

THE COMPLEX  
COMMERCIAL  
LITIGATION LAW  
REVIEW

Editor  
Steven M Bierman

THE LAWREVIEWS

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COMPLEX  
COMMERCIAL  
LITIGATION LAW  
REVIEW

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# PREFACE

I am privileged to be the editor of the inaugural edition of *The Complex Commercial Litigation Law Review*. This first edition 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 counter-parties go oft awry, businesses and their legal counsel in every jurisdiction must be familiar not only with the law governing commerce but also must be keenly aware of the legal issues that most frequently arise in commercial disputes.

I have had the good fortune to practise law for many years as a litigation partner of a global law firm, Sidley Austin LLP, in New York City, one of the world's great commercial and financial 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 inaugural volume. 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, the utility, of this volume is that, notwithstanding these differences, we have asked the authors to report on 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 towards minimising litigation risk, or simply

interested in learning more about this important area of law as related by a seasoned and savvy practitioner, we hope you will find this volume informative, instructive and enjoyable.

**Steven M Bierman**

Sidley Austin LLP

New York

November 2018

# AUSTRIA

*Sara Khalil and Andreas Natterer*<sup>1</sup>

## I OVERVIEW

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

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

## II CONTRACT FORMATION

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

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

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1 Sara Khalil is an associate and Andreas Natterer is a partner at Schoenherr Attorneys at Law.

2 Eschig/Pircher-Eschig, *Das österreichische ABGB – The Austrian Civil Code*, 206.

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.<sup>3</sup>

The consent to a contract must be declared freely, seriously, in a determined fashion and clearly as per Section 896 of the Austrian Civil Code. Offer and acceptance must be definite and must express the parties' intent to be legally bound by the effect of their declaration (declaration of will). The offer must be definite and precise if it includes any main contract points, such as goods and price for sales contracts.<sup>4</sup> 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 without simultaneous delivery, must be in the form of a notarial deed.

Especially where actual delivery of goods is required, preliminary agreements may be concluded. A preliminary agreement is the agreement to conclude a contract in the future. It is only binding if the main provisions of the actual main contract and the time of the conclusion of the main contract are determined. The parties may sue for the 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.<sup>5</sup>

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

### III CONTRACT INTERPRETATION

If the parties to a contract agree, there is no further need to interpret the contract. Even if the parties use a different term, the contract is concluded if the parties actually meant the very same (principle of *falsa demonstratio non nocet*).

Simple contract interpretation starts with the common literal meaning of the wording of the contract. If the contracts wording is not clear enough, or the parties in hindsight cannot agree what certain words mean or should have meant, the courts interpret the contract by applying the 'reliance theory' to determine the true intention of the parties at the time of the conclusion of the contract. The court aims to determine how the meaning of the declaration of intent could have been objectively understood by the recipient of this declaration.<sup>7</sup> Therefore, the wording of the contract primarily is the starting point, whereas the exercise of fair dealing must be considered as well. If the wording of the contract does not provide a succinct interpretation, non-mandatory statutory law may fill in any gaps of meaning. As a third step, supplementary interpretation is applied, 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.<sup>8</sup>

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3 Hausmaninger, *The Austrian Legal System* Fourth Edition, 251.

4 Perner/Spitzer/Kodek, *Bürgerliches Recht* Fifth Edition, 54 ff.

5 Perner in Schwimann/Kodek, *ABGB Praxiskommentar* Fourth Edition Section 936 ABGB Rz 21 ff.

6 Hausmaninger, *The Austrian Legal System* Fourth Edition, 254.

7 Perner/Spitzer/Kodek, *Bürgerliches Recht* Fifth Edition, 59 f.

8 Perner/Spitzer/Kodek, *Bürgerliches Recht* Fifth Edition, 61 f.

If interpretation cannot solve the vagueness of the contract, Section 915 of the Austrian Civil Code stipulates that if contracts are only obligatory for one party, it is assumed in doubt that the obliged party wanted to accept the lesser rather than the more cumbersome burden; in the case of contracts that are obligatory for both parties, an unclear expression is interpreted to the detriment of the party who used such expression.<sup>9</sup> Thus, when drafting a contract it should be kept in mind that unprecise or ambiguous language, while often employed to give the parties certain flexibility in their dealings, could affect the party drafting the unprecise or ambiguous clause negatively in the end.

If the parties clearly dissent and the court cannot determine unequivocally the contract's reasonable meaning, the contract is void.

## IV DISPUTE RESOLUTION

### i Court system

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

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

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

The parties may appeal any first instance judgments within four weeks of the day the judgment was served. The appeal must be signed by a member of any of the nine regional Austrian Bar Associations. An appeal to the Supreme Court is only admissible if certain prerequisites are met, such as the value of the claim exceeding €30,000.<sup>10</sup>

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

In commercial law matters, especially business-related transactions where the defendant is registered in the company register, disputes between the shareholders of a company or between the company and its shareholders, product liability disputes and disputes with regard to cheques and bills of exchange, the competent courts are commercial courts.<sup>11</sup> 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.

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9 Eschig/Pircher-Eschig, *Das österreichische ABGB – The Austrian Civil Code*, 222.

10 Kodek/Mayr, *Zivilprozessrecht* Fifth Edition, margin 1089 ff.

11 Kodek/Mayr, *Zivilprozessrecht* Fifth Edition, margin 216 ff.

If a commercial claim or a labour claim is brought at a court not situated in 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 (Section 14 of the Consumer Protection Act). Furthermore, Regulation (EU) No. 1215/2012 ('Brussels 1a') must be taken into consideration.<sup>12</sup>

## iii Jurisdiction and arbitration clauses

Parties to a contract may agree on a different forum; however, in some cases the forum may not be selected (e.g., an entrepreneur's claim against a consumer). If another forum is selected, Austrian law provides that when in doubt such a new forum can only be a place of elective jurisdiction. Thus, a jurisdiction clause under Austrian law should include a phrase determining that the chosen forum is a 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.<sup>13</sup>

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.<sup>14</sup> The parties may also agree on a multi-tiered dispute resolution clause, as long as the multi-tiered clause is precise and not immoral; in particular, the duration of a mediation attempt (before bringing a claim in front of a state court) should not exceed six months, otherwise it might be argued that the clause delays the party's right to ordinary legal procedures.<sup>15</sup>

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12 As this chapter only covers Austrian law, we will not go into the EU Regulations.

13 Czernich in Czernich/Kodek/Mayr, *Europäisches Gerichtsstands- und Vollstreckungsrecht* Fourth Edition, Article 25 margin 96.

14 VIAC-Website <http://www.viac.eu/en/mediation-en/mediation-en> (last accessed on 25 September 2018).

15 Knoetzl/Schacherreiter, 'Schlichtungsvereinbarungen: Gültigkeit, Wirkung und Musterschlichtungsklausel' in *AnwBl* 2016, 445 [446 f].

#### **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 fixed at €500,000 the court fees amount to €9,488. Other than that, the prevailing party may recover its costs of legal representation in the proceedings (any court fees or costs of expert witnesses) based on the Austrian Lawyers Tariff Act.

#### **v Preparation of claim or evidence**

In order to bring a breach of contract claim, the injured party to the contract should gather any documentation of the contract and its execution, including, if available:

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

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

## **V BREACH OF CONTRACT CLAIMS**

Austrian contract and tort law is based on a fault-based liability, it presupposes wrongful behaviour. A claimant generally has to prove that a damage occurred and that it was caused by the other contracting party. Furthermore, the claimant carries the burden of proof of the unlawfulness of the other party's behaviour. In the case of contractual claims, the unlawfulness follows from the breach of the contract. As a fourth step, the defendant's fault has to be proven.

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

Secondly, usually the injured party has to prove that the other party is at fault; nevertheless, contractual liability differs, because in this case the injuring party has to prove that it is not at fault. This reversal of the burden of proof only applies to minor negligence.

Thirdly, pecuniary loss is not compensated in tort.

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

#### **i Non-performance**

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

impossible consideration, or rescind the contract and demand the balance between its own performance and due consideration. Moreover, the infringing party may claim damages for any disadvantages suffered by the contracts non-performance.<sup>16</sup>

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).<sup>17</sup> If the party in delay of performance is at fault, the injured party may additionally claim for damages caused by delay.

## iii Warranties

Statutory warranty against defects applies to any non-gratuitous contract under Austrian law. Statutory warranty must not be mistaken for a contractual guarantee (or warranty). Section 922 of the Austrian Civil Code stipulates that the party selling goods is liable for the asset having the agreed or generally assumed qualities, that it must conform with its description, a sample or a model and that it can be used in line with the nature of the transaction or the concluded agreement.<sup>18</sup> Thus, any deviation from the contractually agreed service or goods, or what is usually expected from the contracted services or goods, may be a defect. There are defects of legal title and quality or quantity defects. In the first case, the debtor failed to transfer the promised right (partially or fully); in the second case, the debtor does not deliver enough or insufficient quality of goods. According to Section 924 of the Austrian Civil Code, it is presumed that any defects appearing within six months from the date of delivery were already present at the time of delivery. The debtor then has to prove that the defect did not exist at that time, which is immensely 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 a rescission of the contract.

In recent years, the Supreme Court has ruled that a party that repairs or replaces contracted goods or services before the debtor has been given a second chance to perform any warranty work, has to pay the full price, but does not have to pay the amount that the debtor saved by not repairing or replacing the contracted goods or services.<sup>19</sup>

In accordance with statutory law, entrepreneurs must give the other party notice of any defects within an appropriate time frame, otherwise the right of warranty or damage claim

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16 Perner/Spitzer/Kodek, *Bürgerliches Recht* Fifth Edition, 168.

17 Gruber in Kletečka/Schauer, *ABGB-ONI.04* Section 918 margin 5 ff.

18 Eschig/Pircher-Eschig, *Das österreichische ABGB – The Austrian Civil Code*, 224.

19 Perner/Spitzer/Kodek, *Bürgerliches Recht* Fifth Edition, 183 ff.

relating to the defect is lost. Instead of making a warranty claim, a party may bring a damages claim instead; the advantage of a damage claim 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).<sup>20</sup> The warranty period for movables is only two years.

#### **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.<sup>21</sup>

#### **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 (*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 ensue from the discontinuance of the negotiations.<sup>22</sup> The injured party may then claim the damages the party suffered owing to its reliance on the conclusion of the contract.

## **VI DEFENCES TO ENFORCEMENT**

### **i Initial impossibility**

Evident initial impossibility of a contract, such as legally impossible or ridiculous (e.g., a sale contract regarding a unicorn) means that a contract cannot even be formed. The contract is void. If one party knew or had to know about the impossibility of the contract, the other party, who was unaware of the fact, may claim reliance interest.<sup>23</sup>

### **ii Subsequent impossibility**

Please see above (non-performance).

### **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.<sup>24</sup> If these circumstances change fundamentally (e.g., a major earthquake at a future holiday destination), the contract may be challenged.

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20 Perner/Spitzer/Kodek, *Bürgerliches Recht* Fifth Edition, 190 ff.

21 Hausmaninger, *The Austrian Legal System* Fourth Edition, 256.

22 Hausmaninger, *The Austrian Legal System* Fourth Edition, 251.

23 Perner/Spitzer/Kodek, *Bürgerliches Recht* Fifth Edition, 76.

24 Perner/Spitzer/Kodek, *Bürgerliches Recht* Fifth Edition, 98.

#### iv **Laesio enormis**

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

#### v **Limitation of liability**

Liability may be limited by party agreement; however, parties may not exclude any possible liability. Entrepreneurs may limit their liability in non-consumer contracts except for personal injuries, damage caused with intent and blatant gross negligence. Entrepreneurs may only limit their liability with regard to consumers for minor negligence.<sup>25</sup>

#### vi **Statute of limitation**

The Austrian Civil Code distinguishes between two limitation periods. The default limitation period is 30 years and applies if statutory law does not provide for a shorter (or seldomly longer) limitation period. A three-year period applies, for example, to damages claims, starting from the time the party becomes aware of the damage and the identity of the damaging party (Section 1489 of the Austrian Civil Code) as well as contractual damages claims such as damages for error, where the statute of limitation starts at the time of the conclusion of the contract.<sup>26</sup> The statutory warranty period is two years for movable objects and three years for immovable objects.

### VII **FRAUD, MISREPRESENTATION AND OTHER CLAIMS**

#### i **Illegality and immorality**

Section 879, Paragraph 1 of the Austrian Civil Code acts as a catch-all rule: a contract that violates a legal prohibition or public policy is void. According to jurisprudence, anything that contradicts the sense of justice of the legal community is immoral (against public policy). This leaves vast room for interpretation and hundreds, if not thousands, of examples of case law. A few impressions:

- a 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.<sup>27</sup>
- b Contractual penalties are immoral if they unduly impair the debtor's economic freedom of movement or clearly favour the creditor without cause.<sup>28</sup>

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25 Graf in Kletečka/Schauer, *ABGB-ON1.04* Section 879 margin 303 ff.

26 Perner/Spitzer/Kodek, *Bürgerliches Recht* Fifth Edition, 218.

27 Bollenberger in Koziol/Bydlinski/Bollenberger, *Kurzkomentar zum ABGB* Fifth Edition, Section 879 ABGB margin 5; OGH 29.11.2013, 8 Ob 112/13y.

28 OGH 20.06.2006, 4 Ob 113/06f; Bollenberger in Koziol/Bydlinski/Bollenberger, *Kurzkomentar zum ABGB* Fifth Edition, Section 879 ABGB margin 7.

- c* Risk transfer clauses are ineffective if they pass on an unforeseeable or nevertheless incalculable risk to the opponent without corresponding compensation.<sup>29</sup>
- d* 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.<sup>30</sup>
- e* Whether an immoral or illegal contract is deemed void or contestable depends on the graveness of the illegality or immorality; if a party has to claim illegality or immorality or if the court takes it up on its own depends on whether the contract is void or contestable.

## 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 may contest the agreement within three years after the threat is dropped.<sup>31</sup>

## iii Error

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

- 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).<sup>32</sup>

Entrepreneurs may exclude the assertion of a claim based on error between them upfront.

## VIII REMEDIES

Austrian law does not recognise the concept of punitive damages. Damages should compensate actual losses suffered and not as a punishment for wrongful behaviour of one party. Punishment for wrongful behaviour is only known in criminal law.

Section 1323 of the Austrian Civil Code provides that everything must be restored to its former condition or, if that is not possible, the estimated values has to be reimbursed to provide compensation for damage caused. Primarily, restitution in kind is in order; more often than not, restitution in kind is not possible or feasible. The Supreme Court has decided that restitution in kind is already unfeasible, if the injuring party's interest to provide monetary

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29 Bollenberger in Koziol/Bydlinski/Bollenberger, *Kurzkommentar zum ABGB* Fifth Edition, Section 879 ABGB margin 9.

30 OGH 22.02.2001, 6 Ob 322/00x; OGH 20.01.2016, 3 Ob 132/15f; Bollenberger in Koziol/Bydlinski/Bollenberger, *Kurzkommentar zum ABGB* Fifth Edition, Section 879 ABGB margin 7.

31 Section 870, 1487 Austrian Civil Code.

32 Perner/Spitzer/Kodek, *Bürgerliches Recht* Fifth Edition, 90 ff.

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.<sup>33</sup>

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 whether 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.<sup>34</sup>

Immaterial damage – any damage that cannot be measured in money, such as loss of reputation – is generally not compensable. Only in very specific instances does the Austrian Civil Code provide for such compensation; for example, compensation for pain and suffering or the lost enjoyment of one's holidays. Jurisprudence has been quite reluctant to grant any kind of immaterial damage; however, during the past few years, secondary opinion has discussed immaterial damage claims in connection with wrongful birth and mourning losses.<sup>35</sup>

Parties may also agree on contractual penalties. A contractual penalty should induce the debtor to perform the contract correctly and simplify the creditor's claim for damages from a breach of contract. It is due even if no damage has occurred at all, unless otherwise agreed. Although the contractual penalty is, in principle, only triggered if the debtor is at fault for non-performance or defective performance, a contractual penalty may be due in the event of a non-culpable breach of contract if the parties provide for it.<sup>36</sup> If the actual damages exceeds the contractual penalty, the excessive amount may be claimed among entrepreneurs. A mandatory judicial right of moderation exists.<sup>37</sup>

## IX CONCLUSIONS

The contractual provisions and concept described above have been developed during the past 200 years and have only been amended to adapt to modern law requirements, such as consumer law. Other than that, the main core of contract and commercial law has remained quite unchanged in the past 200 years (the Austrian Civil Code was introduced in 1812 and amended in 1914, 1915 and 1916). In this particular area, contract and damages law, no major overhauls have been performed by the legislator. A few years ago, an attempt was made to revise Austrian tort law in general; however, the attempt failed. Therefore, Austrian contract law only gradually changes whenever a new EU legislation case law requires it. Even though case law specifies certain issues, the main legal concepts remain the same. Whether certain clauses are immoral or abusive is mainly decided on a case-by-case basis. A definite trend is that courts have become increasingly consumer-friendly.

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33 Hinteregger in Kletečka/Schauer, *ABGB-ON1.04* Section 1323 margin 9-11.

34 Perner/Spitzer/Kodek, *Bürgerliches Recht* Fifth Edition, 297.

35 Hinteregger in Kletečka/Schauer, *ABGB-ON1.04* Section 1325 margin 1ff.

36 Danzl in Koziol/Bydlinski/Bollenberger, *Kurzkommentar zum ABGB5*, Section 1336 ABGB Rz 3;

37 Perner/Spitzer/Kodek, *Bürgerliches Recht* Fifth Edition, 155.

# BRAZIL

*Diógenes Gonçalves, Eider Avelino Silva, Gianvito Ardito and Pedro Ivo Gil Zanetti*<sup>1</sup>

## 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 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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<sup>1</sup> Diógenes Gonçalves is a partner, Eider Avelino Silva is a senior associate, Gianvito Ardito and Pedro Ivo Gil Zanetti are mid-level associates of Pinheiro Neto Advogados.

## 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 the elements of existence, validity and effectiveness. A contract exists when two or more parties manifest a consent in a way that creates obligations for at least one of them (although the creation of reciprocal obligations is more usual). A contract will only be valid, however, if it meets the legal requirements imposed by law:

- a* the parties must be capable of contracting by themselves or through their duly empowered legal representatives;
- b* the purpose and the object of the contract must be lawful, and its object must be possible to make material and be determined or determinable; and
- c* the contract must comply with the specific formalities required by law, if any.

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

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

- a* the performance of a contract may be deferred in time or be subject to conditions precedent or subsequent; and
- b* the contract may be effective for a limited period of time or up until the occurrence of a fact, after which, it will be automatically terminated.

If the parties agree that a contract will be effective during a certain predefined term, and if one of the parties decides to terminate it before such date, the counterparty may demand the specific performance of it or, subsidiarily, may claim an indemnification. However, if

parties set forth that the contract will be effective for an indefinite term, it may be terminated upon a prior notice, ordinarily without indemnification, unless parties define so or there are investments to be recovered.

### III CONTRACT INTERPRETATION

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

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

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

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

- a* a reduction in the obligation content as a result of the lapse of a long period without a certain right being exercised or a certain obligation being enforced by the parties; and
- b* an increase in the obligation content owing to the creation of a right that has not been originally agreed to.

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

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

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

#### IV DISPUTE RESOLUTION

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

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

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

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

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

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

- a* an enforcement proceeding, in which the judge grants a prompt order for the fulfilment of the defaulted obligation, the payment of the defaulted debt or the foreclosure of collaterals (if any), should the contract be deemed as an extrajudicial enforcement instrument privately constituted by the parties (e.g., promissory note; instrument executed by the debtor and two witnesses; contracts guaranteed by a bond, mortgage, pledge or other security) and if the defaulted obligation is liquid, certain and demandable;
- b* a monition action, that may be filed by the creditor when the instrument does not fulfil all the legal requirements to be considered as an extrajudicial enforcement instrument, but represents a written document issued by the debtor or guarantor acknowledging a certain debt or obligation. The monition action is similar to an enforcement proceeding if the debtor or guarantor fails to file a defence and is similar to an ordinary collection action if the guarantor does file such a defence; and
- c* an ordinary collection action, to be filed by the creditor in case it does not hold an extrajudicial enforcement instrument or if the title held by the creditor does not fulfil the requirements of liquidity, certainty and demandability. In this ordinary collection proceeding, the creditor will have to first constitute a judicial executive instrument to then be allowed to initiate the enforcement proceeding against the debtor (which may take from three to 10 years to occur, depending on the complexity of the underlying transaction).

Depending on the matter, contracts should set forth the forum selection, indicating the court with jurisdiction to rule any dispute arising out of the contract, including breaches and its enforcement. The parties may also set forth that the jurisdiction will be exclusive upon a certain court, excluding any other court.

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

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

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

## V BREACH OF CONTRACT CLAIMS

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

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

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

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

- a the supervening occurrence of an unforeseeable and extraordinary situation responsible for changing the original assumptions of the agreement; and

- 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 be notarised and the signature of the notary public must be legalised by a competent authority, in the case of apostillation, or authenticated by a Brazilian consulate, if the document emanated from a country that is not signatory to the Hague Convention of 5 October 1961, Abolishing the Requirement of Legalisation for Foreign Public Documents. If demanded by law, the plaintiff must also register the contract with the relevant office of the Registry of Deeds and Documents in Brazil.

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

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

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

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

The dynamic distribution of the burden of proof may also be agreed by the parties, before or during the lawsuit, as the Code of Civil Procedures allows the parties to allocate the burden of proof by themselves, provided that such an allocation does not impact an inalienable right or renders the exercise of a right by one of the parties extremely difficult. This provision is especially useful for domestic and transnational commercial agreements, improving legal certainty and avoiding the risks inherent to leaving that allocation at 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 broad a defence against the claim – regardless of whether it is made through an enforcement proceeding, motion 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 preemption, statute of limitation, *lis pendens* and *res judicata*. In the case of an enforcement proceeding, the immediate enforcement acts against the defendant will only be stayed if the defendant provides a guarantee in court in an amount sufficient to cover the amount under dispute plus court costs and attorneys' fees, and if the party evidences immediate risk of damage to its defence and rights.

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

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

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

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

The allegation of fortuitous event or force majeure is also possible. However, only events that were unforeseeable can serve as grounds to refute the party's liability.

Although the law authorises the submission of any defence, the parties should act based on good faith and ethics, and the filing of a defence that is against existing evidence and legal provisions is prohibited, and the party may be fined for abuse of process.

## **VII FRAUD, MISREPRESENTATION AND OTHER CLAIMS**

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

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

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

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

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

## **VIII REMEDIES**

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

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

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

The request of specific performance may be coupled with a request to the court to fix a periodical penalty to ensure that the counterparty will perform the defaulted obligation as set forth in the contract. The setting forth of a periodical penalty has shown high level 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 arisen 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 about 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 Commercial Code,<sup>2</sup> with relevant changes for commercial contracts and corporate daily activities.

The current economic environment in Brazil is that currency exchange rates have been fluctuating considerably and political turmoil linked to corruption investigations has 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.

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<sup>2</sup> Legislative Bill No. 1,572/2011.

# CANADA

*Alan H Mark and Jesse-Ross Cohen*<sup>1</sup>

## 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 that typically requires the losing party to pay a certain percentage of legal fees to the winning party.

Canadian law is subject to a distribution of legislative powers and responsibilities between the two main levels of government: federal and provincial.<sup>2</sup> Contract law, as a matter of civil rights, is under provincial jurisdiction.<sup>3</sup> There are 10 Canadian provinces, each with its own court system and jurisprudential history.<sup>4</sup> The laws of each province, however, although there are some differences as between them, 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).<sup>5</sup> 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.<sup>6</sup> 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.<sup>7</sup> With

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1 Alan H Mark is a partner, and Jesse-Ross Cohen is an associate at Goodmans LLP. The authors wish to acknowledge the contributions of Steve Inglis (student-at-law).

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 and Labrador. 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.

6 John D McCamus, *The Law of Contracts* (2nd ed) (Toronto: Irwin Law, 2012) ('McCamus on Contracts') at p. 31.

7 The old common law rule is that a 'peppercorn' of value will always be adequate. See, for example, *Shaw Production Way Holdings Inc. v. Sunvault Energy, Inc.*, 2018 BCSC 926 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.<sup>8</sup> Also further to the need for certainty, an acceptance must be unequivocal and affirmatively communicated to the offeror in order to be effective.<sup>9</sup> In all respects, contract formation is assessed objectively.<sup>10</sup>

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.<sup>11</sup> 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.<sup>12</sup>

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.<sup>13</sup> 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.<sup>14</sup> Most recently 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’.<sup>15</sup>

The same practical, fairness-oriented approach governs scenarios where parties make an agreement to engage in further negotiations. Although Canadian courts will not deviate

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- 8 McCamus on Contracts at 31. See also the discussion in *Copperthwaite v. Reed*, 2016 ONSC 1824 (S.C.J.), citing *Harvey v. Perry*, [1953] 1 S.C.R. 233, A.G. Guest, Chitty on Contracts (27th ed.) (UK: Sweet & Maxwell Ltd., 1994) at p. 100 and G.H.L. Fridman, *The Law of Contract in Canada* (6th ed.) (Toronto: Carswell, 2011) at p. 46.
- 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.
- 10 ‘The important question is not what the offeror intended but what the offeree reasonably understood by what the offeror did or said’: Swan on Contracts at 4.12. See also, for example, *Saint John Tug Boat Co. v. Irving Refinery Ltd.*, [1964] S.C.R. 614, [1964] S.C.J. No. 38 at 18–20.
- 11 Swan on Contracts 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 Frederickton 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. The Ontario Court of Appeal, for its part, recently declined to reconsider the enforceability of unilateral modifications but acknowledged that ‘the time might be ripe’ to do so: *Richcraft Homes Ltd. v. Urbandale Corp.*, 2016 ONCA 622 at 43.

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.<sup>16</sup> 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.<sup>17</sup> 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.<sup>18</sup>

As a general matter of law, contracts need not be in writing in order to be valid.<sup>19</sup> 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.<sup>20</sup>

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 that 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.<sup>21</sup> Provincial legislation also exists to ensure that the regular rules of contract are adapted as seamlessly as possible to new technological realities.<sup>22</sup> How this practical approach to the intersection of contract formation and technology is applied to blockchain 'smart contracts' by Canadian courts will be of particular interest in 2019 and beyond.<sup>23</sup>

16 Swan on Contracts at 4.165.

17 Swan on Contracts at 4.156 and 4.162–4.164. For example, in a case where the parties are already in a landlord-lessee relationship and agree to renew such arrangement at 'the market rate prevailing...as mutually agreed': *Empress Towers Ltd. v. Bank of Nova Scotia*, [1990] B.C.W.L.D. 2293, [1990] C.L.D. 1089 (C.A.).

18 Swan on Contracts at 4.148.

19 Obviously, this is not the general commercial practice.

20 See, for example, the legislation in Ontario: Statute of Frauds, R.S.O. 1990, Chapter S.19; in British Columbia: Law and Equity Act, [RSBC 1996] Chapter 253 at 59(1).

21 Guided by Lord Wilberforce of the United Kingdom House of Lords, who noted that '[n]o universal rule can cover all such cases: they must be resolved by reference to the intentions of the parties, by sound business practice and in some cases by a judgment where the risks should lie.' Barry B Sookman, *Computer, Internet and Electronic Commerce Law*, Chapter 10.7 – 'Time And Place Of Contract Formation', citing *Brinkibon v Stahag Stahl und Stahlwarenhandels GmbH*, [1983] 2 A.C. 34; [1982] 2 W.K.R. 264 (H.L.). See also, citing *Brinkibon*, Swan on Contracts.

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.'

22 See, for example, the Electronic Commerce Act, 2000, S.O. 2000, c. 17. This statute codifies, among many other things, that contract is not invalid or unenforceable by reason only of being in electronic form.

23 See: Kim Nayer, *Blockchain: Lawyers, Take Note*, 25 May 2017, accessed online ([www.cba.org](http://www.cba.org)); Ann Macaulay, *Smart Contracts: Coming Soon To A Law Firm Near You*, 26 February 2018, accessed online ([www.cba.org](http://www.cba.org)).

### 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.<sup>24</sup> To determine the parties' objective intentions, courts look foremost to the plain meaning of the language expressed in the contract,<sup>25</sup> 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.<sup>26</sup> Canadian courts avoid rigid constructions or findings of ambiguity<sup>27</sup> in favour of treating the words as flexible instruments meant to achieve a particular purpose; that is, they will seek to reconcile disputes by adopting an interpretation that accords with the overall business purpose of the provision or 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,<sup>28</sup> and probative to the extent that considering it deepens the analysis by providing context and does not inform an interpretation that 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.<sup>29</sup>

As the interpretive exercise is objective, the subjective intentions of parties are not relevant.<sup>30</sup> 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

24 *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.

25 There is a 'cardinal presumption' that parties intended what they said in the contract: *Ventas Inc. v Sunrise Senior Living Real Estate Investment Trust*, 2007 ONCA 205 at 24; *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.

26 *Nortel Networks Corp., Re*, 2016 ONCA 332 at 58.

27 Pursuant to a 'practical, common-sense' approach mandated by the Supreme Court of Canada: *Creston Moly Corp. v Sattva Capital Corp.*, 2014 SCC 53 at 47.

28 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 Marketing*, 2017 ABCA 157 at 129; *Seven Oaks Inn Partnership v. Directcash Management Inc.*, 2014 SKCA 106; *Langley Lo-Cost Builders Ltd. v. 474835 B.C. Ltd.*, 2000 BCCA 365 at 29.

29 *Creston Moly Corp. v Sattva Capital Corp.*, 2014 SCC 53 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.

30 *Eli Lilly & Co. v. Novopharm Ltd.*, [1998] 2 S.C.R. 129 at 54–59.

contract that has been wholly reduced to writing.<sup>31</sup> This rule, however, is subject to myriad exceptions.<sup>32</sup> Notably, moreover, the rule does not preclude evidence adduced as part of the factual matrix.<sup>33</sup>

Another relevant principle of interpretation is that Canadian courts will seek to promote commercial efficacy.<sup>34</sup> Interpretations that make ‘no commercial sense’<sup>35</sup> or result in a commercial absurdity<sup>36</sup> will be strenuously avoided, while interpretations that ‘allow the contract to function and meet the commercial objective in view’ will be preferred.<sup>37</sup> 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).<sup>38</sup> Second, the principle of commercial reasonableness will not save a party from a bargain that, although commercially sensible at the time of contract, has proven to be improvident or disadvantageous.<sup>39</sup>

Where commercial reasonableness has conflicted with a plain reading of the words of a contract, courts have taken inconsistent approaches.<sup>40</sup> 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.<sup>41</sup> In Manitoba, by contrast, the Court of Appeal has ruled that where ‘a tension that 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’.<sup>42</sup> The Alberta Court of Appeal has phrased the test differently yet again, holding that an interpretation that ‘defeats

31 *Creston Moly Corp. v. Sattva Capital Corp.*, 2014 SCC 53 at 58.

32 Swan on Contracts at 3.1.2. The exceptions include evidence adduced to: (1) show that the contract was invalid due to fraud, misrepresentation, incapacity, lack of consideration or lack of contracting intention; (2) dispel ambiguities in the written text; (3) support a claim for rectification; (4) establish a condition precedent; (5) establish a collateral agreement; (6) support an allegation that the contract does not constitute the entire agreement between the parties; (7) support a claim for an equitable remedy; and (8) support a claim in tort that an oral statement was in breach of the duty of care.

33 *Creston Moly Corp. v. Sattva Capital Corp.*, 2014 SCC 53 at 59–60.

34 *Salah v. Timothy’s Coffees of the World Inc.*, 2010 ONCA 673 at 16; *Kentucky Fried Chicken Canada v. Scott’s Food Services Inc.*, [1998] O.J. No. 4368 (CA) at 27. This is in keeping with the ‘practical, common-sense’ approach mandated by the Supreme Court in *Sattva: Warburg-Stuart Management Corp. v. DBG Holdings Inc.*, 2015 ONSC 1594 at 30.

35 *Lauderdest Developments Ltd. v. Rottenberg*, [2004] O.J. No. 140 (S.C.J.) (aff’d [2004] O.J. No. 4708 (C.A.), leave to appeal to SCC ref’d [2005] SCCA No 207) at 17.

36 *Kentucky Fried Chicken Canada v. Scott’s Food Services Inc.*, [1998] O.J. No. 4368 (C.A.) at 27.

37 *Humphries v. Lufkin Industries Canada Ltd.*, 2011 ABCA 366 at 15, citing *Consolidated Bathurst Export Ltd. v. Mutual Boiler & Machinery Insurance Co.*, [1979] S.C.J. No. 133 at 12–13.

38 *King v. Operating Engineers Training Institute of Manitoba Inc.*, 2011 MBCA 80 at 75; *Kentucky Fried Chicken Canada v. Scott’s Food Services Inc.*, [1998] O.J. No. 4368 (C.A.) at 27; *Hunt River Camps/Air Northland Ltd. v. Canamera Geological Ltd.*, [1998] N.J. No. 325, 168 Nfld. & P.E.I.R. 207 (C.A.) at 28.

39 See, for example, *Northbrook Resources v. ExxonMobil Canada Energy*, 2017 SKCA 60 at 22.

40 Hall on Interpretation at 63–65.

41 As noted by Hall on Interpretation 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.

42 As noted by Hall on Interpretation at 65, citing *Nickel Developments Ltd. v. Canada Safeway Ltd.*, 2001 MBCA 79 (‘Nickel Developments’) at 34–35, citing *Mannai Investment Co. v. Eagle Star Life Assurance Co.*, [1997] 3 All E.R. 352 (Eng. H.L.) (‘*Mannai*’) at p. 964.

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 that promotes a sensible commercial result'.<sup>43</sup>

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.<sup>44</sup> 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.<sup>45</sup> Similarly relevant is objective evidence regarding the genesis 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.<sup>46</sup>

Generally, provisions that prescribe a governing law are effective.<sup>47</sup> 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*).<sup>48</sup> 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).<sup>49</sup>

#### 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).<sup>50</sup> One other common

43 *Bears paw Petroleum Ltd. v. EnCana Corp.*, 2011 ABCA 7 at 24, citing *Mannai* and *Nickel Developments*.

44 See, for example, *King v. Operating Engineers Training Institute of Manitoba Inc.*, 2011 MBCA 80 at 80; *Glaswegian Enterprises Inc. v. BC Tel Mobility Cellular Inc.*, [1997] B.C.J. No. 2946, 101 B.C.A.C. 62 (C.A.) at 18–19.

45 Geoff Hall, *Canadian Contractual Interpretation Law* (3rd) (Toronto: LexisNexis, 2016) at 122. Generally this will need to be established by expert evidence.

46 See: *Creston Moly Corp. v. Sattva Capital Corp.*, 2014 SCC 53, [2014] 2 S.C.R. 633 (S.C.C.) at 47 and *Kentucky Fried Chicken Canada v. Scott's Food Services Inc.*, [1998] O.J. No. 4368, 114 O.A.C. 357 (C.A.) at 25, approving *Reardon Smith Line Ltd. v. Yngvar Hansen-Tangen*, [1976] 1 W.L.R. 989 at 995–96 (U.K.H.L.).

47 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).

48 *Yugranefit Corp. v. Rexx Management Corp.*, 2010 SCC 19 at 27, citing *Tolofson v. Jensen*, [1994] 3 S.C.R. 1022, [1994] S.C.J. No. 110 at 74–89.

49 *Tolofson v. Jensen*, [1994] 3 S.C.R. 1022, [1994] S.C.J. No. 110 at 85–86 and 89.

50 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 1 July 2014 at Part II(1).

law province, Alberta, houses its own Commercial List.<sup>51</sup> 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’.

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 and there is no ‘strong cause’ for why it should not be enforced.<sup>52</sup> This approach should continue in light of the recent decision of the Supreme Court of Canada in *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.<sup>53</sup>

Another ‘forum’ that parties may select is arbitration, the use of which has significantly increased in popularity in Canada in recent years. Unlike civil litigation generally, arbitration can be private (subject to the parties’ agreement); and with the number of sophisticated counsel and former judges in the ranks of Canadian arbitrators,<sup>54</sup> arbitration is far from a ‘second-class’ method of dispute resolution in Canada.<sup>55</sup> This trend has been encouraged by Canadian courts and legislatures.<sup>56</sup> As noted by the Supreme Court of Canada, arbitration furthers the interests of justice;<sup>57</sup> 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.<sup>58</sup>

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,<sup>59</sup> which is known as the ‘competence-competence principle’.<sup>60</sup> As recently demonstrated, Canadian courts will generally not allow parties to circumvent contractual arbitration clauses simply by, for

51 There is also the ‘Commercial Division’ of the Quebec courts.

52 *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’.

53 *Douez v. Facebook, Inc.*, 2017 SCC 33 at 31.

54 Including, as of recently, former Chief Justice of the Supreme Court of Canada, Her Honour Justice McLachlin.

55 *Seidel v. TELUS Communications Inc.*, 2011 SCC 15, [2011] 1 S.C.R. 531 at 89–103.

56 ‘The law favours giving effect to arbitration agreements. This is evident in both legislation and in jurisprudence.’ *Haas v. Gunasekaram*, 2016 ONCA 744 at 10.

57 To use the language of the Supreme Court of Canada: *Seidel v. TELUS Communications Inc.*, 2011 SCC 15, [2011] 1 S.C.R. 531 at 89–103.

58 See, for example, *Greer v. Babey*, 2016 SKCA 45 at 30, citing *Union des consommateurs v. Dell Computer Corp.*, 2007 SCC 34, [2007] 2 S.C.R. 801 at 74: ‘if the challenge requires the production and review of factual evidence, the court should normally refer the case to arbitration.’

59 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.

60 *Union des consommateurs v. Dell Computer Corp.*, 2007 SCC 34, [2007] 2 S.C.R. 801 at 84–86; *Seidel v. Telus Communications Inc.*, 2011 SCC 15, [2011] 1 S.C.R. 531 at 29. To be clear, the ‘competence-competence principle’ is no more than an attempt to properly manifest the parties’ intentions, that is, sophisticated parties can contract whatever variation of the principle suits their needs; see, for example, *Enmax Energy Corp. v. TransAlta Generation Partnership*, 2015 ABCA 383 at 23.

example, pleading in tort<sup>61</sup> or arguing that a certain dispute is not covered by the arbitration agreement because it is not explicitly referred to therein.<sup>62</sup> On the merits, too, Canadian courts are generally willing to defer to arbitrators as a general proposition; the 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'.<sup>63</sup>

To facilitate the use of arbitration, since the early 1990s, each Canadian province has enacted 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. 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'.<sup>64</sup> Other provincial legislation is similar, albeit somewhat less restrictive.<sup>65</sup> Most provinces have also enacted international commercial arbitration statutes.<sup>66</sup> These statutes are based, in full or in part, on the Model Law on International Commercial Arbitration, adopted by the United Nations Commission on International Trade Law on 21 June 1985, as amended by the United Nations Commission on International Trade Law on 7 July 2006 (the Model Law).<sup>67</sup> Notably, the Model Law does not permit appeals on questions of fact or law, but only on questions of illegality, jurisdiction,

61 *Haas v. Gunasekaram*, 2016 ONCA 744 at 32–35.

62 See *Harrison v. UBS Holding Canada Ltd.*, 2014 NBCA 26 at 30; noting also that even claims of fraud and misrepresentation may be determined by arbitration.

63 See *Popack v. Lipszyc*, 2016 ONCA 135 at 26, citing *Quintette Coal Ltd. v. Nippon Steel Corp.* (1990), [1991] 1 W.W.R. 219, at p. 229 (B.C.C.A.), leave to appeal refused, [1990] S.C.C.A. No.

64 See *McMillan v. McMillan*, 2016 BCCA 441 at 31, citing the Arbitration Act, R.S.B.C. 1996, c. 55 at 15(2).

65 The Arbitration Act of Ontario, for example, generally requires a stay of court-initiated proceedings where there is an arbitration agreement but contains more exceptions to this rule than the British Columbia statute (most notably, where the matter is a 'proper one for default or summary judgment'): Arbitration Act, 1991, S.O. 1991, c. 17 at 7.

66 See, for example, in Ontario: International Commercial Arbitration Act, 2017, S.O. 2017, c. 2, Sched. 5; in British Columbia: International Commercial Arbitration Act, [RSBC 1996] Chapter 233; in Manitoba: The International Commercial Arbitration Act, C.C.S.M. c. C151; in New Brunswick: International Commercial Arbitration Act, RSNB 2011, c. 176.

67 See *Yugraneft Corp. v. Rexx Management Corp.*, 2010 SCC 19 at 11, noting that the Model Law is a 'codification of best practices' that 'has been adopted, subject to some modifications, by every jurisdiction in Canada'. At one end of the spectrum is the Manitoba statute, which defines the Model Law as the 'International Law' to be followed in respect of all international commercial arbitration agreements and awards in that province: The International Commercial Arbitration Act, C.C.S.M. c. C151 at 1(1), 4(1) and 4(2). The British Columbia statute, by contrast, requires that arbitrators have regard to the Model Law but also to other texts as well as the 'need to promote uniformity in its application and the observance of good faith': International Commercial Arbitration Act, [RSBC 1996] Chapter 233 at 6(1). The Ontario statute requires application of the Model Law in context of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, adopted by the United Nations Conference on International Commercial Arbitration in New York on 10 June 1958: International Commercial Arbitration Act, 2017, S.O. 2017, c. 2, Sched. 5 at 2(1) and 5(1).

procedural fairness and public policy.<sup>68</sup> The general rule of interpreting the recognition and enforcement provisions of the Model Law is that ‘the grounds for refusal of enforcement are to be construed narrowly’.<sup>69</sup>

## V BREACH OF CONTRACT CLAIMS

To make out a claim for breach of contract, a plaintiff 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.<sup>70</sup>

This test is assessed on a balance of probabilities.<sup>71</sup>

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’;<sup>72</sup> warranties are important but non-fundamental terms.<sup>73</sup> 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.<sup>74</sup> The lexical distinction between conditions and warranties does not dominate the repudiation analysis, however,<sup>75</sup> 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’,<sup>76</sup> that is, whether the innocent party is 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’.<sup>77</sup> This question is assessed objectively, querying what a reasonable person would conclude from

68 Model Law at Chapter VII, Article 34.

69 *Popack v. Lipszyc*, 2018 ONCA 635 at 40, citing *Corporacion Transnacional de Inversiones S.A. de C.V. v. STET International S.p.A.* (1999), 45 O.R. (3d) 183 (Ont. S.C.J. [Commercial List]), at 26, aff’d (2000), 49 O.R. (3d) 414 (C.A.), leave to appeal refused, [2001] 1 S.C.R. xi.

70 Where damages cannot be proven, courts may find a breach but award only nominal damages.

71 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.

72 *Deputy Minister of National Revenue v. Mattel Canada Inc.*, 2001 SCC 36 at 58, citing P.S. Atiyah, *The Sale of Goods*, 8th ed. (London: Pitman Publishing, 1990)

73 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 at 7.3.

74 *Potter v. New Brunswick (Legal Aid Services Commission)*, 2015 SCC 10 at 145–149.

75 See Swan on Contracts at 7.5.

76 *Potter v. New Brunswick (Legal Aid Services Commission)*, 2015 SCC 10 at 145.

77 *Spirent Communications of Ottawa Ltd. v. Quake Technologies (Canada) Inc.*, 2008 ONCA 92 at 37, leave to appeal ref’d ([2008] S.C.C.A. No. 151).

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.<sup>78</sup>

However and whenever an innocent party elects to accept a repudiation, it must promptly, clearly and unequivocally communicate that decision to the breaching party.<sup>79</sup> (The general Canadian practice in such cases is for the innocent party to clearly reserve its right to claim damages.)<sup>80</sup> Where an innocent party does not wish to terminate the contract, by contrast, it may waive its rights to do so.<sup>81</sup> 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 often seek to protect that reliance.<sup>82</sup> 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.<sup>83</sup>

## 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<sup>84</sup> or that the contract is void for uncertainty.<sup>85</sup> Canadian courts, however, are highly reluctant to invalidate written agreements made between two sophisticated entities or void provisions of a contract *ab initio*.<sup>86</sup> Rather,

78 *Spirent Communications of Ottawa Ltd. v. Quake Technologies (Canada) Inc.*, 2008 ONCA 92 at 37, leave to appeal ref'd ([2008] S.C.C.A. No. 151).

79 *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.

80 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.).

81 Generally, a party may waive any term that is for its own benefit. See, for example, *Palkovics v. Barta*, 2013 BCCA 181 at 13-14; 1258816 *Ontario Inc. v. Business Depot Inc.*, [2006] O.J. No. 1007, 14 B.L.R. (4th) 21 (C.A.) at 2.

82 As noted in *Swan on Contracts* at 2.239-2.240.

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

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

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

86 *Johnson v. BFI Canada Inc.*, 2010 MBCA 101 at 74, citing Geoff R Hall, *Canadian Contractual Interpretation Law* (Markham: LexisNexis Canada Inc., 2007) at 2.6.1. See also: *Sherry v. CIBC Mortgages Inc.*, 2016 BCCA 240 at 62, citing *Marquest Industries Ltd. v. Willows Poultry Farms Ltd.*, [1968] B.C.J. No. 231, 1 D.L.R. (3d) 513 (C.A.) at 12. See, further, Part III – Contractual Interpretation.

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’<sup>87</sup> 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,<sup>88</sup> 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.<sup>89</sup> 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.<sup>90</sup> 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.<sup>91</sup>

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.<sup>92</sup> In certain provinces, legislation has codified this rule and the remedies that may be applicable where frustration is made out.<sup>93</sup> 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.

87 See, for example, *Sherry v. CIBC Mortgages Inc.*, 2016 BCCA 240 at 62, citing *Marquest Industries Ltd. v. Willows Poultry Farms Ltd.* (1968), 1 D.L.R. (3d) 513 (B.C. C.A.); *Vandal v. Cousineau*, 2015 ABCA 408 at 26; *Hunt River Camps/Air Northland Ltd. v. Canamera Geological Ltd.*, [1998] N.J. No. 325, 168 Nfld. & P.E.I.R. 207 (C.A.) at 29.

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

89 *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 *Abrahamovitz 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’.

90 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.

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

92 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 at 8.303, citing various decisions.

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

With respect to the equitable defences of undue influence and unconscionability, the law is, generally speaking, 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).<sup>94</sup>

Notably, Canadian courts have taken to applying the unconscionability standard to contractual defences in respect of which it is not historically linked; namely, limitation of liability clauses and the rule against penalties.<sup>95</sup> As a result of the focus on inequality of bargaining power in the unconscionability analysis, penalty clauses and limitation of liability clauses agreed to by sophisticated commercial parties are generally enforced in Canada,<sup>96</sup> even where the outcome visits an unfairness on one of the parties.<sup>97</sup> Highlighting this jurisprudential reality is a recent decision of the Ontario Court of Appeal, where a party that failed to act reasonably in terminating a contract (notwithstanding being contractually obligated to do so) was still able to fully rely on the limitation of liability clause contained therein.<sup>98</sup>

Exceptions to the foregoing trend may be emerging. In its 2017 decision regarding penalties in *Redstone Enterprises Ltd. v. Simple Technology Inc (Redstone)*,<sup>99</sup> the Ontario Court of Appeal held that the defence of unconscionability can be established based solely on a 'gross disproportionality' between damages that are owing under contract and the harm actually suffered by the innocent party in respect of those damages.<sup>100</sup> *Redstone*, which was endorsed in this respect by the Alberta Court of Appeal,<sup>101</sup> reminds of an old decision of the Supreme Court of Canada (which remains good law), where 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'.<sup>102</sup>

94 *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.

95 With respect to clauses limiting liability, see: *Tercon Contractors Ltd. v. British Columbia (Minister of Transportation & Highways)*, 2010 SCC 4. With respect to penalties, see: *Birch v. Union of Taxation Employees, Local 70030*, 2008 ONCA 809 at 32–40.

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

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

98 *Chuang v. Toyota Canada Inc.*, 2016 ONCA 584 at 22 and 31–34 and 49

99 *Redstone Enterprises Ltd. v. Simple Technology Inc.*, 2017 ONCA 282 at 26–30. This case is pre-*Douez*. Note, however, that *Douez* did not consider penalty clauses or the related doctrine of relief from forfeiture.

100 The Court describes inequality of bargaining power as an 'indicia' of unconscionability, hierarchically equivalent to inequality of bargaining power in the unconscionability analysis: *Redstone Enterprises Ltd. v. Simple Technology Inc.*, 2017 ONCA 282 at 26–30 (*Redstone*).

101 See *Buterman v. St. Albert Roman Catholic Separate School District No. 734*, 2017 ABCA 196 at 55. This decision was released on the same day as *Douez*.

102 *H.F. Clarke Ltd. v. Thermidaire Corp.*, [1976] 1 S.C.R. 319 at 28 (*Thermidaire*).

Though these inconsistencies raise interesting jurisprudential questions,<sup>103</sup> they may not provide meaningful assistance to sophisticated commercial parties absent truly exceptional circumstances. 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 wherever possible) is generally a dominant policy concern, especially where sophisticated commercial parties are involved.<sup>104</sup> Even in *Redstone*, the Ontario Court of Appeal grounded its analysis in public policy and noted that a finding of unconscionability must be an exceptional one, strongly compelled on the facts.<sup>105</sup>

Other equitable defences may be similarly inaccessible to sophisticated commercial parties. An example of such is rectification, which allows courts to correct errors made in the recording of written legal instruments.<sup>106</sup> First, there is the general hurdle of needing to convince the court that those certain concerns of equity militating in favour of rectification outweigh the public policy considerations militating in favour of judicial non-intervention (namely, certainty and finality in contract).<sup>107</sup> Second, as recently confirmed by the Supreme Court of Canada, the test for rectification requires that the party seeking the remedy prove (as an evidentiary matter) a prior agreement concerning the term or terms in respect of which the remedy is sought.<sup>108</sup>

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').<sup>109</sup> 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.<sup>110</sup>

103 Notably, for example, inequality of bargaining power is queried as at the time of contract formation whereas the analysis in *Redstone* and *Thermidaire* queried the consequences of the breach.

104 This is true even in *Redstone*; *Redstone Enterprises Ltd. v. Simple Technology Inc.*, 2017 ONCA 282 at 22–24. See also, for example, *Downer v. Pitcher*, 2017 NLCA 13 at 18.

105 *Redstone Enterprises Ltd. v. Simple Technology Inc.*, 2017 ONCA 282 at 22 and 25.

106 Rectification is not 'equity's version of a mulligan'; courts will rectify instruments that were not properly recorded, not where the faithful recording of an instrument has led to an undesirable or otherwise unexpected outcome: *Canada (Attorney General) v. Fairmont Hotels Inc.*, 2016 SCC 56 at 39.

107 As noted by the Supreme Court of Canada, a 'relaxed approach to rectification as a substitute for due diligence at the time a document is signed would undermine the confidence of the commercial world in written contracts': *Canada (Attorney General) v. Fairmont Hotels Inc.*, 2016 SCC 56 at 13, citing *Sylvan Lake Golf & Tennis Club Ltd. v. Performance Industries Ltd.*, 2002 SCC 19 at 31.

108 *Canada (Attorney General) v. Fairmont Hotels Inc.*, 2016 SCC 56 at 26–33, overturning the decision of the Ontario Court of Appeal on this point in *Juliar v. Canada (Attorney General)*, [1999] O.J. No. 3554, [2000] 2 C.T.C. 464 (C.A.).

109 *Atos IT Solutions v. Sapient Canada Inc.*, 2018 ONCA 374.

110 *Atos IT Solutions v. Sapient Canada Inc.*, 2018 ONCA 374 at 72. 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.

## VII FRAUD, MISREPRESENTATION AND OTHER CLAIMS

Parties are able to sue for negligent or fraudulent misrepresentation even if the relationship between them is governed by contract.<sup>111</sup> 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.<sup>112</sup>

The elements of fraudulent misrepresentation are:

- a the making of a false representation to the party alleging the wrong;
- b the misrepresentation is made either:
  - knowing it to be untrue;
  - without belief in its truth; or
  - reckless as to whether it be true or false; and
- c the false representation caused the complaining party to act and to suffer a corresponding loss.<sup>113</sup>

Where misrepresentation is made out, rescission of the contract is often an appropriate remedy (although damages may also be available).<sup>114</sup>

A major development in Canadian law was the recognition by the Supreme Court of Canada in 2014 of the ‘organising principle of good faith’ in contractual performance<sup>115</sup> and the corresponding duty to act honestly in performance.<sup>116</sup> The Court did not thereby impose a duty of fiduciary loyalty or of disclosure, however, or establish a rule requiring parties to forego advantages flowing from the contract out of some ‘*ad hoc* moralism’; rather, the Court established ‘a simple requirement not to lie or mislead the other party about one’s contractual performance.’<sup>117</sup> The parameters of the duty of good faith and the contexts where it might appear are still being developed in the jurisprudence.<sup>118</sup>

## VIII REMEDIES

The general remedy for breach of contract is damages. Damages are meant to be compensatory; the basic rule is that the innocent party be placed, so far as money can, in the same situation as

111 See, for example, *Carom v. Bre-X Minerals Ltd.*, [2000] O.J. No. 4014, 103 A.C.W.S. (3d) 17 (C.A.) at 43, citing *Parna v. G. & S. Properties Ltd.* (1970), 15 D.L.R. (3d) 336 (S.C.C.) at 344. To protect against such claims, parties will often disclaim liability for negligence as an express term of the contract.

112 *Queen v. Cognos Inc.*, 119931S.C.J. No. 3.

113 *Century Services Inc. v. LeRoy*, 2015 BCCA 120 at 19.

114 See, for example, *Ragin v. Ven-Cor Vending Distributors Ltd.*, 2001 CarswellOnt 2511, 106 A.C.W.S. (3d) 642 (S.C.J.) at 23.

115 *Bhasin v. Hrynew*, 2014 SCC 71 at 32–70.

116 *Bhasin v. Hrynew*, 2014 SCC 71 at 73.

117 *Bhasin v. Hrynew*, 2014 SCC 71 at 70, 73 and 86.

118 For example, in a recent decision the Alberta Court of Appeal 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 at 49–53, leave to appeal ref’d (2017 CarswellAlta 949).

if the contract had been performed.<sup>119</sup> 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.<sup>120</sup> However, 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.<sup>121</sup>

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.<sup>122</sup> 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’.<sup>123</sup>

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.<sup>124</sup> 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.<sup>125</sup>

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.<sup>126</sup> A recent decision of the Ontario Court of Appeal highlights this principle, where the Court awarded damages to a party who terminated a contract for cause to rely on the (less onerous) termination for convenience provisions therein (on which the party could have relied, but did not).<sup>127</sup>

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

119 Swan on Contracts at 6.11.

120 McCamus on Contracts at p. 890.

121 McCamus on Contracts at p. 894.

122 See: *Houweling Nurseries Ltd. v. Fisons Western Corp.*, [1988] B.C.W.L.D. 1254, [1988] C.L.D. 592 (C.A.) (McLachlin, JA, as she then was) at 27, citing *Hadley v. Baxendale* (1854), 9 Exch. 341, 156 E.R. 145 at 151.

123 *Al Boom Wooden Pallets Factory v. Jazz Forest Products* (2004) Ltd., 2016 BCCA 268 at 78–79.

124 *Southcott Estates Inc. v. Toronto Catholic District School Board*, 2012 SCC 51 at 24.

125 *Southcott Estates Inc. v. Toronto Catholic District School Board*, 2012 SCC 51 at 39–40.

126 *Open Window Bakery*, 2004 SCC 9 at 11 and 20.

127 *Atos IT Solutions v. Sapient Canada Inc.*, 2018 ONCA 374. Note that leave to the Supreme Court of Canada has been sought: 2018 CarswellOnt 11486

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.<sup>128</sup>

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.<sup>129</sup> Note that, while the common law of Canada previously presumed uniqueness in land, the Supreme Court of Canada recently overturned this presumption.<sup>130</sup>

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.<sup>131</sup> The rationale for assessing damages as of 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.<sup>132</sup> 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 day of breach.<sup>133</sup>

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.<sup>134</sup>

128 *Teva Canada Limited v. Janssen Inc.*, 2018 FCA 33 at 32–36, citing *Watson, Watson, Laidlaw & Co. v. Pott, Cassels & Williamson* (1914), 31 R.P.C. 104 (U.K.H.L.)

129 *Southcott Estates Inc. v. Toronto Catholic District School Board*, 2012 SCC 51 at 92, citing *Baud Corp., N.V. v. Brook*, [1978] S.C.J. No. 106, [1979] 1 S.C.R. 633.

130 Which is the natural consequence of the ‘advent of condominiums and other forms of interest in land’; see: *Youyi Group Holdings (Canada) Ltd. v. Brentwood Lanes Canada Ltd.*, 2014 BCCA 388 at 52, citing *Southcott Estates Inc. v. Toronto Catholic District School Board*, 2012 SCC 51 at 95.

131 See *Rougemount Capital Inc. v. Computer Associates International Inc.*, 2016 ONCA 847 at 45 and 50–53, citing *Johnson v. Agnew* (1979), [1980] A.C. 367 (U.K. H.L.), at pp. 400–401. As an example of such unfairness, see footnote 132.

132 The rationale for early crystallization is explained by Laskin, JA (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 crystallization 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.’

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

134 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.

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.<sup>135</sup>

## IX CONCLUSIONS

Canadian contract law draws heavily from the principles of British common law, but Canadian courts and legislatures have, in recent years, done much to modernise the law and ensure it responds to the exigencies of present-day commerce and technology. More pragmatic and flexible concepts now govern the creation, interpretation and enforcement of contracts. The introduction of specialised commercial courts and the fostering of a robust regime for the determination of disputes by arbitration allow contracting parties to obtain timely and effective resolution of disputes. Commercial parties can be confident that Canada provides a modern and effective legal regime for their contractual relationships.

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135 *Berry v. Pulley*, 2015 ONCA 449 at 70, citing *Folland v. Reardon* (2005), 74 O.R. (3d) 688 (C.A.) at 73.

# CHINA

*Peng Shen*<sup>1</sup>

## I OVERVIEW

In China, the Contract Law of People's Republic of China (the PRC Contract Law) is the most important legislation dealing with commercial contracts and commercial disputes. The PRC Contract Law was promulgated by the China's National People's Congress on 15 March 1999 and came into effect on 1 October 1999. The judicial interpretations issued by the highest judicial authority, namely, the Supreme People's Court (SPC) are also binding rules for deciding commercial contract disputes. Although China is not a case law jurisdiction, Chinese judges are more and more inclined to refer to decided cases, especially those decided by the SPC or higher level courts. The SPC also encourages this trend by publishing selected decided cases quarterly.

Under Chinese law, parties have the freedom to decide whether to enter into a contract and to decide the contract terms between themselves. Entities or individuals, including government agencies, who are not a party to the contract are not allowed to interfere with parties' rights to contract. A contract duly executed by parties is legal binding and enforceable with limited exceptions. Principles such as fairness and good faith have been well established by both legislations and judicial practice.<sup>2</sup>

Chinese courts, especially those located in major cities such as Beijing, Shanghai and Shenzhen, are very experienced and have a good record in deciding commercial contract disputes. In China, parties are generally allowed to agree on the court jurisdiction or refer the dispute relating to the contract to arbitration. In the absence of such agreement, a party is allowed to file its claim to the court where the defendant has domicile or where the contract is performed. In order to successfully file its claim with the court, the injured party, in other words the plaintiff, needs to submit civil complaint and preliminary evidence to the court. If the court agrees to accept the case, the plaintiff will be required to pay a court acceptance fee that is calculated based on the claiming amount.

## II CONTRACT FORMATION

Under Chinese law, a contract can be formed by mutual agreement by parties. To reach a legal binding contract, parties must have appropriate capacity for civil rights and capacity for civil acts. All individuals have capacity of civil rights. Individuals' capacity for civil acts are determined by their age and mental status. Capacity of civil rights and capacity of civil acts of

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2 See Articles 5 and 6 of PRC Contract Law.

commercial entities registered in China are provided in their business licences issued by the Chinese authority. Foreign entities' capacity shall be determined by the law of jurisdiction where they are registered.

A contract can be made in writing, orally or by other means unless written form is expressly required by the law or administrative regulation. For example, the Regulation on the Implementation of the Law of the People Republic of China on Chinese-Foreign Equity Joint Ventures requires Sino-Foreign Joint Ventures Contracts (SFJV contracts) to be made in writing.

In practice, commercial parties typically make their contracts in writing. It is rare for commercial parties to enter into a contract in verbal form. At the same time, if the parties did not conclude the contract in a written or verbal form, but it may be inferred from both parties' acts that they intended to enter into the contract, the court may determine it is a factual contract. This position was confirmed by the Jiangsu Nantong Intermediate Court in a recent decision.<sup>3</sup>

The formation of a contract is generally a result of parties' negotiation, including the process of offer and acceptance. 'Offer' means the expression of intent to enter into a contract with another party. Such expression of intent shall comply with the following two requirements to be an effective offer:

- a* its contents shall be specific and definite; and
- b* it indicates that the offeror will be bound by the expression of intent if the offeree accepts the offer.

According to the PRC Contract Law, mailed price lists, public notices of auction and tender, prospectuses and commercial advertisements, etc. are typically deemed as invitations for offer, rather than offers. Such invitations for offer are not legal binding. However, if the contents of a commercial advertisement meet the above-mentioned requirements for an offer, it shall be regarded as an offer.

An offer becomes effective when it reaches the offeree. Generally, before the offeree dispatches a notice of acceptance, an offeror may revoke its offer. However, there are some exceptions. In the following circumstances, the offeror is not allowed to revoke its offer:

- a* the offeror indicates a fixed time for acceptance;
- b* the offeror explicitly states that the offer is irrevocable; or
- c* the offeree has good reasons to believe the offer is irrevocable and has made preparation for performing the contract.

Acceptance means an expression of intent to accept the offer. An acceptance should reach the offeror within the time period prescribed in the offer. In the absence of such time limit in the offer, the acceptance should reach the offeror within reasonable time period, taking into account all of the circumstances of the underlying transaction. The acceptance should be made in the form of a notice, except where acceptance may be made by an act on the basis of customary business practice or as expressed in the offer. The acceptance comes into effect once it reaches the offeror. A contract is established when the acceptance becomes effective. Consideration is not a necessary condition to form a contract.

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<sup>3</sup> See *Nanjing Shui Mu Qiang Hua Decoration Limited v. Rong Chang Construction Materials Business Department of Ru Bing City*, Jiangsu Nantong Intermediate Court, 2018, PKU Law.

Under Chinese law, parties may agree that the effectiveness of a contract is subject to a condition or conditions. A contract whose effectiveness is subject to certain conditions shall become effective when such conditions are satisfied.

Article 44 of PRC Contract Law provides that if law or administrative regulation requires the effectiveness of a contract subject to approval or record process with relevant authority, such contract shall become effect when such approval or record process are accomplished. For example, according to relevant administrative regulations,<sup>4</sup> SFJV contracts and Sino-Foreign Cooperative Enterprises contracts are subject to government approval to became effective. In *Si Fupai International Shares Limited v. Yongfeng Si Fupai Packaging Holding*, the SPC expressly confirmed this position.<sup>5</sup>

Even if a formal contract is not formed, parties still shall act in good faith such as complying with confidentiality obligation and various expressed or implied obligations generated from a pre-contractual relationship.

### III CONTRACT INTERPRETATION

In China's regime, the rules of choice-of-law are mainly provided in the PRC Contract Law, PRC Choice Law of Foreign-Related Civil Relation (PRC Choice of Law) and PRC General Principles of Civil Law.

According to Article 3 of the PRC Choice of Law, as a general principle, Chinese law recognises and respects parties' agreement on the choice of law in a foreign-related contracts with a few of exceptions. However, for domestic contacts, parties are not allowed to select the governing law applying to the contract. This position has been well established by both statutes and court-decided cases. For example, in *Shenzhen Jianda Construction Engineering Limited v. Jin Yilin (Dongguan) Housing Development*, the Guangdong Dongguan Intermediate Court expressly held that for a domestic contact without any foreign elements, parties' agreement on applying foreign law is invalid and Chinese law should apply.<sup>6</sup> Foreign-related contracts means contracts with foreign elements. In the following circumstances, a contract could be regarded as having foreign elements:

- a* one or more than one contracting party is a foreign party or its domicile is outside China;
- b* the subject matter is outside China; or
- c* the legal facts that caused the establishment, change or termination of the contractual relation took place outside of China.

If there are mandatory provisions on foreign-related civil relations in the laws of China, these mandatory provisions shall prevail over parties' agreement and directly apply. In the event that the law has no provision on the application of any laws concerning foreign-related civil relations and parties have no agreement, the laws that have the closest relation with this foreign-related civil relation shall apply.

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<sup>4</sup> See Article 14 of Regulation on the Implementation of the Law of the People's Republic of China on Chinese-Foreign Equity Joint Ventures and Article 11 of Detailed Rules for the Implementation of the Law of the People's Republic of China on Chinese-Foreign Contractual Joint Ventures.

<sup>5</sup> See *Si Fupai International Shares Limited v. Yongfeng Si Fupai Packaging Holding*, SPC, 2017, PKU Law.

<sup>6</sup> See *Shenzhen Jianda Construction Engineering Limited v. Jin Yilin (Dongguan) Housing Development*, the Guangdong Dongguan Intermediate Court, 2018, PKU Law.

If any disputes arise between the parties over the understanding of any clause of the contract, the true meaning thereof shall be determined according to the words and sentences used in the contract, the relevant provisions in the contract, the purpose of the contract, the transaction practices and the principle of good faith.

In the event that a contract is concluded in two or more languages and it is agreed that all versions are equally authentic, the words and sentences in each version are construed to have the same meaning. In the case of any discrepancy in the words or sentences used in the different language versions, they shall be interpreted in light of the purpose of the contract.

The PRC Contract Law also provides that where, after the contract becomes effective, there is no agreement in the contract between the parties on certain contents such as quality, price or remuneration, or place of performance, or such agreement is ambiguous, the parties may agree upon supplementary terms through consultation. If a supplementary agreement cannot be reached, such terms are determined in accordance with the relevant provisions of the contract or the transaction practices.

According to Article 62 of the PRC Contract Law, where certain contents agreed upon by the parties in the contract are ambiguous and cannot be determined in accordance with the methods discussed in the above paragraph, the court may consider the following rules in deciding the case:

- a* if quality requirement is not clear, performance shall be in accordance with the state standard or industry standard; absent any state or industry standard, performance shall be in accordance with the customary standard or any particular standard consistent with the purpose of the contract;
- b* if price or remuneration is not clear, performance shall be in accordance with the prevailing market price at the place of performance at the time the contract was concluded, and if adoption of a price commissioned by the government or based on government issued pricing guidelines is required by law, such requirement applies;
- c* where the place of performance is not clear, if the obligation is payment of money, performance shall be at the place where the payee is located; if the obligation is delivery of immovable property, performance shall be at the place where the immovable property is located; for any other subject matter, performance shall be effected at the place of location of the party fulfilling the obligations;
- d* if the time of performance is not clear, the obligor may perform, and the obligee may require performance, at any time, provided that the other party shall be given the time required for preparation;
- e* if the method of performance is not clear, performance shall be rendered in a manner that is conducive to realising the purpose of the contract; and
- f* if the responsibility for the expenses of performance is not clear, the party fulfilling the obligations shall bear the expenses.

#### **IV DISPUTE RESOLUTION**

In order to file a lawsuit, including one that arises from a contract dispute before Chinese courts, the following requirements should be satisfied:

- a* the PRC court has jurisdiction over the claim presented;
- b* the plaintiff has a legal standing to file the claim;
- c* the defendant is identifiable;
- d* a specific claim for relief has been presented;

- e* there is clear and specific factual basis in support of the claim; and
- f* there is a clear and specific legal ground or grounds in support of the claim.

Plaintiffs are allowed to file a case with a nominal disputing amount. There is no minimum amount requirement for a claim to be submitted to the court.

In terms of jurisdiction, for contract disputes parties can agree in writing to be subject to the jurisdiction of the Chinese court at the place having connection with the dispute, such as where the defendant has domicile, where the contract is performed, where the contract is signed, where the plaintiff is domiciled or where the subject matter is located.

In recent years, special courts have been set up to handle specific category of disputes. For example, intellectual property courts are set up in Beijing, Shanghai and Guangzhou to handle exclusively intellectual property disputes. In Shanghai, a financial court was founded in early 2018. It has jurisdiction over financial loan contracts, financing lease contracts and contracts for commissioned wealth management.

In June 2018, two international commercial courts of China (CICCs) were found in Shenzhen and Xi'an respectively. The establishment of CICCs is a significant development in China's judicial system. They will offer additional dispute resolution choices to companies doing business in China or internationally. Their jurisdiction will include, among other disputes, international commercial cases with a disputing amount over 300 million yuan or of nationwide significance.<sup>7</sup>

Apart from court litigation, other common forms of dispute resolution in China include arbitration, and alternative dispute resolution (ADR) methods such as negotiation, mediation and conciliation, or a combination of these methods. Some dispute resolution clauses provide that any dispute shall first be resolved through friendly consultation, failing which it shall be submitted to litigation or arbitration.

Chinese law and Chinese courts respect arbitration agreements or agreements on ADR. It is clearly provided by law that the court shall not accept the case or interfere into the dispute if parties have entered into a valid arbitration agreement.

Over the past decades, commercial arbitration has gradually gained wide populism and recognition in China. Also, as the Chinese government has been engaged in prompting and establishing a 'harmonious society' in China, ADR methods, including mediation, are expected to be booming in the future.

## **V BREACH OF CONTRACT CLAIMS**

The success of a claim for breach of contract depends on the satisfaction of the following elements:

- a* formation of the contract; and
- b* the defendant fails to perform its obligation or its performance fails to satisfy the terms of the contract.

With regard to liabilities resulting from breach of contract, Chinese law applies the principle of liability without fault. That is, the defendant's intention or negligence is not an element for breach of contract claim.

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<sup>7</sup> See Provisions on Several Issues regarding the Establishment of International Commercial Courts issued by the SPC.

The general rule of evidence is that the party raising a claim bears the burden of proof. Therefore, the plaintiff bears the burden of proving that the above elements are well established. The extent of the plaintiffs' burden varies. Usually the plaintiff can justify its claims merely by a 'preponderance of the evidence' – namely, by showing that the claim against the defendant is more likely true than not. According to Article 108 of the Interpretation of the Supreme People's Court on the Application of the Civil Procedure Law, with regard to the evidence provided by the party concerned with the burden of proof, where the court believes that the existence of a fact to be proved is highly probable upon examination and in combination with the relevant facts, it shall affirm the existence of the said fact.

Chinese courts permit the introduction of various kinds of evidence, including documentary evidence, real evidence, witnesses statement, statements by parties, expert's opinion, audio-visual materials and electronic evidence. As a general rule, all types of evidence must be verified by the court as to its authenticity before being allowed to be used as a basis for determining facts. In addition, in order for a piece of evidence to be admitted, the party submitting the evidence needs to prove that the evidence is relevant to the claim and obtained through lawful means. Documents formed outside China need to be notarised and legalised in order to be admitted as evidence.

Unlike common law jurisdictions, there is no evidence discovery in China. Except for limited circumstances, a party is allowed to only submit evidence in its favour, as there is no obligation to disclose all documents. The court is allowed to collect evidence, on its own initiative or per a party's request, from the parties to the case or other relevant parties. These parties being investigated by the court have obligation to cooperate and provide evidence as required.

## VI DEFENCES TO ENFORCEMENT

The party seeking to avoid enforcement of contractual obligations or challenge claims of breach of contract may invoke the following grounds, among others as its defences:

- a* there is no contract or the contract is void;
- b* the statute of limitation has elapsed;
- c* liability for breach of contract has been exempted or limited as provided in the contract;
- d* *force majeure*; and
- e* unforeseeable circumstances.

If the defendant is able to prove that there is no contract between plaintiff and defendant, the court will deny the breach of contract claim. In the event that defence is not available, the defendant may consider whether the contract could be determined as void. Under China law, a contract shall be void under any of the following circumstances:<sup>8</sup>

- a* the contract is concluded by means of fraud or coercion by one party, thereby damaging the interests of the state;
- b* malicious collusion is conducted to damage the interests of the state, a collective group or a third party;
- c* an illegitimate purpose is concealed under the guise of legitimate forms;
- d* the public interests are damaged; or
- e* the mandatory provisions of the laws and administrative regulations are violated.

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<sup>8</sup> See Article 52 of PRC Contract Law.

A contract that is determined as void by the court has no legal effect from the beginning. As such, plaintiffs are not able to rely on a void contract to make a breach of contract claim.

The limitation period is another ground commonly relied upon by the parties to defeat the claim for enforcing contractual obligations. In general, the statute of limitation in China for contract dispute is three years starting from the date when the plaintiff knows or should have known the existence of its claim. The limitation period can be interrupted or suspended.

The defendant may also argue that its liability for breach of contract has been exempted or limited as provided in the contract. Clauses on exemption or limitation of liabilities are generally valid under Chinese law, unless the agreements are relating to personal injury to the other party, or property damage to the other party as result of deliberate intent or gross negligence.<sup>9</sup>

Under PRC Contract Law, there is no equivalent regime of impossibility or impracticality. Nonetheless, under Chinese law, a party can refuse to enforce the contract under unforeseeable circumstance. According to Article 26 of Interpretation of the Supreme Court on Certain Issues Concerning the Application of the PRC Contract Law (II), where a party to a contract petitions the court to modify or terminate the contract on the grounds that the continuous performance of the same is obviously unfair to the party or the purpose of the contract will not be realised owing to the occurrence of any material change of circumstances that is unforeseeable, not caused by *force majeure*, and not a commercial risk after the conclusion of the contract, the court shall decide whether the contract shall be modified or terminated according to the principle of fairness on a case-by-case basis.

Moreover, a party who is unable to perform a contract owing to *force majeure* is exempted from liability in part or in whole in light of the impact of the event of *force majeure*, except otherwise provided by law.

## VII FRAUD, MISREPRESENTATION AND OTHER CLAIMS

In addition to breach of contract claims, claims based on tortious acts such as fraud claim, claim on misrepresentation or claims based on other party's improper acts (collectively, 'improper acts') are available for commercial contracts governed by Chinese law.

Chinese law recognises quasi-contract claims. Even if the contract is not formed or is not yet effective, a party is still entitled to claim for compensation of damage against the other party if the other party:

- a* pretends to conclude a contract, and negotiating in bad faith;
- b* deliberately conceals important facts relating to the conclusion of the contract or providing false information; or
- c* performs other acts that violate the principle of good faith.

Chinese law does not have an equivalent concept of 'promissory estoppel'. But it is established that a party is bound by its promise to the other party. If the opposing party suffered losses owing to reliance of the promise, the Chinese court may support the injured party's claim relying on the principle of good faith.

Chinese law also allows a party to an effective contract to make a claim based on tort law as an alternative to the breach of contract claim. Regardless of the fact that such tort

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<sup>9</sup> See Article 53 of PRC Contract Law.

claims are made based on fraudulent acts, misrepresentation or other types of bad faith acts, the basis for such claims are all from tort law. Therefore, elements for such claims are the same or similar. That is, in order to prevail, a injured party needs to prove:

- a* the other party conducted an improper act or acts intentionally or negligently;
- b* the plaintiff suffered damages; or
- c* the damages are caused by the improper acts of the other party.

It is important to know that, under Chinese law, the injured party is not allowed to bring a breach of contract claim and tort claim against the opposing party at the same time. The injured party must choose either contractual claim or tort claim. Otherwise, the court will refuse to accept the injured party's claim. Having said that, assuming the injured party fails in its contract claim, it is allowed to initiate tort claim afterwards and vice versa.

The claim of tortious interference of a contract is merely a theory to date and is still developing in the Chinese regime. There is no statute supporting such type of claim.

## VIII REMEDIES

Under PRC law, if a party fails to perform its obligations under a contract, or its performance fails to satisfy the terms of the contract, the injured party is entitled to ask the party who breached the contract to bear liabilities for breach of contract such as to continue to perform its obligations, to take remedial measures or to compensate for losses. The injured party may also claim termination if relevant conditions are satisfied.

As a general principle, where a party fails to perform its non-monetary obligations or its performance of non-monetary obligations fails to satisfy the terms of the contract, the other party may request it to perform the obligations unless the following exceptions apply:

- a* it is unable to be performed in law or in fact;
- b* the subject matter of the obligation is unfit for compulsory performance or the performance expenses are excessively high; and
- c* the obligee does not require performance within a reasonable time.

In practice, when deciding whether specific performance shall be granted, the Chinese court will consider whether the enforcement of the order requesting specific performance is possible and feasible. If it is impossible or difficult to enforce, the court will be reluctant to order specific performance, and will be inclined to order alternative remedies such as compensation of losses. The trend is that Chinese courts are increasingly willing to order specific performance comparing with themselves in the past.

In addition to specific performance, monetary damages are also available under Chinese law. The amount of damages the innocent party is entitled to is generally equal to the damage it actually suffered, including both direct loss and indirect loss such as loss of profit, but shall not exceed the amount that has been foreseen or ought to be foreseen when the party in breach concludes the contract. Punitive damages are only available for certain types of claims in customer protection cases. For commercial cases, punitive damages are not available. Chinese Law does not have any statute dealing with indemnification. In practice, courts generally recognise the validity and enforceability of indemnification clause agreed by parties.

In commercial disputes over contracts, plaintiffs have the obligation to prove:

- a that the opposing party has breached the contract;
- b that it has suffered damages and the amount of damages; and
- c causation between breach of contract and damages.

As it may be difficult for plaintiffs to prove the exact amount of losses it suffered, it is common for parties to agree on liquidated damages in commercial contracts. Such liquidated damages clauses are typically enforceable under Chinese law. However, if a party makes a petition, the court is allowed to adjust the amount of the agreed liquidated damages in the following circumstances:

- a where the amount of liquidated damages agreed upon is lower than the damages incurred; or
- b where the amount of liquidated damages agreed upon are significantly higher than the damages incurred.

Parties may also agree upon limitation on damages in contractual or extra-contractual claims. However, if such agreement on limitation is about personal injury to the other party, or property damage to the other party as result of deliberate intent or gross negligence, such agreement is void under the law.

The innocent party may also seek remedies by claiming termination of contract if relevant conditions agreed by parties or provided by law are satisfied. The parties may agree upon conditions under which either party may rescind the contract.

Article 94 of PRC Contract Law provides statutory conditions for termination of contract. Under the following circumstances, a party may petition to the court to terminate the contract:

- a it is rendered impossible to achieve the purpose of contract owing to an event of *force majeure*;
- b prior to the expiration of the period of performance, the other party expressly states, or indicates through its conduct, that it will not perform its main obligation;
- c the other party delayed performance of its main obligation after such performance has been demand, and fails to perform within a reasonable period; and
- d the other party delays performance of its obligations, or breaches the contract in some other manner, rendering it impossible to achieve the purpose of the contract.

Regardless of the basis of termination, a party demanding termination of a contract shall notify the other party. The contract shall be terminated upon the receipt of the notice by the other party. If the other party objects to such termination, it may petition to a court or an arbitration institution to adjudicate the validity of the termination notice. After the termination of a contract, performance shall cease if the contract has not been performed; if the contract has been performed, the injured party may, in accordance with the circumstances of performance or the nature of the contract, demand the other party to:

- a restore it to its original state;
- b take remedial measures; or
- c compensate damages.

## **IX CONCLUSIONS**

Contract law in China has been well developed in the past 20 years. It offers good protection to commercial parties, including foreign parties doing business in China or having commercial relation with Chinese parties. Chinese contract law respects that a contract is a mutual agreement between parties. A binding contract could be formed by the process of offer and acceptance or other alternative ways and becomes effective once it is formed, with limited exceptions. Chinese contract law recognises the good faith principle and principle of fairness. For foreign-related contract, parties are allowed to select foreign law as a governing law.

Where parties have a dispute over the meaning of a contract clause, it could be determined according to the context used in the contract, the relevant provisions in the contract, the purpose of the contract, the transaction practices and the principle of good faith. In the event of a breach of contract, the injured party may request specific performance, claim damages it suffered or terminate the contract if conditions are satisfied.

Before 2016, China did not enter into any international convention or bilateral treaties regarding cross-border enforcement of court judgments with other major economics such as the United States and EU nations. Also, Chinese court did not apply the principle of reciprocity in practice. Accordingly, it is difficult or even impossible to enforce Chinese judgments in major foreign jurisdictions and vice versa. Bearing this situation in mind, companies having transactions with Chinese parties are inclined to submit disputes to arbitration. However, this situation has changed. First, a Chinese court enforced a judgment issued by the Singapore High Court in late 2016 and a judgment issued by a US court in 2017 based on the principle of reciprocity, respectively. Also, the Chinese government signed the Hague Convention on Choice-of-Court Agreements in September 2017, joining a framework with all EU nations (except Denmark), Singapore, Mexico, the United Kingdom and the United States to prompt cross-border enforcement of court judgments. We expect China's National Congress will approve the Convention in or around 2019 to make it effective in China.

# DENMARK

*Dan Terkildsen*<sup>1</sup>

## I OVERVIEW

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

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

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

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

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

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

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

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

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In recent years, the Danish litigation process has been digitalised, with the Supreme Court and Maritime and Commercial Court being digitalised in early 2018. This means that all procedural documents and correspondence are uploaded to a digital portal and exchanged electronically.

## II CONTRACT FORMATION

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

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

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

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

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

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

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

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

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

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

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

If an offer is accepted after the deadline or the acceptance does not match the offer, the offeror is not bound by the acceptance but the acceptance is considered a new offer.

There are no formal requirements in respect of contract formation. A contract or agreement does not need to be produced in writing; it can be created orally insofar as an offer was made and validly accepted. There is also no writing requirement with respect to subsequent alterations to an already existing contract.

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

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

### III CONTRACT INTERPRETATION

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

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

- a* 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, cf. Article 4(1) Rome

Convention. The presumption is that the law governing the contract will be the law of the place in which the contract is performed (cf. Article 4(2), or that of the seller's, service provider's or franchisee's habitual residence).

## **IV DISPUTE RESOLUTION**

### **i Minimum amounts and thresholds**

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

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

### **ii Specialised commercial courts**

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

### **iii Provisions regarding submission to court jurisdiction**

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

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

### **iv Mediation**

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

## v Arbitration

The Danish Arbitration Act from 2005 is based on the United Nations Commission on International Trade Law (UNCITRAL) Model Law of 1985.

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

#### **v Force majeure**

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

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

### **VII FRAUD, MISREPRESENTATION AND OTHER CLAIMS**

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

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

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

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

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

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

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

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

## VIII REMEDIES

### i Specific performance

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

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

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

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

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

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

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

### ii Avoidance

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

A contracting party can avoid the contract if:

- a* the contract specifies an explicit right to rescission;
- b* a statutory provision, which covers the contract in question, provides a right of recession in certain circumstances; or
- c* in circumstances where there is no defined basis for avoidance, the breach of the contract qualifies as a fundamental breach.

### iii Damages

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

Outside the CISG and the Danish domestic Sales of Goods Act, the party in breach must have acted in a culpable manner. Danish law applies the generally well-known concept that the loss must be foreseeable. Denmark does not apply a principle of punitive damages but awards compensatory damages only. The burden of proof regarding damages in contract is on the injured party.

Damages in contract can be divided into two subcategories: expectancy damages and reliance damages. The aim of expectancy damages is to position the injured party as if the contract had not been breached and the contractual duties were performed in accordance with the contract. As a general rule, the injured party is entitled to full compensation for any provable loss. Reliance damages, on the other hand, aims to set the parties as if the contract was never entered into by either of the parties.

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

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

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

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

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

## IX CONCLUSIONS

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

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

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

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

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

# ENGLAND & WALES

*Oliver Browne, Ian Felstead and Mair Williams*<sup>1</sup>

## I OVERVIEW

Courts of England<sup>2</sup> are some of the most established fora for dealing with complex commercial litigation. The Civil Procedure Rules (CPR) that govern 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 commercial contracts. Much of the law governing commercial disputes has evolved through case law rather than through statute, with the Misrepresentation Act 1967, Unfair Contract Terms Act 1977, Limitation Act 1980 and the Contracts (Rights of Third Parties) Act 1999 being notable exceptions.

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

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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.

## 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:

- a* offer;
- b* acceptance;
- c* consideration;
- d* an intention to create legal relations; and
- e* certainty of terms.

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

### i Offer and acceptance

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

In order for there to be an offer, it must be communicated to the offeree, specific, complete, capable of acceptance and made with the intention of being bound by that offer. As such, an offer is distinguishable from an invitation to negotiate or an ‘invitation to treat’, such as an advertisement, where a seller of goods is inviting a buyer to contract but it is the buyer that makes the offer. An offer may be terminated by withdrawal, rejection<sup>3</sup> 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.<sup>4</sup> 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.<sup>5</sup> 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.*<sup>6</sup> In that case, a party came into financial difficulties and sought additional payment to perform the contract without delay.

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3 A counter-offer is also considered to be a rejection of the original offer (*Hyde v. Wrench* (1840) 3 Beav 334).

4 Unless the contract is made by way of a deed, the requirements of which are outside the scope of this chapter.

5 *Stilk v. Myrick* (1809) 2 Camp 317.

6 *Williams v. Roffey Bros* [1989] EWCA Civ 5.

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.<sup>7</sup>

The case law on this was reviewed by the High Court in 2017 in *Blue v. Ashley*.<sup>8</sup> 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 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.

### 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.<sup>9</sup> 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.<sup>10</sup>

### 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, with a few exceptions, made after 11 May 2000 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)*,<sup>11</sup> 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.

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7 *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).

8 *Blue v. Ashley* [2017] EWHC 1553 (Comm), 26 June 2017.

9 *Barbudev v. Eurocom Cable Management Bulgaria EOOD and others* [2012] EWCA Civ 548.

10 See, for example, *RTS Flexible Systems Ltd v. Molkerei Alois Müller GmbH & Company KG (UK Production)* [2010] UKSC 14.

11 *Chudley v. Clydesdale Bank plc (t/a Yorkshire Bank)* [2017] EWHC 2177 (Comm).

### 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. Examples are given below.

#### *Quantum meruit*

A supplier of goods or services who has not been compensated by the recipient of those goods or services may be able to bring a claim of *quantum meruit* ('as much as he has earned') in order to be paid for the goods or services provided, so long as it is able to show that the goods or services were either expressly 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 a promise by one party that it will not enforce its strict legal rights against the other;
- b an intention on the promisor's part that the other will rely on that promise; and
- c actual reliance by the promisee on that promise.

### 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*,<sup>12</sup> Lord Neuberger recently summarised and clarified the approach that the English courts will now take. He explained that the courts will focus on the meaning of the relevant words used by the parties 'in their documentary, factual and commercial context', in the light of the following considerations:

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

This decision is seen by many commentators as a move away from the more 'purposive' approach set out (primarily by Lord Hoffmann) in previous Supreme Court (and House of

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12 *Arnold v. Britton* [2015] UKSC 36.

Lords) decisions.<sup>13</sup> Although two Supreme Court decisions in 2017<sup>14</sup> suggest that all of these cases ‘were saying the same thing’ in relation to contractual interpretation, and though there has never been an entirely literal or purposive approach to contractual interpretation, there does appear to be a greater emphasis at present on the primacy of the language used by the parties in their agreement.

Indeed, in a 2017 extrajudicial speech, Lord Sumption suggests that those older cases did adopt a different approach and that they failed to attach sufficient weight to the language of the contract.<sup>15</sup> Later that year, the Court of Appeal ruled in *Teva Pharma – Productos Farmaceuticos LDA v. Astrazeneca – Productos Farmaceuticos LAD*<sup>16</sup> that the judge in the lower court had failed to have regard to the principles in *Arnold v. Briton* and had erred by subverting the natural meaning of the contractual provisions in favour of commercial common sense.

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

- a the courts will strictly interpret contractual provisions that seek to limit rights or remedies, or exclude liability, which arise by operation of law;<sup>17</sup> and
- b where a clause has been drafted by a party for its own benefit, it will be construed in favour of the other party (the *contra proferentem* rule).<sup>18</sup>

### 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.*<sup>19</sup> A term may be implied if:

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

The 2018 case of *Bou-Simon v. BGC Brokers LP*<sup>20</sup> 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.

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13 *Investors Compensation Scheme Ltd v. West Bromwich Building Society* [1997] UKHL 28, *Chartbrook Ltd v. Persimmon Homes Ltd* [2009] UKHL 38 and *Rainy Sky SA v. Kookmin Bank* [2011] UKSC 50.

14 *Wood v. Capita Insurance Services Ltd* [2017] UKSC 24 and MT.

15 Lord Sumption, ‘A Question of Taste: The Supreme Court and Interpretation of Contracts’ 8 May 2017. (<https://www.supremecourt.uk/docs/speech-170508.pdf>).

16 *Teva Pharma – Productos Farmaceuticos LDA v. Astrazeneca – Productos Farmaceuticos LAD* [2017] EWCA Civ 2135.

17 In that regard, the Unfair Contract Terms Act 1977 requires limitation clauses to be ‘reasonable’.

18 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 *Persimmon Homes v. Ove Arup* [2017] EWCA Civ 373.

19 *Marks & Spencer Plc v. BNP Paribas Securities Services Trust Co (Jersey) Ltd* [2015] UKSC 72.

20 *Bou-Simon v. BGC Brokers LP* [2018] EWCA Civ 1525.

## IV DISPUTE RESOLUTION

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

### i Jurisdiction

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

There are three principal types of jurisdiction clauses:

- a An exclusive jurisdiction clause specifies a jurisdiction in respect of disputes, and prevents either party from bringing proceedings against the other in the courts of any jurisdiction other than the one specified in the contract.
- b A non-exclusive jurisdiction clause enables either party to bring proceedings against the other, either in the courts of the chosen jurisdiction or in the courts of any other jurisdiction (provided that court has jurisdiction over the dispute under its own rules).
- c An asymmetrical jurisdiction clause permits one of the parties (party A) to sue the other party (party B) in any competent jurisdiction, but restricts party B to bringing proceedings in only one jurisdiction.

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

- a In *China Export & Credit Insurance Corp v. Emerald Energy Resources*,<sup>21</sup> 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*,<sup>22</sup> 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.

### 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.<sup>23</sup>

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.<sup>24</sup>

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21 *China Export & Credit Insurance Corp v. Emerald Energy Resources* [2018] EWHC 1503 (Comm).

22 *AMT Futures Limited v. Karim Boural* [2018] EWHC 750 (Comm).

23 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.

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

### **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.<sup>25</sup>

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

#### ***Negotiation***

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

#### ***Mediation***

Settlement negotiations facilitated by an independent third party mediator.

#### ***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.

#### ***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. The value of the loss claimed will most

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<sup>25</sup> 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.

likely determine which type of court in England hears the case.<sup>26</sup> Before bringing a breach of contract claim, the claimant should comply with the applicable pre-action protocols, annexed to the CPR.

### **i Termination for breach**

Under English law, a breach of contract does not automatically entitle the non-breaching party to terminate the contract. A repudiatory breach, however, is a breach of contract that allows the non-breaching party to treat the contract as being at an end.<sup>27</sup> The most common example of a repudiatory breach is a breach of condition (although a fundamental breach of an innominate term may also be a repudiatory breach) that allows the non-breaching party to terminate the contract and claim damages, regardless of what the consequences of the breach are. Breaches of warranties do not terminate contracts and the correct remedy in that situation is damages. Parties are also entitled to explicitly state breach of a term results in termination, even if that right would not be a right 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.

### **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.

### **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.<sup>28</sup>

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).

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26 CPR 26.

27 *Heyman v. Darwins Ltd* [1942] AC 356.

28 *Galoo Ltd v. Bright Grahame Murray* [1994] 1 WLR 1360.

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

### **i Force majeure and frustration**

Contracting parties may choose to include a *force majeure* clause, which excuses performance of a contract following certain events that are beyond the control of the parties. *Force majeure* clauses must be certain in order to be effective and so must include reference to specific events (such as natural disasters, acts of war and acts of terrorism) or be specific enough as to be certain. Wording equivalent to 'usual *force majeure* clauses shall apply' will be considered void.<sup>29</sup>

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.<sup>30</sup>

### **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.'<sup>31</sup> However, more recently the law on illegality of contracts was criticised as being unnecessarily complex, uncertain and arbitrary.<sup>32</sup> In 2016, the Supreme Court evaluated the law in this area in *Patel v. Mirza*.<sup>33</sup> Although consensus was not reached, the majority of the Supreme Court deemed the key issue to be whether upholding the relevant contract would 'produce inconsistency and disharmony in the law, and so cause damage to the integrity of the legal system'. In 2018, the Court of Appeal found in the case of *Singularis Holdings Ltd (in liquidation) v. Daiwa Capital Markets Europe Ltd*<sup>34</sup> 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.

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29 *British Electrical and Associated Industries (Cardiff) Ltd v. Patley Pressings Ltd* [1953] 1 WLR. 280.

30 *Davis Contractors Ltd v. Fareham Urban District Council* [1956] UKHL 3.

31 *Holman v. Johnson* [1775] 1 Cowper 341 at page 343.

32 'The Illegality Defence' [2010] The Law Commission (LAW COM No 320).

33 *Patel v. Mirza* [2016] UKSC 42.

34 *Singularis Holdings Ltd (in liquidation) v. Daiwa Capital Markets Europe Ltd* [2018] EWCA Civ 84.

### 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. 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<sup>35</sup> 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.<sup>36</sup>

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. It is a defence for the defendant to show that it had

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

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

a reasonable belief in the truth of its statement, although this may still give rise to a claim of innocent misrepresentation.<sup>37</sup> In successful claims, the court may award damages in tort and rescission of the contract (or damages in lieu of rescission).

## 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.<sup>38</sup> The only other element required is intention, which is usually shown by the defendant having knowledge of the existence of the contract and its specific terms.

## iii Good faith

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

In 2013, the High Court appeared to move towards the idea of a more pervasive implied term of good faith in the cases of *Yam Seng Pte Ltd v. International Trade Corporation Ltd*<sup>39</sup> and *MSC Mediterranean Shipping Company SA v. Cottonex Anstalt*,<sup>40</sup> but the Court of Appeal overturned the first instance decision and Moore-Bick LJ noted 'there is in my view a real danger that if a general principle of good faith were established it would be invoked as often to undermine as to support the terms in which the parties have reached agreement.'<sup>41</sup> 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.<sup>42</sup>

## VIII REMEDIES

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

### 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.<sup>43</sup>

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37 Innocent misrepresentation (also governed by the Misrepresentation Act 1967) is where the representor is without fault because they had reasonable grounds to believe in the truth of its statement and, if a claim is successful, the claimant is entitled to rescission or damages in lieu of recession.

38 *OBG v. Allan* [2007] UKHL 21.

39 *Yam Seng Pte Ltd v. International Trade Corporation Ltd* [2013] EWHC 111 (QB).

40 *MSC Mediterranean Shipping Company SA v. Cottonex Anstalt* [2015] EWHC 283 (Comm).

41 *MSC Mediterranean Shipping Company SA v. Cottonex Anstalt* [2016] EWCA Civ 789.

42 *Sheikh Tahnoon Bin Saeed Bin Shakhboot Al Neyaban v. Kent* [2018] EWHC 333 (Comm).

43 *Robinson v. Harman* (1848) 1 Ex 850.

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

## ii Limitations to recovery of damages

A key restriction on the recovery of damages for breach of contract is remoteness.<sup>44</sup> Only losses that are 'in the contemplation of both parties'<sup>45</sup> will be recoverable by the claimant. This principle can be summarised as follows:<sup>46</sup>

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

The innocent party must also ensure that it has taken reasonable steps to mitigate its loss, and the court will apportion damages between the parties if they result partly from the claimant's own fault and partly from the fault of any other person.<sup>47</sup>

## 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*,<sup>48</sup> but has recently been re-considered in *Morris-Garner and another v. One Step (Support) Ltd*,<sup>49</sup> where the Supreme Court found that negotiating damages may be a tool for determining the economic value of a right that has been breached.

Punitive damages, intended to penalise the defendant, cannot be awarded for breach of contract.<sup>50</sup>

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*

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44 See *Hadley v. Baxendale* (1854) 9 Ex. 341; *Victoria Laundry (Windsor) Ltd v. Newman Industries Ltd* 4 [1949] 2 KB.528; *Koufos v. C. Czarnikow Ltd (The Heron II)* [1969] 1 AC 350.

45 *Hadley v. Baxendale* [1854] EWHC Exch J70 at page 151.

46 Chitty, J (2012), *Chitty on Contracts: General principles*. 31st ed. Sweet & Maxwell.

47 Section 1, Law Reform (Contributory Negligence) Act 1945.

48 *Wrotham Park Estate Ltd v. Parkside Homes Ltd* 1 WLR 798.

49 *Morris-Garner and another v. One Step (Support) Ltd* [2018] UKSC 20.

50 *Johnson v. Unisys Ltd* [2003] 1 AC 518 at paragraph 15.

*Ltd v. Beavis*, the Supreme Court held that the test for whether or not a penalty clause was enforceable was as follows: ‘whether the impugned provision is a secondary obligation which imposes a detriment on the contract breaker out of all proportion to any legitimate interest of the innocent party in the enforcement of the primary obligation’.<sup>51</sup>

#### **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.<sup>52</sup>

## **IX CONCLUSIONS**

As noted above, the English courts are some of the most established fora for dealing with complex commercial litigation. And, from the discussion above, it should be clear that English law is a sensible and commercial choice of governing law. The combination of the two – English courts and English law – is one of the best ways for contract drafters to ensure that what is contained in their contracts will be upheld.

Going forward, and despite the impact of Brexit on the United Kingdom in political and economic terms, it is very likely indeed that the English courts will retain their reputation for delivering high quality justice in the context of complex commercial litigation. 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. 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.

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51 *Cavendish Square Holding BV v. Talal El Makdessi (El Makdessi) and ParkingEye Ltd v. Beavis* [2015] UKSC 67 (ParkingEye).

52 *Beswick v. Beswick* [1968] AC 58.

# FRANCE

*Fabrice Fages and Myria Saarinen*<sup>1</sup>

## I OVERVIEW

Complex commercial litigations often stem from disputes arising out 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,<sup>2</sup> contracts entered into force and court proceedings commenced before 1 October 2016 remain subject to the former provisions of the French Civil Code.<sup>3</sup> 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.<sup>4</sup>

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<sup>5</sup> or contracts of mandate<sup>6</sup>), but also in other bodies of texts, and for instance in the French Commercial Code (such as the rules applicable to commercial loan contracts).<sup>7</sup>

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1 Fabrice Fages and Myria Saarinen, partners at Latham & Watkins. This chapter was written with the contribution of associate Floriane Cruchet and with the assistance of trainees Clara Giordano, Charlotte Guérin and François Tréfois.

2 Articles 1123 (Sections 3 and 4), 1158 and 1183 of the French Civil Code are immediately applicable to all contracts.

3 Article 9, Ordinance No. 2016-131 of 10 February 2016 on the reform of contracts, the general regime and the proof of obligations.

4 It covers the modifications made to Articles 1110, 1117, 1137, 1145, 1161, 1171, 1223, 1327 and 1343-3 of the French Civil Code.

5 Articles 1582 et seq. French Civil Code.

6 Articles 1984 et seq. French Civil Code.

7 Articles L. 145-2 et seq. French Commercial Code.

## II CONTRACT FORMATION

A contract is defined as ‘a concurrence of wills between two or more persons to create, modify, assign or terminate obligations’.<sup>8</sup> 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.<sup>9</sup>

### i Contract conclusion

#### *Negotiations*

The initiative, conduct and termination of negotiations are free but must be conducted in good faith.<sup>10</sup>

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.<sup>11</sup> 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.<sup>12</sup> Breaching this duty may result in the nullity of the contract and the allocation of damages by the breaching party.<sup>13</sup> It is thus crucial to respect this duty, especially for significant operations such as mergers and acquisitions.

#### *Offer and acceptance*

The offer must contain all the essential elements of the contract. It must express the will of its author to be bound in case of acceptance; otherwise, it only qualifies as an invitation to negotiate.<sup>14</sup> An offer may only be withdrawn after the expiration of the time period stipulated or after the expiration of a reasonable time.<sup>15</sup>

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

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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;<sup>19</sup> 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.<sup>20</sup>

### **ii Conditions of validity of a contract**

Three requirements must be satisfied to conclude a valid contract:<sup>21</sup>

- a* consent of all parties;
- b* parties' capacity to contract; and
- c* defined and lawful subject matter of the contract.

### ***Capacity and representation***

Any natural person over 18 has the capacity to contract unless he or she is under protection, as per Article 425 of the Civil Code.<sup>22</sup> As for legal persons, their capacity to contract is limited by the specific provisions that govern each of them.<sup>23</sup> Contracts are signed by the company's legal representative or by any person to whom such powers have been delegated.<sup>24</sup>

### ***Validity of consent***

Parties' consents are not valid when given only by error, obtained by violence or induced by dol.<sup>25</sup>

Indeed, if a party's error concerned an essential component of the contract, that party cannot have understood its real implications. Consent is also void when a party only agreed under an illegitimate moral, physical or even pecuniary threat. As per the dol, a civil law concept, it can be defined as a fraud committed to induce another party into entering into a contract.<sup>26</sup>

### ***Validity of content***

A contract's content must not breach public order<sup>27</sup> and must be based on a present or future obligation that must be both possible and determined or determinable.<sup>28</sup>

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19 Article 1123 (Section 1), French Civil Code.

20 Article 1124 (Section 1), French Civil Code.

21 Article 1128, French Civil Code.

22 Articles 1145 and 1146, French Civil Code.

23 Article 1145 (Section 2), French Civil Code.

24 Articles 1153–1161, French Civil Code.

25 Article 1130, French Civil Code.

26 The consequences of such invalid consent are examined in Part VI 'Defences to enforcement'.

27 Article 1162, French Civil Code.

28 Article 1163, French Civil Code.

In a bilateral contract, the fact that the obligations are unbalanced is not a cause of nullity.<sup>29</sup> 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.<sup>30</sup>

### iii form of the contract

As a principle, contracts are consensual.<sup>31</sup> 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.<sup>32</sup> Not only must they comply with their explicit provisions, but also with all other terms implied by equity, customs or the law.<sup>33</sup>

Contracts can only be modified or revoked if both parties consent to it, unless otherwise specified by law.<sup>34</sup> However, a contract may be renegotiated if some unpredictable events occur.<sup>35</sup>

Regarding the transfer of ownership, unless parties have decided otherwise, the transfer occurs upon conclusion of the contract.<sup>36</sup> After that, the seller must deliver the good as promised and preserve it until delivery.<sup>37</sup>

As a general rule, one may only bind oneself in one's own name and for oneself.<sup>38</sup> However, some contracts have third-party beneficiaries (third-party provision,<sup>39</sup> third-party performance promise,<sup>40</sup> mandate,<sup>41</sup> commissioning agents,<sup>42</sup> etc.).

## III CONTRACT INTERPRETATION

### i Law governing contract interpretation

Choice-of-law provisions willingly inserted in a contract are, in principle, upheld by French courts, for parties are free to determine which law will govern the substance of their contract (*lex contractus*). Said law will also govern its interpretation.

However, parties may not choose a foreign law solely out of convenience, in order to escape imperative provisions of the law that would otherwise have been naturally applicable.

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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 1167, 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.

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.<sup>43</sup>

## ii Participants to contract interpretation

Agreements lawfully entered into have the force of law for those who have made them.<sup>44</sup> 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.<sup>45</sup> However, 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.<sup>46</sup> 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.<sup>47</sup>

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.<sup>48</sup> When several contracts partake in a given operation, courts may give meaning to a provision in one of these contracts in accordance with the intention of the parties as set out in the other contracts.

In addition, when a clause is susceptible of two meanings, it shall be understood to mean that which may produce some effect, rather than according to the meaning that would produce none.<sup>49</sup>

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43 Article 4.1.(a), Regulation (EC) 593/2008 of the European parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I).

44 Article 1103, French Civil Code.

45 Article 1192, French Civil Code.

46 Article 1188, French Civil Code.

47 *ibid.*

48 Article 1189, French Civil Code.

49 Article 1191, French Civil Code.

When none of the aforementioned rules of construction are enough to discover the meaning of a clause, said clause must be interpreted:

- a* in favour of the consumer, when the contract governs the relation between a professional and a consumer;<sup>50</sup>
- b* in favour of the debtor, when the contract was freely negotiated;<sup>51</sup> and
- c* in favour of the party who did not draft the contract, for standard form agreements.<sup>52</sup>

Finally, as a general principle, parties must not only comply with the express provisions of their contract but also with all the terms implied in it by equity, customs or the law.<sup>53</sup> Therefore, judges may discover obligations that were not expressly incorporated in the contract, such as an obligation to ensure the security of the passengers in an agreement related to the provision of transportation services.<sup>54</sup>

#### **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 3.3 and not by an obligation to follow a given hierarchy of evidence.

## **IV DISPUTE RESOLUTION**

### **i Court litigation**

#### ***Court structure***

The French court structure follows a division between the public law courts, which deal with most disputes involving administrative bodies, the criminal courts, which deal with criminal complaints and prosecutions in relation with a criminal offence, and the private law courts, which deal with commercial, employment and civil matters.

Within the private law court system, a three-tier structure is observed whereby litigants can submit their dispute to a court of appeals when at least one of them is unsatisfied with the decision of the first instance court, provided the disputed amount exceeds €4,000. Access to the highest court, the *Cour de Cassation*, is only granted to parties claiming that the lower courts have rendered a ruling grounded on errors in law.

Once a conflict has arisen, parties may agree that their dispute will be judged without appeal even if the disputed amount exceeds €4,000, provided the case only involves rights over which they have an unrestricted power of disposition.<sup>55</sup>

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50 Article L. 211-1, French Consumer Code.

51 Article 1190, French Civil Code.

52 Article 1190, French Civil Code.

53 Article 1194, French Civil Code.

54 *Cour de Cassation*, First Civil Chamber, 21 November 1911, *Compagnie Générale Transatlantique*.

55 Article 41, French Code of Civil Procedure.

### ***Rules of substantive jurisdiction***

By default, the competent first instance courts for civil matters are the high courts, provided the disputed amount exceeds €10,000, or the district courts, when the disputed amount is inferior to that threshold.<sup>56</sup> Parties may agree, after a conflict has arisen, that their dispute will be heard either by a high court or a district court irrespective of the disputed amount.<sup>57</sup>

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.<sup>58</sup>

Judges sitting in commercial courts are not career judges but lay magistrates, elected by delegates – themselves elected among the commercial community.<sup>59</sup> 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.<sup>60</sup>

### ***Rules of territorial jurisdiction***

By default, a claimant must seize the competent court of the jurisdiction where the respondent resides (*actor sequitur forum rei*).<sup>61</sup> 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;<sup>62</sup>
- b 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 Appeals;<sup>63</sup> and
- c 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.<sup>64</sup>

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.<sup>65</sup> In contractual matters, this other court is that of the place of actual delivery of the goods or of

56 Article R. 211-3, French Code of Judicial Organisation.

57 Article 41, French Code of Civil Procedure.

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

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

60 Article 860-1, French Code of Civil Procedure.

61 Article 42, French Code of Civil Procedure.

62 Article 145, French Code of Civil Procedure.

63 Article D. 442-3, French Commercial Code; Annex 4-2-1, Regulatory Section of the French Commercial Code.

64 Articles D. 211-5 et seq. French Code of Judicial Organisation; Table V of the Annex, French Code of Judicial Organisation.

65 Article 46, French Code of Civil Procedure.

the place of performance of the service. For claims based on extra-contractual liability (tort), this other court is that of the place where the harmful event occurred or the court within whose jurisdiction the damage was suffered.

Parties may only derogate from the rules of territorial jurisdiction by convention if they all contract in their capacity as businesses. In addition, the choice of forum clause must be stated very distinctly in the undertaking of the party to whom it is opposed as, otherwise, it is deemed unwritten.<sup>66</sup>

## 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 bailiffs' 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.<sup>67</sup>

### *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).<sup>68</sup> 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 divulgence of trade secrets in the course of legal proceedings.<sup>69</sup>

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.<sup>70</sup> 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

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66 Article 48, French Code of Civil Procedure.

67 Article 700, French Code of Civil Procedure.

68 Articles 433 et seq. French Code of Civil Procedure.

69 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 and disclosure; Law No. 2018-670 of 30 July 2018 on the protection of trade secrets.

70 Law No. 2014-344 of 17 March 2014 on consumer protection; Law No. 2016-41 of 26 January 2016 for the modernisation of our health system; Law No. 2016-1547 of 18 November 2016 on modernising justice in the 21st century.

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:

- a the clause must have been expressly established as a mandatory prerequisite to the referral of the dispute to a court;
- b parties must have given their express consent to that effect; and
- c the practical details of its implementation must have been specified in the agreement.<sup>71</sup>

A claimant referring the matter to a court directly will expose himself to a ruling of inadmissibly of the proceedings.<sup>72</sup>

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.<sup>73</sup> To encourage these alternative dispute resolution mechanisms, the limitation period on the 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.<sup>74</sup>

## V BREACH OF CONTRACT CLAIMS

### i Contractual liability

Sectoral laws may specify parties' particular obligations, as is for instance the case for sales contracts. Indeed, a buyer benefits from protective provisions such as a warranty against eviction,<sup>75</sup> a warranty against hidden defects,<sup>76</sup> an obligation of proper delivery<sup>77</sup> and a product liability claim.<sup>78</sup>

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.

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71 *Cour de Cassation*, Commercial Chamber, 29 April 2014, No. 15-25.928.

72 *Cour de Cassation*, Mixed Chamber, 14 April 2003, No. 00-19.423.

73 Article 1528, French Code of Civil Procedure.

74 Article 56, French Code of Civil Procedure

75 Articles 1626 et seq. French Civil Code.

76 Articles 1641 et seq. French Civil Code.

77 Articles 1604 et seq. French Civil Code.

78 Articles 1245 et seq. French Civil Code.

### ***Breach of contract***

A contract is deemed breached if at least one obligation was not performed or was delayed, unless it was owing to an external cause that cannot be imputed to the party.<sup>79</sup>

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.

### ***Damage***

The breach of contract must have harmed the co-contractor. French courts can order the compensation of different damages such as material injuries, non-pecuniary damages or bodily harms.

However, a debtor is liable only for damages that were foreseen or that could be foreseen at the time of the contract, unless the debtor's failure is owing to his or her own gross negligence or fraud.<sup>80</sup>

### ***Causal link***

A causal link must be demonstrated between the breach of contract and the damages, that is to say that the damages must be the immediate and direct consequences of the non-performance of the agreement.<sup>81</sup>

## **ii Burden of proof**

Each party must prove, according to the law, the facts necessary for the success of the claim.<sup>82</sup>

### ***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.<sup>83</sup> Per this scheme, parties may agree not to seize a court, at least for the duration of their agreement, and instead to work together, with their counsels, in order to find an amicable settlement of their dispute. In such contexts, parties must contractually organise the terms of their exchange of evidence.<sup>84</sup>

In anticipation of a proceeding, a court may also order legally permissible preparatory inquiries at the request of any interested party, by way of a petition or by way of a summary procedure, if there is a legitimate reason to preserve or to establish, before any legal proceedings, the evidence of the facts upon which the resolution of the dispute depends.<sup>85</sup> This scheme is the most common mean to obtain evidence.

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79 Article 1231-1, French Civil Code.

80 Article 1231-3, French Civil Code.

81 Article 1231-4, French Civil Code.

82 Article 9, French Code of Civil Procedure.

83 Law No. 2010-1609 of 22 December 2010.

84 Article 2063, French Civil Code.

85 Article 145, French Code of Civil Procedure.

### ***Rules of evidence***

A claimant requesting the performance of an obligation must prove it.<sup>86</sup> Similarly, a person claiming to be released from an obligation must prove the payment or the fact that caused the extinction of his or her obligation.<sup>87</sup>

Unless the law states otherwise, evidence may be brought by any means.<sup>88</sup> Nonetheless, any contract obligation exceeding €1,500<sup>89</sup> must be proved by a private or authentic act<sup>90</sup> unless:

- a* it is materially or morally impossible to obtain the written proof;
- b* it is common under the customs not to write the contract down; or
- c* the written proof was lost owing to a *force majeure*.<sup>91</sup>

A confession, a decisive oath or *prima facie* evidence may be substitutions for a required written proof.<sup>92</sup>

The law may establish presumptions related to some acts or facts. These presumptions are said to be simple, mixed or irrefutable.<sup>93</sup> It is possible to prove the contrary of a simple presumption by any mean. However, a mixed presumption can only be rebutted by the means of proof stated by the law, and the irrefutable presumption cannot be rebutted.

## **VI DEFENCES TO ENFORCEMENT**

### **i Extinctive limitation period**

In general, personal actions or movable rights of action apply for five years from the day the holder of a right knew or should have known the facts enabling him or her to exercise the right.<sup>94</sup>

The time limitation may, in certain cases, be either suspended or interrupted. For instance, the time limitation period is suspended when a judge grants an investigative measure submitted prior to any trial.<sup>95</sup> Any legal action, even summary proceedings, interrupts the prescription.<sup>96</sup>

However, parties may decide, by mutual agreement, to modify the prescription by shortening or extending its time limit.<sup>97</sup>

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86 Article 1353 (Section 1), French Civil Code.

87 Article 1353 (Section 2), French Civil Code.

88 Article 1358, French Civil Code.

89 Decree No. 80-533 of 15 July 1980.

90 Article 1359, French Civil Code.

91 Article 1360, French Civil Code.

92 Article 1361, French Civil Code.

93 Article 1354, French Civil Code.

94 Article 2224, French Civil Code.

95 Article 2239, French Civil Code.

96 Article 2241, French Civil Code.

97 Article 2254, French Civil Code.

## ii Legal compensation

Compensation is defined as the simultaneous extinction of mutual obligations between two persons.<sup>98</sup> For compensation to operate, several conditions must be met: the obligations must be fungible, certain, liquid and due.<sup>99</sup>

## iii Nullity of a contract

In principle, a contract that does not fulfil the conditions required for its validity is void and deemed never to have existed, which raises the question of the restitution of performances that have already taken place.<sup>100</sup>

### *Defects of consent*

Defects of consent, which have already been presented in Part II 'Contract formation', are a cause of nullity of the contract<sup>101</sup> if and only if they have been decisive. In other words, the error, dol or violence must be of such a nature that without them one of the parties would have not entered the contract or would have but under substantially different conditions.<sup>102</sup> To be a ground for nullity, the error must not be inexcusable and must relate to the essential qualities of one of the performances.<sup>103</sup> Therefore, errors on the value resulting from an erroneous economic assessment are excluded,<sup>104</sup> whereas errors resulting from a dol are always excusable and a cause of nullity even if when relating to the value.<sup>105</sup> With regard to violence, it may be a ground for nullity whether exercised by a co-contractor or by a third party.<sup>106</sup>

### *Incapacity and defaults in representation*

Capacity is a condition of validity of contracts<sup>107</sup> and, therefore, incapacity a ground for relative nullity.<sup>108</sup>

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.<sup>109</sup> 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.<sup>110</sup> 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.<sup>111</sup>

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98 Article 1347 (Section 1), French Civil Code.

99 Article 1347-1, French Civil Code.

100 Article 1178 (Sections 1 and 2), French Civil Code.

101 Article 1131, French Civil Code.

102 Article 1130, French Civil Code.

103 Article 1132, French Civil Code.

104 Article 1136, French Civil Code.

105 Article 1139, French Civil Code.

106 Article 1142, French Civil Code.

107 Article 1128, French Civil Code.

108 Article 1147, French Civil Code.

109 Article 1156 (Section 2), French Civil Code.

110 Article 1157, French Civil Code.

111 Article 1161, French Civil Code.

### ***Illicit contracts***

Contracts are only valid insofar as they include a defined and lawful subject matter.<sup>112</sup> 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.<sup>113</sup>

The sanction of an illicit or indefinite subject matter is the nullity of the contract.<sup>114</sup>

### ***Nullity exception***

The nullity exception is a defence to enforcement that may be raised by the party to a contract who is being asked to perform a voidable contract on grounds of nullity. The nullity exception is imprescriptible (i.e., can still be raised even where the limitation period is expired) as long as it relates to a contract that has not received any performance.<sup>115</sup>

### **iv Illusory or derisory consideration in onerous contracts**

As mentioned in Section II.ii. 'Validity of content', an onerous contract is null and void if, at the time of its formation, the consideration provided to a party is illusory or derisory.<sup>116</sup> However, in a bilateral contract, the lack of equivalence between two obligations is not a ground for nullity.<sup>117</sup>

### **v Exclusion or limitation of liability clauses**

Parties may validly include in their contracts exclusion or limitation of liability clauses in order to adapt their contractual relations, or to limit their mutual obligations. However, any clause that would deprive the essential obligation of the debtor of its substance is deemed unwritten, that is to say null and void.<sup>118</sup> 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.<sup>119</sup>

### **vi Significant imbalance**

In standard form agreements, where clauses and general conditions are determined in advance by one of the parties, any non-negotiable clause, unilaterally determined by one of the parties, and which creates a significant imbalance between the respective rights and obligations of the parties to the contract shall be deemed unwritten.<sup>120</sup>

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112 Article 1128, French Civil Code.

113 Article 1162, French Civil Code.

114 Article 1178, French Civil Code.

115 Article 1185, French Civil Code.

116 Article 1169, French Civil Code.

117 Article 1168, French Civil Code.

118 Article 1170, French Civil Code.

119 Article 1231-3, French Civil Code.

120 Article 1171, French Civil Code.

### **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.<sup>121</sup>

### **viii Force majeure**

In contractual matters, *force majeure* occurs when an event beyond the debtor's control, which could not reasonably have been foreseen at the time the contract was concluded and whose effects cannot be avoided by appropriate measures, prevents the debtor from performing his or her obligation.<sup>122</sup> 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 the *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.<sup>123</sup>

## **VII FRAUD, MISREPRESENTATION AND OTHER CLAIMS**

### **i Breach of the duty of good faith**

Contracts must be negotiated, formed and executed in good faith.<sup>124</sup> This provision is imperative.<sup>125</sup>

Any breach of the duty of good faith will result in contractual or extra-contractual liability on the part of its author, depending on whether the parties have entered into a contract or are still negotiating the terms of their agreement.

### **ii Revision of the contract for unforeseen circumstances**

The 2016 reform enshrines the principle of revision for unforeseen circumstances after the *Cour de Cassation* had refused to do so for many years. Three cumulative conditions are required: (1) a change in circumstances unforeseeable at the time the contract was concluded, (2) which makes the performance of the contract excessively onerous for a party (3) who had not accepted the risk.<sup>126</sup>

When these conditions are met, a party may request the renegotiation of the contract to his or her co-contractor. Parties may also agree to terminate it or ask the judge for an adaptation of the contract. If they fail to reach an agreement, a party may still request the revision or termination of the contract.<sup>127</sup>

### **iii Quasi-contractual claims**

Quasi-contracts are purely voluntary acts resulting in a commitment by the person who benefits from them without being entitled to it, and sometimes a commitment by their

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121 Article 1186, French Civil Code.

122 Article 1218, French Civil Code.

123 Article 1351, French Civil Code.

124 Article 1104 (Section 1), French Civil Code.

125 Article 1104 (Section 2), French Civil Code.

126 Article 1195, French Civil Code.

127 *ibid.*

author towards others.<sup>128</sup> The Civil Code identifies three quasi-contracts: the management of affairs,<sup>129</sup> the undue payment<sup>130</sup> and the unjustified enrichment.<sup>131</sup> They give rise to the obligation to compensate for the unfair advantage received from others. Therefore, the person impoverished has a legal action against the person enriched on the basis of one of these three quasi-contracts.<sup>132</sup>

#### **iv Fraud**

Fraud is a case law concept characterised by a desire to circumvent a mandatory law by using artifice or machination. Under the adage *fraus omnia corrumpit*, in other words, ‘fraud corrupts everything’, a judge may declare the contract void or deprive the scheme of its fraudulent effect.

Moreover, a fraudulent act directed against a third party will be declared unenforceable against that third party. The specific scheme that is the Paulian action (*‘action paulienne’*) enables a creditor to protect himself or herself from fraud by having the acts committed by his or her debtor in fraud of his or her rights declared unenforceable against him or her inasmuch as the debtor arranges his or her insolvency in order to avoid performing his or her obligation.<sup>133</sup>

### **VIII REMEDIES**

#### **i Remedies available for breach of contract**

The French Civil Code sets out five remedies that are available to the creditor, victim of a non-performance or an improper performance.<sup>134</sup>

- 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,<sup>135</sup> or suspend the performance of his or her obligation when it is obvious that the other party will not execute his own obligation;<sup>136</sup>
- 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;<sup>137</sup>
- c* price reduction: the creditor may accept, after a formal notice, a partial performance of the contract and seek for a proportional price reduction;<sup>138</sup>

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128 Article 1300, French Civil Code.

129 Articles 1301–1301-5, French Civil Code.

130 Articles 1302–1302-3, French Civil Code.

131 Articles 1303–1303-4, French Civil Code.

132 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.

133 Article 1341-2, French Civil Code.

134 Article 1217, French Civil Code.

135 Article 1219, French Civil Code.

136 Article 1220, French Civil Code.

137 Articles 1221 and 1222, French Civil Code.

138 Article 1223, French Civil Code.

- d* termination for breach: termination for breach may be obtained on three grounds: application of a termination clause, judicial resolution or unilateral termination.<sup>139</sup> The latter is a major innovation of the 2016 reform whereby creditors can terminate contracts by notice to their debtors, and after a formal notice,<sup>140</sup> and
- e* damages: the creditor may obtain compensation for the damage caused.<sup>141</sup> Damages will be awarded provided that the non-performance is final or that a formal notice has been issued.

Parties may also include a penalty clause in their contract, providing that the party who fails to fulfil his or her obligations will pay a certain amount of damages.<sup>142</sup>

These remedies are cumulative, provided they are not incompatible. Punitive or exemplary damages do not exist as such. Finally, the choice of remedy is at the sole discretion of the debtor.

## **ii Conditions for the award of damages**

The cornerstone principle is that of full indemnification: damages granted to the victim shall allow the complete repair of the damage, no more and no less, in such a way as to restore the victim to the same situation in which he or she would have been had the damage not occurred.

However, in French contract law, the award of damages is subject to certain conditions. First and foremost, the damage must be certain, even if it exists in the future. Indeed, one can get compensation for the loss of a chance, as long as it really exists. Secondly, the damage must be direct; namely, the immediate and direct result of the breach of contract.<sup>143</sup> Finally, compensation is limited to the damage foreseeable at the time the contract is concluded, except in the event of gross negligence or fraud.<sup>144</sup>

Judges may still use their sovereign power to assess the damage in order to moderate the quantum of damages. Additionally, both default interests and compensatory damages may be awarded.<sup>145</sup> With regard to the latter, the breach of contract by the bad faith debtor must have caused an additional damage, distinct from the delay, to the creditor.

## **iii Extra-contractual claims (tort)**

Under French law, contractual liability applies between co-contracting parties for any damage resulting from the non-performance of a contractual obligation. Consequently, if these conditions are not met, the liability is necessarily extra-contractual.<sup>146</sup> Also, pursuant to the principle of non-cumulation of contractual and extra-contractual liabilities, where the conditions for contractual liability are met, extra-contractual liability can no longer be enforced by a party to the contract.

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139 Articles 1224–1229, French Civil Code.

140 Article 1226, French Civil Code.

141 Article 1231, French Civil Code et seq.

142 Article 1231-5, French Civil Code.

143 Article 1231-4, French Civil Code.

144 Article 1231-3, French Civil Code.

145 Article 1231-6, French Civil Code.

146 Article 1240, French Civil Code et seq.

As regards third parties, a landmark ruling by the Plenary Assembly of the *Cour de Cassation*<sup>147</sup> enshrined the principle whereby a third party to a contract may invoke, on the basis of extra-contractual liability, a breach of contract if such breach has caused him or her damage. In other words, the sole breach of contract by a co-contracting party is sufficient for a third party to engage the latter's extra-contractual liability. Nevertheless, several recent decisions of the *Cour de Cassation* as well as the Civil Liability Bill of 13 March 2017<sup>148</sup> have tempered this principle.

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147 *Cour de Cassation*, Plenary Assembly, 6 October 2006, Myr'ho, No. 05-13.255.

148 Article 1234, Civil Liability Bill of 13 March 2017.

# HONG KONG

*Athena Hiu Hung Wong and Moses Wanki Park*<sup>1</sup>

## 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:<sup>2</sup>

- a* the District Court;
- b* the Court of First Instance (of the High Court);
- c* the Court of Appeal (of the High Court); and
- d* the Court of Final Appeal.

### ii Minimum amount in disputes

The majority of commercial litigation in Hong Kong is commenced in District Court (the amount of the claim must be over HK\$50,000 but not more than HK\$1 million) or the Court of First Instance (which has unlimited jurisdiction over all civil matters).

With effect from 3 December 2018, the civil jurisdiction limits of the District Court and the Small Claims Tribunal will be increased as follows:<sup>3</sup>

	Existing limit	New limit
General financial limit of the civil jurisdiction of the District Court	HK\$1 million	HK\$3 million
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)	HK\$240,000	HK\$320,000
Limit for the equity jurisdiction of the District Court where the proceedings do not involve or relate to land	HK\$1 million	HK\$3 million
Limit for the equity jurisdiction of the District Court where the proceedings wholly involve or relate to land	HK\$3 million	HK\$7 million
Limit for the Small Claims Tribunal	HK\$50,000	HK\$75,000

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2 The list does not encompass various other courts and tribunals in Hong Kong.

3 Commencement notices for jurisdictional rise of District Court and Small Claims Tribunal and Small Claims Tribunal (Fees) (Amendment) Rules 2018 gazetted: <https://www.info.gov.hk/gia/general/201807/06/P2018070500771p.htm>.

### 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<sup>4</sup> from the date on which the breach of contract happened. The limitation is 12 years for contracts under seal (specialty).<sup>5</sup> 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.<sup>6</sup>

### 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,<sup>7</sup> 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.<sup>8</sup> 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.<sup>9</sup> 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

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4 Section 4(1)(a) of the Limitation Ordinance.

5 Section 4(1)(3) of the Limitation Ordinance.

6 Cases showed that 'the court always gave effect to such a clause and did not regard the same as against public policy': *Kanson Crane Service v. Bank of China Group Insurance* HCA 4246/2002 (Unreported, 1 August 2003), at Section 14.

7 The Commercial List contains claims arising out of trade and commercial transactions.

8 Commercial contracts are presumed to be legally binding: *Gibson v. Manchester City Council* [1979] 1 WLR 294.

9 *Pharmaceutical Society of Great Britain v. Boots Cash Chemists (Southern) Ltd* [1953] 1 QB 401.

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.<sup>10</sup>

### **Consideration given?**

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

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

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10 *Lee Siu Fong Mary v. Ngai Yee Chai* [2006] 1 HKC 157, at Paragraph 15.

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 PJ.

17 *New World Development Co Ltd v. Sun Hung Kai Securities Ltd* (2006) 9 HKCFAR 403, [32], per Ribeiro PJ.

18 *Gee Tai Trading Co Ltd v. Sun Wah Oil & Cereal Ltd* [1994] 1 HKLR 50.

## ii Third-party beneficiaries

In common law, the doctrine of privity of contract dictates that a third party cannot sue on a contract intended by the parties to be for his or her benefit.<sup>19</sup> 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.<sup>20</sup>

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'.<sup>21</sup> 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.<sup>22</sup> A promissory estoppel might arise where:<sup>23</sup>

*[T]he parties are in a relationship involving enforceable or exercisable rights, duties or powers;*

or

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

or

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

Nonetheless, as a general rule, a 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 *Tweedle 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 resile from his or her promise on (1) giving reasonable notice and (2) providing to the promisee a reasonable chance to resume his or her position.<sup>24</sup> The promise will only become final and irrevocable if the promisee cannot resume his or her position.<sup>25</sup>

#### **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.<sup>26</sup>

### **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.<sup>27</sup>

The law excludes from the admissible background the previous negotiations of the parties and their declarations of subjective intent.<sup>28</sup> Equally, the parties' subsequent conduct is not normally admissible.<sup>29</sup> The court interprets terms in their context in both statutory and constitutional interpretation.<sup>30</sup>

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'.<sup>31</sup> 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'.<sup>32</sup>

#### **ii Conflict of law**

In commercial litigation, it is uncommon for a contract to cover more than one jurisdiction. In those circumstances, there is a need to determine which law governs the contract or any part of it. In Hong Kong, conflict of law is regulated by common law, which recognises the parties' freedom to contract. Thus, first, the court looks at the express terms of the contract to

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24 *Perfect Direct Limited and Another v. Dejin Resources Group Company Limited* HCCW 76/2014 (Unreported, 19 June 2015).

25 *Ajayi v. RT Briscoe (Nigeria) Ltd* [1964] 1 WLR 1326, 1330.

26 *British Steel Corporation v. Cleveland Bridge and Engineering Co Ltd* (1984) 1 All ER 504.

27 *Investors Compensation Scheme v. West Bromwich Building Society* [1998] 1 WLR 836.

28 *ibid.*

29 *James Miller v. Whitworth Street Estates (Manchester) Ltd* [1970] AC 583.

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.

32 *Mannai Investment Co v. Eagle Star Life Assurance* [1997] AC 749 (HL), per Lord Steyn.

see whether the proper law was expressly provided for.<sup>33</sup> 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.<sup>34</sup>

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.<sup>35</sup> 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.<sup>36</sup>

#### 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 arbitration 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.<sup>37</sup> The court may stay court proceedings in favour of arbitration<sup>38</sup> and it has limited power to assist and supervise in arbitral proceedings, such as by granting interim measures.<sup>39</sup> Crucially, the parties may seek the court's assistance in enforcing arbitral awards, whether made in or outside Hong Kong.<sup>40</sup>

In all civil proceedings in Hong Kong, there is a voluntary mediation procedure<sup>41</sup> 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:<sup>42</sup>

*a* failure to perform contractual obligations (an actual breach);

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33 *Amin Rasheed Shipping Corp. v. Kuwait Insurance Co* [1984] AC 50.

34 *Whitworth Street Estates (Manchester) Ltd v. James Miller & Partners* [1970] AC 583 at p. 611.

35 *ibid.*

36 *York Airconditioning & Refrigeration Inc v. Lam Kwai Hung trading as North Sea A/C Elect Eng Co* HCA008176/1993 (unreported, 16 December 1994).

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.

- b defective performance of contractual obligations (an actual breach); or
- c refusal or inability to fulfil contractual obligations due in the future (an anticipatory breach).<sup>43</sup>

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). The burden of proof of repudiation is on the party who alleges it.<sup>44</sup>

### 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');<sup>45</sup>
- b performance has been rendered impossible by the guilty party's breach;<sup>46</sup>
- 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<sup>47</sup> or by judicial decision,<sup>48</sup> or if the parties have so agreed in their contract.<sup>49</sup> 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.<sup>50</sup> 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.<sup>51</sup> Notably, the effect of the breach will only be determined after the breach.

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43 'If, before the time arrives at which a party is bound to perform a contract, he expresses an intention to break it, or acts in such a way as to lead a reasonable person to the conclusion that he does not intend to fulfill his part, this constitutes an 'anticipatory breach' of the contract...', per Cheung JA in *Chao Keh Lung Bill v. Don Xia* [2003] 4 HKC 660, [2004] 2 HKLRD 11 (CA), Paragraph 26.

44 *Lombard North Central Plc v. Butterworth* [1987] QB 527.

45 *Heyman v. Darwins Ltd* [1942] AC 356, 397.

46 See footnote 45..

47 For instance, Section 16(2) of the Sale of Goods Ordinance (Cap. 26) provides that 'Where the seller sells goods in the course of a business, there is an implied condition that the goods supplied under the contract are of merchantable quality...'

48 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 *Chitty on Contract, Volume 1 General Principles*, Sweet & Maxwell, 32 edn, 12-040.

50 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.

51 *Hongkong Fir Shipping Co Ltd v. Kawasaki Kisen Kaisha Ltd* [1962] 2 QB 26, 66.

## ii Right of election

A repudiatory breach normally allows the innocent party the right to claim damages for the breach and the right to elect to:

- 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 and sue for damages, 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 for the loss resulting from failure to perform the primary obligation.<sup>52</sup>

Where a repudiatory breach takes place, in order to terminate the contract, 'the innocent party must clearly and unequivocally accept the repudiation.'<sup>53</sup>

## 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.<sup>54</sup> An objective standard is used when determining whether terms are too uncertain. The objective standard is that of a reasonable person in the position of the contracting parties. When the parties have failed to agree on essential terms because some of them were missing or because some were unclear, Hong Kong courts will not make the contract for the contracting parties. If any unclear term is essential in the pertinent way, the entire contract will be void for uncertainty even if the parties intended it to be contractually binding.<sup>55</sup>

Lack of consideration is a defence to enforcement of a contract as the consideration or price of the deal is always an essential term in any contract. A contract that fails to clearly

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52 *Moschi v. Lep Air Services Ltd* [1973] AC 331 at 345, 346.

53 If the party does not do so, they will run the risk of being in breach themselves were they not to perform their side of the bargain.... The basis for this conclusion (often ignored in the business world) is that unless a contract is terminated, it remains in existence for the benefit of the wrongdoer as well as the innocent party: see *Chao Keh Lung Bill v. Don Xia* [2003] 4 HKC 660, [2004] 2 HKLRD 11 (CA), paragraph 73.

54 *New World Development Co Ltd v. Sun Hung Kai Securities Ltd* (2006) 9 HKCFAR 403.

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.<sup>56</sup> 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.<sup>57</sup> 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.<sup>58</sup>

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’.<sup>59</sup> 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.<sup>60</sup>

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’.<sup>61</sup> It is necessary to institute pressure amounting to coercion of the will of the victim or the absence of choice.<sup>62</sup> 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 eliminated,*

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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.

57 LexisNexis *Ho & Hall’s Hong Kong Contract Law*, Fourth Edition, [64] Uncertainty in Essential Terms.

58 LexisNexis *Ho & Hall’s Hong Kong Contract Law*, Fourth Edition, [415] Duress, Undue Influence and Unconscionability.

59 LexisNexis *Ho & Hall’s Hong Kong Contract Law*, Fourth Edition, [416] Duress, Undue Influence and Unconscionability.

60 LexisNexis *Butterworths Hong Kong Contract Law Handbook*, Third Edition, [120] Duress.

61 LexisNexis *Butterworths Hong Kong Contract Law Handbook*, Third Edition, [121] Duress.

62 *ibid.*

*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.*<sup>63</sup>

### 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.*<sup>64</sup>

The onus of proof lies on the party asserting that a contract is unconscionable.<sup>65</sup> 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.<sup>66</sup>

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*.<sup>67</sup> 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.'<sup>68</sup> The test to be applied is a subjective one.

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63 LexisNexis *Ho & Hall's Hong Kong Contract Law*, Fourth Edition, [437] Undue Influence.

64 LexisNexis *Ho & Hall's Hong Kong Contract Law*, Fourth Edition, [456–457] Unconscionable Contracts Ordinance.

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.<sup>69</sup>*

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.<sup>70</sup>

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.<sup>71</sup>

## 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.<sup>72</sup>*

Then, in the context of commercial litigation the question is in the absence of any contractual relationship between a representor and representee whether a representor owes a duty of care to the representee. That is, tort of liability for economic loss can be invoked in such situation. In 1990, the House of Lords in *Caparo Industries plc v. Dickman*<sup>73</sup> 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.<sup>74</sup>

Apart from common law principles, Hong Kong has the Misrepresentation Ordinance (Cap 284), which has created a wider cause of action for negligent misrepresentation. Where the representor and representee are in contractual privity, liability arises even when they are not in any special relationship. The burden of proof is shifted to the representor to prove that he or she had reasonable grounds to believe that the representation to be true. Under the Ordinance, the representee does not need to prove the negligence of the representor.

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69 LexisNexis *Ho & Hall's Hong Kong Contract Law*, Fourth Edition, [304] Fraudulent Misrepresentation. See, *Lee Yuk Shing v. Dianoor International Ltd (in liquidation)* [2016] 4 HKC 535.

70 LexisNexis *Ho & Hall's Hong Kong Contract Law*, Fourth Edition, [305] Fraudulent Misrepresentation.

71 *F & H Entertainments Ltd v. Leisure Enterprises Ltd* (1976) 120 SJ 331, 240 EG 455.

72 LexisNexis *Ho & Hall's Hong Kong Contract Law*, Fourth Edition, [328] Negligence Misrepresentation.

73 *Caparo Industries plc v. Dickman* [1990] 2 AC 605 (HL).

74 *ibid* at 617–655.

## VIII REMEDIES

In Hong Kong, as held by Steyn LJ in *Surrey County Council v. Bredero Homes Ltd*,<sup>75</sup> there are largely three separate interests to protect: expectation interest; reliance losses; and restitutionary interests.

### i Expectation interest

The general common law rule dictates that where a party suffers a loss by the other party breaching the contract, he or she is to be placed in the same position as if the contract had been performed. Thus, the courts do whatever they can to place the suffered party in as good a situation financially as far as it can be done. The courts have found largely two different means of fulfilling the expectation. The first is to reinstate the financial position to that before the contract was made. The second is to compensate costs of curing the defects in performance.<sup>76</sup>

### ii Reliance losses

Reliance interest is often claimed in speculative transactions. As held by Fletcher Moulton LJ in *Chaplin v. Hicks*:<sup>77</sup>

*[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'.<sup>78</sup>

### 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

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75 *Surrey County Council v. Bredero Homes Ltd* [1993] 3 All ER 705.

76 LexisNexis *Butterworths Hong Kong Contract Law Handbook*, Third Edition, [139] Remedies.

77 *Chaplin v. Hicks* [1911] 2 KB 786.

78 LexisNexis *Butterworths Hong Kong Contract Law Handbook*, Third Edition, [146] Contributory negligence.

contractual obligations. It is an exceptional remedy as opposed to common law damages. In Hong Kong, specific performance cannot be ordered against the government of Hong Kong in accordance with Crown Proceedings Ordinance (Cap. 300).<sup>79</sup> 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.<sup>80</sup> 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.<sup>81</sup>

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.

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79 LexisNexis *Butterworths Hong Kong Contract Law Handbook*, Third Edition, [148] Equitable remedies.

80 LexisNexis *Butterworths Hong Kong Contract Law Handbook*, Third Edition, [149] Equitable remedies.

81 Theft Ordinance (Cap. 210).

# IRELAND

*Julie Murphy-O'Connor, Claire McLoughlin and Karen Reynolds*<sup>1</sup>

## I OVERVIEW

Ireland is a common law jurisdiction in which the courts are bound by the decisions of superior courts in the court structure.<sup>2</sup> Almost 230,000 civil law cases were commenced in the Irish courts during 2017.<sup>3</sup> 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).<sup>4</sup>

The Commercial Court (a division of the High Court) judicially manages commercial disputes with a monetary value in excess of €1 million. Since the introduction of the Commercial Court in 2004, Ireland has been a forum of choice for commercial disputes and is recognised internationally as an efficient platform for the determination of substantial commercial disputes with approximately 90 per cent of cases decided within one year.

Although the courts remain the ultimate forum for the resolution of commercial disputes, there is a growing trend towards the use of alternative dispute resolution (ADR), in particular mediation and arbitration. The recently enacted Mediation Act 2017 regulates and promotes the settlement of disputes by way of mediation.

## II CONTRACT FORMATION

In Ireland, there are four prerequisites that must be satisfied before a contract comes into being: offer, acceptance, consideration and an intention to create legal relations. Other factors that the courts will look at before enforcing a contract include the terms of the contract, the capacity and authority of the parties and whether the contract is illegal or contrary to public policy.

Generally, commercial contracts are in writing; however, the Irish courts also recognise oral contracts. In certain circumstances, statute requires contracts to be performed in a specific format: in the form of a deed in writing or evidenced in writing. By way of example, the Land and Conveyancing Law Reform Act 2009 requires commercial contracts

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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.

3 Courts Service Annual Report 2017, available online at <http://www.courts.ie/Courts.ie/Library3.nsf/pagecurrent/AC7C2772ABD0E1F880257FC0003D294C?opendocument>.

4 Section 11 of the Statute of Limitations 1957.

transferring an interest or right in property be executed as a deed. The introduction of the Electronic Commerce Act 2000 allows for contracts to be formed via email and also allows for e-signatures.

### **i Offer**

An offer to contract, whether oral or written, must be unequivocal, unconditional, and express all terms and conditions. An offer expires on acceptance, the making of a counter-offer or rejection.

### **ii Acceptance or intention to create legal relations**

As acceptance of an offer constitutes the creation of legal relations, parties to commercial contracts often include expressions such as 'subject to contract', 'agreement in principal', 'provisional agreement' or 'non-binding heads of terms' during negotiations to distance themselves from this. In commercial contracts, it is presumed that the parties intend to create legally binding contracts unless otherwise stated.

An issue can arise in trading relations known as 'battle of the forms', with each party trying to incorporate its own terms and conditions into the contract. Disputes can arise as to whether the terms and conditions have been accepted by both parties or whether they constitute no more than a counter-offer.

In resolving disputes relating to battle of the forms, two approaches can be taken:

- 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 Court<sup>5</sup> has recently 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.

### **iii Consideration**

Where an offer is accepted and sufficient consideration has passed between the parties, a contract will be deemed to be in existence. Consideration can take any form once it has legal value and is not illegal, vague or impossible to perform. However, consideration in commercial contracts generally takes the form of payment.

### **iv Proof**

The creation of legal relations can be delayed or denied by the input of conditions precedent and conditions subsequent.

Conditions precedent suspend the coming into existence of a contract until a specific event has occurred. Examples include the renewal of leases, the production of documents or obtaining the relevant consents from a regulatory authority.

Conditions subsequent arise after a contract has been executed, but the contract is not enforceable until a specific event has occurred.

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<sup>5</sup> *Noreside Construction Limited v. Irish Asphalt Limited* [2014] IESC 68.

## v Privity of contract

The effect of the doctrine of privity of contract is that only the parties to a contract can enforce its terms, even where a third party stands to benefit from the contract. Specifically, this means that:

- a a person is unable to enforce any rights under a contract to which such a person is not a party;
- b a person who is not a party to a contract will not have any contractual liabilities imposed on them; and
- c contractual remedies are only available to compensate parties to a contract and not third parties.

Certain exceptions to the rule have developed over time, to include agency, collateral contracts and assignments.

In 2008, the Law Reform Commission published a final report recommending reform in this area with the introduction of the Contract Law (Privity of Contract and Third Party Rights) Bill 2008. The Bill is similar to the United Kingdom's Contract (Rights of Third Parties) Act 1999 and provides for three instances where a third party should be entitled to enforce a contract:

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

However, 10 years on from the Law Reform Commissions' recommendation, the Bill has yet to be proposed by the government.

## vi Modifications to contracts

In certain circumstances, modifications to contracts are necessary (e.g., to extend the contract's duration or to change terms such as payment, delivery or receipt of the product). Commercial contracts normally contain a variation clause that restricts amendments to the contract unless it is in writing and signed by all parties. The English Court of Appeal had found that parties were free to agree to vary the terms of a contract orally or by conduct and not solely by writing as per the variation clause included in the contract.<sup>6</sup> 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.<sup>7</sup> 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.

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

7 *Rock Advertising Limited v. MWB Business Exchange Centres Limited* [2018] UKSC 24.

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.<sup>8</sup> 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.<sup>9</sup>

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.<sup>10</sup>

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.<sup>11</sup>

## 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.<sup>12</sup>

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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.

9 *Law Society v. The Motor Insurers' Bureau of Ireland* [2017] IESC 31.

10 *Wood v. Capita Insurance Services Ltd* [2017] UKSC 24.

11 *McMullan Brothers Ltd v. McDonagh* [2015] IESC 19.

12 *Tolan v. Connacht Gold Co-operative Society Ltd* [2016] IECA 131.

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.<sup>13</sup>

## **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.<sup>14</sup>

The Commercial Court is a division of the High Court and is a specialised court that deals with commercial disputes with a monetary value in excess of €1 million. The Commercial Court is designed to provide an efficient and effective mechanism through close case management for dealing with commercial litigation cases.

### **ii Jurisdiction**

Irish courts will generally uphold an exclusive jurisdiction clause, where the clause is valid and has been freely entered into, unless there are compelling circumstances to the contrary. Ireland is bound by Article 25 of the Brussels I Recast Regulation<sup>15</sup> 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 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 and the courts have displayed a strong policy of staying court proceedings in favour of agreements to arbitrate.

### **iv Mediation**

Equally significant in terms of ADR is the recent enactment of the Mediation Act 2017 (the 2017 Act). 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.

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13 *Cadbury Ireland Ltd v. Kerry Co-operative Creameries Limited* [1982] ILRM 77.

14 The Circuit Court has jurisdiction to hear claims with a monetary value of not more than €75,000. The District Court has jurisdiction to hear claims with a monetary value of not more than €15,000.

15 Regulation (EU) No. 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters.

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.<sup>16</sup>

As the 2017 Act only came into force at the beginning 2018, it remains to be seen whether it will lead to an increase in mediation and a reduction in litigation.

## **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;
- b* a failure by the defendant to adhere to the requirements, terms and conditions of the contract; and
- c* the suffering of a loss by the plaintiff a result of the non-adherence.

The main element of a breach of contract cause of action is the non-fulfilment of one or more of the defendants' obligations under the legally enforceable contract. This may occur through an action or an omission.

Whether a particular act or omission constitutes a breach and the entitlements flowing therefrom will depend on the terms of the contract and the nature of the obligations arising thereunder. The materiality of the breach will depend on the individual contract, with some contracts applying an obligation to exercise due care and skill and others a standard of absolute or strict liability.

### **iii Specific performance**

An order of specific performance is an equitable remedy to a breach of contract and compels a party to perform its obligations under the contract. As specific performance is based on the duty to perform a contract, a prior breach of contract is not required as a prerequisite to an order. Failure to obey an order for specific performance can result in the offending party being in contempt of court.

An order for specific performance is at the discretion of the court to grant it. Examples of where an order will not be granted include:

- a* where damages are an adequate remedy;
- b* contracts that require ongoing supervision; and
- c* open contracts.

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16 Section 18 of the 2017 Act.

It is important that a plaintiff considers whether an order for specific performance is appropriate to a particular contract as compelling performance from an unwilling counterparty may increase the risk of defective performance. Additionally, where an order is not granted, damages may be awarded against the party seeking relief.

#### **iv Right to terminate in the event of a breach**

A breach of an innominate or intermediate term does not automatically entitle the innocent party to terminate the contract.

A right to terminate arises where there has been:

- a* a fundamental breach – a breach so serious that it terminates the rights and obligations of the innocent party;
- b* a repudiatory breach – a breach so serious it terminates the contract immediately; and
- c* a statutory breach – a breach provided for under statute.

In order to rely on a statutory breach, any preconditions set in statute must be complied with. An example of this is the Sale of Goods Act 1893, which imports terms relating to title, description and merchantability into commercial contracts.

The most common form of breach in commercial contracts arises where there has been a fundamental breach, a principle that was developed by the courts with a view to limiting the operation of exemption clauses, the rationale being that no party could exclude or restrict his or her liability for such a breach.

## **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 impracticality. 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<sup>17</sup> are only relevant where actual undue influence has arisen. In a 2016 Court of Appeal decision,<sup>18</sup> the court found that there was no evidence to support a claim that a wife had executed a guarantee under the undue influence of her husband, placing emphasis on the fact the wife was an experienced businesswoman who had regularly dealt with Ulster Bank. 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.

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17 *Ulster Bank v. Roche & Buttimer* [2012] IEHC 66.

18 *Ulster Bank (Ireland) Limited v. Walter DE Kretser and Gillian Fox* [2016] IECA 371.

## ii Duty to ensure independent legal advice

As an ancillary argument to undue influence, parties to finance agreements frequently argue that lenders are under an obligation to ensure that they receive independent legal advice. The argument was recently considered by the Court of Appeal in a case that involved a father who guaranteed the debts of his son who subsequently defaulted and was subject to enforcement proceedings.<sup>19</sup> The father argued that there was an arguable defence to the claim against him under the guarantee as the creditor had been on notice of the familial relationship between him and the debtor and the creditor was under a duty to ensure that he got independent legal advice. He had received advice from his son's solicitor in this case, and not a separate solicitor. The court found that in circumstances where no evidence was presented by the guarantor to support an argument that he had been subject to undue influence, there was no positive duty on the lender to ensure that he obtained independent legal advice or otherwise ensured that he had freely entered into the guarantee.

## iii Public policy and illegality

Contracts that are contrary to public policy are unenforceable. The Supreme Court<sup>20</sup> 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.<sup>21</sup> 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.<sup>22</sup> The event must

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19 *ACC Loan Management v. Connolly* [2017] IECA 119.

20 *Quinn v. IBRC Ltd* [2015] IESC 29.

21 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).

22 *Neville Sons Ltd v. Guardian Builders* [1994] IESC 4.

so significantly change the nature of the outstanding contractual rights and obligations from what the parties could reasonably have contemplated, so as to make holding them to its stipulations unjust.

Frustration takes place only after a contract has been entered into, and means that the contract ceases to have effect from a particular date onwards. As such, it discharges an otherwise valid contract.

## VII FRAUD, MISREPRESENTATION AND OTHER CLAIMS

### i Misrepresentation

Misrepresentation claims are common in Ireland, particularly in relation to commercial contracts in the financial services industry. Much of the recent case law on this topic arises in the context of mis-selling of financial products, mismanagement of investment funds and allegations of reckless lending.

In order to be actionable, a misrepresentation must be a false statement of fact, not of opinion or future intention or law. A misrepresentation may be fraudulent, negligent or innocent. The plaintiff will not succeed unless he or she can show that the misrepresentation was made with the object and had the result of inducing him or her to enter the contract.

A fraudulent misrepresentation is established where it is found:

- a that a party has made a representation knowing that it is not true or with reckless indifference as to whether it is true or not; and
- b a counterparty relies on such representation in deciding to enter into a contract.

Notwithstanding carefully drafted contracts, it is not generally possible to exclude liability for fraudulent misrepresentation.

### ii Covenant of good faith and fair dealing

Under Irish law, there is no implied covenant of good faith and fair dealing in the context of commercial contracts. A 2017 Court of Appeal decision<sup>23</sup> 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

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23 *Flynn & Anor v. Breccia & Anor* [2017] IECA 74.

the counterparty relies upon the representation to his or her detriment. The High Court<sup>24</sup> recently reaffirmed that the doctrine of promissory estoppel has no application to pre-contract negotiations in advance of the creation of any legal rights.

#### **iv Duty to disclose**

A duty to disclose requires the parties to a contract to make full disclosure of all material facts during contractual negotiations. The Court of Appeal,<sup>25</sup> in recent months, confirmed that as a matter of ordinary contract law, there is no general duty to disclose. However, the court held that where a statement had been made containing an implied representation that no surcharge interest would be charged, the defendant was estopped from later charging surcharge interest on the basis of that implied representation.

### **VIII REMEDIES**

#### **i Damages**

The most common remedy awarded in breach of contract litigation is damages (monetary compensation). A contractual claim based on breach of a contractual term is aimed at putting the plaintiff in the position he or she would have occupied if the term had been properly adhered to. Punitive damages are generally regarded as inappropriate in contractual claims.

In terms of measuring damages, a court will consider the following:

- a* expectation interest – putting the plaintiff in the same situation as if the contract had been performed; and
- b* reliance interest – where the plaintiff may have changed his or her position in reliance on the defendant's performance of the contract. Reliance damages are recoverable in cases where it is not possible to estimate the profit the plaintiff could have made had the contract been performed.

In deciding whether to award damages, the court will have regard to the remoteness of damages (i.e., whether the damages arise naturally as a result of the breach of contract) and whether they ought to have been reasonably foreseeable by the parties to the contract in contemplation of a breach of the contract. Only net losses are recoverable and there is a duty to mitigate loss. Reasonable costs incurred in mitigation are also recoverable.

The Supreme Court<sup>26</sup> 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

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24 *Allied Irish Banks plc v. Kennedy & Anor* [2018] IEHC 381 (note: an appeal has been lodged in respect of this decision).

25 *Sheehan v. Breccia & Ors* [2018] IECA 286.

26 *Murray v. Budds & Ors* [2017] IESC 4.

in terms and conditions available to a party ‘on request’, the Supreme Court<sup>27</sup> has held that the clause in question had not been successfully incorporated into the contract and therefore could not be relied upon.

### iii Equitable remedies

Equitable remedies can be granted in circumstances where a breach of contract occurs and damages are not an appropriate remedy. The most common forms of relief in relation to commercial contracts are specific performance, rectification and injunctive relief.

An order for specific performance compels the party in breach to fulfil the terms of the contract. Because specific performance is a discretionary remedy, the court will bear in mind the broader justice of the case before granting it.

Rectification involves rectifying any error made in a written contract that does not reflect the intentions of what the parties agreed to. The party seeking rectification must establish a ‘common continuing intention’ in relation to a particular provision of the contract agreed between the parties up to the point of execution of the formal contract, which was not subsequently reflected in the contract. A contract can also be rectified on the basis of unilateral mistake where there has been sharp practice on the part of one of the parties giving rise to that mistake.<sup>28</sup>

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.

Given the ongoing Brexit negotiations, companies are advised to take steps to ‘future-proof’ any new contracts during the course of drafting, particularly in choice of law or jurisdictional clauses.

Separately, there are likely to be developments in the context of ‘smart’ contracts over the coming months. In March 2018, the Department of Finance published a discussion paper on

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27 *James Elliott Construction Limited v. Irish Asphalt Limited* [2014] IESC 74.

28 *Slattery v. Friends First* [2015] IECA 149.

Virtual Currencies and Blockchain Technology,<sup>29</sup> which recommended the establishment of an intra-departmental working group to monitor developments in this area. It is anticipated that the working group will draw on the expertise of multiple state agencies with a view to addressing the risks and opportunities presented by virtual currencies and distributed ledger technology.

In light of the increasing digitalisation of the economy, it is inevitable that the law of contract will need to move apace with technological advancements and to give legal recognition to concepts that are already being used in practice.

Trading in, and profiting from, litigation currently falls foul of Ireland's maintenance and champerty laws<sup>30</sup> 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.<sup>31</sup> 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'.<sup>32</sup> More recently, *Moorview Development Limited & Ors v. First Active Plc & ors*,<sup>33</sup> a decision of the Supreme Court, delivered in late July of this year, clarified that the provision of funding by a third party funder with a legitimate interest in the litigation is lawful. However, third-party funders with a legitimate interest may find themselves subject to a costs order, even if not a party to the proceedings, where the party to the litigation that they are funding is not a good mark for costs.

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29 Department of Finance, 'Discussion Paper: Virtual Currencies and Blockchain Technology', available online at <https://www.finance.gov.ie/wp-content/uploads/2018/03/Virtual-Currencies-and-Blockchain-Technology-March-2018.pdf>.

30 Maintenance and Embracery Act 1634.

31 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 or 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.)

32 *SPV Osus Limited v. HSBC Institutional Trust Services (Ireland) Limited & Ors* [2018] IESC 44.

33 *Moorview Development Limited & Ors v. First Active Plc & ors* [2018] IESC 33.

# ISLE OF MAN

*Vicki Unsworth*<sup>1</sup>

## I OVERVIEW

The law relating to commercial contracts in the Isle of Man does not vastly differ to that of England and Wales and many other common law jurisdictions. In a dispute pertaining to a breach of a commercial contract, the claimant must, in most cases, issue a claim form with the Isle of Man Court within six years of the breach. The High Court of Justice of the Isle of Man is well used to determining commercial contract claims, and has considerable experience in relation to cross-border jurisdiction claims.

In the Isle of Man a contract is not required to be in writing, in most cases; however, there are some exceptions, although, it is highly advisable to ensure that any agreement is reduced to writing, in case something goes wrong later. The lack of a written contract, however, does not prevent a claim being issued, although it is of course more difficult to prove the agreed terms. In most cases, the outcome will turn upon the deemster's (High Court judge) assessment of the evidence before it, particularly where there is a lack of documentary evidence.

There is not a significant number of judgments issued by the Manx (Isle of Man) courts in relation to these types of dispute on an annual basis and, therefore, in order to get a proper understanding of the Manx legal position, a review of more historic cases is required.

## II CONTRACT FORMATION

The law in relation to the formation of contracts in the Isle of Man is identical to that of England and Wales.

A contract is not required to be reduced to writing; however, for commercial contracts it is highly advisable to ensure certainty of the agreement reached between the parties. There are, however, certain contracts that must be in writing in order that they may be enforced, such as the transfer of shares, guarantees and assignments of contractual rights or intangible assets (for example, the goodwill in a company). When dealing with the transfer of land, the transfer agreement must not only be in writing but must be in the form of a deed.

The law governing commercial contracts in the Isle of Man will be reassuringly familiar to any practitioner acquainted with the laws of England and Wales. The courts consistently follow and apply case law from England and Wales concerning contract law and there is little,

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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*<sup>2</sup> 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*,<sup>3</sup> third-party rights were considered in the context of an anti-suit case.

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].<sup>4</sup>

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:

*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*

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2 CHP 2017/83 judgment dated 4 January 2018.

3 2DS 2017/19 judgment dated 24 November 2017.

4 [2018] UKSC 24.

*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*,<sup>5</sup> the court approved the claimant's submissions that the law of restitution covers unjust enrichment and actions for money had and received. Quoted therein was the English Authority of *Fibrosa Spolka Akcyjna v. Fairbairn Lawson Combe Barbour Ltd*,<sup>6</sup> 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*,<sup>7</sup> 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*,<sup>8</sup> 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.

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5 ORD 2015/63 judgment dated 20 December 2017.

6 [1943] AC 32.

7 SUM 2012/6 judgment dated 4 December 2013.

8 DEF 2009/1432 judgment dated 21 April 2011.

The English case of *The Spiliada*<sup>9</sup> 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;
- 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.<sup>10</sup> This point has been considered by the Manx court in a number of cases including *Bryan v. Waterman*:<sup>11</sup>

*[I]t 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 most recently considered in the case of *Nectrus v. UCP & otrs*,<sup>12</sup> 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.

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9 [1986] 3 All ER 843.

10 *AB v. CD* CHP 2016/7 judgment dated 30 June 2016.

11 ORD 2011/82 judgment dated 14 March 2012.

12 ORD 2017/27 judgment dated 9 July 2018.

In the recent case of *Kniveton v. Public Services Commission*,<sup>13</sup> 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*.<sup>14</sup>

In the case of *FPA Limited (in liquidation)*,<sup>15</sup> 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*.<sup>16</sup> To paraphrase, Lord Neuberger stated that the Court needed to discern the intention of the parties from the meaning of the relevant words of the contract:

- a. in light of:*
  - i. the natural and ordinary meaning of those words;*
  - ii. the overall purpose of the document;*
  - iii. any other provisions in the document;*
  - iv. the facts known or assumed by the parties at the time of the contract;*
  - v. common sense; and,*
- b. ignoring subjective evidence of any party's intentions.*

#### 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.

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13 SUM 2015/49 judgment dated 26 October 2017.

14 SUM 2015/4 judgment dated 7 March 2016.

15 CHP 2011/98 judgment dated 6 August 2014.

16 [2014] UKSC 2.

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*.<sup>17</sup>

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.

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<sup>17</sup> CHP 2017/117 judgment dated 27 October 2017.

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*.<sup>18</sup>

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 & Otrs*,<sup>19</sup> 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. Nugent*<sup>20</sup> 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 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 LJ 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*

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18 SUM 2015/80 judgment dated 25 August 2016.

19 ORD 2015/56 judgment dated 15 August 2018.

20 2DS 2018/2 judgment dated 15 June 2018.

*ambiguity so long as any definite meaning can be extracted. But the test of intention is to be found in the words used. If these words, considered however broadly and untechnically and with due regard to all the just implications, fail to evince any definite meaning on which the court can safely act, the court has no choice but to say that there is no contract. Such a position is not often found.'*

*At [29], Simon LJ referred to Lewison's Interpretation of Contracts (6th Ed) at p473: 'A provision in a contract will only be void for uncertainty if the court cannot reach a conclusion as to what was in the parties' minds or where it is not safe for the court to prefer one possible meaning to other equally possible meanings.'*

The Limitation Act 1984 is in broadly similar terms to the English equivalent. A party has six years in which to bring a claim in respect of a simple contract, including cases of fraud, concealment or mistake. However, such six-year period does not commence until such time as any fraud, concealment or mistake has been discovered or could, with reasonable diligence, have been discovered.

In common law, a promise is not, as a general rule, binding as a contract unless it is supported by consideration.

A lack of consideration is an issue that seldom arises in commercial contracts, as few commercial parties would do something for nothing. However, rarely, such issues can arise. If the parties agree that one party will do something that the party is already contractually obliged to do, so that any new obligation assumed by the other party is unsupported by fresh consideration, there will be no consideration, and therefore no binding contract.

Further, consideration may also become an issue if the parties seek to vary the contract, as a variation requires fresh consideration from each party. A defect in consideration cannot be resolved by reliance on consideration that does not exist or that has been given in the past.

In the case of *McSween v. Royal London Mutual Insurance Society Limited*,<sup>21</sup> 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.*

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*,<sup>22</sup> where the claimant had entered into a property transaction subject to the undue

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21 SUM 2016/129 judgment dated 9 August 2018.

22 ORD 2010/77 judgment dated 1 March 2012.

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*,<sup>23</sup> 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.

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*,<sup>24</sup> 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

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23 CP 2006/20 judgment dated 27 October 2006.

24 ORD 2013/47 judgment dated 11 November 2016.

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*.<sup>25</sup>

The court considered misrepresentation in the case of *McSween & otr v. Royal London*,<sup>26</sup> 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*<sup>27</sup> – such case also considered the law on negligent misstatement.

## VII FRAUD, MISREPRESENTATION AND OTHER CLAIMS

Manx courts will consider claims, alongside breach of contract, for fraud, misrepresentation, negligent misstatement and promissory estoppel. There is no prohibition in the Isle of Man to running these claims within the same proceedings as breach of contract; in fact, if arising from the same set of circumstances, it would be preferable.

In the case of *Old Mutual & otr v. Leonteq Securities & otrs*,<sup>28</sup> 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*,<sup>29</sup> 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

### Compensatory damages

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

In Manx law, the purpose of an award of damages for breach of contract is to compensate the injured party for loss, rather than to punish the wrongdoer, and, as far as possible, to place the aggrieved party in the same position as if the contract had been performed.

When claiming damages, causation is relevant, and the onus is on the claimant to prove that the breach is linked to the loss. Damages may be directly linked to the breach, or indirectly, but in both cases the claimant must demonstrate that the loss was foreseeable in the circumstances of the case and that the link between breach and loss is sufficiently close,

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25 SUM 2017/15 judgment dated 18 October 2017.

26 SUM 2016/129 judgment dated 9 August 2018.

27 SUM 2015/91 judgment dated 20 July 2018.

28 ORD 2018/12 judgment dated 20 March 2018.

29 ORD 2013/12 judgment dated 23 January 2014.

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*,<sup>30</sup> 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*,<sup>31</sup> 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 in relation to litigation involving commercial contracts. The case law and legal commentary from England and Wales is therefore extremely helpful and a good starting point in relation to any contractual based claim.

Courts are currently considering cases arising from confidentiality and non-disparagement clauses contained in commercial contracts, and it will be interesting to see how Manx courts determine these issues in the next year and whether they stay strictly in line with England and Wales. Further, the issues arising from unjust enrichment will also be considered by Manx courts.

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30 ORD 2009/60 judgment dated 11 January 2014.

31 ORD 2017/11 judgment dated 25 October 2017.

# LIECHTENSTEIN

*Thomas Nigg, Johannes Sander and Eva-Maria Rhomberg*<sup>1</sup>

## 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. A typical hybrid of both legal systems is Liechtenstein's summary proceedings for the recovery of debt, which originate from Austria and lead to proceedings implemented according to Swiss law. Therefore, an in-depth examination of both legal systems is necessary.<sup>2</sup>

With regard to contract law in a wider context and commercial contracts in particular, generally Austrian law applies. Nevertheless, it is essential to look at the individual provisions of the contracts in order to obtain certainty as to which law applies.

However, the private law order provides the opportunity to freely shape legal relations with its environment according to will, within the bounds of good morals.

## II CONTRACT FORMATION

With regard to the conclusion of contracts, reference should be made to the general principles as well as the legal requirements set forth in Section 861 et seq. of the Liechtenstein Civil Code (ABGB).

According to the general principles (Section 861 ABGB), a contract is concluded by the concordant declaration of will of (at least) two persons. The introductory declaration of intent is called an offer. This offer (promise) must be sufficiently defined in terms of content, and the applicant's willingness to commit must be sufficiently clear. As long as negotiations are pending and the offer has not yet been made or has neither been accepted in advance nor afterwards, no contract is established.

The offer must be accepted within the period that has been determined by the offeror. In lack of such, an offer made to a person who is present or via phone from one person to another must generally be accepted immediately. An offer made to an absent person must be delivered in a reasonable time to in order to receive a timely answer, failing which the offer

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1 Thomas Nigg is a senior partner, Johannes Sander is a senior associate and Eva-Maria Rhomberg is an associate at Gasser Partner Attorneys at Law.

2 Gasser in Batliner/Gasser (eds), *Litigation and Arbitration in Liechtenstein*, 14.

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.<sup>3</sup>

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.<sup>4</sup> In this context, for example, dissent and error have different consequences. In the case of dissent, no contract is concluded at all, but in the case of error it is. A contract concluded in error must therefore be challenged.

In general, contracts can be concluded verbally, in writing or implied by the behaviour of the parties. For reasons of evidence, however, it is strongly advisable to always conclude contracts in writing. Under Liechtenstein law, there are very few formal provisions. There are only certain formal requirements for gift contracts, property purchase contracts or, for example, contracts between spouses.

All of the above applies to commercial contracts as well as to other contracts.

Agreements (contracts) in favour of third parties are possible. If someone has been promised a performance to a third party, he or she can demand that performance is delivered to the third party.<sup>5</sup> However, if the third party rejects the right acquired in connection with the contract, the right is deemed not to have been acquired.<sup>6</sup>

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.<sup>7</sup>

### 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.<sup>8</sup> In the case of contracts that are only obligatory for one party, if in doubt, it is assumed that the obliged party wanted to assume the lesser rather than the more cumbersome burden. In the case of contracts that are obligatory for both parties, an unclear expression is interpreted to the detriment of the party who used such expression (Section 869 ABGB).<sup>9</sup> A declaration of intent that has been declared to someone else, with his or her consent, as sham, 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.<sup>10</sup>

According to the case law of the Liechtenstein Supreme Court,<sup>11</sup> contractual provisions are to be interpreted (with due caution) in such a way that they do not contain any

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3 Section 862 ABGB.

4 Section 869 ABGB.

5 Section 881 Paragraph 1 ABGB.

6 Section 882 ABGB.

7 See Austrian Supreme Court, RIS Justiz RS0084880.

8 Section 914 ABGB.

9 Section 915 ABGB.

10 Section 916 ABGB.

11 For instance, OGH U 01.10.2004, 03 CG.2001.310, LES 2007, 150.

contradictions and remain as effective as possible (*favor negotii*). The intended meaning and purpose – the ‘intention to the parties’ to be determined by teleological interpretation – rather than the words of a contractual provision are at the forefront of the interpretation.

The interpretation of contracts and written declarations should also take into account the declarations made by the contracting parties occasionally and the resulting intention. The interpretation should be measured against the ‘recipient’s horizon’. The legal consequences to be derived from the declaration are not judged on the basis of what the declarant wanted to say or what the recipient of the declaration understood by it, but on the basis of an objective assessment on the facts by a *bona fide* and circumspect person. The concrete circumstances, in particular the business purpose and the interest situation, must be taken into consideration here.<sup>12</sup>

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 security required by 863 ABGB.<sup>13</sup>

However, when interpreting contracts, it is not strictly the literal meaning of the term that should be held responsible, but 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.<sup>14</sup>

#### IV DISPUTE RESOLUTION

In general, Liechtenstein has a very efficient court system. 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. The most common, and thus fatal, error committed by lawyers regularly dealing exclusively with either Austrian or Swiss law is to ignore Liechtenstein specifics, at least as far as procedural law is concerned. However, litigation in Liechtenstein is not always the first choice either for foreign parties or their legal advisors. Most parties wish to seek justice in their home country, being unaware of the efficiency and competence of Liechtenstein lawyers and courts. Compared with other jurisdictions, Liechtenstein justice is considerably swift. There is no rule requiring criminal cases to be granted priority. Once the relevant documents are filed, a hearing is scheduled within weeks. The median time from commencement of a lawsuit to a judgment of first instance is 12 months. It may take longer if the case is complex or international, 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

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.

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12 OGH U 13.01.2015, 02 CG.2002.4, LES 2006,138.

13 OGH U 06.07.2000, 05 C 303/98-53, LES 2000,148.

14 OGH U 01.07.1999, 04 C 260/98, LES 2000,169.

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 to accept the case. The case may easily be dismissed if the court has no jurisdiction. However, there are 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,<sup>15</sup> plaintiffs must therefore sue Liechtenstein residents before a Liechtenstein court because of the general forum at the domicile of the defendant.<sup>16</sup> In addition, there are several other jurisdictions such as the asset-based jurisdiction,<sup>17</sup> jurisdiction of the main proceedings<sup>18</sup> or, particularly with regard to contracts, the jurisdiction of the place of performance.<sup>19</sup>

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.<sup>20</sup>

Owing to the 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. According to Section 599, Paragraph 1 of the Liechtenstein Civil Code of Procedure, any pecuniary claim to be decided by state courts may be submitted to arbitration agreements.

## V BREACH OF CONTRACT CLAIMS

Basically, 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

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 also occurred. The aggrieved party must, therefore, also prove the fault of the tortfeasor (liable party). However, there is an exception to this rule.

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15 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.

16 Section 30 JN.

17 Section 50 JN.

18 Section 47 JN.

19 Section 43 JN.

20 Section 53 JN.

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.<sup>21</sup> 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.<sup>22</sup>

In the event of a breach of contract, a party is, based on Sections 1293 et seq. of the ABGB, entitled to sue the other party or parties for damages.

However, contracts can also be challenged on usury (Section 879, Paragraph 2 Z4 ABGB) or owing to material imbalance (*lesio enormis*, Section 934 ABGB). A contract may also be contested on the grounds of error, cunning or threat.

In the event of defective performance of a contract, the party concerned is entitled to the statutory warranty rights, provided by Section 932 ABGB. According to the law, the transferee can demand improvement (repair or providing the missing), the replacement of the asset, a reasonable reduction of the price (price reduction) or the rescission of the contract (redhibition). The right to the legal warranty must be claimed at court within three years if it relates to immovable assets, and 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. The warranty right can therefore be excluded in principle contractually; in the case of a consumer contract, however, it is mandatory. In addition, contractually agreed warranty clauses can be sued as well.

## VI DEFENCES TO ENFORCEMENT

It is within the scope of normal practice that the other party, under certain circumstances, will attempt to avoid any obligation to perform a contract or avoid enforcement of contractual obligations. In addition, the other party could try to challenge claims of breach of contract.

Under Liechtenstein law, there are several options to try to avoid enforcement of contractual obligations. In general, every party can object that no contract has been formed at all (e.g., unenforceable agreements, indefinite or missing essential terms). Further, it can be argued that the limitation periods are over, the contract was formed under duress or there was a lack of any consideration. One could also argue that the contract is against public policy or unenforceable because of fraudulent inducement, misstatement or misrepresentation.

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 the promissory estoppel (e.g., pre-contractual relations or contractual accessory obligations).

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21 Section 1298 ABGB.

22 OGH U 5.11.1998, 03 C 311/94-44, LES 1999,191; OGH U 09.03.2012, 02 CG.2010.273, GE 2012,75.

Further, fraud, misrepresentation or tortious interference with contract gives rise to claims in addition to claims out of breach of contract. As mentioned above, contracts can also be challenged on usury (Section 879, Paragraph 2 Z4 ABGB), owing to material imbalance (*lesio 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.<sup>23</sup> In accordance with Liechtenstein Supreme Court rulings, liability is governed by the provisions on liability arising from contracts. Therefore, in accordance with Article 182(1) of the Persons and Companies Act (PGR), the respective body has the duty to ensure the preservation of the law based on the minimum capital of a legal entity to prove that it is free from culpability.<sup>24</sup>

In each case, however, the following criteria are required for the award of damages:

- a damage (loss);
- b unlawfulness (e.g., breach of contract, breach of law);
- c culpability; and
- d causal connection between culpability and unlawfulness.

In addition, creditors of contract parties have the possibility of challenging legal transactions via the challenging order.<sup>25</sup> 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 (specific performance) or sue the other party for damages. The available remedies for a breach of contract, however, range from compensation and damages to non-monetary remedies such as specific performance, rescission and reformation of the contract.

The law also expressly states that contracting parties may reach a special agreement that, in the case of a contract that is not fulfilled, fulfilled too late or not fulfilled in a proper manner, a certain amount of money should be paid in compensation for the disadvantage (a contractual penalty).<sup>26</sup> 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.<sup>27</sup>

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23 Claims based on Section 1293 et seq. ABGB in connection with Article 218 et seq. PGR.

24 See OGH U 08.05.2008, 01 CG.2006.276, GE 2008,37.

25 Article 64 et seq. of the Liechtenstein Act on the Protection of Rights – Rechtssicherungsordnung (RSO).

26 Section 1336 ABGB.

27 Welser, Bürgerliches Recht II<sup>13</sup> 23.

The amount of contractually agreed interest should, in principle, be determined by the parties, only being limited by the usury provisions.<sup>28</sup> However, the general legal interest rate is 5 per cent.<sup>29</sup> In commercial matters, the general legal interest rate is 8 per cent.<sup>30</sup> Default interest does not presuppose culpability. It must already be paid if there is an objective delay in performance of the contract.<sup>31</sup> 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 suffered (positive damage) is compensated, while full compensation also includes the lost profit (compensation of interest). However, in the case of, for example, breach of contract, the scope of compensation is generally determined by the degree of culpability of the liable party:

In the case of slight culpability (slight negligence), only the damage suffered (positive damage) must be compensated.<sup>32</sup> 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 for the lost profit.<sup>33</sup>

However, 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.

## IX CONCLUSIONS

Based on contractual freedom and private autonomy, Liechtenstein's contract law is very liberal. There are hardly any formal requirements, and if there are then they are in written form or require 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 years. This provides for legal certainty. High court jurisdiction with regard to the formation of contracts, interpretation, etc., has also largely remained the same.

In addition, Liechtenstein has been a member of the New York Convention since 2011. The forthcoming years will make clear which commercial disputes will increasingly shift from ordinary court proceedings to arbitral tribunals.

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28 See Section 879 ABGB.

29 Section 1000 ABGB.

30 Article 336b of the General German Commercial Code (ADHGB), which also applies in Liechtenstein.

31 Welser, Bürgerliches Recht II<sup>13</sup> 36; Reischauer in Rummel (eds), ABGB<sup>3</sup> Section 1333 ABGB, Rz 6 (www.rdb.at).

32 Welser, Bürgerliches Recht II<sup>13</sup> 323.

33 Welser, Bürgerliches Recht II<sup>13</sup> 324.

# MEXICO

*Javier Curiel Obscura and Ernesto Palacios Juárez<sup>1</sup>*

## 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:

- a* capacity of the parties;
- b* absence of vices of consent;

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- c* a valid subject matter; and
- d* the contract's form, if required by law.

Likewise, the lack of any of such elements will result in an unenforceable contract.

The first essential element for the existence or modification of a contract is the consent of its parties; in order for consent to be perfected, 'offer and acceptance' must be present. The concept of 'offer' implicates a unilateral proposal from one party, which, if accepted in its terms by its counterparty, will constitute a contract. If such acceptance involves a change of the offer's original terms, then a new offer will be in place that should be accepted in such new terms for the contract to be perfected. There are two ways to accept an offer, which may be either express (by a verbal or written statement) or implied (by its performance); however, the parties may also require express acceptance as a condition for the enforceability of the contract.

In addition, consent must be valid and truly intended, absent of any vices thereto. Following the civil law theory, a contract will be formed only through the valid consent of each of its parties, rendering such consent as ineffective if impaired by any of the legally recognised 'vices of consent', such as error, fraud, duress or unconscionable bargain.

As for the second essential element, the contract's subject matter should always be valid, meaning that the rights and obligations therein, as well as the goods or services subject thereto, must be legal, possible and merchantable.

As for the formalities of the contract itself, as a general rule, as long as there is consent and the contract's subject matter is legal, contracts may be agreed either verbally or in writing. However, certain types of contracts must be in writing. For example, when its value or consideration exceeds a certain amount (i.e., acquisition and transfer of real estate rights, donations or settlements). Other examples include promissory agreements, powers-of-attorney, security agreements (e.g., mortgages, pledges, securities and trust agreements), construction, lease or services agreements, association, partnership or shareholders agreements, or adhesion contracts.

In the same way, certain contracts, because of the amount of their consideration, should be prepared by and executed before a notary public and then formally filed before the applicable public registries. In such cases, the parties themselves, or their attorneys-in-fact with sufficient powers, must appear before the notary public for the process of notarisation of the contract, which is essential for its validity, even among the parties themselves.

As in most Latin American countries, in Mexico the notary public is of significant importance in the country's legal system. They are licensed attorneys and appointed officials who have the authority to officially attest to the truth of facts occurring in their presence, or to certify documents or authenticate signatures therein. Before the notarisation, it is the notary's duty to fully identify the parties and certify their authority and capacity, as well as the legal validity of the act itself. Therefore, there is a legal presumption that a contract executed before a notary public is valid; however, despite the notary's certification, the parties must always comply with the contract's legal requirements for it to be valid.

If the above-mentioned requisites are fulfilled, the parties may agree to almost any obligation they wish, as well as on their assignment or termination.

Regarding the obligations or covenants agreed in contracts, Mexican law allows the contracting parties to condition their enforcement or termination. Contracts may include conditions precedent or suspensive conditions, in the sense that an agreed obligation (or

covenant) will only rise when and whether such condition occurs. Likewise, the occurrence of subsequent conditions or resolutive conditions will terminate an obligation (or covenant) by returning things to their former condition, as though it never existed.

### III CONTRACT INTERPRETATION

Similar to contract formation, the rules for the interpretation of contracts are contemplated by the civil law: the Federal Civil Code. The rules are as follows, are implicit in all commercial obligations and should be observed when interpreting any contract:

- a* if the terms of a contract are clear and leave no doubt about the intention of the contracting parties, the literal meaning will prevail;
- b* if the words appear contrary to the evident intention of the parties, the latter shall prevail over them;
- c* notwithstanding the generality of the terms of a contract, it is not to be comprehended therein different things or cases from those on which the parties intended to contract;
- d* if a clause admits several meanings, an interpretation must be provided that is most suitable in order to give the contract's purpose;
- e* the contract's clauses must be interpreted as a whole in connection with the other clauses therein, giving an overall meaning to the group of clauses, some of which may be unclear;
- f* it should be understood that words that may have different meanings refer to the one meaning that is most in accordance with the contract's nature and purpose; and
- g* customs and usages can be considered to interpret the ambiguities therein.

When the rules above are insufficient to interpret the true meaning of a provision in a contract, if it refers to accidental or secondary circumstances of a contract, and when there is no legal consideration, it shall be interpreted in favour of the lower transmission of rights. If the contract does have consideration, the interpretation should be in favour of the greater reciprocity between the contracting parties.

Finally, if the main purpose of the contract is unclear, so that the intention of the contracting parties cannot be known, the contract will be null and void.

These rules should be interpreted hermeneutically and can be summarised into three main categories: the literality of the clauses; the intention of the contracting parties; and the effects that the contract may produce.

Based on the above, it can be concluded that, under Mexican law, contract interpretation is more literal than in common (case) law. Therefore, attention must be devoted primarily to the language contained in the agreements in order to evidence the true intention of the contracting parties. In such sense, the parties' intention, however relevant when interpreting a contract, is a secondary source of interpretation, because if the language contained therein is sufficiently clear and it leaves no doubt about the intention of the parties, there should be no other interpretation.

Notwithstanding the importance of the literal meaning of words, when in doubt, a contract should always be interpreted as a whole in order to be able to identify its true purpose. Based on the rules of interpretation set forth above, if the words of a contract seem contrary to the evident intention of the contracting parties, the latter will prevail over them.

In addition, the nature of a contract will always depend not on the title or name given to the agreement, which may be inaccurate or mistaken, but on the facts and acts consented by the parties therein.

Another example of the importance of the ‘intentional element’ when interpreting contracts is the relevance of the parties’ conduct, before, during its execution and while performing the obligations therein. With such conduct, courts can analyse and deduce their true intention. For instance, when the parties execute a series of acts in a regular or ordinary way, or when executed by a single party, there is an express or tacit acceptance by the other. Such behaviour indicates the true intention of the parties regarding the scope they wanted to give to the agreement. Likewise, it could be understood that a contract has been automatically renewed if both parties continue executing actions in connection with such contract.

#### **IV DISPUTE RESOLUTION**

Mexican commercial law has a complex system for the resolution of disputes regarding disagreements that derive from acts of commerce and responsibilities derived from commercial contracts. And so, the Commerce Code allows commercial disputes to be filed before Mexican courts – in both the federal or local courts – or to be decided through arbitration proceedings, to the extent the relevant parties agree to submit their controversy to arbitration.

It is important to point out that the Commerce Code establishes the general rules that regulate commercial proceedings. However, the involved parties may agree on the procedure to be followed for the resolution of a controversy, since they can agree on a conventional proceeding.

##### **i Legal proceedings**

Applicable law provides various types of proceedings to solve commercial disputes, among which are ordinary, executive and special. The ‘ordinary commercial proceeding’ is the most common one and, as a general rule, would be the one applicable to all disputes arising from commercial contracts.

Additionally, the Commerce Code regulates the ‘commercial executive proceeding’, which implies that the cause of action must be based on an ‘executory instrument’, which is a legal document that underlines an immediate enforcement action, which translates into the possibility that the judge, at the time of admitting the claim, can issue an ‘*exequendo order*’ allowing the seizure or attachment of property at the commencement of the procedure to guarantee the payment of the amounts claimed in the lawsuit.<sup>2</sup> 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.<sup>3</sup>

##### **ii Written and oral commercial proceedings**

Although commercial legislation does not provide for a minimum amount in order to be able to initiate a commercial dispute, the amount of the controversy currently determines whether these should be processed in a written (traditional) manner or through an oral proceeding.

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2 Castrillón y Luna, Victor, *Derecho Procesal Mercantil*, Editorial Porrúa, México, 2001, p. 378.

3 idem.

However, as a general rule, as from 26 January 2020, all commercial disputes will be processed through the commercial oral proceeding, no matter its amount, meaning that the Mexican legal system is intended to evolve into an oral justice system.

Until 26 January 2020, controversies that do not have a determined amount will generally be processed in a written form. However, the proceeding will be oral if the principal amount does not exceed the legal threshold – 650,000 Mexican pesos as of 26 January 2017; 1 billion Mexican pesos as of 26 January 2019; and without limitation as of 26 January 2020.

Executive proceedings will generally be processed in a written (traditional) manner, although those claims not exceeding the amount of 650,000 Mexican pesos will be orally processed – 1 million Mexican pesos as of 26 January 2019 and 4 million Mexican pesos as of 26 January 2020.

As for the ordinary and executive oral proceedings, certain actions must be carried out in written form (i.e., the lawsuit and the statement of defence), though others must be carried out orally (i.e., the offering of evidence and the formulation of pleadings), their main characteristic being speed and efficiency.

### **iii Arbitral proceedings**

Mexican commercial law provides that parties may enter into arbitration agreements under which they will submit to arbitration all or certain disputes that may arise between them from a certain legal, contractual or non-contractual relationship. In order to regulate the arbitration procedure, the Commerce Code establishes certain rules; however, the parties are free to determine said procedure.

Mercantile legislation provides certain judicial proceedings in order to enforce or support the effectiveness of arbitral awards (i.e., proceeding for the recognition and enforcement of arbitral awards), as well as the possibility for Mexican courts to declare the nullity of arbitration awards under certain specific assumptions.

### **iv Alternative dispute resolution proceedings**

In addition to the arbitral and conventional proceedings described above, the Mexican Federal Constitution mandates that legislators should provide alternative dispute resolution mechanisms in order to allow ‘mediation’ as such. In Mexico City, according to the Alternative Justice Law, judges are obliged to inform the parties about the mediation alternative, which will only proceed if mutually agreed by them.

In addition, the Federal Consumer Protection Law provides legal mechanisms through which the Consumer Protection Agency (PROFECO) can initiate a conciliatory proceeding to solve controversies that arise between consumers and suppliers of goods or services, which, if not solved with an agreement between the parties, culminates with the issuance of an ‘opinion’ that constitutes an ‘executory instrument’ in favour of the consumer. When designated by the parties, PROFECO may act as an arbitrator and solve controversies of this nature. Also, the Federal Consumer Protection Law grants similar prerogatives to the National Protection and Defence for Users of Financial Services Commission, so it can initiate conciliatory or arbitration proceedings to solve disputes between financial institutions and their users.

### **v Extension of jurisdiction**

In case of any controversy or need for interpretation, parties may waive the jurisdiction that the law grants them, having the right to submit themselves to any other jurisdiction

of their choice, provided that the proper legal requirements<sup>4</sup> 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.<sup>5</sup> 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.<sup>6</sup> 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 extra-judicially, through a notary public or before two witnesses).

Although Mexican legislation does not establish specific means of evidence to demonstrate compliance or breach of an obligation, judicial precedents from federal courts have established that the affected party must only demonstrate the existence of a valid contract,

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4 Article 1093 of the Commercial Code.

5 Judicial precedent issued by the Eighth Collegiate Civil Court in Mexico City, No. I.8o.C. J/14, digital record number 186972.

6 Rico Álvarez, Fausto (among others), *Teoría General de las Obligaciones*, Editorial Porrúa, México, 2005, pp. 362–363.

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.<sup>7</sup>

## ii Damages and lost profits

As explained above, the breach of contract generates the obligation of the breaching party to pay its counterparty the damages and lost profits actually caused in connection thereto.

Civil legislation defines ‘damage’ as the loss or impairment suffered in one’s patrimony because of the obligation’s lack of fulfilment and ‘lost profits’ as the deprivation of any legal future earnings that would have been obtained if the obligation was fulfilled.

## iii Constitutive elements of contractual liability

Mexican doctrine considers that, in order to demonstrate the constitutive elements of contractual responsibility, it is necessary to prove the following:

- a the existence of a contractual obligation;
- b the breach of such obligation; and
- c that the caused damage is the direct and immediate consequence of such breach.<sup>8</sup>

These elements may be proved through any of the evidence means provided by law – private or public documents, confessions, testimonies, expert evidence, legal presumptions or presumptions of fact, etc.

Also, Mexican law grants the affected party the possibility to claim damages and lost profits, either in a ‘determined’ way – specifying the claimed amount as compensation, since filing the claim – or in an ‘indeterminate’ way – meaning that the compensation quantification will be subject to a special ancillary proceeding during the enforcement of judgment stage.

## iv Exemptions for contractual breach

Civil legislation establishes certain rules according to which a party may be released from its contractual obligations without generating contractual responsibility. Such is the case of ‘acts of God’ (‘fortuitous case’ or *‘force majeure’*).

## VI DEFENCES TO ENFORCEMENT

One of the most recurrent methods to avoid enforcement of contractual obligations is through defences related to missing essential or validity elements of a contract. For instance, the purpose of a contract cannot violate the law or public policy; otherwise, such contract would be unenforceable because of its illegal object. Additionally, contracts signed under duress would be unenforceable as well, as duress is considered a vice of consent.

It is possible to avoid enforcement of a contractual obligation under the ‘frustration of purpose’ theory. Mexican law defines the purpose of a contract as the main reason a party enters into it. As such, frustration of purpose occurs when an unforeseen event prevents said

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7 Judicial precedent issued by the Fifth Collegiate Civil Court in Mexico City, No. I.5o.C.54 C (10a.), digital record number 2004314.

8 *ibid*, p. 365.

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.<sup>9</sup>

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.<sup>10</sup> 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.<sup>11</sup> 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.<sup>12</sup> The Mexican Supreme Court of Justice has also recognised this horizontal aspect in different judicial precedents.<sup>13</sup>

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.<sup>14</sup> Based on these precedents, human rights violations defences are becoming more common in Mexico in respect of civil and commercial contractual controversies.

Regarding statutes of limitations, the Commerce Law provides for different periods according to the subject matter and type of claim, from one to 10 years. Under Article 1048 of the Commerce Code, when no particular statute of limitation period is established by law, the general period of 10 years will apply. Mercantile law does not include a statute of limitation period for claims related to missing essential or validity elements of a contract or

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9 Judicial precedent issued by the Eighth Collegiate Civil Court in Mexico City, No. I.8o.C. J/14, digital record number 186972.

10 Silva Meza Juan N and Silva García Fernando, *Derechos Fundamentales*, Editorial Porrúa, México, 2009, p. 216.

11 Judicial precedent issued by the First Chamber of the Mexican Supreme Court of Justice, digital record No. 314379.

12 Judicial precedent issued by the Third Collegiate Civil Court in Mexico City, No. I.3o.C.739 C, digital record No. 166676.

13 Judicial precedent issued by the First Chamber of the Mexican Supreme Court of Justice, No. 1a./J. 15/2012 (9a.), digital record No. 159936.

14 Judicial precedent issued by the First Chamber of the Mexican Supreme Court of Justice, No. 1a./J. 132/2012 (10a.), digital record No. 2002817.

contractual breaches or claims; instead, those statute of limitation periods are established in the Federal Civil Code. For instance, the period for claims regarding a contract entered into under duress is of six months from the date such duress has stopped.

## VII FRAUD, MISREPRESENTATION AND OTHER CLAIMS

In addition to the defences and claims mentioned above, there are other claims based on the tortious conduct surrounding commercial relationships before entering into a contract. For instance, pursuant to Article 1815 of the Federal Civil Code, a contract would be deemed invalid and thus unenforceable if one of the parties uses false pretences and deception to induce the other party to enter into a contract.

The fraudulent inducement must be directly related to the affected party's purpose to execute the contract, otherwise it would not result in an invalid contract. Simply put, to establish a claim of fraudulent inducement, the victim must prove that he or she would not have entered into the contract if he or she had known the truth. In addition to fraudulent inducement, the above referred provision also includes 'fraudulent concealment' as a cause to invalidate a contract. Mexican law defines fraudulent concealment as a deliberate hiding of a material fact or circumstance to deceive the other party into entering a contract. It also requires the concealing party to be aware of the other party's lack of belief in or unawareness of the hidden material fact in order for the contract to be invalidated.

In addition to the latter, the implied covenant of good faith and fair dealing is recognised in Article 1796 of the Federal Civil Code, providing that the parties entering into a contract must act in good faith and deal with each other honestly and fairly during its execution. Given the nature of the covenant of good faith and fair dealing, most of the claims that arise from said principle are claims to enforce a contract or to avoid that one of the parties might use a rigorist or technical interpretation thereto in order to refuse to perform his or her obligations. The covenant of good faith and fair dealing is also recognised as an interpretation rule that both parties and courts must take into account when executing or enforcing a contract.

## VIII REMEDIES

Mexican legislation on contractual matters establishes an extensive regulation to ensure the rights of the parties in such a way that, in the event of a breach, they have at their disposal a series of legal means to ensure the enforcement of the contractual obligation.

In this regard, applicable doctrine and legislation give the parties certain rights and remedies to ensure the fulfilment of a contractual obligation or, at least, to seek compensation. These rights and remedies are regulated through the following legal fundamentals:<sup>15</sup>

### i **Pactum commissorium**

This principle is implied in all reciprocal obligations, by which the party that fulfilled its obligation is entitled to claim from the other either the specific performance or the termination of the contract, and, in both cases, the payment of caused damage and lost profits.

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15 Rico Álvarez, Fausto (among others), *Teoría General de las Obligaciones*, Editorial Porrúa, México, 2005, p. 411-413.

Federal courts have considered that judicial intervention is necessary to enforce this principle.

## **ii Exceptio non adimpleti contractus**

In the event of breach of contract, the affected party has the right to refuse to comply or perform his or her obligations therein.

Mexican doctrine considers that the exercise of this exception does not attack the validity of contractual obligation, since the only effect it generates is the deferral of its compliance. Once the breaching party has performed his or her obligation, this defence will no longer be valid and, consequently, the former breaching party may demand immediate performance.<sup>16</sup>

## **iii Right to retain**

Mexican legislation allows the creditor who holds a debtor's asset to refuse to its delivery until the debtor complies with his or her obligations relating to the delivery of the property.<sup>17</sup>

This has similar characteristics to the *exceptio non adimpleti contractus*, since it tends to protect the fulfilment of contractual obligations, granting the affected party the ability to refuse to comply with the obligations that correspond such party – in this case, the delivery of a good.

## **iv Theory of risks**

It is possible to determine in contracts that establish reciprocal obligations 'to give' something, which of the parties will assume the risk of a loss in the event that one of the parties cannot comply with its obligations, in case of fortuitous event or *force majeure*.

## **v Indemnity by dispossession by due process of law**

Legislation regulates the right of the acquirer of a property to be compensated in the event that a third party deprives him or her of such property by means of an enforceable judgment, claiming to have a better and prior right.

For compensation to proceed, it must be a transferring domain agreement where the right of the third party arose prior to the acquisition of the property; that the acquirer is totally or partially deprived of such property; and that the reason of the deprivation of the property is based on an 'enforceable judgment'.

## **vi Indemnity by hidden defects by due process of law**

There are certain legal provisions that grant the acquirer of a property the right to claim compensation in the event that such property presents hidden defects of the acquired property.

To enforce these rights and remedies, the parties can initiate a proceeding before Mexican courts, arbitral courts or through any other alternative dispute resolution mechanism.

## **vii Conventional penalty**

Mexican law entitles the parties to agree, in advance, to a 'conventional penalty' or 'penalty clause', which, essentially, is a benefit agreed by the parties that has the nature of a 'penalty'

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16 *ibid*, p. 426.

17 *ibid*, p. 427.

in case of breach of contract. However, if the penalty clause is enforced, the affected party cannot also claim any compensation for damages or lost profits caused by such breach. In addition, a penalty clause cannot exceed the value of the contract's main obligation.

**viii Damages and lost profits**

As mentioned in Section V, Mexican legislation provides the possibility of claiming damages and lost profits; however, it does not regulate the concept 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.

However, regarding commercial litigation, Mexico is about to adopt a fully orally driven system that will likely translate into faster and more efficient proceedings. As of 2018, the migration of commercial litigation into such oral system is still a work in progress.

As given throughout this work, Mexico offers a strong legal commercial framework that safeguards the rights of merchants and strengthens commercial relations in the country, making it suitable for both local and foreign investors.

# NEW YORK

*Steven M Bierman and John J Kuster*<sup>1</sup>

## I INTRODUCTION

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.<sup>2</sup> 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 contract laws are often 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’.<sup>3</sup> A binding contract exists where ‘there is a sufficiently definite offer such that its unequivocal acceptance will give rise to an enforceable contract’.<sup>4</sup> ‘An offer not given for consideration may be revoked at any time.’<sup>5</sup> The price itself is also considered a key term of the contract.<sup>6</sup>

Acceptance must track the offer’s terms and be ‘clear, unambiguous and unequivocal’.<sup>7</sup> An acceptance that is ‘qualified with conditions’ constitutes a rejection.<sup>8</sup> 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

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2 Generally, state law governs contract disputes in the United States, even in cases filed in federal court.

3 *Civil Serv. Emps. Ass’n, Inc. v. Baldwin Union Free Sch. Dist.*, 84 A.D.3d 1232, 1233–34, (2d Dep’t 2011).

4 *Kolchins v. Evolution Markets, Inc.*, 31 N.Y.3d 100, 106 (2018).

5 *Civil Serv. Emps.*, 84 A.D.3d at 1234.

6 *See Garcete v. Lazar*, 294 A.D.2d 118, 119 (1st Dep’t 2002) (‘[T]here was never any meeting of the minds as to the price, an essential term of any contract of sale.’).

7 *Kolchins v. Evolution Markets, Inc.*, 128 A.D.3d 47, 59, 60 (1st Dep’t 2015), *aff’d*, 31 N.Y.3d 100 (2018).

8 *Silber v. New York Life Ins. Co.*, 92 A.D.3d 436, 440 (1st Dep’t 2012).

that counter-offer, may be found to have demonstrated its intent to accept the terms of that counter-offer.<sup>9</sup> Moreover, where a party has an ‘opportunity and duty to speak, failure to speak may constitute an assent’.<sup>10</sup>

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.<sup>11</sup> 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.<sup>12</sup> However, the promise by a party to perform some action must entail some kind of detriment to that party. New York courts have found that contracts that offer consideration while also maintaining a way to escape detriment do not qualify as consideration.<sup>13</sup>

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

## 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’.<sup>17</sup> 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.<sup>18</sup> If an agreement falls under the statute of frauds, the writing must contain the agreement’s material terms, such as the agreement’s duration.<sup>19</sup> New York

9 *Gator Hillside Vill., LLC v. Schuckman Realty, Inc.*, 158 A.D.3d 742, 744 (2d Dep’t 2018).

10 *533 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.’).

12 *See, e.g., Nassau Cty. v. New York State Urban Dev. Corp.*, 157 A.D.3d 805, 808 (2d Dep’t 2018); *Hollander v. Lipman*, 65 A.D.3d 1086, 1087 (2d Dep’t 2009).

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).

15 *Yeon v. Mehta*, 134 A.D.3d 701, 701 (2d Dep’t 2015).

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).

17 N.Y. Gen. Obl. Law § 5-701(a).

18 *Kroshnyi v. U.S. Pack Courier Servs., Inc.*, 771 F.3d 93, 110 (2d Cir. 2014).

19 *Hadami, S.A. v. Xerox Corp.*, 272 F. Supp. 3d 587, 596–97 (S.D.N.Y. 2017).

law recognises that electronic signatures and emails may constitute a writing sufficient to satisfy the statute of frauds.<sup>20</sup> New York courts often find that emails form enforceable agreements provided that the emails include all of the agreements' essential terms.<sup>21</sup>

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.<sup>22</sup> The court clarified that the standard for unconscionability in this context was the same used to declare a contract void.<sup>23</sup> 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.<sup>24</sup> 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]'.<sup>25</sup> 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.<sup>26</sup>

## III CONTRACT INTERPRETATION

### i 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'.<sup>27</sup> A contract will be considered unambiguous if the language has 'no reasonable basis for a difference of opinion'.<sup>28</sup> New York's Court of Appeals has long held that:

20 The reader should note that although many jurisdictions in the United States have adopted the Uniform Electronic Transactions Act (UETA), which validates electronic contracts and records, including electronic signatures, New York has not done so. *Naldi v. Grunberg*, 80 A.D.3d 1, 9–13 (1st Dep't 2010).

21 *Kasowitz, Benson, Torres & Friedman, LLP v. Duane Reade*, 98 A.D.3d 403, 405 (1st Dep't 2012); *Naldi v. Grunberg*, 80 A.D.3d 1, 6–13 (1st Dep't 2010); *Agosta v. Fast Sys. Corp.*, 46 Misc. 3d 1217(A), 2015 WL 523344, at \*6 (N.Y. Sup. 2015), *aff'd*, 136 A.D.3d 694 (2d Dep't 2016).

22 *Matter of Hannel*, 29 N.Y.3d 487, 493 (2017).

23 *Id.* at 495.

24 *Latin Events, LLC v. Doley*, 120 A.D.3d 501, 501 (2d Dep't 2014).

25 *Nassau Beekman LLC v. Ann/Nassau Realty LLC*, 105 A.D.3d 33, 35 (1st Dep't 2013).

26 *Id.* at 39.

27 *Bank of N.Y. Mellon v. WMC Mortg., LLC*, 136 A.D.3d 1, 6 (1st Dep't 2015).

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.'*<sup>29</sup>

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.<sup>30</sup> If the contract is ambiguous, a court will consider evidence of what the parties intended the ambiguous provision of the contract to mean.<sup>31</sup> 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.<sup>32</sup> Generally, New York courts are inclined to stringently apply the parol evidence rule when commercial contracts are negotiated by sophisticated businesspeople.<sup>33</sup>

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'.<sup>34</sup> Courts must also avoid interpretations that 'render contract provisions meaningless or superfluous'.<sup>35</sup> 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'.<sup>36</sup> Parties should consider these kinds of interpretation rules carefully when drafting their agreements.

#### IV BREACH OF CONTRACT<sup>37</sup>

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

29 *W.W.W. Assocs., Inc. v. Giancontieri*, 77 N.Y.2d 157, 162 (1990) (citations omitted); see also *Schron v. Troutman Sanders LLP*, 20 N.Y.3d 430, 436 (2013); *Woolfolk v. N.Y.C. Bd./Dep't of Educ.*, 161 A.D.3d 643, 644 (1st Dep't 2018); *Outstanding Transp., Inc. v. Interagency Council of Mental Retardation & Developmental Disabilities, Inc.*, 110 A.D.3d 1049, 1049 (2d Dep't 2013).

30 *Heartland Brewery, Inc. v. Nova Cas. Co.*, 149 A.D.3d 522, 522–23 (1st Dep't 2017).

31 *Sarinsky's Garage Inc. v. Erie Ins. Co.*, 691 F. Supp. 2d 483, 486 (S.D.N.Y. 2010).

32 See, e.g., *Grewal v. Cuneo Gilbert & Laduca LLP*, No. 13-CV-6836, 2018 WL 4682013, at \*6 (S.D.N.Y. Sept. 28, 2018) ('A party's uncommunicated subjective intent [cannot] supply the ultimate meaning of an ambiguous contract.');

*Axiom Inv. Advisors, LLC v. Duetsche Bank AG*, No. 15 CIV. 9945 (LGS), 2018 WL 4253152, at \*6 (S.D.N.Y. Sept. 6, 2018) ('Extrinsic evidence may also include industry custom and practice if certain requirements are met.').

33 *Ashwood Capital, Inc. v. OTG Mgmt., Inc.*, 99 A.D.3d 1, 7 (1st Dep't 2012).

34 *Eitan Ventures, LLC v. Peeled, Inc.*, 94 A.D.3d 614, 616 (1st Dep't 2012).

35 *T.M. Real Estate Holding, LLC v. Stop & Shop Supermarket Co. LLC*, No. 12 CIV. 1808 CM, 2013 WL 603325, at \*6–\*7 (S.D.N.Y. Feb. 14, 2013), *aff'd sub nom.*, 543 F. App'x 41 (2d Cir. 2013).

36 *T.M. Real Estate Holding, LLC v. Stop & Shop Supermarket Co. LLC*, No. 12 CIV. 1808 *Id.*, 2013 WL 603325, at \*7 (S.D.N.Y. Feb. 14, 2013), *aff'd sub nom.*, 543 F. App'x 41 (2d Cir. 2013).

37 This section discusses neither the sale of goods nor other similar commercial transactions governed by the Uniform Commercial Code, nor does it discuss employment law. This section solely addresses common law contract provisions, and the reader is advised to consult additional sources for information on those topics.

obligations and that the non-breaching party sustained damage as a result of the breach.<sup>38</sup> The non-breaching party must demonstrate that the other party committed a material breach of the contract.<sup>39</sup> A breach is material if it deprives 'the injured party of the benefit it justifiably expected' under the contract.<sup>40</sup> Conversely, '[i]f the party in default has substantially performed, the other party's performance is not excused'.<sup>41</sup>

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.<sup>42</sup>

In New York, parties to a contract are also bound by the implied duty of good faith and fair dealing.<sup>43</sup> 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'.<sup>44</sup> 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"',<sup>45</sup> while other courts in New York have allowed claims to proceed notwithstanding such language.<sup>46</sup> Whether the covenant was allegedly breached, however, often is fact-specific and dependent on the nature of the act that violated it. As a general rule, courts are more likely to find a party breached an express term of an agreement rather than the implied covenant of good faith.

Anticipatory breach or repudiation of a contract is a breach 'that occurs before performance by the breaching party is due'.<sup>47</sup> 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.<sup>48</sup> The repudiator's expression of intent not to perform must be 'positive and unequivocal'.<sup>49</sup> When faced with an anticipatory repudiation, the non-repudiating party may elect to:

38 *Karimian v. Time Equities, Inc.*, 164 A.D.3d 486, 489 (2d Dep't 2018).

39 *VFS Financing, Inc. v. Falcon Fifty LLC*, 17 F.Supp.3d 372, 379 (S.D.N.Y. 2014).

40 *Doner-Hedrick v. N.Y. Inst. of Tech.*, 874 F. Supp. 2d 227, 242 (S.D.N.Y. 2012); see *Ma v. Biaggi*, 150 A.D.3d 778, 779 (2d Dep't 2017); *SBIW, Inc. v. Gen. Elec. Co.*, No. 10 CIV. 7812, 2013 WL 5338525, at \*12 (S.D.N.Y. Sept. 24, 2013); *Willoughby Rehab. & Health Care Ctr., LLC v. Webster*, 134 A.D.3d 811, 814 (2d Dep't 2015).

41 *Hadden v. Consol. Edison Co. of N.Y., Inc.*, 34 N.Y.2d 88, 96 (N.Y. 1974).

42 *Id.*

43 *Lola Roberts Beauty Salon, Inc. v. Leading Ins. Grp. Ins. Co.*, 160 A.D.3d 824, 825 (2d Dep't 2018).

44 *Concesionaria DHM, S.A. v. Int'l 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 'duplicative of the breach of contract claim').

45 See *Transit Funding Assocs., LLC v. Capital One Equip. Fin. Corp.*, 149 A.D.3d 23, 29 (1st Dep't 2017) ("The covenant of good faith and fair dealing cannot negate express provisions of the agreement, nor is it violated where the contract terms unambiguously afford Capital One the right to exercise its absolute discretion to withhold the necessary approval.').

46 *Ahmed Elkoulily, M.D. v. New York State Catholic Healthplan, Inc.*, 153 A.D.3d 768, 770 (2d Dep't 2017).

47 *Kaplan v. Madison Park Grp. Owners, L.L.C.*, 94 A.D.3d 616, 618 (1st Dep't 2012).

48 *Princes Point LLC v. Muss Dev. L.L.C.*, 30 N.Y.3d 127, 133 (2017).

49 *Id.*

- a* 'treat the repudiation as an anticipatory breach and seek damages for breach of contract';  
or  
*b* 'continue to treat the contract as valid and await the designated time for performance before bringing suit'.<sup>50</sup>

## 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.<sup>51</sup> Unfavourable terms or terms that lead to inequitable performances are insufficient bases for courts to rewrite the contract.<sup>52</sup> 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.<sup>53</sup> 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.<sup>54</sup> Courts also will enforce clauses in preliminary agreements such as memoranda of understanding regarding confidentiality and exclusive negotiation periods.<sup>55</sup>

### ii Limitation period unenforceable

The statute of limitations to assert a breach of contract claim in New York is six years.<sup>56</sup> '[A] breach of contract cause of action accrues at the time of the breach.'<sup>57</sup> Parties to a contract may, however, agree to a shorter time period within which a claim must be asserted.<sup>58</sup> 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.<sup>59</sup>

50 *DiFolco v. MSNBC Cable L.L.C.*, 831 F. Supp. 2d 634, 641 (S.D.N.Y. 2011).

51 *See, e.g., 159 MP Corp. v. Redbridge Bedford, L.L.C.*, 160 A.D.3d 176, 190 (2d Dep't 2018).

52 *Id.*

53 *See, e.g., London Paint & Wallpaper Co. v. Kesselman*, 158 A.D.3d 423, 424 (1st Dep't 2018); *Total Telecom Grp. Corp. v. Kendal on Hudson*, 157 A.D.3d 746, 747 (2d Dep't 2018).

54 *See Moshan v. PMB, LLC*, 141 A.D.3d 496, 496 (1st Dep't 2016).

55 *See Main St. Baseball, LLC v. Binghamton Mets Baseball Club, Inc.*, 103 F. Supp. 3d 244, 254–55 (N.D.N.Y. 2015) (finding that an exclusive negotiation period in a preliminary agreement was enforceable); *Learning Annex Holdings, LLC v. Whitney Educ. Grp., Inc.*, 765 F. Supp. 2d 403, 413–414 (S.D.N.Y. 2011); *McLeod v. Post Graduate Ctr. for Mental Health*, No. 14 CIV 10041 ALCF, 2016 WL 6126014, at \*2 (S.D.N.Y. Sept. 30, 2016) (holding that an MOU completed by parties at a mediation was enforceable where parties agreed on material components and the MOU contained a strict confidentiality clause).

56 N.Y. C.P.L.R. § 213.

57 *See Ely-Cruikshank Co. v. Bank of Montreal*, 81 N.Y.2d 399, 402 (1993).

58 *See Rudin v. Disanza*, 202 A.D.2d 202, 203 (1st Dep't 1994).

59 *See D&S Restoration, Inc. v. Wenger Constr. Co., Inc.*, 160 A.D.3d 924, 925–26 (2d Dep't 2018).

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.<sup>60</sup>

### iii Lack of consideration

As explained above, agreements must contain consideration to be enforceable.<sup>61</sup> Though the lack of the presence of consideration may be used as a basis to dispute contract enforcement, the adequacy of the substance of that consideration is generally not reviewable, and New York courts will hold parties to the terms of the contract even where the consideration is heavily disproportionate.<sup>62</sup>

### iv Enforcement is contrary to public policy

New York courts will not enforce contracts that are contrary to the public policies of New York.<sup>63</sup> Public policy is to be determined by reference to 'laws and legal precedents' rather than 'general considerations of supposed public interests'.<sup>64</sup> Contracts that are contrary to public policy include contracts allowing a contracting party to benefit from a criminal enterprise<sup>65</sup> or contractual choice-of-law provisions applying foreign laws that are 'truly obnoxious'.<sup>66</sup> 'Further, as a general rule, illegal contracts are unenforceable.'<sup>67</sup> However, New York courts typically endeavour to protect the clear and unambiguous terms of a mutual contract, and the burden to prove that public policy would be violated by the enforcement of a contract is high.<sup>68</sup>

### 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.<sup>69</sup> Economic duress arises when 'one party has unjustly taken advantage of the economic necessities of another and thereby threatened to do an unlawful injury'.<sup>70</sup> 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.<sup>71</sup>

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60 See *Batales v. Friedman*, 144 A.D.3d 849, 850-51 (2d Dep't 2016).

61 See *Reddy v. Mihos*, 160 A.D.3d 510, 514 (1st Dep't 2018).

62 *Moezinia v. Ashkenazi*, 136 A.D.3d 988, 989 (2d Dep't 2016).

63 See *Transparent Value, L.L.C. v. Johnson*, 93 A.D.3d 599, 600 (1st Dep't 2012).

64 See *Lubov v. Horing & Welikson, P.C.*, 72 A.D.3d 752, 753 (2d Dep't 2010).

65 See *Youshah v. Staudinger*, 604 N.Y.S.2d 479, 480 (Sup. Ct. 1993).

66 See *Brown & Brown, Inc. v. Johnson*, 25 N.Y.3d 364, 368 (2015) (quoting *Cooney v. Osgood Mach., Inc.*, 81 N.Y.2d 66, 79 (1993)).

67 See *Lanza v. Carbone*, 130 A.D.3d 689, 691 (2d Dep't 2015).

68 See *159 MP Corp. v. Redbridge Bedford, LLC*, 160 A.D.3d 176, 186-87 (2d Dep't 2018).

69 See, e.g., *DRMAK Realty LLC v. Progressive Credit Union*, 133 A.D.3d 401, 404 (1st Dep't 2015).

70 See *VKK Corp. v. Nat'l Football League*, 244 F.3d 114, 122 (2d Cir. 2001) (quoting *Sci. Holding Co. v. Plessey Inc.*, 510 F.2d 15, 22 (2d Cir.1974)).

71 See *DRMAK Realty LLC v. Progressive Credit Union*, 133 A.D.3d 401, 403 (1st Dep't 2015).

## vi Impossibility or impracticability<sup>72</sup>

‘[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.’<sup>73</sup> 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.<sup>74</sup>

For example, a governmental order preventing a party from performing will typically constitute sufficient grounds for impossibility.<sup>75</sup> 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.<sup>76</sup> However, New York courts have also found that parties cannot avoid enforcement where impossibility arises from ‘financial difficulty or economic hardship’.<sup>77</sup>

## 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’.<sup>78</sup> 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.<sup>79</sup> Under New York law, a court will not excuse a party from a contract merely because performance has become an economic burden.<sup>80</sup> 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.<sup>81</sup>

72 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.

73 See *Kolodin v. Valenti*, 115 A.D.3d 197, 200 (1st Dep’t 2014) (quoting *Kel Kim Corp. v. Cent. Markets, Inc.*, 70 N.Y.2d 900, 902 (1987)).

74 See *407 E. 61st Garage, Inc. v. Savoy Fifth Ave. Corp.*, 23 N.Y.2d 275, 281 (1968).

75 *MG Ref. & Mktg., Inc. v. Knight Enterprises, Inc.*, 25 F. Supp. 2d 175, 188 (S.D.N.Y. 1998).

76 See *Nomura Home Equity Loan, Inc. v. Nomura Credit & Capital, Inc.*, 133 A.D.3d 96, 106-07 (1st Dep’t 2015).

77 See, e.g., *Valenti v. Going Grain, Inc.*, 159 A.D.3d 645, 645 (1st Dep’t 2018).

78 See *Structure Tone, Inc. v. Universal Servs. Grp., Ltd.*, 87 A.D.3d 909, 912 (1st Dep’t 2011).

79 *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-CV-1189 (DAB), 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).

80 *A+E Television Networks, LLC v. Wish Factory Inc.*, No. 15-CV-1189 (DAB), 2016 WL 8136110 at \*13 (S.D.N.Y. Mar. 11, 2016).

81 See *Gen. Elec. Co. v. Metals Res. Grp. Ltd.*, 293 A.D.2d 417, 419 (1st Dep’t 2002).

## VI FRAUD, MISREPRESENTATION AND OTHER CLAIMS IMPACTING CONTRACTS

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.<sup>82</sup>

A party invoking fraud as a defence in the execution of a contract must show ‘excusable ignorance’.<sup>83</sup> 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.<sup>84</sup> However, if the signing of the contract was induced by fraud, it is unenforceable by the party that perpetrated the fraud.<sup>85</sup> A fraudulent inducement claim is valid, and enforcement of a contract may be voided under New York contract law if the party can prove:

- a a false representation of a material fact was made with the intent to reduce reliance; and
- b the party claiming to have been defrauded reasonably relied on that fact and suffered damage as a result.<sup>86</sup>

When determining whether a party reasonably relied on a representation, New York courts may hold sophisticated parties and business entities to a higher standard.<sup>87</sup> 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.<sup>88</sup> 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.<sup>89</sup> General merger clauses (which fore swear 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.<sup>90</sup> Further, if the disputed information was not ‘peculiarly’ known by the party allegedly perpetuating the fraud and could have been discovered by ordinary diligence, then New York courts will be disinclined to excuse performance of the contract, which is an exception to the enforcement of a specific anti-reliance disclaimer clause as well.<sup>91</sup> In addition, ‘where a party is merely seeking to enforce its bargain, a [fraud] claim will not lie’.<sup>92</sup> Thus, if a party alleging

82 *Basis PAC-Rim Opportunity Fund (Master) v. TCW Asset Mgmt. Co.*, 149 A.D.3d 146, 149 (1st Dep’t 2017).

83 *TufAmerica, Inc. v. Codigo Music LLC*, 162 F. Supp. 3d 295, 326 (S.D.N.Y. 2016).

84 *Id.*; *Stortini v. Pollis*, 138 A.D.3d 977, 978 (2d Dep’t 2016).

85 *Int’l Exterior Fabricators, LLC v. Decoplast, Inc.*, 128 A.D.3d 1016, 1018 (2d Dep’t 2015).

86 *Lankau v. Luxoft Holding, Inc.*, 266 F. Supp. 3d 666, 675 (S.D.N.Y. 2017).

87 *See, Merrill Lynch & Co. Inc. v. Allegheny Energy, Inc.*, 500 F.3d 171, 181 (2d Cir. 2007).

88 *See, e.g., Allenby, LLC v. Credit Suisse, AG*, 134 A.D. 3d 577, 580 (1st Dep’t 2015); *Basis Yield Alpha Fund Master v. Stanley*, 136 A.D.3d 136, 141–43 (1st Dep’t 2015).

89 *See Danann Realty Corp. v. Harris*, 5 N.Y.2d 317, 320–21 (1959); *JM Vidal, Inc. v. Texdis USA, Inc.*, 764 F. Supp. 2d 423–24, 599, 624 (S.D.N.Y. 2011); *JMC Ne. Corp. v. Porcelli*, 100 A.D.3d 552, 552–53 (1st Dep’t 2012).

90 *Danann Realty*, 5 N.Y. 2d at 320–21; *St. Paul Mercury Ins. Co. v. M & T Bank Corp.*, No. 12 CIV. 6322 JFK, 2014 WL 641438, at \*5 (S.D.N.Y. Feb. 19, 2014).

91 *N. Grp. Inc. v. Merrill Lynch, Pierce, Fenner & Smith*, 135 A.D.3d 414, 414 (1st Dep’t 2016).

92 *Orient Overseas Assocs. v. XL Ins. Am., Inc.*, 132 A.D.3d 574, 577 (1st Dep’t 2015).

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.<sup>93</sup>

## 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.’<sup>94</sup> 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’.<sup>95</sup> A non-party closely related to the contracting parties could also be bound by a forum selection clause.<sup>96</sup>

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’.<sup>97</sup>

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.<sup>98</sup> 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.<sup>99</sup> In conjunction, these statutes allow parties otherwise lacking New York contacts to select New York law to govern their contract and to litigate in New York courts.<sup>100</sup> 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.<sup>101</sup>

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

93 *Spinelli v. Nat’l Football League*, 903 F.3d 185, 209–11 (2d Cir. 2018).

94 *Signature Fin. LLC v. Neighbors Glob. Holdings, LLC*, 281 F. Supp. 3d 438, 446 (S.D.N.Y. 2017) (quoting *Matter of Smith Barney v. Luckie*, 85 N.Y.2d 193, 201 (1995)).

95 *KTV Media Int’l, Inc. v. Galaxy Grp., LA LLC*, 812 F. Supp. 2d 377, 387 (S.D.N.Y. 2011).

96 *Universal Investment Advisory SA v. Bakrie Telecom PTE, Ltd.*, 154 A.D.3d 171, 179 (1st Dep’t 2017).

97 *Moose Toys Pty, Ltd. v. Creative Kids Far E. Inc.*, 195 F. Supp. 3d 599, 402–03 (S.D.N.Y. 2016).

98 N.Y. Gen. Oblig. Law § 5-1401.

99 *Id.* § 5-1402.

100 *IRB-Brasil Resseguros, S.A. v. Inepar Investments, S.A.*, 20 N.Y.3d 310, 314–15 (2012).

101 *Honeywell Int’l Inc. v. ARC Energy Servs., Inc.*, 152 A.D.3d 444, 444 (1st Dep’t 2017).

at a minimum of US\$500,000.<sup>102</sup> 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.<sup>103</sup> 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.<sup>104</sup>

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

New York law provides that a written agreement to submit a dispute to arbitration is ‘enforceable without regard to the justiciable character of the controversy’ and ‘confers jurisdiction on the courts of the state to enforce it and to enter judgment on an award’.<sup>105</sup> 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.<sup>106</sup> Under New York law, a party seeking to compel an unwilling party to arbitrate must show a ‘clear and unequivocal’ agreement to arbitrate.<sup>107</sup> 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’.<sup>108</sup> Notably, under New York statutory law, a party may seek a court order preventing arbitration if the asserted claim is time barred.<sup>109</sup> 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.<sup>110</sup>

## VIII REMEDIES

To prevail on a breach of contract claim a plaintiff generally must show damage caused by the breach.<sup>111</sup> 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.<sup>112</sup> 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.

102 *N.Y. Comp. Codes R. & Regs.* tit. 22, § 202.70(a).

103 *Id.* § 202.70(b).

104 *Id.* § 202.70(g) Rule 9. Court proceedings generally commence in New York courts when a request for judicial information is filed by one of the parties.

105 N.Y. C.P.L.R. § 7501.

106 N.Y. C.P.L.R. § 7503(a); *Piller v. Tribeca Dev. Grp. LLC*, 156 A.D.3d 1257, 1260 (3d Dep’t 2017).

107 *Burke v. Gray*, 146 A.D.3d 452 (1st Dep’t 2017) (quoting *Gerling Glob. Reinsurance Corp. v. Home Ins. Co.*, 302 A.D.2d 118, 126 (1st Dep’t 2002)).

108 *Ferrarella v. Godt*, 131 A.D.3d 563, 566 (2nd Dep’t 2015).

109 N.Y. C.P.L.R. § 7502.

110 *See Patterson v. Raymours Furniture Co.*, 96 F. Supp. 3d 71, 76 (S.D.N.Y. 2015), *aff’d*, 459 F. App’x 40 (2d Cir. 2016); *Schiffer v. Slomin’s, Inc.*, 11 N.Y.S. 3d 799, 801–02 (N.Y. App. Term 2015).

111 *Harris v. Seward Park Hous. Corp.*, 79 A.D.3d 425, 426 (1st Dep’t 2010).

112 Post-judgment interest is awarded in breach of contract actions, at a rate of 9 per cent. C.P.L.R. § 5001–5004.

## 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.<sup>113</sup> 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.<sup>114</sup>

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.<sup>115</sup> One common example is lost profits.<sup>116</sup> 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.<sup>117</sup> New York courts have classified lost profits as direct damages in instances where they are 'the direct and immediate fruits of the contract'.<sup>118</sup>

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.<sup>119</sup> Reliance damages 'seek to restore the injured party to the position she was in before the contract was formed'.<sup>120</sup>

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'.<sup>121</sup> 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'.<sup>122</sup> A liquidated damages clause will be unenforceable if it functions as a penalty.<sup>123</sup>

## ii Punitive damages

Under New York law, punitive or exemplary damages are typically non-recoverable for breach of contract.<sup>124</sup> 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

113 *E.J. Brooks Co. v. Cambridge Sec. Seals*, 31 N.Y.3d 441, 448 (2018).

114 *Id.*

115 *Uncas Int'l LLC v. Crimson Rose, Inc.*, No. 16 CIV. 9610 (JSR), 2017 WL 2839668, at \*6 (S.D.N.Y. June 26, 2017).

116 *See Carco Group, Inc. v. Maconachy*, 718 F.3d 72, 82 (2d Cir. 2013).

117 *Uncas Int'l LLC v. Crimson Rose, Inc.*, No. 16 CIV. 9610 (JSR), 2017 WL 2839668, at \*6 (S.D.N.Y. June 26, 2017).

118 *Biotronik A.G. v. Conor Medsystems Ireland, Ltd.*, 22 N.Y.3d 799, 806 (2014).

119 *World of Boxing, LLC v. King*, 634 F. App'x 1, 3 (2d Cir. 2015).

120 *Id.* at 4.

121 *172 Van Duzer Realty Corp. v. Globe Alumni Student Assistance Ass'n, Inc.*, 24 N.Y.3d 528, 536 (2014).

122 *555 W. John St., LLC v. Westbury Jeep Chrysler Dodge, Inc.*, 149 A.D.3d 796, 797 (2d Dep't 2017).

123 *172 Van Duzer Realty Corp. v. Globe Alumni Student Assistance Ass'n, Inc.*, 24 N.Y.3d 528, 536 (2014).

124 *Pinnacle Info. Sys. v. W. Clearing Corp.*, No. 11 CV 5092 NRB, 2011 WL 3586433, at \*1 (S.D.N.Y. Aug. 4, 2011).

a scheme directed at the general public.<sup>125</sup> A plaintiff must also show that public rights are involved.<sup>126</sup> Additionally, New York courts do not allow punitive damages to be awarded in arbitration.<sup>127</sup>

### 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'.<sup>128</sup> However, a party may not seek indemnification for its own acts of gross negligence or willful misconduct under New York law.<sup>129</sup>

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.<sup>130</sup> 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'.<sup>131</sup>

### 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'.<sup>132</sup> In order to obtain this remedy, a party generally must also show that its remedies at law (i.e., money damages) are inadequate.<sup>133</sup>

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.<sup>134</sup> The injury must be 'neither remote nor speculative, but actual and imminent'.<sup>135</sup> Under New York law, injury to reputation or loss of goodwill can establish irreparable harm.<sup>136</sup>

125 *JPMorgan Chase Bank v. Corrado*, 162 A.D.3d 994, 996 (2d Dep't 2018).

126 *2470 Cadillac Res., Inc. v. DHL Exp. (USA), Inc.*, 84 A.D.3d 697, 699 (1st Dep't 2011).

127 *Help Me See, Inc. v. Wonderwork, Inc. for Poor, Inc.*, 157 A.D.3d 455, 455 (1st Dep't 2018).

128 *Gotham Partners, L.P. v. High River Ltd. P'ship*, 76 A.D.3d 203, 204 (1st Dep't 2010).

129 *In re MF Glob. Holdings Ltd.*, No. 12 CIV. 4139 AJN, 2013 WL 139594, at \*5 (S.D.N.Y. Jan. 11, 2013), *aff'd sub nom. In re MF Glob. Holdings Ltd.*, 531 F. App'x 179 (2d Cir. 2013) (citing *American Tissue, Inc. v. Donaldson, Lufkin & Jenrette Secs. Corp.*, 351 F.Supp.2d 79, 99 (S.D.N.Y.2004)).

130 *Amguard Ins. Co. v. Getty Realty Corp.*, 147 F. Supp. 3d 212, 220 (S.D.N.Y. 2015).

131 *Id.*

132 *Chester Green Estates, LLC v. Arlington Chester, LLC*, 161 A.D.3d 1036, 1038 (2d Dep't 2018).

133 *Id.*

134 *DAG Jewish Directories, Inc. v. Y & R Media, LLC*, No. 09CIV.7802RJH, 2010 WL 46016, at \*1 (S.D.N.Y. Jan. 7, 2010).

135 *Bisnews AFE (Thailand) Ltd. v. Aspen Research Grp. Ltd.*, 437 F. App'x 57 (2d Cir. 2011).

136 *Singas Famous Pizza Brands Corp. v. New York Advert. LLC*, No. 10 CIV. 8976 RJH, 2011 WL 497978, at \*6 (S.D.N.Y. Feb. 10, 2011), *aff'd*, 468 F. App'x 43 (2d Cir. 2012).

## v Rescission and reformation

If a contract is induced by fraud, then rescission is an appropriate remedy.<sup>137</sup> Rescission prevents the party who perpetrated the fraud from enforcing the contract.<sup>138</sup> Under New York law, an intentional misrepresentation is not required for rescission, and an ‘innocent misrepresentation’ is typically sufficient.<sup>139</sup>

Reformation can be used to restate the terms of a contract in a way the parties originally intended.<sup>140</sup> In New York, contracts are strictly construed against reformation.<sup>141</sup> 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’.<sup>142</sup>

## 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.<sup>143</sup> Courts typically honour these provisions because they ‘represent[ ] the parties’ Agreement on the allocation of the risk of economic loss’.<sup>144</sup> New York courts will generally enforce clauses excluding particular types of damages, such as punitive damages and consequential damages.<sup>145</sup> 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.<sup>146</sup>

Limited-liability clauses may be unenforceable if they allow for intentional wrongdoing, such as fraud.<sup>147</sup> 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.<sup>148</sup>

## IX CONCLUSION

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,

137 *Int'l Exterior Fabricators, LLC v. Decoplast, Inc.*, 128 A.D.3d 1016, 1018 (2d Dep't 2015).

138 *Id.*

139 *Jack Kelly Partners LLC v. Zegelstein*, 140 A.D.3d 79, 80 (1st Dep't 2016).

140 *US Bank Nat. Ass'n v. Lieberman*, 98 A.D.3d 422, 423–24 (1st Dep't 2012).

141 *Gaylords Nat. Corp. v. Arlen Realty & Dev. Corp.*, 112 A.D.2d 93, 96 (1st Dep't 1985).

142 *Id.*

143 *Electron Trading, LLC v. Morgan Stanley & Co. LLC*, 157 A.D.3d 579, 580 (1st Dep't 2018).

144 *id.*; see also *Nomura Home Equity Loan, Inc.*, Series 2006-FM2, by *HSBC Bank USA, Nat'l Ass'n v. Nomura Credit & Capital, Inc.*, 30 N.Y.3d 572, 581 (2017).

145 See *DynCorp v. GTE Corp.*, 215 F. Supp. 2d 308, 318 (S.D.N.Y. 2002).

146 *Electron Trading*, 157 A.D.3d at 580.

147 *Id.* at 580–81.

148 *Id.* at 581.

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.

# PORTUGAL

*Fernando Aguilar de Carvalho and Daniel Bento Alves<sup>1</sup>*

## I OVERVIEW

Commercial contracts are undoubtedly an essential instrument for business transactions. In fact, contrary to what some authors predicted in the mid-twentieth century, the ‘demise of contracts’ is a long way away. Commercial contracts are currently the most relevant tool to create, organise and carry out business. In Portugal, on the one hand, commercial contracts are used to incorporate and organise companies and to set up commercial ties and, on the other, to organise business in terms of production, distribution and arbitrage of goods and services in the market.

In Portugal, commercial contracts are thus clearly recognised as a key instrument for business. Under Portuguese law, commercial contracts have their own category and are distinct from purely civil contracts (e.g., a standard sale and purchase contract for a house) and thus are subject to a specific legal regime (joint liability, statutory limitation periods, etc.). According to Portuguese law, the distinction between commercial and purely civil contracts is traditionally based on the criteria set out in the Portuguese Commercial Code, which was enacted in 1833. These traditional criteria were based on the concepts of:

- a* an objective act of commerce; and
- b* a subjective act of commerce.

However, these longstanding criteria are now being replaced by the concept of company as the cornerstone to identify the commercial nature of any given contract.

Portuguese law regulates commercial contracts using the Portuguese Commercial Code and other specific laws. In fact, over the past 30 years, the number of laws providing legal regimes for specific contracts has grown significantly, for example:

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

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

- a* European directives regarding liability for defective products: Directive 85/374/EC of 25 July;
- 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
- e* combating late payment in commercial transactions: Directive 2000/35/EC of 29 June.

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 143/2001 based on Directive 97/7/EC of the European Parliament and of the Council of 20 May 1997); e-commerce (Decree-Law 290-D/99 based on Directive 1999/93/EC of the European Parliament and of the Council of 13 December 1999); automatic contracting (e.g., vending machines) and self-contracting (markets, etc.).

Seventh, under Portuguese law, a fundamental rule to contract formation is that silence cannot be considered, in general, as acceptance. However, in certain areas of commercial contracts, silence can be considered acceptance (e.g., in relation to confirmation letters). Silence should not be confused with acceptance by conduct, that is, when the conduct of the parties indicates acceptance and a clear intention to be bound by the contract. In fact, although silence has no value, a particular conduct (for example, acts towards executing a commercial contract) may be deemed equivalent to tacit acceptance. This also applies under Portuguese law.

Eighth, under Portuguese law, proof of commercial contract formation can be based, in principle, on any means of evidence, except when the law requires a specific form for a particular commercial contract. Therefore, as explained above, according to Portuguese law, a commercial contract can be executed verbally.

Ninth, in general, once created, commercial contracts cannot be modified unless the parties so agree. However, Portuguese law grants the parties the right to request the court to

modify or terminate a commercial contract in the event of an atypical change of circumstances (Articles 437 to 439 of the Portuguese Civil Code). This legal mechanism is, however, very demanding and strict. Therefore, it is not uncommon for parties to commercial contracts to include *force majeure* clauses and hardship clauses.

Finally, the trend in Portugal is to consider that, if a company's business is transferred, the commercial contracts regarding said company's business are automatically assigned to the new owner of the company's business and the consent of the other parties to the contracts is not required.

### III CONTRACT INTERPRETATION

In Portugal, choice-of-law principles are, hypothetically, determined by Regulation (EC) 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I). According to Rome I and, as a general rule, parties are free to choose the applicable law. The law that the parties choose will govern the contract unless the right to choose the law is limited or restricted by other provisions of Rome I (e.g., Article 3 (3)). If the parties do not agree on the applicable law, the rules of Rome I will apply to determine the applicable law.

Should Portuguese law apply to a commercial contract, Portuguese rules on interpretation will also apply. According to Portuguese law, the fundamentals of contract interpretation are as follows.

In general, if the true will of the parties is known, the meaning of the contract is valid in accordance with such true will (Article 236(2) of the Portuguese Civil Code), regardless of how the parties express such will. In principle, a party can resort to any type of evidence to prove the true will of the parties (i.e., documentary evidence or witness evidence).

However, if the true will of the parties is unknown or cannot be established, then a contract has to be interpreted according to the meaning that a normal party, under the same set of circumstances, would hypothetically give to it (Article 236(1) of the Portuguese Civil Code). This standard of interpretation relies on several elements, such as:

- a* the literal element (the wording of the contract);
- b* the historical element (namely, pre-contractual negotiations);
- c* the contextual element (the contract as a whole);
- d* the purposive element (the purpose and nature of the contract); and
- e* the behavioural element (the conduct of the contracting parties).

In other words, the interpreter – the courts – will rely and consider all these elements when establishing the meaning of a contract or contractual clause.

With regard to formal commercial contracts (i.e., those in written form), the purpose or intention of the contracting party must be stated in the contract with a minimum correspondence, even if in a deficient, rudimentary or imperfect way (Article 238 of the Portuguese Civil Code). This is known as the minimum correspondence test. For example, a lease agreement is subject to this interpretative standard because it constitutes a formal agreement (Article 3 of Decree-Law 149/95). However, even in formal contracts, the real intent of the parties can prevail if the grounds determining the form of the agreement do not hinder the prevalence of such a meaning (Paragraph 2 of Article 238 of the Portuguese Civil Code).

Under Article 237 of the Portuguese Civil Code, if the meaning of a commercial contract is ambiguous or dubious, it must be interpreted in a way that guarantees an adequate balance between the parties' mutual obligations. However, there are specific rules for interpreting adhesion contracts. In fact, in the event of ambiguous general contractual terms, the prevailing meaning is that which is more favourable to the party adhering to the contract (Article 11 of Decree-Law 446/85 of 25 October).

It is not unusual for parties to commercial contracts to include a merger clause. However, under Portuguese law, this type of clause does not automatically render prior statements or agreements irrelevant and thus they may still be used as a means of interpreting the contract.

Finally, if something is not expressly regulated in the commercial contract and no special provision applies, this gap must be filled in accordance with the hypothetical intention of the parties had they foreseen such gap or according to good faith principles (Article 239 of the Portuguese Civil Code).

#### IV DISPUTE RESOLUTION

In Portugal, there are no specialised commercial courts with authority to adjudicate disputes related to commercial contracts. Hence, disputes regarding commercial contracts are, in principle, heard by regular civil courts.

Although there are some specialised courts in Portugal such as the chamber of commerce, the competition court and the intellectual property court, none of them have, in principle, jurisdiction to hear disputes regarding commercial contracts, except for the inexistence or nullity of memoranda of association. The competition court, in principle, only has jurisdiction to hear appeals regarding decisions by the Bank of Portugal or the Portuguese Competition Authority. The intellectual property court has jurisdiction to hear disputes related to industrial and intellectual property.

Court fees related to judicial proceedings are calculated on the basis of the value under dispute. For disputes exceeding €275,000, the parties also have to pay additional court fees, which are calculated as a percentage over the amount of the dispute exceeding the €275,000 threshold and can be very significant (for example, in a dispute of €275,000, each party will have to pay court fees in the amount of €1,632. However, if the amount in dispute adds up to €20 million, each party will have to pay €241,434 regarding court fees). The party that obtains a favourable verdict will be reimbursed for the court fees it has paid at the expense of the other party, plus 50 per cent of their legal fees, but must file an application for that purpose at the end of the proceedings.

In Portugal, there is no specific threshold to litigate commercial contract disputes in court. However, the amount in dispute is relevant to determine, on the one hand, which regular civil court has jurisdiction to hear the dispute, and on the other, whether the party has the right to appeal. In fact, parties only have the right to challenge a decision before the appeal court if the amount in dispute exceeds €5,000. The amount in dispute must exceed €30,000 to be eligible to appeal to the Portuguese Supreme Court.

Disputes regarding commercial contracts involving €2,500 or less will be heard by specific courts called *Julgados de Paz*. These courts were created to encourage parties (whether or not represented by a lawyer) to actively participate in the procedure and settle their disputes.

Portugal also has a special commercial debt collection procedure called *injunção* (regulated by Decree-Law 269/98 of 1 September). This procedure was designed to claim monetary debts arising from commercial contracts and starts with the claimant filing a

standard form (claiming the debt), followed by the debtor being summoned. If the debtor does not settle the debt or files an opposition brief within 15 days, the claimant is granted an enforcement title. If the debtor files an opposition brief, this procedure develops into ordinary proceedings.

In Portugal, parties to a commercial agreement can, in principle, agree on a provision granting jurisdiction to a specific court to hear any dispute related to the agreement. The validity of the provision is scrutinised in accordance with Article 95 of the Portuguese Civil Procedure Code.

However, alternative dispute resolution methods are clearly on the rise in Portugal – in particular, arbitration (either *ad hoc* or institutional). In fact, the Portuguese Constitution allows for the creation of arbitral tribunals as an alternative dispute resolution method. Currently, arbitration in Portugal is regulated by Law 63/2011 of 14 December, which follows, in general, the UNCITRAL Model Law on International Arbitration.

In practice, the current trend in Portugal is for commercial contracts between medium-to-large companies to contain an arbitration clause. Parties generally opt for institutional arbitration. A well-known arbitral institution in Portugal is the Arbitration Centre of the Portuguese Chamber of Commerce and Industry. In commercial contracts with foreign investors, it is standard practice to appoint an international arbitral institution (e.g., the International Chamber of Commerce or the London Court of International Arbitration).

Finally, recourse to mediation is also being encouraged in Portugal to solve disputes related to commercial contracts (Law 20/2013 of 19 April). However, in our experience, mediation in Portugal still requires further development.

## V BREACH OF CONTRACT CLAIMS

Under Portuguese law, standards of performance require, in general, that a party to a contract performs exactly what he or she undertook to do (point by point of the contract). This standard of performance is called *princípio da pontualidade* in Portugal. Besides this standard of performance, Portuguese law also requires that the parties to a contract, when fulfilling their contractual obligations, comply with good faith principles.

Commercial contracts are subject to this general standard of performance with some other specific features. One of these specific features is the principle of conformity. In fact, inspired by Article 35 of the United Nations Convention on Contracts for the International Sale of Goods, Portuguese scholars understand that goods delivered pursuant to a commercial contract must meet the quantities, quality and other features established in the contract. Based on this principle of conformity, Portuguese scholars also believe that the classic model of commercial contracts based on *caveat emptor* (i.e., the buyer alone is responsible for checking the quality and suitability of goods before a purchase is made) has evolved into a *caveat venditor* model (i.e., the seller is responsible for checking that the quality and suitability of goods meets the standards set out in the agreement). This evolution is especially evident in consumer contracts (Decree-Law 67/2003).

Based on the above-mentioned demanding standard of performance, there are three main forms of breach of commercial contracts:

- a* non-compliance;
- b* delayed performance; and
- c* defective or improper performance.

Any of these breaches may – under certain circumstances – entitle the creditor to terminate the contract or claim compensation for damage.

For the non-breaching party to claim compensation for breach of contract it must prove that the following legal requirements are met:

- a* that the breach of contract was intentional;
- b* that the debtor was at fault;
- c* that there was an actual damage or loss; and
- d* 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.

# SOUTH AFRICA

*Jonathan Ripley-Evans and Fiorella Noriega Del Valle*<sup>1</sup>

## 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. However, most oral contracts (save for contracts for the sale of land) are enforceable in South Africa, although 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.

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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 *SA Sentrale Ko-op Graan maatskappy Bpk v. Shifren*,<sup>2</sup> the then Appellate Division held that a verbal variation of a contract containing a non-variation clause is of no effect.

## III CONTRACT INTERPRETATION

### i Governing law of the contract

Parties are free to choose the substantive law that they wish to govern the contract. That law will then govern substantive aspects relating to the contract such as its formation, interpretation, validity and termination.

In the event of a dispute, a court will determine the governing law (also known as the proper law) of the contract at the outset and will give effect to the law chosen by the parties, subject to certain exceptions (such as the fact that the chosen law will not override local statutes that are directly applicable).

If the parties have not expressly chosen the substantive law of the contract, a South African court will determine if there is a tacit choice of law. This is done by trying to determine the parties' intention at the time of concluding the contract, through a consideration of factors such as the surrounding circumstances and any references in the contract to statutes of a specific country.

If no tacit choice can be found, the court will assign a law to the contract by determining which legal system is most closely connected to the contract. This is usually either the place where the contract was concluded or performed.

A conceptual difficulty arises in instances where the conclusion of a binding agreement is in dispute. If there is no binding agreement, then no proper law has been chosen and the question is then what law must a court apply in order to determine the validity of the contract? A leading South African author (CF Forsyth, *Private International Law*) suggests that the approach adopted in English law ought to be applied in South Africa; namely, the question must be determined by applying the law that would have been the proper law, had a valid contract been concluded. This question has not yet been answered by South African courts.

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2 *SA Sentrale K-op Graan maatskappy Bok v. Shifren* 1964 (4) SA 760 (A). Confirmed in *Brisly v. Drotzky* 2002 (4) SA 1 (SCA) and *Yarram Trading CC t/a Tijuana Spur v. Absa Bank* 2007 (2) SA 570 (SCA).

**ii The terms of a contract: express, implied and tacit**

In South African law, when interpreting a contract it is first necessary to determine what terms form part of the contract.

A party who alleges that a term forms part of a contract bears the onus of proving that the parties intended it to form part of the contract.

South African law recognises three types of terms, given below.

***Express terms***

This is a term that the parties expressly agreed to include. There are four rules that the courts utilise in order to determine whether an express term forms part of the contract.

*Incorporation by reference*

If a contract refers to a separate document with sufficient certainty, it incorporates the terms of that separate document.

*Parol evidence rule*

This rule states that when a contract has been reduced to writing, a court will assume that the parties intended the document to reflect all of the express terms of the contract and will not consider external (parol) evidence that differs from the written contract.<sup>3</sup>

The rule has, however, 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.

*Caveat subscriptor rule*

This rule states that a person who signs a contract is bound to all of the terms contained therein, even if he or she did not read them or intend to be bound by them. The rule is an exception to the principle that parties must reach subjective agreement on the terms of the contract.

*Ticket case rules*

This rule states that a party is bound to a contract, even if he or she did not sign the document, if:

- a* they were willing to be bound by them; or
- b* if the other party took reasonable steps to bring the terms to his or her attention.

An example of such a contract is an indemnity contained at the entrance to a building.

***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.

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<sup>3</sup> *Union Government v. Vianini Pipes* 1941 AD 43 at Paragraph 47.

### *Terms implied by trade usage*

These terms are implied where a practice in a trade is so established that it is assumed to form part of the contract.

### *Tacit terms*

A tacit term is a term that was not expressly agreed to, but that can be read into the contract because of the intentions of the parties. These take the form of unexpressed terms and imputed terms

The test to establish whether a tacit term should be read into a contract is the 'necessary implication test', which looks at whether the term is a necessary implication of the contract. The test has two elements:

- a business efficacy test: a court will look at whether the term is required to make the contract commercially viable;<sup>4</sup> and
- b officious bystander test: a court will ask what would have happened if an 'officious bystander' was present at the time of entering into the contract and he or she had asked the parties whether they wished to include the term.<sup>5</sup>

### **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 parole evidence rule states that the court may only look at the contract to ascertain the meaning of the express terms, as this reflects the intention of the parties.

A court would first look at the written words used by the parties when entering into the contract. The written words would then be applied, even if an unfair result was reached.

#### ***Stage two: the surrounding circumstances***

Additional factors could be taken into account only where the meaning of the term was not clear from the contract itself.

These surrounding circumstances related to evidence of matters that the parties probably had in mind when contracting.<sup>6</sup>

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, 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;

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4 *West End Diamonds Ltd v. Johannesburg Stock Exchange* 1946 AD 910.

5 *Reigate v. Union Manufacturing Co* [1918] 1 KB 592 at 605.

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

- b if the clause is capable of more than one meaning, one of which leads to invalidity and one of which leads to validity, the meaning favouring validity will be chosen; and
- c the *contra preferentem* rule is used as a last resort and states that a term will be interpreted against the party who was responsible for the drafting of the clause.

#### **iv Developments in South African law relating to contractual interpretation**

The above-mentioned 'staged' approach has been severely criticised in the past, and recent developments have seen a move towards a less formalistic approach to the interpretation of contracts.

In this regard, South African courts recognise the concept of 'substance over form', and a move towards a method of interpretation that gives effect to the intention of the parties has been seen in recent jurisprudence.

The recent Supreme Court of Appeal judgment in *Bothma-Batho Transport (Edms) Bpk v. S Bothma & Seun Transport (Edms) (Bpk)*<sup>7</sup> 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'.

#### **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 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.

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<sup>7</sup> *Bothma-Batho Transport (Edms) Bpk v. S Bothma & Seun Transport (Edms) (Bpk)* 2014 (2) SA 494 (SCA).

There are, however, instances where a party may approach a court for interim relief, pending the conclusion of the arbitration or alternative dispute resolution mechanism.

## ii Jurisdiction clauses

Jurisdiction clauses, in terms of which parties expressly agree that a contractual dispute will be determined in a particular jurisdiction, are also enforced by South African courts.

A South African court will defer to the jurisdiction of a foreign court in instances where the parties have agreed to submit to the jurisdiction of a foreign court. It is important to note 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 entertain the dispute even if the parties agreed to litigate in South Africa.

## 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.<sup>8</sup>

Repudiation occurs when:

- a there is conduct indicating a refusal to perform;
- b there is no justification for a refusal to perform; and
- c the other party has performed.

The innocent party must then make an election as to whether it intends to accept the repudiation and cancel the contract, or to hold the breaching party to the contract (in which case the innocent party will also need to indicate that it is willing to perform).<sup>9</sup> 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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8 *Highveld 7 Properties v. Bailes* 1999 (4) SA 1307 (SCA).

9 *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**

### **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 follow:

- 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.<sup>10</sup>

### *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.<sup>11</sup>

### *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*,<sup>12</sup> 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:

- a* objective impossibility: this means that performance would be impossible for everyone;
- b* subjective impossibility: this occurs when performance is possible for some people, but not for the debtor specifically; and
- c* legal impossibility:<sup>13</sup> this occurs when parties are prevented from performing by virtue of a statute or legal rule (however, the contract is not necessarily illegal).

A contract can only be avoided by a defendant in the event that there is an objective impossibility that exists, prior to entering into the contract.

In some instances, performance becomes impossible after the contract has been entered into. This does not mean that the contract is void; however, such circumstances do lead to other remedies that are dependent on who bore the risk at the time that the impossibility occurred.

### *Non-compliance with formalities*

Formalities in respect of contracts can be prescribed by statute, or self-imposed. Non-compliance with these formalities will usually render the contract null and void.

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10 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.

11 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.'

12 *Southernport Developments (Pty) Ltd v. Transnet Ltd* 2005 (2) SA 202 (SCA).

13 *Wilson v. Smith* 1956 (1) SA 393 (W).

### ***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.<sup>14</sup>

In the event that the guilty party brings a claim against the innocent party, the innocent party may raise the *exceptio* as a defence.

### ***Prescription or time barring of contractual claims***

South African law recognises a prescription period or time limitation period of three years for the enforcement of an ordinary debt. A defendant can therefore raise the defence that a claim has prescribed, after the lapse of three years from the date when the debt arose.

What exactly is meant by the word 'debt' has been a subject of debate over the years. A claim for damages, for example, can no longer be enforced after a period of three years has lapsed from the date that the damage was suffered.

It has, however, been recently held that a claim for return of property is not a debt that is subject to prescription.

## **VII FRAUD, MISREPRESENTATION AND OTHER CLAIMS**

In certain instances, the requirements for a valid contract may have been met; however, it may be the case that one of the parties acted improperly in obtaining the consensus of the other party. These contracts are not void, but 'voidable' at the election of the innocent party.

Such improper conduct includes misrepresentation, duress and undue influence. These will be dealt with below.

### **i Misrepresentation**

This occurs when a guilty party induces an innocent party to enter into a contract by making a false representation of fact, by way of a pre-contractual statement or conduct.<sup>15</sup>

The misrepresentation must be a material one, in the sense that a reasonable person would also have been induced to contract by the misrepresentation.<sup>16</sup> 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:

- a* fraudulent;
- b* negligent; and
- c* innocent.

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14 *Wynn's Car Care Products v. First National Bank* 1991 (2) SA 754 (A).

15 *Novick v. Comair Holdings* 1979 (2) SA 116 (W).

16 *Lourens v. Genis* 1962 (1) SA 431 (T).

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:

- 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;
- b* delictual (tortious) damages: this is only available in the event of a fraudulent or negligent misrepresentation;
- c* the buyer may set aside the contract of sale; and
- d* the buyer may claim that the purchase price be reduced to the true value of the goods.

## **ii Duress**

In this instance, an innocent party is induced to enter into a contract by threats of harm. The duress must consist of a threat of actual (or a reasonable fear of) violence directed at the innocent person, his or her property or his or her family. The violence must also be imminent or inevitable and must have the potential to cause damage.

The remedies for a contract concluded under duress are:

- a* rescission of the contract; and
- b* delictual damages.

## **iii Undue influence**

This occurs when a guilty party exploits the influence that it has over an innocent party, in order to induce the party to enter into the contract.

The wrongdoer must have an influence over the innocent party, which is unconscionably used to reduce the innocent party's resistance and induces the innocent party to contract, to his or her detriment.

The remedies for a contract concluded under undue influence are:

- a* rescission of the contract; and
- b* delictual damages.

## **VIII REMEDIES**

When a party materially breaches a contract the innocent party must make an election as to whether it wishes to cancel or enforce the contract. If the breach is not material, the innocent party may only elect to enforce the contract. A claim for damages is available to the innocent party regardless of this election.

An innocent party may choose from the following remedies:

### **i Specific performance**

An innocent party is entitled to insist upon performance under the contract, save in the event that performance is no longer possible.

A claim for specific performance entails requesting a court to order that the breaching party deliver the performance that it has agreed to. However, the innocent party must at least tender full and proper performance of his or her reciprocal obligations.

In South Africa, a court has the discretion to award specific performance. In the event that it does not view specific performance as the most appropriate remedy, it will not grant the order. In the event that performance is impossible or illegal as a result of the breach, this remedy is also not available and the innocent party can only choose to cancel the contract.

## ii Interdict

If a breach is imminent, but has not yet occurred, an innocent party may obtain an interdict against the counterparty to prevent the breach from occurring.

An interdict may also be a form of 'negative' specific performance, in the case of the breach of a negative obligation.

## iii Cancellation

In South Africa, cancellation of a contract is an extraordinary remedy that requires a right to cancel. A right to cancel is usually obtained in instances where:

- a the contract contains a cancellation clause;
- b the breach is a material one that warrants cancellation; and
- c in the case of mora, if the innocent party has placed the breaching party on terms to deliver the performance by a specified date.

This is because the legal effect of cancellation is that the contract is extinguished and all performance already made must be restored.<sup>17</sup> 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.<sup>18</sup> 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*,<sup>19</sup> 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;

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17 *Nash v. Golden Dumps* 1985 (3) SA 1 (A).

18 *Administrator, Natal v. Edouard* 1990 (3) SA 581 (A).

19 *Thoroughbred Breeders' Association v. Price Waterhouse* 2001 (4) SA 551 (SCA).

- 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.

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.

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Oliver Browne is a partner in the London office of Latham & Watkins. He is chair of the London litigation department and a solicitor advocate. Oliver has been an international arbitration specialist for almost 20 years, and has represented companies and states in proceedings conducted under all the major rules as well as on an *ad hoc* basis. Oliver also has considerable experience with complex commercial litigation around the world, and arbitration related litigation in all levels of the English courts. Oliver's recent experience includes disputes in various industry sectors, including power generation and distribution, energy, defence, media, retail and manufacturing, financial services and private equity.

Oliver was named as one of the 'next generation of partners setting the disputes agenda' by *Legal Business* in 2015, listed as one of *Legal Week's* litigation rising stars 2016 (which profiled him as one of the up-and-coming litigation stars at UK top 50 and top international firms in London) and named a 'future leader' in *Who's Who Legal* in 2017.

He is recommended for international arbitration, dispute resolution, banking litigation: investment and retail, commercial litigation and public international law by *The Legal 500*, where he has been praised as ‘smart and modest’, ‘delightful to work with’, a lawyer who ‘handles cases professionally’ and who is ‘great with clients and a strategic thinker’.

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Jesse graduated from Osgoode Hall Law School on the Dean’s Honour List and was named as an outstanding oralist at the Willms & Shier Environmental Law Moot. During his legal studies, Jesse worked as a research assistant for a law professor specialising in energy law matters relating specifically to oil and natural gas.

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Mr Fages has extensive experience in French and European public policy matters and in advising companies, professional federations and NGOs in their relations with public authorities in Paris and Brussels.

Mr Fages teaches arbitration law and litigation at University of Paris I (Sorbonne University). Moreover, he also teaches at the Ecole Centrale-Supelec de Paris, and was a featured speaker at the University of Cairo for several years.

## **IAN FELSTEAD**

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Ian Felstead is a partner in the London office of Latham & Watkins and a member of the firm's litigation department. Ian has almost 20 years' experience advising clients on a variety of litigation and dispute resolution matters, in particular in relation to commercial, media and regulatory litigation. Ian's complex commercial litigation practice encompasses all forms of dispute resolution, including High Court litigation, domestic and international arbitration, and specialist tribunals (for example, the Copyright Tribunal). Ian has particular expertise in media litigation, including defamation, breach of confidence or privacy, contempt, data protection, freedom of information and copyright issues. Ian also advises clients on regulatory and public law matters, including acting on behalf of claimants and defendants in judicial review proceedings, advising clients on their regulatory obligations and acting for them in respect of investigations by the relevant regulator. In addition, Ian has considerable experience conducting internal investigations on behalf of clients.

Ian has been described as 'a very effective lawyer [who] always thinks things through right to the end' by *Chambers & Partners UK*, and as being 'a real pleasure to deal with and [having] great ability' by *The Legal 500*.

## **DIÓGENES GONÇALVES**

*Pinheiro Neto Advogados*

Diógenes Gonçalves has been a partner in the litigation group of Pinheiro Neto Advogados' São Paulo office since 2007, practising in litigation, insurance and reinsurance.

He graduated from São Paulo University in 1995 and holds a postgraduate degree in civil procedure law from the Università degli Studi di Milano, Italy (1997) and an LLM degree in civil procedure law from USP, Brazil (2002).

As part of his international professional experience, he was a foreign associate at Villa Manca Graziadei in Italy in 1997.

He is currently the coordinator of the litigation group in Pinheiro Neto Advogados, and a member of the São Paulo Lawyers Institute, the International Association of Defense Counsel, Insuralex and the Association of Foreign Insurance Companies.

Mr Gonçalves has been consistently named a leading lawyer by *Chambers Latin America*, *Chambers Global*, *Latin Lawyer*, *The Legal 500*, *Who's Who Legal* and *Advocacia 500*. He is fluent in Portuguese, English and Italian.

## **SARA KHALIL**

*Schoenherr Attorneys at Law*

Sara Khalil has been an associate with Schoenherr in Vienna since 2016. Sara's main practice area is litigation. Sara graduated from the University of Vienna in 2013 and the University of York in international commercial and corporate law in 2014. Before joining Schoenherr, she gathered experience as an associate at a national law firm and completed several internships

as well as a judicial clerkship. Sara's focus lies on commercial litigation in various legal areas, including particularly proceedings following the termination of distribution agreements.

## **JOHN J KUSTER**

*Sidley Austin LLP*

John J Kuster is a partner in the New York office, and practises in the litigation group. Mr Kuster is co-leader of Sidley's firm-wide commercial litigation and disputes practice area team. He has extensive experience handling all aspects of complex civil litigation matters, including bankruptcy litigation, real estate and partnership disputes, as well as general contract and business tort law. He also represents clients on internal investigations. He is currently representing a large international professional sports organisation in connection with a host of civil litigation matters arising out of an internal investigation and criminal inquiry, and represents that client in other matters before the Court of Arbitration for Sport. Mr Kuster has represented the firm's clients in both state and federal courts in New York and throughout the country, as well as in arbitrations internationally and domestically. His representative matters include obtaining a US\$125 million federal court jury verdict on behalf of a firm client in a breach of duty and fraud case, a US\$150 million claim of fraud and breach of contract claim in New York State court and an award after a bench trial in federal court in which his client was able to obtain an order enforcing a complex purchase price agreement.

## **CLAIRE MCLOUGHLIN**

*Matheson*

Claire McLoughlin is a partner in the commercial litigation and dispute resolution department in Matheson and co-head of the firm's regulatory and investigations group.

Claire has advised a wide variety of clients on contentious matters, with a particular focus on the areas of financial services disputes, contractual disputes and corporate offences. Claire has also been involved in a number of judicial review proceedings, acting both for and against statutory bodies.

Claire is highly experienced in advising clients on all aspects of High Court, Commercial Court and Supreme Court litigation. The majority of Claire's cases consist of High Court and Commercial Court litigation matters. In this regard, Claire has developed experience in case management, disclosure and discovery requirements, including privilege and confidentiality issues, the instruction of experts and preliminary issues and modular trials procedure. From a practical perspective, Claire has particular expertise in coordinating and managing large-scale discovery exercises.

## **ALAN H MARK**

*Goodmans LLP*

Alan H Mark is a partner in the Litigation Group at Goodmans. Alan carries on a diversified advocacy practice, specialising in corporate and commercial litigation, class actions and electricity law and regulation. Alan's corporate and commercial litigation practice encompasses all manner of business disputes with a focus on corporate governance, corporate finance, securities, financial services, and restructuring and insolvency. Alan's class action practice includes securities, product liability and environmental claims. Alan also carries on a

substantial electricity and regulatory practice, regularly representing clients in the electricity sector before the Ontario Energy Board and the courts.

Alan has appeared at all levels of the Ontario and Federal Courts, including the Supreme Court of Canada, before the courts of several other provinces and before various administrative tribunals. Alan has represented many Fortune 500 companies and has been lead counsel on a number of high profile domestic and cross-border cases.

Alan is widely recognised as a leading counsel. He is listed as recommended counsel in numerous leading guides and directories including *Chambers Global*, *The Lexpert/American Lawyer Guide* to the Leading 500 Lawyers in Canada, the *Lexpert* Special Editions on Canada's Leading Lawyers in the Globe & Mail's Report on Business Magazine for energy and litigation, *Best Lawyers* in Canada, *Benchmark Canada* and *Euromoney's* Guide to the World's Leading Litigation Lawyers. In 2013, Alan was recognised as Canada's energy/resource litigator of the year by *Benchmark Canada*.

Alan is a fellow of the American College of Trial Lawyers and a former director and past president of the Advocates' Society. He is also a member of the Canadian Bar Association and the Toronto Lawyers Association.

Alan is also a frequent contributor to continuing legal education programmes. He has authored numerous published articles and has been an instructor in trial advocacy courses and programmes.

## **JULIE MURPHY-O'CONNOR**

### *Matheson*

Julie is a partner at Matheson. She has over 20 years' experience in financial services litigation, contentious and non-contentious corporate restructuring and insolvency cases, as well as high-stake complex corporate disputes. She regularly advises shareholders, directors and private equity investors in relation to their rights, remedies and duties. She also has extensive experience of advising financial institutions, insolvency practitioners and investment funds in relation to debt restructuring, enforcement and security issues.

Julie holds a Ministerial appointment to the board of semi-state company, Coillte. She was on the Council of the Irish Society of Insolvency Practitioners from 2011–2014, acting as secretary and as chair of its educational subcommittee during that period. Julie is also a member of INSOL Europe and the American Bankruptcy Institute. She is co-author of the Commercial Litigation Association of Ireland's *Practitioner's Guide to the Commercial Court* in Ireland and of the Law Society of Ireland's *Insolvency Law Textbook*.

## **ANDREAS NATTERER**

### *Schoenherr Attorneys at Law*

Andreas Natterer has been a partner at Schoenherr since 2008, where he specialises in litigation, food and pharmaceutical law. He is one of Austria's leading experts in food and pharma law and has 25 years of experience in several areas of litigation, with a focus on claims arising out of product liability, compensation for damages and distribution agreements, representing Austrian and international corporates out of and before court. Andreas Natterer advises many major companies from the food and pharmaceutical industry.

## **THOMAS NIGG**

*Gasser Partner Attorneys at Law*

Thomas Nigg is a Liechtenstein lawyer and citizen, currently practising in Vaduz. He studied law at the University of St Gallen (Switzerland), where he obtained his master of arts in legal studies HSG (MA HSG) in 2008. In 2008 he started his professional career as a lawyer in Liechtenstein and was admitted to the Liechtenstein Bar in 2010. In 2014 he was appointed partner in Batliner Gasser Attorneys at Law (now Gasser Partner Attorneys at Law). In 2016 he was appointed senior partner of Gasser Partner Attorneys at Law. In 2018 he obtained his executive master of laws (LLM) in corporate, foundation and trust law at the University of Liechtenstein. The greater part of his work involves representing clients, mostly corporations or high-net-worth individuals, before courts in civil, criminal and administrative matters, and assisting clients in commercial, corporate and criminal law, pertaining to both national and international affairs. In addition, he is a co-author of 'Litigation and Arbitration in Liechtenstein', the Liechtenstein chapter in *The Asset Tracing and Recovery Review*, and has authored articles on various legal topics.

## **IORELLA NORIEGA DEL VALLE**

*Herbert Smith Freehills*

Fiorella joined Herbert Smith Freehills as an associate in March 2018. Fiorella has experience in commercial litigation, including cross-border dispute resolution (specifically in Africa) and alternative dispute resolution, such as arbitrations and mediations.

Fiorella is fluent in English and Spanish and holds an Advanced Certificate in International Arbitration from the Chartered Institute of Arbitrators, and is also a board member of the Young Members Group of the CI Arb (Johannesburg branch).

She is part of a team that specialises in various aspects of commercial litigation.

## **ERNESTO PALACIOS JUÁREZ**

*Martínez, Algaba, De Haro y Curiel, SC*

Mr Palacios was admitted to practise law by Universidad Panamericana (2004), with a speciality degree in procedural institutions and *amparo* (2005) from the same university. He has been a member of Martínez, Algaba, De Haro y Curiel since 2006, and became a partner in 2013.

Mr Palacios' practice is mainly focused on commercial and administrative litigation. His commercial litigation practice includes banking, insurance and other financial disputes. Meanwhile, in the administrative field, part of his practice involves privacy and data protection, expropriations, regulatory, telecommunications, public bids, antitrust and railroad affairs.

Mr Palacios has strong experience challenging administrative regulations before federal courts, and handling complex commercial and administrative litigations with relevant constitutional transcendence before the Mexican Supreme Court of Justice.

## **MOSES WANKI PARK**

*Liberty Chambers*

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/recovery, 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.

## **KAREN REYNOLDS**

*Matheson*

Karen Reynolds is a partner in the commercial litigation and dispute resolution department at Matheson, and co-head of the firm's regulatory and investigations group.

Karen has a broad financial services and commercial dispute resolution practice. She has over 10 years' experience of providing strategic advice and dispute resolution to financial institutions, financial services providers, domestic and internationally focused companies and regulated entities and persons. She advises clients in relation to contentious regulatory matters, investigations, inquiries, compliance and governance related matters, white-collar crime and corporate offences, commercial and financial services disputes, anti-corruption and bribery legislation, and document disclosure issues.

Karen has substantial experience in corporate restructuring and insolvency law matters, having had a lead role in some of the most high-profile corporate rescue transactions of the past 10 years. She advises liquidators, regulators, directors and insolvency practitioners in relation to corporate offences and investigations, shareholder rights and remedies, directors' duties, including in relation to fraudulent and reckless trading and disqualification and restriction proceedings.

## **EVA-MARIA RHOMBERG**

*Gasser Partner Attorneys at Law*

Eva-Maria Rhomberg is an associate at Gasser Partner Attorneys at Law, currently practising in Vaduz. Before joining Gasser Partner in 2017, she studied law at the Universities in Vienna and Innsbruck, where she earned her master's degree in law (Mag.iur.) in 2013. After graduating from Innsbruck University, she worked as a patient representative for an extrajudicial mediator and as a legal trainee at a supervisory authority in Liechtenstein. Her main areas of practice include civil law, criminal law, compliance, litigation and arbitration.

## **JONATHAN RIPLEY-EVANS**

*Herbert Smith Freehills*

Jonathan Ripley-Evans is a director based in the Johannesburg office of Herbert Smith Freehills. Jonathan has extensive experience in alternative dispute resolution and general commercial litigation. He has acted as mediator and as advisor in both mediations and arbitrations, domestic and international.

Jonathan is a board member of the Chartered Institute of Arbitrators, SA Branch and a committee member of both AFSA international and AFSA Construction. He is an AFSA accredited mediator and arbitrator.

Jonathan's practice is geared towards alternative dispute resolution, in particular arbitration and mediation. He specialises in the resolution of commercial disputes in a wide range of sectors including energy, mining, tourism, hospitality, property and engineering.

## **MYRIA SAARINEN**

*Latham & Watkins*

Myria Saarinen is a partner in the litigation and trial department of Latham & Watkins' Paris office. Her practice focuses on complex commercial litigation, data privacy, and compliance. She is the global co-chair of the technology industry group.

Ms Saarinen's practice focuses on resolving a broad range of complex disputes through litigation proceedings, mostly in an international context and in various areas of business (healthcare, aeronautics, information technology, construction works, insurance, etc.). She is very active in litigation relating to major industrial operations and is involved in a broad range of general commercial disputes (contract and liability) and corporate litigation.

Ms Saarinen has expertise on cross-border issues raised in connection with discovery and similar requests in France. In addition, she has developed specific expertise, for 20 years now, in the privacy/personal data area, advising international clients. She supports her clients in their compliance program regarding the GDPR. She is also active in the corporate governance and compliance area and assists clients in drafting and implementing grant of powers, delegation of liability, and other compliance schemes.

## **JOHANNES SANDER**

*Gasser Partner Attorneys at Law*

Johannes Sander is an Austrian citizen, currently practising as a lawyer in Vaduz. He studied law at the University of Innsbruck, 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. His main areas of practice include civil law, criminal law, corporate law, foundation and trust law, and litigation.

## **MR PENG SHEN**

*Baker McKenzie*

Peng Shen is a special counsel at Baker McKenzie's Beijing office, and has over 18 years' experience as a legal professional. His practice focuses on commercial litigation, international arbitration and compliance-related investigation. He used to work as a judge in a Beijing court.

Mr Shen is a PRC contract law expert, a seasoned litigator and a skilled investigator. He is a mediator on the panel of Beijing Mediation Center.

## **DAN TERKILDSEN**

*Lundgrens Law Firm P/S*

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 arbitration 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.

## **VICKI UNSWORTH**

*Advocates Smith Taubitz Unsworth Ltd*

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 with distinction and is a certified data protection practitioner. Vicki is recommended by *The Legal 500* in the field of dispute resolution, and has held this recommendation consistently since she was a very junior advocate. Vicki routinely works with a number of high ranking London and international law firms and barristers.

## **MAIR WILLIAMS**

*Latham & Watkins*

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, pharmaceutical and transportation.

### **ATHENA HIU HUNG WONG**

*Liberty Chambers*

Athena Wong is a dispute resolution lawyer practising as a barrister based 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, arbitration and mediation. She has handled a broad spectrum of commercial works, 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 Zhongyin (Nanjing) Law Firm in 2016.

She currently serves in the Adjudication & Construction Committee of the Hong Kong Institute of Arbitrators, the Committee of China Practice Development at the Hong Kong Bar Association, and the legal committee of the Hong Kong General Chamber of Commerce.

### **PEDRO IVO GIL ZANETTI**

*Pinheiro Neto Advogados*

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 in the University of St Gallen, in Switzerland, offered in partnership with the Lemann Foundation. He now focuses his academic studies on the economic analysis of procedural law. He joined Pinheiro Neto Advogados litigation practice in 2011 and works with complex commercial, aviation, and civil litigation and pre-litigation cases.

## Appendix 2

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*Vermulst Verhaeghe Graafsma & Bronckers (VVGb)*

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*Dentons*

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