IN-DEPTH

Complex Commercial Litigation

EDITION 6

Contributing editors
Oliver Browne, **Ian Felstead**, **Mair Williams** and **Matthew Unsworth**
Latham & Watkins LLP

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In-Depth: Complex Commercial Litigation (formerly The Complex Commercial Litigation Law Review) is a useful global overview of the core principles and recent developments concerning the fundamental legal issues likely to feature in complex commercial disputes, wherever they may arise. It examines key topics including contract formation and modification; contract interpretation; breach of contract; defences to enforcement; fraud and misrepresentation; dispute resolution; remedies; and much more.

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Editors' Preface

Oliver Browne, **Ian Felstead**, **Mair Williams** and **Matthew Unsworth**
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Litigation is, on one analysis, all about telling stories to impartial decision makers. Complex commercial litigation means that those stories are more detailed, more involved and more intricate. That means that telling the best story, in the most effective fashion, requires an incredible amount of preparation, research and skill.

But telling the best story is only part of the battle: every good story requires a strong foundation. That is the purpose of *The Complex Commercial Litigation Law Review*.

The world is becoming increasingly small, and disputes increasingly cross national borders. That means that the stories we tell are increasingly multi-jurisdictional, and playing a proper role in litigation (which now often makes us venture into new and uncharted territory to serve our clients and other stakeholders properly) requires an understanding of the different approaches each jurisdiction takes to important issues.

Addressed in these pages are the components required to provide a strong foundation to allow us to enhance our understanding of the ways in which complex commercial litigation works in different jurisdictions. From contract formation and interpretation (contracts being at the heart of the overwhelming majority of complex commercial litigation) to explaining the dispute resolution process, the remedies that might be sought and the defences that might be presented in response, this volume details the different approaches taken around the world to the resolution of complex commercial disputes.

We are very fortunate to have had considerable assistance fulfilling the purpose of this edition of *The Complex Commercial Litigation Law Review* from colleagues around the globe who are leading practitioners in their various jurisdictions. They come from some of the most respected law firms, and we are privileged to have the benefit of their insight into the ways in which complex commercial litigation arises and is addressed, as well as recent developments, in the countries in which they practice.

Ultimately, whether you are a corporate counsel, a business executive, a private practitioner, a government official or simply an interested bystander, and whether you are facing litigation, arbitration, mediation or some other form of dispute resolution (or simply wanting to understand litigation risk), we hope this edition provides useful insight and guidance. If it makes your foundations stronger, and your stories more informed and more effective, then we will have achieved our objectives.

Finally, please remember Abraham Lincoln's wise words: 'Discourage litigation. Persuade your neighbours to compromise whenever you can. As a peacemaker the lawyer has superior opportunity of being a good man. There will still be business enough.'

Litigation is not always the answer – but where it is unavoidable, we hope this edition provides assistance.

Oliver Browne, Ian Felstead, Mair Williams and Matthew Unsworth
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Summary

Introduction

The courts of England[2] are some of the most established fora for dealing with complex commercial litigation. The Civil Procedure Rules (CPR) that apply to English civil litigation, which govern every aspect of cases from pleadings to evidence, witnesses and costs, are robust and provide a clear framework for the cost-effective resolution of disputes. 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 express terms of valid contracts. There is a focus on the language used when looking at contracts and, in broad terms, absent ambiguity, that language will determine each party's obligations. In light of this approach, the courts have repeatedly rejected an implied term of good faith in all commercial contracts.

Much of the law governing commercial disputes has evolved through case law rather than through statute, with the Misrepresentation Act 1967, the Unfair Contract Terms Act 1977, the 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 torts relating to economic loss, that offer claimants the opportunity, in some instances, to seek remedies beyond the relevant contract.

Year in review

i Litigation and digitisation

Covid-19 accelerated a trend towards greater use of digital technology in English courts.-[3] The ubiquity of remote hearings during the pandemic dispelled '[m]any reservations about [their] use', and the courts appear comfortable that attendance by video link is not a bar to fair and effective participation in proceedings.[4] Hearings under half a day are now frequently held remotely, and The Law Society (which is the professional body for solicitors in England and Wales) expects remote hearings to become increasingly common for administrative and procedural matters going forward.[5] The courts have also embraced hybrid hearings in appropriate cases, including when witnesses would otherwise need to travel a significant distance to attend in person.[6]

There is now greater emphasis on leveraging technology to streamline the disclosure process too, in response to the vast volume of data involved in modern complex commercial litigation. Since the launch of the Disclosure Pilot Scheme (recently adopted on a permanent basis),[7] parties have been required to consider how they can employ computer assisted review software and coding strategies to improve the reliability, efficiency and cost-effectiveness of disclosure exercises.[8] In turn, this promotes transparency between the parties at an early stage about how they will conduct searches for documents.

This technological shift will continue to gain momentum as the courts maximise the benefit of digital tools (and, eventually, artificial intelligence)[9] to deliver savings in time, expense and complexity.

ii Key case law and other developments

Sanctions arising out of Russia's invasion of Ukraine, together with lingering disruption from covid-19, have once again brought issues of *force majeure* and frustration to the fore (as discussed further in Section VII(i)). The English courts remain reluctant to permit reliance on broadly drafted or catch-all *force majeure* provisions, with the result that parties in recent cases have had to accept performance that differed significantly from what they had envisaged – including payment in a different currency or into a blocked account. In other cases, the door to relying on *force majeure* provisions was closed due to the narrow drafting of the relevant clauses.

Good faith has also proven fertile ground for litigation – although, again, judges have stood firm against any radical change to the existing law (see Section VIII(iii)). It appears that the category of 'relational' contracts (into which a duty of good faith may be implied) will forever be a narrow one, despite repeated attempts to enlarge it – most recently to include a solicitor's retainer. Meanwhile, the Court of Appeal clarified that express duties of good faith are to be interpreted as requiring parties to behave honestly, although they may also stretch to prohibiting 'commercially unacceptable' behaviour depending on the context.

Looking ahead to the ultimate enforcement of any English judgment, it remains to be seen whether the UK will accede to the Lugano or 2019 Hague Conventions (though the former looks increasingly unlikely as a result of opposition from Europe). As discussed in more detail in Section V(i), post-Brexit, EU Member States are no longer bound to recognise English court judgments rendered pursuant to certain types of jurisdiction clause.

Contract formation

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

1. offer;
2. acceptance;
3. consideration;
4. an intention to create legal relations; and
5. certainty of terms.

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

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i Offer and acceptance

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

For there to be an offer, the offer must be communicated to the offeree, and the offer must be specific, complete and capable of acceptance and made by the offeror 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 make the seller an offer. An offer may be terminated by withdrawal, rejection[10] 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.[11] Although 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 and not a valid contract.

As a general rule, past consideration will not constitute good consideration.[12] 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*.[13] In that case, a party came into financial difficulties and sought additional payment to perform the contract without delay. The Court of Appeal found that good consideration had been given for a promised additional payment as the promisee received a benefit in continuing the contract and avoiding delay. Many subsequent judgments have

been critical of this decision,[14] and the Supreme Court has indicated that the case law in this area is 'probably ripe for re-examination'.[15]

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 intention, the court will consider the 'objective conduct of the parties as a whole' rather than the 'subjective states of mind' of the parties.[16] In respect of commercial parties, there is a rebuttable presumption that each had 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.[17]

v Conditions precedent and subsequent

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

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

vi Third-party beneficiaries

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

The general rule is that a third-party beneficiary of a contract cannot be implied. In the 2017 case of *Chudley v. Clydesdale Bank plc (t/a Yorkshire Bank)*,[18] the High Court extended this general rule and held that a third-party beneficiary might be identified by analysis of the construction of the express terms of the agreement, provided that the process of the construction did not involve implied identification.

vii Other ways of establishing commercial rights and obligations

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

Quantum meruit

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

Promissory estoppel

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

1. a promise by one party that it will not enforce its strict legal rights against the other;
2. an intention on the promisor's part that the other will rely on that promise; and
3. actual reliance by the promisee on that promise.

The doctrine of promissory estoppel is available for use as 'a shield not a sword' and can only be used as a defence to an action brought by parties wishing to enforce their legal rights.[19]

Contract interpretation

Under 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*,[20] Lord Neuberger summarised and clarified the approach that the English courts should take. He explained that the courts will focus on the meaning of the relevant words used by the parties 'in their documentary, factual and commercial context', in the light of the following considerations:

> (1) the natural and ordinary meaning of the clause;
> (2) any other relevant provisions of the [contract];
> (3) the overall purpose of the clause and the [contract];
> (4) the facts and circumstances known or assumed by the parties at the time that the document was executed; and
> (5) commercial common sense; but
> (6) disregarding subjective evidence of any party's intentions.

This decision is seen by many commentators as a move away from the more 'purposive' approach set out (primarily by Lord Hoffmann) in previous Supreme Court (and House of Lords) decisions.[21] Although two Supreme Court decisions in 2017[22] suggest that all of these cases 'were saying the same thing' in relation to contractual interpretation, and although there has never been an entirely literal or purposive approach to contractual interpretation taken by the courts, there is a greater emphasis at present on the primacy

of the language used by the parties in their agreement and consideration of the contract as whole.[23]

In the 2019 case of *Federal Republic of Nigeria v. JP Morgan Chase Bank NA*,[24] Professor A Burrows KC, sitting then as a High Court judge, usefully summarised the modern approach to contract interpretation in the following terms:

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

The courts have established that to determine the relevant context of the contract, the wider context (outside of the contractual document itself) is admissible, and they have typically ruled that they will adopt a broad test for establishing the admissible background. The 'background' to a contract includes 'knowledge of the genesis of the transaction, the background, the context and the market in which the parties are operating'.[25]

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

1. in cases of ambiguity, the courts will endeavour to interpret the contract in a way that ensures the validity of the contract rather than rendering the contract ineffective or uncertain;[26]
2. the courts will strictly interpret contractual provisions that seek to limit rights or remedies, or exclude liability, which arise by operation of law;[27] and
3. where a clause has been drafted by a party for its own benefit, it will generally be construed in favour of the other party (the *contra proferentem* rule).[28]

The Supreme Court has held that it is not appropriate for the courts or anyone else to use hindsight to assess whether a contractual provision makes good commercial sense or is inconveniently inflexible.[29]

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*.[30] A term may be implied if:

1. it is necessary to give the contract commercial or practical coherence;
2. it can be clearly expressed;
3. it does not contradict an express term;

4. reasonable parties would have agreed the term was needed; and
5. it passes the 'officious bystander' test.

The courts take a narrow approach when implying terms and will not read a term into a contract simply because it appears fair.[31] Neither will the courts imply terms to plug apparent gaps in a contract, since this is understood to override the parties' express agreement. Thus, when a contract provided for a fee of £1.2 million to be payable to a property dealer if a property was sold for £6.5 million or more but was silent on what fee would be payable if it was sold for less than that sum, the Supreme Court refused to imply a term that the dealer would be entitled to remuneration equivalent to the reasonable value of his services.[32]

Dispute resolution

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i Jurisdiction

The court must have jurisdiction to hear a dispute. Whether a court has jurisdiction may be decided by the courts themselves in accordance with Part 6 of the CPR. Contracting parties may, however, include an express 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:

1. an exclusive jurisdiction clause, which 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;
2. a non-exclusive jurisdiction clause, which 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);[33] and
3. an asymmetrical jurisdiction clause, which 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.[34]

An exclusive jurisdiction clause in favour of the English courts will be upheld by any contracting state to the 2005 Hague Convention, provided the clause was entered into after the UK acceded on 1 October 2015 (by virtue of its then EU membership).[35] Any resulting English judgment will also be recognised and enforced in those states.

The 2005 Hague Convention does not cover non-exclusive jurisdiction clauses or asymmetric jurisdiction clauses.[36] Relying on such provisions therefore creates a risk of parallel proceedings in other jurisdictions, and English judgments may not be recognised or

enforced. In some cases, however, there may be a reciprocal relationship with the relevant jurisdiction or that jurisdiction may allow enforcement without significant hurdles.

ii Threshold requirements

When bringing a claim in the courts, a claimant must have regard to any threshold requirements litigating the dispute. These will dictate whether a claim can be brought, and, if so, which court it should be brought in.[37]

Specialist courts in England may have further threshold requirements. For example, the Technology and Construction Court can only hear claims that are 'technically complex'. Despite this, a number of the specialist courts have a wide scope, and will hear a range of disputes.[38]

iii Alternative dispute resolution

There are a number of alternative dispute resolution (ADR) mechanisms, which allow parties to avoid court litigation completely or 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 provided that the ADR process to be followed and, in particular, the point at which that process can be said to have come to an end, is outlined with sufficient detail and clarity and does not require further agreement by the parties.[39] If a party issues proceedings in breach of an ADR clause, the usual remedy will be a stay of those proceedings pending completion of the ADR process.[40]

The CPR encourages parties to consider settlement at all times or risk costs sanctions being imposed against them.[41] In the preliminary stages of litigation, parties will be asked by the court whether they have considered ADR and, if they have not, adverse costs consequences may follow.[42]

The principal methods of ADR used in England include:

1. negotiation, attempts to reach settlement between the parties;[43]
2. mediation, an independent third-party mediator facilitating settlement negotiations;
3. early neutral evaluation, involving a neutral person evaluating the case on a non-binding basis to encourage more constructive negotiations between the parties; and
4. arbitration, a private and binding dispute resolution process before an impartial tribunal.[44]

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 of the contract. When such a breach occurs, the non-breaching party is entitled to bring a claim in relation to the breach and seek compensation – usually in the form of monetary 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 it loss. Before bringing a breach of contract claim, the claimant should comply with the applicable pre-action protocols annexed to the CPR.

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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,[45] however, is a breach of contract that allows the non-breaching party to treat the contract as having come to at an end.[46] Parties are also entitled to state explicitly that breach of a term results in termination, even if that right would not be provided under common law.

It is for the non-breaching party to elect whether it will accept the breach and treat the contract as terminated or affirm the contract and require continued performance.

ii Anticipatory breach

An anticipatory breach is where one party indicates, either by words or conduct, that it will not perform all or some of its obligations under the contract, such that the result of its performance will be substantially different from the requirements of the contract. If the anticipated breach would be a repudiatory breach (and it would be for the claimant to prove this) the non-breaching party is immediately entitled to terminate, without waiting for actual performance or breach.

The non-breaching party does not have to terminate the contract; it is also entitled to wait until the time fixed for performance in the hope that the other party will perform its contractual obligations or affirm the contract, if possible performing its own part of the contract and thereby claiming the contract price from the other party.

iii Causation

To bring a breach of contract claim, the non-breaching party must show causation: that the breach is the effective or dominant cause of a loss.[47]

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', the court may hold the party in breach not liable for the loss.

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, if successful, may render that contract void or voidable.[48]

A contract that lacks any of the key elements 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 (e.g., an individual purporting to contract on behalf of a corporate entity without requisite authorisation).

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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.[49] *Force majeure* clauses must be certain to be effective and should include reference to specific events (e.g., natural disasters, acts of war, acts of terrorism and, especially post-covid-19, epidemics).[50] Wording equivalent to 'usual *force majeure* clauses shall apply' are likely to be considered void,[51] and the courts have had some difficulty in upholding the validity of *force majeure* clauses that contain such catch-all language.[52]

Each *force majeure* clause must be considered on its own terms.[53] If a *force majeure* clause provides that the parties use reasonable endeavours to mitigate a *force majeure* event, this may extend to accepting non-contractual performance. In *MUR Shipping BV v. RTI Ltd*, the parent company of a charterer became subject to US sanctions, with the consequence that it would have been difficult for the charterer to make US dollar payments to the claimant shipowner under a contract of affreightment. The majority of the Court of Appeal found that the shipowner was required to accept payment in euros instead of US dollars provided that it would not suffer detriment as a result. The High Court has since held, in a case in which a payment obligation was similarly impeded by sanctions, that a payee may also be required to accept non-contractual performance in the form of payment into a 'frozen' account.[54]

A *force majeure* clause may grant one party the power to designate an event as a supervening event, in which case this power must be exercised honestly, genuinely and in good faith.[55] In *Dwyer (UK Franchising) Ltd v. Fredbar Ltd*,[56] a franchisor refused to designate covid-19 as a supervening event on the basis that the franchise business (emergency plumbing) was an essential service that could continue to operate during lockdowns. The judge held that the franchisor had fallen below the requisite standard by failing to take into account that a member of the franchisee's household was clinically extremely vulnerable.

If there is not an explicit *force majeure* clause, 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.[57]

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 was comprehensively evaluated by the Supreme Court in *Patel v. Mirza*.[58] Although a 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'. The courts will approach this issue by weighing the policy reasons for and against the illegality defence before, if public policy favours allowing it, considering whether this would be proportionate.[59]

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.[60] 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.[61]

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, as long as they are not prohibited by legislation[62] or common law principles such as illegality, subject to the caveat that more valuable rights can only be excluded with very clear and obvious language.[63]

iv Duress and undue influence

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 (e.g., actual or threatened violence against the party or to its property) or economic duress (e.g., threats to terminate the contract).

Fraud, misrepresentation and other claims

i Fraud and misrepresentation

In England, fraud associated with breach of contract is claimed either as a claim in the tort of deceit or as fraudulent misrepresentation. The tort of deceit has four elements:

1. there is a false representation (of fact or law);
2. the defendant knows the representation is false (or is reckless);
3. the defendant intends the claimant to act in reliance on the representation; and
4. the claimant acts in reliance on the representation and, as a consequence, suffers loss.[64]

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

Misrepresentation, on the other hand, is governed by the Misrepresentation Act 1967. A claim of misrepresentation requires the claimant to show that a statement made by the defendant was false (either dishonestly made for fraudulent misrepresentation or negligently made for negligent misrepresentation); that they entered into the contract as a result of that statement; and that damage was consequently suffered.

The issue of reliance is a question of fact, and all issues regarding reliance are, therefore, fact-sensitive.[65] It is a defence for the defendant to show that it had a reasonable belief in the truth of its statement, although this may still give rise to a claim of innocent misrepresentation.[66] In successful claims, the court may award damages in tort and rescission of the contract (or damages in lieu of rescission).

It is not possible for either party to a contract to attempt to exclude or restrict liability for fraudulent misrepresentation, and any purported attempt to exclude liability for fraudulent misrepresentation will be deemed unreasonable by the courts.[67]

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.[68] The only other element required is intention, which is usually shown by the defendant having knowledge of the existence of the contract and its specific terms.

iii Good faith

Historically, the courts have refrained from implying general obligations of good faith in commercial contracts on the basis that such an implied term would interfere with the certainty of the contract. The courts generally 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. The Court of Appeal recently clarified that, at a minimum, express good faith clauses will be interpreted as requiring parties to behave honestly, but they may be more demanding depending on the contractual context.[69]

In 2013, the High Court appeared to move towards the idea of a more pervasive and general implied term of good faith in the cases of *Yam Seng Pte Ltd v. International Trade Corporation Ltd*[70] and *MSC Mediterranean Shipping Company SA v. Cottonex Anstalt*,[71] but the Court of Appeal took a different view, and Moore-Bick LJ noted 'there is in my view a real danger that if a general principle of good faith were established it would be invoked as often to undermine as to support the terms in which the parties have reached agreement'.[72] The courts will resist attempts to rely on good faith obligations to override express contractual terms.[73]

Although there is a general unwillingness to imply a term of good faith into a contract, the courts are more likely to find an implied duty of good faith in certain types of contractual relationships, such as employer and employee contracts, and insurance contracts. More recently, the courts have recognised 'relational' contracts[74] as a further type of contract into which a duty of good faith may be implied,[75] although this category is narrow and there has so far been little judicial appetite for expanding it.[76]

Remedies

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When a contract has been breached, there are various remedies that may be available to the injured party in England.[77]

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.[78]

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 that otherwise would not have been received by the claimant.

ii Limitations to recovery of damages

We have discussed causation above: to bring a breach of contract claim, the non-breaching party must show that there is sufficient causation between the breach and the loss it has suffered. If the chain of causation cannot be demonstrated, or cannot be demonstrated in full, that will impact the remedies available.

A key further restriction on the recovery of damages for breach of contract is remoteness.[79] Only losses that are 'in the contemplation of both parties'[80] will be recoverable by the claimant. This principle can be summarised as follows:

> 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.[81]

The non-breaching party must also ensure that it has taken reasonable steps to mitigate its loss, and the court can (in the context of negligence claims) apportion damages between the parties if they result partly from the claimant's own fault and partly from the fault of any other person.[82]

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', those 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.[83]

Punitive damages, intended to penalise the defendant, almost certainly cannot be awarded or recovered for breach of contract.[84] In addition, a clause that specifies an amount to be paid where there is a breach of contract will not be enforceable if it amounts to a 'penalty'. In *Cavendish Square Holding BV v. Talal El Makdessi* and *ParkingEye Ltd v. Beavis*,[85] the Supreme Court defined a penalty clause as 'a secondary obligation which imposes a detriment on the contract breaker out of all proportion to any legitimate interest of the innocent party in the enforcement of the primary obligation'.

iv Indemnification

A party to a contract that includes indemnities may have an alternative remedy available for breach of contract, which may provide quicker and easier recovery than a contractual claim for damages. Under an indemnity, one party promises to compensate another party in respect of a specified liability.[86] The contract must be explicit about what liabilities 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. Although specific performance may only be ordered where damages are inadequate as a remedy,[87] the courts have demonstrated a willingness to take a broad approach to the requirement that damages must be an inadequate remedy.[88]

Outlook and conclusions

The English courts are some of the most established fora for dealing with complex commercial litigation, and they continue to evolve to meet the demands of modern disputes. A move towards remote hearings and technology-assisted disclosure (as well as, for example, online court filings)[89] is a welcome development against a backdrop of increasingly international parties and burgeoning document review pools. This willingness to exploit digital solutions should maximise efficiencies for parties and ensure that the CPR keep pace with advancements in technology.

It is very likely that the English courts will retain their importance in the context of complex commercial litigation. They have a reputation for delivering high-quality justice, thanks in no small part to well-trained and respected judges (who are often specialists in their fields). The general rule that a successful party is awarded a significant proportion of its costs will doubtless prove another enduring draw.

From the discussion in this chapter, it should be clear that English law is a sensible and commercial choice of governing law. Combining 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. With the Supreme Court addressing any remaining grey areas in 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 placement centre stage of party autonomy and freedom of contract.

Endnotes

1. Oliver Browne and Ian Felstead are partners and Mair Williams and Matthew Unsworth are associates at Latham & Watkins. ^ Back to section

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 applicable in England and Wales. ^ Back to section

3. One of the catalysts for this trend was an extensive review of the civil court system in England and Wales, which culminated in the publication of the Briggs Report in July 2016. ^ Back to section

4 *Yilmaz and another v. Secretary of State for the Home Department* [2022] EWCA Civ 300, paragraph 39, *Aston Risk Management Ltd v. Jones* [2023] EWHC 603 (Ch), paragraph 142 and *Optis Cellular Technology LLC and others v. Apple Retail UK Ltd and others* [2022] EWHC 561 (Pat), paragraph 8. ^ Back to section

5 The Law Society, 'Remote Hearings' (9 August 2023), available at '' target="_blank">https://www.lawsociety.org.uk/campaigns/court-reform/whats-changing/remote-hearings>. ^ Back to section

6 HM Courts and Tribunals Service,*The Commercial Court Guide*, 11th edn (2022), paragraph H4.1. See also *Miah v. Ahmed* [2023] EWHC 1742 (KB), in which Chamberlain J noted that a party who was temporarily unable to attend trial in person could be permitted to participate remotely rather than having to seek a substantial adjournment. ^ Back to section

7 The Disclosure Pilot Scheme was incorporated into the CPR as a new Practice Direction 57AD – Disclosure in the Business and Property Courts from 1 October 2022. ^ Back to section

8 If parties elect not to use these tools, especially if they have more than 50,000 documents to review, they must explain why. ^ Back to section

9 Speech by the Master of the Rolls (who is, inter alia, the President of the Court of Appeal's Civil Division), 'The future of London as a pre-eminent dispute resolution centre: opportunities and challenges' (19 April 2023), available at '' target="_blank">https://www.judiciary.uk/speech-by-the-master-of-the-rolls-the-future-of-london-as-a-pre-eminent-dispute-resolution-centre-opportunities-and-challenges/>. ^ Back to section

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

11 Unless the contract is made by way of a deed (which frequently represents a unilateral promise to take on certain obligations), the requirements of which are outside the scope of this chapter (but which include certain specific formalities). ^ Back to section

12 *Stilk v. Myrick* (1809) 2 Camp 317. ^ Back to section

13 *Williams v. Roffey Brothers & Nicholls (Contractors) Ltd* [1989] EWCA Civ 5. ^ Back to section

14 See, for example,*South Caribbean Trading Ltd v. Trafigura Beheer BV* [2004] EWHC 2676 and *Adam Opel GmbH, Renault SA v. Mitras Automotive* (UK) Ltd [2008] EWHC 3205 (QB). ^ Back to section

15 *Rock Advertising Limited v. MWB Business Exchange Centres Limited* [2018] UKSC 24. ^ Back to section

16 *Barbudev v. Eurocom Cable Management Bulgaria EOOD and others* [2012] EWCA Civ 548. ^ Back to section

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

18 *Chudley v. Clydesdale Bank plc (t/a Yorkshire Bank)* [2017] EWHC 2177 (Comm). ^ Back to section

19 *Tool Metal Manufacturing Co Ltd v. Tungsten Electric Co Ltd (No.3)* [1955] 1 WLR 761. ^ Back to section

20 *Arnold v. Britton* [2015] UKSC 36. ^ Back to section

21 *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. ^ Back to section

22 *Wood v. Capita Insurance Services Ltd* [2017] UKSC 24 and *MT Hojgaard A/S v. E.ON Climate and Renewables UK Robin Rigg East Ltd* [2017] UKSC 59. ^ Back to section

23 *Interactive E-Solutions JLT v. O3B Africa Ltd* [2018] EWCA Civ 62. However, note the recent case of *Sara & Hossein Asset Holdings Ltd v Blacks Outdoor Retail Ltd* [2023] UKSC 2: in the Supreme Court's decision, notwithstanding the prevailing approach in favour of giving 'primacy' to the ordinary meaning of contractual language, there appears to remain some room to persuade a court that the 'literal' should give way to the more 'commercial'. ^ Back to section

24 *Federal Republic of Nigeria v. JP Morgan Chase Bank NA* [2019] EWHC 347 (Comm), paragraph 32, approved by the Court of Appeal in *JP Morgan Chase Bank NA v. Federal Republic of Nigeria* [2019] EWCA Civ 1641, paragraphs 29, 73 and 74. ^ Back to section

25 *Merthyr (South Wales) Ltd v. Merthyr Tydfil CBC* [2019] EWCA Civ 526. ^ Back to section

26 *Tillman v. Egon Zehnder Ltd* [2019] UKSC 32. ^ Back to section

27 In that regard, the Unfair Contract Terms Act 1977 requires limitation clauses to be 'reasonable'. ^ Back to section

28 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 Ltd v. Ove Arup & Partners Ltd* [2017] EWCA Civ 373. ^ Back to section

29 *Barnardo's v. Buckinghamshire and others* [2018] UKSC 55. ^ Back to section

30 *Marks & Spencer Plc v. BNP Paribas Securities Services Trust Co (Jersey) Ltd* [2015] UKSC 72. ^ Back to section

31 *Bou-Simon v. BGC Brokers LP* [2018] EWCA Civ 1525, followed by the Supreme Court in *Wells v. Devani* [2019] UKSC 4. ^ Back to section

32 *Barton and others v. Morris and another in place of Gwyn Jones* [2023] UKSC 3. ^ Back to section

33 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: see*China Export & Credit Insurance Corp v. Emerald Energy Resources Ltd* [2018] EWHC 1503 (Comm). ^ Back to section

34 When interpreting a jurisdiction clause, the English courts will start from the assumption that commercial parties, as rational business people, are likely to have intended any and all disputes arising out of the relationship into which they have entered to be decided by a single tribunal or court: see*Fiona Trust and Holding Corporation and another v. Privalov and others* [2007] EWCA Civ 20. See also *Fiona Trust and Holding Corporation and another v. Privalov and others* [2007] UKHL 40. ^ Back to section

35 The UK considers that the Hague Convention entered into force on this date and that it has been a contracting state without interruption since: see Part 2 of Schedule 5 to the Private International Law (Implementation of Agreements) Act 2020. Conversely, the European Commission considers that the 2005 Hague Convention only applies to exclusive jurisdiction clauses entered into after the UK became a party in its own right (i.e., on 1 January 2021, when the UK formally left the EU): see European Commission, 'Notice to Stakeholders Withdrawal of the United Kingdom and EU Rules in the Field of Civil Justice and Private International Law' (27 August 2020), Section 3.3. ^ Back to section

36 The UK applied to join the Lugano Convention in early 2020, which does extend to non-exclusive and asymmetric jurisdiction clauses, however the European Commission has not accepted the UK's application and this position appears unlikely to change, despite the UN's recent intervention. The UK is also considering acceding to the 2019 Hague Convention, which would ensure recognition and enforcement of judgments rendered pursuant to a non-exclusive or asymmetric jurisdiction clause by any contracting state but would not prevent parallel proceedings in breach of that clause. ^ Back to section

37 For example, proceedings may not be started in the High Court unless the value of the claim is more than £100,000, and claims for £100,000 or less must be commenced in the County Court. ^ Back to section

38 This has recently been confirmed in*Aldridge v. O'Leary* [2022] EWHC 420 (Ch). See also *Mezvinsky and another (acting through their litigation friends) v. Associated Newspapers Ltd* [2018] EWHC 1261 (Ch). ^ Back to section

39 *Kajima Construction Europe (UK) Ltd v. Children's Ark Partnership Ltd* [2023] EWCA Civ 292. See also *Ohpen Operations UK Ltd v. Invesco Fund Managers Ltd* [2019] EWHC 2246 (TCC). ^ Back to section

40 Although they may be struck out entirely if the issuing party has acted unreasonably: see*Kajima Construction Europe (UK) Ltd v. Children's Ark Partnership Ltd* [2023] EWCA Civ 292. ^ Back to section

41 In the most recent version of the Commercial Court Guide Alternative Dispute Resolution has been renamed 'Negotiated Dispute Resolution' to make it clear that settlement outside of Court is not an alternative course of action but something which should be always considered. The overarching consideration of the new Guide is to ensure that limited judicial resource is used efficiently. ^ Back to section

42 In the 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. ^ Back to section

43 Settlement negotiations typically take place either on a 'without prejudice' basis (meaning that the court cannot be informed of the content of those negotiations at all) 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 in respect of the costs of the court proceedings). ^ Back to section

44 Arbitration is contract-based but is regulated and enforced by the state (in England, under the Arbitration Act 1996, as supplemented by any institutional rules chosen by the parties). ^ Back to section

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

46 *Heyman v. Darwins Ltd* [1942] AC 356. ^ Back to section

47 *Galoo Ltd v. Bright Grahame Murray* [1994] 1 WLR 1360. ^ Back to section

48 If a contract is rendered 'void' it is immediately ineffective; if a contract is merely 'voidable' it will remain valid and effective unless and until it is rescinded. ^ Back to section

49 A party's performance will only be excused if it establishes a causative link between the*force majeure* event and its non-performance. *Force majeure* cannot be pleaded in the abstract: see *PD Teesport Ltd v. P&O North Sea Ferries Ltd* [2023] EWHC 857 (Comm). ^ Back to section

50 The recent cases of*Football Association Premier League Limited v. PPLive Sports International Limited* [2022] EWHC 38 (Comm) and *European Professional Club Rugby v. RDA Television LLP* [2022] EWHC 50 (Comm) had equivalent fact patterns (relating to disruption to live sports events resulting from covid-19) but *force majeure* could only be pleaded in the latter, where 'epidemic' was included in the definition of *force majeure* event. ^ Back to section

51 *British Electrical and Associated Industries (Cardiff) Ltd v. Patley Pressings Ltd* [1953] 1 WLR 280. ^ Back to section

52 See*Tandrin Aviation Holdings Ltd v. Aero Toy Store LLC* [2010] EWHC 40. ^ Back to section

53 *MUR Shipping BV v. RTI Ltd* [2022] EWCA Civ 1406. ^ Back to section

54 *Gravelor Shipping Limited v. GTLK Asia M5 Limited, GTLK Asia M6 Limited* [2023] EWHC 131 (Comm). ^ Back to section

55 Applying the principles identified in*Braganza v. BP Shipping Ltd and another* [2015] UKSC 17. ^ Back to section

56 *Dwyer (UK Franchising) Ltd v. Fredbar Ltd* [2021] EWHC 1218. ^ Back to section

57 *Davis Contractors Ltd v. Fareham Urban District Council* [1956] UKHL 3. ^ Back to section

58 *Patel v. Mirza* [2016] UKSC 42. ^ Back to section

59 *Stoffel & Co v. Grondona* [2020] UKSC 42 and *Henderson v. Dorset Healthcare University NHS Foundation Trust* [2020] UKSC 43. ^ Back to section

60 See, in this regard, the Limitation Act 1980. ^ Back to section

61 The High Court has 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 the breach is unlikely to be dismissed on the basis that it is time-barred: see*AMT Futures Limited v. Karim Boural* [2018] EWHC 750 (Comm). ^ Back to section

62 In particular, the Unfair Contract Terms Act 1977, the Unfair Terms in Consumer Contracts Regulations 1999 and the Consumer Rights Act 2015. ^ Back to section

63 This principle was recently reaffirmed in*Soteria Insurance Limited (formerly CIS General Insurance Limited) v. IBM United Kingdom Limited* [2022] EWCA Civ 440. ^ Back to section

64 *Ludsin Overseas Ltd v. Eco 3 Capital Ltd and others* [2013] EWCA Civ 413. ^ Back to section

65 *Zagora Management Ltd v. Zurich Insurance Plc* [2019] EWHC 140 (TCC). ^ Back to section

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

67 *Thomas Witter Ltd v. TBP Industries Limited* [1996] 2 All ER 573. ^ Back to section

68 *OBG Ltd v. Allan* [2007] UKHL 21. ^ Back to section

69 *Mark Faulkner & Ors v. Vollin Holdings Limited & Ors* [2022] EWCA Civ 1371, in which Snowden LJ commented: 'I accept the argument that apart from the 'core' duty of honesty and (depending on the context) a duty not to engage in conduct that could be characterised as bad faith [i.e. 'commercially unacceptable'], any further requirements of an express duty of good faith must be capable of being derived as a matter of interpretation or implication from the other terms of the contract in issue in the particular case'. See also *Quantum Advisory Ltd v Quantum Actuarial LLP* [2023] EWCA Civ 12. ^ Back to section

70 *Yam Seng Pte Ltd v. International Trade Corporation Ltd* [2013] EWHC 111 (QB). ^ Back to section

71 *MSC Mediterranean Shipping Company SA v. Cottonex Anstalt* [2015] EWHC 283 (Comm). ^ Back to section

72 *MSC Mediterranean Shipping Company SA v. Cottonex Anstalt* [2016] EWCA Civ 789. This approach (not accepting a general implied duty of good faith) appears to have been favoured in more recent cases: see *UTB LLC v. Sheffield United Ltd* [2019] EWHC 2322 (Ch), *Wales v. CBRE Managed Services Ltd* [2020] EWHC 16 (Comm) and *TAQA Bratani Ltd v. Rockrose UKCS8 LLC* [2020] EWHC 58 (Comm). However, per *Cathay Pacific Airways Ltd v. Lufthansa Technik AG* [2020] EWHC 1789, the 'law has not yet reached a state of settled clarity'. ^ Back to section

73 *Mackie Motors (Brechin) Ltd v. RCI Financial Services Limited* [2022] EWHC 1942 (Ch). ^ Back to section

74 Relational contracts involve a longer term relationship to which each party makes a substantial commitment, as may be the case with a joint venture agreement or long-term distribution agreement: see*Yam Seng Pte Ltd v. International Trade Corporation Ltd* [2013] EWHC 111 (QB). See also *Bates v. Post Office Ltd (No. 3)* [2019] EWHC 606 (QB), in which Fraser J set out a list of characteristics that were indicative of a relational contract. ^ Back to section

75 *Sheikh Tahnoon Bin Saeed Bin Shakhboot Al Neyahan v. Kent* [2018] EWHC 333 (Comm). See also *Cathay Pacific Airways Ltd v. Lufthansa Technik AG* [2020] EWHC 1789 and *Essex County Council v. UBB Waste (Essex) Ltd* [2020] EWHC 1581 (TCC). ^ Back to section

76 See, for example, the recent case of*Candey Limited v. Basem Bosheh & Another* [2022] EWCA Civ 1103, in which the Court of Appeal accepted the possibility of implying a term of good faith into a relational contract but rejected the argument that a solicitor's retainer was relational. Coulson LJ noted more generally that out of an 'avalanche' of claimants alleging the existence of a relational contract in recent years, '[o]nly a relatively few have succeeded'. ^ Back to section

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

78 *Robinson v. Harman* (1848) 1 Ex 850. ^ Back to section

79 See*Hadley v. Baxendale* (1854) 9 Ex 341, *Victoria Laundry (Windsor) Ltd v. Newman Industries Ltd* [1949] 2 KB 528 and *Koufos v. C Czarnikow Ltd (The Heron II)* [1969] 1 AC 350. ^ Back to section

80 *Hadley v. Baxendale* (1854) 9 Ex 341. A recent summary of the test for remoteness can be found in the Privy Council's decision of *Attorney General of the Virgin Islands v. Global Water Associates Ltd (British Virgin Islands)* [2020] UKPC 18. ^ Back to section

81 Joseph Chitty,*Chitty on Contracts: General principles*, 34th edn (Sweet & Maxwell: 2022). ^ Back to section

82 Law Reform (Contributory Negligence) Act 1945, Section 1. In a contractual sense, mitigation can be regarded as part of the chain of causation as it relates to post-breach acts or omissions of the claimant that impact on the damage caused by the breach: see Lord Sumption in*BPE Solicitors v. Hughes-Holland* [2017] UKSC 21. ^ Back to section

83 This principle was first established in*Wrotham Park Estate Ltd v. Parkside Homes Ltd* [1974] 1 WLR 798 and was reconsidered in *Morris-Garner and another v. One Step (Support) Ltd* [2018] UKSC 20, where the Supreme Court found that negotiating damages may be a tool for determining the economic value of a right that has been breached. ^ Back to section

84 *Abbar v. Saudi Economic & Development Co (SEDCO) Real Estate Ltd* [2013] EWHC 1414 (Ch). ^ Back to section

85 *Cavendish Square Holding BV v. Talal El Makdessi* and *ParkingEye Ltd v. Beavis* [2015] UKSC 67. ^ Back to section

86 For example, where a company is acquired by way of a share purchase, the buyer will frequently require indemnities from the seller against any tax liabilities of the target, as well as other relevant risks (such as shortfalls in the target's pension scheme). ^ Back to section

87 *Beswick v. Beswick* [1968] AC 58. ^ Back to section

88 *Starlight Shipping Co v. Allianz Marine and others* [2014] EWHC 3068 (Comm). ^ Back to section

89 See Practice Direction 51O – The Electronic Working Pilot Scheme, which at time of writing has been extended until 6 April 2024 but is expected to be retained indefinitely. ^ Back to section

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