial review only on narrow grounds set forth by statute.\textsuperscript{56}

Moreover, under the California Arbitration Act, a party to an agreement to arbitrate can avoid arbitration only under limited circumstances.\textsuperscript{57} An unwilling party may challenge an arbitration agreement by arguing that fraud ‘permeates it’,\textsuperscript{58} that the compelling party waived the right to arbitrate,\textsuperscript{59} or that there are grounds that would justify non-enforcement of any type of contract.\textsuperscript{60}

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.\textsuperscript{61} 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.\textsuperscript{62} The United States Supreme Court held that this ruling categorically disfavoured agreements to arbitrate, which are not typically conducted on a class-wide basis, and required that the arbitration agreement be enforced.\textsuperscript{63}

A party opposing the enforcement of an arbitration agreement is not entitled to a jury trial on that issue in California.\textsuperscript{64} A dispute on arbitrability will be submitted to a judge for decision or, if the parties ‘clearly and unmistakably’ so provide in their arbitration agreement, by the arbitrator itself.\textsuperscript{65}

**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.\textsuperscript{66} The main distinction between arbitration


\textsuperscript{57} id. § 1281.2.


\textsuperscript{60} Cal. Civ. Proc. Code §§ 1281, 1281.2(b); see supra § V.


\textsuperscript{63} \textit{AT&T Mobility LLC}, 563 U.S. 333.


and judicial reference is that judicial reference proceedings are conducted much like non-jury trials. For example, referees are bound to follow applicable substantive law rather than more abstract notions of ‘equity’ or ‘fairness’.67 A judicial referee’s statement of decisions must be prepared within 20 days,68 and upon its filing, ‘judgment may be entered thereon in the same manner as if the action had been tried by the court’.69 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.70

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 non-performance); (3) defendant’s failure to perform; and (4) resulting damages to the plaintiff.71 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.72

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.73 For that, the breach must be ‘material’, a designation that depends on the circumstances of the breach.74 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.75 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.76

If a party communicates that it will not perform under the contract, even before performance is due, that can be enough to justify termination.77 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

74 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).
76 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. Dept of Prof’t Vocational Standards, 11 Cal. App. 2d 554, 557 (1936).
77 See Gold Mining & Water Co. v. Swinerton, 23 Cal. 2d 19, 29 (1943).
for it to perform.\textsuperscript{78} In the face of an anticipatory repudiation, the non-breaching party does not have an obligation to act.\textsuperscript{79} He or she is permitted to seek relief immediately, but may also wait until the time of performance to initiate legal action.\textsuperscript{80}

In addition to the express terms of the agreement, every contract in California includes an implied covenant of good faith and fair dealing.\textsuperscript{81} 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 receiving the benefit of its bargain.\textsuperscript{82} 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{83}

\section*{VI 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.

\subsection*{i No enforceable contract was formed}

As noted above, to be enforceable, a contract requires ‘reasonably certain’ terms.\textsuperscript{84} 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{85} 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{86} But an agreement to negotiate in good faith allows parties to create such an obligation by contract.

\begin{thebibliography}{9}
\bibitem{79} id. at 703.
\bibitem{80} id.
\bibitem{82} id.
\bibitem{86} 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).
\end{thebibliography}
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. The limitations period begins when the contract has been breached and the non-breaching party knows or has reason to know of the breach.

California permits parties to shorten or lengthen the time period for asserting a breach in their contract. If the parties agree to lengthen the limitations period, their agreement must be in writing and cannot extend the deadline for more than four years at a time. The parties may then make ‘any number of successive, separately executed agreements for additional four-year’ extensions. If the parties agree to shorten the limitations period, the cut-off 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.

iii Enforcement contrary to public policy

A contract with an illegal purpose is unenforceable as a matter of public policy. California takes a strict approach to illegal contracts, stating that an entire contract is void if any part of its consideration is unlawful. 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.

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. Contracts that are substantively unconscionable have been described in a variety of ways, including ‘overly-harsh’.
‘unfairly one-sided’,98 ‘unduly oppressive’99 or ‘so one-sided as to “shock the conscience”’.100 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’.101

Procedural unconscionability refers to some element of ‘surprise’ or ‘oppression’ in the process of negotiating or executing the agreement.102 For example, a material term may have been hidden by the party seeking to enforce it (i.e., surprise),103 or there may be such a disparity in bargaining power that the weaker party is not given a meaningful choice (i.e., oppression).104

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.105 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.106

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.107 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.108 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.109 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.110

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100 Pinnacle Museum Tower Ass’n v. Pinnacle Market Dev., 55 Cal. 4th 223, 246 (2012) (citation omitted);
Sanchez, 61 Cal. 4th at 910–11.
101 Sanchez, 61 Cal. 4th at 911 (quoting Sonic-Calabasas A, Inc. v. Moreno, 57 Cal. 4th 1109, 1145 (2013)).
102 Patterson, 14 Cal. App. 4th at 1664; A & M Produce, 135 Cal. App. 3d at 486.
103 Patterson, 14 Cal. App. 4th at 1664 (citing A & M Produce, 135 Cal. App. 3d at 486).
110 Hicks, 897 F.3d at 1119–20.
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.111 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 the operator of a particular gravel pit.112 Unknown to the parties at the time, most of the gravel was under water and would cost ten times the anticipated amount to extract.113 The builder was excused from performance on the ground of impracticality.114

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.115 Payment of the fee was still possible, but achieving the underlying purpose of the agreement was not, and the agreement was not enforced.116

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.117 California, unlike New York, does not require the misled party to show that its ignorance was ‘excusable’.118 As one court put it, California ‘protect[s] the ignorant and credulous no less than the well-informed and analytical’.119 Courts in California may hold sophisticated parties to a higher standard, however.120 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.121

113 id. at 291, 293.
114 id. at 293.
117 Engalla, 15 Cal. 4th at 974.
121 See Seeger v. Odell, 18 Cal. 2d 409, 415 (1941).
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.

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.

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125 Cal. Civ. Code § 3300 (damage must have been ‘proximately caused’ by the breach).
129 Lewis Jorge Constr. Mgmt., 34 Cal. 4th at 968.
131 Lewis Jorge Constr. Mgmt., 34 Cal. 4th at 968.
132 id. at 967.
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 wilful.135 Punitive damages may be available, however, if – in addition to the breach of contract – an independent tort is involved.136 Even in such cases, however, a defendant must act with ‘oppression, fraud, or malice’ toward the plaintiff.137 Mere negligence, even gross negligence, is not sufficient to justify an award of punitive damages.138

iii Specific performance

Specific performance is an equitable remedy that compels the breaching party to live up to his contractual obligations.139 A court will not order specific performance where monetary damages will make a plaintiff whole.140 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.141

The availability of specific performance typically depends on the uniqueness of the goods or services being exchanged.142 The classic example of a suit for specific performance seeks to compel the seller of real property to transfer the property to the buyer.143 Since each piece of real property is considered unique, money damages are considered inadequate.144 Specific performance is never available in certain specific circumstances defined by statute, such as contracts for employment or personal services.145 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.146 Following an order of rescission, the parties no longer need to comply with their obligations and must restore any consideration exchanged.147 When a contract is induced by fraud, negligent misrepresentation, or duress, rescission is an appropriate remedy.148 California courts may award both damages and rescission (so long as the relief

144 id.
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.149

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.150 The public interest may be involved where, for example, the limitation provision concerns a regulated business or an important public service.151 No matter what the contract says, however, it cannot exempt the parties from liability for intentional wrongs, gross negligence, or a violation of law.152

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.153 Liquidated damages control regardless of the amount of actual damages incurred, thereby limiting the breaching parties’ exposure and relieving the non-breaching party of having to prove an amount of damages.154 Liquidated damages agreements are enforceable unless another statute expressly controls damages or the liquidated damages provision was unreasonable.155 To avoid invalidation as an unlawful penalty, a liquidated damages provision must have a reasonable relationship to actual damages.156 Otherwise, it risks being deemed unconscionable and reduced by the court.157

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.

150 Tunkl v. Regents of Univ. of Cal., 60 Cal. 2d 92 (1963).
151 id. at 98–100.
154 id.
155 Cal. Civ. Code § 1671(a), (b).
Chapter 5

CANADA

Alan Mark and Jesse-Ross Cohen

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 courts generally remained ‘open’ during the covid-19 pandemic to resolve urgent commercial disputes, with the judiciary, registrars and counsel appearing digitally by videoconference.

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 10 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

1 Alan Mark is a partner and Jesse-Ross Cohen is an associate at Goodmans LLP.
2 Constitution Act, 1867 at 91 and 92.
3 Constitution Act, 1867 at 92(13).
4 The Canadian provinces are, from west to east: British Columbia, Alberta, Saskatchewan, Manitoba, Ontario, Quebec, New Brunswick, Nova Scotia, Prince Edward Island and Newfoundland. Canada also has three territories, which are not the subject of this paper: Yukon, Nunavut and the Northwest Territories.
5 Certain instances of non-alignment are discussed herein.
7 The old common-law rule is that a ‘peppercorn’ of value will always be adequate. See, for e.g., Shaw Production Way Holdings Inc. v. Sunraids Energy, Inc., 2018 BCSC 926 (affirmed 2019 BCCA 72) at 136, citing Shekter v. Polonuk, 1992 ABCA 324 (Alta. C.A.). Note that the consideration given by each party need not flow to the counterparty, but can inure to the benefit of third parties.
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.\(^8\) Also further to the need for certainty, an acceptance must be unequivocal and affirmatively communicated to the offeror in order to be effective.\(^9\) In all respects, contract formation is assessed objectively.\(^10\)

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.\(^11\) 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.\(^12\)

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.\(^13\) 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.\(^14\) 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’.\(^15\) This decision was cited with approval by the Tax Court of

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\(^9\) Angela Swan and Jakub Adamski, Canadian Contract Law (3rd ed.) (Toronto: LexisNexis, 2012) (‘Swan on Contracts’) at 4.45–4.48. Note, however, that the requirement of unequivocal acceptance does not alter the burden of proof; the test of acceptance is always assessed objectively. See: Marehard v. Ridgway, 2002 BCCA 405 at 27.


\(^11\) Swan on Contracts, supra note 9 at 4.51.

\(^12\) See, for example, Cana International Distributing Inc. v. Standard Innovation Corporation, 2018 ONCA 145 at 12, where the Court held that the subsequent ‘negotiations concerned relatively minor matters of the kind that would be expected to arise within the framework of a long-term exclusive distributorship agreement.’

\(^13\) The leading Ontario law remains the decision of the Court of Appeal in Gilbert Steel Ltd. v. University Construction Ltd., [1976] O.J. No. 2087, 12 O.R. (2d) 19; see Richcraft Homes Ltd. v. Urbandale Corp., 2016 ONCA 622 at 43.

\(^14\) Greater Fredericton Airport Authority Inc. v. NAV Canada, 2008 NBCA 28 at 31–32.

\(^15\) Rosas v. Toca, 2018 BCCA 191 at 176. In support of this finding, the Court also cited the decision of the New Zealand Court of Appeal in Teat v. Willcocks, [2013] NZCA 162, [2014] 3 N.Z.L.R. 129 at 5.
Canada and the Alberta Court of Queen's Bench, but otherwise has not been applied by any non-British Columbia court (most of which remain bound by the traditional pre-existing duty rule, at least for now).

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. 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. 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.

As a general matter of law, contracts need not be in writing in order to be valid. 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.

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. Provincial legislation also exists to ensure that the regular rules of contract are adapted as seamlessly as possible to new technological realities.

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. To determine the parties’ objective intentions, courts look foremost to the plain meaning of the language expressed in the contract, 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. Canadian courts avoid rigid constructions or findings of ambiguity 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 provisions in question.

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, and probative to the extent that considering it deepens the analysis

23 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 Brinkibon v Stabag Stahl und Stahlwarenhandels GmbH, [1983] 2 A.C. 34; [1982] 2 W.K.R. 264 (H.L.). 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 Distributing Inc. v. Standard Innovation Corporation, 2018 ONCA 145 at 8–11, citing Foley v. R., [2000] 4 C.T.C. 2016 (T.C.C. [Informal Procedure]) at 32: ‘Agreements signed in counterpart are a part of commercial life.’

24 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.

25 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.

26 There is a ‘cardinal presumption’ that parties intended what they said in the contract: Venust Inc. v Sunrise Senior Living Real Estate Investment Trust, 2007 ONCA 205 at 24; Petty 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.

27 Nortel Networks Corp., Re, 2016 ONCA 332 at 58.

28 Pursuant to a ‘practical, common-sense’ approach mandated by the Supreme Court of Canada: Sattva, supra note 23 at 47.

29 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.

30 See: Dumbrell v Regional Group of Cos., 2007 ONCA 59 at 52–54, citing McCamus, The Law of Contracts (Toronto: Irwin Law, 2005) at 710–11; IFP Technologies (Canada) Inc. v. EnCana Midstream and
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.31

As the interpretive exercise is objective, the subjective intentions of parties are not relevant.32 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 contract that has been wholly reduced to writing.33 This rule, however, is subject to myriad exceptions.34 Notably, moreover, the rule does not preclude evidence adduced as part of the factual matrix.35

Another relevant principle of interpretation is that Canadian courts will seek to promote commercial efficacy.36 Interpretations which make ‘no commercial sense’37 or result in a commercial absurdity38 will be strenuously avoided, while interpretations that ‘allow the contract to function and meet the commercial objective in view’ will be preferred.39 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).40 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.41

31 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.
33 Sattva, supra note 23 at 58.
34 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.
35 Sattva, supra note 23 at 59–60.
36 Salah v Timothy’s Coffees of the World Inc., 2010 ONCA 67 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. Tuckamore Holdings LP, 2017 ONCA 594 at 11–13.
38 Kentucky Fried Chicken Canada v Scott’s Food Services Inc., [1998] O.J. No. 4368 (CA) at 27.
41 See, for example, Northrock Resources v. ExxonMobil Canada Energy, 2017 SKCA 60 at 22.
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 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’.

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43 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.


45 *Bearspaw Petroleum Ltd. v. EnCana Corp.*, 2011 ABCA 7 at 24, citing *Mannai and Nickel Developments*.


47 Hall On Interpretation, supra note 40 at 122. Generally this will need to be established by expert evidence.

48 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-Tängen*, [1976] 3 All E.R. 570.

49 Sattva, supra note 23 at 47.

50 Which, as with custom and usage, must generally be proven by expert opinion evidence.

51 *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.
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).

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). One other common law province, Alberta, houses its own Commercial List. 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 questions 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. On a question of mixed fact and law, such as a question of contractual interpretation, the trial

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52 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.
55 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).
56 There is also the ‘Commercial Division’ of the Quebec courts.
57 Housen v. Nikolaisen, 2002 SCC 33 at 8. This is referred to as the ‘correctness’ standard.
judge’s findings will be upheld as long as they are reasonable.\textsuperscript{58} A purely factual finding will be upheld absent a ‘palpable and overriding error’.\textsuperscript{59} Where a principle of natural justice is involved, however, no deference is owed to the judge below.\textsuperscript{60}

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’.\textsuperscript{61}

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, exclusive\textsuperscript{62} and there is no ‘strong cause’ for why it should not be enforced.\textsuperscript{63} This approach should continue in light of the recent decision of the Supreme Court of Canada in \textit{Douez v. Facebook}, where three judges 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.\textsuperscript{64}

Commercial disputes are also commonly resolved through arbitration. 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,\textsuperscript{65} arbitration is far from a ‘second-class’ method of dispute resolution in Canada.\textsuperscript{66} This trend has been encouraged by Canadian courts and legislatures.\textsuperscript{67} As noted by the Supreme Court

\begin{itemize}
  \item \textsuperscript{58} Sattva, \textit{supra} note 23 at 50. That another contractual interpretation might reasonably be available does not provide a basis for appellate intervention: \textit{Atos IT Solutions v. Sapient Canada Inc.}, 2018 ONCA 374 (leave to appeal refused, 2019 CarswellOnt 4343) at 86.
  \item \textsuperscript{59} \textit{Housen v. Nikolaisen}, 2002 SCC 33 at 10.
  \item \textsuperscript{60} See, recently, \textit{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.
  \item \textsuperscript{61} Sattva at 53, citing \textit{Housen v. Nikolaisen}, 2002 SCC 33 at 31 and 34–35 and \textit{King v. Operating Engineers Training Institute of Manitoba Inc.}, 2011 MBCA 80 at 21.
  \item \textsuperscript{62} That is, a clause that explicitly precludes the applicability of laws of other jurisdictions. See, recently, \textit{Forbes Energy Group Inc. v. Parsian Energy Rad Gas}, 2019 ONCA 372 at 5–7.
  \item \textsuperscript{63} \textit{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’.
  \item \textsuperscript{64} \textit{Douez v. Facebook, Inc.}, 2017 SCC 33 at 31.
  \item \textsuperscript{65} Including, as of recently, former Chief Justice of the Supreme Court of Canada, Her Honour Justice McLachlin.
  \item \textsuperscript{66} \textit{Seidel v. TELUS Communications Inc.}, 2011 SCC 15, [2011] 1 S.C.R. 531 at 89–103.
  \item \textsuperscript{67} ‘The law favours giving effect to arbitration agreements. This is evident in both legislation and in jurisprudence:’ \textit{Haas v. Gunasekaram}, 2016 ONCA 744 at 10.
\end{itemize}
of Canada, arbitration furthers the interests of justice; 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.

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 enforced by Canadian courts. The general rule is that challenges to an arbitrator’s jurisdiction must first be resolved by the arbitrator, which is known as the ‘competence-competence principle’. Canadian courts will generally not allow parties to circumvent contractual arbitration clauses simply by, for example, pleading in tort, arguing that a certain dispute is not covered by the arbitration agreement because it is not explicitly referred to therein or becoming a party to a parallel claim brought by other parties. To facilitate the use of arbitration, each province has enacted domestic and international 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.


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.

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.


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’: Arbitration Act, S.B.C. 2020 c. 2 at 7(2); see McMillan v. McMillan, 2016 BCCA 441 at 31, referring to equivalent language in the predecessor legislation: Arbitration Act, 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.
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’. 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. 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. These grounds are enforced narrowly. A similar deference to the decisions of arbitrators is applied with respect to the recognition and enforcement of arbitral awards.

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.

This test is assessed on a balance of probabilities. 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’;

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 BSCC 1708 at para. 12.


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).

Important, 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.


Where damages cannot be proven, courts may award nominal damages.

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.

warranties are important but non-fundamental terms.85 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.86 ‘The lexical distinction between conditions and warranties does not dominate the repudiation analysis, however,87 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’,88 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’.89 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.90

However and whenever an innocent party elects to accept a repudiation, it must promptly, clearly and unequivocally communicate that decision to the breaching party91 (the general Canadian practice in such cases is for the innocent party to clearly reserve its right to claim damages).92 Where an innocent party does not wish to terminate the contract, by contrast, it may waive its rights to do so.93 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.94 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.95

85 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.
86 Potter v. New Brunswick (Legal Aid Services Commission), 2015 SCC 10 at 145–149.
87 See Swan on Contracts, supra note 9 at 7.5.
88 Potter v. New Brunswick (Legal Aid Services Commission), 2015 SCC 10 at 145.
91 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.
92 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’: 1394918 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.)).
94 Swan on Contracts, supra note 9 at 2.239–2.240.
95 See, for example, Diniciola v. Huang & Danzey 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
In limited circumstances, a prospective commercial claimant may seek third party financing to fund its legal costs. The Supreme Court of Canada recently affirmed the use of third party litigation financing in context of an insolvency, and it is likely that litigation financing will continue to grow in prominence in Canada in the years to come.

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, 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.

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).

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

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104 407 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 *Abrahamowitz 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’.

105 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.

106 See, for example, Limitations Act, 2002, S.O. 2022, c.24, Sched. B at section 11(1).

107 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.

108 See, for example, Frustrated Contracts Act, R.S.O. 1990, Chapter F.34.

109 *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. 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.
liability clauses and the rule against penalties.\textsuperscript{110} 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;\textsuperscript{111} even where the outcome visits an unfairness on one of the parties.\textsuperscript{112} 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 obliged to do so) was still able to fully rely on the limitation of liability clause contained therein.\textsuperscript{113} 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.\textsuperscript{114}

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 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’).\textsuperscript{115} 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.\textsuperscript{116}


\textsuperscript{111} See \textit{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.’ See, contra, \textit{Uber Technologies Inc. v. Heller}, 2020 SCC 16 at paras 87–90.

\textsuperscript{112} 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’. \textit{Plas-Tex Canada Ltd. v. Dow Chemical of Canada Ltd.}, 2004 ABCA 309 (C.A.) (affirmed on this point: \textit{Tercon Contractors Ltd. v. British Columbia} (Minister of Transportation & Highways), 2010 SCC 4 at 119).

\textsuperscript{113} \textit{Chuang v. Toyota Canada Inc.}, 2016 ONCA 584 (leave to appeal refused, 2017 CarswellOnt 4671) at 22 and 31–34 and 49.

\textsuperscript{114} 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’: \textit{Canada (Attorney General) v. Fairmont Hotels Inc.}, 2016 SCC 56 at 13, citing \textit{Sylva Lake Golf & Tennis Club Ltd. v. Performance Industries Ltd.}, 2002 SCC 19 at 31.

\textsuperscript{115} \textit{Atos IT Solutions v. Sapient Canada Inc.}, 2018 ONCA 374, leave to appeal refused, 2019 CarswellOnt 4343.

\textsuperscript{116} \textit{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.

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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,
c. knowing it to be untrue;
d. without belief in its truth; or
e. reckless as to whether it be true or false; and
f. 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 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.

120 See, for example, Rugin v. Ven-Cor Vending Distributors Ltd., 2001 CarswellOnt 2511, 106 A.C.W.S. (3d) 642 (S.C.J.) at 23.
121 Bhasin v. Hrynew, 2014 SCC 71 at 32–70.
122 Bhasin v. Hrynew, 2014 SCC 71 at 73.
123 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.
124 Bhasin v. Hrynew, 2014 SCC 71 at 70, 73 and 86.
125 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...
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 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 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.

126 Swan on Contracts, supra note 9 at 6.11.
127 McCamus on Contracts at p. 890.
128 McCamus on Contracts at p. 894.
133 Open Window Bakery, 2004 SCC 9 at 11 and 20.
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).134

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.135

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.136 Note that, while the common law of Canada previously presumed uniqueness in land, the Supreme Court of Canada recently overturned this presumption.137

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.138 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.139 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.140

134 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.


139 The rationale for early crystallisation is explained by Laskin, J.A. (in dissent) in Kinbauri Gold Corp. v. IAMGOLD International African Mining Gold Corp., [2004] O.J. No. 4568, 135 A.C.W.S. (3d) 70 (C.A.): ‘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’.

140 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
Where damages at law are unavailable, an equitable remedy may be available in limited circumstances to address instances of unjust enrichment.141

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.142 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.143

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.144 This presumption can be displaced by the parties’ prior agreement.145 Unless an award (or settlement agreement) provides otherwise, it is deemed to be inclusive of tax.146


141 Usually pursuant to the equitable principles of restitution or disgorgement. As recently explained by the Supreme Court of Canada in Atlantic Lottery Corp. Inc. v. Babstock, 2020 SCC 19 [citations removed] at para. 24: ‘[R]estitution for unjust enrichment and disgorgement for wrongdoing are two types of gain-based remedies … disgorgement requires only that the defendant gained a benefit (with no proof of deprivation to the plaintiff required), while restitution is awarded in response to the causative event of unjust enrichment, where there is correspondence between the defendant’s gain and the plaintiff’s deprivation.’

142 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.


144 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.

145 This is provided for explicitly in certain provincial legislation; see, for example, Court Order Interest Act, RSBC c C. 43 at 2(e). 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.

Chapter 6

### CHINA

_Yang Zhengyu and Shen Yi_¹

## I  OVERVIEW

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 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.

On 28 May 2020, the NPCC adopted the Civil Code of the People’s Republic of China (the Civil Code), which will take effect on 1 January 2021. The Civil Code has 1,260 Articles, in addition to general and supplementary provisions, it has six other Parts relating to property rights, contracts, personality rights, marriage and family, inheritance and tort liabilities. Among them, the contracts Part consists of three Subchapters, 29 Sections and 526 Articles, accounting for almost half of the entire Civil Code.

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¹ Yang Zhengyu and Shen Yi are partners at Grandall Law Firm. The authors wish to acknowledge the contributions of Wang Liying, Liu Xueyang, Zhang Kai and Liang Yiming, all of whom are attorneys at Beijing office of Grandall.
Codification of the Civil Code is the systematic integration of the existing norms of the civil legal system in China to form a code with a rigorous structure and complete and coherent content.

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; and
- (8) methods of dispute resolution.²

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. The Civil Code also makes it clear that if the acceptance is made within the time limit for acceptance in such a way as to be unable to reach the offeror in time under the usual circumstances, it will be deemed a new offer.³ A contract is established when the acceptance becomes effective.

² See Article 12 of the PRC Contract Law.
³ See Article 486 of the Civil Code.
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.

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. The Civil Code stipulates that, if a party fails to comply with the procedures for approval or other formalities that affect the effectiveness of the contract, it does not affect the validity of the provisions concerning these obligations and other provisions relevant. The other party may hold it liable for breach of such obligations. 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.

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 material 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.

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4 See Article 44 of the PRC Contract Law.
5 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).
6 See Article 502 of the Civil Code.
A contract shall be void under any of the following circumstances:

a. the contract is concluded by malicious collusion to damage the interests of the state, a collective group or a third party;
b. an illegitimate purpose is covered up;
c. the contract damages public interests; or
d. 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.

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).

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7 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).
8 See Article 5 of Law of the People’s Republic of China on Application of Law in Foreign-related Civil Relations.
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 unfavourable 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 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.

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.9

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.10

The interpretation of a contract may provide a criterion for the court to 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 behaviours of the borrowers constitute a breach of contract.11

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.

- the plaintiff must be a citizen, a legal person or other entity with direct interests in the case;
- the defendant must be identifiable;
- the claim must be specific and clear supported by specific facts and grounds; and
- 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 5 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. 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 of the Beijing Higher Court, the Beijing No. 4 Intermediate Court shall exercise jurisdiction over all the cases involving financial loan contracts disputes and insurance 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 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 judgments and rulings made by the CICC are final and binding on the parties and with legal effect. 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, which 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

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12 See the Announcement of the Beijing High People’s Court on Performance of Duties by the Beijing No. 4 Intermediate People’s Court.

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.

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 be 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 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 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.

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 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.

The limitation period has expired. The limitation of action for commercial contract litigation is three years in China. The Civil Code provides a four-year limitation period.

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15  See ‘CICC Has Completed These Things in The Last Year’, Sun Hang, the public WeChat account of SPC.
for litigation or arbitration due to disputes over contracts of international goods sales and import and export of technology. 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.

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 purpose of the contract is rendered impossible to achieve due to force majeure; (2) one party to the contract indicates, expressly or by conduct, before the expiry of the performance period, that it will not perform its principal obligations; (3) one party to the contract delays performing its principal obligations and fails to perform the same within a reasonable time period after being urged to do so; (4) one party to the contract delays performing the obligations or commits other acts in breach of the contract, resulting in the impossibility to achieve the purpose of the contract; or (5) other circumstances as provided by the laws. The Civil Code has added that the a party may rescind an indefinite contract involving a continuing obligation to perform at any time, provided that it give reasonable notice to the other party prior to doing so.

The Civil Code also provides that where there is a significant change in the basic conditions of the contract that could not be foreseen by the parties at the time of conclusion of the contract and is not a commercial risk, continuing to perform is manifestly unfair to one party. If the adversely affected party fails to renegotiate the contract with the other within a reasonable period, this party may request a court or an arbitration to modify or terminate the contract.

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, 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, or if the other party’s performance does not comply with the terms of the contract.

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, 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.

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.

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16 See Article 594 of the Civil Code.
18 See Article 563 of the Civil Code.
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. 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.

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.

i 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.

ii 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.

19 See Article 122 of the PRC Contract Law.
20 See Article 111 of the PRC Contract Law.
iii 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.21

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.

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.

Upon taking effect, the Civil Code will repeal numerous existing Laws, including the General Principles of the Civil Law, the General Rules of the Civil Law, Contract Law, Guarantee Law and Property Rights Law. The Civil Code aims to create a market environment in which all parties use resource elements equally by law, participate in competition openly and fairly, and are equally protected by law, which ultimately leads to high-quality development of the economy.

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.

21 See Articles 113 and 114 of the PRC Contract Law.
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.
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 is 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 or she 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.

6  Section 11 of Cap. 149.
7  Section 10 of Cap. 149.
8  Section 77 of Cap. 149.
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 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 ‘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.\textsuperscript{11}

\textbf{iii} \hspace{1em} \textbf{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.

\textbf{iv} \hspace{1em} \textbf{Implied terms}

Terms in a contract may be either express or implied and can be established by custom, statute or the courts.\textsuperscript{12} 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.\textsuperscript{13}

\textbf{v} \hspace{1em} \textbf{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).\textsuperscript{14}

\textbf{IV} \hspace{1em} \textbf{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.

\textsuperscript{11} Takis Xenopoulos v. Thomas Nelson (1982) 1 CLR 674.
\textsuperscript{12} Agiulouo Tsiali v. Doras K. X Androu (Tsiali) mentally ill, dated 17/7/00 Civil Appeal 10174.
\textsuperscript{13} Chitty on Contracts, Volume I, 30th edition, par. 1015.
\textsuperscript{14} Marketrends Finance Ltd v. Perdikou a.o. (2006) 1B C.L.R. 1042.
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 solely be handling high-value commercial disputes and adopt fast track procedures.


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 or 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.

Domestic arbitration is governed by the Arbitration Law 1944 (Cap. 4), which is based on the older version of the English Arbitration Act 1950. Moreover, the International Arbitration in Commercial Matters Law (Law 101/1987) applies exclusively to international commercial disputes and is almost identical to the UNCITRAL Model Law of 1985. The amendments of UNCITRAL Model Law in 2006 have not been adopted by the Cypriot legislator. Cyprus is also a party to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (ratified in Cyprus by the Ratification Law (84/1979).

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.\textsuperscript{15}

The filing of an action itself can be considered as a termination of a contract.\textsuperscript{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.\textsuperscript{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.\textsuperscript{18} Specifically, the parties do not enter into a contract under their free will if their consent is given due to the following reasons.

\textsuperscript{15} Hong Kong Fir Shipping Ltd v. Kisen Kaisha Ltd (1962) EWCA Civ 7.
\textsuperscript{17} Hochster v. De La Tour (1853) 2 E & B 678.
\textsuperscript{18} Sections 14–22 of Cap. 149.
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.\(^\text{19}\)

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 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.\(^\text{20}\)

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:

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

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.\(^\text{21}\)

Misrepresentation

Misrepresentation includes the following:

\(\begin{align*}
a & \text{ 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 & \text{ 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 & \text{ 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.}\(^\text{22}\)
\end{align*}\)

\(^{19}\) Section 15 of Cap. 149.  
\(^{20}\) Section 20 of the Law on Contracts, Cap. 149.  
\(^{21}\) Section 17 of Cap. 149.  
\(^{22}\) Section 18 of Cap. 149.
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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{25}

**The parties are not competent to contract**

A person is considered competent to contract if he or she is not disqualified from contracting by any law and is of sound mind, namely if at the time of making the contract he or she is capable of understanding it and of forming a rational judgment as to its effect upon his or her interests.\textsuperscript{26} It is irrelevant if he or she is occasionally of unsound mind, as long as he or she was of sound mind at the time he or she 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 compulsable 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.\textsuperscript{27}

\textsuperscript{23} Sections 16 and 19 of Cap. 149.
\textsuperscript{24} Section 19(2) of Cap. 149.
\textsuperscript{25} Section 21(1) of Cap. 149.
\textsuperscript{26} Sections 11 and 12 of Cap. 149.
\textsuperscript{27} Section 25 of Cap. 149.
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\(^{28}\) and until 1 January 2016\(^{29}\), 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.

The general limitation period provided is 10 years from the date the cause of action was perfected.\(^{30}\) 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, 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.\(^{31}\)

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.\(^{32}\) 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.\(^{33}\)

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.

\(^{28}\) Law on Suspension of Limitation of Actions, No. 57/1964.

\(^{29}\) Law on Limitation of Actions No. 66(I)/2012.

\(^{30}\) 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.

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.

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:

a 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;

b the person making the representation must be aware that the representation is false;

c the person making the representation intends the plaintiff to rely at the said representation and to suffer damage due to the said reliance;

d the plaintiff actually relied on and acted in accordance to the said false representation; and

e the plaintiff actually suffered loss, because he or she acted in accordance to the said false representation.

On the other hand, a person commits the fraud of deceit if he or she 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 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 prove 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:

a 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;

34 *Jonesco v. Beard* (1930) A.C. 298.
b the plaintiff must prove he suffered damage because of the procured breach of contract; and
c 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.35

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 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

35 Section 34 of the Law on Civil Wrongs, Cap.148
36 British Industrial Plastics Ltd v. Ferguson (1940) 1 All E.R. 479, pp.482–483.
contract. 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.

**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.

**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.

**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.

**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.

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.

**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.

### 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.44

### 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:

- if the contract is not void;
- if the contract is expressed in writing;
- if the contract is signed at the end thereof by the party to be charged therewith; and
- 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.45

### 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 that will handle only high-value commercial disputes. Such a court will enhance the faster and more efficient adjudication of these 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 *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

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of urgency or of other exceptional circumstances. Even in the case where interim relief is granted on an *ex parte* basis, subsequently a full *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.
Chapter 8

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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The Danish litigation process has been digitalised in recent years – 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:

a a purposive approach;

b a contextual approach;

c the contra proferentem rule; or

d 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, see Article 4(1) Rome
The presumption is that the law governing the contract will be the law of the place in which the contract is performed (see 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.
v 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.

V 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:

\( a \) the performance is defective; and

\( b \) 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, these 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 and riots.

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, inter alia, whether the provision can be said to be unusual if the provision concerns direct or indirect damages or whether any consumer protective legislation applies.

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.
I OVERVIEW

The courts of England\(^2\) 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.

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 all 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, that offer claimants the opportunity, in some instances, to seek remedies beyond the terms of the contract.

i The covid-19 pandemic

The covid-19 pandemic has had a considerable impact on every aspect of life in the United Kingdom. That having been said, the impact of the pandemic on English contract law has been limited,\(^3\) and the quantity of litigation through the courts has not decreased.

The courts have, however, moved quickly to deliver their services remotely and online,\(^4\) with considerable success (building on, for example, the extensive review of the civil court

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\(^1\) Oliver Browne and Ian Felstead are partners, and Mair Williams is an associate, at Latham & Watkins.

\(^2\) 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.

\(^3\) There have been significant changes in the context of insolvency proceedings and the relationship between landlords and tenants, as well as regards certain aspects of enforcement: see the Coronavirus Act 2020 and the Corporate Insolvency and Governance Act 2020.

\(^4\) See, for example, the 114th to 121st Practice Direction Updates to the Civil Procedure Rules (implemented during 2020), and the introduction, amendment and/or extension of Practice Directions 51O – The
system in England and Wales, culminating in the publication of the Briggs Report in July 2016, which encouraged greater efficiency with a particular focus on the use of digital technology).\textsuperscript{5}

ii Brexit

The United Kingdom exited the European Union on 31 January 2020 (commonly referred to as Brexit). By virtue of Sections 1A and 1B of the European Union (Withdrawal) Act 2018 (as amended by the European Union (Withdrawal Agreement) Act 2020) (the EUWA), European Union law will continue to be applicable to the United Kingdom for the duration of the implementation period set out in Section 1A(6) of the EUWA (in other words, for all of 2020, unless further amendments occur). After the implementation period, pursuant to and in accordance with Sections 2 to 4 of the EUWA, EU legislation, so far as operative immediately before the end of the implementation period, forms part of domestic law on and after the day on which the implementation period ends.

That means that Brexit will have a limited impact on English contract law itself;\textsuperscript{6} 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.\textsuperscript{7}

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:
\begin{itemize}
  \item \textit{d} offer;
  \item \textit{e} acceptance;
  \item \textit{f} consideration;
  \item \textit{g} an intention to create legal relations; and
  \item \textit{h} certainty of terms.
\end{itemize}
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, rejection\(^8\) or lapse of time.

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.\(^9\) 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.\(^10\) 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*.\(^11\) 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.\(^12\)

The case law on this was reviewed by the High Court in 2017 in *Blue v. Ashley*.\(^13\) In that case, Leggat J provided clarification, asserting that, although some might be concerned that *William v. Roffey Bros* opens the window for a party to seek extra payment while threatening

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\(^8\) A counter-offer is also considered to be a rejection of the original offer (*Hyde v. Wrench* (1840) 3 Beav 334).
\(^9\) Unless the contract is made by way of a deed (which frequently represents a unilateral promise to take on certain obligations), the requirements of which are outside the scope of this chapter (but which include certain specific formalities).
\(^10\) *Stilk v. Myrick* (1809) 2 Camp 317.
\(^12\) 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)).
\(^13\) *Blue v. Ashley* [2017] EWHC 1553 (Comm), 26 June 2017.
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.14

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.15 In respect of commercial parties, there is a rebuttable presumption that there was an intention to create legal relations.

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.16

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),17 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.

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16 See, for example, RTS Flexible Systems Ltd v. Molkerei Alois Müller GmbH & Company KG (UK Production) [2010] UKSC 14.
17 Chudley v. Clydesdale Bank plc (t/a Yorkshire Bank) [2017] EWHC 2177 (Comm).
**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 promise by one party that it will not enforce its strict legal rights against the other;
- an intention on the promisor's part that the other will rely on that promise; and
- 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.¹⁸

### 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*,¹⁹ Lord Neuberger summarised and clarified the approach that the English courts should 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.²⁰ Although two Supreme Court decisions in 2017²¹ suggest that all of these

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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 is now 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.\textsuperscript{22}

In the 2019 case of \textit{Federal Republic of Nigeria v. JP Morgan Chase Bank NA},\textsuperscript{23} Professor A Burrows QC, sitting then as a High Court judge, usefully summarised the modern approach to contract interpretation in the following terms:

\begin{quote}
The modern approach is to ascertain the meaning of the words used by applying an objective and contextual approach. One must ask what the term, viewed in the light of the whole contract, would mean to a reasonable person having all the relevant background knowledge reasonably available to the parties at the time the contract was made (excluding the previous negotiations of the parties and their declarations of subjective intent). Business common sense and the purpose of the term (which appear to be very similar ideas) may also be relevant. But the words used by the parties are of primary importance so that one must be careful to avoid placing too much weight on business common sense or purpose at the expense of the words used; and one must be astute not to rewrite the contract so as to protect one of the parties from having entered into a bad bargain.
\end{quote}

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’.\textsuperscript{24}

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

\begin{enumerate}
\item the courts will endeavour to interpret the contract in cases of ambiguity in a way that ensures the validity of the contract rather than rendering the contract ineffective or uncertain;\textsuperscript{25}
\item the courts will strictly interpret contractual provisions that seek to limit rights or remedies, or exclude liability, which arise by operation of law;\textsuperscript{26} and
\item where a clause has been drafted by a party for its own benefit, it will be construed in favour of the other party (the \textit{contra proferentem} rule).\textsuperscript{27}
\end{enumerate}

\textsuperscript{22} \textit{Interactive E-Solutions JLT v. O3B Africa Ltd} [2018] EWCA Civ 62.


\textsuperscript{24} \textit{Merthyr (South Wales) Ltd v. Merthyr Tydfil CBC} [2019] EWCA Civ 526.

\textsuperscript{25} \textit{Tillman v. Egon Zehnder Ltd} [2019] UKSC 32.

\textsuperscript{26} In that regard, the \textit{Unfair Contract Terms Act 1977} requires limitation clauses to be ‘reasonable’.

\textsuperscript{27} This principle has limited applicability in cases involving sophisticated commercial agreements where a contract has been jointly drafted by the parties or where the parties are of comparable bargaining power – see \textit{Persimmon Homes v. Ove Arup} [2017] EWCA Civ 373.
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.\(^{28}\)

**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.*\(^ {29}\) A term may be implied if:

\[
a \quad \text{it is necessary to give the contract commercial or practical coherence;}
\]

\[
b \quad \text{it can be clearly expressed;}
\]

\[
c \quad \text{it does not contradict an express term;}
\]

\[
d \quad \text{reasonable parties would have agreed the term was needed; and}
\]

\[
e \quad \text{it passes the ‘officious bystander’ test.}
\]

The 2018 case of *Bou-Simon v. BGC Brokers LP*\(^ {30}\) 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.\(^ {31}\)

**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:

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

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

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

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30 Bou-Simon v. BGC Brokers LP [2018] EWCA Civ 1525.
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*,[^32] 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*,[^33] 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*,[^34] 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.

d. A number of cases have considered and affirmed the *Fiona Trust* principle,[^35] a case in which the Court of Appeal commented that the construction of a dispute resolution clause should start from the assumption that the parties, as rational business people, are likely to have intended any dispute arising out of the relationship into which they have entered to be decided by the same tribunal or court (sometimes called the ‘one-stop shop’ principle).[^36]

 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 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.

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[^34]: *Ohpen Operations UK Ltd v. Invesco Fund Managers Ltd* [2019] EWHC 2246 (TCC).
[^35]: *Fiona Trust and Holding Corporation and another v. Privalov and others* [2007] EWCA Civ. 20 and see also *Fiona Trust and Holding Corporation and another v. Privalov and others* [2007] UKHL 40.
[^36]: *See Terre Neuve SARL and others v. Yeudale Ltd and others* [2020] EWHC 772 (Comm), where the High Court discussed the cases applying *Fiona Trust* and the ‘extended Fiona Trust principle’ permitting a wider interpretation to be given to jurisdiction clauses including in multi-contract disputes. And see also *Macquarie Global Infrastructure Funds 2 S.a.r.l. v. Gonzalez and another* [2020] EWHC 2123 (Comm), which makes it clear that the ‘one-stop shop’ principle will extend to non-contractual claims, even where no claim based on the underlying contract is advanced.
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, another development which is being pursued by the UK government: the UK applied to join the Lugano Convention in early 2020).

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.37

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.38

**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.39

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).

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37 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. Note that some of the thresholds have been amended, or disapplied altogether, in light of the covid-19 pandemic.

38 This has recently been confirmed in Mezvinsky and another (acting through their litigation friends) v. Associated Newspapers Ltd [2018] EWHC 1261 (Ch).

39 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.
Mediation
Settlement negotiations facilitated by an independent third party mediator. These also typically take place in a confidential and ‘without prejudice’ manner.

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, 40 however, is a breach of contract that allows the non-breaching party to treat the contract as being at an end. 41 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

40 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 the consequences of the breach. Breaches of warranties do not terminate contracts, and the correct remedy in that situation is a claim for damages.
is subject to such an implied limit. In *Bates v. Post Office Ltd (No. 3)*[^42] 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.

In light of the covid-19 pandemic, a number of measures have been taken to limit a party’s right to terminate contracts with an entity that is insolvent.[^43]

### 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; it is 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 its 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.[^44]

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).

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[^43]: Per the provisions of the Corporate Insolvency and Governance Act 2020.
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 should include reference to specific events (such as natural disasters, acts of war and acts of terrorism). Wording equivalent to ‘usual force majeure clauses shall apply’ will be considered void, and the courts have had some difficulty where the force majeure clause in question contains catch-all language.

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.

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 sublet 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 sublet 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.

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.’ However, more recently the law on illegality of contracts was criticised as being unnecessarily complex, uncertain and arbitrary. In 2016, the Supreme Court evaluated the law in this area in Patel v. Mirza. 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

45  British Electrical and Associated Industries (Cardiff) Ltd v Patley Pressings Ltd [1953] 1 WLR 280.
47  Davis Contractors Ltd v Fareham Urban District Council [1956] UKHL 3.
48  Canary Wharf (BP4) T1 Ltd and others v European Medicines Agency [2019] EWHC 335 (Ch).
England and Wales

Ltd (in liquidation) v. Daiwa Capital Markets Europe Ltd\(^{52}\) 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 relevant limitation period.\(^{53}\) 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\(^{54}\) 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:

\(a\) a false representation (of fact or law);

\(b\) the defendant knows the representation is false (or is reckless);

\(c\) the defendant intends that the claimant acts in reliance on the representation; and

\(d\) the claimant acts in reliance on the representation and, as a consequence, suffers loss.\(^{55}\)

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\(^{52}\) Singularis Holdings Ltd (in liquidation) v. Daiwa Capital Markets Europe Ltd [2018] EWCA Civ 84.

\(^{53}\) See, in this regard, the Limitation Act 1980.

\(^{54}\) In particular, the Unfair Contract Terms Act 1977, the Unfair Terms in Consumer Contracts Regulations 1999 and the Consumer Rights Act 2015.

\(^{55}\) Eco 3 Capital Ltd and others v. Ludsin Overseas Ltd [2013] EWCA Civ 413.
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 in to 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 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 general 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 and general 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 took a different view, 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 and ‘relational’ contracts.⁶³

VIII REMEDIES

When a contract has been breached, there are various remedies that may be available to the injured party in England.⁶⁴

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.⁶⁵

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

We have discussed causation above: 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. If the chain of causation cannot be demonstrated, or cannot be demonstrated in full, that will impact the remedies available.

A key further restriction on the recovery of damages for breach of contract is remoteness.⁶⁶ Only losses that are ‘in the contemplation of both parties’⁶⁷ will be recoverable by the claimant. This principle can be summarised as follows:

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⁶⁴ It is also possible to agree remedies for breach of contract as well, including by way of deposit mechanisms, actions for agreed sums and liquidated damages. Agreed remedies are subject to the rule against penalties, discussed below.

⁶⁵ Robinson v. Harman (1848) 1 Ex 850.


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.68

The innocent party must also ensure that it has taken reasonable steps to mitigate its loss, and the court can (in the context of negligence claims) apportion damages between the parties if they result partly from the claimant’s own fault and partly from the fault of any other person.69

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,70 but has recently been reconsidered in Morris-Garner and another v. One Step (Support) Ltd,71 where the 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.72

Punitive damages, intended to penalise the defendant, almost certainly cannot be awarded or recovered for breach of contract.73

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,74 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’.

69 Section 1, Law Reform (Contributory Negligence) Act 1945. Note that, in a contractual sense, mitigation can be regarded as part of the chain of causation, as it relates to post-breach acts or omissions of the claimant that impact on the damage caused by the breach: see Lord Sumption in BPE Solicitors v. Hughes-Holland [2017] UKSC 21.
70 Wrotham Park Estate Ltd v. Parkside Homes Ltd 1 WLR 798.
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.\(^{75}\) Although, the courts have demonstrated a willingness to take a broad approach to the requirement that damages must be an inadequate remedy.\(^{76}\)

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 the covid-19 pandemic and 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. 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’.8 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.9

i Contract conclusion

Negotiations

Pre-contractual negotiations may be initiated, conducted and terminated freely but must be conducted in good faith.10 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.11 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.12 Breaching this duty may result in the nullity of the contract and the allocation of damages by the breaching party.13 It is thus crucial to respect this duty, especially for significant operations such as mergers and acquisitions as the parties may neither limit nor exclude this duty.

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.14 An offer may only be withdrawn after the expiry of the time period stipulated or, in the absence of such a time period, after the expiration of a reasonable time.15

The reunion of both an offer and an acceptance whereby parties express their will to contract forms the contract.16 Consent can either be drawn from parties’ statements or by their unequivocal behaviours.17 Silence is not construed as acceptance unless otherwise implied by law, customs, business relationships or specific circumstances.18

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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.
**Preliminary contracts**

The 2016 reform introduced two preliminary contracts, already vastly used in practice:

* a. 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;\(^\text{19}\) and

* b. 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.\(^\text{20}\)

**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.\(^\text{21}\)

**Capacity and representation**

Any natural person over 18 has the capacity to contract unless he or she is subject to a measure of legal protection, as per Article 425 of the Civil Code.\(^\text{22}\) As for legal persons, their capacity to contract is limited by the specific provisions that govern each of them.\(^\text{23}\) Contracts are signed by the company's legal representative or by any person to whom such powers have been delegated.\(^\text{24}\)

**Validity of consent**

Parties’ consents are not valid when given only by error, obtained by violence or induced by *dol*.\(^\text{25}\)

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 for the *dol*, a civil law concept, it can be defined as a fraud committed to induce another party into entering into a contract.\(^\text{26}\)

**Defined and lawful subject matter of the contract**

A contract’s content must not breach public order,\(^\text{27}\) and the object of the obligation arising from it must be a present or future performance that must be both possible and determinable or determinable.\(^\text{28}\)

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19. Article 1123 (Section 1), French Civil Code.
20. Article 1124 (Section 1), French Civil Code.
22. Articles 1145 and 1146, French Civil Code.
23. Article 1145 (Section 2), 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.
In a bilateral contract, the fact that the obligations are unbalanced is not a cause of nullity, unless otherwise specified by law.\(^{29}\) 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.\(^{30}\)

iii Form of the contract

As a principle, contracts are consensual.\(^{31}\) 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.\(^{32}\) Not only must they comply with their explicit provisions, but also with all such consequences as equity, customs or law may give them.\(^{33}\)

Contracts can only be modified or revoked if both parties consent to it, unless otherwise specified by law.\(^{34}\) However, a contract may be renegotiated if some unpredictable events that make it prohibitively expensive to carry out occur.\(^{35}\)

Regarding the transfer of ownership, unless parties have decided otherwise, the transfer occurs upon conclusion of the contract.\(^{36}\) After that, the seller must deliver the good as promised and preserve it until delivery.\(^{37}\)

As a general rule, one may only bind oneself in one’s own name and for oneself.\(^{38}\) However, some contracts have third-party beneficiaries (third-party provision,\(^{39}\) third-party performance promise,\(^{40}\) mandate,\(^{41}\) commissioning agents,\(^{42}\) 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 (\textit{lex contractus}). Said law will also govern its interpretation.

\(^{29}\) Article 1168, French Civil Code.
\(^{30}\) Article 1169, French Civil Code.
\(^{31}\) Article 1172, French Civil Code.
\(^{32}\) Article 1199, French Civil Code.
\(^{33}\) Article 1194, French Civil Code.
\(^{34}\) Article 1193, French Civil Code.
\(^{35}\) Article 1195, French Civil Code.
\(^{36}\) Article 1196, French Civil Code.
\(^{37}\) Article 1197, French Civil Code.
\(^{38}\) Article 1203, French Civil Code.
\(^{39}\) Article 1205, French Civil Code.
\(^{40}\) Article 1204, French Civil Code.
\(^{41}\) Articles 1984 et seq. French Civil Code.
\(^{42}\) Article L. 132-1, French Commercial Code.
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

\[b\]
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 interpret the meaning of a provision in one of these contracts in light of that operation.

\(^{43}\) 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.
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:

- in favour of the consumer, when the contract governs the relation between a professional and a consumer;50
- in favour of the obligor, when the contract was freely negotiated;51 and
- in favour of the party who did not draft the contract, for standard form agreements.52

As parties must not only comply with the express provisions of their contract but also with all consequences as equity, customs or law may give them,53 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 €5,000.55 Access to the highest court, the Court of 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 €5,000, provided the case only involves rights over which they have an unrestricted power of disposition.56

49 Article 1191, French Civil Code.
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.
56 Article 41, French Code of Civil Procedure.
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 contracts, unfair competition, transportation, operations on financial instruments, claims for compensation following anti-competitive commercial practices). These chambers’ main particularities are as follows:

a. 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;

b. parties, witnesses and experts may be heard in English; and

c. 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. Parties may agree, after a conflict has arisen, that their dispute will be heard by a court even if that court does not have jurisdiction because of the amount of the claim.

The law also grants exclusive jurisdiction to specialised tribunals. For instance, commercial courts have exclusive jurisdiction over disputes involving:

a. commercial companies;

b. obligations among traders, credit institutions and financing companies; or

c. commercial deeds.

Judges sitting in commercial courts are not career judges but lay magistrates, elected by delegates – themselves elected among the commercial community. 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.

Rules of territorial jurisdiction

By default, a claimant must seize the competent court of the jurisdiction where the respondent resides (actor sequitur forum rei). 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:

a. in matters relating to rights in rem in immovable property, the court of the place where the property is located has sole jurisdiction.

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57 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.


59 Article 41, French Code of Civil Procedure.

60 Article L. 721-3, French Commercial Code.

61 Articles L. 723-1 et seq. and Article L. 713-7, French Commercial Code.


63 Article 42, French Code of Civil Procedure.

64 Article 44, French Code of Civil Procedure.
France

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;\(^{65}\) 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.\(^{66}\)

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.\(^{67}\) 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 traders. 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.\(^{68}\)

### 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.\(^{69}\)

#### 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).\(^{70}\) 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 on the protection of trade secrets now enables litigants and interested third parties to request the application of appropriate confidentiality measures to prevent the divulging of trade secrets in the course of legal proceedings.\(^{71}\)

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68 Article 48, French Code of Civil Procedure.
69 Article 700, French Code of Civil Procedure.
70 Articles 433 et seq. French Code of Civil Procedure.
71 Directive (EU) 2016/943 of the European Parliament and of the Council of 8 June 2016 on the protection of undisclosed know-how and business information (trade secrets) against their unlawful acquisition, use
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.

**iii 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:

- the clause must have been expressly established as a mandatory prerequisite to the referral of the dispute to a court;
- parties must have given their express consent to that effect; and
- the practical details of its implementation must have been specified in the agreement.

A claimant referring the matter to a court directly will expose himself or herself to a ruling of inadmissibility of the proceedings.

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. To encourage these alternative dispute resolution mechanisms, the limitation period on the

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73 Cour de Cassation, Commercial Chamber, 29 April 2014, No. 12-27.004.
74 Cour de Cassation, Mixed Chamber, 14 April 2003, No. 00-19.423.
75 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{76}

V \textbf{BREACH OF CONTRACT CLAIMS}

\textbf{i Contractual liability}

Sectoral laws may specify parties’ particular obligations, as is for instance the case for sales contracts. For example, a buyer benefits from protective provisions such as a warranty against eviction,\textsuperscript{77} a warranty against hidden defects,\textsuperscript{78} an obligation of proper delivery\textsuperscript{79} and a product liability claim.\textsuperscript{80}

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 this was due to an external cause that cannot be imputed to the party.\textsuperscript{81}

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 obligor is liable only for damages that were foreseen or that could be foreseen at the time of the contract, unless the obligor’s failure is owing to his or her own gross negligence or fraud.\textsuperscript{82}

\textit{Causal link}

A causal link must be demonstrated between the breach of contract and the damages. In other words, the damages must be the immediate and direct consequences of the non-performance of the agreement.\textsuperscript{83}

\begin{itemize}
\item \textsuperscript{76} Article 54, French Code of Civil Procedure.
\item \textsuperscript{77} Articles 1626 et seq. French Civil Code.
\item \textsuperscript{78} Articles 1641 et seq. French Civil Code.
\item \textsuperscript{79} Articles 1604 et seq. French Civil Code.
\item \textsuperscript{80} Articles 1245 et seq. French Civil Code.
\item \textsuperscript{81} Article 1231-1, French Civil Code.
\item \textsuperscript{82} Article 1231-3, French Civil Code.
\item \textsuperscript{83} Article 1231-4, French Civil Code.
\end{itemize}
ii Burden of proof
Each party must prove, according to the law, the facts necessary for its claim to succeed.84

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 2010.85 According to this procedure, 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 to their dispute. In this context, parties must formalise the terms of their exchange of evidence in writing.86

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 proof of the facts upon which the resolution of the dispute depends.87 This is the procedure most commonly used by parties 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).88 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 a maximum fine of €90,000 for legal persons.89 Rarely enforced, the Blocking Statute was recently back in the spotlight when the Gauvain report suggested increasing the sanctions to a maximum two-year imprisonment or a criminal fine amounting to €2 million, or both, for natural persons and a maximum fine of €10 million for legal persons.90

Rules of evidence
A claimant demanding the performance of an obligation must prove it.91 Similarly, a person claiming to be released from an obligation must prove its payment or the fact that caused its extinction.92

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84 Article 9, French Code of Civil Procedure.
86 Article 2063, French Civil Code.
87 Article 145, French Code of Civil Procedure.
88 Article 1 bis of Law No. 68-678 of 26 July 1968 (the Blocking Statute).
89 Article 3 of Law No. 68-678 of 26 July 1968 (the Blocking Statute).
90 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).
91 Article 1353 (Section 1), French Civil Code.
92 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 in writing 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 accepted as substitutions for a required written proof.

The law may establish presumptions related to some acts or facts. Three types of presumptions exist: simple, mixed and 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 an irrefutable presumption cannot be rebutted.

VI DEFENCES TO ENFORCEMENT

i Extinctive limitation period

In general, personal actions or movable rights of action are extinguished 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 the trial. Any legal action, even summary proceedings, interrupts the prescription, even if the action was brought before a court that lacks jurisdiction or was annulled for procedural error.

However, parties may decide, by mutual agreement, to shorten or extend the prescription period.

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.

93 Article 1358, French Civil Code.
94 Decree No. 80-533 of 15 July 1980.
95 Article 1359, French Civil Code.
96 Article 1360, French Civil Code.
97 Article 1361, French Civil Code.
98 Article 1354, French Civil Code.
99 ibid.
100 ibid.
101 Article 2224, French Civil Code.
102 Article 2239, French Civil Code.
103 Article 2241, French Civil Code.
104 Article 2254, French Civil Code.
105 Article 1347 (Section 1), French Civil Code.
106 Article 1347-1, French Civil Code.
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 restitution for any contractual performances that have already taken place.\(^\text{107}\)

Defects of consent

Defects of consent, which have already been presented in Part II ‘Contract formation’, are a cause of nullity of the contract\(^\text{108}\) if and only if they have been decisive. In other words, the error, \textit{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 contracted only under substantially different conditions.\(^\text{109}\) To be a ground for nullity, the error must not be inexcusable and must relate to the essential qualities of one of the performances or of the co-contractor.\(^\text{110}\) Therefore, errors on the value resulting from an erroneous economic assessment are excluded,\(^\text{111}\) whereas errors resulting from a \textit{dol} are always excusable and a cause of nullity even when relating to the value of the consideration.\(^\text{112}\) With regard to violence, it may be a ground for nullity whether exercised by a co-contractor or by a third party.\(^\text{113}\)

Incapacity and defaults in representation

Capacity is a condition of validity of contracts,\(^\text{114}\) and, therefore, incapacity to contract is a ground for relative nullity.\(^\text{115}\)

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.\(^\text{116}\) 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.\(^\text{117}\) 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.\(^\text{118}\)

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107 Article 1178 (Sections 1 and 2), French Civil Code.
108 Article 1131, French Civil Code.
109 Article 1130, French Civil Code.
110 Article 1132, French Civil Code.
111 Article 1136, French Civil Code.
112 Article 1139, French Civil Code.
113 Article 1142, French Civil Code.
114 Article 1128, French Civil Code.
115 Article 1147, French Civil Code.
116 Article 1156 (Section 2), French Civil Code.
117 Article 1157, French Civil Code.
118 Article 1161, French Civil Code.
Illicit contracts

Contracts are only valid insofar as they include a defined and lawful subject matter. 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. The sanction of an illicit or indefinite subject matter is the nullity of the contract.

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. 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 under which there has been no performance.

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. However, in a bilateral contract, the lack of equivalence between two obligations is not a ground for nullity absent legal provisions to the contrary.

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 contractual obligation of its substance is deemed unwritten, that is to say null and void. 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.

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 creating a significant imbalance between the respective rights and obligations of the parties to the contract, shall be deemed unwritten.

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.

119 Article 1128, French Civil Code.
120 Article 1162, French Civil Code.
121 Article 1178, French Civil Code.
122 Article 1185, French Civil Code.
123 Article 1169, French Civil Code.
124 Article 1168, French Civil Code.
125 Article 1170, French Civil Code.
126 Article 1231-3, French Civil Code.
127 Article 1171, French Civil Code.
128 Article 1186, French Civil Code.
viii Force majeure

In contractual matters, *force majeure* occurs when an event beyond the obligor’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 obligor from performing his or her obligation.\(^\text{129}\) 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.\(^\text{130}\)

VII FRAUD, MISREPRESENTATION AND OTHER CLAIMS

i Breach of the duty of good faith

Contracts must be negotiated, formed and executed in good faith.\(^\text{131}\) This provision is required by public order.\(^\text{132}\)

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 Court of 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.\(^\text{133}\)

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 the contract or ask the judge for its adaptation. If they fail to reach an agreement, a party may still request the revision or termination of the contract.\(^\text{134}\) The party who requested the renegotiation of the contract must continue to execute its obligations during the course of the renegotiations.

iii Quasi-contractual claims

Quasi-contracts are purely voluntary acts resulting in an obligation by the person who benefits from them without being entitled to it, and sometimes a commitment by their author towards others.\(^\text{135}\) The Civil Code identifies three quasi-contracts: the management
of affairs, the undue payment and the unjustified enrichment. They give rise to the obligation to compensate for the unfair advantage taken from others. Therefore, the impoverished person has a legal action against the enriched person on the basis of one of these three quasi-contracts.

**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 Paulian action is a specific cause of action that enables a creditor to protect himself or herself from fraud by having the acts committed by the debtor in fraud of the creditor’s rights declared unenforceable against the creditor inasmuch as the obligor has arranged his or her insolvency in order to frustrate the enforcement of the creditor’s debt.

**VIII REMEDIES**

**i Remedies available for breach of contract**

The French Civil Code sets out five remedies that are available to the party, victim of a non-performance or an improper performance:

- **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, or suspend the performance of his or her obligation when it is obvious that the other party will not perform;

- **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;

- **c** price reduction: the obligee may accept, after a formal notice, a partial performance of the contract and demand a proportional price reduction;

- **d** termination for breach: termination for breach may be obtained on three grounds: application of a termination clause, judicial resolution or unilateral termination.

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136 Articles 1301–1301-5, French Civil Code.
137 Articles 1302–1302-3, French Civil Code.
139 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.
140 Article 1341-2, French Civil Code.
141 Article 1217, French Civil Code.
142 Article 1219, French Civil Code.
143 Article 1220, French Civil Code.
144 Articles 1221 and 1222, French Civil Code.
145 Article 1223, French Civil Code.
146 Articles 1224–1229, French Civil Code.
Unilateral termination is a major innovation of the 2016 reform, according to which obligees can terminate contracts by notification to their obligors if they have not remedied the breach of contract despite a formal notice; and damages: the obligee may obtain compensation for the damage caused. 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 in damages. These remedies are cumulative, provided they are not incompatible. Punitve or exemplary damages do not exist as such. Finally, the choice of remedy is at the sole discretion of the obligee.

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 has not yet materialised. Indeed, one can obtain compensation for the loss of an opportunity, as long as its existence can be proven. Secondly, the damage must be direct; namely, the immediate and direct result of the breach of contract. Finally, compensation is limited to the damage foreseeable at the time the contract is concluded, except in the event of gross negligence or fraud.

Judges may still use their sovereign power to assess the damage in order to moderate the quantum of damages. Additionally, both interest at the legal rate and compensatory damages may be awarded. The breach of contract by the bad faith obligor must have caused additional damage, distinct from the delay, to the obligee, for additional damages to be awarded.

iii Extra-contractual claims (torts)
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. 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 sought 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

147 Article 1226, French Civil Code.
148 Article 1231, French Civil Code et seq.  
149 Article 1231-5, French Civil Code.  
150 Article 1231-4, French Civil Code.  
151 Article 1231-3, French Civil Code.  
152 Article 1231-6, French Civil Code.  
153 Article 1240, French Civil Code et seq.
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 based on the same facts.\textsuperscript{154}

As regards third parties, a landmark ruling by the Plenary Assembly of the Court of Cassation\textsuperscript{155} 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 former’s extra-contractual liability. Nevertheless, several recent decisions of the Court of Cassation as well as the Civil Liability Bill of 13 March 2017\textsuperscript{156} have tempered this principle.

\begin{flushright}
\textsuperscript{154} Cour de Cassation, Commercial Chamber, 24 October 2018, No. 17-25672.
\textsuperscript{155} Cour de Cassation, Plenary Assembly, 6 October 2006, Myr’ho, No. 05-13.255.
\textsuperscript{156} Article 1234, Civil Liability Bill of 13 March 2017.
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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 2018 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 – 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 was recently published.

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3 See https://www.destatis.de/DE/Themen/Staat/Justiz-Rechtspflege/Tabellen/gerichtsverfahren.html (in German).

4 Dannemann / Schulze - German Civil Code Volume I = Bürgerliches Gesetzbuch (BGB).
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.

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 favourable 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.
Germany

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 euros 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 often still 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 hard copies (or by fax). This has changed now though, and courts and lawyers are increasingly making use of electronic communication – to some extent motivated by an increased reliance on such communication in the wake of the covid-19 pandemic.

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.

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 April 2020, one of the standout cases was amicably settled, with about 240,000 consumers receiving payouts.

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 from case law or statutory law. Such presumptions may, for example, apply where claimants seek to establish that specific purchases of theirs were affected by cartel infringements, a subject matter that is addressed in a growing body of case law and may be further developed in the upcoming competition law reform.

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 10 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. In a related manner, 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 jeweller’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 defence. 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
Germany

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 kickback 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 flip side of the above-mentioned 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 differently.

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. Among the current areas of reform is the matter of cartel damages, where both case law and statutory law keep evolving.
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:

- the District Court;
- the Court of First Instance (of the High Court);
- the Court of Appeal (of the High Court); and
- 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:

<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>

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1 Athena Hiu Hung Wong and Moses Wanki Park are barristers-at-law at Liberty Chambers. The information in this chapter was accurate as at October 2019.
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\(^4\) from the date on which the breach of contract happened. The limitation is 12 years for contracts under seal (specialty).\(^5\) 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.\(^6\)

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,\(^7\) 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:

\(a\) an agreement;
\(b\) the intention to create legally binding relations;
\(c\) the capacity to enter into the agreement;
\(d\) consideration (unless the agreement is contained in a deed); and
\(e\) 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.\(^8\) 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.\(^9\) Both offer and acceptance can be made by words or conducts. 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

\(^4\) 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’: 
\(^7\) The Commercial List contains claims arising out of trade and commercial transactions.
\(^8\) Commercial contracts are presumed to be legally binding: 
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.10

**Consideration given**

Consideration, in essence, means ‘something of value in the eye of the law’11 (sufficiency).12 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.13

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.14 However, there are exceptions to this general rule. One exception is where the promisor requested the act to be carried out.15 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’.16 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.17 The court also has the power to sever a meaningless term, leaving the rest of the contract enforceable in law.18

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11 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, 859.
12 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.’
13 Thomas v. Thomas (1842) 2 QB 851.
14 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.
15 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.
16 New World Development Co Ltd v. Sun Hung Kai Securities Ltd (2006) 9 HKCFAR 403, [31], per Ribeiro P.J.
17 New World Development Co Ltd v. Sun Hung Kai Securities Ltd (2006) 9 HKCFAR 403, [32], per Ribeiro P.J.
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.\(^\text{19}\) 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.\(^\text{20}\)

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'.\(^\text{21}\) 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.\(^\text{22}\) A promissory estoppel might arise where:

\[
\text{[T]he parties are in a relationship involving enforceable or exercisable rights, duties or powers;}
\]

or

\[
\text{[O]ne party (the promisor) by words or conduct conveys or is reasonably understood to convey a clear and unequivocal promise or assurance to the other (the promisee) that the promisor will not enforce or exercise some of those rights, duties or powers;}
\]

or

\[
\text{[T]he promisee reasonably relies upon that promise and is induced to alter his position on the faith of it, so that it would be inequitable or unconscionable for the promisor to act inconsistently with the promise.}^{23}
\]

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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\(^{19}\) Tweddle v Atkinson [1861] EWHC J57 (QB); B + B Construction Ltd v Sun Alliance and London Insurance Plc [2000] 2 HKC 295.

\(^{20}\) 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.

\(^{23}\) Luo Xing Juan v Estate of Hui Shui See (2009) 12 HKCFAR 1, paragraph 55.
may rescile 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

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:

a failure to perform contractual obligations (an actual breach);
b defective performance of contractual obligations (an actual breach); or

c

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).  

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’);  
b performance has been rendered impossible by the guilty party’s breach;  
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 or by judicial decision, or if the parties have so agreed in their contract. 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. 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. 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.


45 See footnote 45.

46 For instance, Section 16(2) of the Sale of Goods Ordinance (Cap. 26) provides that ‘[w]here 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.


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.

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:

a  bring the contract to an end, in other words, terminate the contract; or

b  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 contact 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

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 the 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 HKLRD 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.  

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.

The onus of proof lies on the party asserting that a contract is unconscionable. 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.

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. 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’. 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. Dickman73 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.

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 contact 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’.

v 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.

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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.
in accordance with Crown Proceedings Ordinance (Cap. 300). 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. An injunction is a court order requiring a person to do, or refrain from doing, a particular action.

vi 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.

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 contract were upheld, as well as to the loss that rescission would cause to the other party’.

IX 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.
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

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, Jessica R Bernhardt and John R Etchingham.

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).

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

An offer must contain sufficiently detailed material terms so that ‘the promises and performances to be rendered by each party are reasonably certain’.6 An acceptance occurs when the offeree communicates a ‘meeting of the minds’ or ‘mutual assent’.7 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’.8 A valid contract requires only an objective manifestation of mutual assent.9

The acceptance ‘must comply strictly with’ the terms of the offer; if not, it will be construed as a rejection and counteroffer.10 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’.11 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]’.12 The price and nature of an item to be delivered are common examples of essential terms.13

Illinois defines consideration as the ‘bargained-for exchange of promises or performances … [which] may consist of a promise, an act or a forbearance’.14 Illinois courts generally will

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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).
11 A conditional acceptance or one which introduces new terms that vary from those offered ‘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.
not inquire into the adequacy of the consideration, which is ‘within the exclusive dominion of the parties where they contract freely and without fraud’\(^15\) unless the sufficiency is ‘so grossly inadequate as to shock the conscience’\(^16\) or the promise of one party is illusory—that is, when ‘closer examination reveals that the promisor has not promised to do anything’.\(^17\) In this vein, one cannot provide valid consideration by ‘[p]erforming an act that one is legally obligated to do . . . because there is no detriment’.\(^18\) Additionally, 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’.\(^19\) In other words, past consideration is no consideration at all.

### 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’.\(^20\) 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’.\(^21\) A modification is its own contract, and there must be a valid offer, acceptance, and consideration for it to be valid.\(^22\) In Illinois, ‘the terms of a written contract can be modified by a subsequent oral agreement even though . . . the contract precludes oral modifications’,\(^23\) but only if the parties agree that they actually intended to modify the contract.\(^24\)

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15. *Id.*


21. *Id.*

22. *Id.*

23. Tadro v. Kuzmak, 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. Quazi, 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.

24. See Stevens v. Newman, 2015 IL App (5th) 130338-U, ¶ 29 (distinguishing Tadro 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]’).
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’. 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. However, Illinois has adopted the traditional statute of frauds, which requires a formal, written contract for 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.

iv 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;

27 740 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).
28 5 ILCS 175/5-110 (West 2019).
29 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 rule 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’).
circumstances after the execution of the contract are generally irrelevant.\textsuperscript{32} 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’.\textsuperscript{33} 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.\textsuperscript{34}

\textit{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),\textsuperscript{35} \textit{quantum meruit},\textsuperscript{36} promissory estoppel,\textsuperscript{37} and equitable estoppel.\textsuperscript{38}

Unjust enrichment and \textit{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’.\textsuperscript{39} But in a \textit{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.\textsuperscript{40}

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'. 41 The key distinction is that 'promissory estoppel requires proof of an unambiguous promise, [while] equitable estoppel does not'. 42

All of these claims may be pleaded in the alternative to claims that the defendant breached an express or implied-in-fact contract.43 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.44 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) covering the same general subject matter as the performance at-issue.45 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’.46 When the parties dispute the meaning of a contractual provision, ‘the threshold issue is whether the contract is ambiguous’.47 If a contract is not ambiguous,48 the court will give its terms their

41 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).
42 Gold, 549 N.E.2d at 664.
43 735 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.’).
46 Urban Sites of Chicago, 979 N.E.2d at 489–90.
47 id.
48 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
‘plain, ordinary and popular meaning’, 49 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’. 50

On the other hand, if the contract’s language is ‘susceptible to more than one meaning,’ 51 or ‘is obscure in meaning through indefiniteness of expression,’ then the contract is ambiguous.52 But ‘[a]n ambiguity is not created simply because the parties disagree about the interpretation’.53 The question of ambiguity is a legal one for the court to decide. 54 If a court determines that the contract is ambiguous, then it may use traditional ‘rules of construction’ 55 and ‘consider extrinsic evidence to determine the parties’ intent’.56 In efforts to resolve ambiguities, Illinois courts have considered the conduct of the parties, 57 prior and contemporaneous transactions, 58 the relationship of the parties, the facts and circumstances that existed when the parties entered the contract, 59 established custom of the parties, and trade usage.60 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’.61

Where there is a conflict between two provisions, they ‘will be reconciled if possible so as to give effect to [both]’; 62 otherwise ‘the more specific provision relating to the same subject matter controls over the more general provision’.63 But courts cannot simply strike


50 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); see also Ritacca Laser Ctr. v. Brydges, 100 N.E.3d 569, 575 (Ill. App. Ct. 2018) (refusing to ‘add terms to a contract to change the plain meaning, as expressed by the parties’, and noting the strong presumption of Illinois courts against interpreting contracts as including provisions that easily could have been included in a contract but were not) (citations omitted).

51 Thompson, 948 N.E.2d at 47.


53 Id.


56 Thompson, 948 N.E.2d at 47.


60 Sterling-Midland Coal Co. v. Great Lakes Coal & Coke Co., 165 N.E. 793, 796 (1929).

61 Countryman, 686 N.E.2d at 64.


63 Countryman, 686 N.E.2d at 64.
the more inconvenient of two conflicting provisions. Additionally, ‘contract provisions and terms are to be interpreted as a whole and not in isolation,’ so ‘as to give effect to all of the contract’s provisions’ and not ‘nullify or render provisions meaningless’. This is because ‘it is presumed that all provisions were intended for a purpose’.

IV DISPUTE RESOLUTION

i Contractual provisions regarding forum selection

A forum selection clause is prima facie valid under Illinois law, 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’. 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 the parties bargained for the clause.’ 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’. If the contract was reached through ‘arm’s-length negotiation between experienced and sophisticated businesspeople’, courts will enforce the clause ‘absent some compelling and countervailing reason’ to the contrary.

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.

65 id.
67 id. (quoting Thompson, 948 N.E.2d at 47).
68 id. (quoting Shorr Paper, 555 N.E.2d at 737).
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.76 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’.77

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,78 as well as agreements that require alternative dispute resolution, like arbitration.79 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’.80 Whether the parties in fact agreed to arbitrate their dispute is determined by ordinary principles of contract law.81 Illinois courts recognise there is a strong policy (at both the state and federal level) favouring arbitration,82 and they generally enforce arbitration clauses.83 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.84

76 Solargenix Energy, LLC, 17 N.E.3d at 182.
77 IFC Credit Corp., 881 N.E.2d at 395.
78 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). In fact, a recent Illinois case reiterates that a party can, by contract, waive not just common-law defences but statutory rights as well, so long as the waiver is ‘voluntary, knowing, and intentional,’ and there is no indication that the legislature intended to prevent parties from waiving the right at issue. See Takiff Props. Grp. Ltd. #2 v. GTI Life, Inc., 124 N.E.3d 11, 15-18 (Ill. App. Ct. 2018).
79 Ramonas v. Kerelis, 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’).
80 710 ILCS 5/1-1 (West 2019).
83 Board of Managers of Courtyards at Woodlands Condo. Ass’n v. IKO Chicago, Inc., 697 N.E.2d 727, 732 (Ill. 1998).
84 Cook County Cir. Ct. R. 25.1 (Dec. 11, 2014) (‘Mandatory Arbitration will be held in those commercial cases assigned to the Commercial Calendar Section of the Law Division, including cases with self-represented or pro se litigants, with damages of less than $75,000’); see also Ill. Sup. Ct. R. 86 (authorizing each judicial circuit to adopt rules for mandatory arbitration); see also Jones v. State Farm Mut. Auto. Ins. Co., 107 N.E.3d 379, 385-86 (Ill. App. Ct. 2018) (upholding local Cook County rule imposing a seven-day deadline for rejecting an arbitration award despite thirty-day deadline imposed by Illinois Supreme Court Rule 93 because the Illinois Supreme Court approved the local rule).
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.\(^{85}\)

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’.\(^{86}\) Illinois courts look to factors such as: whether there has been a ‘receipt and enjoyment’ of contractual benefits by one party,\(^{87}\) 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.\(^{88}\)

Parties to a contract are held to an implied covenant of good faith and fair dealing.\(^{89}\) Under this duty, parties executing an agreement must use reasonable discretion and act with proper motive.\(^{90}\) Discretion cannot be employed arbitrarily, capriciously, or in a manner inconsistent with the reasonable expectations of the parties.\(^{91}\) 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.\(^{92}\)

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.\(^{93}\) Illinois courts strongly emphasise that the repudiating party must be ‘definite and unequivocal’ in manifesting non-performance of the agreement.\(^{94}\) Ambiguous statements do not suffice.\(^{95}\) 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.\(^{96}\)

VI  DEFENCES TO ENFORCEMENT

A party may defend against a breach of contract claim in Illinois on several grounds.

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\(^{90}\) Slay, 115 N.E.3d 941 at 950-51.

\(^{91}\) id. at 951.

\(^{92}\) McCleary, 29 N.E.3d at 1093.

\(^{93}\) See, e.g., 810 ILCS 5/2A-402 (West 2019) (anticipatory repudiation for the sale of goods).


\(^{95}\) In re Marriage of Olsen, 528 N.E.2d 684, 686 (Ill. 1988).

i  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.97 For an oral contract (not involving the sale of goods), the limitations period is five years.98 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).99 When multiple statutes of limitation arguably apply to a claim, Illinois courts will analyze the statutory language against the subject matter of the claim, and apply the statute that ‘more specifically relates to the [cause of] action’.100

A breach of contract claim begins accruing at the time of the breach, not when a party sustains damages.101 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.102

ii  Lack of consideration

As explained above, an enforceable contract requires consideration.103 In Illinois, sufficient consideration is ‘[a]ny act or promise which is of benefit to one party or disadvantage to the other’.104 Illinois courts generally will not inquire into the adequacy of consideration, only its existence.105 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’.106 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.107

iii  Enforcement is contrary to public policy

A contract contrary to public policy can be voided.108 Illinois courts, however, have a ‘long tradition’ of protecting the interests of parties who ‘freely contract’ with one another,109 and thus rarely void contracts on public policy grounds.110 The burden rests on the party alleging the breach to show that the agreement is ‘clearly contrary to what the constitution, the

97 735 ILCS 5/13-206 (West 2019).
98 735 ILCS 5/13-205 (West 2019).
99 810 ILCS 5/2-725 (West 2019).
101 id.; see also Hermitage Corp. 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.’).
103 See supra Part II(i).
106 id.
107 id. at 62–63.
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’. For example, in a recent Illinois case, the court held that a confidentiality provision in a contract was void as against public policy because it was designed to conceal the parties’ prior and continuing misrepresentations to third parties (including third-party banks) about ownership changes that might have resulted in a default under other agreements.

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’. Rather, a claim of duress implies that, if not for the wrongful act, the agreement ‘would have been avoided’.

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.

111Mohanty, 866 N.E.2d 85 at 92.
112id.
1141550 MP Rd., LLC v. Teamsters Local Union No. 700, 131 N.E.3d 99, 109 (Ill. 2019) (quoting Restatement (Second) of Contracts § 178 (1981)).
116Colony 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)).
119id. (quoting Carlile, 648 N.E.2d at 322).
122id.
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’. However, the parties’ contractual duties may be suspended when a condition, thing, or person necessary for the execution of the contract no longer exists. To invoke an impossibility defence, a party must have tried all practical alternatives and the cause of the impossibility cannot have been anticipated. The party also cannot have created the circumstances that gave rise to the impossibility. The contract must be objectively impossible to perform; subjective, ‘personal inability’ to perform does not absolve a party of its contractual obligations. 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. 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. 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. The party alleging frustration of purpose must also show that the unforeseen circumstance ‘totally or nearly totally destroyed [the value of counter-performance]’.

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123 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.
125 Leonard, 64 N.E.2d at 479.
126 id. at 480.
128 id.
130 id. ¶ 30 (citing Illinois-American Water, 774 N.E.2d at 390).
131 id. ¶¶ 30–31.
132 id. ¶ 30; see also Illinois-American Water, 77 N.E.2d at 390–91.
133 Ury, 2016 IL App (1st) 150277-U, ¶ 31.
vii Lack of capacity
To enter into a contract, parties must be competent. Parties are competent at the age of majority,134 which is 18 years in Illinois.135 However, a party experiencing ‘insane delusions or other mental illness’ is not competent when the party’s condition impairs its ability to understand the nature of the agreement.136 For agreements regarding necessities, the parties need not meet the capacity requirement.137

viii Lack of legal authority
A party cannot enter into a contract on behalf of another person or entity unless the party has proper legal authority to do so.138 If a party attempts to enter into a contract on behalf of another without proper legal authority, the resulting contract is void ab initio; the other party to the contract cannot be held responsible for its promises.139

ix 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.140 The breach must be ‘so material and important’ that it justifies ending the contract.141 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’.142

VII 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.

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137 Iverson, 483 N.E.2d at 897.
139 id.
140 Spanish Court Two Condo. Ass’n v. Carlson, 12 N.E.3d 1, 6 (Ill. 2014).
i 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’.143 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.144 ‘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’.145 The party who allegedly expressed the fact must have either known of its falsity or not believed in its truth,146 and the induced party must have justifiably relied on the misrepresentation.147 Illinois courts also recognize fraudulent concealment when a party does not speak about or disclose a fact while under the obligation to do so,148 due to a special or fiduciary relationship.149

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’.150 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 be151 rather than completely rescind the agreement.

ii 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’.152 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.153 The mistake must be of ‘such grave consequence that enforcement of the contract would be unconscionable’.154

146 Bank of Am. v. All About Drapes, Inc., 2017 IL App (1st) 162849-U, ¶ 35.
147 id. (quoting Doe v. Dilling, 888 N.E.2d 24, 35 (Ill. 2008)).
151 In re Marriage of Ardelean, 2015 IL App (2d) 140142-U ¶ 31 (quoting Restatement (Second) of Contracts §166 (1981)).
152 id. ¶ 27 (quoting Restatement (Second) of Contracts § 151 (1981)).
153 In re Marriage of McGuinn, 2018 IL App (2d) 161065-U, ¶ 26 (quoting Cameron v. Bogusz, 711 N.E.2d 1194, 1197 (Ill. App. Ct. 1999)).
parties also must have exercised reasonable care in forming the agreement. For contracts formed under mutual mistake of fact, the parties may seek equitable relief. Courts commonly employ the remedies of rescission or reformation 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’. A contract entered into by mutual mistake cannot be voidable, however, where the affected party bears the risk of the mistake.

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. A unilateral mistake may result in the rescission of a contract only if the party who made the mistake exercised reasonable care. In addition, Illinois courts allow rescission only when it can be executed ‘without doing injustice to the other party’. 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’.

### 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. The inducing party must have done more than ‘merely provid[e] information in a passive way’. Inducement ‘requires some active persuasion, encouragement, or inciting’ of the third party by the inducing party. 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.
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.\(^\text{168}\)

### 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 proving that the breach caused damages,\(^\text{169}\) and must prove damages to a reasonable degree of certainty.\(^\text{170}\) A prevailing plaintiff is entitled to post-judgment interest,\(^\text{171}\) and under certain circumstances pre-judgment interest also may be available.\(^\text{172}\) If a legal, monetary remedy will be inadequate, Illinois courts can grant equitable remedies – such as specific performance.\(^\text{173}\) This section addresses the measurement of damages,\(^\text{174}\) 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’.\(^\text{175}\) Lost profits may be awarded as compensation if (1) ‘the court is satisfied

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\(^{168}\) Dowd & Dowd, Ltd. v. Gleason, 693 N.E.2d 358, 370 (Ill. 1998).

\(^{169}\) 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’).

\(^{170}\) Kirkpatrick v. Strusberg, 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’).

\(^{171}\) 735 ILCS 5/2-1303 (West 2019) (setting the standard post-judgment interest rate at 9 per cent).


\(^{173}\) Schwinder 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’).

\(^{174}\) For damages under the Uniform Commercial Code, see 810 ILCS 5/2-701 et seq. (West 2019) (titled ‘Remedies’).

that the wrongful acts of [the] defendant caused the loss'; 176 (2) 'the profits were reasonably within the contemplation of the defaulting party at the time [the] contract was entered into'; 177 and (3) the lost profits can be 'determined with reasonable certainty'. 178

Consequential damages also may be available. These damages comprise 'economic harm beyond the contract's immediate scope'; 179 but often they are too speculative to recover. 180 Notably, 'lost profits can be categorised as either direct – compensatory – or indirect – consequential – depending on the situation'. 181 Thus, if a contract disclaims liability for consequential damages, lost profits may not be recovered unless they are part of 'the benefit of the bargain that the party lost from the contract itself'. 182 For example, in *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. 183 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. 184

If expectation damages are difficult to determine, the plaintiff may obtain 'damages based on his reliance interest'. 185 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'. 186 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'. 187

Punitive damages will 'not be awarded for a breach of contract, even if the breach was willful.' 188 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'. 189

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180  *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').
181  *Westlake Fin. Grp., Inc.*, 25 N.E.3d at 1175 (internal quotation marks omitted).
182  id.
183  id. at 1168–69.
184  id. at 1174–79; see also *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).
185  *Merry Gentleman, LLC v. George & Leona Prod., Inc.*, 799 F.3d 827, 829 (7th Cir. 2015).
189  *Morrow v. L.A. Goldschmidt Assocs., Inc.*, 492 N.E.2d 181, 184 (Ill. 1986); see also *Franz v. Calaco Dev. 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').
ii Contractual provisions concerning remedies

Illinois courts generally enforce contractual limits on remedies.\(^{190}\) 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’.\(^ {191}\) Courts also uphold and enforce indemnity provisions,\(^{192}\) but they will be ‘strictly construed’.\(^{193}\) Attorneys’ fees, for example, ‘are only recoverable pursuant to an indemnity contract if such terms are specifically provided for within the contract’.\(^ {194}\) Exculpatory clauses are disfavoured.\(^ {195}\) 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’\(^{196}\) – exculpatory agreements will also be ‘strictly construed against a benefitting party’.\(^ {197}\)

Parties are free to include liquidated damages provisions in their agreements, which Illinois courts will evaluate on a case-by-case basis.\(^ {198}\) 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’.\(^ {199}\)

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’.\(^ {200}\) Although specific performance ‘is not granted as an absolute right’,\(^ {201}\) 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 rescission must be able to ‘restore the other party to the status quo ante existing at the time the contract was made’. The remedy of rescission ‘presumes that a valid contract exists; it does not negate that a contract ever existed’.

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 for reformation’. A plaintiff must prove the fourth and fifth elements by ‘clear and convincing evidence’ before a court will consider reforming a contract.

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. 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

203 Schwinder, 809 N.E.2d at 195.
204 Chapman v. Hoek, 475 N.E.2d 593, 598 (Ill. App. Ct. 1985) (noting that the fraud may consist of a misrepresentation or concealment of a material fact).
205 Clara Wonjung Lee, DDS, Ltd. v. Robles, 2014 IL 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’)).
208 United City of Yorkville, 875 N.E.2d at 1195.
210 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.
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.
Chapter 14

IRELAND

Julie Murphy-O’Connor and Karen Reynolds

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 233,000 civil law cases were commenced in the Irish courts during 2019, while some 176,000 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. The recent passing of the Courts (Establishment and Constitution) (Amendment) Act 2019 also had the effect of increasing the number of judges assigned to the Court of Appeal from 10 to 16, resulting in enhanced capacity to meet demand.

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.

1 Julie Murphy-O’Connor 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.
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 example, the Land and Conveyancing Law Reform Act 2009 requires commercial contracts transferring an interest or right in property to 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 which, as a result of the disruptions caused by the covid-19 pandemic, have seen a significant increase in use.

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:

   a there is no agreement between the parties as the offer has not been accepted; and

   b there is an agreement whereby the terms of the last form apply.

The Supreme Court5 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.

**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 person is unable to enforce any rights under a contract to which such a person is not a party;
- a person who is not a party to a contract will not have any contractual liabilities imposed on them; and
- 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 where:

- the intention of the parties was to give the third party a right to enforce;
- the contract expressly states that the third party has a right of enforcement; and
- the contract permits a third party to rely on exclusions or limitations on liability.

However, 11 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.  

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. 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

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6 **Globe Motors, Inc v TRW Lucas Varity Electric Steering Limited and Another** [2016] EWCA 396.

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.

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. 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.

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.

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.

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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.


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.

In a recent Court of Appeal decision, the court held that in implying terms into a commercial contract, the terms must:

a  be necessary to give business efficacy;

b  be so obvious that it is implied; and

c  give effect to the parties’ intentions.12

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.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 €75,000.14

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 Regulation15 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

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.
intervention. 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.

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 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

There was a slight increase in the number of civil claims commenced before the Irish courts in 2019, as compared to 201818 (some 226,000 in 2018 as opposed to almost 233,000 in 2019). In practice a high proportion of complex commercial disputes are mediated at some stage between the issuing of proceedings and the trial of the action. Despite commercial mediation being in its relative infancy in Ireland, statistics available from the Irish Commercial Court indicate that almost 65 per cent of cases referred to mediation last year were successfully settled.

### 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:

a. the existence of a legally enforceable contract between the claimant and the defendant;

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16 The Insurance and Reinsurance Law Review 2019 – 'Ireland'.
17 Section 18 of the 2017 Act.
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 as 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 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:

- where damages are an adequate remedy;
- contracts that require ongoing supervision; and
- 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 fundamental breach – a breach so serious that it terminates the rights and obligations of the innocent party;
- a repudiatory breach – a breach so serious it terminates the contract immediately;\(^\text{19}\) and
- a statutory breach – a breach provided for under statute.

\(^{19}\)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.
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.

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 impracticability. 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 are only relevant where actual undue influence has arisen. In a 2016 Court of Appeal decision, the court found that a 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.

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. In 2017, the argument was 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. 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

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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.

iii Public policy and illegality

Contracts that are contrary to public policy are unenforceable. The Supreme Court\(^\text{24}\) 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.\(^\text{25}\) 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.\(^\text{26}\) 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.

\(^{24}\) *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).

\(^{26}\) *Neville Sons Ltd v. Guardian Builders* [1994] IESC 4.
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.

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:

- 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
- 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 decision27 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 Court28 recently reaffirmed that the doctrine of promissory estoppel has no application to pre-contract negotiations in advance of the creation of any legal rights.

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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).
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,29 in 2018, 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.

VIII REMEDIES
i  Damages
The most common remedy awarded in breach of contract litigation is damages (monetary compensation). A contractual claim based on a 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 Court30 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 Court31 has held that the clause in question had not been successfully incorporated into the contract and, therefore, could not be relied upon.

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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.32

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 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.

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. When deciding on matter involving contracts, the courts seek to uphold the written terms of valid commercial contracts so that parties understand the entirety of their obligations and the need for certainty.

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. Certainty is a necessity in commercial transactions. Ireland, as the largest English-speaking, common law jurisdiction remaining in the EU, will offer an attractive alternative jurisdiction in which to litigate international commercial disputes post-Brexit. For example, the International Swaps and Derivatives Association, Inc (more commonly referred to as ‘ISDA’) has already added an Irish (and a French) law version to its 2002 ISDA Master Agreement. Prior to that, ISDA’s documentation offered participants in cross-border derivatives markets a choice of only two governing laws, English law or New

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Ireland

York law. The availability of the Irish law ISDA Master Agreement will enable parties to continue to transact derivatives under the laws of an EU Member State that is a common law jurisdiction and to ensure they will continue to benefit from the automatic recognition and enforcement of judgments between EU Member States.

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 transition to remote or ‘virtual’ hearings by the Commercial Court and Appellate Courts throughout the covid-19 pandemic has been a smooth one, demonstrating that virtual hearings can be utilised successfully in many instances.

Trading in, and profiting from, litigation currently falls foul of Ireland’s maintenance and champerty laws33 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.34 However, the Supreme Court has said legislation needs to be urgently enacted to address mounting difficulties with securing access to justice in the civil 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’.35 More recently, Moorview Development Limited & Ors v. First Active Plc & ors,36 a decision of the Supreme Court, delivered in late July of 2018, 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.

33 Maintenance and Embracery Act 1634.
34 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 Supreme Court ruled that the assignment of a claim to an unconnected third party with the possibility of profit is trading in claims and such an assignment is unenforceable in Irish law. (SPV Osus Limited v. HSBC Institutional Trust Services (Ireland) Limited & Ors [2018] IESC 44.)
35 SPV Osus Limited v. HSBC Institutional Trust Services (Ireland) Limited & Ors [2018] IESC 44.
I OVERVIEW

The law relating to commercial contracts in the Isle of Man does not vastly differ from 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 *Excalibur*, the Staff of Government Division held that an anti-suit injunction was an equitable relief and, therefore, at the discretion of the court but that discretion was not unfettered. The following principles, contained in the English jurisprudence, applied equally to the Isle of Man:

1. the general practice was to give exclusive jurisdiction clauses, as between the parties to them, a generous interpretation;
2. the exercise of the broad discretion conferred on the court by Section 42 of the High Court Act 1991 to grant an injunction in all cases in which it appeared to the court to be just and convenient to do so was controlled by principles to be derived from a substantial line of authority;
3. if contracting parties agreed to give a particular court exclusive jurisdiction to rule on claims between those parties, and a claim falling within the scope of the agreement was made in proceedings in a forum other than that which the parties had agreed, the court would ordinarily exercise its discretion by restraining the prosecution of proceedings in the non-contractual forum abroad to secure compliance with the contractual bargain, unless the party suing in the non-contractual forum (the burden being on him) could show 'strong reason' for suing in that forum. Whether a party could show 'strong reason' sufficient to displace the other party's prima facie entitlement to enforce the contractual bargain, would depend on all the facts and circumstances of the particular case;

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a party could lose his claim to equitable relief by dilatoriness (or other unconscionable conduct); and

interests of justice were best served by the submission of the whole dispute to a single tribunal that was best fitted to make a reliable, comprehensive judgment on all the matters in issue. Further, damages would not usually be an adequate remedy, since damages would not be easily calculable and could only be calculated by comparing the advantages and disadvantages of the respective fora. That was likely to involve an even graver breach of comity than the granting of an anti-suit injunction.

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 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:

\[
\text{No action shall be brought whereby to charge the defendant upon any special promise to answer for the debt, default or miscarriage of another person; or upon any contract for the sale or other disposition of land or any interest in land; unless the agreement upon which such action is brought, or some memorandum or note thereof, is in writing, and signed by the party to be charged or by some other person thereunto by him lawfully authorised.}
\]

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, the court approved the claimant’s submissions that the law of

6 ORD 2015/63 judgment dated 20 December 2017.
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*, 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*, 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*, 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.

## 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:

a the forum with the most real and substantial connection to the case in point;

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7 [1943] AC 32.
8 SUM 2012/6 judgment dated 4 December 2013.
9 DEF 2009/1432 judgment dated 21 April 2011.
10 [1986] 3 All ER 843.
Isle of Man

b which forum is the most convenient;
c which forum would be better in terms of cost;
d the availability of witnesses;
e the law governing the relevant transaction;
f the place where the parties carry on business; and
g 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.11 This point has been considered by the Manx court in a number of cases including *Bryan v. Waterman*12:

"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] 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*,13 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. More recently, in *Old Mutual v. Lynch & otr*14 an application to discharge an anti-suit injunction granted in January 2018 was dismissed, on the basis that the contract between the parties contained a Manx exclusive jurisdiction clause and that there remained a high degree of probability that a the dispute in the Spanish courts was caught by the clause.

The issue was most recently considered, in *Old Mutual & Otr v Leonteq Securities & otrs*15 where the court was considering applications for both service of the claim form out of the jurisdiction pursuant to Rule 2.41 of the Rules of the High Court of Justice 2009 (the

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11 *AB v. CD CHP 2016/7* judgment dated 30 June 2016.
12 ORD 2011/82 judgment dated 14 March 2012.
equivalent to Rule 6.20 of the Civil Procedure Rules in England and Wales) and whether the Island is the proper place to bring the claim, in accordance with Rule 2.42 (equivalent to Rule 6.21).

On the Rule 2.41 ‘jurisdictional gateway’ issue, the court stated that, following recent UK Supreme Court decisions, the law in this area may be said to be reasonably settled. The Deemster went on to set out several recent Supreme Court and Privy Council cases, further evidencing the court’s willingness to be guided by English law principles in this area. On the Rule 2.42(3) ‘proper forum’ issue the court, yet again, affirmed that the principles set out in *Spiliada* are to be followed by the Manx courts.

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:

\[a. \text{in light of:}
\]

\[i. \text{the natural and ordinary meaning of those words;}
\]

\[ii. \text{the overall purpose of the document;}
\]

\[iii. \text{any other provisions in the document;}
\]

\[iv. \text{the facts known or assumed by the parties at the time of the contract;}
\]

\[v. \text{common sense; and,}
\]

\[b. \text{ignoring subjective evidence of any party’s intentions.}
\]

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16 SUM 2015/49 judgment dated 26 October 2017.
17 SUM 2015/4 judgment dated 7 March 2016.
18 CHP 2011/98 judgment dated 6 August 2014.
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.20

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:

a the seller has title to sell;
b the goods correspond with the description;
c they are of satisfactory quality;
d they are reasonably fit for purpose (the buyer must expressly or impliedly make the seller aware of the purpose); and
e a sample provided will correspond with the bulk of the goods.

For supply of services in course of business, the implied terms are:

a the supplier will use reasonable care and skill;
b the service will be carried out within a reasonable time; and
c if the contract is silent as to consideration, the contracting party will pay a reasonable charge.

The court also considered its powers to imply clauses into contracts in the case of Hodgson v. Tuck.21 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, Carters & otr v. FCS & ors,22 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.

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 Willers v. Nugent23 the Staff of Government Division stated:

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 how it was to operate, when there was no express formula by which the relevant calculation was to

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22 ORD 2015/56 judgment dated 15 August 2018.
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 p.473: ‘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,24 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 Yiu [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.

24 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*, 25 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*, 26 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:

\[ a \]
if all of the information was held by the Bank of Ireland in Dublin in any event but in unwieldy form;
\[ b \]
if some of the information was held by Bank of Ireland in Dublin in any event, but in unwieldy form; and
\[ c \]
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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25 ORD 2010/77 judgment dated 1 March 2012.
26 CP 2006/20 judgment dated 27 October 2006.
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*, 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*.

The court considered misrepresentation in the case of *McSween & otr v. Royal London*, 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* – 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 & ors*, 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*, 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.

**VIII REMEDIES**

i **Compensatory damages**

The principle remedy in the Isle of Man for a breach of contact is damages – usually compensatory damages, which are awarded to compensate a party for loss.

29 SUM 2016/129 judgment dated 9 August 2018.
32 ORD 2013/12 judgment dated 23 January 2014.
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*, 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*, 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.

**IX  CONCLUSIONS**

The courts in the Isle of Man largely follow the principles of England and Wales concerning 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.

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33 ORD 2009/60 judgment dated 11 January 2014.
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 coming 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.
Chapter 16

LIECHTENSTEIN

Thomas Nigg and Johannes Sander

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.\

With regard to contract law in a wider context and commercial contracts in particular, generally Austrian law applies. Nevertheless, it is essential to look into 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

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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, determinedly 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. These
formal requirements are provided for gift contracts, property purchase contracts and, 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. Regarding 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

\[^3\] 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.
\[^11\] For instance, OGH U 01.10.2004, 03 CG.2001.310, LES 2007, 150.
contradictions and remain as effective as possible (favor negoti). 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 such rule stating that criminal cases must be granted priority. Once the relevant documents are filed, a hearing is scheduled within weeks. The median time from filing a lawsuit to receiving 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.

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:

* a first instance: District Court;
* b second instance: Superior Court; and
* c 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:

* a action for a declaratory judgment;
* b action for performance (e.g., damages); and
* c 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.\(^{23}\) This means that it is not the aggrieved party who must prove that the tortfeasor is at default, 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.\(^{24}\)

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 No. 4 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 affected party 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). A warranty claim must be asserted within three years if it relates to immovable assets, and within two years if it relates to movable assets. Warranty law does not apply if assets are transferred outright, in the case of obvious defects or in case of contractual exclusion. In principle, the warranty right can be excluded contractually unless one of the contracting parties is a consumer. Therefore, in the case of a consumer contract, warranty rights are obligatory. In addition, contractually agreed warranty clauses can be made subject to a lawsuit 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 oneself 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 consideration. One could also argue that the contract violates public policy or is unenforceable because of fraudulent inducement, misstatement or misrepresentation.

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\(^{23}\) 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 No. 4 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.25 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.26

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.27 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).
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(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, or that is fulfilled too late or not 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 breach of contract, for example, 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.

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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), ABGB13334 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. Even if formal requirements are stipulated (by law or by contract) 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. Also the case law of the Higher Courts with regard to the formation of contracts, interpretation, etc., has remained quite constant and thus ensures certainty 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:

- capacity of the parties;
- absence of vices of consent;

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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.
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 usage 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

Commercial legislation in Mexico does not provide for a minimum amount in order to be able to initiate a commercial dispute, although the amount of the controversy does determine the type of proceeding to pursue and whether its judgment is subject to appeal or not. As

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3 id.
a general rule, as from 26 January 2020, all ordinary commercial disputes will be processed through the commercial oral proceeding, regardless of the amount; that the Mexican legal system has significantly evolved into an oral justice system in this type of proceedings.

However, executive proceedings will generally be processed in a written (traditional) manner, except for claims not exceeding the amount of 4 million Mexican pesos, as of 26 January 2020, which will be orally processed.

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 arbitral 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 an 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 extrajudicially, through a notary public or before two witnesses).

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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.
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, 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:

- the existence of a contractual obligation;
- the breach of such obligation; and
- 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.

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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.
8 ibid, p. 365.
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 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 limitations period is established by

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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.
law, the general period of 10 years will apply. Mercantile law does not include a statute of limitations period for claims related to missing essential or validity elements of a contract or contractual breaches or claims; instead, those statute of limitations 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.\(^\text{15}\)

i Pactum commisorium
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.
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.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.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.

16 ibid, p. 426.
17 ibid, p. 427.
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’ 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 adopting a mostly 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

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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
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’.9

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.11 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.12 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 maintain a way for a party to escape detriment do not provide appropriate consideration.13

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.14 The party exercising the option must act in the ‘manner specified in the option’.15 Options, such as a right of first offer and right of first refusal, are enforceable under New York law.16

ii 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’.17 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.18 If an agreement falls under the statute of frauds, the writing

10 Park Ave. Realty, LLC v. Park Ave. Building & Roofing Supplies, LLC, 156 A.D.3d 744, 748 (2d Dep’t 2017); see also Minelli Constr. Co. v. Volmar Constr., Inc., 82 A.D.3d 720, 722 (2d Dep’t 2011) (holding general contractor accepted subcontractor’s offer through ‘acquiescent conduct’).
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’).
14 IPE Asset Mgmt., LLC v. Fairview Block & Supply Corp., 123 A.D.3d 883, 885 (2d Dep’t 2014).
16 See, e.g., Singh v. Turtle Bay Towers Corp., 74 A.D.3d 568, 568 (1st Dep’t 2010) (finding cooperative corporation had enforceable right of first refusal).
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}

### III CONTRACT 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’.\textsuperscript{27} A contract will be considered unambiguous if the language has ‘no reasonable basis for a difference of opinion’.\textsuperscript{28} New York's Court of Appeals has long held that:


\textsuperscript{20} Naldi v. Grunberg, 80 A.D.3d 1, 9–13 (1st Dep’t 2010).

\textsuperscript{21} Kasowitz, Benson, Torres & Friedman, LLP v. Duane Read, 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. Anu/Nassau Realty LLC, 105 A.D.3d 33, 35 (1st Dep’t 2013).

\textsuperscript{26} id. at 39.

\textsuperscript{27} Bank of N.Y. Mellon v. WMC Morg., LLC, 136 A.D.3d 1, 6 (1st Dep’t 2015).

\textsuperscript{28} Selective Ins. Co. of Am. v. Cty. of Rensselaer, 26 N.Y.3d 649, 655 (2016).
[W]hen 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’.36 Parties should consider these kinds of interpretation rules carefully when drafting their agreements.

33 Ashwood Capital, Inc. v. OTG Mgmt., Inc., 99 A.D.3d 1,7 (1st Dep’t 2012).
36 id. at 7.
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 have allowed claims to proceed notwithstanding such language. 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.

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.

id.
Concessionaria DHM, S.A. v. Intl Fin. Corp., 307 F.Supp.2d 553, 565 (S.D.N.Y. 2004); see also Town Sports Intern., LLC v. Ajilon Sol., 976 N.Y.S.2d 53, 55 (1st Dep’t 2013) (dismissing the implied covenant of good faith and fair dealing claim because it was ‘duplicitous of the breach of contract claim’).
See Transit Funding Asocs., 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.’).
Anticipatory breach or repudiation of a contract is a breach ‘that occurs before performance by the breaching party is due’. 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. The repudiator’s expression of intent not to perform must be ‘positive and unequivocal’. 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’.

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. Unfavourable terms or terms that lead to inequitable performances are insufficient bases for courts to rewrite the contract. 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. 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. Courts also will enforce clauses in preliminary agreements such as memoranda of understanding regarding confidentiality and exclusive negotiation periods.
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.

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 disproportionated.63

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 enterprise66 
or contractual choice-of-law provisions applying foreign laws that are ‘truly obnoxious’.67 
‘Further, as a general rule, illegal contracts are unenforceable.’68 However, New York courts

56 N.Y. C.P.L.R. § 213.
58 See N.Y. C.P.L.R. § 201; Digesare Mech., Inc. v. U.W. Marx, INC., 176 A.D.3d 1449, 1450 (3d 
Dep't 2019).
60 See Batales v. Friedman, 144 A.D.3d 849, 850-51 (2d Dep't 2016).
61 Deutsche Bank Nat'l Tr. Co. Tr. for Harborview Mortg. Loan Tr. v. Flagstar Capital Markets Corp., 32 N.Y.3d 
139, 151 (2018)
63 Moezinia v. Ashkenazi, 136 A.D.3d 988, 989 (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. Horng & Welikson, P.C., 72 A.D.3d 752, 753 (2d Dep't 2010).
N.Y.2d 66, 79 (1993)).
68 See Lanza v. Carbone, 130 A.D.3d 689, 691 (2d Dep't 2015).
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’.

70 See, e.g., DRMAK Realty LLC v. Progressive Credit Union, 133 A.D.3d 401, 404 (1st Dep’t 2015).
71 See Farkash v. Five Star Travel Inc., No. 18 CIV . 03699, 2019 WL 4600956, at *3 n.2 (S.D.N.Y. Sept. 23, 2019) (quoting VKK Corp. v. Nat’l Football League, 244 F.3d 114, 122 (2d Cir. 2001)).
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.

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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

viii Force majeure

A force majeure provision is generally understood as a contractually defined event, beyond the control of both parties, the occurrence of which prevents a parties’ performance and excuses their obligation under the contract. These events may include natural disasters (floods, earthquakes, hurricanes), riots, strikes or wars. Force majeure clauses are narrowly construed, and ‘only if the force majeure clause specifically includes the event that actually prevents a party's performance will that party be excused.’83 Generally, economic hardship alone will not be sufficient to invoke a force majeure clause.84 Furthermore, if a contract does not contain a force majeure clause, a court is unlikely to read one in.85

Governmental action may trigger a force majeure clause where the clause includes ‘governmental prohibitions’ or ‘government interference,’ or other language to that effect. For example, one court has held that a force majeure clause containing the language ‘governmental interference’ applied to a contract for shipment of products to a country where the US had banned exports.86 There is limited precedent regarding whether a force majeure clause can be

80 Jack Kelly Partners LLC v. Zegelstein, 140 A.D.3d 79, 85 (1st Dep’t 2016); see also A + E Television Networks, LLC v. Wish Factory Inc., No. 15 CIV. 1189, 2016 WL 8136110, at *12–13 (S.D.N.Y. Mar. 11, 2016) (frustration of purpose defence failed despite allegation that party’s comments deprived defendant of business because financial hardship is not a defence to contract enforcement under New York law); Tycoons Worldwide Grp. (Thailand) Pub. Co. v. JBL Supply Inc., 721 F. Supp. 2d 194, 203 (S.D.N.Y. 2010) (possibility of delays was foreseeable to both parties, and therefore did not constitute the type of event that would excuse performance under the contract).
83 See Reade v. Stonebrook Realty, LLC, 63 A.D.3d 433, 434 (1st Dep’t 2009).
84 See Macalloy Corp. v. Metallurg, Inc., 284 A.D.2d 227, 227 (1st Dep’t 2001) (force majeure provision inapplicable to a voluntarily plant shutdown due to financial considerations brought about by environmental regulations, as ‘financial hardship is not grounds for avoiding performance under a contract’).
invoked in connection with a public health crisis or other epidemic. While it is unlikely for a force majeure clause to reference a flu virus as a triggering event, the covid-19 outbreak could perhaps be covered by terms such as ‘epidemic’ or ‘pandemic’.87

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.88

A party invoking fraud as a defence in the execution of a contract must show ‘excusable ignorance’.89 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.90 However, if the signing of the contract was induced by fraud, it is unenforceable by the party that perpetrated the fraud.91 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.92

When determining whether a party reasonably relied on a representation, New York courts may hold sophisticated parties and business entities to a higher standard.93 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.94 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.95 General merger clauses (which forswear 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.96

Further, if the disputed information was not ‘peculiarly’ known by the party allegedly

87 See, e.g., W.D. on behalf of A. v. Cty. of Rockland, 101 N.Y.S.3d 820, 824 (N.Y. Sup. Ct. 2019) (defining ‘epidemic’ as ‘an outbreak of disease that spreads quickly and affects many individuals at the same time’ or ‘affecting or tending to affect a disproportionately large number of individuals within a population, community, or region at the same time’).
88 Basis PAC-Rim Opportunity Fund (Master) v. TCW Asset Mgmt. Co., 149 A.D.3d 146, 149 (1st Dep’t 2017).
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. In addition, ‘where a party is merely seeking to enforce its bargain, a [fraud] claim will not lie’. 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.

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.’ 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’. A non-party closely related to the contracting parties could also be bound by a forum selection clause.

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 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’.

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. 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. 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

104 N.Y. Gen Oblig. Law § 5-1401.
105 id. § 5-1402.
courts. 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. The intent of these laws is to ‘promote and preserve New York’s status as a commercial center and to maintain predictability for the parties’.

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. 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. 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.

**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’. 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. New York County’s (Manhattan) Commercial Division has implemented its Alternative Dispute Resolution Program, whereby parties are required to engage in a mediation session with a court-appointed mediator. In 2019, New York’s Chief Judge announced a ‘Presumptive ADR Program’, a state-wide initiative in which the majority of civil cases will be referred to ADR processes to facilitate early and efficient resolution; particulars are being developed and implemented by local judicial districts.

Under New York law, a party seeking to compel an unwilling party to arbitrate must show a ‘clear and unequivocal’ agreement to arbitrate. 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 a party can show the fraud ‘was part of a grand scheme that permeated the entire contract’. Notably, under New York statutory law, a party may seek a court order preventing arbitration if the asserted claim is time...
barred.\textsuperscript{116} 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{117}

\textbf{VIII REMEDIES}

To prevail on a breach of contract claim a plaintiff generally must show damage caused by the breach.\textsuperscript{118} 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{119} 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.

\textit{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{120} 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{121}

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{122} One common example is lost profits.\textsuperscript{123} 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{124} New York courts have classified lost profits as direct damages in instances where they are 'the direct and immediate fruits of the contract'.\textsuperscript{125}

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 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’.\textsuperscript{126}

\textsuperscript{116} N.Y. C.P.L.R. § 7502.
\textsuperscript{118} \textit{Belle Lighting LLC v. Artisan Constr. Partners LLC}, 178 A.D.3d 605, 606 (1st Dep’t 2019).
\textsuperscript{119} Post-judgment interest is awarded in breach of contract actions at a rate of 9 per cent. C.P.L.R. § 5001–5004.
\textsuperscript{120} \textit{E.J. Brooks Co. v. Cambridge Sec. Seals}, 31 N.Y.3d 441, 448 (2018).
\textsuperscript{121} id.
\textsuperscript{125} \textit{Biotronik A.G. v. Conor Medsystems Ireland, Ltd.}, 22 N.Y.3d 799, 806 (2014).
\textsuperscript{126} \textit{World of Boxing, LLC v. King}, 634 F. App’x 1, 3 (2d Cir. 2015).
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’.\(^{127}\) 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’.\(^{128}\) 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.\(^{129}\) 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.\(^{130}\) A plaintiff must also show that public rights are involved.\(^{131}\) Additionally, New York courts do not allow punitive damages to be awarded in arbitration.\(^{132}\)

### 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’.\(^{133}\) However, a party may not seek indemnification for its own acts of gross negligence or willful misconduct under New York law.\(^{134}\)

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.\(^{135}\) 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’.\(^{136}\)

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\(^{127}\) Van Duzer Realty Corp. v. Globe Alumni Student Assistance Ass’n, Inc., 24 N.Y.3d 528, 536 (2014)

\(^{128}\) W. John St., LLC v. Westbury Jeep Chrysler Dodge, Inc., 149 A.D.3d 796, 797 (2d Dep’t 2017).

\(^{129}\) City of Buffalo City Sch. Dist. v. LPCiminelli, Inc., 159 A.D.3d 1468, 1471 (4th Dep’t 2018).

\(^{130}\) JPMorgan Chase Bank v. Corrado, 162 A.D.3d 994, 996 (2d Dep’t 2018).

\(^{131}\) Cadillac Res., Inc. v. DHL Exp. (USA), Inc., 84 A.D.3d 697, 699 (1st Dep’t 2011).

\(^{132}\) Help Me See, Inc. v. Wonderwork, Inc. for Poor, Inc., 157 A.D.3d 455, 455 (1st Dep’t 2018).

\(^{133}\) Gotham Partners, L.P. v. High River Ltd. P’ship, 76 A.D.3d 203, 204 (1st Dep’t 2010).


\(^{136}\) id.
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 show that it 'substantially performed its contractual obligations and was ready, willing and able to perform its remaining obligations'. The party must show 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  Rescission and reformation

If a contract is induced by fraud, then rescision is an appropriate remedy. Rescission 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

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137 Chester Green Estates, LLC v. Arlington Chester, LLC, 161 A.D.3d 1036, 1038 (2d Dep't 2018).
138 id.
140 Bisnews AFE (Thailand) Ltd. v. Aspen Research Grp. Ltd., 437 F. App’x 57 (2d Cir. 2011).
143 id.
144 Jack Kelly Partners LLC v. Zegelstein, 140 A.D.3d 79, 80 (1st Dep’t 2016).
147 id.
of damages, such as punitive damages and consequential damages.\textsuperscript{150} 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.\textsuperscript{151}

Limited-liability clauses may be unenforceable if they allow for intentional wrongdoing, such as fraud.\textsuperscript{152} 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{153}

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{150} See \textit{DynCorp v. GTE Corp.}, 215 F. Supp. 2d 308, 318 (S.D.N.Y. 2002).

\textsuperscript{151} \textit{Electron Trading}, 157 A.D.3d at 580.

\textsuperscript{152} id. at 580–81.

\textsuperscript{153} id. at 581.
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:

- an objective act of commerce; and
- 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:

- agency contracts: Decree-Law 178/86 of 3 July;
- joint ventures: Decree-Law 231/81 of 28 July;
- real estate mediation contracts: Law No. 15/2013;
- lease agreements: Decree-Law 149/95 of 24 June;
- securitisation: Decree-Law 453/99; and
- factoring: Decree-Law 171/95).

This legislative activity has been intensified by European acts, in particular:

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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:

- the literal element (the wording of the contract);
- the historical element (namely, pre-contractual negotiations);
- the contextual element (the contract as a whole);
- the purposive element (the purpose and nature of the contract); and
- 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:

- non-compliance;
- delayed performance; and
- 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:

- that the breach of contract was intentional;
- that the debtor was at fault;
- that there was actual damage or loss; and
- that there is a causal link between the (illicit and intentional) act and the loss or damage suffered by the creditor.

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.
Chapter 20

SINGAPORE

Tan Xeauwei and Melissa Mak

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 | a valid offer and acceptance;

b | consideration;

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Contracts may be made in writing, orally, or by conduct.

**i 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.

**ii 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

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3 *Gay Choon Ing v. Lob Sai Ti Terence Peter* [2009] 2 SLR(R) 332 (SGCA) at [48].
5 *Gay Choon Ing v. Lob Sai Ti Terence Peter* [2009] 2 SLR(R) 332 (SGCA) at [47], citing E Peel, Trettel on the Law of Contract (Sweet & Maxwell, 13th edn 2011) at p17.
6 *Stuttgart Auto Pte Ltd v. Ng Shuow Yong* [2005] 1 SLR(R) 92 (SGHC).
7 Section 11(1) of the Electronic Transactions Act (Cap 88).
9 *Gay Choon Ing v. Lob Sai Ti Terence Peter* [2009] 2 SLR(R) 332 (SGCA) at [83].
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.

### 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.

### 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.

### 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:

- **a** the contract expressly provides that he may do so; or
- **b** 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.

The third party must be expressly identified by name, class or description.

### 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 brought in unjust enrichment where:

- **a** the defendant has been enriched or benefited;
- **b** the enrichment was at the expense of the claimant;

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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).
c one of the unjust factors is established; and
d there is no defence available.\textsuperscript{16}

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.

\textbf{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:

\begin{enumerate}[a]
  \item a clear and unequivocal promise by the promisor as to his or her future conduct, whether by words or conduct;
  \item reliance on the promise by the promisee; and
  \item detriment suffered by the promisee as a result of the reliance.\textsuperscript{17}
\end{enumerate}

This doctrine cannot, however, be used as an independent cause of action.

\textbf{III CONTRACT INTERPRETATION}

The principles of contractual interpretation in Singapore are well-established. These principles were summarised by the Court of Appeal in \textit{PT Bayan Resources TBK and another v. BCBC Singapore Pte Ltd}\textsuperscript{18} as follows:

\begin{enumerate}[a]
  \item The starting point is to look at the text of the contract.
  \item The court may have regard to the relevant context if it is clear, obvious and known to both parties.
\end{enumerate}

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.

\textbf{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.\textsuperscript{19}

\begin{footnotes}
\item[16] Wee Chiau Sek Anna v. Ng Li-Ann Genevieve (sole executrix of the estate of Ng Hock Seng, deceased) [2013] 3 SLR 801 (SGCA) at [98].
\item[17] Cupid Jewels Pte Ltd v. Orchard Central Pte Ltd [2014] 2 SLR 156 (SGCA) at [35].
\item[18] PT Bayan Resources TBK and another v. BCBC Singapore Pte Ltd [2019] 1 SLR 30 (SGCA) at [120].
\item[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].
\end{footnotes}
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.  

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. The Singapore Court of Appeal has not expressed a concluded view on the admissibility of extrinsic evidence on pre-contractual negotiations or on the admissibility of extrinsic evidence on subsequent conduct. Nonetheless, evidence of subsequent conduct has been observed to generally fall into one of two categories which militate against their use, namely: (1) such evidence would either be inadmissible because it does not fulfil the relevant criteria; or (2) be superfluous because it does no more than echo what were the objectively ascertained intentions of the parties based on the contextual evidence at the time of the contract.

**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* set 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, while the Magistrates’ Court hears claims below S$60,000.

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20 *Sembcorp Marine Ltd v. PPL Holdings* [2013] 4 SLR 193 (SGCA) at [73].
21 *Sembcorp Marine Ltd v. PPL Holdings* [2013] 4 SLR 193 (SGCA) at [59].
22 *Xia Zhengyan v. Geng Changqing* [2015] 3 SLR 732 (SGCA) at [62]–[69]; *BNA v. BNB and another* [2020] 1 SLR 456 (SGCA) at [81]–[88]
23 *MCH International Pte Ltd and others v. YG Group Pte Ltd and others and other appeals* [2019] 2 SLR 837 (SGCA) at [15]–[21].
24 *Sembcorp Marine Ltd v. PPL Holdings Pte Ltd* [2013] 4 SLR 193 (SGCA).
25 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).
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.26

ii Jurisdiction clauses
The Singapore courts will give effect to contractual jurisdiction clauses.

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 also signed

26 Cases may also be transferred from the High Court to the SICC: Order 110 Rule 12 of the Rules of Court (Cap 322, R5).
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).
the Singapore Convention on Mediation, which came into force as of 12 September 2020. This provides for the cross-border enforcement of mediated settlement agreements, allowing businesses that are seeking enforcement of a mediated settlement agreement across borders to apply directly to the courts of countries that have signed and ratified the treaty, instead of having to enforce the settlement agreement as a contract in accordance with each country’s domestic process. To give effect to the Singapore Convention on Mediation, the Singapore Convention on Mediation Act 2020 commenced on 12 September 2020.

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:

- 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;
- 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
- 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 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:

- they have been discharged from performing their contractual obligations;
- the contract is void;
- the contract is voidable and that it should be rescinded or set aside; or
- the limitation period has expired. Examples are set out below.

33 RDC Concrete Pte Ltd v. Sato Kogyo (S) Pte Ltd [2007] 4 SLR(R) 413 (SGCA).
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 that 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.\(^{34}\) The doctrine is a narrow one that only applies in exceptional circumstances.

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.\(^ {35}\) In general, four requirements have to be met. First, at the time of the contract, there must be an assumption shared by both parties as to a particular state of affairs. Second, that assumption must be fundamental to the performance of the contract. Third, the assumption must have been wrong. And, fourth, performance of the contract must either be impossible or be radically different to what was contemplated.\(^ {36}\)

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 identity of the other contracting party.

The Singapore courts have not expressed a concluded view whether a unilateral mistake in equity can extend beyond a mistake as to a term of the contract, or whether a mistaken assumption about the circumstances under which the contract was or would be concluded can itself be an operative mistake.\(^ {39}\)

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\(^{34}\) *Alliance Concrete Singapore Pte Ltd v. Sato Kogyo (S) Pte Ltd* [2014] 3 SLR 857 (SGCA) at [33].

\(^{35}\) *Olivine Capital Pte Ltd v. Chia Chin Yan* [2014] 2 SLR 1371 (SGCA) at [67].

\(^{36}\) *B2C2 Ltd v. Quoine Pte Ltd* [2019] 4 SLR 17 (SGHC(I)) at [237]; *Quoine Pte Ltd v. B2C2 Ltd* [2020] 2 SLR 20 (SGCA(I)).

\(^{37}\) *Quoine Pte Ltd v. B2C2 Ltd* [2020] 2 SLR 20 (SGCA(I)).

\(^{38}\) *Chwee Kin Keong and others v. Digilandmall.com Pte Ltd* [2005] 1 SLR(R) 502 (SGCA) at [53]; *Quoine Pte Ltd v. B2C2 Ltd* [2020] 2 SLR 20 (SGCA(I)) at [105]–[111].

\(^{39}\) *Quoine Pte Ltd v. B2C2 Ltd* [2020] 2 SLR 20 (SGCA(I)) at [90]–[92].
**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.40

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.41

**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.42 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:

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.43

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.

**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,44 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.45

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41 BCBC Singapore Pte Ltd v. PT Bayan Resources TBK [2016] 4 SLR 1 (SICC) at [175]–[176].


43 Chwee Kin Keong and others v. Digilandmall.com Pte Ltd [2005] 1 SLR(R) 502 (SGCA) at [80], Quoine Pte Ltd v. B2C2 Ltd [2020] 2 SLR 20 (SCGA(I)).

44 Tjong Very Sumito v. Chan Sing En [2012] 3 SLR 953 (SGHC) at [249].

**Limitation**

A breach of contract claim must be brought within six years of the date the cause of action accrued.\(^{46}\) 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.\(^{47}\)

**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.\(^{48}\)

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.\(^{49}\)

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 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 or her;
- \(b\) the influence was in fact exercised;

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\(^{46}\) Section 6(1)(a) of the Limitation Act (Cap 163).

\(^{47}\) Section 29 of the Limitation Act (Cap 163).

\(^{48}\) Panatron Pte Ltd v. Lee Cheow Lee [2001] 2 SLR(R) 435 (SGCA) at [14].

\(^{49}\) Spandeck Engineering (S) Pte Ltd v. Defence Science & Technology Agency [2007] 4 SLR(R) 100 (SGCA).
c the exercise of the said influence was undue; and

d the exercise of the said influence brought about the transaction.\(^{50}\)

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.\(^{51}\)

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.\(^{52}\)

Singapore law does not presently recognise an overriding doctrine of good faith or a general implied duty of good faith,\(^{53}\) although the courts will enforce an express contractual duty between the parties to negotiate in good faith.\(^{54}\)

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 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.\(^{55}\)

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.\(^{56}\)

VIII REMEDIES

There are various remedies available for breach of contract.

\(^{50}\) BOM v. BOK [2019] 1 SLR 349 (SGCA) at [101(a)].

\(^{51}\) BOM v. BOK [2019] 1 SLR 349 (SGCA) at [101(b)].

\(^{52}\) BOM v. BOK [2019] 1 SLR 349 (SGCA) at [142].

\(^{53}\) 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].

\(^{54}\) HSBC Institutional Trust Services (Singapore) Ltd (trustee of Starhill Global Real Estate Investment Trust) v. Toshin Development Singapore Pte Ltd [2012] 4 SLR 738 (SGCA).

\(^{55}\) Turf Club Auto Emporium Pte Ltd v. Yeo Boong Hua [2018] 2 SLR 655 (SGCA) at [311].

\(^{56}\) EFT Holdings, Inc v. Marinteknik Shipbuilders (S) Pte Ltd [2014] 1 SLR 860 (SGCA) at [112].
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.57

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.58

iii  Punitive damages
These generally cannot be awarded for a pure breach of contract under Singapore law.59

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.

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.60

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

57 Hon Chin Kong v. Yip Fook Mun [2018] 3 SLR 534 (SGHC) at [60]–[61]
58 Alvin Nicholas Nathan v. Raffles Assets (Singapore) Pte Ltd [2016] 2 SLR 1056 (SGCA) at [24]–[25].
59 PH Hydraulics & Engineering Pte Ltd v. Airtrust (Hongkong) Ltd [2017] 2 SLR 129 (SGCA).
60 Paragraph 14 of the First Schedule to the Supreme Court of Judicature Act (Cap 322, 2007 Rev Ed), read with Section 18(2).
defendant’s actual knowledge of special or extraordinary facts and circumstances at the time of the contract. The claimant is also expected to take reasonable steps to mitigate the losses he suffers as a result of the breach.

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 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). The Ministry of Law has also proposed the enactment of a similar framework for conditional fee agreements, and a public consultation in relation to its proposal for prescribed categories of proceedings in Singapore has concluded. These anticipated developments are likely to increase Singapore’s attractiveness as a dispute resolution centre.

61 Out of the Box Pte Ltd v. Wanin Industries Pte Ltd [2013] 2 SLR 363 (SGCA) at [17]–[18].
62 The Asia Star [2010] 2 SLR 1154 (SGCA) at [44].
63 Civil Law (Amendment) Act 2017 (No. 2 of 2017) and the Civil Law (Third-Party Funding) Regulations 2017.
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

i 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:

a the rights and obligations created by the terms of the contract; and
b 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:

a an intention to be bound by the acceptance;
b all the material terms of the contract should be set out in the offer;
c the content of the offer cannot be vague; and
d 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.

1 Jonathan Ripley-Evans is a director and Fiorella Noriega Del Valle is a senior associate at Herbert Smith Freehills.
The requirements for a valid acceptance are:

\[ a \] there must be an intention to enter into a legally binding contract;
\[ b \] the acceptance must be made by the offeree;
\[ c \] the acceptance of the offer must be unequivocal, otherwise it may amount to a counter-offer;
\[ d \] the acceptance must be communicated to the offeror; and
\[ e \] 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 \textit{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, \textit{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.

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

According to the partial integration rule, where an agreement is partially written and partially oral, then the parol evidence rule prevents the admission of extrinsic evidence to contradict and vary the written portion without proof of the oral agreement.5

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, unless the other party misled the person regarding the terms6 or the document contains unreasonable terms.7

The rule is an exception to the principle that parties must reach subjective agreement on the terms of the contract.

3 Union Government v. Vianini Pipes 1941 AD 43 at paragraph 47.
4 Tshwane City v Blair Atholl Homeowners Association 2019 (3) A 398 (SCA)
6 RPM Bricks (Pty) Ltd v. City of Tshwane Metropolitan Municipality 2007 3 All S.A. 423 (T) at paragraph 41.
7 Mercurius Motors v. Lopez 2008 3 All SA 238 (SCA); 2008 3 SA 572 (SCA) at paragraph 33.
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:

- they were willing to be bound by them; or
- 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.

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:

- business efficacy test: a court will look at whether the term is required to make the contract commercially viable; and
- 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.

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.

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8 West End Diamonds Ltd v. Johannesburg Stock Exchange 1946 AD 910.
9 Reigate v. Union Manufacturing Co [1918] 1 KB 592 at 605.
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.\(^1\)

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.

If the contract is so obscure that even with the use of the above the intention of the parties cannot be determined then the contract is void due to vagueness.\(^1\)

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)*\(^1\) 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.\(^1\)

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\(^1\) *Van der Westhuizen v. Arnold* 2002 (6) SA 453 (SCA).

\(^1\) *Namibian Minerals Corporation Ltd v Benguela Concessions Ltd* 1997 1 All SA 191 (A).

\(^1\) *Bothma-Batho Transport (Edms) Bpk v. S Bothma & Seun Transport (Edms) (Bpk)* 2014 (2) SA 494 (SCA).

\(^1\) *Airports Company South Africa v Big Five Duty Free (Pty) Ltd and Others* 2019 (5) SA 1 (CC).
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.

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.

South African courts have historically supported mediation as a method of dispute resolution; however, more formal mechanisms recognising mediation have recently been introduced. For example:

a the amendment of the Magistrate Court Rules in 2014 introduced a system of court-annexed mediation (CAM) in selected magistrates’ courts; this was extended to the remaining provinces in South Africa in March 2019; and

b on 9 March 2020, the Uniform Rules of the High Court saw the incorporation of Rule 41A, which requires the plaintiff of applicant in an action or application to consider or advise the court of the potential of mediating the dispute. In addition the parties must give reasons, if the dispute cannot be mediated, as to why this is the case.

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 when determining these questions.

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.

**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.

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 hold the breaching party to the contract (in which case the innocent party will also need to indicate that it is willing to perform). As will be explained further below, the innocent party may also claim for any damage it has suffered, regardless of this election.

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14 In *Foize Africa (Pty) Ltd v. Foize Beheer BV and Others* 2013 (3) SA 91 (SCA), it was confirmed that private contracts cannot exclude the jurisdiction of the South African courts. Jurisdiction is determined by the court and not the parties.


17 *Moodley v. Moodley* 1990 (1) SA 427 (D).
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

i 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.

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.\(^{18}\)

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.\(^{19}\)

Historically, there has been controversy regarding the application of concepts such as good faith, reasonableness and fairness. In Barkhuizen v. Napier,\(^{20}\) the Constitutional Court had held that good faith is ‘not a self-standing rule, but an underlying value that is given expression through existing rules of law’.\(^{21}\) Recently, however, in Beadica 231 CC and Others v. Trustees for the time being of the Oregon Trust and Others\(^{22}\) the Constitutional Court acknowledged that the consideration of public policy in the context of the law of contract is rooted in the Constitution. The Constitutional Court held that constitutional rights apply indirectly to contracts, as well as the enforcement of contractual terms, and a careful balancing act is required in order to determine whether a contractual term or its enforcement, would be contrary to public policy.

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,\(^{23}\) 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.

Impossibility

There are three types of impossibility in South African law:

- objective impossibility: this means that performance would be impossible for everyone;
- subjective impossibility: this occurs when performance is possible for some people, but not for the debtor specifically; and

\(^{18}\) 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.

\(^{19}\) 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’.

\(^{20}\) 2007 (5) SA 323 (CC).

\(^{21}\) Ppara 82.


\(^{23}\) Southernport Developments (Pty) Ltd v. Transnet Ltd 2005 (2) SA 202 (SCA).
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.

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 not 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.

**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.

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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.\textsuperscript{26}

The misrepresentation must be a material one, in the sense that a reasonable person would also have been induced to contract by the misrepresentation.\textsuperscript{27} 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:

\begin{itemize}
  \item[a] fraudulent;
  \item[b] negligent; and
  \item[c] innocent.
\end{itemize}

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:

\begin{itemize}
  \item[a] 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;
  \item[b] delictual (tortious) damages: this is only available in the event of a fraudulent or negligent misrepresentation;
  \item[c] the buyer may set aside the contract of sale; and
  \item[d] the buyer may claim that the purchase price be reduced to the true value of the goods.
\end{itemize}

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:

\begin{itemize}
  \item[a] rescission of the contract; and
  \item[b] delictual damages.
\end{itemize}

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.

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:

\begin{itemize}
  \item[a] rescission of the contract; and
  \item[b] delictual damages.
\end{itemize}

\textsuperscript{26} Novick v. Comair Holdings 1979 (2) SA 116 (W).
\textsuperscript{27} Lourens v. Genis 1962 (1) SA 431 (T).
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.\(^{29}\) 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*,\(^{30}\) 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.

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.

\(^{29}\) *Administrator, Natal v. Edouard* 1990 (3) SA 581 (A).

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.
Chapter 22

SPAIN

Carles Vendrell and Miguel Ángel Cepero

I  OVERVIEW

The commercial litigation landscape in Spain is currently characterised by two main factors, namely the critical role of the case law of the Supreme Court and the increase of the number of complex contractual (including liability for negotiations) cases.

The role of the case law is of utmost importance in this area. The basic private law provisions under Spanish law (basically, the Spanish Civil Code of 1889) have not been modernised, but the Supreme Court has substantially modified the interpretation of these provisions. The modern configuration of the remedies arising out of breach of contract (see Section V) is a very clear example of this trend. In this judicial modernisation the Supreme Court has used some of the European private soft-law tools (namely, the Principles of European Contract Law and the Draft Common Frame of Reference).

Another trend, as indicated, refers to the increasing number of complex contractual cases, such as securities and M&A litigation, liability for breach of negotiations related to potentially relevant transactions.

II  CONTRACT FORMATION

i  Essential terms of contracts

According to the Spanish Civil Code, three requirements have to be met in order for a contract to be in existence, valid and enforceable: (1) the contracting parties' valid consent; (2) subject matter; and (3) the cause of the obligation established.

Firstly, the valid consent of the parties is manifested through the reciprocal expression of the offer and the acceptance over the subject matter and cause expressed in the contract. Consent exists from the moment the offeror is aware of the other party's acceptance or when said acceptance cannot be ignored in accordance with good faith. As explained below, consent given pursuant to error, duress, intimidation or fraudulent misrepresentation shall be null and void.

Second, the subject matter of a contract can be (1) all things that are not beyond the bounds of commerce between parties (including future things), and (2) all services that are not contrary to the laws or to good customs.

Third, the cause (purpose) of the contract has to be lawful (i.e., not contrary to the law or good morals). Otherwise, the contract shall not come into effect.

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ii  Form of contracts

The general rule under Spanish law is freedom of form, so that contracts shall be binding, whatever the form in which they have been entered into (orally or in writing), provided that they meet the essential conditions for their validity.

However, in practice, most contracts in commercial transactions are entered into in writing so that it is easier to prove their existence and specific terms. Furthermore, in cases where the transaction has a significant economic value, contracts are often formalised in public deeds before a notary (even if doing so is not mandatory). In the latter cases, it must be noted that, despite the fact that notarisation is not required in every contract, it is advisable for evidentiary purposes as deeds before notaries are considered stronger evidence than a mere written contract.

Indeed, the form of contracts is an important issue in potential proceedings. In spite of the fact that courts may be satisfied that an oral contract has been entered into in light of the evidence provided in the proceedings (and, therefore, oral contracts may be enforceable), it is easier for the parties to prove their existence in those cases where contracts are in writing, namely in a public deed. It is more difficult to bring a claim against the non-performing party if the contract is oral, due to the lack of written evidence.

There are also specific contracts that must be executed in writing and formalised in a public deed. The formalities to execute these contracts mainly depend on either their subject matter or the type of contract to be executed. For instance, contracts regarding real estate, land or purchases or sales of shares must be in written form and be recorded in a public instrument document.

Additionally, certain contracts must be set out in a public instrument for evidentiary purposes (ad probationem): contracts for the creation, amendment, transfer or extinction of rights in rem; contracts for leasing real-estate property for a period of over six months; the assignment of actions or rights arising from an act which is provided for in a public deed.

iii  Implied terms of contracts

The contracting parties are not only bound by specific terms set out in the contract, but also by those obligations arising out of good faith rules, such as the abuse of rights, and parties are always obliged to take reasonable and normal steps when exercising their rights.

In this regard, it is not uncommon to see courts read terms into a contract by reference to good faith or trade usage. For instance, the Supreme Court case law requires a notice period for a party to terminate a distribution agreement (otherwise, the breaching party would be held liable for damages). Also on the basis of good faith, the Supreme Court has adopted the rule of the notice fixing additional period of performance (the ‘Nachfrist’ mechanism), by which the aggrieved party may acquire a right to terminate the contract although the non-performance of the contractual obligation is to be considered initially non-fundamental.

Obviously, the more issues that are addressed in the contract the less likely it is that that would be the case, since good faith rules often arise when the contract does not set out a relevant aspect.

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3  Supreme Court Ruling dated 25 June 2016.
iv Third parties’ rights under the contract

Under Spanish law, third parties (i.e., parties other than the contracting parties) are not usually affected by contracts, since the contractual effects are limited to the contracting parties or their heirs. However, it is possible for a contract to include a stipulation granting rights to a third party who, in order to acquire those rights, must make its acceptance known to the obligor before the stipulation is revoked. Obligations can only be imposed when they are accepted by the third party. In this regard, the Spanish Supreme Court, in a decision dated 8 July 2017, has established that ‘the third party is entitled to demand the enforceability of the contractual clause established in his favour if he accepted it and made that acceptance known to the liable party’. The acceptance can be tacit, as interpreted by the Spanish Supreme Court in several decisions (e.g., judgment of 6 March 1989), and can be given through inaction or words. According to the case law, the third party acquires the right before that the acceptance requirement is fulfilled.

Furthermore, in some exceptional cases, a third party may be held liable for damages under the contract as a recent Supreme Court judgment has shown. The Supreme Court has held that the buyer of a car (consumer) is entitled to bring a claim seeking damages not only against the seller but also against the car manufacturer directly.4

v Cases where the formal contract has not been formed

In some cases, negotiations do not lead to a contract as the parties are not legally bound to reach an agreement. As indicated by the case law of the Supreme court, parties are free to negotiate and they are not liable for failure to reach an agreement.5

However, there are certain circumstances in which parties can incur in pre-contractual liability on the basis of culpa in contrahendo (extra-contractual under Spanish law): for example, when negotiations are not initiated or conducted in good faith, or when they have reached a point at which it is legitimate to expect closing (but this does not occur because of an unjustified cause). In this regard, courts would assess the nature of the potential contract and the goods and services being traded, the circumstances of the negotiating process, the potential frustration of parties’ expectations after the withdrawal from negotiations and whether there are fair grounds for ending the negotiating process. The key point, according to the indicated case law of the Supreme Court, is to assess whether a party entered into or continue negotiations with no real intention of reaching an agreement.

Liability for culpa in contrahendo is, in principle, restricted to the reliance interest (interès contractual negativo) and does not cover the interest the party had in the performance of the contract (i.e., expectation interest).6

vi Contracts based on standard form (the ‘general conditions of contract’)

Finally, it is worth mentioning those contracts based on standard form (the ‘general conditions of contract’) as entering into contracts by reference to those general terms is common in commercial transactions (not only with consumers but also with other companies in business-to-business relationships).

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4 This ruling was handed down in the Dieselgate case; Supreme Court Ruling dated 11 March 2020.
6 Supreme Court Ruling dated 25 June 2013.
These general terms are not individually negotiated, are imposed by one party and are intended to be incorporated into multiple contracts. In cases where those general non-negotiable conditions of contract are incorporated into contracts entered into with consumers, they are subject to consumer legislation. On the contrary, when included in contracts entered into with sellers or suppliers (who are not regarded as consumers), some requirements have to be met in order for the contract to be valid and enforceable: (1) the other party has to be aware of the conditions under which the contract is formed; and (2) those conditions must be drafted in plain and intelligible language (formal transparency).

In particular, there is a noteworthy case relating to the validity of one of these general terms. Although the term was incorporated into a contract entered into with a consumer, such case had a significance impact on the financial sector as it was about the ‘administration fee’ which is normally charged when taking out a loan. In this case, the Supreme Court’s decision was threefold. First, the Supreme Court held that the administration fee shall be deemed a contractual term related to the definition of the main subject matter of the contract, so that its material transparency must be assessed in terms of Article 4.2 of Directive 93/13. Second, such clause is transparent on the following grounds: it is a fee generally used and known in the market by consumers and clients; the fee has an important role in the information provided to the consumer prior to the signing of the contract and in advertisements by which banks offered their loans; the client would be aware of the fee as it is a one-off payment and due at the very moment the contract is entered into; the clause is incorporated in a transparent manner into the contract, since it is in plain language and has an important role in the contract. Third, the Supreme Court held that, in any case, the administration fee cannot be deemed unfair as it is intended to pay for the essential services rendered by banks before granting the loan (client’s creditworthiness assessment, preparing and drafting documentation, necessary arrangements in order for clients to have the principal granted in their banking account, etc.). Furthermore, the Supreme Court established that the adequacy of the remuneration, on the one hand, as against the services or supplies provided in exchange, on the other, cannot be assessed in this case, so the potential unfairness of the clause related to the administration fee cannot rely upon the excessive nature of the amount of the fee charged. The Supreme Court is now expected to issue a new ruling on the administration fee clause after the European Court of Justice Ruling of 16 July 2020, which also provided the relevant criteria for the assessment of such clauses in terms of the Directive 93/13 provisions.

III CONTRACT INTERPRETATION

Numerous disputes over contract interpretation come up in commercial transactions. Some of them are easily resolved, whereas others involve complex litigation in which the parties to the proceedings adduce oral and documentary evidence in order to show what the real intention and will of the contracting parties was when entering into the contract. A perfect illustration of this is the case resolved by the final judgment of Commercial Court 3 of Madrid of 13 November 2019 concerning the Spanish television series Money Heist (La casa
de papel). The court dismissed the breach of contract claim by which the claimant (a media producer) alleged that the real intention of the parties had been to grant option rights over the television series. On the basis of both the evidence submitted by the defendants (including witness examinations) and the ‘systematic criterion’ (see below), the court concluded that the parties had not agreed to any option right.

This kind of dispute normally arises when the wording of the contract is not clear enough, the contract contains contradictory terms or an issue that was not explicitly set out in the contract arises.

In the event of a discrepancy or a dispute between the contracting parties, the Spanish Civil Code provides general rules on contract interpretation. The main purpose of these provisions on contract interpretation is to establish the real intention of the parties (beyond the precise wording of the contract). Therefore, courts must uncover that intention bearing in mind circumstances such as the wording, nature and scope of the contract or clause in dispute, preliminary negotiations, subsequent conduct, etc.

For the purposes of establishing the real and effective intention of the parties, the Spanish Civil Code provides a set of supplementary and subordinate rules on contract interpretation:

a. The literal or grammatical interpretation will prevail in cases where the terms of a contract are clear and do not leave any doubt as to the intention of the contracting parties. However, if the wording seems contrary to the intention of the contracting parties, the latter shall prevail over the former.

b. In order to assess the intention of the parties, the main thing taken into account will be their conduct at the time of and subsequent to the contract. Therefore, courts may pay attention to the negotiation of the agreement or the actions carried out by the parties in performing the agreement.

c. The rest of the contract is also a key aspect in interpretation, as clauses must be interpreted in connection with each other, attributing to any doubtful clauses the meaning resulting from the whole (the so-called systematic criterion). This criterion consists of interpreting the contractual provisions jointly, in order to investigate the spirit and purpose of the contract itself.

d. The nature and uses and customs in the kind of business governed by the contract shall also be assessed in order to interpret any ambiguities in contracts or when clauses usually set forth therein have been omitted.

e. Although the terms of the contract are general, they must not be deemed to comprise things and cases different from those in respect of which the interested parties intended to contract. In this regard, courts normally hold that a term specifically drafted for a particular issue prevails over a general rule.

f. If any clause of the contract should admit several meanings, it must be understood to have the meaning most suitable for it to be effective, so that the discrepancy is avoided.

There are specific rules on interpretation when the contract is based on a standard form (general contract conditions). In these cases, specific terms will prevail over general terms unless the latter are more beneficial to the buyer (i.e., the contracting party that has not drafted the wording of the contract and agrees to enter into a contract under the general

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9 Supreme Court ruling dated 25 April 2016.
terms drafted by the other contracting party, the supplier or the seller). Furthermore, in standard form contracts, clauses which have not been drafted in plain, intelligible language shall be interpreted in favour of the buyer.

In addition, due to the influence of common law jurisdictions, and the complexity of contracts nowadays, it has become increasingly common for contracts to include an interpretation clause setting out the rules on interpretation agreed by the parties beyond the legal rules.

IV DISPUTE RESOLUTION

i Amounts in dispute
Under Spanish Procedural Law, there is no minimum amount for the parties to commence judicial proceedings on contractual disputes. However, some procedural issues will depend on the amount in dispute: (1) the kind of proceedings (those claims whose amount may exceed €6,000 or cannot be calculated shall be heard in 'ordinary proceedings' and, on the contrary, those in which the amount does not exceed €6,000 must be heard in 'verbal proceedings' which, effectively, are summary proceedings, unless the claim deals with any of the matters that have to heard in ordinary proceedings); (2) leave to appeal before the second instance courts (the first instance judgment may be appealed if the amount exceeds €3,000); (3) leave to appeal before the Supreme Court (the second instance judgment may be appealed if the amount exceeds €600,000, unless the case has the 'reversal interest' because the judgment contradicts Supreme Court case law or decides on issues in which there is contradictory case law from second instance courts or applies laws that have been in force for less than five years); or (4) appearing in court represented by a court agent and a counsel (in those claims where the amount is lower than €2,000 parties may appear before the court on their own).

ii Commercial courts
In Spain, there are specialised commercial courts that hear cases relating to insolvency law, unfair competition, industrial property, intellectual property and advertising, claims brought pursuant to corporate law (particularly, those claims based on Corporate Enterprises Act provisions), transport matters, maritime law and collective actions on general contracting conditions. Any other matters regarding commercial transactions are heard by civil courts. This means that disputes over commercial transactions will normally be heard in civil courts (for example, claims related to the breach of SPA contracts).

iii Jurisdiction clauses
Clauses submitting disputes to the jurisdiction of foreign or national courts are valid and are enforced by Spanish courts in any proceedings brought before them in relation to contracts, provided that the choice of jurisdiction is asserted in accordance with Spanish procedural law. First, Spanish courts have exclusive jurisdiction in connection with, among others, matters relating to the incorporation, validity, nullity and dissolution of companies or legal entities domiciled in Spain, and any decisions and resolutions of their governing bodies and the validity or nullity of any registrations with the Spanish registry. Second, parties to the contract also are able to submit disputes to a national court based in a specific region (for example, the first instance court of Madrid), as long as that choice of court fulfils the mandatory provisions
on territorial jurisdiction. However, there is no room for the parties to choose commercial courts to hear claims that have to be heard by civil courts, as the objective jurisdiction (which depends on the nature of the matter in dispute) is based on mandatory provisions.

iv Arbitration clause

Parties can establish an arbitration clause in case any disputes arise out of the contract. In Spain, arbitrations must be conducted following the provisions of the Spanish Arbitration Act, Law 60/2003 of 23 December on arbitration. The arbitration clause has to be in writing (in the contract or in another document or communication) and is not necessarily affected by the potential nullity of the contract.

The inclusion of a clause in the corporate by-laws on submission to arbitration will be subject to a two-thirds’ majority of the shares into which the share capital is divided.

The contracting parties can challenge the court’s jurisdiction on the grounds of an arbitration clause.

The parties are also free to determine the number of arbitrators, providing the total number is an odd number. Some of the most important arbitration centres in Spain are: the Court of Arbitration of Madrid (CAM); the Spanish Court of Arbitration (CEA); the Civil and Commercial Court of Arbitration (CIMA) and the Barcelona Arbitration Court (TAB).

Parties are entitled to bring an application before the courts to override the award granted by the arbitrator only based on the following exceptional grounds: (1) the arbitration agreement does not exist or is not valid; (2) the applicant was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings; (3) the award contains decisions on matters not submitted to arbitration or not apt for settlement by arbitration; (4) the appointment of the arbitrators or the arbitral procedure was not in accordance with the arbitration agreement (unless the agreement was in conflict with an imperative provision); and (5) the award is against public policy (in general, the set of rights and principles that have to be upheld by courts in all cases such as fundamental rights including the right of defence).

v Mediation clause

A mediation clause can also be set out in the contract by which the contracting parties undertake to submit to mediation a dispute that might arise in civil or commercial matters. If that is the case, a good-faith attempt must be made to follow the agreed procedure before resorting to the courts or to another out-of-court solution. However, no one is obliged to remain in a mediation procedure, nor to reach an agreement, as the mediation is on a voluntary basis.

V BREACH OF CONTRACT CLAIMS

The basic elements of a claim for breach of contract will depend on the pleadings. First, the claimant can seek specific performance and compensation for damage. In this case, the claimant would have to prove the following facts: (1) the breach of contract, regardless of its significance; (2) the possibility of specific performance (performance in natura), if possible and suitable for satisfying the business purpose agreed in the contract and the creditor’s needs; (3) damage derived from the breach of contract and caused by the breaching party’s wilful misconduct or negligence (if the latter, the court has to be satisfied that the damage
was foreseeable at the time of contracting and came as a necessary consequence of the failure to perform). If specific performance is not possible nor suitable, the aggrieved party can only claim for damages.

Second, the claimant could seek the termination of the contract and damages, provided that the following facts are proved: (1) the breach of contract, as long as it is essential and definitive (fundamental non-performance), so that said breach leads to the frustration of the contract, and (2) damages in the same terms explained above. For evidentiary purposes, parties often set out specific provisions on which terms are regarded as essential for termination purposes in case of breach. In the absence of these provisions, the essentiality of a particular term will be assessed in accordance with case law, taking into account the nature and scope of the contract.

Therefore, in general, the burden of proof of breach of contract, damage (or loss) and causation lies on the claimant. The defendant, on the other hand, would have to prove those facts which mitigate or prevent their liability from existing, such as unpredictability or inevitability of events for which the negligent breaching party cannot be held liable.

In reciprocal obligations, the defendant can also assert and prove that the claimant failed to perform or duly perform its obligation (exceptio non adimpleti contractus and exceptio non rite adimpleti contractus). In this regard, neither of the obligors will incur in default if the other does not perform its obligations.

The remedies against breach of contract will be addressed at length in Section VIII.

VI DEFENCES TO ENFORCEMENT

There are different ways for parties to seek to avoid enforcement of contractual obligations or challenge claims of breach of contract. These legal actions can be aimed at rendering the contract null and void or excluding or mitigating the liability.

i Defences to enforcement aimed at rendering the contract null and void

Defects in the contracting party’s valid consent, the subject matter of the contract or the cause of the obligation established are the overriding grounds for seeking to establish the invalidity of a contract.

Consent given pursuant to error, duress, intimidation or fraudulent misrepresentation shall be null and void. The error must concern the substance of the subject matter of the contract, or the conditions thereof, which should have been the main reason for entering into it. Furthermore, the error would not suffice to invalidate the consent if it could have been avoided by acting with due diligence, so the personal circumstances of both parties would be taken into account to assess if an error can be regarded as a defence to enforcement of the contract. In the financial sector, there has been a significant increase in litigation against banks via actions for nullity brought by retail customers and professional non-institutional investors which relied upon error in consent at the time of contracting on the grounds that the client allegedly did not receive sufficient information to be aware of the nature and risks of the investment products. In this particular realm, the case law seems to have shifted from a traditional and exceptional concept of error to a wider and more flexible interpretation.

There is duress when an irresistible force is applied to obtain the other party’s consent, whereas intimidation entails the presence of fear caused by an exterior threat which induces
a party to enter into the contract. Fraudulent misrepresentation exists where, as a result of insidious words on the part of one of the contracting parties, the other is induced into entering a contract which he or she would not have entered into otherwise.

The contracting parties can dispute the subject matter of the contract if: (1) it is impossible; (2) it is beyond the bounds of commerce between persons; or (3) it is contrary to the laws or to good customs.

The cause of the obligation established must also be considered when assessing the validity of the contract. The cause must be permissible, that is, legal and morally correct.

As these matters involve its essential elements, the contract as a whole would be rendered null and void.

ii Defences to enforcement aimed at excluding or mitigating the liability due to a breach of contract

There are different ways for the defendant to reject the claim seeking the release from liability or from performing the contract. The first refuting argument could be that the claim is time-barred.

A claim for nullity of the contract relying upon the absence of the essential terms must be brought within four years. In particular, the limitation period starts to run from the following moments depending on the case: (1) in cases of duress or intimidation, from the date on which the duress of intimidation ceased; (2) in those of error, fraudulent misrepresentation, or falseness of the cause, from the completion of the contract. However, the Supreme Court case law has conceptualised completion in claims aimed at rendering the nullity of investment contracts depending on which kind of contract is assessed: in swaps, completion takes place at the moment of the termination of the swap; in bonds, when they were purchased; for convertible bonds, the limitation period would start to run on the date of their conversion into shares; in loans, the completion comes into effect on the date the loan was taken out. When assessing complex investment products, the Supreme Court has also required, in order for the limitation period to begin to run, that the client could have been aware of the circumstances which caused the error when signing the contract (which normally happens when the client realises he could suffer financial losses). The time limit for filing those kinds of claims will not cease to run when filing of out-of-court complaints.

In general, a claim for one or more of breach of contract seeking damages, specific performance and termination of contract must be brought within 15 years of the date on which the action first could have been brought or, in any event, within five years of October 2015, if the latter occurs prior to the former. These limitation periods could cease to run due to an out-of-court complaints, so that the whole period would start to run again.

Finally, it is worth mentioning that the period between 14 March 2020 and 4 June 2020 (82 days) will not be taken into account for the calculation of limitation periods in accordance with regulations passed due to covid-19.

Furthermore, several Spanish contract law concepts could lessen the impact of any breach of contract, in accordance with the circumstances applicable to each case. Some of them could be aimed at justifying a potential termination of the contract or exclusion of liability derived from its breach and others seek to mitigate the potential consequences of a breach of contract. However, the legal regime will only apply where the parties have not agreed to exclude it (either expressly or by agreeing upon a different regulation). Therefore, the starting point for determining the possible legal consequences of this situation must always focus on the contract signed by the parties.
One of these concepts is force majeure which, according to the Spanish Civil Code, refers to those events that are unforeseeable or, if foreseeable, are inevitable (effectively, force majeure is equivalent to the term ‘act of God’). This is necessarily a case-based concept, based on the existing case law, according to which force majeure is generally reserved for extraordinary events that are beyond the control and organisational reach of the contracting party that intends to rely on it.

The effects of force majeure on contractual obligations are not specific but may relate to different aspects of the contract with differing conditions and scope. Thus, force majeure may lead to or indeed justify the release from an obligation to compensate the counterparty for damage when relevant goods or services have not been provided (and it is no longer possible for the breaching party to provide them), or a potential modification, cancellation or termination of a contract when the agreed benefit is no longer possible or feasible, thus thwarting the original purpose of the transaction. Yet, no general conclusions may be drawn regarding this point as this will depend on the specific contract and the particular circumstances of the case.

Furthermore, the case law has applied such concept on an exceptional basis. For example, for the force majeure to justify the release from the specific performance of the contract (so it has to be terminated), the contract performance has to be proved physically (or legally), objectively, absolutely and definitively impossible and, in any case, said impossibility cannot be caused by the breaching party. On the basis of such principles, the Supreme Court case law has highlighted that force majeure cannot be relied upon when the obligation in dispute is purely monetary, as there is no proper and factual impossibility for the parties to obtain funds to fulfil their pecuniary obligation.

It is also worth mentioning that it is common practice to set out contractual provisions in order to allocate risk between the contracting parties and assign liability in cases of force majeure. Said clauses are generally deemed valid given the primacy of the parties’ intention, with no other limitations other than those generally imposed by the criteria of incorporation and content of contractual clauses. In deferred-performance contracts, it is advisable to include force majeure clauses aimed at determining, modifying and adapting the legal concept to the specific contractual relationship (especially if the contract has an international aspect).

However, in contracts entered into with consumers, any term by which the supplier releases itself from liability in the event of force majeure is an unfair term pursuant to the Consumer Act.

Separately, the parties can seek modification of the terms agreed due to an extraordinary and unforeseeable change in circumstances by means of another contract law principle: rebus sic stantibus.

In short, the elements required to date by case law as the basis for an action based on this principle are as follows: (1) the existence of an extraordinary change in the circumstances when performing the contract compared to those existing when the contract was entered into; (2) excessive hardship of the obligation in light of the unforeseeable events, which shall be deemed to exist in essence, when there is imbalance or disproportion between the obligations of the parties to the contract; (3) unforeseeability and, in particular, a failure to include the unforeseeable event in the contract, excluding the normal risk inherent to or arising from the contract or risks assumed explicitly or tacitly by a contracting party; and (4) the ongoing (i.e., not merely episodic or transitory) nature of the change in circumstances, such that the balance of obligations may be reasonably expected to be disrupted for a long period of time.
The rebus principle has usually been applied to continuing-performance contracts, because the performance of one-off contracts generally renders unforeseeable events unable to cause an imbalance of obligations. Likewise, its application has normally been limited to long-term contracts, since, in short term contracts, it is more difficult to assert that a specific event is unforeseeable. That is why the Supreme Court rejected the rebus sic stantibus principle in a case where the contract had a duration of one year.  

Similarly, the Supreme Court has also dismissed those claims relied upon the principle of rebus sic stantibus when the parties had agreed a minimum guarantee income in the contract, as, in doing so, the parties previously envisaged the potential effects of events which could reduce the income agreed.

With regard to this matter, to the best of our knowledge, there is no Spanish case law on the application and interpretation of material adverse change (MAC) clauses and material adverse effect (MAE) clauses. They are less frequently used than in common law based systems, although they are not uncommon in contracts for the acquisition and financing of companies, for example. Nevertheless, to a large extent, there is some common ground between the qualifying cases and effects that other legal systems afford this type of clause and those attributed under Spanish law to force majeure and the rebus principle. Therefore, in such cases, the dispute would depend on the terms agreed and other contract-related factors. The wording of these clauses varies from case to case, although perhaps this practice is better established in financing contracts that are based on Loan Market Association standards. As a general rule, the application of these clauses should be limited to cases in which MAC or MAE deal solely with matters relating to the specific business or sector in which the company with the obligation (or the target in an M&A contract) operates, provided that general systemic or macroeconomic circumstances are excluded from these provisions.

Finally, it is noteworthy that both force majeure and rebus sic stantibus would pave the way for claimants to bring proceedings on contractual disputes on the grounds of the devastating effects caused by the covid-19 pandemic on the economy and namely on the performance of contracts. Notwithstanding that, the potential outcome of these claims is still uncertain and, in any case, they would be decided on a case-by-case basis.

7 VII FRAUD, MISREPRESENTATION AND OTHER CLAIMS

As explained in Section VI (i), there are different ways for the contracting parties to seek the nullity of the contract. This Section addresses fraudulent representation, which gives rise to a remedy to seek to rescind and avoid enforcement of the contract, whereas fraudulent representation as a remedy to seek damages is addressed in Section VIII.

A fraudulent misrepresentation enables a person who has been induced to enter into a contract as a result of an untrue statement made dishonestly to seek the nullity of the contract. By way of this remedy, the victim of a misrepresentation is entitled to recover payments made under a contract and thus be placed in the position in which he, she or it would have been had the contract never been entered into.

For the misrepresentation to give rise to such remedy, (1) the statement has to be substantially incorrect to such an extent so as to have induced a person to act differently than they would have had the statement been true; (2) the representation must be fraudulent, so
that the person making it knows it to be untruthful or does not believe it to be true; and
(3) the aggrieved party must have relied on the misrepresentation, so it must have caused
the claimant to act otherwise than he or she would have done had it not been made. If the
misrepresentation does not meet said requirements, it will only give the aggrieved party the
right to seek damages.

The nullity reverses the contract ab initio (retrospectively), as if it had never been
entered into in the first place. Therefore, all payments made and goods transferred under the
contract can be recovered.

Claims seeking the nullity of the contract on the grounds of a misrepresentation have
been fairly common in the field of investment products. This is the case of swaps contracts,
where most claims brought by retail customers and professional non-institutional investors
have been upheld. Those claims were essentially based on a fraudulent misrepresentation
concerning the nature and risks of the swap made by the bank when entering into the contract.
In these particular cases, the courts have held that, after assessing the level of information
provided and the personal conditions of the client, the banks misled the client, so that the
client relied on an untrue statement related to the characteristics and potential risks of the
product when entering into the contract.

VIII REMEDIES

Under Spanish Contract Law, there are several remedies available for the parties when a
contract has been breached, which are not necessarily linked to a particular kind of breach.
As a general rule, each party can opt for the remedy they consider to be most appropriate
to protect their rights and interests, as there is no legal rule on preference in remedies under
Spanish Law. In fact, the claimant can also bring joined actions on a subsidiary basis (for
example, the claim can rely on specific performance and, if impossible, on damages).

i Specific performance

The parties are allowed to claim specific performance of the contract. This remedy usually
seeks an order from the court requiring a party to either do or refrain from doing something
(for example, the handover of the house which has been purchased through the contract
signed by the parties).

The parties can seek this specific remedy as long as the performance is still possible.
Following the example above, if the house had been destroyed, the only remedy available for
the non-breaching party would be damages.

ii Termination of the contract

The aggrieved party is entitled to terminate the contract in the event that the breach of
contract is significant and affects an essential term, so it is considered serious, absolute and
definitive. Therefore, the right to terminate a contract arises when there is a fundamental
and essential breach of contract according to its nature and scope or when the parties have
established that the potential breach of a specific term enables them to terminate the contract.

In this regard, the parties are free to stipulate the causes for the termination of an agreement. In the absence of such a provision, the courts will consider whether the breach of contract has a significant effect on the performance of the contract.

The aggrieved party can also seek termination when, after having sought specific performance, this has proved to be impossible.

In some cases, the courts have allowed for the termination of the contract when the breach, although in theory not affecting an essential term, can be damaging to the interests of the performing party. Examples of such breaches are: the appearance of planning charges which were not stipulated;\(^\text{13}\) the refusal to formalise a notarial deed;\(^\text{14}\) the frustration of underlying planning motives;\(^\text{15}\) the significantly poor performance of the contract;\(^\text{16}\) the lack of works licence issued by the public administration;\(^\text{17}\) and the unfair and extended delay in performing the contract.\(^\text{18}\) The anticipatory breach also allows for termination when it is proved to be certain or it has been announced by the other party.\(^\text{19}\)

Finally, it is noteworthy that the Supreme Court has held that the termination of the contract cannot be relied upon upon the breach of pre-contractual liability (Supreme Court Ruling 13 July 2016).

### iii  Price reduction in some contracts

In sales and purchases or lease agreements, there is a tendency in the courts to provide a reduction in price when a breach of contract has taken place. This remedy could be awarded in those cases where the good provided does not meet the characteristics or requirements that were agreed in the contract, so its value is less than expected.

### iv  Liability for hidden defects

As regards purchasing agreements, the Spanish Civil Code obliges sellers to provide a warranty for hidden defects in the following circumstances where the defect: (1) renders the product unsuitable for its intended use; or (2) reduces its utility in a way that, had the buyer known about it, they would not have acquired it or would have paid a lower price. However, there are three circumstances in which the seller will not be liable, namely where: (1) the defects are manifest or in plain sight; (2) the buyer is an expert who, as a result of his or her trade or profession, should have easily been aware of them; and (3) the parties have expressly agreed to exclude liability.

Although the Spanish Commercial Code does not explicitly regulate the existence of hidden defects, it does acknowledge the obligation of the seller to ensure the buyer is not deprived of possession of the goods purchased and to correct any defects found therein. This general approach has led the courts to apply the articles of the Civil Code relating to the correction of hidden defects by analogy.

\(^\text{13}\) Supreme Court Ruling dated 10 February 2012.

\(^\text{14}\) Supreme Court Ruling dated 28 February 2012.

\(^\text{15}\) Supreme Court Ruling dated 24 April 2013.

\(^\text{16}\) Supreme Court Ruling dated 5 July 2012.

\(^\text{17}\) Supreme Court Ruling dated 24 September 2013.


\(^\text{19}\) Supreme Court Rulings dated 26 February 2013; 9 July 2013; 16 July 2013; 5 March 2014.
The main drawback of this remedy is the short limitation period: six months from the delivery of the thing sold. This is the reason why, in these cases, the aggrieved party usually also seeks other contractual remedies.

v Damages

As a general rule, a breach of contract results in an obligation, for the breaching party, to compensate the damage suffered by the other party due to the failure to perform the obligations. Therefore, it is a general remedy aimed at putting the claimant in the position it would have been in had the contract been properly performed. Thus, damage is usually measured by the difference in value between the contemplated and actual performance of the contract.

When seeking performance of the obligation or its termination, the aggrieved party may claim for damages and the payment of interest.

Under Spanish law, damages include the value of the loss suffered and the gain that the creditor has failed to obtain.20 Damages must compensate for the detriment directly suffered by the creditor (restitutio in integrum). In addition, the creditor can obtain compensation for consequential and indirect damages, which cover the costs or expenses incurred by the non-defaulting party as a direct consequence of the breach. This includes profits lost as a consequence of the breach. Finally, punitive damages are not awarded under Spanish law.

The extent of liability for damages would hinge on the conduct of the breaching party. On the one hand, a good-faith debtor will only be liable for damage that is (or could have been) both foreseeable at the time of entering into the obligation and a necessary consequence of their failure to fulfil the obligation. Spanish courts generally consider that this provision excludes liability for consequential and indirect damages. On the other hand, when debtors engage in wilful misconduct (i.e., an intentional breach), they are liable for all damage known to have arisen from the breach, without limitation. Wilful misconduct includes not only cases of intentional breaches but also those in which the debtor is aware that his behaviour causes (or, in the case of gross negligence, could cause) damage, and he does not take the necessary steps required by good faith to prevent it.

Therefore, an indemnity will be unenforceable due to the remoteness of loss or damage if the breaching party has acted in good faith. Conversely, if the breaching party has acted in bad faith, the indemnity will be enforceable, even if the loss or damage was remote.

Nevertheless, parties can agree on the scope and the terms of the indemnity so it covers any loss or damage (including indirect or consequential damage), which they will ultimately have to prove in court. However, any provision waiving or limiting liability arising from wilful misconduct would be null and void.

In the event of contributory negligence, the damages can be reduced in view of the role of each party and the consequences of their conduct in causing the damage. Each party has a duty to mitigate the damage derived from the breaching party’s conduct, so the injured party is expected to take all reasonable steps to minimise its loss resulting from the defendant’s breach of its obligations.

Spanish case law has set, in connection with specific cases, a presumption that a breach of contract causes actual damage to the aggrieved party, so it is the defendant’s burden to

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20 Article 1106, Civil Code.
prove that the breach of contract did not result in any actual damage to the aggrieved party. This situation occurs in particular with those damages that can be inferred by the very nature of the breach of contract (in re ipsa) (such as the unlawful use of a naturally productive good).

However, the burden of proof as to the amount of the claimed damages lies with the claimant. This calculation can be proved by means of: (1) documentary evidence (direct damage that involves costs incurred by the aggrieved party); (2) expert witness report (which is quite common in litigation involving breaches of contract in order to prove the amount of damages and particularly the loss of profits, as normally the cause of the breach would require a legal analysis, rather than an expert opinion); or (3) factual witnesses (although this evidence does not normally suffice for the purposes of calculating damages). There is an exception to that general rule on the burden of proof: the availability of evidence and the difficulty in producing it, so that it is easier for the breaching party to prove the amount of damages taking into account the evidentiary means at his or her disposal.

The high standard of proof on the existence and amount of damages has led to a widespread inclusion of penalty clauses (especially in commercial contracts). By means of a penalty clause, parties to a contract agree on an amount of compensation payable in the event of a default or a specific breach, so that the non-breaching party can directly claim the amount established in the penalty clause, without having to prove causation and the monetary value of the damages actually suffered.

It is not necessary to state that the sum agreed to is a genuine pre-estimate of the loss of a party. Unless agreed otherwise by the parties, the penalty will serve as a substitute for damages. This works not only as a way of liquidating damages, but also as a deterrent to breaches of contracts.

The Spanish Supreme Court case law has held that courts are not able not to apply or may only partially apply these penalty clauses when the breach of contract established in the clause has occurred. Only in very exceptional cases, where the defendant proves (on the basis of hardship theories) that the penalty clause significantly exceeds the actual damages suffered (so that it is disproportionate to the actual damages), can the court possibly reduce the amount of the penalty. In this case, the burden of proof is borne by the breaching party requesting a reduction in the liquidated damages.

Finally, it is worth mentioning damages as a potential remedy in cases relating to breaches of representations and warranties (which are common in sale and purchase agreements, like transactions for the purchase of companies). The potential breach of representations and warranties can give rise to liability for the truthfulness of the statements made through them. According to case law, representations and warranties fulfil a role as a guarantee or indemnity for prior events or circumstances, so that they assign contractual risks derived from a sale or purchase by extending the scope of the grantor’s liability to the truthfulness of the declared circumstances, and guarantee them. In this regard, representations and warranties, like information about facts or circumstances, can give rise to a contractual breach if they are inaccurate or false.

In addition, when such assets are subject to specific representations and warranties, they become facts within the scope of the contract, and are presumable of an essential nature for the buyer. Due to the nature of the ‘representations and warranties’, the duty to disclose the relevant circumstances takes on special importance under the rules of good faith. For this reason, legal scholars have held that any breach of a specific representation and warranty is

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21 Supreme Court Ruling dated 13 September 2016.
normally deemed wilful misconduct (or, at the very least, it helps to prove the fraud) as the warrantor has failed to fulfil his or her duty to disclose material aspects related to the factual situation subject to the guarantee.

In those cases, the buyer must be indemnified in an amount equal to the amount necessary to put the buyer in the position that he or she would have been in if all of the representations had been true. Thus, the loss would be the difference between the value of the target company as warranted and its actual value. In practice, according to some scholars, this compensation allows the creditor to obtain a possibility of reducing the purchase price with effects similar to those that it would have obtained had it exercised an action for a price reduction. For this reason, it is advisable for the valuation multiple (or in general the price valuation methodology) to be established in the contract, or at least to be included in some communication between the contracting parties.

IX CONCLUSIONS

A clear trend in the current commercial litigation landscape in Spain is the increase in the number of complex contractual cases, such as securities and M&A litigation, liability for breach of negotiations related to potentially significant transactions and disputes related to the devastating effects of covid-19 on the performance of certain contracts. To adapt basic Spanish private law provisions to this complex landscape, the Supreme Court is constantly ‘modernising’ the law, specifically in connection with remedies for breach of contract.

The areas and industry sectors affected by this trend seem to be broadening too. Apart from the tourism and real estate sectors, the media and television-series sectors are now playing an increasingly important role.
Chapter 23

SWITZERLAND

Patrick Rohn

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). Chapters 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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contract depends on a simple agreement of the receiving party.\(^3\) 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.\(^4\)

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 culpa in contrahendo.
The liability for the breach of pre-contractual duties (culpa in contrahendo) is not regulated in
the Code of Obligations but originates from case law.\(^5\)

### 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.\(^6\) 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 lex causae determines the
existence, content and effect of the main contract.\(^7\)

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.\(^8\) 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.\(^9\)

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’.\(^10\) 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.\(^11\) In addition

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3 Schwenzer, Schweizerisches Obligationenrecht Allgemeiner Teil, Seventh Edition, Paragraph 28.05.
4 Zellweger-Gutknecht/Bucher, Basler Kommentar - Obligationenrecht I Art. 1 - 529 OR Sixth Edition,
preface Article 1 Paragraph 15 f.
5 BGE 140 III 200 consid. 5.2; BGE 124 III 363 consid. II.5.b; BGE 116 II 695 consid. 2 et seq.
131 III 511, 516.
8 BGE 128 III 265, 267 consid. 3a.
9 BGE 121 III 118, consid. 4 b/aa.
10 BGE 129 III 118, 122 consid. 2.5.
11 BGE 128 III 265, 267 consid. 3a.
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 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 **Concilioratory 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,\textsuperscript{15} Gloor/Umbricht, \textit{Kurzkommentar Schweizerische Zivilprozessordnung Second Edition}, Article 199 Paragraph 1 et seq.
\textsuperscript{16} Sutter-Somm/Hedinger, \textit{Kommentar zur Schweizerischen Zivilprozessordnung (ZPO) Third Edition}, Article 62 Paragraph 9 et seq.
\textsuperscript{17} Article 106 Paragraph 2 of the Civil Procedure Code.

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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.

22 Wiegand, Basler Kommentar - Obligationenrecht I, Art. 1 - 529 OR Sixth Edition, Article 97 Paragraph 3 et seq.
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. If the debtor fails to perform within the grace period set, the creditor has three options under Article 107 Paragraph 2 CO: 

a. the creditor may continue requesting performance of the contract and compensation for the damage caused by the delay;
b. the creditor may waive performance and claim expectation damages for non-performance instead; or
c. the creditor may withdraw from the contract and claim restitution damages.

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.

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 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 defences 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. The unlawfulness may result from the object of the contract, the content agreed upon


27 BGer 4A_472/2010 (26.11.19) consid. 3.2.

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 or herself of his or her freedom or restrict his or her 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 that 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

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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.32 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.33 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.34

A fraudulent behaviour consists in the pretence of false facts or the non-disclosure of existing facts.35 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.36

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 contrabendo 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 24

TURKEY

Mert Namli1

I OVERVIEW

Turkey is a part of the civil law system and has the Turkish Code of Obligations and the Turkish Commercial Code as substantial laws regulating its civil law system. Besides these, rules for relations involving foreign elements are governed by the International Private and Civil Procedural Law. Regulations concerning contracts are held by the Turkish Code of Obligations and those rules are applicable for commercial contracts unless special provisions exist in the Turkish Commercial Code.

Civil law regulations in Turkey date back approximately 170 years. Under the law revolution that happened just after the establishment of the Republic of Turkey, the Turkish Code of Obligations inspired by the Swiss Code of Obligations and the Turkish Commercial Code inspired by the German Commercial Code were adopted in 1926. At the beginning of the 21st century, these codes were modernised. Accordingly, the Turkish Code of Obligations No. 6,098 (CO) and the Turkish Commercial Code No. 6,102 (CC) entered into force on 11 January 2011 and 13 January 2011, respectively.

Under the state jurisdiction system in Turkey, commercial dispute resolutions are conducted by commercial courts that are specialised in that regard. Where subject matter is over 500,000 lira, these courts adjudicate as a collective formed with three judges; and in disputes with a subject matter below 500,000 lira they adjudicate with one judge. From 2016, the Turkish civil litigation system has operated with three levels of judicial scrutiny comprising first instance courts (commercial courts in cases issuing commerce), regional Courts of Appeal and the Court of Cassation. Besides the above, Turkey supports alternative dispute resolution systems (arbitration and mediation) for the quick and efficient resolution of commercial disputes.

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II CONTRACT FORMATION

i Freedom of contract

‘Freedom of contract’ is a fundamental principle of the Turkish contract law and guaranteed by the Constitution. According to this principle, parties can dictate the content of the contract as they wish unless an exception exists.\(^2\)

Freedom of contract also includes the freedom for deciding the type of contract. The sales contract, tenancy agreement, donation agreement, contract of work, general service agreement, loan agreement, publishing contracts, and power of attorney agreement listed as a type of contracts in the CO. Nonetheless, parties are not obliged with the types of contracts listed in the CO: they could make a contract in different forms at their will due to the existence of freedom of contract.

ii Necessary elements for the establishment of the contract

Parties shall agree on essential components of the contract per Turkish Law. Essential components of a contract are divided into two subcategories as ‘objective essential components’ and ‘subjective essential components’. Objective essential components are components defined in the legal definition of the contract and constitute the minimum conditions for the contract (e.g., price in the sales contract). Subjective essential components are components that became an essential component through the common will of the parties, or one party’s will and other’s approval (place and date of performance).

Statements required for the establishment of the contract are offer and acceptance. The offer is an appeal for making a contract including all essential components of the contract and directed towards the other party or everyone.\(^3\) The person proposing may restrict the bindingness of the offer for time. If an offer is made without limitation of time; there will be two possibilities. If there is a face to face situation between parties, the offer will not be binding unless the counterparty accepts it immediately.\(^4\) If a face to face situation does not exist between parties, the offer will bind the proposer for a reasonable time.\(^5\) The contract will be established with the acceptance of the offered. Silence is not regarded as a declaration of will as a rule; hence, the person remaining silent against the offer is not considered as accepting it.

If the offer for making a contract does not include the essential components or will of binding, it will be called as ‘invitation for offer’. In an invitation to an offer, one party calling the other party for making negotiations and contracts.

In Turkish law, the validity of contracts is not subject to any form unless the opposite is indicated by the law. Nonetheless, lawmakers required a form for making a contract as an exception. Assignment of claim, surety, and real estate sales contract can be provided as instances for this exception. If a contract is not made according to form ordained by law, it will be invalid.

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\(^2\) Contracts that are contrary to the mandatory provisions of the law, morality, public order, personal rights, or whose subject is impossible are void. The invalidity of some of the provisions in the contract does not affect the validity of the others. However, if it is clearly understood that the contract will not be made without these provisions, the entire contract will be invalid.


\(^4\) Article 4 Paragraph 1 of the CO.

\(^5\) Article 5 Paragraph 1 of the CO.

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III CONTRACT INTERPRETATION

In Turkish Law, international private and procedural law regulate which international transactions will be subject to which law. The lawmaker accepts the principle of freedom of contract in that regard. As a consequence of this principle, parties can decide the applicable law for the contract. Parties can decide the applicable law for a part or the whole of the contract.\(^6\) The choice of applicable law after the contract can be retrospectively applied without prejudice to third-party rights. If parties do not choose the applicable law, the most related law will be applied to the contract.

While interpreting a contract in Turkish law, the expressions (words) in the contract by the parties are initially taken as a basis. However, such expressions and words are considered as a whole in the contract, not on their own. The meaning obtained from that interpretation will be checked as if it fits the conditions existing in negotiations. Correspondence between parties during negotiations might have a pivotal role in that regard.

IV DISPUTE RESOLUTION

i State jurisdiction

In Turkish Law, Civil Procedure Code No. 6,100 (CPC) regulates the procedural rules that shall be applied in private law disputes. With that code, several specialist courts have been established, and commercial disputes will be resolved at commercial courts as a rule.

In civil litigation, two different trial procedures exist: simple trial procedure and written trial procedure. These two trial procedures are quite similar, yet a simple trial procedure can be considered as a simpler and quicker version of the written trial procedure. In commercial courts, a written trial procedure is enforced in cases that are worth 500 lira and above, and a simple trial procedure is enforced in cases that are worth below 500 lira.

The first instance is comprised of five stages in Turkish Law. These are pleadings, pre-trial examination, trial, verbal argument, and decision. At the stage of pleadings, each party has the right to submit two pleadings, in those pleadings parties can argue their claims.\(^7\) In the pre-trial examination, the court examines and eliminates deficiencies about the procedural process, and decides contentious issues between parties, and invites them to mediation. At the stage of the trial, the evidence submitted by parties in hearings is evaluated. After such an evaluation court proceeds with oral argument and asks the parties for their last sentences about the lawsuit and decides. Parties can apply regional court of appeal against first instance courts decisions, and they can apply to the Court of Cassation against the decision of the regional court of appeal.\(^8\)

Parties can decide several matters through contracts in commercial disputes. For instance, merchants can decide which commercial court will be authorised in the event of

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\(^6\) Article 24 Paragraph 1 of International Private and Procedural Law.
\(^7\) In the simple judgment, each party has the right to give one pleading.
\(^8\) A value limit has been accepted for appeal and appeal in cases related to assets. The limit of appeal for 2020 is 5,390 lira. The decisions below this cannot be appealed. The appeal limit for 2020 is 72,070 lira. There is no appeal against decisions below this amount.
dispute through jurisdiction agreement.\textsuperscript{9} Besides, parties can make an evidence agreement and determine what kind of evidence can be used in case of disputes. For example, parties may execute an arbitrator–expert contract.

In the 21st century, studies for integrating the judicial system into technology has begun. UYAP (National Judiciary Information System) entered into service in 2005 as an instance of those integration activities. Thus, a case can easily be brought and all documents can be electronically submitted from beginning to end. Secondly, in civil litigation courts may allow one party upon the requests of one of the parties to join trial remotely by transferring their voice and display.\textsuperscript{10}

Publicity is regarded as the main principle in civil jurisdiction. Accordingly, trials and declaration of the decision shall be made public as a rule.\textsuperscript{11} Nevertheless, courts might decide for totally or partially private trials upon request or \textit{ex officio} in cases where public morality, public security or benefits that should be protected are required.\textsuperscript{12} The exception of benefits to be protected paves the way for private sessions in cases where business secrets might be revealed.

\textbf{ii Costs}

In the Turkish judiciary system, legal representation is not compulsory. Therefore, a person wanting to commence a lawsuit shall only pay judicial costs in the civil jurisdiction system.

The first litigation cost in the civil jurisdiction system is a fee. There are two different fees, such as application fee and advance fee. The application fee is fixed (54 lira for 2020). The fee for the verdict is 0.6831 per cent of the amount of the case (for instance, 683 lira for a case that worth 10,000 lira). A quarter of the verdict fee will be paid in advance while pressing charges and the remaining amount will be made within two months of declaring the decision.

The second litigation cost is advance for expenses. To accelerate the trial procedure, the costs of transactions are paid in advance. The amount of advance for expenses might shift according to the number of parties and evidence, and it costs 1,000 to 2,000 lira on average. All judicial costs are incurred by the party that lost the case. In light of the information above, it can be said that the judicial process is not expensive in Turkey.

\textbf{iii Mediation}

From the start of 2000, Turkey has shown its will to improve and generalise mediation and arbitration which are alternative dispute resolution methods. In this context, the main purpose is the provide integration of the alternative dispute resolution methods into the judicial system.

Mediation in civil litigation is regulated in the Code of Mediation in Law Disputes No. 6,325, dated 7 June 2012. In Turkish law, mediation can be used in all disputes of which the parties can freely dispose. The parties may apply for mediation before the case, or they can decide to apply for mediation at every stage of the case.

Turkish law has made it mandatory to apply for mediation in some disputes before commencing a case to fully integrate mediation into the judiciary. Accordingly, it is mandatory.
to apply for mediation before commencing a lawsuit in disputes between the employee and the employer, commercial disputes and consumer disputes. Under CC Article 5/A, in commercial lawsuits regarding claims and compensation claims, the subject of which is the payment of a certain amount of money, it is obligatory to apply to the mediator before filing a lawsuit.

In commercial disputes is mandatory to apply for mediation and attend the first session. After participating in the first session, the parties are completely free to decide whether to continue the mediation process. The first meeting is without charge for both parties. After that, each party willing to continue the mediation process will pay 330 lira for one hour of mediation.

Mediation has shown success in Turkey. That is, the agreement rate at the end of compulsory mediation in labour disputes is 65 per cent.13 The agreement rate is 57 per cent at the end of compulsory mediation in commercial disputes.14

iv Arbitration
Arbitration is divided into two as national arbitration and international arbitration in Turkish law. National arbitration is regulated in the Code of Civil Procedure, and international arbitration is regulated in the International Arbitration Code. Both laws are inspired by the UNCITRAL Model Law. Therefore, the regulations on national arbitration and international arbitration are quite similar.

In Turkish Law, an arbitral award constitutes a res iudicata like a court decision and can, therefore, be enforced like a court decision. At the same time, the arbitral awards were not subject to legal remedies; an action for annulment can be filed against an arbitrator’s decision solely on grounds enumerated in the law. Although public order is among these reasons, the Court of Cassation has an arbitration-friendly attitude by narrowly interpreting public order.

The Istanbul Arbitration Centre (ISTAC) was established on 1 January 2015 to improve arbitration in Turkey and to make Istanbul an arbitration centre. ISTAC is an important alternative especially in commercial disputes with its serial arbitration procedure, emergency arbitrator procedure and the med-arb procedure applied in disputes below 300,000 lira.

Turkey has also signed the New York Contract. Therefore, a foreign arbitrator decision can be enforced per New York Contract.

V BREACH OF CONTRACT CLAIMS
Not performing obligations arising from the contract is regulated in Article 112 and the rest in the CO. Accordingly, impossibility, default, failure to perform the debt properly and excessive performance difficulties can be evaluated within this framework.

i Impossibility
Impossibility is the failure of a contractual debt to be fulfilled for an objective or subjective reason. Subjective or objective impossibility doesn’t matter in terms of the legal consequences of it.15

15 Oğuzman/Öz, 568; Rona Serozan, Ifa Engelleri, 5th Edition, § 14 n 5.
In case of impossibility, the debtor is obliged to compensate for the creditor’s resulting damage, unless he proves that no fault can be imposed on him.\(^{16}\) Therefore, the debtor must fault concerning the impossibility to be responsible. Nonetheless, the presumption of fault is accepted for the debtor; therefore, the obligor must prove that no fault can be laid on him/her.

ii  **Delay in performance (default)**

The default of the obligor is the failure of the debtor to fulfil a debt on time. For debtor’s default, the debt shall be payable, and the time of payment shall be due. The creditor must also notify the debtor for the debtor’s default, in principle. No form of the rule is required for the validation of notification as a rule. However, notices to be made between merchants are made through a notary public or via email system using an electronic signature. If the parties have agreed on the date on which the debt will be paid, there is no need to notify the debtor.

iii  **Defective performance**

Defective performance refers to the failure of the debtor to fulfil his or her debt properly. In Turkish law, no performance includes all breaches of the contract excluding default and impossibility. For example, selling damaged goods is one of the good examples of no performance.

VI  **DEFENCES TO ENFORCEMENT**

i  **The invalidity of the contract**

Per the principle of freedom of contract, the parties can freely determine the content of a contract within the limits prescribed by law. However, agreements that are against the mandatory provisions of the law, morality, public order, personal rights, or contracts with impossible subjects are void.\(^{17}\) The invalidity of some of the provisions in the contract does not affect the validity of the others. However, if it is clearly understood that the contract will not be made without these provisions, the entire contract will be invalid.\(^{18}\)

ii  **Non-liability agreements**

The prior agreement that the debtor will not be liable for gross fault is invalid according to the Article 115/1 of the CO. This clause prohibits agreements concluded before the liability arises. Therefore, the parties may decide that the debtor will not be liable due to the serious fault of the debtor after the liability arises. The parties can also agree in advance that the debtor will not be liable for minor defects.

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\(^{16}\) Article 112 of the CO.

\(^{17}\) Article 27 Paragraph 1 of the CO.

\(^{18}\) Article 27 Paragraph 2 of the CO.
Statute of limitations

Statute of limitations refers to the obligor having the right to refrain from performing his or her debt after a certain period has passed. Accordingly, when the statute of limitations expires, the debt does not expire, only the debtor gets the right to refrain from performing the debt.\(^\text{19}\) The statute of limitations is for the right for claims; real rights do not expire.

The statute of limitations is 10 years for all receivables unless another period is specified in the law.\(^\text{20}\) As a rule, the statute of limitations specified in the law cannot be changed by the parties. Even if the court understands this from the case file, it cannot automatically take into account that a claim has expired.\(^\text{21}\) This must be put forward by the debtor.

VII FRAUD, MISREPRESENTATION AND OTHER CLAIMS

i Misconduct in negotiations

Establishing commercial contracts may require long negotiations between the parties. Parties that start negotiations to conclude a contract must behave mutually, with care and honesty with the trust they have engendered. If one of the parties has caused damage by acting contrary to this, the responsibility of culpa in contrahendo may arise.\(^\text{22}\)

ii Defect in consent

While the contract is being made, some defects may occur during the formation or disclosure of the will of the person or persons making the contract. In Turkish law, these are generally referred to as ‘defect in consent’.

The first type of defect in consent is an error. The party that made a fundamental error while establishing the contract will not be bound by the contract according to the CO Article 30. The following examples of fundamental error cases are prescribed in law:

a if the person has declared his or her will for a contract other than the one he or she wants to be established;
b if the person has declared his or her will for a subject other than what he or she wanted;
c if the person has explained his or her will to make a contract to someone other than the person he or she wanted to contract;
d when the person has declared his or her will for another person despite considering a person with certain qualifications while making the contract; and
e when the person has declared his or her will for a significantly greater deed than he or she wanted to undertake, or for a significantly lesser deed than he or she wanted.

Simple miscalculations do not affect the validity of the contract; the correction of these will be enough. Failure in motive is not considered as a fundamental error. If the failing person

\(^{19}\) Cour of Cassation, 3rd Chamber, 4074/7712, 05 July 2018 (Official Journal, 11 September 2018).

\(^{20}\) The 10-year time limitation period is mainly valid for the receivables arising from the contracts. There are special regulations for receivables arising from tortious acts and unjust enrichment. Claims for compensation due to wrongful act expire two years from the date the injured person learns about the damage and the liability of compensation, and in any case, ten years from the date of the act. The right to claim arising from unjust enrichment expires from the date on which the right owner learns that he has the right to reclaim it for two years and in any case ten years from the date of enrichment.

\(^{21}\) Article 161 of the CO.

counts the motive of the error as the basis of the contract, it is deemed to be based on error if this failure is acceptable according to good faith in business relations. However, this situation must be known by the other party. In case of error, fraud, or threat, the party will not be bound by that contract. As a result of error, fraud, or threat, the contracting party must declare that it is not contractually bound within one year, starting from the moment the error or fraud is learned or the effect of the threat disappears. Otherwise, it will be bound by the contract.

The error cannot be claimed against good faith. For example, if the other party states that the contract is agreed to be established in the sense intended by the perpetrator, the contract is deemed to have been established in this sense.

Unlike the deficiency in consent, one of the parties acts to deceive the other. Fraud can be with a positive action or with a negative action (being quiet). A person's silence in a situation where he or she has the task of enlightening (informing) the other person is an example of fraud with a negative action.

Fraud by a third party, as a general rule, does not affect the validity of the contract. The deceived person is bound by the contract in such a situation. However, if the counterparty knows or shall know the third party's fraud at the time the contract is concluded, the deceived party may cancel the contract.

If one of the parties made a contract as a result of a threat of the other or a third party, it is not bound by the contract (TCO Article 37/1). If the person is justified in believing that there is a serious and imminent danger of damage to his or his relatives' rights or assets, intimidation will be deemed to have occurred.

iii Excessive fulfilment of debt difficulty

Per the principle of *pacta sunt servanda* in Turkish law, every debtor must perform the action stipulated in the contract, despite the difficulties and obstacles that arise after the contract is established. However, an extraordinary situation that was not foreseen and was not expected by the parties at the time of the conclusion of the contract may arise later, and this change may disrupt the balance in the contract unbearably against one party. In such a case, the obligor has the right to ask the judge to adapt the contract into the new conditions and to terminate the contract if this is not possible. For example, the covid-19 pandemic is a significant example.

**VIII REMEDIES**

i Impossibility

If there is a fault of the obligor, in the emergence of the impossibility, the obligor will be responsible. The lawmaker has accepted a presumption of fault against the obligor, namely the obligor will be obliged to compensate the creditor’s damage arising from it unless he or she proves that no fault can be imposed according to CO Article 112.

The loss for which the faulty obligor is liable is a ‘positive loss’. The difference between the condition that the creditor would be in if the debt was properly executed and the
condition of the creditor due to the realisation of the impossibility determines the scope of the positive loss. The penalty that the creditor had to pay to third parties, loss of profit, etc., is covered by the positive loss.

ii  **Delay in performance**

If the debtor is at fault in default, he or she will be obliged to compensate for the damage incurred by the creditor.

In the event of default of the debtor in a contract that imposes a mutual debt, the creditor is given three optional powers. However, to use these optional rights, the creditor must first allow reasonable additional time to the debtor.\(^{24}\) At the end of this period, if the debtor does not repay its debt, the creditor can choose one of the following:

**Fulfilment of debt and compensation of delay**

In this sense, the creditor will be able to claim the damage that arises due to the late performance of the debt. This includes the expenses incurred by the creditor due to delay, the compensation that the creditor has to pay to others due to the delay, the loss suffered by the creditor due to the decrease in the value of the property during the delay and the profit that the creditor is deprived of due to the delay.\(^{25}\)

In the case of money debt, the obligor in default has to pay default interest, even if it is not agreed in the contract. The delay interest rate in commercial affairs can be freely determined by the parties.\(^{26}\)

**Giving up performance and compensation for its positive damage**

If the debtor goes into default in a contract that creates a mutual debt, the creditor will be able to waive the performance and claim compensation for the positive loss. The scope of the damage to be incurred by the debtor is the same as the loss mentioned in the case of impossibility.

**Renounce the contract and compensation for negative damage**

The third optional right owned by the creditor is to renounce the contract. The debt relationship is effectively eliminated retrospectively with the renouncement of the contract.\(^{27}\)

In this case, the creditor may request compensation for the negative loss incurred due to the termination of the contract.

Negative loss is loss caused by reliance on the validity of the contract. In other words, the difference between the condition that the creditor would be in if the contract was never made and the current situation determines the extent of the negative loss. For example,

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\(^{24}\) The granting of this period is required for termination of the contract and compensation of the positive damage, withdrawal from the contract, and compensation of the negative damage. It is not necessary to give such a period for performance and delay compensation.

\(^{25}\) Oğuzman/Öz, 449; Tekinay/Akman/Burcuğlu/Altop, 962.

\(^{26}\) Article 8 Paragraph 1 of the CC.

\(^{27}\) Oğuzman/Öz, 660.
expenses incurred for the establishment of the contract and losses arising from the loss of the opportunity to contract with others due to reliance on the contract are among the elements of the negative loss.28

### iii  Failure to repay the debt in time

Failure to repay the debt properly is specifically regulated in the law in terms of some contracts. For example, detailed regulations are included in CO Article 219 et seq. for sales contracts, CO Article 417 et seq. for the contract of work and CO Article 301 for loan agreements. Other than that, CO Article 112 will be in effect ‘where the obligation has not been performed at all or required, the obligor shall compensate the damage or loss of the creditor unless the obligor proves that he was not at fault’.

### iv  Defect in consent

If the party that made a fundamental error is in fault, he or she is obliged to eliminate the damage (negative loss) arising from the invalidity of the contract. However, compensation cannot be sought if the other party knows or needs to know fault.

The party that cancels the contract due to fraud or threat may demand compensation for the negative loss from the person cheating. Even if the person who is cheated or threatened chooses to be bound by the contract, he or she does not lose his right to demand compensation for his negative loss.

### v  Penal clause

The parties may decide that a penalty will be paid in the contract between them if the contract is not performed at all or in the permitted time. Especially in commercial contracts, penal clauses are frequently used. In this case, unless otherwise is specified, the creditor may request the fulfilment of the debt or penalty.29 If the penalty is decided for the non-execution of the debt at the specified time or place, the creditor may request the execution of the penalty together with the original debt.30

For the penalty determined in the contract to be demanded, it is necessary and sufficient that the debt not be performed at all or as required. Unless the parties agree otherwise, the obligor must fault not performing the debt at all or properly. Also, the creditor does not need to suffer a loss.

The parties can freely decide on the amount of the penal clause. The penal clause does not depend on the amount of the loss.31 If the parties determine the penal clause lower than the damage, the creditor can demand the damage exceeding the penalty clause, given that the obligor is faulty.32

If the amount of the penal clause is determined excessively, a judge is authorised to reduce it. The merchant does not have the authority to demand a reduction from the court by claiming that the penal clause is excessive, because in commercial law, it is essential for

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28 Nomer, 201; Court of Cassation, 15th Chamber, 2015/5697, 2 February 2017 (www.yargitay.gov.tr).
29 Article 179 Paragraph 1 of the CO.
30 Article 179 Paragraph 2 of the CO.
31 Article 182 Paragraph 1 of the CO.
32 See also: İrem Yayvak Namli, Penal Clause in Labor Law, 149.
the trader to be prudent. However, in the doctrine and the Court of Cassation judgments, it is accepted that if the penal clause is so high as to cause the economic ruin of the merchant, parties may require a reduction from the judge.33

IX CONCLUSIONS

Turkey is a representative of the civil law system concerning private law and has a very liberal view shaped around freedom of contract in that context. Turkish contract law contains robust solutions for the conclusion of a contract, its invalidity or the consequences of the contractual debts not being fulfilled at all or improperly, and to compensate for the damage that the parties may incur. Likewise, Turkish doctrine and judicial decisions on this issue are very rounded.

The resolution of commercial disputes is carried out entirely by specialised commercial courts. At this point, it should also be noted that the Turkish civil litigation also has a liberal perspective; it is based on fundamental principles that guarantee the independent functioning of the judiciary. This point of view is reinforced by the idea of full integration of mediation and arbitration especially into commercial dispute resolutions so that parties can resolve disputes between them in a very wide area.

33 Cour of Cassation, 19th Chamber, 4335/157027 13 December 2016. Oğuzman / Öz, 555; T ekinay/ Akman/Burcuoğlu/Altop, 357; Yayvak Namli, 180-182.
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 long-standing, 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 colours 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 defences 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.

1 Mark P Guerrera and Robert D Keeling are both partners at Sidley Austin LLP.
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.3 Like many jurisdictions, including Virginia, DC follows the objective view of contracts.3 Thus, both intent to be bound, and agreement to material terms, are objective inquiries.4

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.5 Agreement to material terms is met when each party assents to ‘the essential terms of the contract’.6 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’.7

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’.8 ‘An exchange of promises provides sufficient consideration, evidencing mutual obligation’.9

The elements in Virginia are similar: ‘there must be a complete agreement including acceptance of an offer as well as valuable consideration’.10 ‘Complete agreement’ is the Virginia equivalent of ‘meeting of the minds’.11 Under Virginia’s objective approach,12 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’.13

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’.14 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

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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.
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

15 See Ashrafi, 193 A.3d at 131; Kramer Assocs., Inc. v. Ikam, 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. Gott 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 D.C. uses the term quantum meruit to encompass 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 (‘Quantum meruit [claims] encompass[] both implied-in-law obligations (‘quasi contracts’) as well as implied-in-fact contracts.’ (alterations in original) (internal quotations omitted)). In Virginia, on the other hand, quantum meruit is used in a narrower sense, to refer to the measure of recovery that is available when the plaintiff establishes the existence of an implied-in-fact contract. See T. Musgrove Constr. Co., Inc. v. Young, 840 S.E.2d 337, 341 (Va. 2020) (holding quantum meruit was not available where plaintiff failed to show the existence of an implied-in-fact contract).
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).
to repay [the plaintiff]; and (3) [the defendant] accepted or retained the benefit without paying for its value.\textsuperscript{22} 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.’\textsuperscript{23}

Unjust enrichment claims operate in the absence of a valid contract.\textsuperscript{24} ‘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.’\textsuperscript{25} 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.’\textsuperscript{26}

Of the two, only DC recognises the doctrine of promissory estoppel.\textsuperscript{27} 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.\textsuperscript{28} Like unjust enrichment, promissory estoppel is an equitable remedy.\textsuperscript{29} Courts will only apply it if ‘injustice otherwise [would] not [be] avoidable.’\textsuperscript{30} 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.\textsuperscript{31} Similarly, DC has also held that

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\item \textsuperscript{22} Schmidt v. Household Fin. Corp., II, 661 S.E.2d 834, 838 (Va. 2008).
\item \textsuperscript{24} See Falconi-Sachs v. LPF Senate Square, LLC, 142 A.3d 550, 556 (DC 2016) (per curiam); CGI Fed, Inc. v. FCi Fed., Inc., 814 S.E.2d 183, 190 (Va. 2018). Recently, the Virginia Supreme Court offered helpful guidance on the contours of when an unjust enrichment claim will be barred by a valid contract. James G. Davis Constr. Corp. v. FTJ, Inc., 841 S.E.2d 642, 648 (Va. 2020). The Court observed that ‘unjust enrichment is not precluded where a valuable performance has been rendered under a contract that is invalid, or subject to avoidance, or otherwise ineffective to regulate the parties obligations.’ Id. (internal citation and quotations omitted). Applying those principles to the case at hand, the Court held that ‘[t]he expressly limited contract here does not foreclose a claim for unjust enrichment when that claim falls outside of the plain terms of the agreement.’ Id.
\item \textsuperscript{25} Falconi-Sachs, 142 A.3d at 556 (internal quotations omitted); CGI Fed., 814 S.E.2d at 190 (‘The existence of an express contract covering the same subject matter of the parties’ dispute precludes a claim for unjust enrichment.’).
\item \textsuperscript{26} Peart, 972 A.2d at 814 (internal quotations omitted); see Belcher v. Kirkwood, 383 S.E.2d 729, 730 (Va. 1989) (noting equitable nature of unjust enrichment); Po River Water & Sewer Co. v. Indian Acres Club of Thornburg, Inc., 495 S.E.2d 478, 482 (Va. 1998) (same); Fid. Nat’l Title, 87 Va. Cir. 77 (referring to claim for unjust enrichment as being based on ‘equitable principles’).
\item \textsuperscript{27} Mongold v. Woods, 677 S.E.2d 288, 292 (Va. 2009) (‘In a trio of cases decided on the same day in 1997, we observed that . . . a [promissory estoppel] cause of action had never been held to exist in the Commonwealth and we expressly declined to create such a cause of action. We have not altered that position.’ (internal citations omitted)). But see Pierce v. Wells Fargo Bank, 85 Va. Cir. 32 (2012) (calling it ‘questionable’ whether promissory estoppel is recognised in Virginia).
\item \textsuperscript{28} See Simard v. Resolution Tr. Corp., 639 A.2d 540, 552 (DC 1994).
\item \textsuperscript{29} See Macu v. Stockard, 580 A.2d 1011, 1035 (DC 1990).
\item \textsuperscript{30} See Kassman v. Int’l Bhd. of Teamsters, 950 A.2d 44, 49 n.7 (DC 2008) (alterations in original) (internal quotations omitted); Bender v. Design Store Corp., 404 A.2d 194, 196 (DC 1979).
\item \textsuperscript{31} See Macu, 580 A.2d at 1034.
\end{itemize}
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 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 ‘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’.

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32 See, e.g., Kauffman, 950 A.2d at 49.
33 See id.
34 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).
35 Palmer & Palmer Co. v. Waterfront Marine Constr., Inc., 662 S.E.2d 77, 80 (Va. 2008); Tauber, 938 A.2d at 729.
36 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]ts plain meaning [is] . . . thus a question of law for the court, not a question of fact for the jury’).
37 Tauber, 938 A.2d at 729 (internal quotations omitted); see Babcock, 788 S.E.2d at 249.
38 See Holland v. Hannan, 456 A.2d 807, 815 (DC 1983); Babcock, 788 S.E.2d at 249.
39 See Holland, 456 A.2d at 815; cf. Babcock, 788 S.E.2d at 249.
40 Holland, 456 A.2d at 815 (internal quotations omitted); James River Ins. Co. v. Doswell Truck Stop, LLC, 827 S.E.2d 374, 376 (Va. 2019).
41 Holland, 456 A.2d at 815 (internal quotations omitted); see Babcock, 788 S.E.2d at 234-44.
43 See Abdelrhman, 76 A.3d at 888 (internal quotations omitted); Virginia Elec., 618 S.E.2d at 326-27.
Notably, DC courts have struggled to consistently define what qualifies as extrinsic evidence.\(^{44}\) Language from some cases indicates that anything outside of the contractual language is extrinsic, while other cases allow evidence of ‘context’.\(^{45}\) The cases that allow contextual evidence do so by defining context as non-extrinsic evidence.\(^{46}\) 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.’\(^{47}\) They then define extrinsic evidence narrowly, as ‘direct evidence as to what a particular party intended the language to mean, a subjective question.’\(^{48}\) 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.\(^{49}\)

Lastly, both jurisdictions courts apply \textit{contra proferentem} – the canon that ambiguities in a contract are construed against the drafter.\(^{50}\) 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’.\(^{51}\) Virginia courts will apply the canon only ‘[i]f the plain meaning is undiscoverable’.\(^{52}\) The canon is commonly referenced by Virginia courts in insurance cases.\(^{53}\)

\section*{IV DISPUTE RESOLUTION}

\subsection*{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’.\(^{54}\) 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’. 55 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’. 56

ii Arbitration clauses 57

In 2008, DC adopted the Revised Uniform Arbitration Act (RUAA). 58 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’. 59 The party seeking arbitration bears the burden of showing the agreement is valid. 60 Challenges to the validity of an arbitration clause are typically for a court to decide. 61 But challenges to the contract generally will likely be resolved by an arbitrator. 62 Notably, the RUAA ‘preserves the . . . severability doctrine’. 63 ‘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.’ 64

Virginia, on the other hand, has not adopted the RUAA. 65 Virginia’s arbitration statute (the Virginia Uniform Arbitration Act, or VUAA) is an adoption of the Uniform Arbitration Act. 66 Additionally, in Virginia, ‘[t]he law of contracts governs the question whether there exists a valid and enforceable agreement to arbitrate’. 67 A valid agreement to arbitrate must

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55 See Yazdani, 941 A.2d at 433.
56 Id. (alteration in original) (quoting Sinochem Int’l Co. v. Malay. Int’l Shipping Corp., 549 U.S. 422, 432 (2007)).
57 This section does not address the Federal Arbitration Act, which covers a broad range of arbitration proceedings.
59 DC Code § 16-4406(a).
60 See Johansson v. Gent. Propps., LLC, 320 F. Supp. 3d 218, 221 (D.D.C. 2018). Despite D.C.’s ‘strong preference favoring arbitration when a contract contains an arbitration clause,’ arbitration clauses can still be waived. See TRG Customer Sols., Inc. v. Smith, 226 A.3d 751, 755 (D.C. 2020) (‘[I]f any contract right, the right to arbitrate may be waived – either expressly or by implication.’). In fact, ‘[a] party to a lawsuit can effect such a waiver by actively participating in the litigation or by taking other actions inconsistent with the right to arbitrate.’ Id. TRG clarified that any participation in the litigation beyond the minimum necessary to avoid entry of default – e.g., filing an answer to the complaint – is likely ‘so inconsistent with the assertion of a right to arbitrate as to waive such a right.’ Id.
61 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.’).
62 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).
63 Menna, 987 A.2d at 465 n.30 (internal quotations omitted).
64 Johansson, 320 F. Supp. 3d at 221 (omission in original) (internal quotations omitted).
65 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.

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. The third element – breach – is satisfied if ‘a party fails to perform when performance is due’. When a contract fails to specify a time for performance, DC law implies that performance must be made within a ‘reasonable time’. Additionally, DC and Virginia recognise the doctrine of anticipatory 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’.

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’. But courts are wary not to push this requirement to ‘extreme limits’. They recognise that ‘[a]ll agreements have some degree of indefiniteness and some degree of uncertainty’. Thus, the material terms need not be ‘fixed with complete and perfect certainty’. Rather, an enforceable contract need only have

68 id.
69 id.
70 id.
74 Wash. Natl’s, 192 A.2d at 586 (internal quotations omitted); see Bennett v. Sage Payment Solns., Inc., 710 S.E.2d 736, 740-41 (Va. 2011); see also Sangaran v. Sachdeva, 843 S.E.2d 754, 757 (Va. Cir. 2020) (‘When one party has anticipatorily repudiated a contract, the other has the right (1) [t]o rescind the contract altogether, (2) to elect to treat the repudiation as a breach, either by bringing suit promptly, or by making some change of position; or (3) to await the time for performance of the contract and bring suit after that time has arrived.’ (internal quotations omitted) (alteration in original)).
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.
‘[r]easonable definiteness in [its] essential terms’

essential terms must be sufficiently concrete for a ‘court to determine whether a breach has occurred and to identify an appropriate remedy’.

ii Statute of limitations

The statute of limitations is frequently raised as a defence in contract litigation. Subject to exceptions, the limitations period begins to run when the breach of contract occurs. In DC, an aggrieved party generally has three years from that time to file a lawsuit. Virginia applies a three-year limit to unwritten contracts, and a five-year limit to written contracts ‘signed by the party to be charged’.

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’. Both jurisdictions will 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.

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).
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 Osborne, 904 A.2d at 340-41.
88 See id. at 341.
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. 89 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. 90

In Virginia, ‘[t]he meaning of the phrase public policy is vague and variable; courts have not exactly defined it.’ 91 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. 92 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’. 93 For example, although Virginia courts have held that ‘pre-injury release provisions relating to personal injury’ are void, 94 they have not been willing to void provisions that indemnify a party from personal injury liability. 95

v Impossibility 96

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

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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 ‘agree[ment] 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 Esites Express, 641 S.E.2d at 478-79.

95 See id. at 478-80.

96 DC courts generally treat impossibility and impracticability as interchangeable. E. Capitol View Cnty. 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).
contract to assume the risk of performance’. The defence will be successful only in limited circumstances: a ‘mere inconvenience or unexpected difficulty’ is not enough to excuse contractual obligations under this defence.

vi Accord and satisfaction

The last defence 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. A common example of this doctrine is cashing a check that says ‘payment in full’. In that situation, the creditor’s decision to cash the check may operate as acceptance of the alternative payment. Importantly though, a genuine dispute is a prerequisite. An accord and satisfaction defence 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. When an accord and satisfaction claim fails, courts will likely deduct the amount paid from the plaintiff’s damages.

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’. DC
courts impose a ‘very high standard on sophisticated business entities claiming fraudulent inducement in arms-length transactions’. 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’. 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’. 108 Restitution ‘is based upon the principle of unjust enrichment’ and ‘require[s] the wrongdoer to restore what he has received’. 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. 110 Compensatory damages are generally limited to those damages that ‘are the natural consequence and proximate result of [the breaching party’s] conduct’. 111 Additionally, although ‘mathematical certainty’ is not required, ‘there must be some reasonable basis on which to estimate damages’. 112

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

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 Ingher v. Rossi, 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.

and assume[d] the character of a willful tort’.\textsuperscript{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.\textsuperscript{115}

\section*{II \hspace{1em} \textbf{Liquidated damages}}

DC and Virginia recognise liquidated damages provisions and will enforce them if they do not constitute a ‘penalty’.\textsuperscript{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’\textsuperscript{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’.\textsuperscript{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’.\textsuperscript{119} This is especially true ‘[w]hen a liquidated damages provision is the product of fair arm’s length bargaining, particularly between sophisticated parties’.\textsuperscript{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’.\textsuperscript{121}

\section*{III \hspace{1em} \textbf{Specific performance}}

Specific performance is an ‘extraordinary equitable remedy’ that ‘rests in the discretion of the court’.\textsuperscript{122} It is most often employed in land-sale transactions,\textsuperscript{123} and is generally not available in addition to damages.\textsuperscript{124} 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.\textsuperscript{125}

\begin{itemize}
\item \textsuperscript{114} \textit{Den v. Den}, 222 A.2d 647, 648 (DC 1966); see \textit{Bernstein v. Fernandez}, 649 A.2d 1064, 1073 (DC 1991); \textit{Kamlar Corp.}, \textsuperscript{299} S.E.2d at 518.  
\item \textsuperscript{115} See \textit{Bernstein}, 649 A.2d at 1073-74 (denying punitive liability because ‘[n]o such merger occurred’); \textit{Kamlar Corp.}, \textsuperscript{299} S.E.2d at 518.  
\item \textsuperscript{116} See \textit{Proulx v. 1400 Pennsylvania Ave., SE, LLC}, 199 A.3d 667, 673 (DC 2019); \textit{Boots, Inc. v. Singh}, 649 S.E.2d 695, 697 (Va. 2007).  
\item \textsuperscript{117} \textit{Boots}, 649 S.E.2d at 697 (internal quotations omitted).  
\item \textsuperscript{118} \textit{Proulx}, 199 A.3d at 673.  
\item \textsuperscript{119} id. (internal quotations omitted).  
\item \textsuperscript{120} id. at 674 (alteration in original) (internal quotations omitted).  
\item \textsuperscript{121} \textit{S. Brooke Purll, Inc. v. Votiles}, 850 A.2d 1135, 1138 (DC 2004) (internal quotations omitted); \textit{Boots}, 649 S.E.2d at 697.  
\item \textsuperscript{122} \textit{Indep. Mgmt. Co. v. Anderson & Summers, LLC}, 874 A.2d 862, 867, 870 (DC 2005) (internal quotations omitted); see generally \textit{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 \textit{Millman v. Swan}, 127 S.E. 166 (Va. 1925)).  
\item \textsuperscript{123} See \textit{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., \textit{Callison}, 826 S.E.2d at 320.  
\item \textsuperscript{124} See \textit{Sanders}, 184 A.3d at 350; \textit{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)).  
\item \textsuperscript{125} \textit{Indep. Mgmt. Co.}, 874 A.2d 870 (internal quotations omitted); see generally \textit{Callison}, 826 S.E.2d at 320 (‘He who seeks specific performance bears the burden of proving [ ] that there is a definite contract and
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 defences 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.

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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Julie holds a Ministerial appointment to the board of semi-state company, Coillte. She is a Council member of the Irish Commercial Mediation Association. 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. She was named Client Choice Award Winner for Asset Recovery (Ireland) in 2020.

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Mert Namli works as an associate professor at Istanbul University’s Faculty of Law.

Mert’s field of academic expertise is the law of civil procedure, alternative dispute resolution, executive and bankruptcy law. Mert has been awarded with many national rewards in the academic field up until today. Among them, the 2009 Turkish Industry and Business Association (Tüsiad) Best Young Jurist Award and the 2007 Atatürk Award can be cited. He has also written many books and articles in Turkish and English related to this field.

Mert has been working as an expert in the commercial courts and as a trustee in bankruptcy procedures for about 10 years. Thus, he has experience of the judicial process and the course of execution and bankruptcy procedures in Turkey.

Mert provides legal consultancy to national and international companies, particularly on the law of contracts, the law of civil procedure, arbitration and mediation, execution and
bankruptcy procedure and on the remedies to be applied by enterprises that are in economic
difficulty, in both Turkey and internationally. In addition, Mert is an active member of the
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Andreas Natterer has been a partner at Schoenherr since 2008, where he specialises in litigation,
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He has 27 years of experience in commercial litigation, with a focus on claims arising out of
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Thomas Nigg is a Liechtenstein lawyer and citizen, currently practising in Vaduz. He studied
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his executive master of laws (LLM) in corporate, foundation and trust law at the University of
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Fiorella is a senior associate and joined Herbert Smith Freehills in March 2018. Fiorella has
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Fiorella is fluent in English and Spanish and holds an advanced certificate in international
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Mr Palacios was admitted to practise law by the Panamerican University (2004), with a
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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 organizations, 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. Stavros represents shareholders in internal
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Katerina Philippidou is a senior associate in the dispute resolution department of Patrikios Pavlou & Associates LLC. Katerina obtained her law degree from the University of Leicester in 2006 and then continued to become a barrister at law at Lincoln's Inn in 2007. After her studies in the United Kingdom, she returned to Cyprus and was admitted to the Cyprus Bar Association the following year. She subsequently returned to the United Kingdom and acquired an LLM in international financial law from King's College London in 2009. She authored several articles on anti-money laundering, international arbitration and dispute resolution matters. Katerina specialises in civil and commercial local and multi-jurisdictional litigation, including shareholder disputes, recognition and enforcement of foreign judgments and arbitral awards, injunctive reliefs and arbitration proceedings, as well as insolvency and receivership proceedings.

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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. Karen has a broad financial services and commercial dispute resolution practice. She regularly advises clients in relation to contentious regulatory matters, investigations,
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Karen also 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
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He is an AFSA accredited mediator and arbitrator.

Jonathan’s practice is geared towards alternative dispute resolution, in particular
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parties in complex contractual and corporate disputes (including M&A, joint venture, and
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tracing and recovery and the enforcement of foreign judgments and arbitral awards. The
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MYRIA SAARINEN
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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 and 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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Johannes Sander is an Austrian citizen, currently practising as a lawyer in Vaduz. He studied law at Sheffield Hallam University, UK, and the University of Innsbruck, Austria, where he earned his master’s degree in law (Mag iur) in 2011. In 2012, he began practising as an associate in Austria and passed the Austrian Bar exam in 2015. After that, he joined Gasser Partner Attorneys at Law. Johannes passed his Liechtenstein Bar exam in 2018 and is admitted to the Liechtenstein Bar. Johannes was appointed partner at Gasser Partner Attorneys at Law in 2020. His main areas of practice include civil law, criminal law, corporate law and foundation and trust law as well as litigation.

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Dr Maximilian Sattler is a senior associate and practices in the areas of domestic and international commercial litigation and arbitration. He joined Baker & McKenzie’s dispute resolution practice group in 2013. Dr Sattler’s commercial litigation practice covers disputes arising from investment consulting and cartel infringements. In arbitration matters, he mainly focuses on large construction projects such as industrial power plants, and on post-M&A disputes.

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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,
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Prudence Smith is of counsel 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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Xeauwei’s areas of expertise encompass corporate litigation and international arbitration.

She has substantial experience handling banking disputes, shareholders’ disputes, trust and property disputes and commodities disputes, including as lead counsel in the Singapore High Court, International Commercial Court and Court of Appeal as well as in international arbitrations. 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 being ‘clear and concise’ and 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 as one of the top 10 individuals of her year’s cohort.

**DAN TERKILDSEN**

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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 as a leader 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.

PAUL E VEITH

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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 US$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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Carles Vendrell joined the Madrid office of Uría Menéndez in 2009 and became a partner of the firm in 2019. From September 2011 to February 2012 he was seconded to the Frankfurt office of Hengeler Mueller. He is a civil law lecturer at the School of Law of the Autonomous University of Madrid. He also lectures on the master’s degree in information and communication technologies, social networks and intellectual property law at ESADE Business School, and on the master’s degree in intellectual property and new technologies law at the School of Law of the Autonomous University of Madrid.
His practice is focused on various areas of commercial litigation. Carles advises national and multinational companies on disputes concerning intellectual property, unfair competition, contract and tort law, and consumer protection matters.

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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 and as an attorney in California. Her practice has a particular focus on white-collar crime and investigations. She has represented individuals, companies and financial institutions in actions brought by the Serious Fraud Office and Financial Conduct Authority and has also acted for clients in commercial litigation in the High Court and Court of Appeal. She frequently conducts internal, cross-border investigations for clients across a range of sectors, including technology, financial services, pharmaceuticals and transportation. In addition to her white-collar work, Mair has experience in all manner of complex commercial litigation and has represented clients at every stage from initial pleadings through to trial and appeal.

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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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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 focuses his academic studies on the economic analysis of procedural law and is the author of a book on procedural contracts in Brazil. He joined the Pinheiro Neto Advogados litigation practice in 2011 and works with complex commercial, aviation, and civil litigation and pre-litigation cases.

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Appendix 2

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