

Salvatore Mancuso
Mauro Bussani *Editors*

The Principles of BRICS Contract Law

A Comparative Study of General
Principles Governing International
Commercial Contracts in the BRICS
Countries

Ius Gentium: Comparative Perspectives on Law and Justice

Volume 102

Series Editors

Mortimer Sellers, University of Baltimore, Baltimore, MD, USA

James Maxeiner, University of Baltimore, Baltimore, MD, USA

Editorial Board

Myroslava Antonovych, Kyiv-Mohyla Academy, Kyiv, Ukraine

Nadia de Araújo, Pontifical Catholic University of Rio de Janeiro, Rio de Janeiro, Brazil

Jasna Bakšić-Muftić, University of Sarajevo, Sarajevo, Bosnia and Herzegovina

David L. Carey Miller, University of Aberdeen, Aberdeen, UK

Loussia P. Musse Félix, University of Brasilia, Federal District, Brazil

Emanuel Gross, University of Haifa, Haifa, Israel

James E. Hickey Jr., Hofstra University, South Hempstead, NY, USA

Jan Klabbers, University of Helsinki, Helsinki, Finland

Cláudia Lima Marques, Federal University of Rio Grande do Sul, Porto Alegre, Brazil

Aniceto Masferrer, University of Valencia, Valencia, Spain

Eric Millard, West Paris University, Nanterre Cedex, France

Gabriël A. Moens, Curtin University, Perth, Australia

Raul C. Pangalangan, University of the Philippines, Quezon City, Philippines

Ricardo Leite Pinto, Lusíada University of Lisbon, Lisboa, Portugal

Mizanur Rahman, University of Dhaka, Dhaka, Bangladesh

Keita Sato, Chuo University, Tokyo, Japan

Poonam Saxena, University of Delhi, New Delhi, India

Gerry Simpson, London School of Economics, London, UK

Eduard Somers, University of Ghent, Gent, Belgium

Xinqiang Sun, Shandong University, Shandong, China

Tadeusz Tomaszewski, Warsaw University, Warsaw, Poland

Jaap de Zwaan, Erasmus University Rotterdam, Rotterdam, The Netherlands

Ius Gentium is a book series which discusses the central questions of law and justice from a comparative perspective. The books in this series collect the contrasting and overlapping perspectives of lawyers, judges, philosophers and scholars of law from the world's many different jurisdictions for the purposes of comparison, harmonisation, and the progressive development of law and legal institutions. Each volume makes a new comparative study of an important area of law. This book series continues the work of the well-known journal of the same name and provides the basis for a better understanding of all areas of legal science.

The *Ius Gentium* series provides a valuable resource for lawyers, judges, legislators, scholars, and both graduate students and researchers in globalisation, comparative law, legal theory and legal practice. The series has a special focus on the development of international legal standards and transnational legal cooperation.

Salvatore Mancuso · Mauro Bussani
Editors

The Principles of BRICS Contract Law

A Comparative Study of General Principles
Governing International Commercial
Contracts in the BRICS Countries

Editors

Salvatore Mancuso
University of Palermo
Palermo, Italy

Mauro Bussani
University of Trieste
Trieste, Italy

ISSN 1534-6781

ISSN 2214-9902 (electronic)

Ius Gentium: Comparative Perspectives on Law and Justice

ISBN 978-3-031-00843-6

ISBN 978-3-031-00844-3 (eBook)

<https://doi.org/10.1007/978-3-031-00844-3>

© Springer Nature Switzerland AG 2022

This work is subject to copyright. All rights are reserved by the Publisher, whether the whole or part of the material is concerned, specifically the rights of translation, reprinting, reuse of illustrations, recitation, broadcasting, reproduction on microfilms or in any other physical way, and transmission or information storage and retrieval, electronic adaptation, computer software, or by similar or dissimilar methodology now known or hereafter developed.

The use of general descriptive names, registered names, trademarks, service marks, etc. in this publication does not imply, even in the absence of a specific statement, that such names are exempt from the relevant protective laws and regulations and therefore free for general use.

The publisher, the authors, and the editors are safe to assume that the advice and information in this book are believed to be true and accurate at the date of publication. Neither the publisher nor the authors or the editors give a warranty, expressed or implied, with respect to the material contained herein or for any errors or omissions that may have been made. The publisher remains neutral with regard to jurisdictional claims in published maps and institutional affiliations.

This Springer imprint is published by the registered company Springer Nature Switzerland AG
The registered company address is: Gewerbestrasse 11, 6330 Cham, Switzerland

Preface

In presenting this first volume related to the preparation of the Principles of BRICS Commercial Contracts, we would like first of all to express our deepest appreciation to the Members of the Working Group, in particular to the Rapporteurs responsible for the preparation of the national reports. It was only on account of the extraordinary efforts of all those who participated in the different activities of the project that this volume was made possible.

A special word of thanks goes to Prof. Jacques Du Plessis, who started with the coordination of the project and had to step down due to other commitments, securing anyway his continuing participation in the project as South African Rapporteur.

Our recognition also goes to Prof. Sara Rigazio for her contribution to the editors for the preparation of the present volume and for the editing work of the national reports.

A further word of thanks goes also to Mrs. Phumelele Dhlamini and Dr. Marta Bono, who served as Secretaries to the Working Group and undertook the important task of preparing the minutes of the two meetings held in Cape Town and Palermo.

Last but by no means least, we would like to express our deepest appreciation to the Universities of Cape Town and Palermo for generously hosting the two meetings of the Working Group.

Trieste, Italy
Palermo, Italy

Mauro Bussani
Salvatore Mancuso

Contents

Setting the Scene

The Research Project on the Principles of BRICS Commercial Contracts Law. An Introduction	3
Mauro Bussani and Salvatore Mancuso	

Commercial Contract Law in the BRICS: A Comparative Overview ...	13
Marta Infantino	

Questions and Answers in the Framework of National Jurisdictions

The Questionnaire for the Drafting of the National Reports	49
Jacques du Plessis	

Brazilian Report	69
Umberto Celli Junior and Lígia Espolaor Veronese	

Russian Report	135
Aleksander Komarov	

Indian Report	187
Nilima Bhadbhade	

Chinese Report	241
Lihong Zhang	

South African Report	297
Jacques du Plessis	

On the Way to the Principles of BRICS Commercial Contracts Law

The Possible Path Towards the Principles of BRICS Commercial Contracts Law	359
Salvatore Mancuso	

Further Reading	427

Editors and Contributors

About the Editors

Salvatore Mancuso is a Professor of Comparative Law and Legal Anthropology at the University of Palermo (Italy) and an Honorary Professor of African Law at the Centre for African Laws and Society of Xiangtan University (P.R. of China). He is also Adjunct Professor at the Loyola University Chicago, John Felice Rome Center, and Visiting Professor at the Somali National University in Mogadishu (Somalia). He holds a Ph.D. in Comparative Law at the University of Trieste (Italy) with a specialization in African law. He has been the Chair, Centre for Comparative Law in Africa, University of Cape Town; Professor of Comparative Law and Legal Anthropology at the University of Macau; Adjunct Professor at the University of Trieste; Visiting Professor at the Universities of Paris I—Panthéon Sorbonne, Limoges, Réunion, and Lisbon; and has given lectures in different universities in Europe, Africa, and China. He has published and edited some books and several articles on Comparative and African Law. Some of his works on African law have been translated into Chinese, French, and Portuguese. He is a member of the International Academy of Comparative Law and Vice President (Events) of the Juris Diversitas group. He is co-coordinator of the TWG on Rule of Law & Justice Reform at the World Bank GFLJD. He is a member of the editorial board of several law journals focused on comparative law and African law.

Mauro Bussani is a Professor of Comparative Law at the University of Trieste, Italy; an Adjunct Professor at the University of Macao, S.A.R. of the People's Republic of China; and a Member of the Faculty of the Católica Global School of Law (Portugal). He received a *Honoris Causa* Ph.D. from the University of Fribourg (Switzerland). He has been Visiting Professor in the US, Canada, Brazil, France, Switzerland, the UK, Portugal, Serbia, Hungary, Israel, and China. He is a Member of the American Law Institute and a Titular Member of the International Academy of Comparative

Law. He sits on the council of a number of scientific institutions and academies and is a member of the editorial board of many journals, including the American Journal of Comparative Law, the Journal of European Tort Law, and the Journal of Comparative Law in Africa. He authored or co-authored 30 books and more than 160 essays, in Italian, English, and French. Many of his works have been translated into Spanish, Portuguese, Turkish, Serbian, Chinese, Japanese, and Korean.

Contributors

Bhadbhade Nilima Private Consultant, Pune, India

Bussani Mauro University of Trieste, Trieste, Italy;
University of Macau, Macau SAR, People's Republic of China

Celli Junior Umberto University of São Paulo, São Paulo, Brazil

du Plessis Jacques University of Stellenbosch, Stellenbosch, South Africa

Infantino Marta University of Trieste, Trieste, Italy

Komarov Aleksander Russian Academy of Foreign Trade, Moscow, Russia

Mancuso Salvatore University of Palermo, Palermo, Italy

Veronese Lígia Espolaor University of São Paulo, São Paulo, Brazil

Zhang Lihong East China University of Political Science and Law, Shanghai,
People's Republic of China

Abbreviations

AADR	Africa ADR
AFSA	Arbitration Foundation of South Africa
AIR	All India Reporter
ALAFCR	Conflicts Statute of China 2010
ALTCPSCH	Supreme Court's Judicial Interpretations on the Application of Law in the Trials on Contract of Purchase and Sale of Commercial Houses
AML	Anti-Monopoly Law
ARBLR	Arbitration Law Reporter
BAC	Beijing Arbitration Commission
CADE	Administrative Council of Economic Defence
CAJAC	China-Africa Joint Arbitration Centre
CAP	Code on <i>Arbitrazh</i> Procedure of the Russian Federation
CCC	Chinese Civil Code
CCL	Chinese Contract Law
CCPL	Chinese Civil Procedure Law
CECL	Chinese E-Commerce Law
CIETAC	China International Economic and Trade Arbitration Commission
CISG	United Nations Convention on Contracts for the International Sale of Goods (Vienna, 1980)
CPA	Consumer Protection Act 68 of 2008
ECL	E-Commerce Law
ECTA	Electronic Communications and Transactions Act 25 of 2002
ESL	Electronic Signature Law
FB	Full Bench
FC	Federal Court
GPCL	General Principles of Civil Law
GZAC	Guang Zhou Arbitration Commission
HC	High Court
IA	Indian Appeals
ICA	Indian Contract Act 1872
ICAC	Russian Federation Chamber of Commerce and Industry

ICC	International Chamber of Commerce
ICSID	International Convention on the Settlement of Investment Disputes
JI	Juridical Interpretation
JICL (2)	Supreme Court's Second Judicial Interpretation on Contract Law
LCIA	London Court of International Arbitration
LCLFCR	Law on the Choice of Law for Foreign-related Civil Relationships
LOI	Letter of Intent
Mah LJ	Maharashtra Law Journal
MIA	Moore's India Appeals
MOA	Memorandum of Agreement
MOU	Memorandum of Understanding
PA	Prescription Act 68 of 1969
PC	Privy Council
PICC	UNIDROIT Principles of International Commercial Contracts
QB	Queen's Bench
Russian CC	Russian Civil Code
SC	Supreme Court
SCC	Supreme Court Cases
SCW	Supreme Court Weekly
SHAC	Shanghai Arbitration Commission
SITCCC	Supreme Court's Opinion on Several Issues on Trials of Commercial and Civil Contract under Current Situation
UNCITRAL	United Nations Commission on International Trade Law
UNIDROIT	International Institute for the Unification of Private Law
WTO	World Trade Organization

Setting the Scene

The Research Project on the Principles of BRICS Commercial Contracts Law. An Introduction



Mauro Bussani and Salvatore Mancuso

1 General Premises

The use of the acronym BRIC to indicate Brazil, Russia, India and China, was first introduced in 2001 in a report by Goldman Sachs.¹ It subsequently evolved in BRICS, adding South Africa to the group in 2010 as observer and in 2011 officially.² Created as a platform for dialog and cooperation between countries that represent, as of 2017, 40.9% of the world's population, 29.6% of the world territory and about 23.2% of the gross world product,³ BRICS have progressively acquired a leading role on the

¹ The term BRICs was originally used in 2001 by Jim O'Neill, then chairman of Goldman Sachs Asset Management, in his publication Building Better Global Economic BRICs, Goldman Sachs, Paper No. 66, 30 November 2001, available at <https://www.goldmansachs.com/insights/archive/archive-pdfs/build-better-brics.pdf>. In the report O'Neill predicted, "the real GDP growth in large emerging market economies in 2001 and 2002 would exceed that of the G7". The group met for the first formal summit in 2009. In 2010, South Africa joined the group so that it was renamed BRICS.

² See the "Sanya Declaration", Hainan, China, on April 14, 2011 where one reads: "The Heads of State and Government of Brazil, Russia, India and China welcome South Africa joining the BRICS and look forward to strengthening dialogue and cooperation with South Africa within the forum". The official documentation is available at the "BRICS Information Center" of the University of Toronto, <http://www.brics.utoronto.ca>.

³ Source: BRICS Joint Statistical Publication, Johannesburg 2018, available at <https://www.statssa.gov.za/wp-content/uploads/2018/11/BRICS-JSP-2018.pdf>; and Sengupta (2019).

M. Bussani (✉)
University of Trieste, Trieste, Italy
e-mail: mauro.bussani@units.it

University of Macau, Macau SAR People's Republic of China

S. Mancuso
University of Palermo, Palermo, Italy
e-mail: salvatore.mancuso06@unipa.it

international scene, stirring the interest, first and foremost, of economic analysts and, although only in recent years and cautiously, also of legal experts.

The main reason for the unadventurous interest of the legal community seems to lie in the fact that, to date, there is not a shared agreement on what the gathering together of the five countries under an acronym should mean from a legal perspective. Perhaps deliberately, from their side, the concerned governments have so far not taken an official stance on the nature of the legal status of their relationship, making it difficult to classify and determine accurately what BRICS should stand for. Some analysts, in fact, believe that it is exclusively an economic alliance born in opposition to the US hegemony in the context of the global economy⁴; others glimpse the possibility of identifying the BRICS as a sort of 'legal network', albeit still in its early days.⁵ All, however, seem to agree on its potentials—many of which are still unexpressed (also from a legal point of view).⁶

Before proceeding two remarks are in order, though. First, over time the entity called BRICS has been the object of an evolution from within. If the initial motivation, or "aspiration"⁷ that pushed these countries to come together was certainly due to economic reasons, over the course of time it seems to have gradually transformed itself into something wider. Suffice it to say that at the first official BRIC meeting in 2009,⁸ the representatives of the four countries limited themselves to state their commitment to continue the reform of the international financial institutions in the light of the new structure of the global economy, while at the meeting held in Brasilia in 2019, they expressly referred to their cooperation not only in financial terms but also as including foreign policies, national security, environment, infrastructure, trade, health, technological and scientific innovation.⁹

⁴ See Marr (2010).

⁵ See Scaffardi (2012).

⁶ On these potentials, amidst the economists, see e.g. Jones (2012); Nadkarni and Noonan (2012). In the legal scholarship literature one can see Neuwirth et al. (2017); Scaffardi (2014). According to Mancuso (2017), even though it is easier to show what BRICS is not ("it is neither simply a regular summit nor a simple international organization"), legal scholars should "try to understand the legal implications of it". See also Bussani (2018); Carducci and Bruno (2014), stressing the necessity "to analyze the legal-institutional dimension of the BRICS phenomenon".

⁷ See Scaffardi (2012). According to the Author, "what was once an aspiration of "emerging economies" is now creating a "legal network"".

⁸ The meeting was held in Yekaterinburg, Russia, on June, 16 2009. See official documents at <http://www.brics.utoronto.ca/docs/090616-leaders.html>.

⁹ The 2009 *Joint Statement of the BRIC Countries' Leaders*, available at <http://www.brics.utoronto.ca/docs/090616-leaders.html>, reads: "The emerging and developing economies must have greater voice and representation in international financial institutions, whose heads and executives should be appointed through an open, transparent, and merit-based selection process. We also believe that there is a strong need for a stable, predictable and more diversified international monetary system". The Preamble, n. 4 of the *Joint Declaration, Brasilia, 2019*, available at <http://www.brics.utoronto.ca/docs/191114-brasilia.html>, reads: "We welcome, among other achievements, the establishment of the Innovation BRICS Network (iBRICS); the adoption of the New Architecture on Science, Technology and Innovation (STI), which will be implemented through the BRICS STI Steering Committee, and the Terms of Reference of the BRICS Energy Research Cooperation Platform. We also welcome the holding of the BRICS Strategies for Countering Terrorism Seminar, the Workshop

The second remark, more obvious, is that the way in which the BRICS countries deal with the different issues they deem worth being tackled follows the traditional institutional and diplomatic path. The results of the summits between heads of state and governments are disclosed through official statements that set out prospective issues of common interest as well as the furthering of current works in progress in order to meet the economic and social challenges affecting the five countries. Decisions on the above-mentioned issues are preceded by preparatory analyses carried out by joint working groups that sometimes are based, in their turn, on the results of previous meetings held by representatives of the various departments or sherpas involved in the matters with a view to elaborate common strategies.

In light of the above, one may think of ‘platform’ and ‘process’ as the key notions to identify, analyse and possibly understand the nature of the BRICS phenomenon in its complexity. The term platform already contains, in itself, the idea of an organization that does not correspond to any traditional international legal structure and, by evoking the idea of equality (in this case between the consenting States), it entails sharing and exchange. Sharing of information, practices and ideas, exchange of goods and services are indeed the main avenues along which the cooperation between those countries takes place. The term process, in its turn, may refer here to the set of activities that create value by transforming a series of resources, including human capital. In the case of BRICS, it is all the aforementioned (financial, political, environmental, technological) activities which combine with each other and eventually generate wealth—to be meant in economic terms as well as in terms of transmission and circulation of models.¹⁰

2 BRICS and the Law

BRICS have never set up a proper international organization. However, from the analysis of the documents published after each summit it is clear that BRICS produce relatively stable ‘legal flows’ in different domains that are the expression of the countries’ activities and interconnections.¹¹

The 2015 Strategy for BRICS Economic Partnership document, signed at the 2015 BRICS Summit held in Ufa (Russia), stressed how improving the transparency of the trade and investment climate in the framework of international obligations

on Human Milk Banks and the BRICS Meeting on Asset Recovery. We commend the signature of the Memorandum of Understanding among BRICS Trade and Investment Promotion Agencies (TIPAs), and the establishment of the BRICS Women Business Alliance (WBA). We further appreciate the approval of the Collaborative Research Program for Tuberculosis, and other initiatives promoted by the 2019 BRICS Chairship”. On the evolving nature of BRICS, see also, Scaffardi (2012), 150, footnote 14.

¹⁰ In these terms, see the VI BRICS Legal Forum Declaration “Building Legal Capacity for New Rule Based World Economic Order” signed in Rio de Janeiro on October 16, 2019, available at <https://bricslegalforum.org/wp-content/uploads/2019/10/Rio-de-Janeiro-Declaration.pdf>.

¹¹ Scaffardi (2012), 162.

and national legislation and creating favorable conditions for the development of mutual trade and foreign direct investment in the BRICS countries are amongst the primary goals to be pursued to expand trade and investment cooperation. In the same document, one of the main areas of BRICS countries' educational cooperation is deemed to be the establishment of networks of researchers and the development of joint projects in areas of mutual interest.¹²

More importantly, from our perspective, on 11 December 2014, further to a meeting held in Brasilia, the BRICS Legal Forum was created,¹³ and in the 10th BRICS summit held in 2018 in Johannesburg, the BRICS Legal Forum has been included in the official and sectorial meetings of the group with a view to make of it the long-term instrument of legal cooperation for the BRICS countries.¹⁴ The BRICS Legal Forum intends to promote integration among the BRICS countries and to achieve infrastructure investments, enabling integrated legal-economic development. It aims to pave the way to the realization of the BRICS objectives through the use of proper legal principle, international decision-making procedures and dispute resolution mechanisms, relationships with and participation in different international organizations and the possible creation of common institutions.¹⁵

The Forum also intends to serve as an instrument to enhance the mutual understanding about the legal systems of the member countries. It is meant to promote legal cooperation and coordination and protect the diversity of the legal culture in each member country, providing a platform of exchange of the respective experiences on common legal issues.¹⁶ Further, the members consider that economic cooperation between them, aiming to develop trade, investments and financial transactions, will call for a common legal framework on which such activities can be performed efficiently, together with a simple, quick and reliable system of dispute resolution.¹⁷

¹² The 2015 Strategy for BRICS Economic Partnership document signed at the 2015 BRICS Summit was held in Ufa (Russia); it is available at <http://www.brics.utoronto.ca/docs/150709-partnership-strategy-en.html>.

¹³ See the official documents at <https://bricslegalforum.org/wp-content/uploads/2019/05/BRA-SILIA-DECLARATION-1st-Forum.pdf>.

¹⁴ See the official document at <https://bricslegalforum.org/wp-content/uploads/2019/05/CAPE-TOWN-DECLARATION-5th-Forum.pdf>, particularly point. n. 8.

¹⁵ For a general view on the Legal Forum, see the official home page available at <https://bricslegalforum.org/about/>. In particular, see the document issued from the Conference held in Cape Town on 23–24 August, 2018, at <https://bricslegalforum.org/wp-content/uploads/2019/09/BRICS-LF2018.-Book-of-Abstracts-Cape-Town.2018.-Final.16.9.2019.pdf>, points n. 5, 6 and 10.

¹⁶ See <https://bricslegalforum.org>, where the Legal Forum is defined as an “opportunity for legal cooperation through unity and diversity”.

¹⁷ See the “New Delhi Declaration” of 2016, made by the BRICS countries for the third Legal Forum, available at <https://bricslegalforum.org/wp-content/uploads/2019/05/NEW-DELHI-DECLARATION-3rd-Forum.pdf>. Worth mentioning is also the *BRICS Law Journal*, founded in 2014 and published in Russia by the Tyumen State University and available at <https://www.bricslawjournal.com>.

3 BRICS and Contract Law

All the above poses to the comparative law scholars many challenges, the most important of which is whether the current scenario drawn by BRICS is actually bound, or not, to yield a common legal pattern that may fit the interconnected needs of these countries. Taking on this challenge as a whole would require expertise and capacities beyond those available to editors and contributors to this volume. We thought it possible to deal, instead, with one specific field, i.e. contract law, whose legal significance and economic relevance is of the utmost concern for any one interested, from within or from outside the BRICS, in the development of the initiative. Moreover, after the starting of the project¹⁸ the Legal Forum held in Cape Town in 2018 stressed the opportunity to find common elements in the subject of contracts and in particular “contractual clauses that are common to BRICS member states, including Governing law; Arbitration, Dispute Resolution, Forum and related matters”.¹⁹ This stance shored up our choice of focusing more particularly on commercial, business-to-business (B2B) contract law. B2B transactions make up the greater part of international trade, and are less vulnerable than other types of transactions to local variations dictated by each system’s needs and policies. Further, B2B contracts are less exposed to the intricacies arising out of the membership of each legal system to one or the other groupings—continental law, common law, mixed jurisdictions—macro-comparison usually relies on.²⁰

That being said, any contract lawyer knows that surveying the law applicable and applied in B2B transactions would require not only enquiring about black-letter rules, courts’ rulings, and scholarly materials, but also investigating how in practice businessmen negotiate and perform (or non- or mis-perform) contracts and how disputes arising out of them are avoided or settled through arbitration or otherwise. Engaging seriously into such an investigation would have needed much more funding and time than we had. Much of the analysis contained in the book is therefore limited

¹⁸ The project started in 2014. See below, Section IV.

¹⁹ See <https://bricslegalforum.org/wp-content/uploads/2019/05/BRICS-Legal-Forum-Programme-24-and-24-August-2018.pdf>.

²⁰ The above-mentioned classifications are obviously debatable, and applying them to BRICS may result even more problematic. A few examples can be brought forward in this respect. Russian company law has been highly influenced by Western law, mainly US company law (see Dedov and Molotnikov 2017, Nougayrède 2013). India displays great legal diversity and legal pluralism with various indigenous, Hindu and Islamic laws being applied in different contexts and fields (see, *ex multis*, Menski 2006, Lingat 1967). Modern Chinese law is commonly associated with the civil law legal family due to the great influence that European continental law exercised on its (official) legal development and on its codification activity preceded by detailed statutory law largely based on the Romano-Germanic model (on the influence exercised by German law on the development of Chinese law, using Japan and Taiwan as access doors, see Chen 2011). However, the strong presence of the socialist pattern and the common law influences deriving from the adoption of institutions from Hong Kong (on which see Chen 2009)—not to mention the deeply rooted sway of traditional law—could lead to Chinese law being considered as a hybrid mixed system, on which see Castellucci (2010).

to the official legal framework applicable to B2B transactions in each country. As we will see in the next section, however, the research methodology we adopted allowed us to go well beyond the surface of that framework whenever necessary.

4 The Book

The volume we are presenting constitutes the first phase of a project that aims to investigate the possible foundations of a common system of international commercial contract law within the BRICS' network.

The Project kicked-off in 2014 in Cape Town (hosted by one of the authors of the present chapter, at that time Chair of the Centre for Comparative Law in Africa at the University of Cape Town) where the project coordinators and the national reporters met in order to delineate the development of the Project, to choose the topics to be addressed, to discuss the preparation of a questionnaire and the main features of the subsequent national reports. The need of replacing the Indian rapporteur and the long uncertainty about the detailed contents of the final version of the new Chinese Civil Code²¹ imposed some delays on the original programme. Eventually, in February 2020, the members of the research team met in Palermo (hosted by the same author, who moved back to Italy in the meantime) to finalize the national reports and discuss outlines and contents of the comparative analysis.

Even though the search for common principles in this area is certainly nothing new in the international arena, the methodology that the editors of this volume have deemed most appropriate to adopt recalls in part what is being done by both "The Common Core of European Private Law" Project²² and by Rudolf Schlesinger through the so-called Cornell Seminars and the subsequent publication, in 1968, of the seminal work on "Formation of Contracts".²³

A questionnaire has therefore been drawn up by Jacques Du Plessis and then shared with the editors and the national reporters who made their suggestions to produce the final version inserted in the present volume. It poses eight questions concerning the various phases of the contract, from its formation, to the moment of its performance up to its possible pathological evolution. Editors and contributors

²¹ Moreover, the Covid-19 pandemic obliged the Chinese authorities to postpone the official adoption of the Code which was originally scheduled for March 2020.

²² 'The Common Core of European Private Law' project was started in 1993 by Ugo Mattei and one of the authors of this paper. While receiving quite a substantial attention in the comparative law literature, the Common Core project has so far been involving more than three hundred scholars. For a more extensive and complete presentation of the project, see Bussani (2015); see also Bussani and Mattei (1997–1998), Bussani et al. (2009), Bussani and Mattei (2007), Bussani and Mattei (2003).

²³ At Cornell, Schlesinger launched in 1957 his collective comparative research project on the 'Formation of Contracts', which resulted, in 1968, in the publication under his general editorship of two monumental volumes: Schlesinger (1968). See also Schlesinger (1957), Farnsworth (1969), Ehrenzweig (1968), Braucher (1970). For a discussion of Schlesinger's (as well as Rodolfo Sacco's) fundamental contributions to comparative law research, see Mattei (2001).

to this volume agreed to draft the questionnaire using the UNIDROIT Principles of International Commercial Contracts (PICC) as a stating reference²⁴—reserving to the second stage of the project (and to the volume to be published thereupon) the opportunity of scrutinizing the suitability of the PICC, or of part of them, to our actual purposes.

The answers to the questionnaire have a double function: on the one hand, they provide the reader with the relevant data on each concerned jurisdiction, on the other hand, the same data become a starting point for the comparative analysis. This methodology allows a further advantage: it enables the reader to look at the answers provided by each rapporteur not only through the lens of the black-letter rules but also taking into account the implementation of the same rule in practice.

The goal is to identify the real differences and similarities in the five legal systems. Comparative law scholarship has already demonstrated how similar (or even identical) rules can lead to different operational results and—on the contrary—how different rules can take to the same operational result, due to the action of different legal formants.²⁵ The comparative analysis of the contract law in the five BRICS countries takes into proper account what these legal formants are, how they operate in each legal system and how they determine the operational rules in the living law of commercial contracts.

A final thought concerns the actual usefulness of a research on the common principles in the area of commercial contracts for the BRICS' legal systems. It could be argued, as has in fact been done, that even if the research led to the drafting of those principles they would be unlikely to find an actual implementation by and in the BRICS countries.²⁶ The degree of probability that a research be used in practice has never stopped scientific endeavours, though. It may be that in view of the path these countries have trodden since the beginning of their cooperation and of the efforts and collaborations made in large areas of common interests, the possibility that those principles might be shared and applied in practice is not so remote. Maybe it is. Yet, we thought our research project worth the effort like any other comparative law

²⁴ UNIDROIT has worked extensively in the area of contract law and adopted a variety of instruments intended to offer harmonised and effective rules to respond to the evolving needs of modern transactions. The UNIDROIT Principles of International Commercial Contracts (whose first edition dates back to 1994) constitute a non-binding codification or “restatement” of the general part of international commercial contracts law, providing a comprehensive set of rules dealing with all the most important topics in that matter. The latest edition of the UNIDROIT Principles was published in 2016 (full text available at <https://www.unidroit.org/english/principles/contracts/principles2016/principles2016-e.pdf>). See *ex multis*, Bonell (2009, 2018).

²⁵ Indeed, another fundamental approach followed by the project is the dynamic comparative law methodology principally developed by Rodolfo Sacco during the last forty years. Sacco's theory is based on the assumption that a list, albeit exhaustive, of all the reasons given for the decisions made by the courts is not the entire law and that the statutes or the definitions of legal doctrines given by scholars are not the entire law. Therefore, it is necessary to analyze the full, complex relationship among what he calls the ‘legal formants’ of a system, that is, all those elements that make up any given rule of law among statutes, general propositions, particular definitions, reasons, holdings and so on, to know what the law is. The theory is summarized in Sacco (1991).

²⁶ For a full discussion of this issue see Mancuso (2017) 265 and ff.

initiative that tries to cast light on a blind spot. This kind of study is meant to gather and spread granular knowledge on the commercial contract laws of a series of legal systems that are usually dealt with in isolation, or with a view of grouping them in one or another legal family, or within analysis surfing over their own specific features inside commentaries devoted to this or that international legal instrument. Thinking out of the box sometimes is path-breaking, sometimes it is a naïve and time-wasting delusion. The reader will judge.

References

- Bonell MJ (2009) *An international restatement of contract law: the UNIDROIT principles*, 3rd edn. Brill, Leiden
- Bonell MJ (2018) The law governing international commercial contracts and the actual role of the UNIDROIT principles. *Uniform Law Rev* 23(1):15–41
- Braucher R (1970) Book review: formation of contracts: a study of the common core of legal systems. *Harv Law Rev* 83(4):957–960
- Bussani M (2015) The Common Core of European private law project two decades after: a new beginning. *Eur Lawyer J* 15(3):9–28
- Bussani M (2018) *El derecho de Occidente. Geopolítica de las reglas globales*. Marcial Pons, Madrid
- Bussani M, Mattei U (1997–1998) *The Common Core approach to European private law*. Columbia J Eur Law 3:339–356
- Bussani M, Mattei U (eds) (2003) *The Common Core of European private law*. Kluwer, The Hague
- Bussani M, Mattei U (eds) (2007) *Opening up European private law*. Carolina Academic Press, Durham
- Bussani M, Infantino M, Werro F (2009) The Common Core sound: short notes on themes, harmonies and disharmonies in European tort law. *King's Law J* 20(2):239–255
- Carducci M, Bruno AS (2014) The BRICS countries as a legal dynamic network and the multilevel 'hard' EU regional structure—a comparative survey. *Int J Public Law Policy* 4(1):1–13
- Castellucci I (2010) Chinese law: a new hybrid. In: Cashin Ritaine E, Donlan SP, Sychold M (eds) *Comparative law and hybrid legal traditions*. Schulthess, Zurich, p 75
- Chen AHY (2011) *An introduction to the legal system of the PRC*, 4th edn. Lexis Nexis, Hong Kong
- Chen J (2009) Modernisation, westernisation, and globalisation: legal transplant in China. In: Costa Oliveira J, Cardinal P (eds) *One country, two systems, three legal orders—perspectives of evolution: essays on Macau's autonomy after the resumption of sovereignty by China*. Springer, Berlin, pp 91–114
- Dedov D, Molotnikov A (2017) *Russian company law: the essentials*. Startup, Moscow
- Ehrenzweig A (1968) Book review: formation of contracts: a study of the common core of legal systems. *Calif Law Rev* 56(5):1514–1518
- Farnsworth EA (1969) Book review: formation of contracts: a study of the common core of legal systems. *Columbia Law Rev* 69(2):339–348
- Jones S (2012) *BRICS and beyond: lessons on emerging markets*. Wiley, Chichester
- Lingat R (1967) *Les sources du droit dans le système traditionnel de l'Inde*. Mouton & Co, Paris
- Mancuso S (2017) Contract law in the BRICS countries: a comparative approach. In: Neuwirth RJ, Svetlicnii A, De Castro Halis D (eds) *The BRICS-lawyers' guide to global cooperation*. Cambridge University Press, Cambridge, pp 221–246
- Marr J (2010) *Investing in emerging markets: the BRIC economies and beyond*. Wiley, Chichester
- Mattei U (2001) The comparative jurisprudence of Schlesinger and Sacco: a study in legal influence. In: Riles A (ed) *Rethinking the masters of comparative law*. Hart Publ, Oxford, pp 238–256

- Menski W (2006) Comparative law in a global context, 2nd edn. Cambridge University Press, Cambridge
- Nadkarni V, Noonan NC (2012) Emerging powers in a comparative perspective: the political and economic rise of the BRIC countries. Continuum, London-New York
- Neuwirth RJ, Svetlicnii A, De Castro HD (eds) (2017) The BRICS-lawyers' guide to global cooperation. Cambridge University Press, Cambridge
- Nougayrède D (2013) Outsourcing law in post-soviet Russia. *Journal of Eurasian Law* 6(3):383–449
- Sacco R (1991) Legal formants: a dynamic approach to comparative law. *Am J Comp Law* 39: 1–34 (Part I) and 343–401 (Part II)
- Scaffardi L (2012) Pensare l'impossibile: BRICS tra miraggio e realtà. In: Scaffardi L (cur) BRICS: Paesi emergenti nel prisma del diritto comparato. Giappichelli, Turin, pp 147–175
- Scaffardi L (2014) BRICS, a multi-centre legal network. *Beijing Law Rev* 5(2): 140. (June 2014)
- Schlesinger RB (ed) (1968) Formation of contracts: a study of the common core of legal systems, vol 2. Oceana Publications, New York, London
- Schlesinger R (1957) Research on the general principles of law recognized by civilized nations. *Am J Int Law* 51(4):734–753
- Sengupta J (2019) The economic agenda of BRICS. <https://www.orfonline.org/research/the-economic-agenda-of-brics-58286/>

Other Resources

- 2009 Joint Statement of the BRIC Countries' Leaders. <http://www.brics.utoronto.ca/docs/090616-leaders.html>
- 2015 Strategy for BRICS Economic Partnership. <http://www.brics.utoronto.ca/docs/150709-partnership-strategy-en.html>
- Brasilia Declaration–1st BRICS Legal Forum. <https://bricslegalforum.org/wp-content/uploads/2019/05/BRASILIA-DECLARATION-1st-Forum.pdf>
- BRICS Joint Statistical Publication, Johannesburg 2018. <https://www.statssa.gov.za/wp-content/uploads/2018/11/BRICS-JSP-2018.pdf>
- Cape Town Declaration–5th BRICS Legal Forum. <https://bricslegalforum.org/wp-content/uploads/2019/05/CAPE-TOWN-DECLARATION-5th-Forum.pdf>
- Goldman Sachs, Building Better Global Economic BRICs, Paper No. 66, 30 November 2001. <https://www.goldmansachs.com/insights/archive/archive-pdfs/build-better-brics.pdf>
- Joint Declaration, Brasilia, 2019. <http://www.brics.utoronto.ca/docs/191114-brasilia.html>
- New Delhi Declaration–3rd BRICS Legal Forum. <https://bricslegalforum.org/wp-content/uploads/2019/05/NEW-DELHI-DECLARATION-3rd-Forum.pdf>
- Rio de Janeiro Declaration–6th BRICS Legal Forum. <https://bricslegalforum.org/wp-content/uploads/2019/10/Rio-de-Janeiro-Declaration.pdf>

Mauro Bussani is Professor of Comparative Law at the University of Trieste, Italy; Adjunct Professor at the University of Macao, S.A.R. of the People's Republic of China and Member of the Faculty of the Católica Global School of Law (Portugal). He received a *Honoris Causa Ph.D.* from the University of Fribourg (Switzerland). He has been Visiting Professor in the US, Canada, Brazil, France, Switzerland, the UK, Portugal, Serbia, Hungary, Israel, and China. He is Member of the American Law Institute and Titular Member of the International Academy of Comparative Law. He sits on the council of a number of scientific institutions and academies and is member of the editorial board of many journals, including the *American Journal of Comparative Law*, the

Journal of European Tort Law, the Journal of Comparative Law in Africa. He authored or co-authored more than 30 books and 160 essays, in Italian, English and French. Many of his works have been translated in Spanish, Portuguese, Turkish, Serbian, Chinese, Japanese, and Korean.

Salvatore Mancuso is a Professor of Comparative Law and Legal Anthropology at the University of Palermo (Italy), and Honorary Professor of African Law at the Centre for African Laws and Society of Xiangtan University (P.R. of China). He is also Associate Member at the Centre for Legal Integration in Africa, University of the Western Cape (South Africa) and Visiting Professor at the Somali National University in Mogadishu (Somalia). He holds a Ph.D. in Comparative Law at the University of Trieste (Italy) with specialization on African law. He has been the Chair, Centre for Comparative Law in Africa, University of Cape Town, Professor of Comparative Law and Legal Anthropology at the University of Macau, Adjunct Professor at the Universities of Trieste, Loyola University Chicago, John Felice Rome Centre, Visiting Professor at the Universities of Paris I–Panthéon Sorbonne, Limoges, Réunion and Lisbon, and has given lectures in different universities in Europe, Africa and China. He has published and edited some books and several articles on Comparative and African Law. Some of his works on African law have been translated into Chinese, French and Portuguese. He is a member of the International Academy of Comparative Law, and Vice President (Events) of the *Juris Diversitas* group. He is a member of the editorial board of several law journals focused on comparative law and African law.

Commercial Contract Law in the BRICS: A Comparative Overview



Marta Infantino

1 Introduction

The aim of this chapter is to provide some background information on the five legal systems analysed in the book, with a particular focus on their institutional infrastructure, organisation of the judicial system and sources of law, traits of contract law, conflict-of-laws rules and arbitration.

One might wonder why the above features matter in a study on international commercial contracts. Merchants, even in domestic settings, are well-known for their tendency to not rely on official law and to avoid litigation.¹ In transnational settings, the move away from national laws and courts is eased by the ability of the parties to choose the law governing their relationship and to select the (most of the time, arbitral) forum that will handle the resolution of the possible disputes between them – a move that often implies a choice of English law or the law of some US states and of an arbitral institution based in Paris, London, Singapore, Hong Kong or Geneva.² As a result, commercial transnational contracts most of the times live governed by self-enforced, sectoral rules that have little contact with national legal systems, the contents of which can be properly ascertained only through a sociological inquiry

¹ Among the substantial literature on these issues, see Macaulay (1963), Milgrom et al. (1990), Bussani (2019).

² On the dominance of English and US law in international contracting, see Roberts (2017), 270–272; on the preference of parties in international commercial contracts in arbitrating before the International Chamber of Commerce (ICC), headquartered in Paris, the London Court of International Arbitration (LCIA), the Singapore International Arbitration Center (SIAC), the Hong Kong International Arbitration Center (HKIAC), and the Swiss Chamber of Commerce (SCC), see Queen Mary University of London (2019), 9.

M. Infantino (✉)
University of Trieste, Trieste, Italy
e-mail: minfantino@units.it

of the field and its actors.³ Even in the exceptional cases in which disputes arise and the contact with official law materialises, details of the contact remain contained in scattered and largely unpublished arbitral awards.

Yet, notwithstanding all of the above, one cannot conclude that national law and culture bear no relevance to international commercial contracts. In some cases, national law might come in through the application of the forum's conflict of law rules; in other cases, some national rules of mandatory application might defy the parties' attempt to eschew domestic law; yet in other cases, parties themselves might be interested in resorting to national courts and having them interfere with the contractual relationship or the arbitral proceedings. Further, it is well known that parties' own legal culture tends to affect national legal actors' negotiating and handling business transactions.⁴ It is therefore reasonable to assume (as the UNIDROIT Secretariat did when preparing the Principles of International Commercial Contracts (UPICC)) that national contract law does matter to international commercial contracts and that surveying the former could "be of considerable assistance" in studying and restating the law applicable to the latter.⁵ This is why the book collects national reports on the main features of commercial contract law in each BRICS country, and, since each legal system presents its own features that affect how contract law is thought of, made, and applied, the present chapter aims at sketching out a basic outline of what these features are.

One caveat, though. The following provides a condensed snapshot of the official legal framework related to commercial contracts of BRICS countries; no consideration is given to adjoining fields, such as those of investment law, public contracting and company law. The focus is only on the latest developments, that is, developments in official law since the Nineteenth and, especially, the Twentieth century, after the countries' encounter with, or colonization by, the West. As such, the description is not only sketchy; it also does not take into consideration both the history of indigenous law and the current survival, more or less officially, of layers of legal pluralism (think of the law applied to Hindus or Muslims in India or South African customary law⁶). This is not because the historical roots and legal pluralism of BRICS countries have left no imprint on their law; quite the contrary. However, given that such an imprint is least visible on international commercial contracts, constraints of space suggest to leave it out of the analysis.

The limitations of this survey—i.e., it being restricted to contemporary official and largely Westernized contract law—justify why, in the following description, legal systems are reviewed through the lens of their membership in and proximity to either the civil law or the common law tradition. According to the classification by

³ Such as those carried out by Dezalay and Garth (1996).

⁴ See, for all, Bologna (2020), Kozolchik (2014), Hill and King (2004).

⁵ UNIDROIT (1974), 2 ("The Committee [...] considered that a general comparative study of the principal legal systems would be of considerable assistance in the preparation of the proposed Code of international trade law").

⁶ On the role of these laws, see, respectively, Bhadbhade (2012); 41–42, Lubbe and du Plessis (2004), 243.

University of Ottawa's JuriGlobe, Brazil and Russia fall into the category of 'civil law monosystems', China is a 'mixed system of civil law and customary law', South Africa a 'mixed system of civil law and common law', and India is a 'a mixed system of common law, Muslim law and customary law'.⁷ Similar categorization attempts clearly suffer with several shortcomings and are of limited explanatory value. Yet, we will see that, as Western-centric as it might be, the civil law/common law axis provides useful insights in looking at BRICS' contract law in context. The survey therefore departs from the alphabetical order otherwise followed in the book, by starting from legal systems participating in the civil law group (Brazil and Russia: paras 2 and 3) and then moving to mixed jurisdictions, from the least to the most oriented to common law (China, South Africa, India: paras 4, 5 and 6).

2 Brazil

According to the 1988 Federal Constitution, which is the supreme law of the land, the political and administrative organization of the Federal Republic of Brazil comprises twenty-six states and one federal district.⁸ While the states have their own constitution and system of state courts,⁹ the power of legislating on civil and commercial law, including contract law, lies exclusively with the Union.¹⁰ In other words, Brazilian federalist structure has little impact on contract regulation, which is the same throughout the entire country.

Of the five countries under examination, Brazilian law is the one most clearly aligned with the civil law tradition.¹¹ Positive legislation is considered as the primary source of law. As to contract law, the basic source today is the Brazilian Civil Code, which was enacted after almost thirty years of parliamentary debates in 2002 and replaced the previous Commercial Code of 1850 and Civil Code of 1916 (which in their turn had superseded the royal Portuguese legislation that ruled the country before and after its independence from Portugal in 1822). The 2002 Civil Code covers both civil and commercial matters and is said to constitute "the second most important piece of legislation in Brazil, after the Constitution".¹² Like the 1916 Civil Code, the 2002 Code is divided into a General and a Special Part; obligations, including contracts, are dealt with in Book I of the Special Part. But while the Civil Code of 1916 was largely inspired by pre-existing Portuguese legislation, as well as by the French,

⁷ See <http://www.juriglobe.ca/eng/sys-juri/index-syst.php>. Rather than adopting the view that mixed legal systems are mixture of civil law and common law (adopted by Palmer (2010)), the University of Ottawa's JuriGlobe clearly embraces a broader notion of mixed jurisdictions, such as the one advocated by Öricü (2010). On these debates, see du Plessis (2019).

⁸ Article 18 of the Brazilian Constitution.

⁹ See Articles 25 and 125 of the Brazilian Constitution.

¹⁰ See Article 22 (1) of the Brazilian Constitution.

¹¹ On the history of Brazilian private law, see Gomes (1959), Rosenn (1971), Rosenn (1984), Wald (1999), Junqueira de Azevedo (2005), Campilongo (2017).

¹² Antunes Soares de Camargo (2003), 162.

Italian, German and Spanish codifications, and embraced a classical liberal approach to contract law, the 2002 Code relies more heavily on the German and Italian traditions and adopts a more socially-attuned approach to contract law.¹³ For instance, the 2002 Civil Code—besides being endowed with a General Part which is reminiscent of the BGB's *allgemeiner Teil* and embracing the idea that party autonomy finds a limitation due to the 'social function' of the contract¹⁴—looks at contracts through the lens of the German notion of '*Rechtsgeschäft*'¹⁵ and treats donations and unilateral agreements as a species of contract,¹⁶ places extensive reliance on general clauses, including on the principle of good faith,¹⁷ recognizes the validity of preliminary contracts (that is, contracts to make a contract),¹⁸ and allows parties to annul transactions tainted by gross disparity¹⁹ and to terminate long-term contracts in case of hardship.²⁰ It seems that neither the UPICC (in their 1994 edition) nor the 1980 UNCITRAL Convention on Contracts for the International Sale of Goods (CISG, which Brazil ratified in 2014 with the Decree No 8.327/2014) have exerted any influence on contract law regulation in the Civil Code.²¹ Rather than aligning with inter- and trans-national sources, drafters of the Code were more interested in reducing the gap between elitarian and foreign-inspired legislation and the needs of the many communities that make up the highly varied Brazilian society.²² As a result, it is said that, in the 2002 Code, "the notion of contractual justice superseded legal individualism, formerly the exclusive source of contractual obligations, and now prevails over the absolute application of the ancient principle of the *pacta sunt servanda*".²³

¹³ Wald (1999), 817–818; Mancuso (2017), 253.

¹⁴ See Article 421 of the Brazilian Civil Code (on the '*função social*' of the contract), which resounds with the idea developed by Emilio Betti in Italy, according to which every contract has 'social and economic function' of its own: Betti (1943), 119. See also Benetti Timm (2006).

¹⁵ See Articles 104 and ff. of the Brazilian Civil Code, under the General Part.

¹⁶ The Brazilian Civil Code deals with donations under Articles 538–564 in the Book on contracts; similarly, the BGB regulates donations under the title 4 of the division 8 (particular types of obligations) of Book II on the Law of Obligations. By contrast, donations are located in Book II of the Italian Civil Code, devoted to succession law.

¹⁷ See Articles 113 and 422 of the Brazilian Civil Code. Cf. with § 242 BGB and Articles 1175 and 1375 of the Italian Civil Code.

¹⁸ See Articles 462–466 of the Brazilian Civil Code; cf. with Articles 1351 and 2932 of the Italian Civil Code.

¹⁹ See Article 157 of the Brazilian Civil Code and cf. with § 138 (II) BGB (but see also the doctrine of unconscionability enshrined in § 2–302 of the US Uniform Commercial Code).

²⁰ See Article 478 of the Brazilian Civil Code; cf. with Article 1467 of the Italian Civil Code.

²¹ Grebler (2005); Gama (2011). On the problems and consequences of Brazil's 2014 ratification of the CISG, see Estrella Faria (2015); Espolaor Veronese (2019).

²² The great social and economic inequality affecting Brazilian society is a feature underlined by many commentators: see, *e multis*, Rosenn (1984), 15–16, 29–30; Wald (1999), 807–808.

²³ Grebler (2005). Under Article 5 of the Introductory Act to Brazilian Law (Decree Law No 4657 of 1942), judges are required, in interpreting the law, "to pay attention to the 'social purposes aimed at by the law and the needs of public welfare'". It should be stressed, however, that, more recently, with the enactment of Law No 13.874 of 2019, which amended the 2002 Civil Code, this social mindset has been mitigated, especially when it comes to business transactions. Under Article 421,

Such a shift was smoothened by the fact that, during the almost thirty years of parliamentary debates over the drafts of the new Civil Code, Brazilian courts often used the drafts as a source for interpreting existing rules, thus facilitating the transition from two pre-existing codes to the new one.²⁴ Further, since the enactment of the 2002 Civil Code, to help adjust to the new rules, the *Conselho da Justiça Federal* (Council of Federal Justice), in conjunction with the *Centro de Estudos Judiciários* (Legal Research Institute), have organized meetings called ‘*Jornadas de Direito Civil*’, which resemble the ‘*Juristentag*’ promoted every two years since 1860 by the Association of German Jurists. At these meetings, judges, professors and lawyers work together to draft statements and clarifications of private law rules (‘*enunciados*’) that work as normative guidelines in practice.²⁵

Other important pieces of legislation include—besides the Consumer Protection Code (Law No 8.078 of 1990), which provides several rules for B2C contracts, and antitrust legislation (originally enacted with Law No 8.884 of 1994, now replaced by Law No 12.529 of 2011)—the 1942 Introductory Act to Brazilian Law (Decree Law No 4657 of 1942) and the 1996 Arbitration Act (Law No 9.307 of 1996). The former provides, inter alia, the conflict-of-laws rules applicable to contractual disputes with a foreign element, stating that such disputes should be regulated by the law of the State in which the contract was entered into, which is presumed to be the place where the promisor resides or has his place of business, except when such law offends “national sovereignty, public order or good usages”.²⁶ Most notably, the Introductory Act does not clearly affirm that contractual parties in transnational contracts are free to choose the law applicable to their transaction and has thus given rise to a heated debate as to whether or not choice-of-law clauses are enforceable in Brazilian law.²⁷ In contrast, when a contractual dispute is submitted to arbitration, the determination of the applicable law is governed by the 1996 Brazilian Arbitration Law. The Law, which was largely inspired by the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958 (NY Convention, ratified by Brazil through Decree No 4.311 of 24 July 2002) and by the UNCITRAL Model Law on International Commercial Arbitration of 1985,²⁸ sets out the rules for national and international arbitral proceedings. In particular, the 1996 Arbitration Law allows courts to refuse recognition and enforcement of foreign arbitral awards which are contrary to “national public order” (a notion that the Brazilian Superior Tribunal of

as amended, the principle of *pact sunt servanda* and minimal intervention in private contracts shall prevail.

²⁴ Antunes Soares de Camargo (2003), 163.

²⁵ See <http://www.jf.gov.br/cjf/corregedoria-da-justica-federal/centro-de-estudos-judiciarios-1/publicacoes-1/jornadas-cej/EnunciadosAprovados-Jornadas-1345.pdf>.

²⁶ See respectively Articles 9 (2) and 17 of the Introductory Act to Brazilian Law.

²⁷ Whenever a contract has to be executed in Brazil, Brazilian courts still tend to override parties’ choice of applicable law and to apply Brazilian law by invoking the ‘public order’ exception under Article 17 of the Introductory Act: see Slomp Aguiar (2011), 493–495; Stringer (2005).

²⁸ Costa and Tavares Paes (2019) no 2.3 (according to which the Brazilian 1996 Arbitration Act was also influenced by the Spanish Arbitration Act of 1988 and by the Inter-American Convention on International Commercial Arbitration, ratified with Decree No 1.902 of 1996).

Justice interprets as meaning ‘international public policy’²⁹) and clearly states that parties are free to choose the applicable law, unless the latter violates good usages or public order, even allowing parties to select “general principles of law, customs, usages and the rules of international trade”.³⁰ Arbitration therefore represents an important means to overcome the resistance of Brazilian courts to recognise the autonomy of parties in their choice of law.³¹

In the absence of a valid arbitration agreement or choice-of-forum clause,³² disputes arising out of commercial contracts are normally within the competence of Brazilian states courts, which are structured in two tiers (trial and appeal courts). Decisions from the Appellate Courts may be appealed before the Superior Tribunal of Justice, Brazil’s highest federal court for all non-constitutional matters, which is also exclusively competent to decide issues regarding the recognition and enforcement of foreign arbitral awards.³³ Traditionally, Brazilian courts are deemed not to be formally endowed with the power to make the law.³⁴ Yet, as in all civil law countries, such statement should be taken with caution. First of all, Brazilian legislation, and the Civil Code in particular, is filled with general clauses that give room to judges “to create, develop or complete legal norms”.³⁵ Second, it is statutorily recognized that in cases not regulated by the law, judges should solve disputes according to “analogy, usage and general principles of law”.³⁶ Third, following a practice developed since the Sixties, the Brazil’s constitutional court (the Supreme Federal Tribunal) and the Superior Tribunal of Justice have started to regularly publish ‘*súmulas*’, that is, summaries of their judgments which, for a long period, provided guidelines to all appellate and lower courts across the country (although it was debated whether or not they were binding). The binding character of the Supreme Federal Tribunal’s ‘*súmulas*’ was established in 2004 by a constitutional amendment which inserted Article 103-A in the 1988 Constitution, while Articles 926–927 of the 2015 Civil Procedure Code made it clear that rulings issued in some specific situations by the

²⁹ See Article 39 (2) of the 1996 Arbitration Act, as well as de Albuquerque Cavalcanti Abbud (2009), 289–292.

³⁰ See, respectively, Articles 39 (2) and 2 (1)–(2) of the 1996 Arbitration Act. By contrast, designation of non-State law as the applicable law is not possible before ordinary courts: Gama (2011), 641.

³¹ Slomp Aguiar (2011), 496.

³² For quite a long time, Brazilian courts have deemed forum-selection clauses invalid, because of the alleged mandatory nature of procedural rules on judicial competence. In 2010, however, the Superior Tribunal of Justice (RESP 1.177.915/RJ, Terceira Turma, STJ, 13 April 2010) ruled that forum-selection clauses are generally valid. The rule is now enshrined in Article 63 of the 2015 Civil Procedure Code (enacted with Law No 13.105 of 2015).

³³ See Article 105 (1) (i) of the Brazilian Constitution and Article 35 of the 1996 Brazilian Arbitration Act. Before 2004 such competence was exclusively endowed to the Brazilian Supreme Federal Tribunal. See Celli & Espolaor Veronese, Brazilian report, no 1.

³⁴ Rosenn (1986), 513.

³⁵ Estrella Faria (2015), 220.

³⁶ Article 4 of the Introductory Act to Brazilian Law.

Superior Tribunal of Justice as ‘*súmulas*’ are binding for all appellate and lower courts.³⁷

Understanding contract law in Brazil would not be possible without considering the position of legal scholarship, on the one hand, and of arbitral tribunals, on the other hand.

Fully in line with the civil law tradition, scholarly doctrine and opinions of distinguished jurists are held, in Brazil, in the highest regard. Brazilian judges are allowed to refer, and often do refer, to the writings of law professors when they confront legal questions that cannot be solved by a plain reading of statutory provisions, often considering them more influential than judicial decisions.³⁸

As for arbitration, as the Brazilian national reporters note, “currently, the majority of disputes arising from international contracts concluded by Brazilian parties are subject to arbitration”³⁹ often before European arbitral centres, and especially the International Chamber of Commerce. Yet, one should keep in mind that, especially in recent years, the Brazilian legal system has embraced a distinctively pro-arbitration attitude—as shown by, inter alia, the rules in the 1996 Arbitration Law opening to the parties’ freedom to choose the law applicable to the contract⁴⁰—and multiplied the arbitral fora available to commercial parties. For instance, in 1979 the Arbitration and Mediation Centre of the Brazil-Canada Chamber of Commerce (CAM-CCBC) was established in São Paulo to provide dispute resolution services under its own arbitration and mediation rules.⁴¹ In the same city, the International Chamber of Commerce opened a hearing office in 2018.⁴²

3 Russia

The largest country in the world, Russia, is a federation of eighty-five states, regions, territories and cities. According to the 1993 Constitution of the Russian Federation, which has “supreme legal force”,⁴³ each of the states has the power to enact its own

³⁷ Even before the statutory reforms mentioned in the text, *súmulas* created a “de facto stare decisis because taking a contrary position [to a *súmula* of the STJ] practically guarantees a reversal” (Rosenn 1986, 514). On the current situation, see Marinoni (2019), 309.

³⁸ Slomp Aguiar (2011), 508; Stringer (2005), 965.

³⁹ Celli & Espolaor Veronese, Brazilian report, no 1.

⁴⁰ See above in the text. There is also some evidence of Brazilian arbitral tribunals applying the UPICC: Gama (2011), 648–653.

⁴¹ See www.ccbc.org.br.

⁴² See <https://iccwbo.org/contact-us/contact-sciab-ltda/>.

⁴³ Article 15 (1) of the Russian Federation’s Constitution of 1993.

Constitution and legislation,⁴⁴ while the power to enact “civil, civil-procedural and arbitration-procedural legislation” lies only with the Federal Government.⁴⁵

As emphasized by the Russian rapporteur, Russian law traditionally belongs to the “continental civil law legal family”.⁴⁶ At the beginning of the Twentieth century, pre-revolution Russian law’s vocabulary, notions, structure and contents were already shaped by continental European traditions, especially the German one, as shown by Book V of the 1913 Draft Civil Code of the Russian Empire. Such influence was still evident (although less clearly, since private property had been abolished in 1917) in the first Civil Code of the Russian Soviet Federated Socialist Republic (RSFSR) of 1922 (*Grazhdanskiy Kodeks RSFSR* 1922).⁴⁷ From 1928 onwards, however, the introduction of a centralised planned economy devalued the role of civil law in general and of contract law in particular; foreign trade was put under the State’s monopoly and disputes arising out of transnational contracts were subject to the exclusive jurisdiction of Soviet arbitral bodies, such as the Maritime Arbitration Commission and the Foreign Trade Arbitration Commission, established, respectively, in 1930 and 1932 before the Chamber of Commerce of the Union of Soviet Socialist Republics (USSR).⁴⁸ In 1936, the newly adopted USSR Constitution assigned to the Union the jurisdiction to enact a civil code, but such a code was never approved. In 1957, the Constitution was amended to give the fifteen Union Republics that at that time made up the USSR the power to enact their own civil codes, while preserving the Union’s power to lay down ‘fundamental principles’ for these codes.⁴⁹ This resulted in the enactment of the 1961 ‘Fundamental Principles of Civil Law of USSR and Union Republics’ by the Union which was followed by the enactment of the Russian RSFSR’s new Civil Code in 1964 (*Grazhdanskiy Kodeks RSFSR* 1964). In both the texts, economic relationships between entities (which were almost all state-owned) were conditioned upon compliance with the State’s acts of planning, while contracts between individuals to satisfy people’s daily needs were admissible insofar as they respected the hyperdetailed requirements and rules set out by the law for each type of contract.⁵⁰ It was only in 1991, with the enactment of the Fundamental Principles

⁴⁴ Article 5 (2) of the Russian Federation’s Constitution. State legislation shall however conform to the Russian Federation’s Constitution and laws, according to Articles 15 (1) and 76 of the Russian Federation’s Constitution.

⁴⁵ Article 71, letter (n), of the Russian Federation’s Constitution; see also Article 3 (1) of the Russian Civil Code of 1994.

⁴⁶ Komarov, Russian report, no 1.

⁴⁷ On Russian law at the beginning of the Twentieth century, see Yefremova et al. (2014), 6–7; Osakwe (2008), 49; Oda (2007), 64–66 (also on the civil law influence on the 1832 *Svod Zakonov*); Ioffe (1985), 115. It should however be noted that Article 1 of the 1922 Civil Code provided that civil law rights were protected by law except “when they are exercised in contradiction with their socio-economic purpose” and that Article 17 of the same Code restricted foreign commercial transactions allowing only the state to engage in foreign trade.

⁴⁸ See Berman (1947), 199–202, 209–213; Kos-Rabcewicz-Zubkowski (1970), 72; Ioffe (1985), 114–116.

⁴⁹ On these developments, see Yefremova et al. (2014), 9.

⁵⁰ Yefremova et al. (2014), 10.

of Civil Legislation of the USSR and the Union Republics, that equality of participants in the commercial market was officially reinstituted and new forms of contract allowed.⁵¹ The 1991 Fundamental Principles laid the basis for the drafting and enactment of the post-Soviet Russian Civil Code (*Grazhdanskiy kodeks Rossiyskoy Federatsii*), whose Four Parts were adopted between 1994 and 2008 (and later revised on several occasions).

The 1994 Civil Code covers both private and commercial law and is nowadays the main source of contract law, which is regulated in both Part One (on the general law of contracts) and Part Two (which deals with special contracts).⁵² As has been noted, the Russian Civil Code's approach to contract law is "in part Soviet and in part Western".⁵³ While the length, style and level of detail of its provisions and the number of rules regarding state contracts are signs of the Socialist heritage, the Code has a clear civil law imprint, in particular of German law. Evidence of this imprint comes, for instance, from the Code's division into a general and a special part, the inclusion of (both bilateral and unilateral) contracts in the wider notion of obligations and '*Rechtsgeschäfte*',⁵⁴ the rejection of the requirement of cause (as well as consideration) for the validity of contracts,⁵⁵ the reliance upon the principle of good faith,⁵⁶ the admissibility of preliminary contracts⁵⁷ and provisions on pre-contractual liability, specific performance and modification or termination of contracts in case of hardship.⁵⁸ Remarkably, and notwithstanding the 1991 ratification of the CISG by the USSR (subsequently succeeded by the Russian Federation), the CISG seems to have provided little inspiration for the Code's drafting. The same holds true for the UPICC, the first edition of which was out in 1994.⁵⁹ In contrast, the Code, mostly thanks to later amendments, bears traces of some common law-inspired transplants, such as rules on indemnity clauses and liability in case of misrepresentation.⁶⁰ Influence from the European legal framework (and in particular by the 1980 Rome Convention on the Law Applicable to Contractual Obligations and by Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, subsequently repealed and replaced by the Regulation (EU) No 1215/2012) is clear in Russian private international law rules, which are also contained in the Civil Code. In case of contracts with foreign elements,

⁵¹ Yefremova et al. (2014), 13; Feldbrugge (1993), 271–282.

⁵² See respectively Articles 420–453 (in Part I) and 454–1063 (in Part II).

⁵³ Osakwe (2008), 27.

⁵⁴ See Articles 153–181 (on *Rechtsgeschäfte*) and 307–419 (on obligations) of the Russian Civil Code. See also Article 423 of the Code, devoted to onerous and gratuitous contracts. See also Oda (2007), 85–86.

⁵⁵ Komarov, Russian report, no 3.1.1.

⁵⁶ Cf., for instance, Articles 1 (3), 307 (3), 434.1 (2) of the Russian Civil Code.

⁵⁷ See Article 429 of the Russian Civil Code.

⁵⁸ See, respectively, Articles 434.1, 308.3 and 451 of the Russian Civil Code.

⁵⁹ Maggs (2009), 200; Komarov (1996).

⁶⁰ See respectively Articles 406.1 and 431.2 of the Russian Civil Code; see also Maggs (2009), 197–203.

Article 1210 (1) of the Code provides for parties' freedom to choose the applicable law (choice of non-state law, though, is thought not to be admissible⁶¹). Absent the indication of choice by the parties, Article 1211 (1) identifies the applicable law with the law of the country where the party providing the most significant performance resides or has its seat at the time when the contract was made.⁶² Foreign law is applicable except if it conflicts with mandatory provisions or Russian public order.⁶³ Obviously, there are many other laws outside the Civil Code that might affect the life of contracts, such as the 1992 law on consumer protection,⁶⁴ the 2006 antitrust law,⁶⁵ and the UN-inspired 2011 law on electronic signatures.⁶⁶ It is however important to keep in mind that, in case of discrepancy, the Civil Code enjoys priority over any other rule, as emphatically stated by Article 3 (2) of the Russian Civil Code itself.

A similar blending of civil law traits and Socialist heritage is visible in the organization of civil justice. The current system is two-tiered, consisting of civil and commercial (called *arbitrazh*) courts. Commercial courts have inherited the function of Tsarist German-inspired commercial courts and of the Soviet *arbitrazh*, which were quasi-judicial bodies that settled economic disputes between enterprises during the socialist period.⁶⁷ They are organized at three levels (circuit, appellate and cassation courts) and deal with litigation between corporations and/or merchants, enjoying exclusive jurisdiction over corporate, intellectual property and bankruptcy matters.⁶⁸ Civil courts are structured in two instances: district and regional courts—some minor disputes are, however, handled by Justices of the Peace. These courts have residual jurisdiction, treating all cases concerning individuals that do not fall within the competence of commercial courts (that is, in the contract field, disputes arising out of B2C and C2C transactions).⁶⁹ Both the systems are headed by the Supreme Court of the Russian Federation, which serves as the appellate and cassational review court for decisions by lower courts.⁷⁰ Despite the fact that precedents

⁶¹ Information letter of the Presidium of the Supreme Arbitration Court of the Russian Federation, No 158, 9 July 2013.

⁶² Further criteria for special contracts are dictated in the second paragraph of the same article. On the influence played by European rules on this regard, see Orlov (2017).

⁶³ See Article 1193 of the Russian Civil Code.

⁶⁴ Law on the protection of consumers No. 2300–1 FZ of 1992.

⁶⁵ Law on the protection of competition No. 135 FZ of 2006.

⁶⁶ Law on electronic signature No. 63 FZ of 2011, amended in 2016, after Russia's ratification in 2014 of the UNCITRAL Convention on the Use of Electronic Communications in International Contracts.

⁶⁷ Berman (1947), 204–209. On the Russian judicial system and its historical origins, see Maleshin (2017), Maggs et al. (2015), 61–95; Oda (2007), 23–40.

⁶⁸ See Federal Constitutional Law on Commercial Courts in the Russian Federation No 1-FKZ of 1995. Many of the recent reforms affecting Russian judiciary were inspired by the need of improving Russia's scoring on the World Bank's Doing Business Report: see World Bank (2017).

⁶⁹ See Federal Constitutional Law on Courts of General Jurisdiction in the Russian Federation No 1-FKZ of 2011.

⁷⁰ The Supreme Court is the highest court on non-constitutional matters under Article 126 of the 1993 Constitution. Until 2014 the apex court of commercial courts was the Higher Commercial

are not officially binding, the Supreme Court's judgments are particularly authoritative for lower courts.⁷¹ Further, alongside the judicial function, the Supreme Court has inherited from the socialist period the function of Soviet apex courts to issue 'guiding explanations' unrelated to concrete disputes and binding on lower courts.⁷² In full continuity with that practice, the Plenum of the Supreme Court often publishes '*разъяснения*' (explanations), that is, advisory opinions detached from any actual case or controversy, which are meant to clarify how to interpret and apply the law and which are treated as binding by lower courts.⁷³ The Supreme Court also publishes selections of its important judgments, which work as a guidance for lower courts of the Supreme Court's trends.⁷⁴

As in many other civil law countries, legal scholarship is not formally included in the sources of law, and courts avoid citing doctrinal sources.⁷⁵ Nonetheless, opinions of commentators are viewed as authoritative by lawyers and judges, and legal scholars are often involved in drafting new laws.⁷⁶

An overview of Russian contract law would not be complete without mentioning the role played by arbitration. Arbitration has a long history in the country, as it was the preferred means of dispute resolution for foreign (and, after 1959, even domestic) commercial contracts during the socialist period.⁷⁷ Several arbitral institutions have existed in the country since the 1930s, and in 1958 the USSR was one of the first states to ratify the NY Convention. With the end of the socialist era, Russia embraced a liberal approach to arbitration, which has spurred an increased demand for arbitration services⁷⁸ and has limited the propensity of Russian courts to deny recognition and enforcement of foreign arbitral awards for violation of Russian public order.⁷⁹

Court of the Russian Federation (originally provided by Article 127 of the 1993 Russian Federation's Constitution), but the court was abolished by the Federal Constitutional Law on the amendment to the Russian Federation's Constitution No 2-FKZ of 2014 and its functions were transferred to the Supreme Court. On the reasons underlying such a choice, see Maggs et al. (2015), 63–68.

⁷¹ Orlov (2019), 131; Oda (2007), 14.

⁷² For references, see Maggs et al. (2015), 26–27; Oda (2007), 15–17.

⁷³ Such power is provided by Article 126 of the Russian Federation's Constitution. On such explanations, see Maggs et al. (2015), 26–27; Oda (2007), 17; Osakwe (2008), 52–53; Zhuikov (2009), 111–114. For a list of the Plenum's opinions (in Russian), see <http://www.supcourt.ru/documents/>. According to Article 104 (1) of the Constitution, the Supreme Court has also the power of legislative initiative in the matter of its own jurisdiction.

⁷⁴ See <http://www.supcourt.ru/documents/thematics/>.

⁷⁵ Maggs et al. (2015), 31.

⁷⁶ Ibid.; see also Orlov (2019), 131.

⁷⁷ See Orlov and Yarkov (2017).

⁷⁸ Oda (2007), 30 (noting that in the past parties in international contracts used to choose arbitration in a third country, while now arbitration in Russia is a more frequent choice).

⁷⁹ Russian courts traditionally adopted a broad notion of Russian public policy under Article 1193 of the Civil Code (see above, footnote 62) and Article 36 of the Law on international commercial arbitration No 5338–1 of 1993 (according to which recognition or enforcement of foreign arbitral awards can be refused when the award is contrary “to the basic principles of Russian law”). The trend was partially reserved in 2013, when the Presidium of the Higher Commercial Court issued the Information Letter no 156 of 25 February 2013 on the application of the public policy exception by

Legal treatment of arbitration is currently bifurcated, with international arbitration covered by the International Commercial Arbitration Law of 1993 and domestic arbitration governed by the Domestic Arbitration Law of 2015. The significance of the distinction is however limited by the fact that both laws were inspired by the UNCITRAL Model Law on International Commercial Arbitration, either in its 1985 or 2006 version.⁸⁰ Currently, the most important arbitral institution dealing with international commercial disputes is the International Commercial Arbitration Court (ICAC, the successor to the Soviet Foreign Trade Arbitration Commission). In 2017, a new Russian Arbitration Centre (RAC) was established to deal with domestic arbitration under the aegis of the Russian Institute of Modern Arbitration.⁸¹ In 2018, there were 450 cases pending before the ICAC and over 250 cases pending before the RAC.⁸² Such statistics demonstrate that Russian arbitral institutions are robust. There is some evidence to suggest the openness of Russian arbitral tribunals to refer to the UPICC to interpret the applicable law, even when the parties are silent on the issue.⁸³

4 China

China, one of the most ancient civilizations in the world, has a historically deep tradition of centralization. This is still visible in today's political structure: in spite of the size of its territory and population (which puts China, in the ranking of the world's countries, respectively at the third and at the first place), China is a highly centralized state. According to the 1982 Constitution, the legislative power lies exclusively in the National People's Congress (NPC) and in its Standing Committee.⁸⁴ The only exception are the two special administrative regions of Hong-Kong and Macao, which, being former foreign colonies, are allowed by the Constitution and special

commercial courts, inviting them to narrowly interpret the public policy requirement. See Dozhdev (2020), Spiegelberger (2014).

⁸⁰ Law on international commercial arbitration No 5338-1 of 1993 and Law on arbitration no 382-FZ of 2015 (replacing the previous Law on arbitration in the Russian Federation no 102-FZ of 2002). The new 2015 law aims in particular at intensifying state supervision over arbitration in order to prevent distortions and abuses of arbitral law; on these developments, see Dozhdev (2020), Kotelnikov et al. (2019), Skvortsov and Kropotov (2018).

⁸¹ See respectively <https://mkas.tpprf.ru/en/>, <https://centerarbitr.ru/en/main-page/>.

⁸² Cf. <https://mkas.tpprf.ru/en/statistics.php> and <https://centerarbitr.ru/en/2019/03/26/the-first-caseload-report-of-russian-arbitration-center-for-2018/>.

⁸³ Komarov (2011).

⁸⁴ Article 58 of the 1982 Constitution. The Standing Committee of the NPC, besides the power of enacting laws, has also the power to issue mandatory interpretations of existing laws under Article 67 (4) of the Constitution.

laws to maintain their legal systems (which have been influenced, respectively, by British and Portuguese law).⁸⁵

China's recent legal past has followed patterns that are largely comparable to Russian ones. In China too, law is primarily thought of as being a body of rules enacted by the State and manifested in legislation. Similarly to what happened in Russia, the fascination for European codes, and in particular for the BGB, at the beginning of the Twentieth century led to the preparation of a draft civil code (the so-called draft Qing code) in 1911 and, after the revolution, the adoption of the Kuomintang Civil Code in 1929–1930 (still in force in Taiwan).⁸⁶ In 1949, after the foundation of the People's Republic of China, the code was repealed and China largely turned to Soviet models (which themselves had roots in the civil law tradition), enacting a large number of contract regulations that provided the types of transactions permitted, parties which were allowed to engage in economic activities, and the rules for enforcing contracts.⁸⁷ In 1954 the plan to enact a civil code modelled after the 1922 Civil Code of the Russian Soviet Federated Socialist Republic (itself inspired by the BGB) failed.⁸⁸ After the deterioration of Sino-Soviet relationships, there were repeated new attempts to draft a civil code, but they all landed nowhere. This in particular was the case for both the, largely original, 1964 draft civil code (which embodied the typically Soviet conception of contracts as vertical relationships between the State and economic entities)⁸⁹ and the 1982 draft civil code (which was influenced by the 1961 Fundamental Principles of Civil Legislation of the USSR, the 1964 Civil Code of the RSFSR and the revised Hungarian Code of 1978).⁹⁰ In the meantime, the piecemeal approach to legislation advocated by Deng Xiaoping led to the enactment of special laws concerning civil law matters, such as the Economic Contract Law in 1981 (dealing with domestic contracts, and inspired by Soviet sources), the Foreign Economic Contract Law in 1985 (on international contracts, and inspired by the 1980 CISG, which China signed in 1981 and ratified in 1986), the General Principles of Civil Law in 1986 (providing general rules of civil and commercial law on persons, property and obligations, including contracts, which look like a mixture of European

⁸⁵ See Article 31 of the 1982 Constitution, as well as the 1990 Basic Law of the Hong Kong Special Administrative Region and the 1993 Basic Law of the Macao Special Administrative Region. On the Hong Kong and Macau's legal systems, see Castellucci (2012).

⁸⁶ Chen (2016) 455 (who, among the sources of the Kuomintang code, cites, besides the BGB, “the Japanese Civil Code of 1896, [...] the French Civil Code of 1804, the Swiss Civil Code of 1907 and the Swiss Code of Obligations of 1911, the Brazilian Civil Code of 1916, the Civil Code of Soviet Russia of 1922, the Siamese Civil Code of 1923–1925, the Turkish Commercial Code of 1926, the draft Italian Commercial Code of 1925 and the never enacted Franco-Italian Code of Obligations and Contracts of 1927”); Fu (2011), 13–15; Zhang (2006), 29–30; Huang and Chen (1999), 38. While the Qing Code distinguished private from commercial law, the Kuomintang Code treated them together: Chen (2016), 456.

⁸⁷ Huang and Chen (1999), 39.

⁸⁸ Chen (2016), 459–460; Fu (2011), 16.

⁸⁹ Chen (2016), 460–461.

⁹⁰ All these codes were, despite their socialist inspiration, somehow modeled after the BGB: Chen (2016), 461.

continental models and Socialist ideology).⁹¹ Pending accession to the World Trade Organization, which was finalized in 2001, China repealed the Economic Contract Law of 1981 and the Foreign Economic Contract Law of 1985 by adopting a unified regulation, the Contract Law of 1999. The rules of the Contract Law were maintained with minor modifications in the Book III ('Contracts') of the Chinese Civil Code, which was approved in May 2020 and came into force on January 1st, 2021.

A number of concepts and provisions of the (then Contract Law and now) Book III of the Civil Code were borrowed from the German and Japanese Civil Code, as well as from the CISG, the UNIDROIT Principles and the 1996 UNCITRAL Model Law of Electronic Communication of the United Nations Commission on International Trade Law.⁹² This is evidenced, for instance, by the presence of general clauses on good faith,⁹³ the absence of any requirement of cause (or consideration) for contract validity, contract formation being based upon receipt of the acceptance by the offeror,⁹⁴ and rules on pre-contractual liability,⁹⁵ *laesio enormis*⁹⁶ and specific performance.⁹⁷ These continental traits are mixed with provisions on the State's control over private autonomy, particularly allowing administrative supervision of contracts⁹⁸ and subjecting the validity of contracts to their observance of "public order" and "good morals" (Article 143). There is also some clear influence of US law, for instance on rules on anticipatory breach,⁹⁹ although the US imprint is less evident than in other pieces of legislation, such as the 1993 Law on Protection of Consumers' Rights and Interest, the 1994 Company Law and the 2007 Anti-Monopoly Law.¹⁰⁰

Outside the Code remains the 2010 Law on the Application of Law for Foreign-Related Civil Legal Relationships, which constitutes the main Chinese statute on private international law. Article 41 of the 2010 Law recognizes that parties in a foreign-related contract are free to choose the applicable law (whereby 'law' is

⁹¹ To the list one should also add the Technology Contract Law of 1987. On all these acts, Chen and DiMatteo (2018), 4–5; Chen (2016), 465–493; Zhang (2006), 48–49; Chen (2001), 155–160; Fu (2011), 16–17; Huang and Chen (1999), 41–43.

⁹² On all these sources, see Janssen and Chau (2018), 447–455; DiMatteo and Wang (2018); DiMatteo (2018), 397–400; Fu (2011), 20; Shaohui (2008), Ling (2002), 37–38; Zhang (2000), 239–240. In 2006 China signed the United Nations Convention on the Use of Electronic Communications in International Contracts, although it never ratified it.

⁹³ See for instance Articles 466, 500, 509 and 558 of the Chinese Civil Code.

⁹⁴ Article 483 of the Chinese Civil Code.

⁹⁵ Article 500 of the Chinese Civil Code.

⁹⁶ Articles 577 and 578–580 of the Chinese Civil Code.

⁹⁷ See Article 157 of the Chinese Civil Code.

⁹⁸ Article 502 of the Chinese Civil Code; on the great deal of administrative supervision of contracts, including licensing and approvals, see Zhang (2000), 248–252, as well as Zhang & Dong, Chinese report, no 3.2.1.

⁹⁹ See Articles 563 and 578 (on anticipatory breach) of the Chinese Civil Code. The influence of US law on the Chinese law of contract is a trait often emphasized—if not exaggerated—by US-trained commentators: cf. Mateson (2006), 340; Zhang (2000), 238.

¹⁰⁰ All these texts are also influenced by EU and European laws: see, respectively, Thomas (2018); Minkang (2010), 5–6, 13–14; Harris et al. (2011), 2–4.

generally understood as State law only¹⁰¹). In the absence of the parties' choice, the same article mandates the application of "the law of the habitual residence of the party whose performance of obligation is most characteristic of the contract or the law that is most closely connected with the contract".¹⁰² Special criteria for identifying the applicable law to specific types of contracts are set forth by the Provisions of the Supreme People's Court on Certain Issues Concerning the Application of Law in the Trial of Cases Involving Disputes over Foreign-related Civil or Commercial Contracts of 2007, which are still deemed to be in force.¹⁰³ Foreign law is however not applicable when it would harm "the social and public interest of the PRC"¹⁰⁴ and is never applicable to Chinese-foreign joint venture contracts and contracts for Chinese-foreign joint exploration and development of natural resources, if performed within the territory of the People's Republic of China, which are mandatorily subject to Chinese law.¹⁰⁵

As the reference to the Supreme People's Court's Provisions on private international law makes clear, the role of the Chinese judiciary is akin to that of Russian courts, mixing a continental institutional structure with Chinese and socialist characteristics.¹⁰⁶ Contract law disputes are heard by ordinary civil courts, which are structured on four levels: county courts, intermediate courts, high courts and then, at the apex, the Supreme People's Court (SPC)¹⁰⁷—however no more than two instances, one trial and one appeal, are ordinarily possible.¹⁰⁸ While there is no separate system of commercial courts, the SPC has established in 2018, as its own bodies, two 'international commercial courts—one in Shenzhen and one in Xi'an—, which are meant to work as the court of first (and only) instance for commercial parties who choose to submit their high-value controversy to the jurisdiction of the Court.¹⁰⁹ There is no doctrine of *stare decisis* and judges are required to apply the law, avoiding any interpretative/creative intervention, since the power of making and interpreting the law officially lies in the NPC and in its Standing Committee only. Yet, like in Russia,

¹⁰¹ Tu (2016), 74–75.

¹⁰² Article 41 of the 2010 Law confirms the criteria that were already embraced by Article 126 of the 1999 Contract Law and that are currently enshrined in Article 467 of the Chinese Civil Code.

¹⁰³ Tu (2016), 31.

¹⁰⁴ Article 5 of the Law on the Application of Law for Foreign-Related Civil Legal Relationships.

¹⁰⁵ Article 467 of the Chinese Civil Code. The rule has remained unaffected by the Chinese Foreign Investment Law of 2019.

¹⁰⁶ On this point, as well as for a survey of the historical precedents of the actual system, see Yu and Gurgel (2012).

¹⁰⁷ The Supreme People's Court is a constitutional body under Article 127 of the Constitution. Local courts are mentioned by Articles 123–126 of the Constitution, but their concrete structure is set forth by Articles 17 and ff. of the 2011 Organic Law of the People's Courts of the People's Republic of China. On the Chinese judicial system, see Chen (2016), 187–195.

¹⁰⁸ See Article 11 of the Organic Law of the People's Courts of the People's Republic of China ("In the administration of justice, the people's courts adopt the system whereby the second instance is the last instance").

¹⁰⁹ See the China International Commercial Court's website at <http://cicc.court.gov.cn/html/1/219/193/195/index.html>, as well as Fei (2020) and Sun (2020).

the SPC does not only perform the judicial function; its main role is supervising and providing guidance to lower courts.¹¹⁰ The guidance of the SPC is given through four types of texts (interpretations, provisions, replies, decisions) which interpret and clarify the law for lower courts and are legally binding on everybody (not only on lower courts).¹¹¹ In particular, the SPC's Interpretations and Provisions (which can be cited by lower courts in their judgments) occupy a central position in the Chinese system of legal sources. De facto, the Court is a sort of second legislature. To provide a few illustrations, before and after the enactment of the 2010 Law on the Application of Law for Foreign-Related Civil Legal Relationships, the rules for determining the applicable law to specific contracts were dictated by the SPC's Provisions of 2007. After the enactment of the 1999 Contract Law, which said nothing on hardship, it was the SPC's Judicial Interpretation that, in 2009, officially introduced in the Chinese system the doctrine of change of circumstances and the right of the disadvantaged party to have the contract modified or terminated by courts¹¹²—a rule which is now enshrined in Article 533 of the 2020 Civil Code. In addition to such texts, the SPC also publishes collections of its own case-law (the so-called 'Gazette' cases), which are considered an important secondary source of law,¹¹³ as well as a selection of 'guiding cases' from the Court itself and other courts, which are cases in which "facts are clearly ascertained, law is correctly applied, and reasoning for the adjudication is sufficient, and which [provide] good legal and social outcomes as well as universal guiding significance for the adjudication of similar cases".¹¹⁴ Although not officially binding, guiding cases are to be taken into account by courts adjudicating similar issues and can even be quoted by them, although not as a basis for their decisions.¹¹⁵ According to another set of SPC's Provisions, courts in their judgments should only report the relevant laws and judicial interpretations by the SPC itself.¹¹⁶

As stated by the SPC, Chinese judges cannot cite legal scholarship. Similar to what happens in Russia, legal scholarship is not considered among the sources of law.

¹¹⁰ Cf. Article 127 of the Constitution and Article 32 of the Organic Law of the People's Courts of the People's Republic of China.

¹¹¹ The Court itself declared that these texts are binding: see Article 5 of the 2007 Supreme People's Court's Provisions on the Work Concerning Judicial Interpretation. The power to interpret the law was officially delegated by the NPC's Standing Committee to the Supreme People's Court in 1981: Resolution of the Standing Committee of the National People's Congress Providing an Improved Interpretation of the Law. For a detailed analysis of the types and effects of the Supreme People's Court's interpretations, see Qi (2020).

¹¹² Article 26, SPC's Second Judicial Interpretation Concerning the Application of the Contract Law of China on 24 April 2009.

¹¹³ Chen and DiMatteo (2018), 7.

¹¹⁴ Article 2, SPC's Detailed Implementing Rules on the Provisions of the Supreme People's Court Concerning Work on Case Guidance, of 13 May 2015.

¹¹⁵ Articles 9–10 of the SPC's Detailed Implementing Rules on the Provisions of the Supreme People's Court Concerning Work on Case Guidance. See also Liu (2019).

¹¹⁶ See Article 4 of the SPC's Provisions on How to Cite Laws, Regulations and Other Normative Documents in Judicial Judgments and Decisions, 26 October 2009, no 14.

However, legal doctrine regularly guides the design and drafting of legislation, and often provides the materials applied by judges when developing their arguments.¹¹⁷

Like elsewhere, parties to commercial contracts prefer to submit their disputes for arbitration rather than to ordinary courts. The People's Republic of China has a long history of arbitration: The Foreign Trade Arbitration Commission was established as early as 1954 to deal with foreign-related contracts and investments¹¹⁸; the 1985 NY Convention was signed and ratified by China in 1987. Arbitration is currently regulated by a law enacted in 1994, as supplemented by SPC's judicial interpretations, which provide different tracks for domestic and international (called 'foreign-related') arbitral proceedings.¹¹⁹ Most notably, a SPC's Notice of 1995 has obliged intermediate people's courts, in cases in which they are about to set an (international or foreign) award aside, or to deny recognition/enforcement, to report their intended decision to the high court. If the high court is also in favour of vacating the award or denying recognition/enforcement, it should send the case to the SPC and ask for the latter's advice¹²⁰: it is the so-called Prior Reporting System, the aim of which is to ensure minimal judicial interference with foreign arbitral awards. Overall, the market for arbitration in China seems to be thriving. Ever since the enactment of the Arbitration Law, official statistics report that Chinese arbitral commissions have handled over 2.6 million cases involving more than 70 countries.¹²¹ Since the 1990s, the China International Economic and Trade Arbitration Commission (the successor of the ancient Foreign Trade Arbitration Commission) has had one of the heaviest caseloads among the world's major arbitration institutions, handling, on an average, more than 2,000 cases annually.¹²²

5 South Africa

South Africa is a republic made up of a national government, nine provinces and local spheres of government.¹²³ According to the 1996 Constitution, which is the supreme law of the land,¹²⁴ national legislative power is residual, while legislative competence is vested in the provinces, except in a few areas of concurrent national

¹¹⁷ Ge (2019), 46, 49–50; Tu (2016), 9.

¹¹⁸ Houzhi (1984), 520.

¹¹⁹ See Chinese Arbitration Law of 1994; see also Chen and Wang (2020); Mo (2017), 188–191.

¹²⁰ Notice of the Supreme People's Court on the Handling by People's Courts of Issues Concerning Foreign-related Arbitration and Foreign Arbitration no 18 of 20 August 1995, at <http://cicc.court.gov.cn/html/1/219/199/201/701.html>.

¹²¹ See 全国仲裁机构累计处理案件逾260万件 标的额逾4万亿元.仲裁已成为解决民商事纠纷主渠道之一, a media report by the Ministry of Justice available at the official website www.moj.gov.cn/subject/content/2019-03/26/862_231600.html.

¹²² See CIETAC, Introduction, at <http://www.cietac.org/index.php?m=Page&a=index&id=34&l=en>.

¹²³ See Section 40 of the 1996 Constitution of the Republic of South Africa.

¹²⁴ Section 2 of the 1996 Constitution.

and provincial competence.¹²⁵ Such a division of power, however, leaves the area of private law almost unaffected, since, in South Africa's mixed legal system, the basic principles and rules of private law, in particular in the area of obligations, are to be found in the country's uncodified common law. The power "to develop the common law" is inherent in courts (and, in particular, in the Constitutional Court, the Supreme Court of Appeal and the High Court of South Africa).¹²⁶

This mix of laws in South Africa is the result of the country's long and varied history of colonization, which started with the Dutch East India Company's settlement in the Cape of Good Hope in 1652 and then continued under British rule from 1806 until the country's independence (first, as an independent dominion of the British empire and then as the Republic of South Africa).¹²⁷ South African common law consists of "an amalgam of rules drawn primarily from Roman-Dutch and, to a lesser extent, English law, which have been combined and adapted by the Courts so as to meet what they perceived as the country's own evolving needs".¹²⁸

This is particularly evident in the law of contracts, which has been forged from Seventeenth century Roman-Dutch civil law and Nineteenth century English common law. In particular, South African contract law derives from Roman-Dutch law the Latin-based vocabulary, a number of core concepts, the systematization of the law of contract as a branch of the law of obligations, and a distinctive inclination to work with abstract legal concepts. But, in terms of the underlying policies and values that they promote, South African contract principles and rules are at times closer to those of Nineteenth century English common law, and are strongly centred on freedom of contract, individual autonomy and legal certainty, as opposed to using values like good faith and Ubuntu to promote greater contractual fairness.¹²⁹ South African contract law therefore traditionally recognizes a limited role for the principle of good faith, only imposes precontractual liability in limited situations, provides no relief based on *laesio enormis* and hardship, and enshrines a variety of English-derived rules, such as the doctrines of estoppel and undue influence, and the notion that anticipatory breach or repudiation is a ground for cancellation.¹³⁰ Furthermore, like the United Kingdom, South Africa has not ratified the CISG (in spite of academic

¹²⁵ For instance, consumer protection law falls into the areas of concurrent national and provincial competence: see Schedule 4 of the 1996 Constitution.

¹²⁶ See Section 173 of the 1996 Constitution ("The Constitutional Court, the Supreme Court of Appeal and the High Court of South Africa each has the inherent power to protect and regulate their own process, and to develop the common law, taking into account the interests of justice"). Also see Section 39(2) of the 1996 Constitution, which the courts often refer to when developing the common law to ensure that it conforms to constitutional demands.

¹²⁷ On the history of South African law and on the variety of official and customary laws applying to the country's heterogeneous population, see, among the many, Van der Merwe et al. (2012), du Bois (2004), Bennett (1996).

¹²⁸ du Bois (2004).

¹²⁹ The emphasis on freedom of contract is evidenced, *inter alia*, by the little relevance that inequality of bargaining power plays under South African contract law, and by parties' freedom in limiting their liability through exclusionary clauses: see du Plessis, South African report, nos 3.1.2, 5.1.2, 6.1.2, 7.2.1.

¹³⁰ du Bois (2004), 42; Lubbe and du Plessis (2004), 243–274.

views suggesting this should be done¹³¹) and there is no evidence of the UPICC's influence on the development of domestic contract law.¹³²

Needless to say, in many cases the South African common law of contract is integrated and supplanted by legislation, which is mostly drafted in the style of detailed rules intended to minimise judicial gap-filling. This is, for instance, the case of antitrust law and consumer contract laws, regulated by the Competition Act 89 of 1998 and Consumer Protection Act 68 of 2008 respectively,¹³³ of contracts formed through electronic means, regulated by the Electronic Communications and Transactions Act 25 of 2002 (following the 1996 UNCITRAL Model Law on Electronic Commerce), and of arbitration law, regulated by the Arbitration Act 42 of 1965 and the International Arbitration Act 15 of 2017, devoted to domestic and international arbitration respectively. Company law too is subject to a separate act, the Company Law Act 71 of 2008.

Private international law rules applicable to contracts, by contrast, are dictated by common law principles. Under such principles, parties are free to choose the applicable law (which, according to South African scholarship, might include non-state law¹³⁴). In the absence of the parties' choice of law, courts determine the proper law applicable to the contract by interpreting the intention of the parties or by looking for the legal system with which the transaction has its closest and most real connection.¹³⁵ Common law also governs recognition and enforcement of foreign judgments, which is possible only if certain requirements (such as the foreign courts having jurisdiction and the decision respecting South African public policy) are met.¹³⁶ Yet, according to the Protection of Businesses Act 99 of 1978, foreign judgments arising from transactions "connected with the mining, production, importation, exportation, refinement, possession, use, or sale of, or ownership of any matter or material, of whatever nature, whether within, outside, into or from the Republic"¹³⁷ are not enforceable in the Republic, except with the permission of the Minister of Economic Affairs. The provision (which was meant to shield South African companies from the effect of US antitrust laws) is unfortunately worded in very wide terms and has been repeatedly criticized by commentators.¹³⁸ However, courts have substantially limited the scope

¹³¹ See for instance Wethmar-Lemmer (2016), 59.

¹³² See Naudé and Lubbe (2001).

¹³³ On the influence of EU law on South African competition and consumer law, see Bradford et al. (2019), Barnard (2017).

¹³⁴ Neels and Fredericks (2006), 122–125.

¹³⁵ Oppong (2013), 133. The same author notes that South Africa has been one of the first African countries to have shown interest in private international law issues, since the first volumes of the Cape Law Journal (1884–1900—now South African Law Journal) already contained several articles on private international law issues: see Oppong (2007), 694.

¹³⁶ The leading case in this regard is South Africa's Supreme Court of Appeal, *Jones v Krok* 1995 (1) SA 677 (A) 685.

¹³⁷ Section 1(3) of the Protection of Businesses Act 99 of 1978. Until the Schedule 4 of the Arbitration Act 15 of 2017 repealed from Section 1 the word 'arbitral awards', the same provision was applicable to foreign arbitral awards.

¹³⁸ See for instance Oppong (2007), 708–709.

of the Act by interpreting it strictly, for example by holding that the above-mentioned rule only applies to transactions involving raw materials rather than manufactured goods.¹³⁹

As all of the above makes clear, the main architects of South African contract law are the courts. Courts competent in private law matters are organized in a three-tier system of courts of general jurisdiction: magistrates' courts, the High Court of South Africa, and the Supreme Court of Appeal (plus, as far as constitutional issues are concerned, the Constitutional Court).¹⁴⁰ The High Court operates both as a court of first instance and as an appellate court for reviewing decisions from the magistrates' courts; the Supreme Court of Appeal is the highest court for non-constitutional matters, and hears only cases for which a leave to appeal is obtained from either the Court itself or the High Court.¹⁴¹ South African courts follow the doctrine of *stare decisis*: precedents established by earlier courts in principle must be followed, unless they are considered to be clearly wrong, while decisions of higher courts are binding on all lower ones.¹⁴² The style of South African decisions is very close to the open, discursive style of English judgments. Yet, South African courts display a remarkable tendency to consider not only material relating to other common law systems (especially Canada and the United States, less often India, Australia, New Zealand) and to contemporary civil law systems (particularly German and the Netherlands), but also Eighteenth and Nineteenth century legal authorities of European *jus commune*.¹⁴³

It follows that legal scholarship enjoys a peculiar position in the South African system. Civil law scholarship predating the age of codification in Europe is considered a source of law.¹⁴⁴ This is not the case for contemporary legal doctrine, which enjoys no formal authority and yet is highly respected by courts.¹⁴⁵ Further, law professors play a key role in promoting legal reforms, for instance by participating in the work of the South African Law Reform Commission, the body that, similar to the English one, oversees the development of the law and puts forward proposals for law reform.¹⁴⁶

¹³⁹ High Court, *Tradex Ocean Transportation SA v MV Silvergate (or Astyanax) and Others*, 1994 (4) SA 119 (D); High Court, *Chinatex Oriental Trading Co. v Erskine*, 1998 (4) SA 1087 (C); Supreme Court of Appeal, *Richman v Ben-Tovim*, 2007 (2) SA 283 (SCA).

¹⁴⁰ See Section 166 of the Constitution.

¹⁴¹ See Sections 168–170 of the South African Constitution, as well as rules 49 and 51 of the 2009 Uniform Rules of Court; see also du Bois (2004), 25–27; Erasmus (2004), 443–444.

¹⁴² du Bois (2004), 43–44; van Huyssteen and Maxwell (2019), 34.

¹⁴³ van Huyssteen and Maxwell (2019), 34–35; Van der Merwe et al. (2012); du Bois (2004), 51–52; O'Regan (1999). South African courts' openness to foreign legal sources is further strengthened by the constitutional provision authorizing courts to "consider foreign law" when interpreting the Bill of Rights (Section 39 (1) (c) of the 1996 Constitution).

¹⁴⁴ See Supreme Court of Appeal, *Willis Faber Enthoven (Pty) Ltd v Receiver of Revenue*, 1992 (4) SA 202 (A) (per Hefer JA) at 219I–J; Supreme Court of Appeal, *Tjollo Ateljees (Edms) Bpk v Small* 1949 1 SA 856 (A) (Van den Heever JA), at 874.

¹⁴⁵ du Plessis (2012), 818; Guadagni (1989), 19–28.

¹⁴⁶ See <https://www.justice.gov.za/salrc/about.html>.

In the field of arbitration, South African law seems to be more aligned with civil law approaches rather than with common law ones. Arbitration is governed by legislation, i.e., the Arbitration Act 42 of 1965 (on domestic arbitration) and the International Arbitration Act 15 of 2017 (which transplants the 2006 UNCITRAL Model Law on International Commercial Arbitration¹⁴⁷). The latter Act also deals with the recognition and enforcement of foreign arbitral awards, essentially incorporating the criteria set forth in the 1958 NY Convention, ratified by South Africa in 1976.¹⁴⁸ In recent years, many institutions have been established to support the development of arbitration: the Association of Arbitrators of Southern Africa was formed in 1979¹⁴⁹ and the Arbitration Foundation of Southern Africa was created in 1996.¹⁵⁰ The latter was given the responsibility, in partnership with the Shanghai International Arbitration Centre (SHIAC), to establish the China-Africa Joint Arbitration Centre (CAJAC), with two seats launched in Johannesburg and Shanghai in 2015.¹⁵¹

6 India

India is a Union of twenty-eight states.¹⁵² According to the 1950 Constitution, the Union and the states each have exclusive power to legislate on matters that are enumerated in the Seventh Schedule's lists for the Union and states respectively; the Union and the states enjoy concurrent legislative powers in matters mentioned in the Schedule's 'concurrent' list.¹⁵³ The Union also has residual power on any issue not mentioned in the latter Schedule.¹⁵⁴ For instance, the regulation of foreign and inter-State trade falls exclusively within the jurisdiction of the Union, intra-State trade within the exclusive competence of the states, while regulation of 'contracts' and 'civil procedure' is a matter for concurrent jurisdiction.¹⁵⁵ In practice, however, the concurrent jurisdiction gives the central government considerable power over the

¹⁴⁷ See Section 6 of the International Arbitration Act 15 of 2017.

¹⁴⁸ As to the criteria for denying recognition/enforcement, see Section 18 of the International Arbitration Act 15 of 2017.

¹⁴⁹ <https://www.arbitrators.co.za/about-us/>.

¹⁵⁰ <https://arbitration.co.za/a-brief-history/>.

¹⁵¹ Cf. <http://www.cajacjhb.com> and <http://www.shiac.org/CAJAC/index.aspx>. See also du Plessis, South African report, n 1.2.

¹⁵² See Article 1 (1) of the Indian Constitution of 1950.

¹⁵³ See Article 246 (1)–(3) of the Constitution.

¹⁵⁴ Article 248 of the Constitution.

¹⁵⁵ Cf. the Schedule Seven of the Constitution, 'Union list', nos 41–42; 'State list', no 26; 'Concurrent list', nos 7 and 13. Similarly, the power to provide for stamp duties on written instruments, including contracts, is shared between the Union and the States: see the Schedule Seven of the Constitution, 'Union list', no 91; 'State list', no 63. Although lack of the stamp does not affect the validity of a contract, written contracts cannot be presented as evidence in court unless they are duly stamped: Bhadbhade (2012), 105–106.

substance and procedure of private law. Moreover, the central legislature has used its power under Article 249 (1) of the Constitution to enact laws in matters falling within the exclusive jurisdiction of states when this is “necessary or expedient in the national interest”.¹⁵⁶ The significance of India’s centralized legislative power in our field, in its turn, is tempered by the fact that much of private law regulation pre-dates the country’s independence from the United Kingdom in 1947, and is actually a legacy of the British rule. It is the Constitution itself that expressly affords all pre-independence legislation continuing validity under the new constitutional system.¹⁵⁷

In the context of an extensive project to codify the common law for all of British India, the colonial government of India enacted the Indian Contract Act in 1872. The codifiers aimed to provide a clear, ordered and written systematization, enriched with illustrations, of the basic rules of English common law, as adapted to the needs of Indian society. Among the objectives underlying such an effort, was the desire of helping local courts and of minimising the risk of unpredictable legal change.¹⁵⁸ The Indian Contract Act (which, with amendments, is still in force today) embodies the distinctive traits of Nineteenth-century English contract law – such as offer and acceptance being effective upon communication, the requirement of consideration for contract validity, doctrines of undue influence and misrepresentation,¹⁵⁹ absence of rules not only on good faith, but also on pre-contractual liability and hardship, although with some important modifications (for instance, past consideration is a valid consideration and all agreements in restraint of trade are void).¹⁶⁰ But the most significant deviation from the common law effected by the Indian Contract Act, 1872 concerns the system of legal sources and the role of courts. Although the Act is far from being a complete codification of contract law and leaves substantial areas to judicial law-making (which Indian courts often fill by looking at English cases¹⁶¹), the codification has effectively distanced Indian contract law from the intrinsic generativity of English common law, putting at centre stage legislative directives as applied and interpreted by courts.¹⁶² A good illustration comes from rules on

¹⁵⁶ Article 249 (1) of the Constitution. On such use of central legislative power, see Niranjana (2016), Halberstam and Reimann (2014), 11; Parikh (2014), 256–258; Bhadbhade (2012), 32.

¹⁵⁷ See Article 372 (1) of the Indian Constitution.

¹⁵⁸ Balganes (2016), 680–682. Localised versions of the same Act are in force in several other countries, such as Pakistan, Bangladesh, Malaysia and Tanzania: Briggs and Burrows (2018), 479.

¹⁵⁹ See respectively Sections 3, 25, 16, 18 of the Indian Contract Act.

¹⁶⁰ See Sections 25 (1), letter (b) and 27 of the Indian Contract Act. Under English law, past consideration is not good (*Eastwood v Kenyon* [1840] 11 Ad & E 438) and agreements in restraint of trade are valid if they are reasonably justified (*Shearson Lehman Hutton Inc v MacLaine Watson & Co. Ltd* [1989] 2 Lloyd’s Rep. 570, 615).

¹⁶¹ For instance, in the silence of the Indian Contract Act and in line with the English common law, Indian courts have held that both perpetual agreements and exclusionary clauses are valid and enforceable (although there is a presumption against perpetual bonds and exclusionary clauses are restrictively interpreted): see Bhadbhade, Indian report, nos 5.12 and 7.1.2. See also, more in general, Bhadbhade (2012), 68.

¹⁶² Balganes (2016), 680–682; see also Bhadbhade, Indian report, no 1.

penalty/liquidated damages. English law traditionally distinguishes between liquidated damages clauses (where the parties genuinely attempt to pre-estimate their losses in case of breach) and penalty clauses (where the amount exceeds that that can be reasonably pre-estimated), and allows enforcement of the former in the absence of any proof of actual loss.¹⁶³ Section 74 of the Indian Contract Act, 1872 speaks of both the sum due and the penalty and allows the party complaining of the breach, “whether or not actual damage or loss is proved to have been caused thereby, to receive from the party who has broken the contract reasonable compensation not exceeding the amount so named”. Yet, in 1929, in an appeal from India, the Privy Council held that “the effect of s. 74 of the Contracts Act 1872 is to disentitle the plaintiffs to recover the sum [provided in the contract] whether as penalty or liquidated damages. The plaintiffs must prove the damages they had suffered”.¹⁶⁴ Subsequent rulings by the Indian Supreme Court confirmed the Privy Council’s approach, holding that s.74 departs from English law in that it does not distinguish between penalties and liquidated damages clauses and requires that all sums stipulated as payable for a breach must be proved to have been suffered.¹⁶⁵ As the example shows, Indian contract law shares the mindset and vocabulary of English common law, but differs from it in terms of sources, interpretive approach and contents.

Apart from general contract law, legislation also covers specific areas of contract law. Worth mentioning are the Sale of Goods Act, 1930 (heavily borrowed from the English Sale of Goods Act, 1893; India followed the English lead in deciding not to ratify the CISG¹⁶⁶), the Specific Relief Act, 1963,¹⁶⁷ the Arbitration and Conciliation Act, 1996 (based on the 1985 UNCITRAL Model Law on International Commercial Arbitration for regulating both domestic and international arbitration),¹⁶⁸ the Information Technology Act, 2000 (based on the 1996 UNCITRAL Model Law on Electronic Commerce), the Competition Act, 2002, and the Consumer Protection Act, 2019.¹⁶⁹ Company law, too, is subject to a separate act, the Companies Act, 2013. Conflicts of law rules, in contrast, are common law-based. As in England, such rules allow the parties in transnational contracts to freely choose the law applicable to their contract, and, in the absence of parties’ choice, point to the ‘proper

¹⁶³ See *Dunlop Pneumatic Tyre Co Ltd v New Garage & Motor Co. Ltd* [1915] AC 847 (establishing a four pronged test to distinguish penalties from liquidated damages clauses); *Cavendish Square Holding BV v Talal El Makdessi (El Makdessi) and ParkingEye Ltd v Beavis* [2015] UKSC 67 (replacing the Dunlop criteria with a proportionality test).

¹⁶⁴ *Bhai Panna Singh v Bhai Arjun Singh*, AIR 1929 PC 179 (per Lord Atkin).

¹⁶⁵ *Fateh Chand v Balkishen Das* [1964] 1 SCR 515; AIR 1963 SC 1405; *Maula Bux v Union of India* [1970] 1 SCR 928. See Bhadbhade, Indian report, no 7.2.3, as well as Swaminathan (2018).

¹⁶⁶ Indian academic scholars, by contrast, support the ratification of the CISG: see for instance Nain and Manish (2011). As to the UPICC, there is no evidence of their influence in either Indian legislation or case-law: Khanderia (2018a).

¹⁶⁷ See also the Special Relief (Amendment) Act, 2018, whose Section 3 introduced specific performance as a general remedy.

¹⁶⁸ The Act was amended in 2015 and in 2019.

¹⁶⁹ The Act repealed the preexisting Consumer Protection Act 1986.

law' of the contract, to be inferred from parties' tacit or presumed intention.¹⁷⁰ It is doubtful whether Indian courts would enforce parties' choice to have their contract governed by a non-state law.¹⁷¹

While "legislation is the primary source of law"¹⁷² in India, judicial precedents are an important source as well. The Indian judicial system is structured in three levels. States' civil and district courts are at the lower level and are subordinate to states' High Courts; a reform of 2015, carried out to improve India's score in the World Bank's Doing Business Reports, established lower level commercial courts for hearing high-value commercial disputes and a special commercial division in every High Court.¹⁷³ The apex court, and the only federal judicial body, is the Supreme Court.¹⁷⁴ Besides receiving requests for the enforcement of constitutional rights,¹⁷⁵ the Supreme Court hears cases certified for appeal by High Courts and has discretionary appellate jurisdiction over any order passed by any court or tribunal across the country.¹⁷⁶ The doctrine of *stare decisis* applies in India: the law declared by the Supreme Court is binding on all courts within the Indian territory,¹⁷⁷ and only the Supreme Court itself is free to depart from it. Further, judgments of the High Court are binding on all the courts subordinate to them (although not on other High Courts).¹⁷⁸ In their decisions, Indian courts rely upon legislative provisions and judicial opinions, as well as on case-law from other common law jurisdictions, the most prominent among which are England, the United States, Canada and Australia.¹⁷⁹ Articles in journals and academic works are rarely mentioned in decisions, while reference to books and treatises is more common.¹⁸⁰

Coherent with India's membership in the common law tradition, legal scholarship is not per se regarded authoritative. Yet, legal doctrine is (occasionally quoted by courts and) regularly used by judges to scrutinize the precedents on which their

¹⁷⁰ Noronha (2010), 4–6, 71–74.

¹⁷¹ Choice of non-state law, by contrast, is explicitly allowed in international arbitration by Section 28 (1) (b) of the Arbitration and Conciliation Act, 1996: Khanderia (2018b).

¹⁷² Bhadbhade (2012), 63.

¹⁷³ See Commercial Courts, Commercial Division and Commercial Appellate Division of the High Courts Act, 2015, as well as Ramani Garimella and Ashraful (2019).

¹⁷⁴ See Articles 124–147 (on the Supreme Court), 214–232 (on High Courts), 233–237 (on subordinate courts) of the Indian Constitution, as well as Bhadbhade (2012), 32, 36–37.

¹⁷⁵ See Article 32 of the Indian Constitution.

¹⁷⁶ See, respectively, Articles 132–134 and 136 of the Indian Constitution. On the competence, power and approach of the Indian Supreme Court, see Chandra et al. (2017); Robinson (2013), 175–193.

¹⁷⁷ See Article 141 of the Indian Constitution. Even the obiter dicta of the Indian Supreme Court are considered to be binding: *Commissioner of Income-Tax v Vazir Sultan and Sons* AIR 1959 SC 814.

¹⁷⁸ Bhadbhade (2012), 66 (also for the specification that the precedent value of High Courts' judgments does not derive from any enactment).

¹⁷⁹ Balakrishnan (2008).

¹⁸⁰ Bhadbhade (2012), 70.

decisions should be based.¹⁸¹ Further, legal scholars are involved in the drafting of statutes and often sit as members of the Indian Law Commission.¹⁸²

It is, for instance, following the suggestions of the 246th Report of the Indian Law Commission of 2014¹⁸³ that the Arbitration and Conciliation Act, 1996 (which governs both domestic and international arbitration on the basis of the 1985 UNCITRAL Model Law) was amended in 2015 to give the High Courts and the Supreme Court exclusive jurisdiction in deciding issues related to international commercial arbitration.¹⁸⁴ In an attempt to improve India's score in the Doing Business Reports, a further legal reform was enacted in 2019 to establish a new independent governmental body, the Arbitration Council of India, charged with the task of supervising Indian arbitral institutions.¹⁸⁵ These reforms are part of a general trend in the country towards strengthening arbitration. Part of the same trend is visible in the judicial position on the recognition and enforcement of foreign arbitral awards. The issue is regulated along the lines of the NY Convention, which India ratified in 1960.¹⁸⁶ Until recently, the Indian Supreme Court allowed foreign arbitral awards to be set aside by lower courts and adopted an expanded notion of the 'public policy' reasons justifying the denial of recognition and enforcement of awards.¹⁸⁷ In the 2010s, however, the Court reversed its position and embraced a restrictive view of both the jurisdiction of Indian courts and reasons to deny recognition/enforcement of foreign arbitral awards.¹⁸⁸ This move towards favouring arbitration is also visible in the multiplication of arbitral institutions. Besides the newly created Indian Council of Arbitration,¹⁸⁹ the International Centre for Alternative Dispute Resolution (ICADR)

¹⁸¹ Bhadbhade (2012), 70 ("One reaches the appropriate report or case from its citation given in books. More often, general digests and manuals or those compiled for particular subjects are useful in locating cases").

¹⁸² Halberstam and Reimann (2014), 14; Bhadbhade (2012), 45, 66. See also <http://lawcommissionofindia.nic.in>. It must be noted that, among the law commissions existing in former British colonies, the Indian one is the one whose proposals are least incorporated in the law: see the comparative analysis carried out by Hammond (2016), 178.

¹⁸³ Indian Law Commission, Report no. 246. Amendments to the Arbitration and Conciliation Act 1996, August 2014, at <http://lawcommissionofindia.nic.in/reports/Report246.pdf>.

¹⁸⁴ See Section 2 (1) letter (e) and Section 6 of the Arbitration and Conciliation (Amendment) Act, 2015.

¹⁸⁵ See Arbitration and Conciliation (Amendment) Act, 2019 and Narang (2020).

¹⁸⁶ See Section 48 of the Arbitration and Conciliation Act, 1996 (the Section, however, applies only to awards from states which ratified the NY Convention; other Sections deal with the enforcement of awards stemming from countries that are not parties to the NY Convention).

¹⁸⁷ See, respectively, *Bathia International v Bulk Trading SA & Anr* AIR 2002 SC 1432; *Venture Global Engineering v Satyam Computer Services Ltd & Anr* AIR 2008 SC 1061 (allowing vacating foreign arbitral awards as if they were domestic ones); *Phulchand Exports Ltd v OOO Patriot* (2011) 10 SCC 300, para. 16 (equating 'public policy' with the notion of 'patent illegality').

¹⁸⁸ *Videocon Industries Ltd. v Union of India* (2011) 6 SCC 161 (holding that parties' choice of arbitration under English law excludes the application of the Indian Arbitration and Conciliation Act 1996 and jurisdiction over the dispute by Indian courts); *Shri Lal Mahal Ltd v Progetto Grano SpA* (2014) 2 SCC 433, paras. 27–30 (overruling the equation between 'public policy' and 'patent illegality'). On all these developments, see Kumar et al. (2017).

¹⁸⁹ See <http://www.icaindia.co.in>.

was set up in 1995,¹⁹⁰ the Delhi International Arbitration Centre (DIAC) in 2009,¹⁹¹ and the Mumbai Centre for International Arbitration (MCIA) in 2016.¹⁹² Further, in the past few years, many foreign arbitral institutions, including the Singapore International Arbitration Centre and the International Chamber of Commerce, have opened representative offices or national committees in India,¹⁹³ even though arbitration remains administered in their Singapore and Paris seats.¹⁹⁴

7 Comparative Conclusions

As the above survey shows, the countries under review differ not only in the contractual rules and principles they embrace, but also in the legal traditions they are more consonant with, the international models which inspired them, their systems of legal sources, judicial structures, approaches to conflict-of-laws rules, and attitudes towards arbitration.

Four systems (Brazil, Russia, South Africa, India) have a federal structure; China does not. In all the five systems, private law is mainly determined by the central government (rather than by local governments). In South Africa, contract law is mainly dictated by common law, which in turn is based on principles based on Roman-Dutch law, supplemented by English law, while in the other four countries contract law is codified, either in the civil code (Brazil, Russia, China from 2020) or in special acts (China before 2020, India). The sources of inspiration, style and contents of these codifications and statutes are however far from being uniform; Brazil's Civil Code has a German-Italian flavour, Russia's Civil Code mixes legacies of socialist law with German- and US-derived norms, China's Civil Code is largely influenced by international principles and rules (including the UPICC) and the Indian Contract Act is firmly grounded in English common law.

A similar lack of uniformity exists as to private international law rules. Conflict-of-law rules applicable to contracts are dictated by the Civil Code in Russia, by special statutes in Brazil and China and by common law in South Africa and India. Only in Brazil it is unclear whether parties are always free to choose the law applicable to their contracts, while in the other countries parties' freedom of choice is a settled principle. Nonetheless, the criteria embraced by BRICS countries to determine the applicable law in the absence of the parties' choice are different, pointing to the 'proper law' (South Africa, India), to the law of the place where the promisor resides

¹⁹⁰ See <http://icadr.nic.in>.

¹⁹¹ See <http://www.dacdelhi.org>.

¹⁹² See <https://mcia.org.in>.

¹⁹³ See <https://www.siac.org.sg/2014-11-03-13-33-43/about-us/siac-india-representative-offices> and <http://www.iccindiaonline.org>. In 2009 the London Court of International Arbitration established a subsidiary in India called LCIA-India, but shut it down in 2016: <http://www.lcia-india.org>.

¹⁹⁴ Chandru and Kumar (2019).

(Brazil), to the law of the place where the party charged with the characteristic performance resides (Russia), to either the law of the place where the party charged with the characteristic performance resides or the law most closely connected with the contract (China).

Further, South Africa and India did not ratify the CISG; Brazil, Russia and China are signatories of the CISG, but only in China such ratification seems to have exerted an influence on national law.¹⁹⁵ All five countries are members of the World Trade Organization, but the effect of such membership on contract law seems to be limited.¹⁹⁶ As to the impact of other international hard and soft sources, China, India and South Africa drafted special statutes on electronic contracts relying on the 1996 UNCITRAL Model Law of Electronic Communication of the United Nations Commission on International Trade Law,¹⁹⁷ while Russia ratified and implemented the 2005 UNCITRAL Convention on the Use of Electronic Communications in International Contracts in a special law (China signed the Convention in 2006 but never ratified it).¹⁹⁸

Diverse also are the legal sources that each country relies upon in the field of contract law. While legislation has a role to play in all the five countries examined, it ranges from announcing general principles held to be the primary source of civil law to providing detailed regulations aiming at stating deviations and exceptions to the common law. As to case law, South African and Indian law abide by the doctrine of *stare decisis*, which is not followed in civil law countries. In the absence of any doctrine of binding judicial precedents, however, Brazilian apex courts have developed the practice of the *súmulas*, while the supreme courts of Russia and China have inherited from their Soviet and socialist predecessors the power to issue guidelines and instructions akin to legislation and of general applicability. Brazil and South Africa have a unified organization of courts for civil and commercial matters; until recently, this was also the case in China and India. Yet, in 2015 India created commercial courts at the lower and appellate level and in 2018 the Chinese Supreme Court established two international commercial courts as its own bodies. Russia, by contrast, has a long history of a dual track of civil and commercial courts. Except for the so-called ‘old authorities’ of the *jus commune*, South African law does regard legal scholarship as an official source of law. Nonetheless, the works of jurists plays an important role in all the jurisdictions surveyed, although the prestige and authority associated with it change considerably from one place to the other. In Brazil, South Africa and India, judges and professors work together to either interpret existing laws (with, for instance, the Brazilian ‘*enunciados*’ produced at the ‘*Jornadas de Direito*

¹⁹⁵ China ratified the CISG in 1986, Russia in 1990, Brazil in 2013: see https://uncitral.un.org/en/texts/salegoods/conventions/sale_of_goods/cisg/status.

¹⁹⁶ While three countries—Brazil, India and South Africa—were members of the GATT since 1948 and then became members of the WTO in 1995, China adhered to the WTO only in 2001 and Russia in 2012: see https://www.wto.org/english/thewto_e/whatis_e/tif_e/org6_e.htm.

¹⁹⁷ Cf. Chinese Contract Law Act of 1999) and India Information Technology Act, 2000.

¹⁹⁸ See https://uncitral.un.org/en/texts/ecommerce/conventions/electronic_communications/status.

Civil') or to evaluate them and put forward proposals for reform (through the South African Law Reform Commission and the Indian Law Commission).

Commonalities are more visible in the regulation and practice of arbitration. All five countries are signatories of the 1958 NY Convention¹⁹⁹ and four out of five (Brazil, Russia, South Africa, India) modelled their arbitration rules on the UNCITRAL Model Law on International Commercial Arbitration, in either its 1985 or 2006 version.²⁰⁰ Yet, under the veil of legal harmonization through hard and soft international legal instruments, the interpretation given to the uniform rules such as the notion of 'public order' preventing recognition and enforcement of international arbitral awards and the criteria for setting aside arbitral awards are subject to considerable variety among countries.

Are all the above differences significant for international commercial contracting and for the project of restating rules of international commercial contracts in the BRICS countries? As we noticed at the beginning of the chapter, there are occasions in which domestic law might have a say in international commercial contracts. Domestic law might frame the expectations of parties and their behaviour during the contractual negotiations and drafting, require stamps, licences and permits, intervene in the adjudication of disputes alongside or in the middle of arbitral proceedings, and govern the enforcement of arbitral awards. It is therefore important to keep in mind and be aware of the diversity of BRICS' domestic law. Yet, one should also take into account that the overall interaction between the self-contained and largely autonomous field of international commercial contract law and national laws remains often limited. Most of the times, international commercial contracts are made, live and end having no relationship whatsoever with domestic official laws. The divergence of the latter might thus be assumed to pose little obstacle to the restatement and development of a BRICS' *lex mercatoria*.

References

- Antunes Soares de Camargo A (2003) Essay: the revised Brazilian civil code. *U Miami Int'l & Comp L Rev* 11:161–166
- Balakrishnan KG (2008) The role of foreign precedents in a country's legal system, Lecture at Northwestern University. <https://www.indialawoffices.com/legal-articles/Impact-of-Foreign-Law-on-Domestic-Judgments>
- Balganesh S (2016) The constitutionalization of Indian private law. In: Choudhry S, Khosla M, Mehta PB (eds) *The Oxford handbook of the Indian constitution*. OUP, Oxford, pp 680–696
- Barnard J (2017) The role of comparative law in consumer protection law: a South African perspective. *SA Mercantile L J* 29:353–389

¹⁹⁹ India and Russia ratified the Convention in 1960, South Africa in 1976, China in 1987, and Brazil in 2002: https://uncitral.un.org/en/texts/arbitration/conventions/foreign_arbitral_awards/status2.

²⁰⁰ Cf. the Brazilian Arbitration Act 1996, the Russian International Commercial Arbitration Law of 1993 and Domestic Arbitration Law of 2015, the South African International Arbitration Act 15 of 2017, and the Indian Arbitration and Conciliation Act, 1996.

- Benetti Timm L (2006) Direito, economia e a função social do contrato: em busca dos verdadeiros interesses coletivos protegíveis no mercado de crédito. *Revista De Direito Bancário e Do Mercado De Capitais* 33:15–31
- Bennett TW (1996) African land—an history of dispossession. In: Zimmermann R, Visser D (eds) *Southern cross. Civil and common law in South Africa*. Clarendon Press, Oxford, pp 65–94
- Berman HJ (1947) Commercial contracts in soviet law. *Cal L Rev* 35:191–234
- Betti E (1943) *Teoria generale del negozio*. Utet, Turin
- Bhadbhade N (2012) *Contracts—India*. Kluwer, The Hague
- Bologna P (2020) Guanxi and litigation in the current Chinese market: a perspective from law and society scholarship. In: Fiorentini F, Infantino M (eds) *Mentoring comparative lawyers: methods, times, and places*. Liber Discipulorum Mauro Bussani. Springer, Cham, pp 57–74
- Bradford A, Chilton AS, Linos K, Weaver A (2019) The global dominance of European competition law over American antitrust law. *J Emp Stud* 16:731–766
- Briggs A, Burrows A (2018) Formation and third party rights in the Myanmar law of contract. In: Chen-Wishart M, Loke A, Vogenauer S (eds) *Formation and third party beneficiaries*. OUP, Oxford, pp 479–515
- Bussani M (2019) Strangers in the law: lawyers' law and the other legal dimensions. *Cardozo L Rev* 40:3125–3184
- Campilongo C (2017) History and sources of Brazilian law. In: Deffenti F, Barral W (eds) *Introduction to Brazilian law*, 2nd edn. Springer, Cham, pp 1–14
- Castellucci I (2012) Legal hybridity in Hong Kong and Macau. *McGill L J* 57:665–720
- Chandra A, Hubbard WHJ, Kalantry S (2017) The supreme court of India: A people's court? *Indian L Rev* 1:145–181
- Chandru G, Kumar P (2019) International arbitration 2019—India. <https://www.globallegalinsights.com/practice-areas/international-arbitration-laws-and-regulations/india>
- Chen F (2001) The new era of Chinese contract law: history, development and a comparative analysis. *Brooklyn J Int'l L* 27:153–191
- Chen J (2016) *Chinese law: context and transformation*, 3rd edn. Martinus Nijhoff, Leiden
- Chen L, DiMatteo LA (2018) History of Chinese contract law. In: DiMatteo LA, Chen L (eds) *Chinese contract law. Civil and common law perspectives*. CUP, Cambridge, pp 3–25
- Chen L, Wang H (2020) Judicial control over arbitral awards in Mainland China. In: DiMatteo LA, Potin N, Infantino M (eds) *Cambridge handbook on judicial control of arbitral awards*. CUP, Cambridge, pp 208–223
- Costa V, Tavares Paes A Jr (2019) Brazil: international arbitration 2019. <https://iclg.com/practice-areas/international-arbitration-laws-and-regulations/brazil>
- de Albuquerque Cavalcanti Abbud A (2009) Fifty years in five? The Brazilian approach to the New York convention. In: Jemielniak J, Miklaszewicz P (eds) *Interpretation of law in the global world: from particularism to a universal approach*. Springer, Cham, pp 279–301
- Dezalay Y, Garth BG (1996) *Dealing in virtue. International commercial arbitration and the construction of a transnational legal order*. University of Chicago Press, Chicago-London
- DiMatteo LA (2018) 'Rule of law' in China: the confrontation of formal law with cultural norms. *Cornell Int'l L J* 51:391–444
- DiMatteo LA, Wang J (2018) CCL and CISG: a comparative analysis of formation, performance, and breach. In: DiMatteo LA, Chen L (eds) *Chinese contract law. Civil and common law perspectives*. CUP, Cambridge, pp 466–500
- Dozhdev D (2020) Judicial control over arbitration in Russia. In: DiMatteo L, Potin N, Infantino M (eds) *Cambridge handbook on judicial control of arbitral awards*. CUP, Cambridge, pp 304–318
- du Bois F (2004) Introduction: history, system and sources. In: van der Merwe CG, du Plessis JE (eds) *Introduction to the law of South Africa*. Kluwer, The Hague, pp 1–26
- du Plessis JE (2019) Comparative law and the study of mixed legal systems. In: Reimann M, Zimmermann R (eds) *The Oxford handbook of comparative law*, 2nd edn. OUP, Oxford, pp 474–501

- du Plessis JE (2012) South Africa. In: Smits JM (ed) *Elgar encyclopedia of comparative law*. EE, Cheltenham, pp 814–819
- Erasmus HJ (2004) Law of civil procedure. In: van der Merwe CG, du Plessis JE (eds) *Introduction to the law of South Africa*. Kluwer, The Hague, pp 431–446
- Espolaor Veronese L (2019) *A convenção de Viena e seus reflexos no direito contratual brasileiro*. Almedina, São Paulo
- Estrella Faria JA (2015) Another BRIC in the wall: Brazil joins the CISG. *Unif L Rev* 20:211–242
- Fei L (2020) Innovation and development of the China international commercial court. *Chin J Comp L* 8:40–44
- Feldbrugge FJM (1993) *Russian law: the end of the soviet system and the role of law*. Martinus Nijhoff, Leiden
- Fu J (2011) *Modern European and Chinese contract law: a comparative study of party autonomy*. Kluwer, The Hague
- Gama L Jr (2011) Prospects for the UNIDROIT principles in Brazil. *Unif L Rev* 16:613–656
- Ge J (2019) *A comparative analysis of policing consumer contracts in China and the EU*. Springer, Cham
- Gomes O (1959) Historical and sociological roots of the Brazilian civil code. *Inter-Am L Rev* 1:331–386
- Grebler E (2005) The convention on international sale of goods and Brazilian law: Are differences irreconcilable? *J L Com* 25:467–476
- Guadagni M (1989) Introduction. In: Guadagni M (ed) *Legal scholarship in Africa: country reports for the seminar held at the University of Trento on 19–22 September 1988*. University of Trento, Trento, 1989, pp 3–28
- Halberstam D, Reimann M (2014) Federalism and legal unification: comparing methods, results, and explanations across 20 systems. In: Halberstam D, Reimann M (eds) *Federalism and legal unification: a comparative empirical investigation of twenty systems*. Springer, Cham, pp 3–68
- Hammond G (2016) The legislative implementation of law reform proposal. In: Dyson M, Lee J, Wilson Stark S (eds) *Fifty years of the law commissions: the dynamics of law reform*. CUP, Cambridge, pp 175–188
- Harris HS, Wang PJ, Cohen MA, Zhang Y, Evrard SJ (2011) *Anti-monopoly law and practice in China*. OUP, Oxford
- Hill CA, King C (2004) How do German contracts do as much with fewer words? *Chi-Kent L Rev* 79:889–926
- Houzhi T (1984) Arbitration—a method used by China to settle foreign trade and economic disputes. *Pace L Rev* 4:519–536
- Huang YL, Chen Y (1999) *Contracts—China*. Kluwer, The Hague
- Ioffe OS (1985) Civil Law. In: Feldbrugge FJM, Van den Berg GP, Bradford simons W (eds) *Encyclopedia of soviet law*. Martinus Nijhoff, Leiden, pp 114–122
- Janssen A, Chau SCK (2018) The impact of the UNIDROIT principles of international commercial contracts on the Chinese contract law: past, present and future. In: DiMatteo LA, Chen L (eds) *Chinese contract law. civil and common law perspectives*. CUP, Cambridge, pp 447–455
- Junqueira de Azevedo A (2005) L'influence du droit français sur le droit brésilien. In: Wald A, Jauffret-Spinozi C (eds) *Le droit brésilien hier, aujourd'hui et demain*. Société de législation comparée, Paris, pp 456–479
- Khanderia S (2018a) Commercial Impracticability under the Indian law of contract: the UNIDROIT principles as the way forward? *UCL J L Juris* 7:52–71
- Khanderia S (2018b) Indian private international law vis-à-vis party autonomy in the choice of law. *Oxford U Commonwealth L J* 18:1–15
- Komarov AS (2011) Reference to the UNIDROIT principles in international commercial arbitration practice in the Russian Federation. *Unif L Rev* 16:657–667
- Komarov AS (1996) The UNIDROIT principles of international commercial contracts: a Russian view. *Unif L Rev* 1:247–254

- Kos-Rabcewicz-Zubkowski L (1970) East European rules on the validity of international commercial arbitration agreement. Manchester University Press, Manchester
- Kotelnikov A, Kurochkin S, Skvortsov O (2019) Arbitration in Russia. Kluwer, The Hague
- Kozolchyk B (2014) Comparative commercial contracts: law, culture and economic development. West, St Paul
- Kumar A, Upadhyay R, Jegadeesh A, Chheda Y (2017) Interpretation and application of the New York convention in India. In: Bermann GA (ed) Recognition and enforcement of foreign arbitral awards. Springer, Cham, pp 445–476
- Ling B (2002) Contract law in China. Sweet & Maxwell Asia, Kong Kong
- Liu Q (2019) Chinese ‘case law’ in comparative law studies: illusions and complexities. *Asian J Comp L* 14:97–117
- Lubbe G, du Plessis JE (2004) Law of contract. In: van der Merwe CG, du Plessis JE (eds) Introduction to the law of South Africa. Kluwer, The Hague, pp 243–274
- Macaulay S (1963) Non-contractual relations in business: a preliminary study. *Am Sociol Rev* 28:55–67
- Maggs PB (2009) Reflections of Anglo-American legal concepts and language in the new Russian civil code. In: Simons WB (ed) Private and civil law in the Russian Federation. Martinus Nijhoff, Leiden, pp 197–203
- Maggs PB, Schwartz O, Burnham W (2015) Law and legal system of the Russian Federation, 6th edn. Juris, New York
- Maleshin D (2017) Civil procedure in Russia, 3rd edn. Kluwer, The Hague
- Mancuso S (2017) Contract law in the BRICS countries. A comparative approach. In: Neuwirth RJ, Svetlicinii A, De Castro HD (eds) The BRICS-lawyers’ guide to global cooperation. CUP, Cambridge, pp 217–246
- Marinoni LG (2019) Precedentes obrigatórios, 6th edn. Revista dos Tribunais, Sao Paulo
- Mateson JH (2006) Convergence, culture and contract law in China. *Minn J Int’l L* 15:329–382
- van der Merwe CG, du Plessis JE, de Waal MJ, Zimmermann R, Farlam P (2012) The Republic of South Africa. In: Palmer VV (ed) Mixed jurisdictions worldwide. CUP, Cambridge, pp 95–215
- Milgrom PR, North DC, Weingast BR (1990) The role of institutions in the revival of trade: the law merchant, private judges, and the champagne fairs. *Econ Pol* 2:1–23
- Minkang G (2010) Understanding Chinese company law, 2nd edn. Hong Kong University Press, Hong Kong
- Mo JS (2017) Interpretation and application of the New York convention in China. In: Bermann GA (ed) Recognition and enforcement of foreign arbitral awards. Springer, Cham, pp 183–218
- Nain Y, Manish S (2011) Why India should opt for CISG. *Indian L J* 4. http://www.indialawjournal.org/archives/volume4/issue_3/article_5.html
- Narang S (2020) Arbitration and conciliation (Amendment) act 2019: significant alterations and its impact on Indian arbitration mechanism. *Manag Acc* 55(2):46–49
- Naudé T, Lubbe G (2001) Cancellation for “Material” or “Fundamental” breach: a comparative analysis of South African law, the UN convention on contracts for the international sale of goods (CISG) and the unidroit principles of international commercial contracts. *Stellenbosh L Rev* 12:371–398
- Neels JL, Fredericks EA (2006) Revision of the Rome convention on the law applicable to contractual obligations (1980): perspectives from international commercial and financial law. *J South African L* 4:121–134
- Niranjan V (2016) Legislative competence. the union and the states. In: Choudhry S, Khosla M, Mehta PB (eds) The Oxford handbook of the Indian constitution. OUP, Oxford, pp 466–486
- Noronha FE (2010) Private international law in India: adequacy of principles in comparison with common law and civil law systems. Universal Law Publishing Co, Delhi
- Oda H (2007) Russian commercial law, 2nd edn. Martinus Nijhoff, Leiden
- Oppong RF (2013) Private international law in commonwealth Africa. CUP, Cambridge
- Oppong RF (2007) Private international law in Africa: the past, present and future. *Am J Comp L* 55:677–719

- O'Regan K (1999) The best of both worlds? Some reflections on the interaction between the common law and the Bill of rights in our new constitution. *Potchefstroom Electron J* 2. <https://doi.org/10.17159/1727-3781/1999/v2i1a2890>
- Orlov V (2019) Legal sources and interpretation in Russian civil law. *Athens J* 1, 5:117–136
- Orlov V (2017) Updated international private law of Russia. *Athens J L* 3:75–98
- Orlov V, Yarkov V (2017) New Russian arbitration law. *Athens J L* 3:257–280
- Örücü E (2010) General introduction. Mixed legal systems at new frontiers. In: Örücü E (ed) *Mixed legal systems at new frontiers*. Wildy, Simmonds & Hill, London, pp 1–18
- Osakwe C (2008) Russian civil code—parts 1–3: text and analysis. Kluwer, The Hague
- Palmer VV (2010) Two rival theories of mixed legal systems. In: Örücü E (ed) *Mixed legal systems at new frontiers*. Wildy, Simmonds & Hill, London, pp 19–52
- Parikh S (2014) India: from political federalism and fiscal centralization to greater subnational autonomy. In: Halberstam D, Reimann M (eds) *Federalism and legal unification: a comparative empirical investigation of twenty systems*. Springer, Cham, pp 255–266
- Queen Mary University of London (2019) 2018 International arbitration survey: the evolution of international arbitration, 2019. [http://www.arbitration.qmul.ac.uk/media/arbitration/docs/2018-International-Arbitration-Survey---The-Evolution-of-International-Arbitration-\(2\).PDF](http://www.arbitration.qmul.ac.uk/media/arbitration/docs/2018-International-Arbitration-Survey---The-Evolution-of-International-Arbitration-(2).PDF)
- Qi D (2020) The power of the supreme people's court: reconceptualizing judicial power in contemporary China. Routledge, London
- Ramani Garimella S, Ashraful MZ (2019) Commercial courts in India: all for ease of doing business. In: Kramer X, Sorabji J (eds) *International Business courts. A European and Global Perspective*. Eleven, The Hague, pp 195–214
- Roberts A (2017) *Is international law really international?* OUP, Oxford
- Robinson N (2013) Structure matters: the impact of court structure on the Indian and U.S. Supreme courts. *Am J Comp L* 61:173–208
- Rosenn KS (1986) Civil procedure in Brazil. *Am J Comp L* 34:487–525
- Rosenn KS (1984) Brazil's legal culture: the jeito revisited. *Fla Int'l L J* 1:1–43
- Rosenn KS (1971) The jeito: Brazil's institutional bypass of the formal legal system and its developmental implications. *Am J Comp L* 19:514–549
- Shaohui Z (2008) L'influence des Principes d'UNIDROIT sur la réforme du droit chinois des obligations. *Unif L Rev* 13:153–177
- Skvortsov O, Kropotov L (2018) Arbitration changes in Russia: revolution or evolution? *J Int'l Arb* 35:253–265
- Slomp Aguiar A (2011) The law applicable to international trade transactions with Brazilian parties: a comparative study of the Brazilian law, the CISG, and the American law about contract formation. *L Bus Rev Am* 17:487–553
- Spiegelberger WR (2014) Enforcement of foreign arbitral awards in Russia. *Juris*, New York
- Stringer D (2005) Choice of law and choice of forum in Brazilian international commercial contracts: party autonomy, international jurisdiction, and the emerging third way. *Columbia J Transnat'l L* 44:975–991
- Sun X (2020) A Chinese approach to international commercial dispute resolution: the China international commercial court. *Chin J Comp L* 8:45–54
- Swaminathan S (2018) De-inventing the wheel: liquidated damages, penalties and the Indian contract act, 1872. *Chin J Comp L* 6:103–127
- Thomas K (2018) Analysing the notion of 'consumer' in China's consumer protection law. *Chinese J Comp L* 6:294–318
- Tu G (2016) *Private international law in China*. Springer, Cham
- UNIDROIT (1974) Progressive codification of international trade law—contracts in general. Study L—Doc. 7. <https://www.unidroit.org/english/documents/1974/study50/s-50-07-e.pdf>
- van Huyssteen LF, Maxwell CJ (2019) *Contracts—South Africa*, 6th edn. Kluwer, The Hague
- Wald A (1999) Le droit comparé au Brésil. *Rev Int Dr Comp* 51:805–839

- Wethmar-Lemmer M (2016) Applying the CISG via the rules of private international law: Articles 1(1)(b) and 95 of the CISG—analysing CISG advisory council opinion 15. *De Jure* (Pretoria) 49:58–73
- World Bank (2017) Russia accelerates reforms pace to improve business climate: doing business report. <https://www.worldbank.org/en/news/press-release/2017/10/31/russia-accelerates-reforms-pace-to-improve-business-climate-doing-business-report>
- Yefremova M, Yakovlena S, Henderson J (2014) *Contract law in Russia*. Hart, Oxford
- Yu P, Gurgel S (2012) Stare decisis in China? the newly enacted guiding case system. In: Wan M (ed) *Reading the legal case: cross-currents between law and the humanities*. Routledge, London, pp 142–158
- Zhang M (2000) Freedom of contract with Chinese legal characteristics: a closer look at China's new contract law. *Temp Int'l & Comp L J* 14:237–262
- Zhang M (2006) *Chinese contract law. Theory and practice*. Martinus Nijhoff, Leiden
- Zhuikov VM (2009) The supreme court of the Russian Federation and the New Russian civil code. In: Simons WB (ed) *Private and civil law in the Russian Federation*. Martinus Nijhoff, Leiden, pp 111–118

Marta Infantino is Ph.D. (Palermo), LL.M. (NYU School of Law), is Associate Professor of Comparative Law at the University of Trieste, Italy. She is Associate Member of the International Academy of Comparative Law and Chair the 'Tort Law Group' of the 'Common Core of European Private Law' project. She has held visiting professorship in Canada, Colombia, and France, and she has published extensively in Italian, English and French on comparative contract law, comparative tort law, and global indicators. Some of her works have been translated into Chinese, Greek and Spanish. Her first monograph ('La causalità nella responsabilità extracontrattuale', Staempfli-ESI, 2012) was awarded the Italian Lynx Academy's prize for emerging authors in 2013.

Questions and Answers in the Framework of National Jurisdictions

The Questionnaire for the Drafting of the National Reports



Jacques du Plessis

1 Introduction (Chapter 1 PICC)

Q.* Please provide a general introduction to how your legal system deals with international commercial contracts, inter alia paying attention to the following:

- the rules that determine what sources of law are applicable to international commercial contracts, as well as what these sources are (e.g. conventions like the CISG etc.);
- the rules that determine which entities (e.g. courts and arbitral tribunals) have jurisdiction over commercial disputes, as well as litigation practices relating to such disputes;
- your system's main economic partners (especially the BRICS countries) and some data on the extent of international commerce between them.

[We did not regard it as necessary to deal with the general issues in Chapter 1 of the PICC, and the questionnaire therefore does not contain questions dealing with them. However they may indirectly be relevant when we consider matters such as illegality (see Article 1.4 on mandatory rules), good faith (Article 1.7), usages and practices (Article 1.9), notices (Article 1.10), and definitions of writing (Article 1.11).]

J. du Plessis (✉)
University of Stellenbosch, Stellenbosch, South Africa
e-mail: jedp@sun.ac.za

2 Formation of Contracts (Chapter 2, Section 1 PICC = Articles 2.1.1–2.1.22 PICC)

Following the practice of the PICC, ‘formation’ in this context primarily deals with agreement, offer and acceptance, negotiation, writing and standard terms. We are therefore not concerned here with issues relating to ‘validity’ such as possibility of performance, mistake, fraud, threats, gross disparity and illegality; these are considered in Sect. 3.

2.1 Formation: Overview

2.1.1 Agreement; Offer and Acceptance

Q* Please indicate in general terms the role your system accords to agreement in the formation of contract; please consider how the system views the relationship between agreement and ‘offer and acceptance’, and whether agreement can be reflected by conduct other than offer and acceptance (see Article 2.1.1). Please further indicate in general terms how a process of offer and acceptance could give rise to a contract in your system. This treatment could include issues such as the following, but it would have to be very brief:

- requirements for a valid offer (see Article 2.1.2, and also see Article 1.2 on the general principle of freedom from form or informality; please bear in mind that letters of intent and memoranda of understanding are dealt with in specific topic Sect. 2.2.1); the withdrawal and revocation of offers, which includes the issue of whether offers can be made irrevocable by a unilateral act or an (option) agreement (Articles 2.1.3, 2.1.4); and the effect of rejection of an offer (Article 2.1.5);
- requirements for valid acceptance, how and by when acceptance can take place (e.g. by silence) and when it becomes effective (Articles 2.1.6–2.1.9; bear in mind that electronic contracts are dealt with under specific topic Sect. 2.2.2); when acceptance can be withdrawn (Article 2.1.10); the consequences of a modified acceptance (Article 2.1.11); the effect of writings in confirmation sent after conclusion of the contract (Article 2.1.12); the effect of a party requiring that the contract first has to be in particular form, such as in writing, to be binding (Article 2.1.13; bear in mind that the requirement that the parties first have to reach agreement about certain matters is dealt with in specific topic Sect. 2.2.1).

2.1.2 Negotiation

Q* Please briefly indicate how your legal system deals with the following aspects of how negotiations are to be conducted:

- the extent to which a party is free to negotiate, which includes having the right to terminate negotiation without incurring liability; in this regard consider the relevance of whether a party acts in bad faith in either negotiating or breaking off negotiations (Article 2.1.15; please make sure that there are no overlaps with specific topic Sect. 2.2.1, which focuses on agreements and understandings that govern pre- and post-contractual negotiations; the focus here is on situations where there are no such agreements or understandings); and
- the extent to which a party may be liable for disclosing or improperly using confidential information provided by the other party (Article 2.1.16).

2.1.3 Integrity of Writing

Q* Please briefly indicate the extent to which your legal system gives effect to the following terms that deal with the relevance of writing in the formation or variation of contracts. Bear in mind that the issue of when writing is a formal requirement for the conclusion of the contract will already have been dealt with in Sect. 2.1.1 (see the reference there to Article 2.1.13):

- ‘merger clauses’, which determine that the writing completely embodies the terms agreed upon and that it cannot be contradicted or supplemented by evidence of prior statements or agreements (Article 2.1.17); and
- ‘no-variation except in writing’ clauses, which determine that any modification or termination by agreement has to be in a particular form (Article 2.1.18).

2.1.4 Standard Terms

Q* Please briefly indicate whether your legal system recognises special rules when parties incorporate standard terms in a contract. Bear in mind that this issue may to some extent already have been dealt with in Sect. 2.1.1, in the context of agreement as a requirement for a valid contract, and how agreement can be established by conduct (see Article 2.1.19). We are unable to deal in any detail with local consumer legislation that could apply to standard terms; but we could at least draw attention to the existence of such legislation and briefly indicate to what extent it could apply to international commercial contracts that are in the standard term format. The focus here could especially be on the following:

- the validity of ‘surprising’ terms, i.e. terms which the other party could not reasonably have expected in the type of standard terms involved (see Article 2.1.20);
- the consequences of a conflict between a standard term and a non-standard term (Article 2.1.21); and
- the consequences of a conflict between different standard terms used by parties who have reached agreement on essential terms, i.e. the ‘battle of forms’ problem (Article 2.1.22).

2.2 *Formation: Specific Topics*

2.2.1 **Pre-contractual and Post-contractual Understandings and Agreements on Further Negotiation Between the Parties**

In the main topic of formation above we touch briefly in Sect. 2.1.1 on the requirements for a valid offer in terms of intention and in Sect. 2.1.2 on the freedom of parties to withdraw offers or to withdraw from negotiations. The focus here is specifically on certain typical understandings or agreements between the parties on conducting further negotiations, and preventing ‘deadlock’ situations. We must just bear in mind that the labels used to describe these typical understandings and agreements do not have a fixed meaning, and we would have to explain any specific meaning they may bear within the context of our particular systems.

The situations where these understandings and agreements apply could relate to the pre-contractual phase, but also to the situation where there is a contract between the parties, and they have an understanding or agreement that certain terms would be left open for subsequent negotiation (see Article 2.1.14 and especially the commentary by Anderson in the Vogenauer (ed) (2015) Commentary on the UNIDROIT Principles of International Commercial Contracts (PICC), 2nd edn., pages 260, 332–341 for examples on the application in the international commercial context). We would have to consider both these phases, since both are relevant in the context of international commercial contracts.

Q* Please indicate to what extent your system recognises the following understandings or agreements, and what their legal consequences are, including their consequences if parties commence performance even though they are not binding:

- Memorandum of Understanding (MOU)

On the treatment of the MOU in the PICC see Official Comments to Article 2.1.2 and to Article 2.1.14, especially illustrations 3 and 4; further see the Commentary by Nottage in the Vogenauer Commentary page 269. In your response please pay special attention to the relevance of the intention of the parties in determining the effect of the MOU, and what inference as to their intention could be drawn from the use of this term, as well as from other circumstances, such as statements that ‘the agreement would not be binding until approved’ or ‘until a final agreement is executed’ (see illustrations 3 and 4); further consider the treatment of the related concept of the ‘memorandum of agreement’ (see the illustration in the Official Comment to Article 2.1.13); is the MOA regarded as the same as the MOU in your system?; if not, in what way does it differ?

- Letter of intent (LOI)

On the treatment of the LOI in the PICC see Official Comment to Article 2.1.14; further see Nottage, Vogenauer Commentary page 269. In your response please pay special attention to the relevance of the intention of the parties in determining

the effect of the LOI, and what inference as to their intention could be drawn from the use of this term itself, as well as from other circumstances.

- **Comfort Letter**

We did not discuss this example, but it is often dealt with the other two above, so we may consider it was well. On the Comfort Letter see Nottage, Vogenauer Commentary at 269, where it is suggested that such a letter indicates ‘to third parties some sort of support for a firm (often within a corporate group) without providing a formal guarantee or indemnity’.

- **The agreement to negotiate further with a particular party (a ‘lock-in’)**

For an illustration of the fact pattern of the ‘lock-in’ agreement see *Walford v Miles* [1992] 2 W.L.R. 174, where the parties negotiated on the sale of a photographic processing business and the potential purchasers alleged that there was an implied obligation on the potential sellers to negotiate with them further in good faith.

In your response please *inter alia* consider of what relevance it may be that the agreement expressly determines that such negotiations are to be conducted in good faith, or whether such a duty would be read in by law; further consider whether such agreements could be concluded expressly or tacitly/be implied in the circumstances.

- **The agreement not to negotiate with a third party (a ‘lock-out’)**

For an illustration of the fact pattern of the ‘lock-out’ agreement see *Walford v Miles* [1992] 2 W.L.R. 174, where it was alleged that the prospective seller agreed that during negotiations he would not negotiate with a third party or consider any alternative offer.

2.2.2 Electronic Contracting

Under the main topic of formation above we deal briefly in Sect. 2.1.1 with the way in which offer and acceptance could lead to the conclusion of contracts. Here the focus is specifically on the use of electronic means of contracting (see Anderson in Vogenauer Commentary pages 258–260). We did not define what constitutes electronic contracting, but it clearly includes concluding contracts through various electronic means of communication.

Q* Please indicate the position in your legal system with regard to the use of electronic means of concluding contracts; *inter alia* attention could be paid to the following issues:

- what is the position in your system with regard to the time and place of conclusion of a contract when electronic means of communication are used? Is it e.g. the moment when and place where acceptance is dispatched to the offeror, received by the offeror, or comes to actual knowledge of the offeror? (see Official Comment 4 to Article 1.10 of the PICC);

- what is the position in your system with regard to the length of time an offer made by electronic means is open for acceptance? (see Anderson in Vogenauer Commentary page 304);
- what is the position in your system with regard to the moment a time fixed for acceptance begins to run if the offer is made by electronic means; e.g. if an offer by email states that it is open for acceptance ‘within 7 days’, when does this period begin to run? From the moment indicated in the offer or from the moment it is transmitted? (see Article 2.1.8);
- what is the position in your system if the offeree’s acceptance only occurs after the time set for acceptance, but this is due to a delay in electronic transmission which cannot be attributed to the offeree? (e.g. if the offeree sends acceptance by email but it only reaches or is read by the offeror after the time set for acceptance due to problems with the email server). Is this still valid acceptance, unless the offeror immediately informs the offeree that it is ineffective since the offer had already lapsed? (see Article 2.1.9 Official Comment Illustration 3; Anderson, Vogenauer Commentary page 311);
- may parties in your system agree to use a system capable of setting in motion self-executing electronic actions that lead to the conclusion of a contract without the intervention of a natural person, i.e. does your system recognise ‘automated contracting’? (see Official Comment 3 and Illustration 2 to Article 2.1.1); does an automated ‘confirmation of order’ amount to confirmation of receipt of an offer, or to acceptance of it? (see Anderson, Vogenauer Commentary page 286);
- to what extent is electronic contracting permissible when it is required that certain contracts have to be in writing to be valid (e.g. typically the sale of land, or providing personal security by way of a suretyship)?; as to the meaning of ‘writing’ in the context of the PICC see Vogenauer Commentary on Article 1.2, page 162; Anderson in Vogenauer Commentary page 259);
- to what extent does your legal system regulate contracts that are contained solely in digital documentation, and especially that are signed by way of digital signatures? (see Anderson in Vogenauer Commentary pages 258–260);
- are there any other aspects of electronic contracting that may be relevant and especially may have caused problems in the context of arbitration in your legal system?

3 Validity of Contracts (Chapter 3 PICC = Articles 3.1.1–3.3.2 PICC)

This section deals with various issues that could affect the validity of a contract, even though the above-mentioned requirements for its formation, and more specifically for establishing agreement, have been met.

3.1 *Validity—Overview*

3.1.1 General Provisions on Validity

Q* Briefly indicate to what extent your legal system, in addition to agreement, imposes requirements for the conclusion or variation of a contract in the form of:

- a legally relevant reason for concluding the contract (i.e. the type of requirement expressed by ‘cause’ in French law), or
- a counter-performance by a party to whom performance is undertaken (i.e. the type of requirement expressed by ‘consideration’ in the common law) (Article 3.1.2, see Huber in Vogenauer Commentary pages 466–468).

Q* Briefly indicate to what extent the validity of a contract in your legal system is influenced by whether it was impossible to perform at the time of its conclusion (Article 3.1.3, see Huber in Vogenauer Commentary pages 469–471).

3.1.2 Mistake, Fraud, Threats and Gross Disparity as Grounds for Avoidance

Q* Briefly indicate to what extent the following (mainly defects of consent) could influence the validity of a contract in your legal system:

- the existence of a mistake, in the sense of an incorrect assumption regarding facts or law, on the side of one or both the parties at the time of its conclusion; inter alia consider what requirements a mistake must meet to have this effect, e.g. whether it must be sufficiently serious or material, or must be attributable to the other party (see Article 3.2.2; we could pay attention to the matters raised in Articles 3.2.3–3.2.4, but that may be too detailed for present purposes);
- a fraudulent representation (inter alia consider whether such a representation could be made by non-disclosure; further briefly explain how the system views the relationship between mistake and fraud as grounds for avoidance—see Article 3.2.5, du Plessis in Vogenauer Commentary 497–498);
- an unjustified threat (it may be useful to pay particular attention to whether threats of economic harm, e.g. not to perform a contract to induce modification of its terms, could constitute an unjustified threat);
- excessive advantage being given by one party to the other, or significant disequilibrium between the performances; please indicate whether, for purposes of obtaining relief, it would be required that this disparity had to arise from unfair advantage being taken by the one party of the weakness or vulnerability of the other party, e.g. due to economic distress, inexperience or lack of bargaining skill (see Article 3.2.7 and the circumstances listed there).

Q* Briefly indicate the relief which a party may be entitled to due to mistake, fraud, threats and gross disparity, for example avoidance (see Articles 3.2.9–3.2.14)

and restitution (Article 3.2.15), damages (Article 3.2.16), and/or adaptation of the contract (see Article 3.2.7), and to what extent such relief could be awarded against third parties (Article 3.2.8).

3.1.3 Illegality

Q* Briefly set out the general legal framework in your legal system that determines when mandatory rules apply to international commercial contracts (on the meaning of ‘mandatory rules’ see Official Comments 1 and 3 to Article 3.3.1); in this regard refer specifically to the rules of private international law recognised by your system that make this determination (see Official Comment 5 to Article 1.4). We could also include the following question, but it is admittedly very broad: please further illustrate the operation of this framework by referring to examples of mandatory rules that may be potentially relevant in the context of international commercial contracts and that are:

- of national origin (e.g. provisions of domestic law on the use of child labour to manufacture goods—see Illustration 5 to Official Comment to Article 3.3.1; provisions of domestic consumer law that could influence the validity of terms in international commercial contracts; bear in mind that contracts requiring public permission, and limitations in restraint of trade are dealt with in the specific examples below), and
- of international or supra-national origin, i.e. those derived from international conventions or general public international law (see Official Comment 1 and 2 to Article 1.4; further see Cuniberti in Vogenauer Commentary page 168–169, 559–560).

Q* Please further consider in general the potential consequences of the infringement of mandatory rules contained in such a legal framework (Article 3.3.1; Cuniberti in Vogenauer Commentary pages 559–564); these consequences could relate to:

- the limitation on remedies based on breach, e.g. the right to claim enforcement or performance;
- the right to adapt the contract;
- the right to treat the contract as having no effect, and
- the right to claim restitution (Article 3.3.2).

3.2 *Validity—Specific Topics*

3.2.1 Public Permission

The issue of obtaining public permission is relevant in two contexts, namely when creating a valid contract (e.g. obtaining permission to make a certain type of foreign investment), and when performing a valid contract. The PICC locates the treatment

of both these contexts in the chapter on performance in general (Chapter 6 Section 1, Articles 6.1.14–6.1.17). However, this may be because the PICC initially did not have a section on legality in the chapter on validity (see Atamer in Vogenauer Commentary 790). This has now changed, and we felt in our discussions that we may as well deal with both these contexts in the section on legality as a requirement for validity (in Chapter 3). In line with this decision, the following questions are consequently posed here:

Q* Please indicate the legal position in your system in regard to international commercial contracts that require public permission for their creation (validity) or performance; your response could *inter alia* focus on the following:

- who should apply for public permission if the domestic law of the State requiring permission or the circumstances do not indicate this; e.g. should it be influenced by whether a party has its place of business in that region? (see Article 6.1.14);
- how a party should comply with a duty to obtain public permission; e.g. should such a party bear the expenses or notify the other party of the outcome? (see Article 6.1.15);
- the rights of parties if the measures to obtain permission were taken, but it was neither granted nor refused within an agreed period or reasonable time; e.g. can either party now terminate the contract? (see Article 6.1.16);
- the legal position where permission is refused and (a) the permission was essential for the validity of a contract or some of its terms, and (b) the permission was required to perform the contract, but not essential for creating a valid contract; (see Article 6.1.17).

Q* Please consider the consequences of the use of improper means to obtain official permission for a contract (see Illustrations to Official Comment 3 to Article 3.3.1). [We did not discuss this question, but it may be worth considering in this context].

3.2.2 Covenants in Restraint of Trade

Q* Please indicate the mandatory rules in your legal system with regard to the validity and consequences of agreements/covenants that limit a party's freedom to engage in a trade, business, profession or occupation, e.g. a clause that restrains a seller of a business from competing with the purchaser for a period of time in a particular region; *inter alia*, consider the following:

- the general test for the validity of such terms;
- who bears the burden of proof, and
- the relief that may be provided to the restrained party, including enforcing the covenant in a limited or attenuated form (but please avoid overlapping with Sect. 3.2.3).

3.2.3 Severability

Q* Please indicate the position in your legal system when some contractual terms are contrary to mandatory rules, i.e. cases of partial illegality; to what extent would contravention of these rules influence the validity or enforceability of the entire contract, or merely the offending part? In answering this question, reference could be made to the relevance accorded to the probable intention of the parties (e.g. would the parties have concluded the contract without the illegal part?), or to considerations of public policy.

4 Interpretation of Contracts (Chapter 4 PICC = Articles 4.1–4.8 PICC)

4.1 *Interpretation—Overview*

Q* Please indicate in general terms the approach of your legal system to the interpretation of contracts; inter alia consider the following:

- to what extent does the system interpret by seeking to establish the actual ‘subjective’ common intention of the parties, compared to seeking to determine an ‘objective’ meaning of the terms?;
- what are the relevant circumstances that regard could be had to when applying the test for interpretation referred to above? (see Articles 4.3 and 4.4 for examples, such as prior negotiations, the contract as a whole, etc.);
- to what extent does your system recognise rules (or maxims) to the effect that contracts shall be interpreted to give effect to all terms, rather than to deprive some of their effect (Article 4.5) or that if terms supplied by a party are unclear, an interpretation against that party is preferred? (Article 4.6);
- to what extent does your legal system clearly distinguish between interpretation (see Articles 4.1–4.7), supplying omitted terms (Article 4.8), and implying terms or obligations?; what are the sources of these terms or obligations? (see Article 5.1.1, dealing with express or implied obligations, and Article 5.1.2, dealing with various sources of implied obligations);
- to what extent does your legal system (unlike the PICC—see Vogenauer Commentary pages 581–582) recognise specific rules for interpreting standard terms?

4.2 *Interpretation—Specific Topics*

4.2.1 The Language of the Contract

Q* Please indicate the position in your legal system to the interpretation of a contract drafted in more than one language (e.g. does a particular version automatically prevail in the case of discrepancy?; are there exceptions to this rule?; which party bears the burden of proof as to which version prevails?—see Article 4.7).

Q* Please indicate in general terms the approach of your legal system when a contract is drafted in a language with which one or more of the parties is not familiar; e.g. are terms in a foreign language more easily held to be surprising, and hence as not binding? (see Official Comment 3 to Article 2.1.20, including the illustrations there).

4.2.2 Recitals

Q* Please indicate in general terms the approach of your legal system to the relevance of recitals in the interpretation of contracts; we did not define the concept of a recital, but it typically refers to a preliminary statement that sets out the purpose of the contract, for example by stating certain facts, and beginning with the phrase ‘whereas ...’; inter alia consider whether the recital may only be referred to as an aid to interpretation in cases of ambiguity, or whether it may automatically be taken into account in such a process.

5 Content of Contracts (Chapter 5 PICC = Articles 5.1.3–5.1.9, 5.3.1–5.3.5)

5.1 *The Content of Contracts—Overview*

5.1.1 Duties of Parties with Regard to the Operation or Performance of the Contract

Q* Please indicate in general terms the approach of your legal system to the following duties that relate to performance of the contract:

- duties of co-operation between the parties, especially in the context of long-term contracts; consider whether these duties would include the duty not to hinder the other party (e.g. by failing to provide access to premises to perform work), or would also include duties that require more active-co-operation (see Article 5.1.3, the Official Comment and illustrations, as well as the Vogenauer Commentary pages 621–625; please beware of overlaps with the topic of obtaining public

permission in Sect. 3.2.1, where duties of co-operation are also considered); further please indicate how this duty relates to a principle of good faith and fair dealing, inasmuch as the system recognises such a principle;

- duties to achieve a certain result, as opposed to the duties of best efforts (Articles 5.1.4 and 5.1.5); inter alia briefly consider whether this distinction is used in your system to assist in determining the obligations of the parties, and what its practical implications are, e.g. whether absence of fault would excuse non-performance of a duty to use best efforts, but not a duty to provide a certain result; this distinction would of course not matter if liability for non-performance in your system is generally not fault-based (see Vogenauer Commentary 627–629, and the examples there of arbitral awards dealing with the distinction).

5.1.2 Obtaining Certainty with Regard to What Has to Be Performed and for What Period

Q* Please indicate in general terms the approach of your legal system to the following:

- what performance is to be rendered when the quality of performance is neither fixed by nor determinable from the contract (i.e. the required quality cannot be established by normal interpretation); please briefly consider whether performance must meet a particular standard, such as having to be of an ‘average quality’ or fit for a particular purpose (see Article 5.1.6 and Vogenauer Commentary 633–634);
- how the price is determined when it is neither fixed or determinable from the contract (see Article 5.1.7; please bear in mind the link with the general requirement of agreement in Article 2.1.1; see Vogenauer Commentary 633–634); and
- whether a contract for an indefinite period may be terminated by reasonable notice (Article 5.1.8).

5.1.3 Conditions

Q* Please indicate in general the approach of your legal system to terms that makes a contract or contractual obligation conditional on the occurrence of an uncertain future event (see Article 5.3.1; on the various meanings of ‘condition’ in civil law and common law systems see Rowan in Vogenauer Commentary page 693); please inter alia consider the following:

- the effect of a condition which determines that the contract or term only takes effect if the uncertain future event occurs (i.e. a suspensive condition—see Article 5.3.2(a));
- the effect of a condition which determines that the contract or term comes to an end if the uncertain future event does occur (i.e. a resolutive condition—see Articles 5.3.2(b) and 5.3.5);

- the consequences if a party interferes with a condition (Article 5.3.3), and the consequences if a party, pending the condition, acts in a way which prejudices the other's party's rights in case of fulfilment of the condition (Article 5.3.4—e.g. where a seller of shares in a business under a conditional sale acts in way which prejudices the business).

5.2 The Content of Contracts—Specific Topics

5.2.1 Warranties

Q* Please indicate in general the approach of your legal system to the operation and effect of warranties; we did not in detail consider the meaning of a 'warranty', but taking general definitions into account, we could regard it as a contractual undertaking, arising by agreement or law, that something is true or that a certain state of affairs exists (e.g. that goods or services are of a certain quality); the parties or the law may then impose particular forms of liability in the event of non-compliance with such warranty. The PICC Commentary does not define a warranty but at least regards it as conceptually distinct from the condition in the sense used in Sect. 5.1.3, inasmuch as a warranty does not relate to an uncertain future event (see Article 5.3.1 Official Comment 5).

5.2.2 Indemnification

Q* Please indicate in general terms the approach of your legal system to the operation and effect of indemnifications; we did not in detail consider the meaning of the term 'indemnification', but taking general definitions into account, we could regard it as a contractual undertaking to compensate another for loss or damage (e.g. an undertaking of liability to compensate losses caused by employees, subcontractors or (other) third parties).

6 Performance of a Contract (Chapter 6 PICC = Articles 6.1.1–6.1.17, 6.2.1–6.2.3)

6.1 Performance of a Contract—Overview

6.1.1 Performance in General

Q* Please indicate in general terms the approach of your legal system to the following issues relating to *when* a contract is to be performed:

- how the time of performance is established (Articles 6.1.1–6.1.2); in this regard also consider any rules on the sequat that requires state permissionence of performance where obligations to perform are reciprocal (see Article 6.1.4 and Atamer Vogenauer Commentary page 736);
- to what extent a creditor (obligee) may reject an offer to perform only in part at the time when performance is due (Article 6.1.3), or may reject an earlier performance (Article 6.1.5).

Q* Please indicate in general terms the approach of your legal system to determining *where* a contract is to be performed (Article 6.1.6).

Q* Please indicate in general terms the approach of your legal system to the following issues relating to *how* a contract is to be performed:

- how monetary obligations are to be performed, i.e. how payment is to be made; this includes what instruments or methods to transfer funds may be used (see Articles 6.1.7–6.1.8), and in what currency payment is to be made (see Articles 6.1.9–6.1.10);
- how the costs of performance are allocated (see Article 6.1.11);
- how, where a debtor (obligor) owes several obligations to the same creditor, it is determined to which obligation a particular performance is to be applied (or ‘imputed’) (Article 6.1.12–13).

6.1.2 Hardship

Q* Please indicate in general terms the approach of your legal system to the effect of ‘hardship’, which occurs when, after conclusion of the contract, events fundamentally alter the equilibrium of the contract due to increase in the costs of performance or decreases in the value of performances received (see Articles 6.2.1–6.2.3); inter alia consider to what extent the availability of relief depends on the foreseeability of the events, on whether the events could have been prevented, and on whether the risk of the events was assumed by a party; further consider whether hardship could give rise to a right to request negotiations or to withhold performance, and whether courts could adapt or invalidate the contract.

6.2 Performance of a Contract—Specific Topics

We did not include any specific topics under the heading of performance. Articles 6.1.14–6.1.17 deal with performance that requires state permission, but this issues is considered in Sect. 3.2.1, in the context of the validity of contracts that require such permission.

7 Non-performance (Breach of Contract) (Chapter 7 PICC = Articles 7.1.1–7.4.13)

7.1 Non-performance (Breach of Contract)—Overview

7.1.1 Non-performance in General (Chapter 7 PICC Section 1 = Articles 7.1.1–7.1.7)

Q* Please indicate in general terms the approach of your legal system to what constitutes non-performance or breach of contract, in the sense of a failure by a party to perform a contractual obligation (see Article 7.1.1); for example, does it recognise a ‘unitary’ concept of non-performance or breach of contract, or does it recognise various types of breach, such as a failure to perform on time, a failure to render proper performance, anticipatory breach, etc.?

Q* Please indicate in general terms the approach of your legal system to the effect of the following circumstances on a creditor’s (obligee’s) ability to rely on non-performance to invoke contractual remedies:

- where the creditor (obligee) caused the debtor’s (obligor’s) non-performance (see Article 7.1.2; it may be that in some systems this issue would have been dealt with under the previous question, as a form of breach, i.e. *mora creditoris* in civil law);
- where the creditor (obligee) is party to a reciprocal contract and the debtor (obligor) is withholding performance to induce the creditor to perform an obligation which, it in turn owes to the debtor first (i.e. the other party invokes the *exceptio non adimpleti contractus* of civil law—see Article 7.1.3; inter alia indicate the consequences if there has been partial performance, but the other party still withholds performance);
- where the non-performing debtor (obligor) has indicated a willingness to cure non-performance. i.e. asks for a ‘second chance’ (see Article 7.1.4);
- where the creditor (obligee) who is aggrieved by non-performance has given the debtor (obligor) an additional period for performance (see Article 7.1.5).

7.1.2 The Right to Specific Performance (Whether Monetary or Non-monetary Obligations) (Chapter 7 PICC Section 2 = Articles 7.2.1–7.2.5)

Q* Please indicate in general terms the approach of your legal system to claiming performance of an obligation (whether of a monetary or non-monetary nature); in your answer please inter alia deal with the following:

- what factors may be relevant when it has to be determined whether performance may be ordered (see Article 7.2.2); please avoid overlapping with the answers to the sections on hardship (Sect. 6.1.2) and force majeure (Sect. 7.2.2);

- whether the right to performance includes the right to require repair, replacement or another cure of the defective performance (Article 7.2.3); and
- what the consequences are when a party does not comply with an order of specific performance (Articles 7.2.4–7.2.5).

7.1.3 The Right to Terminate a Contract Due to Non-performance (Chapter 7 PICC Section 3 = Articles 7.3.1–7.3.7)

Q* Please indicate in general terms the approach of your legal system to termination by an aggrieved party of a contract due to non-performance by the other party; in your answer please inter alia deal with the following:

- when the right to terminate arises (see Article 7.3.1); especially indicate whether it arises in cases of anticipatory breach (see Article 7.3.3), or a failure to provide assurances (see Article 7.3.4);
- how the right to terminate is exercised (see Article 7.3.2); and
- the effects of exercising the right to terminate (see Articles 7.3.5, 7.3.6, 7.3.7).

7.1.4 The Right to Damages (Chapter 7 PICC Section 4 = Articles 7.4.1–7.4.13)

Q* Please indicate in general terms the approach of your legal system to the right of an aggrieved party to recover damages due to non-performance; in your answer please inter alia deal with the following:

- whether the right to recover damages is qualified inasmuch as it e.g. depends on proof of fault, or lies in the discretion of an adjudicating body, or may only be exercised in conjunction with certain remedies (see Article 7.4.1);
- how damages are quantified, e.g. whether there is a general test for quantification, and to what extent damages cover losses actually sustained and deprivation of gain (see Articles 7.4.2, 7.4.3); further indicate to what extent the measure of damages may be influenced by
 - remoteness, or lack of foreseeability of harm (Article 7.4.4);
 - the fact that a party may have made a replacement transaction (Articles 7.4.5–7.4.6);
 - the harm being due in part to the aggrieved party (Article 7.4.7); and
 - the possibility that the harm could have been reduced or mitigated by the aggrieved party taking certain steps (Article 7.4.8);
- liability for interest (Articles 7.4.9, 7.4.10); and
- in what currency damages are to be assessed (Article 7.4.12).

7.2 *Non-performance/Breach—Specific Topics*

7.2.1 Exemption/Exclusion Clauses

Q* Please indicate in general terms the approach of your legal system to the validity and enforceability of exemption clauses; in the response please indicate any general test for the validity of exemption clauses, and illustrate the operation of such a test with reference to examples (e.g. terms that exclude certain forms of fault/culpable conduct, or certain types of injury, or terms that render the obligation to perform effectively meaningless by excusing non-performance—see illustrations in the Official Comment to Article 7.1.6). Also consider whether restrictions on these clauses only apply if they are contained in standard term contracts. If special rules of interpretation apply to exemption clauses, it may also be useful to refer to them briefly here, but avoid overlapping discussions with Sect. 4.1. As far as the meaning of the term ‘exemption clause’ is concerned, please note the following:

- We did not discuss the exact meaning of the term ‘exemption clause’, but under Article 7.1.6 PICC it includes clauses that limit a party’s liability for non-performance, or that permit a party to render performance substantially different from what the other party reasonably expected.
- Exemption clauses may be distinguished from ‘termination clauses’, which provide an aggrieved party the right to terminate a contract in certain circumstances, since ‘termination clauses’ typically expand rather than restrict such a party’s rights (see Schelhaas in Vogenauer Commentary 859). A distinction may also be drawn between exemption clauses and ‘forfeiture clause’, which permit a party to withdraw from a contract on payment of an ‘indemnity’ (see Article 7.1.6 Official Comment 3).

7.2.2 Force Majeure

Q* Please indicate in general terms the approach of your legal system when non-performance was due to ‘force majeure’; inter alia consider the possible effect force majeure has on liability, and more specifically on the duty to pay damages due to non-performance; consider whether steps need to be taken by the party who failed to perform to notify the other party of the impediment and its effect. As far as the meaning of force majeure is concerned, please note the following:

- According to Article 7.1.7 PICC the term ‘force majeure’ covers situations where non-performance was due to an (external) impediment beyond a party’s control and it could not reasonably be expected of the party to have taken the impediment into account at the time of the conclusion of the contract or to have avoided or overcome it or its consequences. The term ‘force majeure’ is supposed to be

interpreted autonomously in the PICC. The Official Comment adds that force majeure ‘covers the ground covered in common law systems by the doctrines of frustration and impossibility of performance and in civil law systems by doctrines such as force majeure, Unmöglichkeit, etc. but it is identical with none of these doctrines.’ It further states that ‘The term “force majeure” was chosen because it is widely known in international trade practice, as confirmed by the inclusion in many international contracts of so-called “force majeure” clauses.’ We are of course not obliged to follow the autonomous meaning accorded to force majeure in the PICC, and it may be that our national systems accord its own meaning to it. However, for purposes of comparing the positions in our respective systems with each other, it does seem desirable that we at least use the PICC formulation as a point of reference.

- Force majeure can apparently overlap with supervening events that cause ‘hardship’, which is dealt with in Sect. 6.1.2 (see Official Comment 3 to Article 7.1.7, Official Comment 6 to Article 6.2.2; Pichonnaz in Vogenauer Commentary 868).

Q* Although interpretation is dealt with in Sect. 4.1, it may be useful also to consider here the approach of our legal systems to the interpretation of force majeure clauses (see Official Comment 4 to Article 7.1.7, Pichonnaz in Vogenauer Commentary 869–870).

7.2.3 Agreed Payment for Non-performance

Q* Please indicate in general terms the approach of your legal system to the validity or enforceability of agreements to pay a specified sum in cases of non-performance (see Article 7.4.13); according to the Official Comment to Article 7.4.13, these agreements could be ‘intended to facilitate the recovery of damages (liquidated damages according to the common law) or to operate as a deterrent against non-performance (penalty clauses proper), or both’. Inter alia consider whether these agreements are valid in principle, whether they may be subjected to judicial review, and if so, what discretion courts may have to set them aside or only enforce them for a limited sum.

Please note that the agreements considered here only deal with situations when there has been non-performance (see e.g. Illustration 2 to Article 7.4.1.3 on clauses that allow a party to retain performances already made in the event of default). We are therefore not concerned with forfeiture clauses that are not triggered by non-performance, but permit withdrawing from a contract upon payment of a sum or forfeiting a deposit (see Official Comment 4 and Illustrations 3 and 4 to Article 7.4.13; also see comment at end of Sect. 7.2.1).

7.2.4 Consequential Losses

Q* Please indicate in general terms the approach of your legal system to consequential losses suffered as a result of non-performance. We did not consider the meaning of

consequential losses in detail, but Official Comment 2 to Article 7.4.2 essentially equates it to a loss of profits, or the benefit that would normally have accrued to the aggrieved party if there had been proper performance (see Illustration 4). It then adds that the benefit will often be uncertain, so that it will frequently take the form of the loss of a chance. Please indicate in particular the position with regard to:

- how consequential losses are proven/the degree of certainty with which these losses have to be established (see Article 7.4.3, which makes special provision for proof when the claim is for loss of a chance; further see the Official Comment to Article 7.4.3 and the illustration there of non-performance of the duty to deliver tender documents in time, resulting in potential loss of the tender; McKendrick in Vogenauer Commentary pages 988–992);
- any limitations on recovery of consequential losses due to lack of a sufficiently strong causal link between the non-performance and the harm (see Official Comment 3 to Article 7.4.3), or due to (reasonable) unforeseeability (see Official Comment to Article 7.4.4, and the illustration there of losses arising from late delivery of a machine; for comment see McKendrick pages 993–996).

8 Limitation Periods (Chapter 10 PICC = Articles 10.1–10.11)

8.1 Limitation Periods—Overview

No overview is required since we decided to deal with limitation periods as a specific topic.

8.2 Limitation Periods—Specific Topics

Q* Please indicate in general terms the approach of your legal system to barring the exercise of contractual rights by the expiration of a period of time, in other words, its approach to limitation periods. In your response please consider the following:

- the type of rights/remedies that the limitation periods apply to (e.g. the right to claim damages due to non-performance, to claim performance, to withhold performance, or to terminate the contract; for examples see Wintgen in Vogenauer Commentary pages 1156–1157);
- the extent to which the rules relating to limitation periods are mandatory in your legal system, or to which parties may (contractually) modify or deviate from such periods (see Article 10.3, Wintgen in Vogenauer Commentary 1158, 1165–1168; we specifically considered this issue in the discussion); please further consider

the extent to which the rules on limitation could also apply in cases of alternative dispute resolution (see Article 10.7; Wintgen in Vogenauer Commentary pages 1179–1181);

- the extent to which a debtor (obligor) could be prevented from asserting the defence of limitation due to inconsistent behaviour, or due to dishonest concealment of facts (see Wintgen in Vogenauer Commentary pages 1158–1159);
- the duration of the general limitation period, and description of the day from which it is determined; as well as the maximum limitation period (if any), and a description of the day from which it is determined (see Article 10.2);
- the circumstances under which a new limitation period will start to run, and the effect when this occurs (see Article 10.4, which deals with the situation where the debtor (obligor) acknowledges the creditor's (obligee's) rights);
- the circumstances under which the running of the limitation period is (temporarily) suspended, where suspension means that the period during which these circumstances prevail does not count when calculating the limitation period) (see Articles 10.5, 10.6, 10.8 and the examples mentioned there);
- the effect of the expiration of a limitation period, i.e. whether the right is extinguished or the debtor (obligor) is merely granted a right to refuse performance (Article 10.9); whether the expiration of the limitation must be asserted by the debtor before the creditor may exercise the right of set-off (Article 10.10); and whether restitution may be claimed of performance made in (purported) fulfilment of an obligation after expiration of the limitation period (Article 10.11).

We decided not to consider the issue of set-off, which is the subject matter of Chapter 8 of the PICC, or the issue of assignment of rights/cession, which falls under Chapter 9. And we decided not to consider the issue of plurality of debtors or creditors, which falls under Chapter 11 PICC.

Jacques du Plessis is a Distinguished Professor in the Department of Private law at the University of Stellenbosch in South Africa. His fields of interest include the law of contract, the law of unjustified enrichment, legal history and comparative law. He has been awarded an Alexander von Humboldt-Fellowship, a TPR exchange chair at the Catholic University of Leuven, and has held visiting fellowships at the Institute for European Private Law in Maastricht, the Max Planck Institute for Foreign Private and Private International Law in Hamburg and the Institute of European and Comparative Law in Oxford. Professor du Plessis is a Vice-President of the World Society of Mixed Jurisdiction Jurists, a member of the editorial boards of a number of international law journals, and an Associate member of the International Academy of Comparative Law. He is also admitted as an attorney of the High Court of South Africa.



1 Introduction

Substantive law. Article 9 of Decree-Law 4,657/42 (Introductory Law to the Brazilian Legal System, hereinafter referred to as ‘Introductory Law’) provides for the conflict of law rules regarding the law applicable to obligations. It establishes that the applicable law is that of the country where the obligation is constituted. As for obligations arising from contracts, para 2 of Article 9 provides that the applicable law shall be the law of the country where the offeror (proposing party) is domiciled. Hence, if the offeror of an international contract is domiciled in Brazil, Brazilian law will govern that relationship. Conversely, if the offeror is domiciled abroad, then the domestic law of its place of domicile will apply to the contract, and likewise to the Brazilian contracting party.

For many years, there has been a heated debate among scholars regarding the conflict between the rule established by the Introductory Law and the principle of party autonomy, since the rule effectively curtails the freedom of parties to international contracts to choose the law that will govern their agreement. However, with the enactment of the Brazilian Arbitration Act (Law no. 9,307/1996) and the reform of the Brazilian Civil Code in 2002 (Law no. 10,406/2002), the Brazilian legal system resoundingly endorsed the party autonomy principle.¹ A considerable part of the literature defends that the rule established by the Introductory Law solely regulates the objective criteria of the *lex loci celebrationis* (the place where the obligation is constituted) which shall not affect nor restrict the subjective criteria related to the

¹ Pursuant to Article 2, §1 of Brazilian Arbitration Act and Article 421 of the Brazilian Civil Code.

intent of the contracting parties.² This subjective criteria of party autonomy must be subject, however, to the limits imposed by public policy.

Brazil further embraced the principle of party autonomy with the ratification of the United Nations Convention on Contracts for the International Sales of Goods (CISG). The Convention came into force in Brazil in October 2014 via Decree-Law no. 8,327/2014. Upon such ratification, the contractual rules established by the Brazilian Civil Code would no longer apply to international sales contracts that were subject to Brazilian law, and such agreements would instead be governed by the provisions of the CISG. Importantly, Article 6 of the CISG specifically permits contracting parties to derogate from the Convention's provisions, or even to entirely exclude its application to their agreement.³ In this sense, the ratification of the CISG was a clear demonstration of the trend in Brazil to favour the principle of party autonomy.

However, since the CISG only applies to international contracts for the sale of goods, the Brazilian Civil Code remains the governing law for all other types of international contracts in Brazil. As a civil law jurisdiction, the material rules of the Brazilian legal system (e.g. those provided by the Brazilian Civil Code) are inspired by other traditional civil codes, e.g. the German *Bürgerliches Gesetzbuch* and the Italian *Codice Civile*.

Given the complementary yet distinct spheres of application enjoyed by the Convention and the Brazilian Civil Code, the following sections will provide an overview of the relevant rules established by each system regarding the various topics in contract law discussed herein.

Forum and procedure governing disputes. The Introductory Law also provides for general rules regarding the forum and procedure for disputes arising from international contracts. Article 12 of this Law sets forth that Brazilian courts are competent to judge procedures involving international contracts if the defendant is domiciled in Brazil, or if the obligation is performed in Brazil. The Brazilian courts are likewise competent to judge procedures for contract disputes regarding real estate properties located in Brazil.

However, it should be noted that, currently, the majority of disputes arising from international contracts concluded by Brazilian parties are subject to arbitration. In these cases, the parties freely choose the seat of arbitration, the governing procedural law (whether the Brazilian Arbitration Act or any other law chosen by the parties), the substantive law applicable to the merits of the dispute, the institution that will administer the proceeding (for instance, the International Chamber of Commerce—ICC, London Court of International Arbitration—LCIA, Stockholm Chamber of Commerce—SCC, etc.), as well as the procedural rules (which address issues e.g. the nomination of arbitrators, the language of the proceeding, the disclosure of documents, etc.).

² See Vieira (2011), 446 and Rechsteiner (2012), 161.

³ Article 6 of the CISG: "The parties may exclude the application of this Convention or, subject to Article 12, derogate from or vary the effect of any of its provisions".

Brazilian law also establishes procedural rules for the recognition and enforcement of foreign judgments and arbitral awards in Brazil. Previously, Article 15 of the Introductory Law gave the Brazilian Federal Supreme Court sole authority over the recognition process. In 2004, however, Amendment No 45 to the Brazilian Federal Constitution was enacted, which superseded Article 15 and transferred authority over recognition and enforcement proceedings to the Brazilian Superior Court of Justice.

Importantly, Brazilian courts may not analyse the merits of a case during this recognition process, but must instead simply confirm whether certain requirements for award validity have been met, including the following: (i) the award must have been issued by a competent court; (ii) the parties must have been duly summoned to the proceeding; (iii) the award must have fulfilled all formalities necessary to be enforceable in the country where it was issued; (iv) the award must be translated by a certified translator (sworn translation); and (v) the award must not offend the national sovereignty, public policy and usages accepted and practised in Brazil.⁴

International commercial context. According to the Ministry of Industry, Foreign Trade and Services (currently named Ministry of Economy), which maintains a database regarding the Brazilian trade balance, China is Brazil's main commercial trading partner for both imports and exports, whereas India is the fifth largest importer of Brazilian products. Other most important commercial partners of Brazil include the United States of America, Argentina and countries of the European Union. Russia and South Africa are among the forty largest trading partners of Brazil. The 2016 available trade data is as follows (see Tables 1 and 2).⁵

2 Formation of Contracts

2.1 *Formation: An Overview*

2.1.1 Agreement; Offer and Acceptance

Offer. Under the Brazilian Civil Code, the general rules regarding offer and acceptance are set out in Articles 427 to 434. The corresponding rules for international sales contracts can be found in Articles 14 to 24 of the CISG.⁶ Specific form requirements for valid offers or acceptances vary in accordance with the nature of the contract. If the parties are negotiating a *consensual* contract, e.g. a sales contract, then the proof of the mere combination of the parties' expression of intent is sufficient for contract

⁴ Pursuant to Articles 15 and 17 of Introductory Law and Article 39 of the Brazilian Arbitration Act (Law 9,307/96).

⁵ Data available at: <https://www.gov.br/produtividade-e-comercio-externo/pt-br/assuntos/comercio-externo/estatisticas/balanco-comercial-brasileira-acumulado-do-ano>.

⁶ For a comparative analysis regarding the provisions of the CISG and the Brazilian Civil Code on the formation of the contract issue, see: Amaral Júnior et al. (2015).

Table 1 Brazilian exports to BRICS—2021—total: US\$ 18,830,197,889.00

Country	Rank	Amount (US\$)	% of total exports	Main products ^a
China	1st	17,531,963,660	31%	Soy bean, seeds, fuel, meat (chicken and bovine), cellulose, sugar, leather, cereals, cotton, paper, textile and minerals
India	15th	786,366,472	1%	Fuel, fat, oil, sugar, minerals (rocks, iron and steel)
Russia	42nd	269,725,006	0.5%	Meat, soy bean, seeds, sugar, tobacco, inorganic chemicals and other prepared food products
South Africa	44th	242,142,751	0.43%	Automotive vehicles, meat, mechanic machinery, sugar, zinc, electric machinery, cereals, aluminium and soy bean

Invest and Export

^a Official data regarding main exported and imported products are available at the Brazilian Ministry of Economy website: <https://www.gov.br/produtividade-e-comercio-exterior/pt-br/assuntos/comercio-exterior/estatisticas/balanca-comercial-brasileira-acumulado-do-ano>

Table 2 Brazilian imports from BRICS—2021—total: US\$ 13,498,772,942

Country	Rank	Amount (US\$)	% of total imports	Main products
China	1st	10,871,795,818	22.8%	Organic and inorganic compounds, electric and mechanic machinery, electronic devices (transmitters, receivers, mobile telephones), engine, insecticide, fertilizers and integrated circuits
India	6th	1,370,889,292	2.8%	Fuel, organic chemicals, pharmaceutical, chemical industry, mechanic machinery
Russia	12th	990,121,217	2.1%	Fertilizers, mineral fuel, aluminium, iron, nickel and rubber
South Africa	33rd	265,966,620	0.564%	Automotive vehicles, fuel, iron, steel, chemical industry, minerals, organic chemicals, aluminium, gold and gemstones

Invest and Export

formation. In this regard, Article 11 of the CISG provides that: “A *contract of sale need not be concluded in or evidenced by writing and is not subject to any other requirement as to form. It may be proved by any means, including witnesses*”.

Article 14(1) of the CISG provides the essential requirements for an offer to be deemed valid under the Convention.⁷ Unlike the CISG, however, the Brazilian Civil Code does not have any specific requirements that must be met for an offer to be valid. Rather, it is widely accepted that an offer is valid if it is complete and accurate enough to constitute an unequivocal expression by the offeror of its intent to be bound by the terms of the offer immediately upon its acceptance by the offeree, or until such time as the offer is withdrawn or revoked.⁸

Under both the CISG and the Brazilian Civil Code, an offer can be withdrawn by the offeror if the withdrawal reaches the offeree either prior to or at the same time as the offer.⁹ If a withdrawal is timely received by the offeree, the offeror is released from the terms of its offer, since no expectation is created in the offeree and thus no losses can be claimed due to the withdrawal.¹⁰ However, once an offer reaches the offeree, the offeror is no longer permitted to withdraw it. Instead, the offeror may *revoke* the offer.

While Article 16(1) of the CISG states that an offer may be revoked until the moment of the conclusion of the contract, Article 16(2) identifies a specific set of circumstances in which an offer becomes irrevocable.¹¹ The Brazilian Civil Code does not contain any similar provision; Article 427 of the Brazilian Civil Code states that an offer “obliges” the offeror, but does not provide for a specific rule on its revocability. Due to the absence of any specific regulation on this issue, there is some debate among scholars as to whether the obligatory/binding nature of the offer established by Article 427 effectively renders an offer irrevocable.¹² However, the majority of the literature asserts that the obligatory nature of an offer necessarily means that revocation implies indemnification to the offeree for any expectations created by the offer, and that an offer will only be irrevocable if it contains an express provision determining as such. In that case, the contract will be concluded upon acceptance of the offer by the offeree, and any subsequent ‘change of mind’

⁷ Article 14(1) of the CISG: A proposal for concluding a contract addressed to one or more specific persons constitutes an offer if it is sufficiently definite and indicates the intention of the offeror to be bound in case of acceptance. A proposal is sufficiently definite if it indicates the goods and expressly or implicitly fixes or makes provision for determining the quantity and the price.

⁸ See Gomes (2009a, b), 73; Verçosa (2010), 256 and 304 and Audit (1990), 57.

⁹ Pursuant to Article 15(2) of the CISG and Article 428, IV of the Brazilian Civil Code.

¹⁰ See Bianca and Bonell (1987), 147; Bessone de Oliveira (1997), 123; Amaral Júnior et al. (2015), 219.

¹¹ Article 16(2) of the CISG: However, an offer cannot be revoked: (a) if it indicates, whether by stating a fixed time for acceptance or otherwise, that it is irrevocable; or (b) if it was reasonable for the offeree to rely on the offer as being irrevocable and the offeree has acted in reliance on the offer.

¹² See Ubaldino Miranda (2013), 429 and Bessone de Oliveira (1997), 128–129.

by the offeror will be treated as a contractual breach, and not as revocation of the offer.¹³

In case of rejection by the offeree, Article 17 of the CISG provides that an offer is terminated when the rejection reaches the offeror. The Brazilian Civil Code does not contain any specific provisions regarding rejection.

Acceptance. Acceptance is understood as an offeree's expression to conclude the contract on the terms proposed by the offeror.¹⁴ Neither the CISG nor the Brazilian Civil Code require any specific form for an acceptance to be valid. However, acceptance must be performed within the deadline established by the offer, and an offeree's silence may not be interpreted as acceptance.¹⁵ Under Brazilian Civil Code acceptance may be 'implicit/tacit', e.g. when it is demonstrated by the offeree's practices.¹⁶

Under Article 19 of the CISG, an acceptance that modifies the terms of the offer is not considered as valid acceptance but is treated as a rejection and counter-offer.¹⁷ Brazilian law provides for a similar rule regarding modified terms in an acceptance, by even going further. Under Article 431 of the Brazilian Civil Code, also late acceptance is treated as a modification to the terms of the offer, and is therefore considered a counter-offer or new offer, rather than an acceptance.

As in the case of an offer, acceptance may be also withdrawn by the offeree, provided that the withdrawal reaches the offeror before or at the same time as the acceptance.¹⁸

There is a difference between CISG and Brazilian Civil Code with respect to the moment at which an acceptance is considered effective and a contract is deemed to be concluded. Under Article 18(2) of the CISG, an acceptance "*becomes effective at the moment the indication of assent reaches the offeror*", meaning that receipt by the offeror is decisive for purposes of determining whether an acceptance is effective. Article 434 of the Brazilian Civil Code, on the other hand, provides that an acceptance is effective upon dispatch by the offeree. Despite this difference, there are several exceptions provided by Article 434 and other provisions of the Brazilian Civil Code, which align with the reception rule established by the CISG. For example, Article 433 of the Brazilian Civil Code provides that the withdrawal must *reach* the offeror to be deemed effective. Therefore, both the dispatch and reception theories are recognized

¹³ See Bessone de Oliveira (1997), 128 and 130; Carvalho de Mendonça (1955), 466; Verçosa (2010), 315; Amaral Júnior et al. (2015), p. 219, p. 223.

¹⁴ Pursuant to Article 18(1) of the CISG. See also: Bessone de Oliveira (1997), 122; Ubaldino Miranda (2013), 132; Gomes (2009a, b), 68.

¹⁵ Pursuant to Article 111 of the Brazilian Civil Code and Article 18(1) CISG.

¹⁶ Pursuant to Article 432 of the Brazilian Civil Code; See also Gomes (2009a, b), 76; Bessone de Oliveira (1997), 117; Serpa Lopes (1961), 112.

¹⁷ Article 19 (1) of the CISG: A reply to an offer which purports to be an acceptance but contains additions, limitations or other modifications is a rejection of the offer and constitutes a counter-offer.

¹⁸ Pursuant to Article 433 of the Brazilian Civil Code and Article 22 of the CISG.

by Brazilian law, and the appropriate rule to apply will be determined by the facts of the specific case in question.¹⁹

2.1.2 Negotiation

Preliminary Negotiations. *Preliminary negotiations* are considered a distinct phase of contracting under Brazilian law. These negotiations typically precede contract formation and involve the exchange of information and documents between contracting parties without binding intent or effect.²⁰ Neither the CISG nor the Brazilian Civil Code contain any provisions regarding preliminary negotiations.

However, although the Brazilian Civil Code does not directly address the liability of the parties regarding negotiations as such, there is unanimous agreement in the literature that the parties are bound by a duty to observe good faith during preliminary negotiations, contract formation, and performance (Zanetti 2005).²¹ The duty of good faith is established by Articles 187 (applicable to obligations in general, in order to qualify illegal acts) and 422 (applicable to the pre-contractual and performance of contracts) of the Brazilian Civil Code.

As a general rule, the non-binding nature of preliminary negotiations means that each party is free to terminate negotiations without incurring any liability to each other. However, violation of the principle of good faith or abusive behaviour by the terminating party will be considered an illegal act, and thus may entail liability for damages suffered by the other party.²²

Confidential Information. The same rationale applies to confidential information exchanged between the parties during the preliminary negotiations. Although there is no express legal provision that requires parties to preserve confidentiality, this obligation is considered as a ‘lateral’ or ‘attached’ duty imposed by the duty to observe good faith during preliminary negotiations, when cooperation between the parties is essential to reaching an agreement (Antunes 2012). Nevertheless, given the absence

¹⁹ See Bessone de Oliveira (1997), 152–53; Carvalho de Mendonça (1955), 474; Amaral Júnior et al. (2015), 216.

²⁰ See Pereira (2015a, b), 34; Bessone de Oliveira (1997), 122; Carvalho de Mendonça (1955), 456.

²¹ See Statement 25 of the 1st Brazilian Journey of Civil Law, which states that Article 422 of the Brazilian Civil Code may be applied by the judge/arbitrator to the “preliminary negotiations, pre-contractual and post-contractual phases”. The Journeys of Civil Law are promoted by the Brazilian Federal Council of Justice and have the objective to discuss and provide interpretation to controversial provisions of the Brazilian Civil Code with the issuance of the so-called “Statements”. These Statements are proposed by experts in the area and, after discussion, they are approved by the participating members of the Journey (also experts in the field) as a guidance for legal interpretation (non-binding provisions). The 1st Brazilian Journey of Civil Law occurred in Brasília on October 12–14, 2002, during which 137 Statements were approved (available at: <http://www.cjf.jus.br/cjf/CEJ-Coedi/jornadas-cej/Jornada%20de%20Direito%20Civil%201.pdf/view>).

²² State Court of São Paulo, Appeal nº 9138933-87.2006.8.26.0000, 3rd Chamber of Private Law, Rel. Des. Jesus Lofrano, j. 15.03.2011; Superior Court of Justice, REsp 1367955/SP, Rel. Min. Paulo de Tarso Sanseverino, j. 18/03/2014.

of any legal provision specifically requiring parties to preserve confidentiality, this obligation is usually expressly agreed upon between the parties, e.g. via the execution of a non-disclosure agreement, or with the inclusion of a confidentiality provision in the exchanged information or drafts prepared by the parties. In any event, since the obligation to preserve confidentiality is intrinsically related to the good faith and loyalty principle, confidentiality must be observed by the contracting parties regardless of whether any express provision directing as such exists, and the failure to do so may result in liability.²³

2.1.3 Integrity of Writing

Merger Clauses. Under Brazilian law there is no express provision regarding the effect and enforceability of merger clauses, also known as entire agreement clauses. The same is true for the CISG. However, these clauses are very common in contracts subject to Brazilian law, particularly international contracts.

Merger clauses were ‘imported’ from the Anglo-Saxon legal tradition, and are designed to address yet another common law legal doctrine, known as the *parol evidence rule*. The parol evidence rule is a procedural rule that prohibits parties from introducing evidence of either prior or contemporaneous statements or agreements that contradict the written terms of their agreement (Farnsworth 1999 and Martins-Costa 2013).

Brazilian law does not recognize the parol evidence rule, and quite to the contrary permits exhaustive means of proving facts or conduct which may impact the interpretation of a contract.²⁴ Therefore, it would be difficult for a party to enforce a merger clause in Brazilian courts if there is clear and legal proof that may support some other interpretation of the contract, especially if the evidence in question demonstrates a defect of consent e.g. mistake, misrepresentation, misconduct or duress (Martins-Costa 2013). In international arbitrations, however, where the principle of party autonomy reigns supreme, merger clauses will usually be deemed enforceable, particularly when placed before arbitrators trained in the common law tradition.

Non-variation except in writing clauses. As to non-modification clauses that prohibit changes to the terms of a contract unless done so in writing, Article 29(2) of the CISG, provides that “*any modification or termination by agreement to be in writing may not be otherwise modified or terminated by agreement*”. Nevertheless, the second part of this subparagraph includes an important caveat, which prevents a party from invoking this provision if the other party has relied upon conduct that seems to demonstrate a modification of the contract terms. This exception corresponds with the duty to observe good faith during the negotiations and performance of a contract.

²³ See Martins-Costa (1999), 438–439 and Nunes Pinto (2005).

²⁴ Article 212 of the Brazilian Civil Code provides that the legal facts may be proved by confession, documents, witness, presumption and expertise witness.

The same reasoning applies in the Brazilian domestic legal system, which gives significant weight to the binding character of contractual agreements (*pacta sunt servanda*), but nevertheless subordinates the ‘inviolability’ of contracts to the limitations imposed by the principle of good faith.²⁵ For example, Brazilian law recognizes several situations in which conduct violating the principle of good faith will result in a modification of the contract, even if it is subject to a non-modification clause, e.g. the *suppressio* (loss of a legal position/right due to a repeated different behaviour during a lapse of time), *surrectio* (creation of a legal position/right due to a repeated different behaviour during a lapse of time), the *venire contra factum proprium* (prohibition of a contradictory behaviour) and the *nemo auditur turpitudinem allegans* (no one can allege and benefit from its own turpitude) (Penteado 2006). Hence, even if there is a contractual provision barring any amendments except in writing, the principle of good faith provides that the repeated behaviour of the parties may be recognized as conduct which effectively modifies the terms of the contract. Importantly, this is a matter of public policy, and therefore constitutes a mandatory rule that cannot be either mitigated or excluded by party agreement (Neves 2016). This is especially true in the case of ‘consensual’ contracts, and cases where one party attempts to utilize this type of ‘non-modification’ provision in order to obtain an unfair or illegal advantage over the other party (Neto 2011).²⁶ Similar to merger clauses, ‘non-modification’ provisions are more likely to be enforced in the context of an international arbitration, due to the supremacy of party autonomy.

2.1.4 Standard Terms

General and surprising terms. There is no specific rule in Brazilian Civil or Commercial Law regarding the incorporation of standard terms in international contracts. While Brazilian law does provide rules that protect parties against ‘surprising’ terms, these rules only apply to consumer transactions in which there is typically an imbalance of power between the parties, and they do not extend to international commercial contracts. In consumer contracts, standard terms that strongly affect a consumer can be deemed invalid by the courts, especially in cases of surprising terms.²⁷

As for international commercial contracts, the CISG applies and its rules on formation will govern the incorporation of standard terms for such agreements. Although

²⁵ Articles 187 and 422 of the Brazilian Civil Code.

²⁶ See also case law: State Court of São Paulo, Appeal 1004453-61.2013.8.26.0100, Rel. Des. Silvia Rocha, j. 09/11/2016.

²⁷ The prohibition of surprising terms firstly derives from the suppliers’ duty to provide clear and adequate information of the products/services to the customers, as set forth in Article 6, III of the Brazilian Consumer Code (Law No 8,078/1990). In addition, Article 54 of the Brazilian Consumer Code prohibits surprising terms by stipulating that the adhesion contracts prepared by the suppliers must be written in clear terms and with ostensible and legible characters in order to grant the easy and immediate comprehension by the customer.

the provisions of the Convention do not specifically address this issue, guidance can be found in the CISG-Advisory Council Opinion No 13, enacted in 2013, which countenances adherence to the provisions of the UNIDROIT Principles as a so-called ‘gap-filler’ for the CISG. According to Rule 7 of this Opinion, surprising terms are “*terms that are so surprising or unusual that a reasonable person of the same kind as the relevant party could not reasonably have expected such a term in the agreement*”, and such terms shall be *excluded* from the agreement and will not be deemed binding upon the parties.²⁸

Conflict. Opinion 13 also provides guidance for scenarios in which a conflict exists between standard and negotiated terms, as well as between contradictory sets of standard terms. Rule 8 of the Opinion gives the prevalence to negotiated terms over standard terms in the event of a conflict.²⁹ As for a conflict between different sets of standard terms, also called a ‘battle of forms’ (when the parties exchange standard terms and there is doubt as to which terms should prevail), Rule 10 of the Opinion provides that the contract is concluded on the basis of the exchanged standard terms which are “*common in substance*”, unless one of the parties clearly objects.³⁰

Both conflict rules are likely to be accepted by Brazilian courts, since they are based on the subjective intent of the parties and avoid the arbitrary choice and use of provisions which were not fully agreed upon at the time of contracting (see Sect. 4.1).

2.2 Formation: Specific Topics

2.2.1 Pre-contractual and Post-contractual Understandings and Agreements on Further Negotiation Between the Parties

Memorandum of Understanding (MOU) and Letter of Intent (LOI). Although widely used in Brazil, there are no provisions in Brazilian domestic law specifically addressing agreements e.g. a Memorandum of Understanding (MOU), a Letter of

²⁸ CISG-AC Opinion No. 13 Inclusion of Standard Terms under the CISG, Rapporteur: Professor Sieg Eiselen, College of Law, University of South Africa, Pretoria, South Africa. Adopted by the CISG Advisory Council following its 17th meeting, in Villanova, Pennsylvania, USA, on 20 January 2013: Rule 7: Standard terms that are so surprising or unusual that a reasonable person of the same kind as the relevant party could not reasonably have expected such a term in the agreement, do not form part of the agreement.

²⁹ CISG-AC Opinion No. 13, Rule 8: Where there is a conflict between negotiated terms and standard terms in the contract, the negotiated terms override the standard terms.

³⁰ CISG-AC Opinion No. 13, Rule 10: Where both parties seek to incorporate standard terms and reach agreement except on those terms, a contract is concluded on the basis of the negotiated terms and of any standard terms which are common in substance unless one party clearly indicates in advance, or later on but without undue delay objects to the conclusion of the contract on that basis. This Rule follows the so-called ‘knock-out rule’, instead of the “last shot approach”, according to which the final terms of the contract are those included by the party who addresses the “last word” to the other party without objection.

Intent (LOI), or Memorandum of Agreement (MOA). Generally, the MOU, LOI and MOA are recognized under Brazilian law as formalizations of the parties' preliminary negotiations (as discussed in Sect. 2.1.2 above); they do not have any binding effect on the parties, nor do they create any obligations that the contract under negotiation might eventually establish. Rather, these are considered preparatory agreements containing general obligation agreed upon by the parties prior to the final conclusion of the contract. The legal nature and effectiveness of these agreements depend on their content and on the degree to which the parties agreed to be bound by the terms contained therein (Baptista 1994).

With the reform of the Brazilian Civil Code in 2002, Brazilian law came to recognize and regulate the 'preliminary contract' or 'pre-contract'. These are agreements whereby the parties grant each other the right to require the conclusion of a definitive and final contract (Gomes 2009a, b). According to Articles 462 and 463 of the Brazilian Civil Code, a preliminary contract exists when an agreement, regardless of its form, contains the *essential elements* of a final contract, and furthermore does not contain a 'regret' clause or any other provision that might indicate a non-binding effect.

Therefore, although the MOU, MOA and LOI are generally understood as lacking any binding effect, under Brazilian law they may nevertheless be recognized as 'preliminary contracts' if the requirements set forth in Articles 462 and 463 are met. In such cases, each party has the right to enforce the MOU, MOA and/or LOI as the case may be, and to require the conclusion of the final contract by a particular deadline. If the other party does not agree to conclude the final contract within the given timeframe, the party can enforce its rights under the preliminary contract in court, and may either claim the conclusion of the final contract, or instead may seek damages for the non-conclusion.³¹

Since the MOU and MOA are generally more exhaustive agreements, they are likely to be recognised in court as binding 'preliminary contracts'. The LOI, however, which is less specific than either the MOU or MO and usually provides for non-binding provisions, is likely to be recognized as the mere formalization of the preliminary negotiations, and therefore be subject to the effects discussed in Sect. 2.1.2 above.

Comfort Letter. Similar to the instruments discussed above, there is no specific regulation in Brazilian law on comfort letters, and the legal nature and effectiveness of such a document will likewise depend on its contents. Since this instrument functions as a guarantee or collateral issued by a third party in favour of a creditor for the performance of an obligation by a debtor, it strongly resembles the 'personal collateral' mechanism (defined by Article 818 of the Brazilian Civil Code), and the 'promise of third-party's facts' (regulated in Articles 439 and 440 of the Brazilian Civil Code).

Notwithstanding such similarity, differently from the personal collateral, the party who issues the comfort letter (comforting party) is not severally liable for

³¹ Pursuant to Articles 464 and 465 of the Brazilian Civil Code.

the ‘comforted’ obligation together with the debtor. As for the ‘promise of third-party’s facts’, this is related to the conclusion of the contract, and is essentially a guarantee whereby someone personally assumes the obligation to a party that a third party will conclude a contract. Conversely, a comfort letter may be issued for any kind of obligation whether within the contractual relationship or not.

Hence, the literature defines the comfort letter as an ‘atypical personal collateral’ with extra contractual and ancillary nature (Moreira Alves 2011), where the ‘comforting’ party is not liable for the performance of the obligation assumed by the debtor, but must act in support of such performance.³² As such, the creditor (comforted party) may demand the performance of this supporting obligation from the comforting party, and the failure to perform may render the comforting party liable for damages (extra contractual liability).³³

The agreement to negotiate further with a particular party (a ‘lock-in’) and the agreement not to negotiate with a third party (a ‘lock-out’). Under the Brazilian legal system, rules regarding lock-in and lock-out agreements are most relevant within the *antitrust* sphere, where individual players typically have a dominant position in a particular market and there is an emphasis on avoiding economic concentration that harms free competition. Outside of the antitrust context, Brazilian courts tend to recognize lock-in and lock-out negotiations if both parties are equally sophisticated and negotiate with the same bargaining power, meaning that neither party enjoys a position of dominance over the other. In these cases, violating a lock-in and/or lock-out agreement may constitute a violation of the duty to observe good faith (Articles 187 and 422 of Brazilian Civil Code), and the breaching party may therefore incur liability for damages, as discussed in Sect. 2.1.2 above (Fritz 2009).

In cases where the parties do not expressly agree to lock-in or lock-out negotiations, the duty to observe good faith does not prevent the parties from conducting parallel negotiations with other parties, provided that the existence of any such parallel negotiation is disclosed to the counterparty. This is particularly important if a third party in the parallel negotiations makes a better offer, in which case the offer must be disclosed to the counterparty, who must be given the opportunity to match those terms before preliminary negotiations are terminated (Almeida Costa 1984).

2.2.2 Electronic Contracting

General. There are no specific regulations on electronic contracting under Brazilian law, nor has Brazil ratified the UNCITRAL Model Law on Electronic Commerce. The drafting commission for the reform of the Brazilian Civil Code in 2002 was widely

³² State Court of São Paulo, Appeal 991.05.032052-2, Rel. Min. Theodureto Camargo, j. 29/09/2011; State Court of São Paulo, Appeal 9068717-04.2006.8.26.0000, Rel. Min. Mônica da Silva, j. 06/06/2012.

³³ Especially in the event of the so-called “hard comfort letters”, which provides for a more direct link between the comforting party’s act and the obligation to be performed by the debtor (guaranteed party). See Salomão Neto (1998), 39 and Guerrero and Marcondes (2011), 363–414.

criticized for not addressing electronic contracts during its revisions to the Code, since the internet and the electronic commerce were already very well-developed in Brazil at that time. The drafters justified their decision by arguing that the existing regulations governing contract formation were sufficient for the purposes of electronic commerce (Reale 2005). As a result, Brazilian case law and literature were forced to adapt to the peculiarities of electronic commerce, in order to fill the gaps left by the existing regulations.

Place and time. As explained in Sect. 2.1.1 above, under Article 435 of the Brazilian Civil Code and Article 9, para 2 of the Introductory Law, the place in which a contract is concluded is defined as the place where the contract was proposed. This rule likewise applies to electronic contracts, and the place of contracting will determine the law applicable to those agreements.

As for the time of the conclusion of the contract, this determination may depend on whether the contract is made between ‘present’ parties (parties enjoying simultaneous/instant communication), or ‘absent’ parties (parties that are remote from one another with delays in their communications). For contracts made between present parties, which includes electronic contracting via videoconference or even ‘chats’, the acceptance of the offer is usually immediately received by the proposing party, and the contract is deemed concluded at that specific moment. As for contracts between ‘absent’ parties, as mentioned above in Sect. 2.1.1, Article 434 of the Brazilian Civil Code provides for the general rule that a contract is concluded at the moment when the acceptance is dispatched.

There is some discussion as to whether contracts concluded by e-mail should be qualified as either ‘present’ or ‘absent’ parties. Although the parties are distant from each other, the immediacy afforded by electronic communication means that it cannot be compared to epistolary correspondence. Nevertheless, the prevailing view in the literature and case law considers contracting by e-mail as between ‘absent’ parties. As such, the dispatch theory should apply for purposes of determining the time at which such a contract is concluded. However, in order to provide greater legal certainty for the parties, who naturally cannot control the operation of a web server, the 3rd Journey of Civil Law issued Statement 173 in 2004.³⁴ This Statement provides that contracts concluded via email will be deemed to have concluded at the moment when acceptance is received by the offeror (arrived in the offeror’s server, regardless of the actual reading of the e-mail).

As for the length of time that an electronic offer remains open for acceptance, Article 428 of the Brazilian Civil Code provides distinct rules based on whether the offer in question is made to a present or absent party. If an offer is made to a present party but is not immediately accepted, then the offer will no longer be binding to the

³⁴ 3rd Journey of Civil Law, Brasilia, on December 1–3, 2004 (available at: <http://www.cjf.jus.br/cjf/CEJ-Coedi/jornadas-cej/III%20JORNADA%20DE%20DIREITO%20CIVIL%202013%20E%20NUNCIADOS%20APROVADOS%20DE%20NS.%20138%20A%20271.pdf/view>). As explained in footnote 22, the Statements of the Journey of Civil Law are proposed and approved by experts in the civil law field in order to provide non-binding interpretation guidance to controversial provisions of the Brazilian Civil Code.

offeror. If the offer is made to an absent party with a specific deadline for acceptance, the offer will remain open until that deadline expires. If an offer is made to an absent party without a specific deadline for acceptance, the offer will remain open and binding on the offeror for a period of time that is sufficient to allow acceptance, considering the circumstances and complexity of that particular transaction. Finally, if an offer is made to an absent party which the offeror wishes to withdraw, the offer will remain valid unless the withdrawal reaches the offeree either prior to or at the same time as the offer.

Brazilian law does not have any mechanism to determine the moment at which the deadline for acceptance begins to run, and specifically whether it begins when the offer is dispatched or when it is received by the offeree. However, based on the 3rd Journey of Civil Law Statement discussed above, literature tends to agree that the clock starts once the offer is received by the offeree (Rebouças 2015).

In case of late acceptance caused by reasons that are not attributable to the offeree (e.g. a problem in the transmission by the web server), the general rule provided for in Article 430 of the Brazilian Civil Code regarding 'late acceptance due to unforeseeable circumstances' shall apply. Under this rule, the offeror must immediately inform the offeree of the late reception or risk being held liable for indemnifying the offeree, who relied on timely receipt of the acceptance by the offeror.

Specific Regulation and formalities. Rules governing automated contracting are usually applied to protect consumers and there is no specific regulation on international contracts in this regard. Decree-Law No 7,962, enacted on March 15th, 2013, created several duties to be observed by the supplier (offeror), which are aimed at protecting consumer rights. Among those duties, the supplier/offeror must immediately confirm the receipt of the offer by the offeree, and this confirmation of receipt is considered as acceptance for purposes of contract formation (Article 4, III of the Decree-Law).

Although Brazilian law does not provide for any specific rules on electronic contracts, it does recognize the validity of such agreements. For purposes of determining the validity of an electronic contract, the virtual registration of the agreement (duly certified) has the same effect as real paper (Coelho 2007). However, certain contracts require some sort of solemnity in order to be deemed valid and enforceable before third parties, e.g. contracts for the sales of real estate. Although the contract may be concluded through electronic means, the transfer of property will only be effective after the due registry with a competent notary public (pursuant to Articles 108 and 1,245 of the Brazilian Civil Code). Non-compliance with these form and/or solemnity requirements will result in the contract being deemed invalid, pursuant to Article 166, IV and V of the Brazilian Civil Code.

Provisory Act No 2,200 was enacted in 2001 and states that digital documents are legally valid if duly certified by the ICP-Brasil (Brazilian Infrastructure for Public Keys).

3 Validity of Contracts

3.1 Validity—Overview

3.1.1 General Provisions on Validity

Requirements for entering into a contract. As the CISG, pursuant to Article 4(a) thereof, does not govern the “*the validity of the contract or of any of its provisions or of any usage*”, this section will address the rules of Brazilian domestic law regarding contract validity and defects of consent, in particular the rules of the Brazilian Civil Code.

While Brazilian law recognizes the principle of party autonomy and the freedom of parties to contract, Article 421 of the Brazilian Civil Code confines the exercise of this right to the limits established by the ‘social function of the contract’. The ‘social function of the contract’ is a concept that is comparable to one of ‘cause’ in French Law. In the Brazilian legal system, the ‘cause’ would be the promotion of the common economic welfare and social justice; however, in business transactions such rule may be mitigated. Additionally, Brazilian law prohibits parties from agreeing to illegal obligations, either as the object or as the determining ‘cause’ of a contract (Article 166, II and III of the Brazilian Civil Code).

Impossibility to perform the contract. In most cases, if the object of a contract is impossible, the contract will be deemed null and void. However, an exception exists under Article 106 of the Brazilian Civil Code for contracts where the impossibility is relative (not absolute), or where the impossibility ceases to exist before the performance of the condition to which the contract is subject (‘initial impossibility’). In all other cases, a contract whose object is impossible, illegal or indeterminable is deemed null and void.³⁵ Relatedly, Article 123, item I, of the Brazilian Civil Code states that contracts which are subject to impossible conditions (whether physically or legally impossible) are likewise invalid.

3.1.2 Mistake, Fraud, Threats and Gross Disparity as Grounds for Avoidance

Mistake. According to Brazilian law, a contract can be nullified due to a *substantial* mistake that affects the expression of intent of one of the contracting parties, and provided that the mistake could be perceived by any person of usual diligence under the particular circumstances of the transaction.³⁶ Pursuant to Article 139 of the Brazilian Civil Code, a substantial mistake exists when: (i) it involves the nature of the transaction, the main object of the declared intent or any of its essential qualities;

³⁵ Pursuant to Articles 104, II and 166, II of the Brazilian Civil Code.

³⁶ Pursuant to Article 138 combined with Article 171, II of the Brazilian Civil Code.

(ii) it involves the identity or essential quality of the person to whom the expression of intent is directed, provided that such mistake has influenced the contract in a relevant manner; or (iii) it implicates the sole or main reason for the contract. If the mistake affects the transmission of one party's expression of intent, such transmission and declaration can be nullified on any one of these three bases as well.³⁷ A mistake regarding the identity of a party or the good to be transacted will not invalidate a contract if such elements can be otherwise identified by the context or the applicable circumstances.³⁸ Finally, a mistake will not invalidate a contract if the person to whom the expression of intent is directed offers to perform the contract in accordance with the real desire of the party that is alleging the mistake.³⁹

Fraudulent Representation. Article 145 of the Brazilian Civil Code further provides that a contract may also be nullified on the basis of fraudulent representation, which encompasses the consent defects of misconduct (malice or, in Portuguese, *dolo*) and fraud, provided that the fraudulent representation is the *cause* of the transaction. Such misconduct occurs if the intentional non-disclosure of a relevant fact or quality was the reason for the other party to conclude the contract.⁴⁰ If the fraudulent representation is perpetrated by a party's legal representative, the liability of the represented party is limited to the advantage it obtained by virtue of the fraudulent representation. Otherwise, in cases of conventional representation, the represented party will be severally liable for any damages suffered by the other party.⁴¹

Since both mistake and fraud are defects of consent that affect the formation of a contract, their occurrence, when duly proven, entitles the aggrieved party to avoid the contract and claim damages.⁴²

Threats. In addition, threats, also known as coercion or duress, are another available basis for invalidation of a contract under Brazilian law. According to Article 151 of the Brazilian Civil Code, a threat affects the expression of intent of a party if it is unjustified and imbues fear of imminent and significant harm to a party's person, his family, or his assets. Although not expressly provided in law, a threat of economic harm is recognized by modern literature and case law as sufficient to affect the validity of a contract, since it is a kind of threat, and therefore a defect of consent, and furthermore violates the principle of good faith.⁴³

Gross Disparity. The concept of the imbalance between the parties as a way to affect the contract is addressed under Brazilian law in two moments: (i) at the moment when

³⁷ Pursuant to Article 141 of the Brazilian Civil Code.

³⁸ Pursuant to Article 142 of the Brazilian Civil Code.

³⁹ Pursuant to Article 144 of the Brazilian Civil Code.

⁴⁰ Pursuant to Article 147 of the Brazilian Civil Code.

⁴¹ Pursuant to Article 149 of the Brazilian Civil Code.

⁴² The term *avoidance* (in Portuguese *rescisão*) is specifically used by Brazilian literature to identify the extinction of the contracts due to defects in their formation (different from *termination*, deriving from a breach on the performance of the contract). See Ubaldino Miranda (2013), 417 and 425.

⁴³ See Medina (2010) and Serpa Lopes (1961); Superior Court of Justice, CC 110844, Rel. Min. Vasco Della Giustina (convened from the State Court of Rio Grande do Sul), j. 09/07/2010.

the contract is concluded, in which case it is known as a *lesion* and governed by Article 157 of the Brazilian Civil Code; (ii) during the performance of the contract, which is known as a *hardship* and governed by Article 478, discussed further below in Sect. 6.1.2. As to the former, Article 157 establishes an objective requirement of ‘disparity’ between the obligations or performances assumed by the parties, and a subjective requirement of ‘urgent necessity’ or ‘inexperience’ of the harmed party.

The urgent necessity needs not solely be related to the economically distressed situation of the aggrieved party, but rather to a ‘contractual necessity’, an impossibility to avoid the contract (Pereira 1993). The party’s inexperience, which is not equivalent to negligence, can either be assessed broadly, or can instead consider the circumstances of that specific transaction, pursuant to Statement 410 approved by the 5th Journey of Civil Law.⁴⁴

Since the concept of ‘lesion’ or ‘gross disparity’ is intended to protect parties that are in an inferior and vulnerable condition, its application is uncommon in the international commercial sphere, which is marked by the participation of sophisticated and experienced players. Finally, even if the effects of such a disparity only become apparent during the performance of the contract, this will still suffice for purposes of avoidance, so long as the disparity existed at the time at which the contract was concluded (Nevares 2002).

Remedies. Where a defect of consent (fraud, malice, threat, gross disparity or mistake) may render a contract voidable, the aggrieved party may elect to avoid the contract and seek compensation for damages (if effectively incurred) against the other party.⁴⁵ However, if both parties have engaged in fraud or misconduct, then neither party may claim avoidance or damages under the terms of Article 150 of the Brazilian Civil Code.

The right to demand the avoidance of a contract for defects of consent expires four years (4) from the date of the conclusion of the contract, and, in the case of threats, four years (4) from the date on which the threat ceased.⁴⁶

Although voidable, a contract can remain in force if it is either expressly confirmed⁴⁷ or partially performed⁴⁸ by the aggrieved party, since such conduct implicitly extinguishes any potential claims by that party.⁴⁹ The continuation of the contract, however, will not affect the rights of third-parties, pursuant to Article 172 of the Brazilian Civil Code. If the fraud, misconduct or threat is imputable to a third-party, the aggrieved party may still be entitled to claim avoidance and

⁴⁴ 5th Journey of Civil Law, Brasília, 9–11 November, 2011 (available at: <http://www.cjf.jus.br/cjf/CEJ-Coedi/jornadas-cej/v-jornada-direito-civil/VJornadadireitocivil2012.pdf/view>). For more information of the scope of the Brazilian Journeys of Civil Law, please refer to footnotes 22 and 35.

⁴⁵ Pursuant to Article 182 of the Brazilian Civil Code, upon the avoidance of the contract, the parties shall be recomposed to the *status quo ante* and, if it is not possible to restore the previous situation, the aggrieved party shall be compensated for the suffered losses.

⁴⁶ Pursuant to Article 178, I and II of the Brazilian Civil Code.

⁴⁷ Pursuant to Articles 172 and 173 of the Brazilian Civil Code.

⁴⁸ Pursuant to Article 174 of the Brazilian Civil Code.

⁴⁹ Pursuant to Article 175 of the Brazilian Civil Code.

damages, provided that the counterparty was aware of the third-party's actions. In that case, the third-party is severally liable for the losses suffered by the aggrieved party. Conversely, if the party that benefited from the wrongful conduct was not aware of such interference, the contract shall remain in force and the aggrieved party may seek damages from the third-party.⁵⁰

3.1.3 Illegality

Application of mandatory rules. Despite the prevalence given to party autonomy in the international sphere, an international contract must still comply with the mandatory rules established by Brazilian law, and must not offend public policy. Article 5, para 1 of the Brazilian Federal Constitution of 1988 classifies mandatory rules as "*rules defining rights and fundamental guarantees*". These rules have direct and autonomous application in Brazil (Nadia de Araújo and Gama Jr 2012).

The Introductory Law provides that any law, act, judgment, or expression of intent that is contrary to Brazilian sovereignty or public policy and usages shall not be effective in Brazil.⁵¹ The Brazilian Arbitration Act (Law No. 9,307/1996) further provides that the exercise of party autonomy in choosing the rules that will govern their arbitral proceeding must also comply with usages and public policy.⁵² Similarly, Article 166, VI of the Brazilian Civil Code states that a contract is deemed null and void if its object violates mandatory rules. The same rationale applies to the recognition and enforcement of foreign judgments.⁵³ Therefore, in order to be effective under Brazilian law, the provisions of a contract may not violate the rules that grant fundamental rights (e.g. consumer rights, free competition, etc.), or the essential values of Brazilian society, regardless of the applicable law chosen by the parties (Nadia de Araújo and Gama Jr 2012).

Consequences to the infringement of mandatory rules. Under Brazilian law, the consequences of a contract being deemed null and void for violation of the mandatory rules will depend on the seriousness and scope of the violation. As seen above, if a contract is deemed null and void in its entirety (its object, as a whole, offends public policy or mandatory rules, or contains one of the defects provided for in Article 166 of the Brazilian Civil Code⁵⁴), it cannot be confirmed or amended, and

⁵⁰ Pursuant to Articles 148 (fraud/misconduct) and 155 (threat) of the Brazilian Civil Code.

⁵¹ Pursuant to Article 17 of Introductory Law.

⁵² Pursuant to Article 2, paragraph, 1 of the Brazilian Arbitration Act.

⁵³ See, for instance, Article 39, II of Brazilian Arbitration Act and Article 963, VI of the Brazilian Civil Procedure Code (Law 13,105/2015), which provide that a foreign arbitration or judicial award will not be confirmed in Brazil if it offends public order.

⁵⁴ Articles 104 and 166 of the Brazilian Civil Code indicate, as causes of annulment of a contract: (i) if it is concluded by incapable party; (ii) if its object is illegal, impossible or indeterminable; (iii) the essential purpose of the contract is illegal; (iv) noncompliance with the form provided by law; (v) noncompliance with any solemnity essential for the validity of the contract; (vi) if its object violates mandatory rules; (vii) if the law declares its annulment or prohibits its practice.

a party that acted in good faith will have the right to seek damages or restitution.⁵⁵ A contract that has been deemed null and void does not produce any effects as to the contracting parties or to third parties.⁵⁶ However, if a contract is merely deemed ‘voidable’, for instance, because of a defect of consent (fraud, mistake, etc.), it can be confirmed either by express declaration or performance by the parties, and thus still be enforceable.⁵⁷ Similarly, if a defect only affects some of a contract’s provisions, and these provisions are separable from the remaining terms and do not constitute the main object of the agreement (i.e., ancillary provisions), the parties may agree on the validity of the remaining terms, as well as to the continuation of the contract with the exclusion or amendment of the problematic clauses (the so-called “partial invalidity”).⁵⁸

3.2 *Validity—Specific Topics*

3.2.1 Public Permission

Who. Brazilian domestic law does not have a general rule on the allocation among parties of the responsibility to apply for or otherwise obtain any necessary public permission for creating or performing obligations under a private contract. Generally, this will either be expressly established by the parties in their contract or be provided by other applicable legal provisions.

With respect to international contracts, an example of such allocation is found in Article 54 of the CISG. This provision requires the buyer to take all necessary measures and steps to comply with any applicable regulations regarding payment of the price,⁵⁹ e.g. providing the necessary administrative authorization to transfer funds to another country.⁶⁰ Another instance for the allocation of such duties by operation of law is set forth by the INCOTERMS⁶¹ related to public authorizations that are necessary for the importation and exportation of goods across different countries.

There are also specific regulations in Brazilian domestic law related to international trade that allocate the responsibility to obtain public permission between the parties, e.g. the Normative Instruction No 28/1994 which requires Brazilian exporters

⁵⁵ Pursuant to Article 169 of the Brazilian Civil Code.

⁵⁶ See Junqueira de Azevedo (2013), 41; 63–64 and Gomes (2010), 366.

⁵⁷ Pursuant to Articles 172, 173, 174 and 175 of the Brazilian Civil Code.

⁵⁸ Pursuant to Article 184 of the Brazilian Civil Code.

⁵⁹ Article 54 of the CISG: The buyer’s obligation to pay the price includes taking such steps and complying with such formalities as may be required under the contract or any laws and regulations to enable payment to be made.

⁶⁰ UNCITRAL Digest of Case Law on the United Nations Convention on Contracts for the International Sale of Goods, Article 54, 2016 Edition, 256; See also Araújo and Spitz (2013).

⁶¹ International Commercial Terms 2010, edited by the International Chamber of Commerce (ICC) (<https://iccwbo.org/resources-for-business/incoterms-rules/>).

to obtain the customs clearance from the Federal Revenue.⁶² Furthermore, Decree No 23/2011 requires Brazilian importers to obtain permissions and registers from the Brazilian Secretary of International Trade.⁶³

Form and time. Similarly, the forms and deadlines for compliance with the obligation to obtain public permissions are either generally included by the parties within the contract itself or are provided by the relevant specific regulation. For instance, Article 15-A, §4, of Decree No 23/2011 requires that a Declaration of Origin shall be presented within 10 days after a request for such Declaration by the Brazilian Secretary of International Trade.

If there is no specific deadline for performance of an obligation (payment⁶⁴) either established by the parties or provided by law, Article 331 of the Brazilian Civil Code will apply as a default rule, pursuant to which a creditor is entitled to request *immediate* performance. However, in accordance with the duty to observe good faith,⁶⁵ the word “immediately” should not be strictly or narrowly interpreted, but instead should be understood as requiring performance without unreasonable delay, so as to avoid harm to the transaction itself or to the counterparty’s interests (Carvalho Santos 2002).

Failure to obtain permission or refusal. If a public permission or authorization is of the essence to the contract, the relevant public authority’s refusal to grant such permission will render the contract invalid pursuant to Article 166, V of the Brazilian Civil Code (for instance, a good cannot be exported from Brazil without customs clearance by the Federal Revenue, otherwise it is deemed an irregular transaction). If the denial is attributable to the party that was entrusted with obtaining such permission (due to its intention, fault or mere negligence), then that party shall be liable for any losses incurred by the other party due to the resulting invalidity of the contract.⁶⁶ The party will be exempted from such liability only if the denial arises from a fortuitous event or force majeure that renders the denial beyond the control of the responsible party.⁶⁷ However, if the permission can be granted at a later date, the contract will not be invalidated, as Article 176 of the Brazilian Civil Code provides that a contract is deemed valid from the date on which such permission is obtained. Additionally, if public permission is not essential to the contract but rather is required only for ancillary and separable obligations, the contract will remain valid with respect to its other provisions (partial invalidity⁶⁸).

⁶² Pursuant to Article 3 of the IN 28/1,994.

⁶³ SISCOMEX Decree 23/2011, Articles 13, 14 and 15.

⁶⁴ The word ‘payment’ present in Article 331 refers to the effective performance of obligations assumed by or applicable to the parties.

⁶⁵ Again, Articles 113 and 422 of the Brazilian Civil.

⁶⁶ Pursuant to the general liability rule provided for in Article 389 of the Brazilian Civil Code and also Article 74 of the CISG.

⁶⁷ Pursuant to Article 393 of the Brazilian Civil Code and Article 79 of the CISG.

⁶⁸ Pursuant to Articles 170 and 184 of the Brazilian Civil Code.

Improper means to obtain permission. The use of improper means to obtain public permission (corruption of a public authority, for instance) invalidates such permission. In addition, if the public permission is essential for the contract, then such improper conduct will invalidate the entire transaction as well, in accordance with Article 166, items III (when the ground for concluding the contract is illegal), VI (objective to fraud mandatory rules) or VII (the law declares the contract void or prohibits such practice)⁶⁹ of the Brazilian Civil Code. Such invalidation will be without prejudice to any applicable criminal consequences.⁷⁰

3.2.2 Covenants in Restraint of Trade

Provisions that restrain parties from competing or engaging in a particular area or trade (for instance, exclusivity clauses in distribution agreements) are recognized by Brazilian law provided that they constitute the parties' free intention and do not harm free competition in the market. In addition, such restrictive covenants will only be accepted if concluded by sophisticated parties of equal bargaining power, whose real intent was not affected by malice or duress as a result of the other party's economic strength.⁷¹

The Brazilian Federal Constitution provides that the national economic order is based, *inter alia*, upon the principle of free competition.⁷² Therefore, any restrictive provision affecting free competition shall be deemed null and void as contrary to the mandatory rules, in accordance with Article 166, VI of the Brazilian Civil Code. A restrictive covenant will be found to affect free competition if the subject of the restriction is sufficiently important to the market. This assessment will in turn depend on factors e.g. the duration of the restriction, its geographical coverage, its scope as well as the relevant market affected by the restraint (Salomão Filho 2013).⁷³ Hence, when assessing the enforceability of a restrictive provision, one must not only consider the relationship between the contracting parties, but it is also well worth taking into account the interest of third-parties, especially customers' (Martinez 2004).

The general practices that will invalidate a contract clause are detailed in Law No 12,529/2011, which regulates free competition in Brazil. For example, Article 36 of this Law considers the dominance of a relevant market, the limitation on free competition or the exercise of a dominant position in the market by one of the parties

⁶⁹ The fraudulent obtainment of a public permission is different from the simulated contract, which occurs if the permission is false or not granted by the competent person/authority.

⁷⁰ Pursuant to Article 317 of the Brazilian Criminal Code.

⁷¹ As seen above, pursuant to Articles 145 and 151 of the Brazilian Civil Code, a contract can be nullified if the intent of a party is affected by the malice or duress of the other party.

⁷² Pursuant to Article 170, IV of the Federal Constitution.

⁷³ See also CADE's Administrative Proceeding n. 08012.002608/2007-26, initiated by Cervejarias Kaiser Brasil S.A. against Companhia de Bebidas das Américas (AmBev). In this case, the period of the restriction was limited, at maximum, to 5 years.

as non-competitive practices. Therefore, contracts and provisions which result in those infringements are voidable.

The Administrative Council of Economic Defence (CADE) is an independent administrative authority responsible for reviewing restrictive covenants in private contracts. In administrative proceedings submitted to CADE, if a strong restriction is detected in a given transaction (for instance, exclusivity of distribution for 30 years), then the authority will generally require the contracting parties to relax that restriction in order to preserve the validity of the remaining contract provisions (for instance, CADE determines the reduction of the exclusivity period).

Finally, it is important to distinguish restrictive covenants in private agreements from the permitted and necessary restrictions on trade provided by law. One example of such necessary restriction can be found in contracts for the sale of business premises. In such contracts, Article 1, 147 of the Brazilian Civil Code prohibits the selling party from competing with the acquiring party for a period of five years, unless otherwise expressly agreed by the parties or authorized by law.

3.2.3 Severability

As already mentioned, the CISG does not deal with the issue of contract validity.⁷⁴ Conversely, as briefly noted in Sect 3.2.1 above, Brazilian law recognizes partial invalidity of a contract under Articles 170 and 183 of the Brazilian Civil Code. In fact, the principle of *pacta sunt servanda* requires that partial invalidity shall be treated as the rule, while the invalidation of a contract in its entirety shall only occur in exceptional cases.⁷⁵

Article 170 provides for the rule of ‘substantial conservation of the contract’, which is possible in cases where a seemingly invalid contract contains the elements required for a valid one, and when it is possible for the interpreter to suppose that the parties would have desired a valid contract had they known about the illegality.⁷⁶ Article 184 states that the partial invalidity of a contract will not affect its otherwise valid provisions, provided that such provisions are separable from those which are deemed invalid, and that the continuation of the contract is the intention of the parties. Article 170 also provides that, while the invalidity of a contract’s principal obligation will also affect the validity of its ancillary obligations, the same is not true in reverse; the invalidity of an ancillary provision does not affect the principal obligation.⁷⁷

⁷⁴ Pursuant to Article 4(a) of the CISG.

⁷⁵ See Junqueira de Azevedo (2013), 66; Betti (1970), 45.

⁷⁶ Pereira (2015a, b, vol. 1), 532 and Andrade (1974), 433.

⁷⁷ See Zanetti (2013a, b), 58 and Junqueira de Azevedo (2013), 68–69.

4 Interpretation of Contracts

4.1 Interpretation—Overview

Real intention of the parties. According to the general rules of Brazilian domestic law on contract interpretation and other legal acts, priority is given to the real and subjective intent of the parties, rather than to the literal terms expressed in their agreement.⁷⁸ However, the ‘subjective’ theory is not absolute, and Brazilian law provides for an exception known as the ‘mental reservation’, which occurs when a party’s expressed intent is in conflict with its real intent. In this case, Article 110 of the Brazilian Civil Code will give legal effect to the party’s *expressed* intent, and, so long as the other party was not aware of that party’s real intent, this real intent will be deemed irrelevant for purposes of contract interpretation.

Parameters. Under Brazilian law, when interpreting a contract, regard must be had for the duty of good faith (the fair and right conduct that would be expected of any person in the same circumstances) and for the common usages of the place at which the contract was concluded.⁷⁹ If no such place has been chosen by the parties, then this is to be determined in accordance with the applicable law.

Unclear terms. Interpretation rules regarding unclear terms usually apply to contracts involving consumers and other potentially vulnerable people, and require that interpretation must always be in favour of the weaker party.⁸⁰ There is no specific requirement under Brazilian law for a contract to be interpreted in a way that gives effect to all of its terms rather than depriving some from having any meaning. However, the literature does recognize the so-called ‘systematic interpretation’, which instructs that all provisions of the same instrument must be analysed within a ‘single system’ and with regard for its other provisions contract (Maximiliano 1961).

Integration. Although there is no specific provision in Brazilian law regarding this question, the literature distinguishes the act of contract ‘interpretation’ from the act of ‘supplying omitted terms’, and the latter is instead referred to as ‘integration’. While interpretation seeks to find the right and fair meaning of a contract provision, integration focuses on filling the existing gaps in a contract. In both cases, regard is given not only to ascertaining the precise intent of the parties, but also to the objective facts and circumstances in which the contract provisions are involved,⁸¹ of course always observing the principles of good faith and the social function of the contract (Miragem 2005).

⁷⁸ Pursuant to Article 112 of the Brazilian Civil Code.

⁷⁹ Pursuant to Article 113 of the Brazilian Civil Code.

⁸⁰ Pursuant to Article 423 of the Brazilian Civil Code.

⁸¹ See Betti (2007), 347 and Lima (2005), 92.

Implied obligations. Brazilian law recognizes implied obligations which derive from general principles of contract law, e.g. the principle to observe good faith, usages, and the preservation of the contract (*pacta sunt servanda*) (Wald 2006). The nature of these obligations may vary in accordance with the specific nature of the contract (for instance, there are implied obligations to be observed by suppliers in consumer contracts, even if these are not expressly provided for in the contract⁸²). As for international contracts for sales of goods, the CISG also recognizes similar implied obligations, e.g. the implied obligation for parties to apply the market price for goods at the time of the conclusion of the contract if a price has not otherwise been expressly fixed by the agreement.⁸³

Standard terms. As noted in Sect. 2.1.4 above, there is no specific rule under Brazilian Civil or Commercial law related to the incorporation or interpretation of standard terms in international contracts. However, since the CISG has entered into force in Brazil, the interpretation of international contracts based on standard terms may follow the CISG's rules, as per CISG Advisory Council Opinion No 13.⁸⁴ Therefore, the interpretation rules suggested by the Advisory Council shall apply to international contracts governed by Brazilian law, e.g. the prohibition of surprising terms and the prevalence of negotiated terms over standard terms (see Sect. 2.1.4 above).

4.2 Interpretation—Specific Topics

4.2.1 The Language of the Contract

Conflict between languages. Brazilian law does not provide for specific rules regarding the interpretation of a contract that is drafted in more than one language. The parties are free to decide which version of their agreement, and which language, will prevail in the event that a term has potentially divergent meanings. This choice will be enforceable, and the interpretation supported by the chosen language will prevail. In the event that a prevailing language is not chosen by the parties to a multi-lingual contract, interpreters in Brazil usually tend to apply, as the case allows, the language that is most closely related to the contract. The determination of which

⁸² For instance, Article 21 of the Brazilian Consumer Code stipulates the implied obligation of the supplier of repairing services to apply, in its services, original, adequate and new components who maintain the same specification of the manufacturer.

⁸³ CISG Article 55: Where a contract has been validly concluded but does not expressly or implicitly fix or make provision for determining the price, the parties are considered, in the absence of any indication to the contrary, to have impliedly made reference to the price generally charged at the time of the conclusion of the contract for such goods sold under comparable circumstances in the trade concerned.

⁸⁴ CISG-AC Opinion 13: 1. The inclusion of standard terms under the CISG is determined according to the rules for the formation and interpretation of contracts under the CISG.

language has the closest connection to the contract considers many factors, e.g. the place of the conclusion of the contract, the applicable law or the place of jurisdiction chosen by the parties (Basso 1998). Importantly, however, if a contract needs to be interpreted by a Brazilian domestic court, such interpretation shall be based on the Portuguese version of that agreement. In fact, Article 224 of the Brazilian Civil Code stipulates that a document must be translated into Portuguese in order to be given legal effect in Brazil.

Unfamiliar language. There is also no specific legal provision under Brazilian law that protects a contracting party from contractual obligations based on his lack of familiarity with the contracting language, provided that the language was freely chosen by the parties. Therefore, such protection will normally only exist in cases involving contracts of adhesion or consumer contracts, where, as seen above, the law seeks to protect consumers/adhering parties from surprising terms (e.g. a word or expression provided in another language which is not known to the consumer/adhering party).⁸⁵ Since international commercial contracts are generally concluded by sophisticated parties, judges and arbitrators are unlikely to grant any protection to a party claiming ignorance of the contracting language. The controversial term will be interpreted in accordance with the knowledge of a reasonable person with normal diligence (the CISG uses the expression person of “*the same kind*”) and by considering the circumstances of the business.⁸⁶

4.2.2 Recitals or Preambles

Unlike common law legal systems, Brazilian law does not give much credence to the recitals (also called the preamble or *consideranda* of a contract) contained in an agreement. This is common in most civil law jurisdictions, since the existing gaps of a contract are generally filled by positive norms that are established by law, and thus the inclusion of recitals or definitions is considered redundant. For these reasons, there is little Brazilian literature or case law addressing the issue of recitals (Cretella Neto 2010). However, the more complex the negotiations, the more useful such recitals will be. This is particularly in the case of international contracts, which by definition will encompass different traditions, languages and usages. In those instances, recitals can be especially useful for purposes of contract interpretation, determining the true intent of the parties, and identifying the objectives of such agreements (Strenger 2000). Therefore, while recitals cannot be given prevalence over the negotiated terms of a contract (also called the ‘operative part’ of a contract in common law systems), they can nevertheless produce important legal effects. As

⁸⁵ As provided by rule 7 of the CISG Advisory Council Opinion No 13; The stipulation of surprising terms or terms in unknown languages violates the consumer’s right of clear and adequate information on products and services, which is set forth in Article 6, III of the Brazilian Consumer Code; Superior Court of Justice, AREsp 595460, Rel. Min. Joel Ilan Paciornik, j. 06/09/2016.

⁸⁶ Pursuant to the parameters accepted under Brazilian Civil Code (Article 138) and the CISG (Article 8) for interpreting the occurrence of mistake and the real intention of the parties.

a result, recitals are generally viewed as critical tools for contract interpretation and integration, and, because they are intrinsically related to the provisions of contract, recitals are also considered extremely useful for identifying the real intention of the parties.⁸⁷

5 Content of Contracts

5.1 *The Content of Contracts—Overview*

5.1.1 Duties of Parties with Regard to the Operation or Performance of the Contract

Cooperation. Under Brazilian law, cooperation between contracting parties is considered crucial for the development of a fair and balanced contractual relationship. As a result, the duty of cooperation is recognized as one of the main ‘lateral’ duties (also called an ‘attached’ or ‘secondary’ duties) deriving from the principle of good faith. As such, parties are required to conduct themselves in accordance with this duty, regardless of whether or not this is expressly required by the contract itself (Couto e Silva 2007).

The principle of good-faith is well-established in the Brazilian legal system, and has three primary functions: (i) the *interpretative* function, set forth in Article 113 of the Brazilian Civil Code, pursuant to which a contract shall be interpreted in accordance with good faith; (ii) the *controlling* or *restrictive* function, set forth in Article 187 of the Brazilian Civil Code, which defines illegal acts as those which exceed the limits imposed by good faith; and (iii) the function to *create duties* for parties in a contractual relationship, which is provided by Article 422 of the Brazilian Civil Code. Several lateral duties are derived from this third function, e.g. the duties of cooperation, guarantee and certainty. Because the conclusion of a contract, particularly a bilateral contract, creates obligations to be performed by the contracting parties, the duty to cooperate and to provide reciprocal support is recognized as a natural by-product of the contract.

The duty of cooperation is further amplified by the principle of preservation of the contract enshrined in Brazilian law (*pacta sunt servanda*) (Nalin 2005). The parties must act in good faith during the entire life of their contractual relationship, and the duty to cooperate must be observed from the formation of the contract, through performance of the contractual obligations, and even during its termination.⁸⁸ The duty to cooperate includes the duty not to harm the other party, since a loss to the other party may create difficulties in complying with the contract, which would plainly be

⁸⁷ See Cretella Neto (2010), 224; Fontoura Costa and Nusdeo (2012) and Lemes (2010).

⁸⁸ Reference is made to the article of Borges and Stringari (2016) which brings an analysis of the duty to cooperate during all phases of the contract.

contrary to the interest of both parties (Frada 1994).⁸⁹ Case law and literature are less clear, however, as to whether the duty to cooperate also requires affirmative conduct by the parties, beyond just the performance of their contractual obligations. Such an expansive interpretation of the duty to cooperate is best understood by application to the facts of a specific case, with consideration for the phase at which the dispute arises in the life of the contract in question.⁹⁰

Result and best efforts obligation. Brazilian literature and case law also distinguish ‘result obligations’ (*obrigações de resultado*) from ‘diligence’ or ‘best efforts obligations’ (*obrigações de meio*). Result obligations are those which require a party to *deliver* or *achieve* an agreed useful result (for instance, a construction contract, where the contractor has the obligation to deliver the completed building to the project owner). If that result is not achieved or delivered by the party then he is presumably liable to pay damages to the creditor, unless the non-performance was not caused by any fault of his own. Importantly, in result obligations, the burden of proof rests with the party that is responsible for performing the obligation (the debtor).⁹¹

Conversely, a diligence or best efforts obligation only requires a party to act with all necessary diligence to obtain an agreed useful result (Miragem 2007), and does not strictly require him to actually *achieve* that result. An example of such obligations can readily be found in agreements for professional services, e.g. those of a doctor. In such cases, the doctor undertakes to treat the patient to the best of his ability, but not necessarily to successfully cure the disease. Thus, the desired result is to cure the patient of the disease, but the doctor’s obligation is only to act with all necessary diligence toward achieving that result. In this type of obligation, an unsatisfied creditor (the party that is to receive the performance) will only be entitled to damages if the failure to achieve the desired result is attributable to the debtor (due to negligence, malpractice or recklessness) (Tepedino 2006). Further, for disputes involving diligence or best efforts obligations, the burden of proof rests with the creditor.

Importantly, in the case of a best efforts obligation, the desired end result itself cannot be viewed as the object of the performance, since achieving that result will depend on other external and potentially intervening factors and circumstances (Cruz 2005). In this sense, the result is the ‘teleological cause’ of the obligation, but not its object, and the debtor is only required to take all diligent and necessary measures to obtain the desired result, not necessarily to achieve it. Thus, it is the inherent ‘randomness’ (*alea*) of the result that ultimately differentiates best efforts obligations from results obligations, and that transfers the burden of proof from one party to the other (Comparato 1967).

⁸⁹ Superior Court of Justice, REsp 1.287.402-PR, Rel. Min. Marco Buzzi, j. 03/05/2012; Superior Court of Justice AREsp 627651-RS, Rel. Min. Antonio Carlos Ferreira, j. 14/09/2015.

⁹⁰ For instance, it is recognized under Brazilian law that the duty to cooperate encompasses effective and active behavior by the parties when revision and renegotiation of the contract is necessary. See Nery Jr and Santos (2011).

⁹¹ See Aguiar Júnior (1995) and Tepedino (2006), 87.

5.1.2 Obtaining Certainty with Regard to What Has to Be Performed and for What Period

Quality. Brazilian law does not delineate criteria regarding quality of performance for obligations in general. As mentioned above, however, Article 422 of the Brazilian Civil Code directs that the performance of contractual obligations must observe the good faith principle. This means that parties must perform in the ‘spirit of loyalty’, and therefore must clarify their expectations regarding quality of performance so as to avoid any confusion (Villaça Azevedo 2002). Although the quality of performance may not be expressly determined, parties are required to apply the general quality parameters related to that kind of contracted performance, considering also the local usages.⁹² For instance, as regards sales contracts, the Brazilian Civil Code provides that if the sale was negotiated through samples, models or prototypes, the seller is obliged to deliver goods that are of that same quality as those examples, and that such quality must prevail over what is written and described in the contract.⁹³

Equally, in consumer relations, the so-called ‘implicit quality theory’ applies, which means that the products and services distributed to the market shall observe minimum quality warranties that are implicit to the given type of product or service, in addition to the specific quality described in the contract (Becker 1994). As for international sales contracts, the CISG contains specific rules regarding quality of performance that will apply when quality is not expressly specified within the contract. For example, CISG Article 35 requires: (i) fitness for the specific purpose for which goods of the same description would ordinarily be used; (ii) fitness for any particular purpose expressly or impliedly made known to the seller at the time of the conclusion of the contract; (iii) qualities of goods which the seller has held out to the buyer as a sample or model (similarly to the provision of Article 484 of the Brazilian Civil Code) or (iv) packaging and storage in the manner usual for such goods or, where there is no such manner, in a manner adequate to preserve and protect the goods.

Price. Under Brazilian Law, the rules regarding price are those provided by Brazilian Civil Code for sales contracts. These rules can be applied to other contracts, always bearing in mind the specific characteristics of the contract under analysis. Like the UNIDROIT Principles, the Brazilian Civil Code also allows parties to contract without fixing a specific price, provided that they instead establish parameters that will allow its objective determination,⁹⁴ e.g. the market price or stock exchange of a certain place on a certain day.⁹⁵ According to Article 488 of the Brazilian Civil Code, if the parties do not fix the price or provide general parameters for its determination, in the absence of any official tabulation of prices, the price will be calculated as the

⁹² See Wald (2014) and Martins-Costa (2006), 162.

⁹³ Pursuant to Article 484 and sole paragraph.

⁹⁴ Pursuant to Article 487 of the Brazilian Civil Code.

⁹⁵ Pursuant to Article 486 of the Brazilian Civil Code.

current price generally applied by the seller. If the seller applies different prices, a *medium/average term* will be used instead.⁹⁶

Articles 485 and 489 are two further provisions of Brazilian Civil Code that are relevant to questions of price. Article 485 establishes that the parties may agree that the price will be fixed by a third person. However, if the third person chosen by the parties does not agree to this responsibility, the contract shall have no effect unless the parties agree on another third person to take their place.⁹⁷ Moreover, Article 489 of the Brazilian Code states that a sales contract is null and void if the determination of the price is left to the exclusive discretion of one contracting party.⁹⁸ This follows the general rule provided in Article 122 of the Brazilian Civil Code, which bars contractual conditions that are subject to the sole discretion of one contracting party ('pure potestative clauses'). Consumer contracts are an exception to this rule, since price is determined in advance by the seller, and other safeguards are in place to protect consumers.⁹⁹

In the case of an international sales contract the CISG will apply. According to Article 55 of the Convention, if there is no express or implicit determination of the price, "*the parties are considered, in the absence of any indication to the contrary, to have impliedly made reference to the price generally charged at the time of the conclusion of the contract for such goods sold under comparable circumstances in the trade concerned*".

Finally, the Brazilian Civil Code also provides for general rules regarding price determinations in service contracts. Pursuant to Article 596, if the parties do not fix the price (also called 'remuneration' to the provider), it shall be determined in accordance with the usage of the place, and the period and quality of the service.

Duration. If a contract provides for indefinite duration, parties commonly agree to a minimum notice requirement for termination. If no minimum term is established in the contract, a party is only allowed to unilaterally terminate the contract where the law expressly or impliedly permits, due to the principle of *pacta sunt servanda* (obligatory nature of the contract).¹⁰⁰

In cases where termination is permitted by law, the contract will terminate once the notice of termination reaches the other party, and no minimum notice requirement applies unless otherwise expressly required by law.¹⁰¹ However, if one of the parties

⁹⁶ Pursuant to sole paragraph of Article 488 of the Brazilian Civil Code.

⁹⁷ This provision of Article 485 of the Brazilian Civil Code differs from Article 5.1.7, item 3 of the UNIDROIT Principles, which states that there shall be applied a "reasonable price" if the indicated third person cannot or will not determine the price.

⁹⁸ Here it is possible to identify another difference from what is provided for in Article 5.1.7, item 2 of the UNIDROIT Principles, according to which the determination of the price by one of the parties is allowed, provided that a reasonable price is applied.

⁹⁹ For instance, Article 51, item X of the Brazilian Consumer Code provides that clauses that allow the seller/provider to unilaterally modify the price are null and void.

¹⁰⁰ Pursuant to Article 473, *caput* of the Brazilian Civil Code.

¹⁰¹ For instance, in insurance contracts, Article 769, §2 of the Brazilian Civil Code establishes that the termination will be effective within 30 days.

made considerable investments in the performance of the contract, the termination will only take effect after a certain period of time has passed, which is compatible to the nature of the relationship and the amount invested (here, reasonable criteria shall apply).¹⁰²

The CISG also gives precedence to the principle of preservation of the contract, and, therefore does not contain a specific rule on unilateral termination without cause, nor does it establish an advance deadline for notice of termination.¹⁰³ However, for contracts governed by the Convention, a declaration of avoidance (whatever the reason of the avoidance) is only effective if made by notice to the other party.¹⁰⁴ Finally, both the CISG and the Brazilian Civil Code provide that a contract may be terminated at any time by the mutual agreement of the parties.¹⁰⁵

5.1.3 Conditions

General. Under Brazilian law, there are two kinds of provisions, both deriving exclusively from the intent of the parties, that will render the existence of a contractual obligation contingent upon the occurrence of a future event: (i) initial term (*termo* in Portuguese), which is a provision that refers to a future event that is certain to occur and (ii) condition (*condição* in Portuguese), which is a provision that refers to a future event that might or might not occur.¹⁰⁶ Thus, these provisions are distinguished by the ‘certainty’ that the future event will occur. As a consequence of this distinction, Article 131 of the Brazilian Civil Code provides that the ‘initial term’ only suspends the *exercise*, but not the *acquisition* of the right, since the future event will certainly occur (the right already exists, but cannot be exercised until the lapse of the initial term, which may be, for instance, a fixed date of the calendar or the death of a person).

Suspensive and resolutive conditions. Brazilian law recognizes two types of condition provisions: *suspensive* conditions and *resolutive* conditions. A suspensive condition subjects the acquisition of the right/effectiveness of a clause to the occurrence of a future event.¹⁰⁷ By contrast, a *resolutive* condition is one in which the relevant right is already acquired, or a clause is already given legal effect, and the right/clause can be enforced until the occurrence of a future event, at which point it is extinguished.¹⁰⁸

¹⁰² Pursuant to the sole paragraph of Article 473 of the Brazilian Civil Code.

¹⁰³ In case of anticipated fundamental breach, Article 73(2) of the CISG provides that the declaration of avoidance shall be done within a reasonable time.

¹⁰⁴ Pursuant to Article 26 of the CISG.

¹⁰⁵ See Article 29(1) of the CISG (A contract may be modified or terminated by the mere agreement of the parties) and Article 472 of the Brazilian Civil Code, which states that the bilateral termination (*distrato* in Portuguese) must follow the same required form for the conclusion of the contract.

¹⁰⁶ Pursuant to Article 121 of the Brazilian Civil Code.

¹⁰⁷ Pursuant to Article 125 of the Brazilian Civil Code.

¹⁰⁸ Pursuant to Article 127 of the Brazilian Civil Code.

If a resolutive condition is provided within a long-term contract (i.e., one with continuous or periodical obligations), the occurrence of the condition (i.e., occurrence of the future event) will not affect any of the obligations that were performed prior to such occurrence, provided that they are compatible with the nature of the condition and with good faith.¹⁰⁹

According to Article 122 of the Brazilian Civil Code, parties may agree to the kinds of conditional obligations discussed above, provided that they are not contrary to the law, public policy or to the general usages. Among those forbidden conditions, the law indicates those which deprive a contract from having any effect, or which subject the effect of a particular provision to the exclusive discretion of one of the parties (in bilateral relationships). Brazilian Civil Code does provide for other types of conditions that can render a contract invalid, e.g.: (i) suspensive conditions that are legally or physically impossible to take place; (ii) conditions that are illegal or are related to illegal activities; and (iii) incomprehensible or contradictory conditions.¹¹⁰ In addition, impossible resolutive conditions and conditions to not perform impossible acts, are both considered ‘inexistent’ under Brazilian law.¹¹¹

Interference by the parties. The holder of a right subject to a condition is allowed by law to take appropriate measures to preserve that right, including performance of his own obligations under the contract.¹¹² However, neither the holder nor any other interested party is permitted to act maliciously in order to either prevent or cause the occurrence of a condition. In these cases, Article 129 of the Brazilian Civil Code states that the condition is deemed to have ‘occurred’ if the disadvantaged party intentionally acts for its non-verification, or to have ‘not occurred’ if the condition was occasioned by an intentional act of the favoured party.

5.2 *The Content of Contracts—Specific Topics*

5.2.1 Warranties

Brazilian law does not provide for a definition or specific provisions regarding ‘warranty clauses’. The concept of a ‘warranty clause’ (also commonly called “representations and warranties”) was imported from the common law tradition, and today is widely used in corporate contracts (for instance, in merger and acquisitions contracts) and other complex transactions in Brazil. Since no particular law on this type of clause exists in Brazil, the issue is not explored in depth by Brazilian literature and case law. By utilizing such clauses, the parties specify declarations and information which they consider important for the performance of the contract,

¹⁰⁹ Pursuant to Article 128 of the Brazilian Civil Code.

¹¹⁰ Pursuant to Article 123 of the Brazilian Civil Code.

¹¹¹ Pursuant to Article 124 of the Brazilian Civil Code.

¹¹² Pursuant to Article 130 of the Brazilian Civil Code.

and strengthen their commitment with the correctness of those information and the compliance with the described obligations. Thus, these clauses enable the parties to better assess and allocate the risks involved in the transaction.

Warranty clauses have three main functions: (i) an *informative* function regarding the transaction; (ii) a *protective* function in regard to the information provided and the existent contingencies involved in the transaction; and (iii) a *responsible* function, establishing the scope of responsibility each party has to the other (Wald 2014). Although warranty clauses are not governed by any specific regulation under Brazilian law, they clearly derive from the duty to observe good faith in the performance of a contract, codified in Article 422 of the Brazilian Civil Code.¹¹³ Like the duty to cooperate, which was analysed in Sect. 5.1.1 above, the warranties undertaken by contracting parties are considered ‘lateral’ or ‘attached’ duties deriving from one of the three functions of the good faith principle (specifically, the function that creates duties to the parties—see Sect. 5.1.1). Therefore, warranty clauses are considered ancillary provisions of the contract, which must be complied with by the parties regardless of any express provisions. Such clauses are enforceable based both on the duty to observe good faith (Rodrigues 1979), as well as on the general rule of the presumption of accuracy of declarations inserted within contracts.¹¹⁴ The express insertion of these clauses, however, highlights the obligations that are important to each party, and, as such, these clauses must be as specific and detailed as possible. Providing false information or violating these clauses may amount to a contractual breach, entitling the affected party to damages (which are normally defined in indemnification clauses, as described in Sect. 5.2.2).¹¹⁵

5.2.2 Indemnification

Much like warranty clauses, ‘indemnification’ clauses were also imported from the common law tradition. Indemnification clauses are frequently used in contracts for complex transactions (generally corporate transactions), and are not governed by any specific regulation in Brazilian law (Potenza 2013). These clauses usually provide for specific allocation of liability among the parties for obligations agreed within the transaction. Their function is to protect the parties from contractual breaches, and from contingencies of which they were not aware or had not assumed at the time of contracting (Botrel 2013).

Usually, an indemnification clause provides that a party must compensate the other party if the declarations and obligations assumed through the warranty clauses are not fulfilled. For instance, it is very common in merger and acquisition contracts to include an indemnification clause stipulating full liability of the seller for all contingencies that are incurred before the closing of that particular transaction.

¹¹³ See Tepedino (2011a, b) and Wald (2014).

¹¹⁴ In this regard, Article 219 of the Brazilian Civil Code states that all declarations contained in a document are presumably true in relation to the signatory parties.

¹¹⁵ See Pontes de Miranda (1962), 284, 307 and 309 and Salomão Filho (2006), 21.

Indemnification clauses are also considered ancillary provisions under Brazilian law, especially because the obligations contained in these provisions are independently legally enforceable, regardless of whether specifically provided for in a contract. This means that, although no express or specific provision exists, there are nevertheless several provisions within the Brazilian Civil Code that already support the obligations that are created by ‘indemnification’ clauses. As mentioned above, the principle of good faith¹¹⁶ requires the parties to act with loyalty, transparency and integrity, and, by extension, requires them to provide accurate information, and to cooperate during the transaction. Based on these lateral duties deriving from good faith, the violation of a declaration or the occurrence of a harmful event that is attributable to one of the parties will render the culpable party liable for damages to the aggrieved party, in accordance with Articles 186 and 927 of the Brazilian Civil Code. In addition, the Brazilian Civil Code contains specific provisions regarding the parties’ liability for the acts of third parties (for instance, a company is liable for harmful acts performed by its employees in the course of their employment¹¹⁷) and for commercialized products (for instance, a seller is liable for hidden defects not known to the buyer¹¹⁸).

Based on the foregoing, the insertion of indemnification clauses into contracts governed by Brazilian law is, at least in principle, unnecessary, unlike contracts subject to common law traditions. The objective of these clauses in contracts governed by Brazilian law is not to create the indemnifying obligation, but rather to emphasize them, or to reallocate compensation duties among the parties, which is permitted under the principle of party autonomy.¹¹⁹ Although parties *may not* allocate *liability* by the terms of their agreement (which, as described in Chap. 7, is defined by the causal connection between the breach and the harmful consequence), they are free to contract on *the duty to indemnify/compensate* through indemnification clauses (Aguilar Dias 1980).

6 Performance of a Contract

6.1 Performance of a Contract—Overview

6.1.1 Performance in General

When. Articles 331 through 333 of the Brazilian Civil Code set forth the general rules concerning the time for performance. Although these provisions contain the word “payment”, this word is used in a general sense, and refers to all types of

¹¹⁶ Again, as provided for Article 422 of the Brazilian Civil Code.

¹¹⁷ Pursuant to Article 932, III of the Brazilian Civil Code.

¹¹⁸ Pursuant to Article 443 of the Brazilian Civil Code.

¹¹⁹ Pursuant to Article 421 of the Brazilian Civil Code.

performances, and to the fulfilment of all manner of obligations. Pursuant to Article 331, the parties must perform the obligations at the time required by the contract or by law. However, if no stipulation is made as to the time for performance, Article 331 provides a general rule of immediate performance, pursuant to which a creditor (the party to receive the performance) can require the performance immediately after the conclusion of the contract. This rule is limited, however, by the nature of the obligation, as well as by public policy provisions and common usages, which means that a creditor will not be entitled to require performance if the obligation cannot feasibly be immediately performed (Tepedino 2005).

Equally, if the obligation is subject to a condition (see Sect. 5.1.3 above), it must be performed at the date on which that condition occurred, provided that the debtor (the party to perform) is aware of such occurrence (the burden to prove the debtor's awareness relies on the creditor).¹²⁰ Article 333, provides for some exceptions to the general rule, and identifies cases where a creditor is permitted to require performance before the time fixed by the contract or by law. These exceptions include (i) cases involving the insolvency of the debtor, (ii) cases involving attachment of debtor's assets and (iii) cases in which the collateral and securities provided by the debtor become insufficient to guarantee performance.

There is no particular rule in Brazilian law stating that an obligation must be performed all at once (in a lump sum), as provided for in Article 6.1.2 of the UNIDROIT Principles. Rather, the general rules explained above will apply, and this issue will depend on the parties' agreement or on the nature of the obligation. If the parties have agreed that the payment should be a lump sum, the debtor is not permitted to tender payment in instalments, even if the sum of those instalments is equal to the total obligation (Tepedino 2005).

Likewise, no specific provision exists regarding reciprocal and simultaneous obligations, although the literature tends to agree that reciprocal obligations with a specific time for performance will prevent a debtor from being forced to perform before the established date, and likewise will excuse a creditor from any obligation to receive performance before the agreed upon date (Varela 2015).

As regards international sales contracts, Article 33 of the CISG determines the time for a seller's performance, and largely tracks with Article 6.1.1 of the UNIDROIT Principles (reasonableness criteria).¹²¹ For the buyer's performance, Article 59 of the CISG determines that the buyer must pay the price on the date fixed by or determinable from the contract or from the Convention.¹²² This provision in turn refers to Article 58 of the Convention, which provides that a buyer must pay the price when the goods are placed at his disposal in accordance with the contract or the

¹²⁰ Pursuant to Article 332 of the Brazilian Civil Code.

¹²¹ Article 33 of the CISG: The seller must deliver the goods: (a) if a date is fixed by or determinable from the contract, on that date; (b) if a period of time is fixed by or determinable from the contract, at any time within that period unless circumstances indicate that the buyer is to choose a date; or (c) in any other case, within a reasonable time after the conclusion of the contract.

¹²² Article 59 of the CISG: The buyer must pay the price on the date fixed by or determinable from the contract and this Convention without the need for any request or compliance with any formality on the part of the seller.

Convention, provided that he has been given an opportunity to examine the goods before tendering payment.¹²³

The nature of an obligation and the importance conferred by the parties on the time for performance will also determine whether or not a creditor may reject partial performance. For instance, for obligations where ‘time is of the essence’, the creditor may reject partial performance at the agreed upon date, and also be entitled to terminate the contract (referred to in the literature as an “absolute fixed contract”). However, if the partial performance does not entail the total frustration of the contract, the principle of *pacta sunt servanda* permits a creditor to accept such performance, and still entitles him to compensation for any damages suffered (“simple or relative fixed contract”).¹²⁴ The CISG follows a similar regulation, since Article 47(1) states that a buyer may fix additional time for the performance of an obligation¹²⁵ and Article 48(1) grants sellers the opportunity to cure a defective performance if it does not inconvenience the buyer,¹²⁶ unless the partial performance amounts to a fundamental breach under Article 25. In this case, the partial performance would allow the buyer to avoid (terminate¹²⁷) the contract altogether.¹²⁸

The same rationale applies in cases of early performance. If performance of an obligation on a certain date is of the essence, and the time for performance was fixed for the creditor’s benefit, then the creditor may reject an early performance. If, however, the time for performance is fixed for the benefit of the debtor, then the debtor is permitted to perform the obligation at any point up to the agreed upon date for performance without the possibility of rejection by the creditor, but he only becomes *obliged* to perform once the contracted date for performance arrives (Varela 2015). Article 52(1) of the CISG does not provide for such difference and grants both options to buyers, stating that “*if the seller delivers the goods before the date fixed,*

¹²³ Article 58 of the CISG: (1) If the buyer is not bound to pay the price at any other specific time, he must pay it when the seller places either the goods or documents controlling their disposition at the buyer’s disposal in accordance with the contract and this Convention. The seller may make such payment a condition for handing over the goods or documents. (2) If the contract involves carriage of the goods, the seller may dispatch the goods on terms whereby the goods, or documents controlling their disposition, will not be handed over to the buyer except against payment of the price. (3) The buyer is not bound to pay the price until he has had an opportunity to examine the goods, unless the procedures for delivery or payment agreed upon by the parties are inconsistent with its having such an opportunity.

¹²⁴ See Machado (1988), 11 and Varela (2015), 45.

¹²⁵ Article 47(1) of the CISG: The buyer may fix an additional period of time of reasonable length for performance by the seller of its obligations.

¹²⁶ Article 48(1) of the CISG: Subject to Article 49, the seller may, even after the date for delivery, remedy at its own expense any failure to perform its obligations, if he can do so without unreasonable delay and without causing the buyer unreasonable inconvenience or uncertainty of reimbursement by the seller of expenses advanced by the buyer. However, the buyer retains any right to claim damages as provided for in this Convention.

¹²⁷ See explanation of the terms “termination” and “avoidance” in footnote 44.

¹²⁸ Pursuant to Article 49(1)(a) of the CISG: The buyer may declare the contract avoided: (a) if the failure by the seller to perform any of its obligations under the contract or this Convention amounts to a fundamental breach of contract.

the buyer may take delivery or refuse to take delivery". Further, the other CISG provisions regarding earlier performance refer to the right of the seller to cure any breach in its performance until the agreed upon date for performance, although he will remain liable for any damages caused to the buyer.¹²⁹

Where. Articles 327 to 330 of the Brazilian Civil Code establish the general rules on the place for performance.¹³⁰ Article 327 states that, in cases where the parties do not agree and the law does not otherwise direct a specific place for performance, the obligation must be performed at the debtor's place of business (the so-called 'querable debt'), bearing in mind the nature of the obligation and any other relevant circumstances. This general rule applies to any type of obligation, whether monetary or not,¹³¹ and is intended to avoid breaches and facilitate the performance of obligations in general.¹³² However, if the contract provides for two or more places for performance, then the creditor has the right to choose the place for performance that he prefers ('portable debt').¹³³ If the obligation requires or is related to the transfer of a real property, then it must be performed at the place where property is located, in accordance with Article 328 of the Brazilian Civil Code.

Brazilian law recognizes two scenarios in which a debtor will not be required to tender his performance in accordance with either the terms of the contract or with the default rule described above: (i) when a serious reason prevents a debtor from performing the obligation at the due place, provided that no losses or damages are caused to the creditor¹³⁴ and (ii) in cases of repeated performance in a different place without complaint by the creditor, constituting a *tacit agreement* to deviate from what was agreed in the contract¹³⁵ (this rule derives from the duty to act in good faith, which forbids the parties to have contradictory behaviour).

The corresponding rule for international sales contracts is found in Article 31 of the CISG as regards a seller's performance. In general, the seller must place the

¹²⁹ For instance, Article 34 of the CISG: If the seller is bound to hand over documents relating to the goods, he must hand them over at the time and place and in the form required by the contract. If the seller has handed over documents before that time, he may, up to that time, cure any lack of conformity in the documents, if the exercise of this right does not cause the buyer unreasonable inconvenience or unreasonable expense. However, the buyer retains any right to claim damages as provided for in this Convention; and also Article 37: If the seller has delivered goods before the date for delivery, he may, up to that date, deliver any missing part or make up any deficiency in the quantity of the goods delivered, or deliver goods in replacement of any non-conforming goods delivered or remedy any lack of conformity in the goods delivered, provided that the exercise of this right does not cause the buyer unreasonable inconvenience or unreasonable expense. However, the buyer retains any right to claim damages as provided for in this Convention.

¹³⁰ Equally to the rules concerning the time for performance, the mentioned legal provisions contain general directives related to the place of 'payment', here broadly understood as any type of performance.

¹³¹ This provision differs from what determines Article 6.1.6 of the UNIDROIT Principles as regards monetary obligation, which must be performed at the obligee's (creditor's) place of business.

¹³² See Azevedo (2011) and Villaça Azevedo (2000), 120–121.

¹³³ Pursuant to the sole paragraph of Article 327 of the Brazilian Civil Code.

¹³⁴ Pursuant to Article 329 of the Brazilian Civil Code.

¹³⁵ Pursuant to Article 330 of the Brazilian Civil Code.

goods at the buyer's disposal "*at the place where the seller had his place of business at the time of the conclusion of the contract*". However, if the sale involves carriage of the goods, then the seller must either (i) hand the goods over to the first carrier for transmission to the buyer or (ii) deliver the goods at a specific stock or other place related to the nature of the goods and of the awareness of both parties at the time of the contracting.¹³⁶ As regards the buyer's performance, Article 57 establishes a general rule that payment is to be made at the seller's place of business, or at the location where the handing over of the goods takes place. Finally, since this provision refers to the seller's place of business, it also renders the seller responsible for any costs associated with a change in his place of business after the contract is concluded.¹³⁷

How—General. Brazilian law does not provide any general rules regarding the form of payment for monetary obligations, and parties are free to choose the form of payment that they prefer, as long as it is permitted by law (whether by transfer to financial institution, in cash or through a debt instrument¹³⁸). Therefore, monetary obligations are expected to be performed as agreed by the parties, considering the nature of the transaction and the circumstances involved (Villaça Azevedo 2000).

How—Currency. The Brazilian Civil Code, however, is much more restrictive regarding permissible currencies for payment obligations, and requires that any monetary obligations performed in Brazil must be paid in national currency¹³⁹ (currently, the Brazilian Real/BRL). Accordingly, agreements that require payment in foreign currencies and/or gold are deemed null and void, unless otherwise specifically permitted by law.¹⁴⁰ Therefore, if a monetary obligation is to be performed in Brazil, it must be converted into Brazilian currency. This rule was not contained in the former Brazilian Civil Code (of 1916), according to which the parties were free to choose the applicable currency, and absent such agreement payment was to be

¹³⁶ Article 31 of the CISG: If the seller is not bound to deliver the goods at any other particular place, its obligation to deliver consists: (a) if the contract of sale involves carriage of the goods—in handing the goods over to the first carrier for transmission to the buyer; (b) if, in cases not within the preceding subparagraph, the contract relates to specific goods, or unidentified goods to be drawn from a specific stock or to be manufactured or produced, and at the time of the conclusion of the contract the parties knew that the goods were at, or were to be manufactured or produced at, a particular place—in placing the goods at the buyer's disposal at that place; (c) in other cases—in placing the goods at the buyer's disposal at the place where the seller had its place of business at the time of the conclusion of the contract.

¹³⁷ Article 57 of the CISG: (1) If the buyer is not bound to pay the price at any other particular place, he must pay it to the seller: (a) at the seller's place of business; or (b) if the payment is to be made against the handing over of the goods or of documents, at the place where the handing over takes place. (2) The seller must bear any increases in the expenses incidental to payment which is caused by a change in its place of business subsequent to the conclusion of the contract.

¹³⁸ Brazilian law provides for specific rules related to debt instruments, e.g. Articles 887 to 903 of the Brazilian Civil Code, as well as specific law, e.g. Law n. 7,357/1985, which regulates transactions performed by cheque and Decrees n 2,044/1908 and 57,663/1966, respectively applicable to promissory notes and bills of exchange.

¹³⁹ Pursuant to Article 315 of the Brazilian Civil Code.

¹⁴⁰ Pursuant to Article 318 of the Brazilian Civil Code.

made in the currency used at the place of performance.¹⁴¹ This rule was changed in the revised Brazilian Civil Code, in an effort to protect and value Brazilian currency over foreign ones (Villaça Azevedo 2000).

There are very limited exceptions to this rule, which are established by Decree-Law No. 857/1969, Article 2, according to which payment may be made in foreign currencies for the following types of transactions: (i) contracts and instruments related to the import and export of goods; (ii) financing contracts or guarantee obligations related to the export of services and goods; (iii) exchange contracts; (iv) loans and other obligations in which the debtor or creditor resides abroad, except for rental contracts involving real estate located within Brazil; and (v) contracts for the assignment, transfer, delegation, assumption or modification of the obligations referenced in item (iv), even if the contracting parties reside in Brazil.

How—Allocation of costs. Article 325 of the Brazilian Civil Code states that, unless otherwise agreed by the parties or determined by law, the costs involved in the performance of obligations are presumed to be the debtor's responsibility. If, however, an increase in such costs is attributable to the creditor, then the creditor will be responsible for the cost of that increase. The same rule is established by Article 54 of the CISG, which provides that the buyer (debtor of the monetary obligation to pay the price) must take the necessary steps to comply with any applicable formalities required for payment of the price,¹⁴² including the payment of any costs related to such formalities.¹⁴³

How—Imputation of payments. The rules regarding 'imputation of payments'—which apply when a debtor owes two or more obligations to the same creditor (whether monetary or otherwise)—are found in Articles 352 to 355 of the Brazilian Civil Code. A debtor has the right to indicate which obligation his payment should be applied to or 'imputed', provided that all obligations are net (quantified) and matured (demandable).¹⁴⁴ If the debtor does not specify the debts to which the payment should be applied, then the creditor may apply the payment to any of the debtor's obligations. In this case, if the debtor accepts the creditor's distribution of the payment funds, then he forfeits the right to complain about that imputation, unless he can prove that the creditor acted with violence or malice.¹⁴⁵ If the creditor also fails to make the imputation and the discharge is unclear, the rule on legal imputation provided for in Article 355 shall apply, which states that the payment will be applied to those obligations which *first* became net and matured, but if all obligations became net and matured at the same time, then the payment will be imputed to the most *burdensome*

¹⁴¹ Pursuant to Article 947 of the former Brazilian Civil Code (Law 3,071/1916).

¹⁴² Article 54 of the CISG: The buyer's obligation to pay the price includes taking such steps and complying with such formalities as may be required under the contract or any laws and regulations to enable payment to be made.

¹⁴³ UNCITRAL Digest of Case Law on the United Nations Convention on Contracts for the International Sale of Goods, Article 54, 2016 Edition, §3, 256. Available via UNCITRAL website. http://www.uncitral.org/pdf/english/clout/CISG_Digest_2016.pdf.

¹⁴⁴ Pursuant to Article 352 of the Brazilian Civil Code.

¹⁴⁵ Pursuant to Article 353 of the Brazilian Civil Code.

obligation. Finally, if the obligation involves a principal amount and the accrual of interest, the payment will be imputed first to the *interest* charges and then to the principal amount, unless otherwise stipulated or the creditor issues a discharge regarding the principal amount.¹⁴⁶

6.1.2 Hardship

As previously mentioned, Brazilian law accords significant weight to the preservation of the contract, due to the principle of *pacta sunt servanda*. Nevertheless, the law also recognizes a category of extreme events or *hardships*, the occurrence of which will permit the parties to either terminate or renegotiate the conditions of the contract. These are referred to as “excessive onerous situations”, and are governed by Articles 478, 479 and 480 of the Brazilian Civil Code.

The main requirements for invoking hardship are set forth in Article 478, which provides as follows: (i) the contract must be a long-term contract; (ii) one party must be experiencing an extremely onerous situation, while the other enjoys an extreme advantage and enrichment¹⁴⁷; (iii) the situation giving rise to the hardship must have arisen after the conclusion of the contract (in other words, it must be supervening, and occur during its continued performance); (iv) and the causes of the onerous situation must be extraordinary, meaning that they could not have been foreseen at the time of the conclusion of the contract. This article also instructs that termination (or renegotiation) of the contract must be sought in court, which by extension implies the failure of the parties to achieve a consensual agreement regarding termination or renegotiation.

Article 479 of the Brazilian Civil Code deals specifically with the equitable renegotiation of the contract, which may be proposed by the defendant (the party in advantage) as a means to avoid termination. Likewise, if the contract provides for obligations only to one of the parties, Article 480 of the Brazilian Civil Codes allows the party in charge of that obligation to seek its reduction or amendment for purposes of avoiding the excessive onerous situation and termination.

Due to the emphasis in Brazilian law on preservation of the contract, the literature and case law both tend to interpret hardship situations very *strictly*, especially in cases where contract termination is sought. Specifically, most will require the existence of an extremely serious imbalance, and that the supervening causes be truly extraordinary and unforeseeable at the time of contracting (unpredictable theory). Given this strict interpretation, Brazilian courts rarely accept termination or renegotiation claims based on hardship filed by large or even medium-sized companies. Instead, courts typically will only permit such claims in cases involving consumer

¹⁴⁶ Pursuant to Article 354 of the Brazilian Civil Code.

¹⁴⁷ The requirement of extreme advantage to the other party is generally criticized by Brazilian literature, which considers as its main requirement the existence of the strong imbalance between the obligations to be performed. In this sense, see Gomes (2009a, b), 215.

relationships, and even then only in very exceptional cases involving external circumstances (Marques 2002). Since companies are sophisticated players, the case law and scholars usually assume that the parties enjoyed equal negotiating conditions, were fully assisted and advised of the possible legal and financial future events that might affect the performance of the contract, and that they nevertheless accepted the risks involved in the transaction.¹⁴⁸

Additionally, the cause of the imbalance must have occurred after the contract was formed, and a party is not entitled to seek modification or termination of the contract for hardships that existed at the time the contract was formed. Rather, hardships that exist at the time of contracting are assumed to have been known to the parties, and further to have been negotiated and accepted by the party in disadvantage (except for the case of lesion/gross disparity, discussed in Sect. 3.1.2 above).

7 Non-performance (Breach of Contract)

7.1 *Non-performance (Breach of Contract)—Overview*

7.1.1 Non-performance in General

General. Article 389 of the Brazilian Civil Code explains that a breach of contract exists when an “*obligation is not fulfilled by the debtor*”. In the event of a breach, the debtor will be liable to pay damages, interests, and monetary adjustments, in addition to attorneys’ fees related to that breach (see details regarding damages in Sect. 7.1.4). This definition is very broad and comprises breaches of both positive and negative obligations. For positive obligations, the time at which a party is considered in breach is on the maturity date. If no time is fixed, the party will only be found in breach through judicial or extrajudicial request by the aggrieved party.¹⁴⁹ Conversely, for negative obligations, the breach occurs at the time when the party performs an act from which it should have abstained.¹⁵⁰ Finally, if the obligation derives from illegal acts, the party is considered in breach at the time when the wrongful act is performed, and there is no need to wait until the maturity of the obligation to find that a breach has occurred.¹⁵¹ Accurately identifying the moment at which a breach of contract occurs is relevant for purposes of determining when the applicable statute of limitations begins to run (which is discussed in Sect. 8).

¹⁴⁸ See Zanetti (2013b), 456 and Villela (2010), 8–9; Also the case law: Superior Court of Justice, AgRg no AREsp 711391/MT, Rel. Min. João Otávio Noronha, j. 01/12/2015; Superior Court of Justice, REsp 849228/GO, Rel. Min. Luis Felipe Salomão, j. 03/08/2010.

¹⁴⁹ Pursuant to Article 397 and sole paragraph of the Brazilian Civil Code.

¹⁵⁰ Pursuant to Article 390 of the Brazilian Civil Code.

¹⁵¹ Pursuant to Article 398 of the Brazilian Civil Code.

The meaning and scope of the expression ‘non-fulfilment of the obligation’ contained in the general rule of Article 389 is addressed in Article 394, which states that a party is in breach (in Portuguese *mora*) when it does not perform an obligation (if the party is the debtor), or refuses to accept/receive such performance (if the party is the creditor) in accordance with the time, place or form established by the law or by the contract. From this statement, one can infer that Brazilian law recognizes various types of breaches, which may be distinguished by the identity of the party in breach (*mora debitoris* and *mora creditoris*), as well as by the different elements of the unfulfilled obligations (time, place and form).

In general, a party is liable for a breach if the wrongful act, fact or omission may be attributed to him/her.¹⁵² A breaching party may be exempted from liability only if the breach results from force majeure or a fortuitous event (see more detailed explanation in Sect. 7.2.2), unless the parties agree otherwise (for instance, it is legal to agree in contracts that the parties will be liable even in events of force majeure).¹⁵³ For more detail on the liability issue, see Sect. 7.1.4.

Mora creditoris. As stated above, Article 394 of the Brazilian Civil Code provides that a creditor’s unjustified refusal to accept payment in the form, place or manner stipulated by the parties’ agreement constitutes a breach of contract. The Code also explains the legal consequences of a creditor’s refusal to accept payment in conformity with the contract: (i) the debtor is relieved of any obligation to preserve the goods (provided that the debtor did not act with malice); and (ii) if the value changes between the date of performance and date on which payment is actually received by the creditor, then the creditor is obligated to accept payment based on the value that is more favourable to the debtor.¹⁵⁴ The creditor’s breach itself does not automatically release the debtor from any liability, unless the creditor’s breach is the sole cause of the debtor’s non-performance or if it annuls any act or omission by the debtor, which leads to the situation provided for in Article 396 mentioned before (“*if no fact, act or omission is attributable to the debtor,*¹⁵⁵ *he/she will not be in breach*”).

Exceptio non adimpleti contractus. The Brazilian Civil Code also contains specific provisions that regulate the parties’ right to invoke the doctrine of *exceptio non adimpleti contractus* (in Portuguese *exceção do contrato não cumprido*). Differently from the rule provided in Article 7.1.3 of the UNIDROIT Principles, which has a *permissive* character in that it permits a party to withhold performance, Article 476 of the Brazilian Civil Code, has an *abstention* character, in that it requires each party to abstain from claiming performance from other until it has satisfied its own contractual obligations. Therefore, although the effect may be the same, the former allows the aggrieved party to withhold its performance in the event of a breach, while the latter prohibits the breaching party from demanding performance unless and until its own obligations have been fulfilled.

¹⁵² Pursuant to Article 396 of the Brazilian Civil Code.

¹⁵³ Pursuant to Article 393 of the Brazilian Civil Code.

¹⁵⁴ Pursuant to Article 400 of the Brazilian Civil Code.

¹⁵⁵ For instance, the cases where the fact, act or omission is attributable to the creditor.

However, the mere existence of simultaneous obligations owed by both parties to the contract is, by itself, an insufficient basis for *exceptio* to be claimed. There must also be a *reciprocity, interdependence, correspondence* between the obligations owed by the parties in order to prevent either party from demanding performance from the other.¹⁵⁶ This reciprocity requirement is very important insofar as it may avoid abuses by parties attempting to invoke the *exceptio* based on disconnected obligations simply to justify their own breach. This *direct correspondence* and *reciprocity* is also required for cases involving partial performance of an obligation. Since the obligations must be related, the aggrieved party is only allowed to withhold (or, is not allowed to claim) its own performance to the extent that it corresponds to the unfulfilled obligation owed by the other party, and the remaining contractual provisions will still be considered valid and enforceable (Tepedino, *Aplicação* 2011a, b).

Under Brazilian law, *exceptio* only applies to *obligations* that are created by virtue of a contractual relationship (it involves the sacrifice of one's own interest for the benefit of the other party). It may not be used in the context of other general duties, e.g. the 'onus', which refers to sacrifices made for a party's own benefit.¹⁵⁷

Cure of the breach. The concept of a debtor's right to an opportunity to cure its breach is intrinsically related to the concept of a creditor's right to allow additional time for the debtor's performance, and these issues will accordingly be discussed in tandem. Article 401 of the Brazilian Civil Code provides for the general rule that a breach can usually be cured by either party. Specifically, a debtor may cure its breach by spontaneously offering the performance of the obligation, plus the amount of losses incurred through the date of such offer. Similarly, a creditor may cure its breach by spontaneously offering to accept the payment, and will remain liable for damages caused by the breach until the date on which that offer is made (for instance, the non-preservation of the goods by the debtor or the costs involved in such preservation by the debtor, as seen above).

Article 401 must be analysed together with Article 395, which states that a breach by the debtor will render him liable to the creditor for damages, interest and reimbursements, until the day on which the debtor offers to cure (effects of the breach) (Rodrigues 2002). In addition, Article 395, in its sole paragraph, requires that the performance must still be useful to the creditor even after the breach in order for cure by the debtor to be permissible. Under this provision, if the obligation loses its utility to the creditor, then he may reject the cure, terminate the contract (see Sect. 7.1.3) and request damages (see Sect. 7.1.4). Here, the literature distinguishes between two different types of breaches for purposes of determining whether a debtor has the right to cure, or whether a creditor is entitled to reject performance and declare termination: (i) relative breaches, and (ii) absolute breaches.

'Relative breaches' are those whose performance is still objectively and subjectively possible, and which, as a result, can be cured. The phrase 'objectively possible' refers to the actual physical possibility for performance to be made, considering also

¹⁵⁶ There is significant literature in this regard: Gomes (2009a, b), 109; Pontes de Miranda (1959), 89 and 97 and Aguiar Júnior (2011), 724–725 and 733.

¹⁵⁷ See Gomes, *Obrigações* (2009), 29 and San Martín Neira (2010), 51–52.

the nature of the contract.¹⁵⁸ The phrase ‘subjectively possible’ refers to the creditor’s continued interest in the performance of the obligation, provided that the losses are compensated by the debtor.

Conversely, an ‘absolute breach’ occurs when an obligation was not, and cannot be, performed by the debtor, again both in objective and subjective senses. The literature refers to this kind of breach as ‘definitive non-performance’, and discusses the ‘irreversibility of the breach’ and ‘uselessness of the performance’.¹⁵⁹ Here, the uselessness of performance is also assessed considering the physical impossibility and seriousness of the breach (objective criteria) and also to the loss or frustration of interest by the creditor (subjective criteria) (Aguiar Junior 2012).

Hence, under the classification established by the Brazilian Civil Code as explained above, a debtor is only entitled to have a ‘second chance’ if its breach is qualified as a *relative*, while a creditor is only entitled to reject performance if the breach is qualified as *absolute*. The nature of a particular breach must be determined on a case-by-case basis. The nature of the breach is equally important to the right of an aggrieved party to confer an additional period for performance. Although Brazilian law does not provide for specific rules in this regard (additional period for cure), the literature understands that the party in breach, in cases involving relative breaches, is permitted to cure and perform the obligation within a period sufficient to satisfy the creditor’s demand.¹⁶⁰

7.1.2 The Right to Specific Performance (Whether Monetary or Non-monetary Obligations)

General. The right of an aggrieved party to request specific performance is provided by Article 475 of the Brazilian Civil Code. Pursuant to this provision, in case of a breach of contract, the aggrieved party may request (in court¹⁶¹) the termination of the contract or specific performance of the obligation, together with any compensable damages incurred. The determination of whether to claim specific performance or termination of the contract will depend on the type of breach involved, explained above. Specific performance is available in cases involving *relative* breaches, where neither the object of the performance, nor the interest of the aggrieved party has been extinguished. However, in cases involving an *absolute* breach, specific performance is

¹⁵⁸ See de Assis (2013), 109; Roppo (2009), 266 and Aguiar Júnior (2011), 382.

¹⁵⁹ Monteiro (2003), 325; de Assis (2013), 101; de Assis (2007), 632; Pontes de Miranda (1959), 9.

¹⁶⁰ This understanding is based on the requirement imposed by Brazilian law that the aggrieved party shall not autonomously require cure or termination, but only through judicial claim (see details in items 7.1.2 and 7.1.3). See Alvim (1972), 159 and Rodrigues (2002), 252.

¹⁶¹ The procedure for obtaining specific performance under Brazilian law is judicial in its essence (as well as the procedure for demanding termination). If the party does not possess a judicial or extrajudicial executive instrument clearly stating the obligation to be performed, the party in breach shall, firstly, resort to court in order to be recognized the right of specific performance and, afterwards, enforce this decision also in court, in order to obtain performance. In this sense, see Varela (2015), 149–150.

not available and the remedy will therefore be termination of the contract (addressed in Sect. 7.1.3).

Type of performances. Unlike the UNIDROIT Principles (which provide for repair, replacement, and other types of specific performance), Brazilian Civil Code does not specify the manner of specific performance that a creditor (aggrieved party) may seek in the event of a breach. The rule of Article 475 is broad enough to include the specific performance remedies provided by Article 7.2.3 of the UNIDROIT Principles, as well as additional remedies and measures that are not available under the Principles.¹⁶² This broader scope of the available types of specific performance is designed to achieve the same practical result which would have been obtained if the obligation had been fulfilled in accordance with the contract.¹⁶³

The choice of possible performances, as well as the decision to seek either specific performance or termination, lies in the sole discretion of the aggrieved party, since it is its interest at issue. Accordingly, the debtor (party in breach) must comply with the creditor's decision, unless it is physically impossible to do so.¹⁶⁴ Likewise, there is no prevalence between specific performance and termination. It is at the sole discretion of the creditor to claim only the first or even to plead the remedies in the alternative, provided that there is no abusive behaviour by the creditor in doing so, which is assessed by the judge.¹⁶⁵

The provisions of the Brazilian Civil Code differ significantly from those found in the CISG. The Convention's provisions regarding remedies for breach of contract establish a progressive phasing of the creditor's remedies. For instance, Articles 46 to 48 of the Convention refer to several remedies available to a buyer seeking to obtain performance by the seller, and only after the failure of those remedies (or if breach is qualified as a 'fundamental breach'—discussed below), may the buyer declare the termination of the contract.¹⁶⁶ Therefore, contrary to the free choice given to the aggrieved party by the Brazilian Civil Code, the CISG privileges the right to specific performance,¹⁶⁷ especially by enumerating the possible performances and alternatives available to the parties so as to avoid contract termination.

Consequences of non-performance. Brazilian law also provides for mechanisms that empower the adjudicator (whether a judge or an arbitrator) to compel the party in breach to perform the specific obligation, especially if the obligation is not fungible and cannot be converted into another performance (e.g. indemnification, for instance).

¹⁶² For instance, Articles 816 and 817 of the Brazilian Civil Procedure Code provides for the possibility of the obligation be converted into money or also be performed by a third party at the expenses of the debtor in breach.

¹⁶³ See Nery Jr (2014a, b), 635–664 and Barbosa Moreira (1980) 31.

¹⁶⁴ See Pontes de Miranda (1972), 358; de Assis (2007), 610; Aguiar Júnior (2011), 460. The same rational is applied by case Law: State Court of São Paulo, Appeal 2014.0000168461, Rel. Des. Alexandre Marcondes, j. 25.03.2014.

¹⁶⁵ See de Assis (2007), 609; Aguiar Júnior (1994), 214; Pontes de Miranda (1984), 331; Serpa Lopes (1961), 202.

¹⁶⁶ Pursuant to Article 49 of the CISG.

¹⁶⁷ See Magnus (2004), 323; Leisinger (2007), 60–63 and Koch (2004).

In these cases, the adjudicator may assess and apply daily fines against the breaching party for each day of non-compliance (called *astreintes*, which are normally a high value per day), in order to compel that party's performance of the relevant obligation (Grinover 1996).¹⁶⁸

7.1.3 The Right to Terminate a Contract Due to Non-performance

When. As mentioned above, if a breach is not adequately cured, Article 475 of the Brazilian Civil Code provides an aggrieved party with two options: (i) that party may require specific performance (as discussed above); or (ii) it may seek to terminate the contract. There is no prevalence or subordination between these two options, and the remedy will be applied in accordance with the interest of the aggrieved party, the nature of the obligation and the breach in question.

Therefore, the right to terminate the contract arises from a breach that is not cured (see Sect. 7.1.1 above). Article 475 does not establish any difference regarding the nature of a breach that will permit termination of the contract—and the lack of such a distinction may mistakenly induce a reader to believe *any* breach will entitle a creditor to claim termination. In fact, the literature distinguishes between *absolute* breaches and *relative* breaches (see Sect. 7.1.1 above), and only an *absolute* breach, where performance is no longer objectively (physically) or subjectively (is not useful and interesting to the creditor, even if the debtor spontaneously offers to cure) possible, will vest an aggrieved party with the right to request termination of the contract.¹⁶⁹

This rule is similar to the treatment of international sales contracts under the CISG, as the Convention contains express provisions regarding the kind of breach that will permit termination of the contract, as well as other circumstances that can lead to the same result. Articles 49 and 64 of the CISG provides that an aggrieved party may declare the contract avoided (terminated) if: (i) the breach committed by the other party amounts to a *fundamental breach*, or (ii) the breaching party does not perform the obligation within the additional period of time conferred by the aggrieved party for such performance. This is similar to the requirements imposed under Brazilian law, with respect to the absence of cure and the relevance of the breach.

The concept of fundamental breach is explained in Article 25 of the Convention, which defines a 'fundamental breach' as one which "*results in such detriment to the other party as substantially to deprive him of what he is entitled to expect under the contract, unless the party in breach did not foresee and a reasonable person of the same kind in the same circumstances would not have foreseen such a result*". From this definition, it is possible to infer that a fundamental breach is distinguished by the *substantial deprivation* it causes to the aggrieved party (serious losses and violation

¹⁶⁸ Pursuant to Article 814 of the Brazilian Civil Procedure Code.

¹⁶⁹ See de Assis (2007), 611; de Assis (2013), 103; Aguiar Júnior (2011), 570; Alvim (1972), 158; Costa Lima (2007), 508 and Aguiar Júnior (2012), 502.

of real expectations and interest of the aggrieved party¹⁷⁰) and the ‘foreseeability’ of the breach by the debtor (the party in breach could have prevented the breach from occurring¹⁷¹). Under both the Brazilian Civil Code and the CISG, the breach of an ancillary obligation may also give rise to termination of a contract, provided that the obligation is intrinsically connected to the creditor’s interest as clearly manifested at the time of contracting, and to the fair balance between the parties.¹⁷²

How. Although the Brazilian Civil Code and the CISG share some similar rules as to *when* an aggrieved party may terminate a contract, they are entirely divergent with respect to *how* that party must exercise its right to terminate the agreement. This is especially true in cases where this issue is not addressed in the terms of the contract itself.

According to Article 474 of the Brazilian Civil Code, a contract may be terminated directly by the aggrieved party if the ‘authority’ to do so was expressly provided in the contract. If there is no such contractual provision, then the party must seek termination in court. Consequently, if there is an *express resolutive clause* specifying the kind of breaches that will permit termination of the contract, then it is sufficient for the aggrieved party to simply notify the breaching party of the termination (subject to any applicable deadlines established in the contract). In this instance, the parties previously negotiated and agreed on the types of conduct that would constitute an absolute breach, and, therefore, the right to termination.¹⁷³ If there is no express provision, mere notice will not suffice, and a determination regarding the seriousness of a breach, as well as the right to terminate the contract, must be instead be made by judicial or arbitral order. In that instance, the aggrieved party must prove that the breach was absolute and caused the frustration of all its interest in the continuation of the contract.¹⁷⁴

Such regulation differs from the rules provided for by Articles 49 (buyer’s right) and 64 (seller’s right) of the CISG. According to these provisions, an aggrieved party may declare the contract avoided by notice to the party in breach (pursuant to Articles 26 and 27 of the Convention¹⁷⁵), upon the occurrence of either a fundamental breach (Article 25), or the non-performance of an obligation after the additional time conferred. However, this distinction between Brazilian domestic law and the CISG is not a cause for concern, since international sales of goods, which is solely governed

¹⁷⁰ There is vast literature in this regard. See Graffi (2003), 339; Ziegel (1984), 14–15; Honnold (1999), 186; Ostendorf (2010), 10; Ferrari (2006), 495.

¹⁷¹ See Picazo and Leon (1998), 217 and Graffi (2003), 340.

¹⁷² See de Assis (2013), 110–111; Dimatteo et al. (2005), 148–149; Magnus (2005–06), 434–435 and Aguiar Júnior (2012), 445.

¹⁷³ See de Assis (2007), 582; Pontes de Miranda (1972), 349 and Aguiar Júnior (1994), 213.

¹⁷⁴ See Aguiar Júnior (2011), 459; de Assis (2013), 114 and Ubaldino Miranda (2013), 424.

¹⁷⁵ Article 26 of the CISG: A declaration of avoidance of the contract is effective only if made by notice to the other party; Article 27 of the CISG: Unless otherwise expressly provided in this Part of the Convention, if any notice, request or other communication is given or made by a party in accordance with this Part and by means appropriate in the circumstances, a delay or error in the transmission of the communication or its failure to arrive does not deprive that party of the right to rely on the communication.

by the CISG, is far more dynamic in nature, and thus cannot abide the delay of a judicial or arbitral proceeding as provided by Brazilian domestic law.

Effects of termination. The Brazilian Civil Code does not provide for general rules regarding the effects of the termination of a contract. However, the general effect of termination is to release the parties from the obligations set forth in the contract, and, where appropriate, to require restitution (for things e.g. goods, equipment, personnel), in addition to the payment of damages by the breaching party (Villaga Azevedo 2000).

In cases of long-term or construction contracts, it is not possible to restore the *status quo ante*; termination of a contract does not have a retroactive effect, and previously performed contractual obligations are not undone by virtue of the termination. For this reason, parties generally include in those contracts a clause that establishes a fixed deadline for when the termination will take effect. Additionally, Article 473 of the Brazilian Civil Code states that the notice of termination will only take effect after a time compatible to the investments made by the parties to the contract has passed (see Sect. 5.1.2 above).

Article 81 of the CISG provides more detailed instruction regarding the effects of termination, and specifies that termination of an agreement shall cause: (i) the release of the parties; (ii) the duty to pay damages by the party in breach; (iii) the restitution of delivered goods or payments tendered; and (iv) the validity of provisions related to dispute resolution shall be preserved, as shall any other provisions governing rights and obligations arising from the termination of the contract (e.g. the confidentiality clauses).¹⁷⁶ Therefore, according to both the CISG and the Brazilian Civil Code, the termination of a contract prospectively releases the parties from future obligations, and endeavours to restore the previous *status quo*.¹⁷⁷

Failure to provide assurance and anticipatory breach. The issues of anticipatory breach and the failure to provide assurance of performance will be discussed together. Although there is no specific provision governing these situations, both issues are generally addressed by Article 477 of the Brazilian Civil Code. According to this provision, if, after the conclusion of the contract, one of the parties suffers reduction in its assets which may compromise or cast doubt over his ability to perform the obligation, then the other party is allowed to withhold its own performance until it receives actual performance or adequate assurance of such performance (by issuing a security, for instance). Therefore, this provision does not specifically address the right of termination due to anticipatory breach or lack of assurance, but rather to the right to withhold the performance, and does not regulate the future consequences in

¹⁷⁶ Article 81 of the CISG: (1) Avoidance of the contract releases both parties from their obligations under it, subject to any damages which may be due. Avoidance does not affect any provision of the contract for the settlement of disputes or any other provision of the contract governing the rights and obligations of the parties consequent upon the avoidance of the contract. (2) A party who has performed the contract either wholly or in part may claim restitution from the other party of whatever the first party has supplied or paid under the contract. If both parties are bound to make restitution, they must do so concurrently.

¹⁷⁷ See Aguiar Júnior (2012), 508 and Tallon (1987), 601.

case of insufficient guarantees offered by the party that is anticipated to breach the contract.

However, Brazilian literature and case law have developed the concept of ‘anticipatory breach’, which occurs when, before the agreed upon time for performance, (i) the debtor clearly expresses that he/she will not perform or will not be able to perform, or takes measures that are contradictory to the performance of the contract; or (ii) the object of the performance becomes impossible or unenforceable.¹⁷⁸ If either one of these requirements are met, the creditor will be entitled to seek termination or demand specific performance, as the case may be, and may additionally seek to recover damages as well (Proença 2006).¹⁷⁹ As explained above, a request for termination must be presented to a competent adjudicative authority (whether a court or an arbitral tribunal), unless a party’s authority to terminate the contract is expressly provided for within the contract terms itself as a ‘resolutive clause’. The same rationale applies to the failure to provide adequate assurance of performance: the party is entitled to withhold performance (Article 477 of the Brazilian Civil Code), and if the party wishes to terminate the contract, it shall prove in court that the failure to provide e.g. surances constituted an absolute breach.

Under the CISG, the rules on this issue are very similar to that which is applied by the Brazilian Civil Code, except for the fact that the Convention empowers the ‘future’ aggrieved party to declare the termination of the contract only if the anticipatory breach corresponds to a ‘fundamental breach’, without the need to initiate judicial or arbitral proceedings.¹⁸⁰ Furthermore, Article 71 of the Convention states that a party may suspend performance of the contract if it becomes apparent that the other party will not perform a substantial part of his obligations, and such suspension will last until the other party provides adequate assurance of the performance¹⁸¹ (much like Article 477 of the Brazilian Civil Code).

¹⁷⁸ See Azulay (1977), 74 and Aguiar Júnior (1991), 196.

¹⁷⁹ Superior Court of Justice, AREsp 853,908/DF, Rel. Min. Marco Buzzi, j. 29/02/2016.

¹⁸⁰ Article 72 of the CISG: (1) If prior to the date for performance of the contract it is clear that one of the parties will commit a fundamental breach of contract, the other party may declare the contract avoided. (2) If time allows, the party intending to declare the contract avoided must give reasonable notice to the other party in order to permit him to provide adequate assurance of its performance. (3) The requirements of the preceding paragraph do not apply if the other party has declared that he will not perform its obligations.

¹⁸¹ Article 71 of the CISG: (1) A party may suspend the performance of its obligations if, after the conclusion of the contract, it becomes apparent that the other party will not perform a substantial part of its obligations as a result of: (a) a serious deficiency in its ability to perform or in its creditworthiness; or (b) its conduct in preparing to perform or in performing the contract. (2) If the seller has already dispatched the goods before the grounds described in the preceding paragraph become evident, he may prevent the handing over of the goods to the buyer even though the buyer holds a document which entitles him to obtain them. The present paragraph relates only to the rights in the goods as between the buyer and the seller. (3) A party suspending performance, whether before or after dispatch of the goods, must immediately give notice of the suspension to the other party and must continue with performance if the other party provides adequate assurance of its performance).

7.1.4 The Right to Damages

General. As mentioned throughout this Section, there are several provisions in the Brazilian Civil Code designed to ensure the payment of damages for losses suffered due to either an absolute or relative breach.¹⁸² According to Articles 389, 395 and 404, the party in breach may be required to not only pay damages, but also to pay interest, monetary adjustment and, where applicable, attorneys' fees. Damages can be cumulatively requested with other available remedies (e.g. termination or specific performance). These losses, as well as any additional monetary obligation, must be paid in Brazilian currency (Real or BRL), as required by Articles 315 and 318 of the Brazilian Civil Code discussed above (see Sect. 6.1.1). For international sales contracts, Articles 45 and 61 of the CISG also state that the aggrieved party may claim damages (expressly treated in Articles 74 to 77) cumulatively with other remedies, however, unlike the Brazilian Civil Code, these provisions do not provide for a specific rule on the applicable currency to be used for such payments.

Interests. As regards the payment of interests, the applicable rate is normally agreed upon by the parties and stated in the terms of the contract. In the absence of a previously agreed rate, the fixed rate then in force for the payment of taxes owed to Brazilian National Treasury will apply.¹⁸³ According to Article 407 of the Brazilian Civil Code, interest must be paid by the party in breach even if the other party does not actually suffer any loss (the same applies to monetary adjustment, although not expressly provided). This is also true in cases where the breach involved a non-pecuniary obligation and a corresponding pecuniary amount is fixed by judicial/arbitral decision, expert appraisal or agreement between the parties. Interest and monetary adjustment accrue from the date of maturity of the obligation,¹⁸⁴ or, if not established in the contract, from the extrajudicial demand by the aggrieved party (formal notice of breach)¹⁸⁵ or from judicial summon of the debtor.¹⁸⁶ The same rule applies to the accrual of monetary adjustments, which are calculated based on the official index regularly established.¹⁸⁷ The CISG also states that a party who fails to pay the price or any other sum in arrears must pay interests to the aggrieved party, without prejudice to the claim for damages, but the Convention does not contain any other specific provisions regarding calculation or accrual.¹⁸⁸

¹⁸² The following Articles of the Brazilian Civil Code ensure the right to claim damages in case of breach: 389, 395, 402 to 404 and 475.

¹⁸³ Pursuant to Article 406 of the Brazilian Civil Code, and the rate currently ranges between 0,5 and 1% per month, simple interests.

¹⁸⁴ Pursuant to Article 397 of the Brazilian Civil Code.

¹⁸⁵ Pursuant to the sole paragraph of Article 397 of the Brazilian Civil Code.

¹⁸⁶ Pursuant to Article 405 of the Brazilian Civil Code.

¹⁸⁷ Pursuant to Article 404 of the Brazilian Civil Code.

¹⁸⁸ Article 78 of the CISG: If a party fails to pay the price or any other sum that is in arrears, the other party is entitled to interest on it, without prejudice to any claim for damages recoverable under Article 74.

Liability for damages. Under Brazilian law, in regard to bilateral and reciprocal contracts (where both parties assume burdensome obligations to each other), a finding of liability for a breach of contract and resulting damages requires the existence of fault by the party in breach (negligence, imprudence or malpractice). The exception to this general rule refers to so-called beneficial contracts (*contratos benéficos* in Portuguese), under which only one party has obligations, and the other is simply a beneficiary thereof. Under this type of contract, the benefited party (the party who receives performance) will be liable for breaches committed with simple fault, while the non-benefited party will only be liable in the event of a breach intentionally committed (*dolo*, in Portuguese).¹⁸⁹

The party in breach will not be liable for damages if (i) the losses result from force majeure or fortuitous event¹⁹⁰ or (ii) no wrongful fact, act or omission can be attributed to the party.¹⁹¹ However, if the fortuitous event or force majeure occurs after the breach has already been committed (for instance, the party already delayed the performance), then liability will attach unless the breaching party can prove that the losses would have occurred even if the obligation had been duly performed (the fortuitous/force majeure event would affect the complied obligation as well).¹⁹²

Based on these general rules, Brazilian literature indicates three main elements that must be met to trigger liability for damages: (i) a breach committed with fault; (ii) direct and immediate losses suffered by the non-breaching party; and (iii) a causal connection between the breach and the losses.¹⁹³ Although the CISG does not expressly require fault by the party in breach, Article 79 exempts a breaching party from liability for damages if the breach was due to an impediment “*beyond his control*” and “*he could not reasonably be expected to have taken the impediment into account*”.¹⁹⁴ Therefore, under both the CISG and the Brazilian Civil Code, the act or failure must be attributable to the breaching party in order to create liability for damages.

Types, limitation and quantification. As for the types of the damages that can be recovered (apart from interests, monetary adjustment and possible attorneys’ fees), Article 402 of the Brazilian Civil Code provides that damages include both the actual and direct losses resulting from the breach (*damnum emergens*) and also the loss of profit directly resulting from the breach (*lucrum cessans*). Even if the breach was intentionally caused (with malice), the damages to be paid will still be limited to the total sum of these two types of losses.¹⁹⁵ A similar rule is provided by Article 74 of

¹⁸⁹ Pursuant to Article 392 of the Brazilian Civil Code.

¹⁹⁰ Pursuant to Article 393 of the Brazilian Civil Code.

¹⁹¹ Pursuant to Article 396 of the Brazilian Civil Code.

¹⁹² Pursuant to Article 399 of the Brazilian Civil Code.

¹⁹³ See Alvim (1972), 177 and Pereira (2009), 319.

¹⁹⁴ See section 1 of the CISG Advisory Council Opinion No. 7: Article 79 exempts a party from liability for damages when that party has failed to perform any of its obligations, including the seller’s obligation to deliver conforming goods.

¹⁹⁵ Pursuant to Articles 403 and 944 of the Brazilian Civil Code.

the CISG,¹⁹⁶ with the sole difference being that damages (loss suffered plus loss of profit) shall be limited to what was *foreseeable* by the debtor (party in breach) at the time of contracting.

Under the terms of the Brazilian Civil Code, a limitation applies to damages that are deemed excessive when compared to the conduct of the breaching party. In cases where there is an extreme disproportion between the nature of the wrongful conduct and the amount of damages, a court or arbitral tribunal may reduce the amount of damages accordingly.¹⁹⁷ In addition, Article 391 of the Brazilian Civil Code states that all the debtor's assets may be attached to compensate for such damages. Unless the amount of the damages is pre-determined by the parties in the contract via a penalty clause (see detail in Sect. 7.2.3), an assessment of the legal requirements as well as the quantification of damages must be made through court proceeding (judicial or arbitral), and based on the proven losses suffered by the party.

While the Brazilian Civil Code does not provide for more specific rules on the quantification of damages, the CISG contains several provisions on this issue. In addition to Article 74 of the Convention, which imposes the foreseeability requirement, Articles 75 and 76 provide that (i) in case of the replacement or resale of goods after the avoidance of a contract due to a breach, damages will cover the difference between the contract price and the price of the substitute transaction; and (ii) if a substitute transaction is not possible, the damages will cover the difference between the contract price and the market price for the goods at the place of delivery, at the time of the avoidance.

Finally, both systems (Brazilian Civil Code and CISG) also consider the conduct of the aggrieved party when quantifying the amount of damages. Article 945 of the Brazilian Civil Code, like Article 7.4.7 of the UNIDROIT Principles, states that if an aggrieved party contributes with fault to the breach (damaging event), the amount of the losses will be determined based on each party's comparative liability, meaning that the damages owed by the party in breach may be reduced in proportion with the aggrieved party's contribution to the breach. The CISG, in turn, provides in Article 80 that a party "*may not rely on a failure of the other party to perform, to the extent that such failure was caused by the first party's act or omission*".

Furthermore, Article 77¹⁹⁸ of the CISG requires the aggrieved party to mitigate the losses it suffers as a result of the breach, and the failure to do so may lead to a reduction of the damages owed by the breaching party. Despite the differences in these provisions of the CISG and Brazilian Civil Code, they both ultimately have

¹⁹⁶ Article 74 of the CISG: Damages for breach of contract by one party consist of a sum equal to the loss, including loss of profit, suffered by the other party as a consequence of the breach. Such damages may not exceed the loss which the party in breach foresaw or ought to have foreseen at the time of the conclusion of the contract, in the light of the facts and matters of which he then knew or ought to have known, as a possible consequence of the breach of contract.

¹⁹⁷ Pursuant to the sole paragraph of Article 944 of the Brazilian Civil Code.

¹⁹⁸ Article 77 of the CISG: A party who relies on a breach of contract must take such measures as are reasonable in the circumstances to mitigate the loss, including loss of profit, resulting from the breach. If he fails to take such measures, the party in breach may claim a reduction in the damages in the amount by which the loss should have been mitigated.

the same effect of reducing the damages payable to an aggrieved party due to its own acts or omissions. Furthermore, although the ‘duty to mitigate the losses’ is not expressly codified in Brazilian law, it is nevertheless required by virtue of the principle of good faith established in Article 422 of the Brazilian Civil Code, as a ‘lateral’ or ‘attached’ duty deriving therefrom.¹⁹⁹ This connection between the duty to mitigate losses and the good faith principle was formalized by the Statement No 169 of the 3rd Brazilian Journey of Civil Law, which states that “*the principle of the objective good faith shall lead the creditor to avoid the worsening of its own losses*”.

7.2 Non-performance/Breach—Specific Topics

7.2.1 Exemption/Exclusion Clauses

Although widely used in contracts involving Brazilian parties, so-called ‘exemption clauses’ are not specifically addressed in Brazilian law. However, this type of provision is recognized and extensively discussed by the Brazilian literature, albeit with some caution. There are two categories of exemption clauses: (i) limiting liability clauses; and (ii) full or pure exemption clauses. The first refers to clauses that limit (cap) the maximum amount of damages payable by the breaching party and, therefore, functions as a limitation on the parties’ risk exposure under the agreement. These clauses are very similar to penalty clauses with compensatory natures, except for the fact that the penalty clauses are also intended to serve as a ‘punishment’ for the breach, and not solely to ensure the reimbursement of damages (see Sect. 7.2.3).²⁰⁰ In pure exemption clauses, one or both parties agree to exempt the other party from paying any damages deriving from breaches to the contract. This amounts to an express waiver to the right to claim damages, and thus alters the distribution of risks under the contract.²⁰¹ Although these clauses are improperly called limitations or exemptions from *liability*, they only apply to the obligation to pay *damages*, and not to the existence of liability itself, which, as already discussed, is verified upon the existence of the three requirements of breach, loss and causal connection.²⁰²

Limiting liability clauses are generally enforceable under Brazilian law, especially if they are reciprocal and assure balance in the contractual relationship (Junqueira de Azevedo 2010). As for full exemption clauses, these will be considered illegal and unenforceable in Brazil if they: (i) exempt a party from liability for an intentional breach of contract; (ii) are contrary to mandatory rules or public policy; (iii) apply

¹⁹⁹ See Zanetti (2012), 29; Martins-Costa (2009), 344–345 and Fradera (2004), 116; The same understanding has been applied in case Law, for instance: Superior Court of Justice, REsp. n. 758.518, Rel. Des. (convened from State Court of Rio Grande do Sul) Vasco Della Giustina, j. 17/06/2010.

²⁰⁰ See Venosa (2007), 61; Aguiar Dias (1980), 30 and Junqueira de Azevedo (2010).

²⁰¹ See Aguiar Dias (1980), 113 and Junqueira de Azevedo (2010).

²⁰² See Cavalieri Filho (1996), 336 and Junqueira de Azevedo (2010).

to the main obligation of the contract (extremely abusive, since the party could be exempted from performance); or (iv) are directly related to the life or physical integrity of natural people²⁰³ (for instance, exemption clauses in contracts for the transport of people are deemed ineffective, pursuant to Precedent 161 of the Federal Supreme Court). Equally, Article 424 of the Brazilian Civil Code states that, in adhesion contracts (common in consumer relationships), clauses containing a waiver of rights related to the contract (e.g. the right to receive compensation for breaches) will be deemed null and void. Furthermore, Article 25 of the Brazilian Consumer Code prohibits the stipulation of clauses that exempt a supplier from paying damages to a consumer for defects in its products or services. Conversely, if these clauses refer to ancillary obligations of non-consumer relationships, and do not contradict public policy, they will be considered valid and binding between the parties.

7.2.2 Force Majeure

As previously mentioned, Brazilian law recognizes force majeure as a cause for exemption from liability to pay damages. In fact, the Brazilian Civil Code actually recognizes both ‘force majeure’ and ‘fortuitous event’, which used to have distinguished meanings²⁰⁴ but today are treated by the literature as synonymous for the purposes of exempting liability. Both refer to acts or facts that are beyond the control or the willingness of the party in breach, that did not derive from negligence, imprudence or malpractice, and which, as a result, exclude liability by breaking the causal link between the conduct of the party and the damage suffered (Rodrigues 1982).

The phrase ‘fortuitous event’ refers to the *unpredictable* and *accidental* nature of the event in question, while the phrase ‘force majeure’ contemplates the *inevitable* and *unavoidable* nature of the effects which such an event creates.²⁰⁵ The general rules regarding the causes for exemption of liability are not mandatory, since Article 393 of the Brazilian Civil Code allows parties to agree otherwise.

In order to fully exclude liability (break the causal connection), the force majeure or fortuitous event must be the sole cause of the damages suffered by the other party. If the breaching party caused or exposed the other party to that fortuitous event, it will still be liable for damages (Alvino Lima 2011). In this context, Article 399 of the Brazilian Civil Code states that if a fortuitous event or force majeure occurs after a breach has been committed, then liability for damages will still attach (since the breach exposed the performance to the fortuitous event), unless the debtor can prove that the losses would have occurred even if the obligation had been duly performed. The causes of exemption from liability differ from the excessive onerous situation,

²⁰³ See Aguiar Dias (1973), 289 and Junqueira de Azevedo (2010).

²⁰⁴ The common and old differentiation between ‘force majeure’ and ‘fortuitous event’ was that the first is related to a *human act* by a third party, while the second refers to a *natural cause* which excludes the liability for the breach. In this sense, see Villaga Azevedo (2000), 269.

²⁰⁵ Pursuant to the sole paragraph of Article 393 of the Brazilian Civil Code, which qualifies force majeure and fortuitous event as an inevitable event, whose effects were not possible to avoid or prevent. See also, Tadeu (2011), 567–606.

since the latter involves an obstacle to performance of the obligation, and does not address liability for damages (Gomes 2009a, b).

Although the CISG does not expressly mention ‘force majeure’, it does recognize events that will exempt a breaching party from liability for damages. Article 79 of the Convention defines these events as those which present an “*impediment beyond his control and that he could not reasonably be expected to have taken the impediment into account at the time of the conclusion of the contract or to have avoided or overcome it or its consequences*”. Paragraph 2 of this provision states that, when the breach is attributable to a third party, the breaching party will only be exempt if it has faced the same impediment described above. Paragraph 3 states that the exemption will continue for the duration of such impediment, while para 4 requires the party who faces the impediment to give notice to the aggrieved party within a reasonable period time.

The Brazilian Civil Code does not contain a similar provision regarding a reasonable time, nor does it require the breaching party to provide notice about the event. However, the literature considers such notification to be required by the duty to inform, which is an attached duty deriving from the principle to observe good faith during the performance of the contract (Fachin 2012). For these reasons, contracts generally provide for a mechanism for invoking force majeure or fortuitous event with fixed deadlines for notification, and specifically enumerate events that will exempt a breaching party from liability.

7.2.3 Agreed Payment for Non-performance

Articles 408 through 416 govern ‘penalty clauses’, which are provisions that establish an agreed upon payment for non-performance of a contractual obligation. Article 408 sets forth the general rule for the application of a penalty clause: the party incurs such penalty if, through its own culpable conduct, it fails to perform an obligation under the contract or commits a contractual breach. Therefore, if the breach is not attributable to the party, then the penalty clause cannot be invoked by the aggrieved party.

Under Brazilian law, penalty clauses may have one or both of two primary functions: (i) a *compulsory* function (punishment for non-performance); and (ii) a *compensatory* function (liquidated damages) (Martins-Costa 2009). As a result of this dual function, the aggrieved party can require payment of the penalty without having to prove that any loss has actually been caused by the breach (the mere culpable breach shall be sufficient).²⁰⁶ However, if the suffered losses surpass the amount fixed by the penalty clause, the aggrieved party is not allowed to claim supplementary damages,²⁰⁷ unless otherwise agreed in the contract. If the parties have agreed that the penalty clause will not exclude liability for damages in excess of that limitation, the penalty clause will operate as a ‘minimum amount of damages’,

²⁰⁶ Pursuant to Article 416 of the Brazilian Civil Code.

²⁰⁷ Pursuant to the first part of the sole paragraph of Article 416 of the Brazilian Civil Code.

and the aggrieved party is only required to prove the surplus losses that it has suffered due to the breach.²⁰⁸

The amount fixed by the penalty clause may not exceed the amount of the contract's principal obligation.²⁰⁹ In addition, Article 413 of the Brazilian Civil Code also provides a safeguard against the potential for abuse by an aggrieved party seeking payment of the penalty. Under this provision, the contracted amount of the penalty must be reviewed, and equitably reduced in court (by a judge or arbitral tribunal) if (i) there has been partial performance of the main obligation; or (ii) the fixed amount is manifestly excessive, considering the nature and purpose of the transaction. The basis for the first reduction is objective in nature, since the adjudicating body must measure the extent of performance by the party in breach, whereas the second basis is more subjective, and considers the nature of the transaction and the parties involved (whether a penalty amount is exorbitant must be determined based on the facts of an individual case, considering the complexity and sophistication of the transaction and the contracting parties) (Martins-Costa 2009). Therefore, the application of Article 413 is a particularly delicate issue to be dealt with by judges and arbitrators.

The penalty clause is ancillary in nature, and can be fixed together with the main obligation of the contract, or instead may be established in a separate act or instrument. The clause can refer to (i) the complete non-performance of an obligation; (ii) the non-performance of a particular provision of the contract; or (iii) a simple breach.²¹⁰ If it refers to the total non-performance of an obligation, the penalty clause shall be converted into an alternative possible remedy for the creditor (the creditor may choose between the amount of the penalty and the performance of the obligation).²¹¹ Conversely, if the penalty clause simply refers to the mere breach (for instance, defective or non-satisfactory performance of an obligation), or is stipulated as intended to guarantee a particular provision, the creditor may, at its discretion, demand payment of the fixed penalty, together with the performance of the main obligation of the contract (compulsory nature of the penalty clause).²¹²

Quite distinct from penalty clauses, 'forfeiture clauses' are provisions through which the parties agree on a specific fine to be paid in the event that one of the parties voluntarily withdraws from the contract without a cause or justification. The penalty provided in forfeiture clauses is referred to as a 'penitential fine' (in Portuguese, *multa penitencial*), and is intended as a kind of compensation for the party that was deprived of the advantages it would have gained if the contract had been performed (Gomes 2009a, b). Forfeiture clauses are not expressly provided for by law, and there is no legal provision on the possible reduction of the applicable fine as in the case of penalty clauses, especially because such fine is not related to a breach but rather to withdrawal. As such, this can be cumulated with a claim for damages suffered due

²⁰⁸ Pursuant to the final part of the sole paragraph of Article 416 of the Brazilian Civil Code.

²⁰⁹ Pursuant to Article 412 of the Brazilian Civil Code.

²¹⁰ Pursuant to Article 409 of the Brazilian Civil Code.

²¹¹ Pursuant to Article 410 of the Brazilian Civil Code.

²¹² Pursuant to Article 411 of the Brazilian Civil Code.

to possible breaches committed before the withdrawal from the contract, which shall be proved by the aggrieved party (Pontes de Miranda 1984).

The forfeiture clause and the penalty clause should not be confused with the so-called *arras* (*signal* or guarantee), which is a deposit of money or movable property made by one party to the other at the time of the conclusion of the contract, and is intended to ensure performance. If the obligation is performed, the deposit can either be returned to the performing party or discounted from the performance.²¹³ Conversely, in the event of a breach, the aggrieved party may retain the deposit as compensation, and may also seek damages if it can prove that the losses it suffered as a result of the breach surpass the amount of the *arras*.²¹⁴

7.2.4 Consequential Losses

As previously noted in the discussion above regarding damages (see Sect. 7.1.4), Articles 402 and 403 of the Brazilian Civil Code states that liability for damages consists of both the losses actually incurred, and what the aggrieved party reasonably lost in profit from the performance of the obligation (loss of profits). The concept of ‘loss of profit’ encompasses the idea of *consequential damages*, since it compensates for future estimated gains that the aggrieved party was prevented from receiving. In other words, it is the economic advantage that the aggrieved party is denied as a result of the breach.²¹⁵ Liability for damages requires the presence of three minimum elements which must be sufficiently proven by the party demanding compensation: (i) the contractual breach; (ii) the damages suffered (including lost profits); and (iii) the causal link between the breach and the damages suffered. Loss of profits differentiates from the pure “loss of chance” (debatable under Brazilian law), due to the lack of strong degree of certainty, as required for the loss of profits.

Thus, the mere occurrence of a breach does not entitle an aggrieved party to recover its lost profits. Further, although lost profits will naturally be an estimation, they must nevertheless be *reasonable* and sufficiently evidenced, as required by Article 402. ‘Absolute proof’ of the loss is not required for lost profits, unlike with actual damages, but a party claiming lost profits must at a minimum provide proof that the claimed profit would effectively and reasonably exist, and that these damages are not imaginative or motivated by the greed of the creditor.²¹⁶

The degree of certainty required to sufficiently prove lost profits is largely related to the *usual development* of such transaction. The creditor of the performance must prove that the claimed loss of profit would derive from the usual course of the contract’s performance, and that there was a *real* and *serious* probability of the claimed profit.²¹⁷ The presumption related to the ‘usual course of the contract’

²¹³ Pursuant to Article 417 of the Brazilian Civil Code.

²¹⁴ Pursuant to Articles 418 and 419 of the Brazilian Civil Code.

²¹⁵ See Villaça Azevedo (2000), 241; Martins-Costa (2009), 330 and Venosa (2007), 271.

²¹⁶ See Guedes (2011), 96 and Almeida (1934), 354.

²¹⁷ See Nery Jr (vol. 6, 2014); Alvim (1972), 189 and Martins-Costa (2009), 362.

corresponds to the *reasonability* requirement of Brazilian law (Article 402). This requirement is designed to prevent an aggrieved party from taking undue advantage of the breach.²¹⁸ The reasonability is also related to the foreseeability of the losses considering the nature of the transaction that was breached and must be taken into account by the judge or arbitrator when fixing the amount owed as loss of profit (Pontes de Miranda 1959).

Furthermore, as already mentioned, this category of damages is limited to the causal connection between the breach and the loss of the expected profit. Article 403 of the Brazilian Civil Code limits the liability to the loss of profit directly and immediately caused by the breach, thus excluding recovery for indirect and unforeseeable damages, as well as those which were caused by factors other than the breach (Martins-Costa 2012).

8 Imitation Periods

Definition. Brazilian Civil law provides for two types of limitation periods: *prescrição* (prescription) and *decadência* (extinction). The general rules regarding *prescrição* are set forth in Articles 189 to 196 of the Brazilian Civil Code, while those related to *decadência* are set forth in Article 207 to 211. Under *prescrição*, the lapse of the period affects (extinguishes) the *claim* by one party (right of a party to claim something). This means that a breach creates a claim to be exercised by an aggrieved party against the breaching party, which may be done within a specific period of time after the breach occurs (the *prescrição* period). On the other hand, *decadência* affects (extinguishes) the *right* itself (and not the claim), meaning that, the lapse of a given period extinguishes the right of a party under the contract (perishing of a right).

Rights and remedies subject to limitation periods. *Prescrição* affects *subjective rights* (right to require something from another party, or a right that depends on the conduct of the other party), while the *decadência* operates on *potestative rights* (a right that is within the sole control of a party, regardless of the other party's behaviour or conduct) (Pereira 2015a, b). Therefore, the *prescrição* period applies to rights and remedies (claims) which depend on the other party's conduct, e.g. the right to claim damages or to claim specific performance of the contract. On the other hand, rights that are under the sole control of one party and, as a consequence, cannot not be violated by the other party (potestative rights), are subject to *decadência* period, e.g. the right to terminate the contract and to withhold performance.

Mandatory nature. The *prescrição* periods are provided by law and, pursuant to Article 192 of the Brazilian Civil Code, they are mandatory and may not be modified

²¹⁸ See Pontes de Miranda (1959) and Guedes (2011), 302; Brazilian case Law decided in the same sense: Superior Court of Justice, 4th Panel, REsp 320417-RJ, Rel. Min. Sálvio de Figueiredo Teixeira, j. 27/11/2001.

by agreement between the parties. However, after the expiration of this period, the debtor may expressly or impliedly waive the *prescrição* in favour of the creditor.²¹⁹ As regards the *decadência* period, the limitation may be provided by law or agreed between the parties. Importantly, if the limitation is provided by law, then it may not be waived by the parties.²²⁰ However, unlike the *prescrição*, the *decadência* period may be stipulated by the parties, and they may shorten or extend this limitation period in the terms of their agreement. These rules are equally applicable in judicial proceedings, arbitrations and mediations/conciliations.

Prohibition. The Brazilian Civil Code does not provide for specific circumstances where a debtor may be prevented from asserting the *prescrição* or *decadência*. However, the Brazilian legal system protects parties who have relied upon the behaviour of their counterparty. This means that, if the claim of *prescrição* of one party breaches a situation of reliance (trust) created to the other party, the claim of *prescrição* may be hindered. Due to the subjective nature of reliance, courts generally consider other objective circumstances when preventing the assertion of a limitation period. This might include, for instance, the objective facts that induced reliance by the party, any investments made by a party by reason of such reliance, and other similar considerations (Martins-Costa 2015).

Duration. Pursuant to Article 205 of the Brazilian Civil Code, the general and maximum duration of the *prescrição* period is 10 years, unless the law provides for a shorter deadline. This is counted from the act that gave rise to the pretension/claim: the violation of the subjective right.²²¹ Article 206 of the Brazilian Civil Code provides for specific *prescrição* periods for different scenarios and rights. In regard to contractual rights, Article 206 provides for some specific limitation periods, e.g.: (i) 5 years for the right to claim net debts arising from particular or public instruments (contracts, for instance)²²²; (ii) 3 years for the right to claim payment of credit securities (notes), counting from the maturity date of the note²²³; (iii) 3 years for the right to claim interests, dividends or ancillary obligations payable in periods no longer than one year, capitalized or not²²⁴; (iv) 3 years for the right to claim reimbursement of unjustified enrichment²²⁵; and (v) 3 years for the right to claim civil compensation²²⁶ (of note, although there is a debate among authors as to whether this limitation period is applicable to contractual civil liability or only to extra-contractual civil liability—*ex delictum*—, recent case law of the Brazilian Superior

²¹⁹ Pursuant to Article 191 of the Brazilian Civil Code.

²²⁰ Pursuant to Article 209 of the Brazilian Civil Code.

²²¹ Pursuant to Article 189 of the Brazilian Civil Code.

²²² Article 206, paragraph 5, I of the Brazilian Civil Code.

²²³ Article 206, paragraph 3, VIII of the Brazilian Civil Code.

²²⁴ Article 206, paragraph 3, III of the Brazilian Civil Code.

²²⁵ Article 206, paragraph 3, IV of the Brazilian Civil Code.

²²⁶ Article 206, paragraph 3, V of the Brazilian Civil Code.

Court of Justice states that the 3-year period also applies to contractual compensation/indemnification²²⁷). The counting of the *prescrição* period excludes the first day and includes the last day and, if the last day is a non-business day, the period is extended to the next business day.²²⁸

As for the *decadência* period, there is no general rule on the duration, and this is either provided by a specific law or can alternatively be agreed between the parties. Therefore, each right must be analysed on a case by case basis in order to identify whether there is a legal or contractual period for *decadência*, and, if so, its specific duration and the day on which it began to run. In addition, there is no limit to the *decadência* period, unlike with *prescrição*, since the general rule is that potestative rights are indefinitely enforceable unless otherwise provided by law or agreed by the parties. The rules for counting of this period are similar to those for the *prescrição* period.

Interruption. Under Brazilian law, a *new* limitation period only restarts to run from the beginning when it is interrupted by specific circumstances provided by law. Interruption only affects the *prescrição* period, and not the *decadência* period (which is neither suspended nor interrupted unless otherwise provided by law). Interruption takes place upon the occurrence of a fact/act that cancels the effect of the already initiated period (Pereira 2015a, b). Article 202 of the Brazilian Civil Code provides for the specific and exhaustive circumstances for the interruption of the *prescrição* period and establishes that the interruption can only happen once (unlike the former Civil Code of 1916, under which the *prescrição* could be interrupted as many times as there was a permissive circumstance). The circumstances that will suffice to cause an interruption of this period are explained in Article 202, and include: (i) summons of the debtor by the judge/arbitrator; (ii) protest made within the deadline and form provided by law; (iii) exchange protest; (iv) presentation of debt instrument before inventory or collective insolvency proceedings; (v) any judicial act that constitutes debtor in breach and (vi) the acknowledgment of the creditor's right by the debtor, by any unequivocal act, including extrajudicial acts.

As for the last circumstance (acknowledgement by the debtor), there is no precise rule on how the debtor must express its unequivocal acknowledgment, and an acknowledgement will suffice so long as it (i) clearly and indisputably asserts the act by the debtor; (ii) is performed by the legitimate party (debtor itself, a legitimate representative/agent or a third interested party pursuant to Article 203); and (iii) is addressed to the legitimate party (creditor itself or a legitimate representative/agent). It can be made by written notice or letter, the partial payment or fulfilment of the obligation, the payment of charges related to the main debt, or other similar such methods (Pereira 2015a, b).

In the case of multiple creditors, an interruption by one creditor does not affect the other creditors, except in cases of severability of creditors. This rule applies equally

²²⁷ Superior Court of Justice, RESp 1.281.594 – SP, Rel. Min. Marco Aurélio Bellizze, j. 22/11/2016.

²²⁸ Article 132 of the Brazilian Civil Code.

to cases involving multiple debtors, and an interruption by one debtor will only affect the others if they are all severally liable for the performance of the obligation.²²⁹

Suspension. The concept of suspension of a limitation period functions quite differently from that of interruption. When a limitation period is suspended, it *does not restart* from the beginning, but rather the clock simply pauses at the time of the suspension; when the period resumes running, it will last for the original remaining time, and the period is not restarted or extended. As explained above, the *decadência* period cannot be suspended or interrupted. As for the *prescrição* period, Brazilian law provides for two types of suspension: impediment, and suspension *stricto sensu*. Impediment is used for suspension of periods that have not started yet, while suspension *stricto sensu* applies to limitation periods that have already begun to run.

Articles 197 and 198 of the Brazilian Civil Code provide some *natural* causes of suspension, e.g. the suspension of *prescrição* period between spouses during the course of the marriage or against individuals who are serving in the Armed Forces during a war. Article 199 establishes that the *prescrição* period is suspended (i) when a suspensive condition (future uncertain event) is still pending occurrence; (ii) when the maturity date has not yet occurred or (iii) when pending an eviction action (action filed by the real owner of a good in order to recover this good that was sold/traded by a false owner).

In cases involving severability of creditors, a suspension will only affect other creditors when the obligation is indivisible.²³⁰ Another specific rule exists regarding civil liability arising from criminal conduct that is the subject of a court proceeding. In these cases, the *prescrição* will be suspended until the delivery of a definitive award/conviction in the criminal action.²³¹

Effects. As explained above, while *prescrição* affects (extinguishes) the legal *claim* by one party (right to claim something from another party), the *decadência* affects (extinguishes) the right itself (perishment). As for the right to set off, an active debt (i.e., a debt which is still enforceable) cannot be used to offset a debt whose limitation period has already elapsed, regardless of when the party alleged the limitation period, since (i) under Brazilian law only enforceable debts may be offset²³² and (ii) *prescrição* may be alleged in any court level²³³ (State Court, Superior Court, etc.).

If a debtor pays for a debt or fulfils an obligation after expiration of the limitation period, he/she is not entitled to restitution under Article 882 of the Brazilian Civil Code (similar to Article 10.11 of the UNIDROIT Principles).

²²⁹ Pursuant to Article 204, paragraph 1 of the Brazilian Civil Code.

²³⁰ Pursuant to Article 201 of the Brazilian Civil Code.

²³¹ Pursuant to Article 200 of the Brazilian Civil Code.

²³² See Article 369 of the Brazilian Civil Code.

²³³ Pursuant to Article 193 of the Brazilian Civil Code.

References

- Aguiar Dias J (1973) Da responsabilidade civil, vol 2, no 216, 5th ed. Forense, Rio de Janeiro
- Aguiar Júnior RR (1991) Extinção dos contratos por incumprimento do devedor (resolução). Aide, Rio de Janeiro
- Aguiar Júnior RR (1994) A Convenção de Viena e a resolução do contrato por incumprimento. RIL, year 31, no 121, Brasília
- Aguiar Júnior RR (1995) Responsabilidade Civil do Médico. RT, vol 718, pp 33–53
- Aguiar Júnior RR (2011) Comentários ao Novo Código Civil. Da extinção do Contrato, arts. 472 a 480. In: Teixeira SF (coord) vol 6, t II, 1st ed. Forense. Rio de Janeiro
- Aguiar Júnior RR (2012) A extinção dos Contratos. In: Fernandes W (coord) Contratos Empresariais: Fundamentos e Princípios dos Contratos Empresariais. 2nd ed. Saraiva, São Paulo
- Almeida Costa MJ (1984) Responsabilidade civil pela ruptura das negociações preparatórias de um contrato. Coimbra, Coimbra
- Almeida L (1934) Dos efeitos das obrigações (arts. 928 a 1.078). coment. CC/1916 1060. Freitas Bastos, Rio de Janeiro
- Alvim A (1972) Da Inexecução das Obrigações e suas Consequências, 4th ed. Saraiva, São Paulo
- Amaral Júnior A, Celli Junior U, Veronese LE (2015) A formação dos contratos após a CISG entrar em vigor no Brasil. Uma análise prática aos operadores do direito. In: Schwenzer I, Pereira CAG, Tripodi L (coord) A CISG e o Brasil, Marcial Pons, Curitiba, pp 206–226
- Amaral Neto FSA (2010) A Autonomia Privada como Princípio Fundamental da Ordem Jurídica—Perspectivas Estrutural e Funcional. In: Doutrinas Essenciais de Direito Civil, vol 2, pp 579–606
- Andrade MAD (1974) Teoria geral da relação jurídica, vol 2. Almedina, Coimbra
- Antunes JAE (2012) Direito dos contratos comerciais. Almedina, Coimbra
- Araújo N, Gama Jr L (2012) A escolha da lei aplicável aos contratos do comércio internacional: os futuros Princípios da Haia e perspectivas para o Brasil, escritório permanente da Conferência da Haia de Direito Internacional Privado. RAM, vol 34, 11–41
- Araújo N, Spitz L (2013) As principais obrigações do comprador. RAM, vol 37, pp 107–123
- Audit B (1990) La vente internationale de marchandises: Convention des Nation Unies du 11 avril 1980. L.G.D.J., Paris
- Azevedo PP (2011) As prestações do reajustamento. Lugar de pagamento—dívida portable ou querable—mora. In: Doutrinas Essenciais Obrigações e Contratos, vol 2, pp 881–887
- Azulay F (1977) Do inadimplemento antecipado do contrato. Editora Brasília/Rio, Rio de Janeiro
- Baptista LO (1994) Dos Contratos Internacionais, Uma visão Prática e Teórica. Saraiva, São Paulo
- Barbosa Moreira JC (1980) Tutela específica do credor nas obrigações negativas, Temas de direito processual. Saraiva, São Paulo
- Basso M (1998) Contratos internacionais do comércio: negociação, conclusão, prática, 2nd ed. Livraria do Advogado, Porto Alegre
- Becker A (1994) As garantias implícitas no direito brasileiro em perspectiva comparativista. RDC, vol 9/69
- Bessone de Oliveira D (1997) Do Contrato, Teoria Geral, 4th ed. Saraiva, São Paulo
- Betti E (1970) Teoria geral do negócio jurídico. t III (trans. Miranda, F). Coimbra, Coimbra
- Betti E (2007) Interpretação da lei e dos atos jurídicos. (trans. Janini, K). Martins Fontes, São Paulo
- Bianca CM, Bonell MJ (1987) Commentary on the International Sales Law. Giuffré, Milano
- Borges GSP, Stringari C (2016) O dever de cooperação nas relações contratuais, The duty of cooperation in contractual relations. RT, vol 971, pp 145–164
- Botrel S (2013) Fusões & aquisições, 2th ed. Saraiva, São Paulo
- Carvalho de Mendonça JX (1955) Tratado de Direito Comercial Brasileiro. Parte I—Das Obrigações em matéria comercial. Livro IV—Das Obrigações, dos Contratos e da Prescrição em Matéria Comercial, vol 6. Freitas Bastos, Rio de Janeiro
- Carvalho Santos JM (2002) Código Civil (LGL\2002\400) brasileiro interpretado, vol 12, 9th ed. Freitas Bastos, Rio de Janeiro
- Coelho FU (2007) Curso de direito comercial, Direito de Empresa, vol 3, 7th ed. Saraiva, São Paulo

- Comparato, FK (1967) Obrigações de meio, de resultado e de garantia. RT, vol 386
- Costa Lima C (2007) Reflexões sobre a resolução do contrato na nova teoria contratual. In: Marques, CL A Nova Crise do Contrato, Estudos sobre a Nova Teoria Contratual. Revista dos Tribunais, São Paulo
- Couto e Silva CV (2007) Obrigação como Processo, FGV, Rio de Janeiro
- Cretella Neto J (2010) Da importância do Preâmbulo nos Contratos Internacionais do Comércio. In: Revista da Faculdade de Direito da Universidade Federal de Minas Gerais, no 57
- Cruz GS (2005) Obrigações alternativas e com faculdade alternativa. Obrigações de meio e de resultado. In: Tepedino G (coord) Obrigações. Renovar, Rio de Janeiro
- de Assis A (2013) Resolução do contrato por inadimplemento, 5th ed. Revista dos Tribunais, São Paulo
- de Assis A, De Andrade RA, Pessoa Alves FG (2007) Comentários ao Código Civil Brasileiro, Direito das Obrigações (arts. 421 a 578). In: Alvim A, Alvim T (coord) Forense, Rio de Janeiro
- Dias JA (1980) Cláusula de não indenizar (chamada cláusula de irresponsabilidade), 4th ed. Forense, Rio de Janeiro
- DiMatteo L et al (2005) International Sales Law, a critical analysis of CISG Jurisprudence. Cambridge University Press. Cambridge
- Fachin LE (2012) Fato de força maior e o adimplemento contratual. In: Soluções Práticas–Fachin. Revista dos Tribunais, vol 1: 231–276
- Farnsworth A (1999) Contracts, 3rd ed. Aspen, New York
- Ferrari F (2006) Fundamental Breach Under the UN Sales Convention: 25 years of Article 25 CISG. In: 25 Journal of Law and Commerce: 489–508
- Filho SC (1996) Programa de responsabilidade civil, 1st ed. 2nd cir. n 111. Malheiros, São Paulo
- Fontoura Costa JA, Nusdeo AMO (2012) As cláusulas de força maior e de hardship nos contratos internacionais. In: Doutrinas Essenciais de Direito Internacional, vol 5, pp 555–594
- Frada MAC (1994) Contrato e deveres de proteção. Coimbra, Coimbra
- Fradera VMJ (2004) Pode o credor ser instado a diminuir o próprio prejuízo? In: Revista Trimestral de Direito Civil, vol 19
- Fritz, KN (2009) A responsabilidade pré-contratual por ruptura injustificada das negociações. RT, vol 883
- Gomes O (2009a) Contratos. Brito E (coord) 26th ed. Forense, Rio de Janeiro
- Gomes O (2009b) Obrigações, 17th ed. (at: Brito, E). Forense, Rio de Janeiro
- Gomes O (2010) Introdução ao Direito Civil, 20th ed. (at: Brito, E, Brito, RP). Forense, Rio de Janeiro
- Graffi L (2003) Case Law on the Concept of “Fundamental Breach” in the Vienna Sales Convention. In: Revue de droit des affaires internationales/International Business Law Journal, no 3, Forum Européen de la Communication, Paris
- Grinover AP (1996) Tutela jurisdicional nas obrigações de fazer e não fazer. In: Teixeira SF (coord) Reforma do Código de Processo Civil. n 2. Saraiva, São Paulo
- Guedes GSC (2011) Lucros cessantes. Do bom-senso ao postulado normativo da razoabilidade. RT, São Paulo
- Guerrero CAA, Marcondes R (2011) A força executiva das comfort letters. RDP, vol 48, pp 363–414
- Honnold JO (1999) Uniform law for international sales under the 1980 United Nations convention, 3rd ed. Kluwer Law International, The Hague
- Junqueira de Azevedo A (2010) Cláusula cruzada de não indenizar (cross-waiver of liability), ou cláusula de não indenizar com eficácia para ambos os contratantes-renúncia ao direito de indenização-promessa de fato de terceiro-estipulação em favor de terceiro. In: Doutrinas Essenciais de Direito Civil. Revista dos Tribunais, vol 4, pp 561–569
- Junqueira de Azevedo A (2013) Negócio Jurídico, Existência, Validade e Eficácia, 4th ed. Saraiva, São Paulo
- Koch R (2004) Fundamental Breach: Commentary on whether the UNIDROIT Principles of International Commercial Contracts may be used to interpret or supplement Article 25 CISG. http://www.cisg.law.pace.edu/cisg/biblio/koch1.html#rk*

- Leisinger BK (2007) Fundamental breach—considering non conformity of goods—contribution on international commercial law. Sellier, München
- Lemes SMF (2010) Homologação de sentença arbitral estrangeira. Lei aplicável. Convenção das nações unidas sobre a compra e venda internacional de mercadorias (CISG). RAM, vol. 24, pp 155–196
- Lima A (2011) Responsabilidade do depositário no caso fortuito ou de força maior. In: Doutrinas Essenciais de Responsabilidade Civil. Revista dos Tribunais, vol 2, pp 791–794
- Lima CC (2005) A resolução do contrato na nova teoria contratual. RDC, Vol 42, no 55
- Machado B (1988) Risco contratual e mora do credor. Coimbra, Coimbra
- Magnus U (2004) In: Ferrari F, Flechtner H Brand R (eds) The draft UNCITRAL digest and beyond: cases, analysis and unresolved issues in the U.N. Sales Convention. Sellier, München
- Magnus U (2005–06) The Remedy of Avoidance of Contract Under CISG-General Remarks and Special Cases. In: 25 Journal of Law and Commerce
- Marques CL (2002) Contratos no Código de Defesa do Consumidor, 4th ed. Revista dos Tribunais, São Paulo
- Martinez AP (2004) A Defesa dos Interesses dos Consumidores pelo Direito da Concorrência. In: Revista do IBRAC—Direito da Concorrência, Consumo e Comércio Internacional, vol 11, pp 67–99
- Martins-Costa J (1999) A Boa-Fé no Direito Privado - Sistema e Tópica no Processo Obrigacional, 1st ed. Revista dos Tribunais, São Paulo
- Martins-Costa J (2006) O método de concreção e a interpretação dos contratos: primeiras notas de uma leitura suscitada pelo Código Civil. RBDC, no 31
- Martins-Costa J (2009) Comentários ao Novo Código Civil. Do inadimplemento das Obrigações. arts. 389 a 420. In: Teixeira SF (coord), vol 5, t 2, 2nd ed. Forense, Rio de Janeiro
- Martins-Costa J (2012) Responsabilidade civil contratual. Lucros cessantes. Resolução. Interesse positivo e interesse negativo. Distinção entre lucros cessantes e lucros hipotéticos. Dever de mitigar o próprio dano. Dano moral e pessoa jurídica. In: Lotufo R, Nanni GE, Martins FR (ed) Temas relevantes de direito civil contemporâneo. Atlas, São Paulo
- Martins-Costa J (2013) Os Regimes do Dolo Civil no Direito Brasileiro: dolo antecedente, vício informativo por omissão e por comissão, dolo acidental e dever de indenizar. RT, vol 923, pp 115–143
- Martins-Costa J (2015) A boa-fé no direito privado, critérios para a sua aplicação. Marcial Pons, São Paulo
- Maximiliano C (1961) Hermenêutica e Aplicação do Direito, 7th ed. Freitas Bastos, Rio de Janeiro
- Medina JMG (2010) Coação Econômica (economic duress). RT, vol 02, pp 87–110
- Miragem BNB (2005) Diretrizes interpretativas da função social do contrato. RDC, vol. 56, pp 22–45
- Miragem BNB (2007) Responsabilidade civil médica no direito brasileiro. RDC, vol 63, pp 52–91
- Monteiro WB (2003) Curso de Direito Civil, v.4: direito das obrigações, 1ª parte. 32th ed. (at: Dabus Maluf, CA). Saraiva. São Paulo
- Moreira Alves JC (2011) Notas sobre a carta de conforto. In: Von Adamek, MV (org.) Temas de direito societário e empresarial contemporâneos - Liber Amicorum Prof. Dr. Erasmo Valladão Azevedo e Novaes França, 1st ed. Malheiros, São Paulo
- Nalin P (2005) Do contrato: conceito pós-moderno, 1st ed. 5th cir. Juruá, Curitiba
- Nery Jr, N (2014a) Execução específica. Emissão de declaração de vontade de um dos contratantes- CPC 466-b e 466-c. In: Soluções Práticas de Direito-Nelson Nery Junior, vol 9, pp 635–664
- Nery Jr N (2014b) Indenização por lucros cessantes milionária e ilegal. Quantificação por dano que não observou os parâmetros legais. In: Soluções Práticas – Nelson Nery Júnior. Revista dos Tribunais, vol 6, pp 365–390
- Nery Jr N, Santos TR (2011) Renegociação Contratual. RT, vol 906, pp 113–156
- Neto ABC (2011) Alteração Verbal de Contrato Escrito Não Solene. In: Doutrinas Essenciais Obrigações e Contratos, vol. 3. Revista dos Tribunais

- Nevares ALM (2002) O erro, o dolo, a lesão e o estado de perigo no novo Código Civil. In: Tepedino G (coord) A parte geral do novo Código Civil. Estudos na perspectiva civil-constitucional, Renovar, Rio de Janeiro
- Neves JGA (2016) A *Suppressio* (*Verwirkung*) no Direito Civil. Almedina, São Paulo
- Nunes Pinto JE (2005) A Confidencialidade na Arbitragem. RAM, vol 6, pp 25–36
- Ostendorf P (2010) International Sales Terms. Beck, München
- Penteado LC (2006) Figuras Parcelares da Boa-fé Objetiva e *venire contra factum proprium*. RDP, vol 27, pp 252–278
- Pereira CMS (2015a) Instituições de Direito Civil. Contratos. Declaração Unilateral de Vontade. Responsabilidade Civil, vol 3, 19th ed. Forense, Rio de Janeiro
- Pereira CMS (1993) Lesão nos contratos, 4th ed. Forense, Rio de Janeiro
- Pereira CMS (2009) Instituições de Direito Civil, Teoria Geral das Obrigações, vol 2, 22th ed. (at: Gama, GCN). Forense, Rio de Janeiro
- Pereira CMS (2015b) Instituições de Direito Civil, Introdução ao Direito Civil, Teoria Geral do Direito Civil, vol 1, 28th ed. (at: Moraes, MCB). Forense, Rio de Janeiro
- Picazo LD, Leon P (1998) La Compraventa Internacional de Mercadorías—Comentário de la Convención de Viena, 1st ed. Civitas, Madrid
- Pontes de Miranda FC (1962) Tratado de Direito Privado, Parte Especial. t XXXVIII. Borsoi, Rio de Janeiro
- Pontes de Miranda FC (1972) Tratado de Direito Privado. Parte Especial. Direito das Obrigações: Compra e Venda. Troca. Contrato estimatório. t XXXIX, 3rd ed. Borsoi, Rio de Janeiro
- Pontes de Miranda FC (1984) Tratado de Direito Privado. Parte Especial. Direito das Obrigações: Extinção das dívidas e obrigações. Dação em soluto. Confusão. Remissão de dívidas. Novação. Transação. Outros modos de extinção. t XXV, 3rd ed. Revista dos Tribunais, São Paulo
- Pontes de Miranda FC (1959) Tratado de Direito Privado. Parte Especial. Direito das Obrigações. Consequências do inadimplemento. Exceções de contrato não adimplido, ou adimplido insatisfatoriamente, e de insegurança. Enriquecimento injustificado. Estipulação a favor de terceiro. Eficácia protetiva de terceiro. Mudança de circunstâncias. Compromisso. T XXVI. Borsoi, Rio de Janeiro
- Potenza GP (2013) Fusões e aquisições: o instrumento de aquisição de empresas do setor sucroalcooleiro: uma visão do comprador estrangeiro. Almedina, São Paulo
- Pronça JCB (2006) A resolução do contrato no direito civil: do enquadramento e do regime. Coimbra Ed, Coimbra
- Reale M (2005) A história do Novo Código Civil. RT, vol 1
- Rebouças RF (2015) Contratos Eletrônicos, Formação e Validade—Aplicações Práticas. Almedina, São Paulo
- Rechsteiner BW (2012) Direito Internacional Privado. Teoria e Prática. 15th ed. Saraiva, São Paulo
- Rodrigues S (1979) Dos vícios do consentimento. Saraiva, São Paulo
- Rodrigues S (1982) Responsabilidade Civil. Saraiva, São Paulo
- Rodrigues S (2002) Direito Civil, Parte Geral das Obrigações, vol 2, 30th ed. Saraiva, São Paulo
- Roppo E (2009) O contrato. (trans: Coimbra, A, Gomes, MJ). Almedina, Coimbra
- Salomão Filho C (2006) Breves acenos para uma análise estruturalista do contrato. RDM, no 141
- Salomão Filho C (2013) Direito concorrencial. Malheiros, São Paulo
- Salomão Neto E (1988) As operações de crédito documentário, as cartas de crédito e as comfort letters. RDM, vol 123
- San Martín Neira LC (2010) Del “deber” del acreedor de evitar o mitigar el daño. Università Degli Studi di Roma “Tor Vergata”, Roma
- Serpa Lopes MM (1961) Curso de Direito Civil. Fonte das Obrigações: Contratos, vol 3, 3rd ed. Freitas Bastos, Rio de Janeiro
- Strenger I (2000) Direito internacional privado, 4 ed. LTR, São Paulo
- Tadeu AS (2011) Responsabilidade civil: nexos causal, causas de exoneração, culpa da vítima, força maior e concorrência de culpas. In: Doutrinas Essenciais de Responsabilidade Civil. Revista dos Tribunais, vol 1, 567–606

- Tallon D (1987) In: Bianca, CM,–Bonell, MJ Commentary on the International Sales Law. Giuffrè, Milano
- Tepedino G (2005) Obrigações, Estudos na Perspectiva Civil-Constitucional. Renovar, Rio de Janeiro
- Tepedino G (2006) Temas de direito civil. t II. Renovar, Rio de Janeiro
- Tepedino G (2011a) Aplicação da exceção de contrato não cumprido. In: Soluções Práticas – Tepedino. Revista dos Tribunais, vol 2, pp 213–230
- Tepedino G (2011b) Novos princípios contratuais e teoria da confiança: a exegese da cláusula to the best knowledge of the Sellers. In: Soluções Práticas – Tepedino, vol 2, pp 425–450
- Ubaldo Miranda CP (2013) Comentários ao Código Civil. Dos Contratos em Geral (arts. 421 a 480). In: Junqueira de Azevedo, A (coord), vol 5. Saraiva, São Paulo
- Varela JMA (2015) Obrigações em Geral, vol 2, 7th ed. Almedina. Coimbra
- Venosa SS (2007) Curso de Direito Civil: Responsabilidade Civil, 7th ed. Atlas, São Paulo
- Verçosa HMD (2010) Contratos Mercantis e a Teoria Geral dos Contratos. O Código Civil de 2002 e a Crise do Contrato. Quartier Latin, São Paulo
- Vieira IA (2011) Plaidoyer por uma aplicação da Convenção de Viena de 1980 relativa à compra e venda internacional de mercadorias no Brasil. In: Vieira IA (org.) Estudos de Direito Comparado e de Direito Internacional Privado, Juruá, Curitiba
- Villaça Azevedo Á (2000) Teoria Geral das Obrigações. 8th ed. Revista dos Tribunais, São Paulo
- Villaça Azevedo Á (2002) Teoria Geral dos Contratos Típicos e Atípicos. Atlas, São Paulo
- Villela JB (2010) Equilíbrio do Contrato: os números e a vontade. RT, vol 900
- Wald A (2006) A evolução da responsabilidade civil e dos contratos no direito francês e brasileiro. RT, vol 845, pp 81–94
- Wald A (2014) Dolo acidental do vendedor e violação das garantias prestadas. RT, vol. 94.
- Zanetti CS (2005) Responsabilidade pela ruptura das negociações. Saraiva, São Paulo
- Zanetti CS (2012) A Mitigação do Dano e Alocação de Responsabilidade. RAM, vol 35
- Zanetti CS (2013a) A Conservação dos Contratos Nulos por Defeito de Forma. Quartier Latin, São Paulo
- Zanetti CS (2013b) O risco contratual. In: Lopez TA, Lemos PFI, Junior OLR (coord) Sociedade de Risco e Direito Privado. Desafios normativos, consumeristas e ambientais. Atlas, São Paulo
- Ziegel JS (1984) The remedial provisions in the vienna sales convention: some common law perspectives. In: Bender M (ed) International sales: the united nations convention on contracts for the international sale of goods, Galston & Smit

Case Law

- Superior Court of Justice, 4th Panel, REsp 320417-RJ, Rel. Min. Sálvio de Figueiredo Teixeira, j. 27/11/2001
- CADE's Administrative Proceeding n. 08012.002608/2007-26
- Superior Court of Justice, REsp. n. 758.518, Rel. Des. (convened from State Court of Rio Grande do Sul) Vasco Della Giustina, j. 17/06/2010
- Superior Court of Justice, CC 110844, Rel. Min. Vasco Della Giustina (convened from the State Court of Rio Grande do Sul), j. 09/07/2010
- Superior Court of Justice, REsp 849228/GO, Rel. Min. Luis Felipe Salomão, j. 03/08/2010
- State Court of São Paulo, Appeal nº 9138933–87.2006.8.26.0000, 3rd Chamber of Private Law, Rel. Des. Jesus Lofrano, j. 15.03.2011
- State Court of São Paulo, Appeal 991.05.032052–2, Rel. Min. Theodureto Camargo, j. 29/09/2011
- Superior Court of Justice, REsp 1.287.402-PR, Rel. Min. Marco Buzzi, j. 03/05/2012
- State Court of São Paulo, Appeal 9068717–04.2006.8.26.0000, Rel. Min. Mônaco da Silva, j. 06/06/2012

Superior Court of Justice, REsp 1367955/SP, Rel. Min. Paulo de Tarso Sanseverino, j. 18/03/2014
 State Court of São Paulo, Appeal 2014.0000168461, Rel. Des. Alexandre Marcondes, j. 25/03/2014
 Superior Court of Justice AREsp 627651-RS, Rel. Min. Antonio Carlos Ferreira, j. 14/09/2015
 Superior Court of Justice, AgRg no AREsp 711391/MT, Rel. Min. João Otávio Noronha, j. 01/12/2015
 Superior Court of Justice, AREsp 853908/DF, Rel. Min. Marco Buzzi, j. 29/02/2016
 Superior Court of Justice, AREsp 595460, Rel. Min. Joel Ilan Paciornik, j. 06/09/2016
 State Court of São Paulo, Appeal 1004453-61.2013.8.26.0100, Rel. Des. Silvia Rocha, j. 09/11/2016
 Superior Court of Justice, REsp 1.281.594 – SP, Rel. Min. Marco Aurélio Bellizze, j. 22/11/2016

Umberto Celli Junior is full professor of International Law at the University of São Paulo, Brazil, with research and practice emphasis on International Trade Law and International Economic Law. Dean of the University of São Paulo Law School at Ribeirão Preto campus (2013–2017). Coordinator of the Graduate Programme on Latin American Integration of the University of São Paulo (2012–2013). Visiting professor at the University of Paris I (Panthéon-Sorbonne) (2009), University of Buenos Aires (2010) and at the University of Padua (2016). Member of the Brazilian list of panellists at the WTO. Lawyer and consultant.

Lígia Espolaor Veronese holds master and Ph.D. degrees from the University of São Paulo, Brazil. Visiting Scholar at the Max Planck Institute for Comparative and International Private Law (Hamburg—2021). Visiting Scholar at the International Institute for the Unification of Private Law (UNIDROIT—Rome—2017). Author of publications in Brazil and abroad in the fields of arbitration, international law and contract law. Lawyer in the practice of national and international arbitration.



Aleksander Komarov

1 Introduction

1.1 The Substantive Law Applicable to International Commercial Contracts

The Russian law belongs traditionally to continental civil law legal family. The Russian domestic law in many fields including civil law is codified and its main source is the Civil Code adopted in separate parts in 1994–2008 and already amended in 2015–2016 (Russian CC).¹

The main feature of the new Civil Code was the introduction of private law concept into Russian civil law as well as a substantial change in the positive law which previously was based on a centralized model of national economy excluding private business activity for many decades and not recognizing freedom of contract in the economic context. Economic operators in Russia had no previous experience of business in the new legal environment and in the years after the adoption of new legislation these circumstances had significant impact on current commercial activities and legal environment.

The court practice had been quite unpredictable and unstable in many respects. Nowadays the situation concerning legal certainty in Russian civil law is improving and courts are gaining more experience in applying the rules of the Russian Civil Code in force. There is no official case law (precedents) in the Russian legal system. Decisions of the courts of higher instances are not recognized as official sources of law which the lower courts should follow. In accordance with the Constitution

¹ Civil Code of the Russian Federation as Amended through February 7, 2017.

A. Komarov (✉)

Russian Academy of Foreign Trade, Pudovkin Str. 6A, Moscow 119285, Russia

of the Russian Federation the Supreme Court of the Russian Federation is responsible for ensuring uniform interpretation of the legislation in the country. It has published continually opinions relating to current court practice of application for most complicated and somewhat unclear enough rules formulated in the Russian Civil Code which had been interpreted and applied by the courts in the course resolving different disputes. This aspect of law enforcement plays a pivotal role in reforming Russian jurisprudence.

Although the doctrine of precedents (*stare decisis*) is not recognized in the Russian Federation legal system lower courts usually strictly follow in their practice legal positions formulated the Supreme Court with regard to interpretation of positive law.

In accordance with the Constitution of the Russian Federation (Article 15.1), Article 7 of Russian CC provides that generally recognized principles and norms of international law and the international treaties of the Russian Federation are a constituent part of the legal system of the Russian Federation. International treaties of the Russian Federation are applied to relations regulating the Civil Code directly, except in cases when from the international treaty it follows that the issuance of a domestic state act is required for its application. If an international treaty of the Russian Federation establishes rules other than those provided by civil legislation, then the rules of the international treaty apply.

At present, among international conventions in which the Russian Federation has formally taken part and which are applicable to international commercial contracts are the following:

- UN Convention on Contract of International Sale of Goods—CISG (Vienna, 1980);
- UN Convention on the Use of Electronic Communications in International Contracts (New York, 2005);
- UNIDROIT Convention on International Financial Leasing (Ottawa, 1988);
- UNIDROIT Convention on International Factoring (Ottawa, 1988).

The Russian Federation is a member of the World Trade Organization (WTO) and applies rules and agreements which represent “WTO Law” to the regulation of its international commerce. The Russian Federation is a party to a number of regional international instruments aimed at liberalizing regional trade and investment activities (mostly for states on the former Soviet Union territory).

In case an international treaty of the Russian Federation contains substantive law norms applicable to the respective relation, application of conflicts of law rules to the points fully regulated by such substantive law rules shall be excluded. The rules of the Vienna Convention play a very significant role as substantive law of international commercial contracts in the Russian Federation since the majority of such contracts have represented the sale of goods transactions being subject to the application of this international instrument.

The Russian private international law applicable to international commercial contracts follows the modern and widely accepted concepts in this field of law since it was drafted mainly considering the latest developments in the European Union on this subject (Rome I), and in many aspects Russian rules relating to the choice of

law are similar to corresponding rules formulated in EC legal instruments. Article 1186 Russian CC indicates the law applicable to relations with the participation of foreign citizens or foreign legal persons or complicated by another foreign element, including in cases when the object of civil-law rights is located abroad is determined by international treaties of the Russian Federation, the Civil Code and other statutes of the Russian Federation, as well as customs recognized in the Russian Federation. International commercial contracts are covered by this definition.

As a main choice of the law principle the Russian law recognizes that where it is impossible to determine the applicable law in accordance with the above-mentioned principles, then the law of the country with which the international commercial contract is most closely connected has to be applied. Another leading principle recognized by the Russian choice of law rules is the principle of autonomy of a party's will.

Article 1210 Russian CC provides that before or after concluding the contract the parties to a international commercial contract may agree on what law is applicable to their contractual rights and duties. The law chosen by the parties shall be applied to all aspects of the contract including the arising and termination of the ownership right and other rights in things to movable property without harm for the rights of third persons. An agreement of the parties on the choice of the applicable law could be directly expressed by or definitely follow from the terms of the contract or all the circumstances of the case. The choice by the parties of the applicable law made after the conclusion of the contract is retroactive and effective, without harm for the rights of third persons, from the moment of conclusion of the contract.

The parties may choose the applicable law both for the contract as a whole as well as for individual parts thereof. If from all the circumstances of the case existing at the time of the choice of applicable law it follows that the contract is actually connected only with one country, then the choice by the parties of the law of another country may not affect the operation of the mandatory rules from the country with which the international commercial contract is connected in fact.

In accordance with Article 1211 Russian CC in the absence of an agreement between the parties on the applicable law, the law of the country where the residence or principal place of activity of the party conducting the performance prevails when the international commercial contract is concluded.

This Article also specifies which contracting party conducts the performance and plays a decisive role for the contents of this contract. In particular, this is determined for the following parties:

- the seller—in a contract of purchase and sale;
- the lessor—in a contract of lease;
- the lender—in a contract of uncompensated use;
- the contractor—in a work contract;
- the carrier—in a contract of carriage;
- the freight forwarder—in a contract of freight forwarding;
- the lender (creditor)—in a contract of loan (credit contract);

- the finance agent—in a contract of financing with assignment of monetary claim (factoring);
- the bailee—in a contract of storage;
- the insurer—in a contract of insurance;
- the delegate—in a contract of delegation;
- the commission agent—in a contract of commission agency;
- the agent—in an agency contract;
- the pledger—in a contract of pledge;
- the surety—in a contract of suretyship.

Besides the above-mentioned choice of law connection this Article provides what law is applicable in other contractual relations, mainly drawing on the criteria that are most relevant for the contractual relationship. For example, with respect to a contract for construction work and a work contract for the performance of design and exploratory activities, the law of the country where the results provided by the respective contract are mainly created is to be applicable.

If from a statute, the terms or nature of a contract, or the totality of circumstances, is clear that the contract is more closely connected with the law of a country other than the one determined by the choice of law rules, the law of the country with which the contract is most closely connected should be applied.

To a contract containing elements of various contracts shall be applied, unless otherwise specified, the law of the country with which this contract, considered as a whole, is most closely connected.

If trade terms widely accepted in international commerce are used in the contract, then in the absence of other indications, it shall be considered that the parties agreed to the application to their relations of the customs of commerce designated by the respective trade terms unless otherwise agreed by the parties.

In the application of foreign law, the court ascertains the content of its norms in accordance with their official interpretation, practice of application, and scholarly opinion in the respective foreign state. For the purpose of ascertaining the content of norms of foreign law, the court may apply, through the established procedure for assistance and explanation, to the Ministry of Justice of the Russian Federation and to other competent bodies or organizations within the Russian Federation and abroad, or involve experts.

Persons participating in a case may present documents confirming the content of the rules of foreign law on which they rely in justification of their claims or defenses and otherwise assist the court in the ascertainment of the content of these norms. For claims connected with realization of entrepreneurial activity by the parties, the burden proof of the content of the foreign law rules may be placed by the court upon the parties. If despite the above-mentioned measures the content of the rules of foreign law is not ascertained within reasonable time, Russian law shall be applied.

The Russian choice of law rules also provides for application of so-called “rules of direct application” that are applicable regardless of the applicable law determined by the choice of law rules or agreed by the parties. These rules include mandatory rules of the legislation of the Russian Federation that in view of an indication or in

view of their special significance for ensuring the rights and interests protected by a statute of participants in civil commerce, regulate their respective relations.

In the application of the law of any country according to the choice of law rules, the court may take into account the mandatory rules of the law of another country having a close connection, if according to the law of that country such rules can directly apply. In this case, the court must consider the purpose and nature of such rules as well as the consequences of their application or non-application.

Foreign law in exceptional cases shall not be applied when the consequences of its application would manifestly contradict the legal order (public policy) of the Russian Federation. In such a case, if necessary, the respective rule of Russian law shall be applied. The Russian law provides that a refusal to apply foreign law may not be based merely on the difference in the legal, political, or economic system of the respective foreign state from the legal, political, or economic system of the Russian Federation.

As regards the particular legal points that are subject to regulation by the law applicable to an international contract, the Russian Civil Code provides for the following:

- (1) the interpretation of the contract;
- (2) the rights and duties of the parties to the contract;
- (3) the performance of the contract;
- (4) the consequences of non-performance or improper performance of the contract;
- (5) the termination of the contract;
- (6) the consequences of the invalidity of the contract.

The Supreme Court in its recent review of court practice relating to the cases with foreign elements expressed its opinion with regard to application of Russian international private law which the lower courts are supposed to follow.²

1.2 The Forum and Procedure Governing Disputes Arising from International Commercial Contracts

In the Russian Federation disputes from international commercial contracts are very rare in state courts as they are usually dealt with by international arbitration institutions. This has been longstanding practice since the establishment of the Soviet Union. The wide use of international commercial arbitration remains a distinctive feature of the current state of foreign economic relations in Russia. Following the Soviet Union's legal tradition, both international and domestic arbitration in

² See *Постановление Пленума Верховного Суда РФ от 27 июня 2017 г. № 23. «О рассмотрении арбитражными судами дел по экономическим спорам, возникающим из отношений, осложненных иностранным элементом»* (Resolution of the Plenum of the Supreme Court of the Russian Federation of 27 June 2017 No. 23 "On practice of arbitrazh courts in consideration of economic disputes that have a foreign element").

Russia are regulated separately. Introduction of market economy in Russia had led to extensive development of arbitration in domestic commercial dealings as well.

The legal regime for international commercial arbitration in Russia is based on the 1985 UNCITRAL Model Law on International Commercial Arbitration. The text of the Law of the Russian Federation “On International Commercial Arbitration” which was enacted on 07.07.1993 is very similar to the text of the UNCITRAL Model Law including the numbering of the articles. The 1993 Law had been amended in 2015³ and some of new rules from UNCITRAL Model Law as amended in 2006 were also included. The close similarity with the UNCITRAL Model Law may be explained by the fact that one of the official texts of the UNCITRAL Model Law was in Russian and also by the fact that in Russia there has never been previously any comprehensive legislation on the subject. Hence, there were practically no legal texts that needed to be amended, adjusted or restructured in accordance with model rules adopted on the international level. Notwithstanding this, there are still minor deviations from the UNCITRAL Model Law in the Russian Law on international commercial arbitration which reflect some specific features of the past historical legal development and the specifications of national legal culture.

In the course of the legislation reform of the law relating to domestic arbitration that took place in 2015 quite rigid rules concerning the establishment and activities of permanent arbitration institutions in the Russian Federation were expanded for application, with regard to international commercial arbitration. The new law has provided that only those permanent institutions having an official permission given by the Government could function in that capacity. This rule is also applicable to foreign arbitration institutions that administer arbitration proceedings on the territory of the Russian Federation.

According to the International Commercial Arbitration Law the parties may agree to refer to international commercial arbitration the disputes arising out of civil law relationships while carrying out foreign trade and other types of international economic relations, if the place of business of at least one of the parties is abroad, or any place where a substantial part of the obligations out of the relationship of the parties is to be performed, or the place with which the subject-matter of the dispute is most closely connected is located abroad, as well as disputes arisen in connection with foreign investments.

Actually for many decades the only arbitration institution that had been dealing with foreign trade disputes in the Soviet Union was the Foreign Trade Arbitration Commission at the USSR Chamber of Commerce and Industry which was established in 1932. This arbitration institution had been involved in settling thousands of international cases and had been recognized in the world as reliable and authoritative arbitration court for international commercial disputes. After the dissolution of the Soviet Union it continued its activities by changing its official name to International Commercial Arbitration Court at the Russian Federation Chamber of Commerce and

³ See *Федеральный закон «Об арбитраже (третейском разбирательстве) в Российской Федерации» от 29 декабря 2015 года № 382 ФЗ* (Federal Law “On Arbitration (Third Party Proceedings) in the Russian Federation” of 29 December 2015 № 382-FZ).

Industry (ICAC) in 1993. Until now ICAC continues to be the most experienced and well-known arbitration institution functioning on the territory of the former Soviet Union and it receives about 300 requests to settle international commercial disputes per year.

Also it is worth mentioning that ad hoc arbitration is still not practiced very often in Russia. Actually in quite rare cases of ad hoc arbitration the UNCITRAL Arbitration Rules have been used more often than any other set of ad hoc arbitration rules in cases of international commercial disputes. Nowadays, in accordance with Russian domestic arbitration law in force which in some part is applicable also to international commercial arbitration, ad hoc arbitration has some limitations with regard to its activities as compared with institutional arbitration being another reason for which it is not widely used in the business community.

Article 1186 Russian CC expressly provides that the application of law in the course of international commercial arbitration is not regulated by the rules of the Civil Code but by the law concerning international commercial arbitration. Article 28 of the Law on International Commercial Arbitration of the Russian Federation of 1993 (as amended in 2015) provides that the arbitral tribunal shall decide the dispute in accordance with such rules of law as these are chosen by the parties as applicable to the substance of the dispute. Basing on this provision arbitral tribunals in ICAC proceedings settling international commercial disputes in a number of cases have applied rules of law contained in non-governmental sources (modern *lex mercatoria*, *soft law*) and, more specifically, the UNIDROIT Principles of International Commercial Contracts.

Also the Russian Civil Code makes it clear that any designation of the law or legal system of a given State shall be construed, unless otherwise expressed, as directly referring to the substantive law of that State and not to its conflict of laws rules. Failing any designation by the parties, the arbitral tribunal shall apply the law determined by the conflict of laws rules which it considers applicable.

The Russian Law on International Commercial Arbitration guarantees the parties' freedom to agree on the procedure to be followed by the arbitral tribunal in conducting the proceedings. There are a limited number of mandatory provisions on procedure the purpose of which is to ensure that arbitration procedure would be conducted in accordance with its fundamental principles. The law empowers the arbitral tribunal, failing agreement by the parties, to conduct the arbitration in such a manner as it considers appropriate. The power conferred upon the arbitral tribunal includes the power to determine the admissibility, relevance, materiality and weight of any evidence.

In addition to the general provisions on arbitration procedure there are some special provisions using the same approach of granting the parties autonomy and, failing agreement, empowering the arbitral tribunal to decide procedural matters. These include the determination in respect of the place of arbitration or the language of the proceedings that very often play a crucial role in international arbitration.

Russian Law considers all international arbitral awards in a uniform manner irrespective of whether they are made in the Russian Federation or abroad. A distinction is drawn between “international” and “non-international” awards instead of the traditional line between “foreign” and “domestic” awards. International awards are rendered by arbitral tribunal acted under the Law of International Commercial Arbitration. Recognition and enforcement of “international” awards, whether “foreign” or “domestic”, is governed by the same provisions.

The grounds on which recognition or enforcement of arbitral awards may be refused in Russia are identical to those listed in Article V of the UN Convention on Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958). Russian Federation is a party to the UN convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958) which is applicable with the “Reciprocity” reservation.

The state courts that have the jurisdiction to deal with economic disputes including those arising from international commercial contracts are represented by a system of *arbitrazh* courts that function under the Code on *Arbitrazh* Procedure of the Russian Federation (“CAP”), effective September 1, 2002.⁴ Generally these courts that are quite often called “Russian commercial courts” have the exclusive jurisdiction with regard to disputes in the area of commercial activities as opposed to the courts of general jurisdiction dealing with other civil and criminal matters. The competent court is in general a court at the place where the defendant or its property is situated unless there are special circumstance indicated in the CAP. The *arbitrazh* courts also play an important role in the context of international commercial arbitration in Russia since the *arbitrazh* courts exercise certain functions of arbitration assistance and supervision with respect of arbitration activities, i.e. setting aside and enforcement procedures relating to arbitration awards to both international and domestic dispute arbitration.

1.3 The International Commercial Context: The Russian Federation’s Main Trading Partners

China is currently the largest trading partner of the Russian Federation in terms of both imports and exports. The trade with India and Brazil is quite considerable, whereas the volume of trade with the Republic of South Africa is still modest. The available data relating to the trade of the Russian Federation with the other BRICS countries in 2016 is the following Tables 1 and 2.

⁴ See “Собрание законодательства РФ,” 29.07.2002, N 30, ст. 3012 (“The Collection of the Legislation of the Russian Federation,” July 29, 2002, at 3012).

Table 1 Exports of the Russian federation January to December 2018

To Brazil	2584.3 Million US Dollars (0.57% of total exports)
To India	7751.5 Million US Dollars (1.72% of total exports)
To the People's Republic of China	56019.4 Million US Dollars (12.46% of total exports)
To the Republic of South Africa	285.7 Million US Dollars (0.06% of total exports)
Total exports	66640.5 US Dollars

Table 2 Imports of the Russian federation January to December 2019

From Brazil	2471.0 Million US Dollars (1.04% of total imports)
From India	3225.1 Million US Dollars (1.35% of total imports)
From the People's Republic of China	52225.4 Million US Dollars (21.9% of total imports)
From the Republic of South Africa	783.9 Million US Dollars (0.33%)
Total import	57921.5 Million US Dollars

2 Formation of Contracts

2.1 *Formation: Overview*

2.1.1 Agreement, Offer and Acceptance

In Russian law regulation relating to formation of contract in principle corresponds to the traditional continental law approach. Distinctive feature of application of current Russian law on contract formation is the fact that it had been to a great extent influenced by rigid and formalistic approach of the courts in their practice.

According to Article 420 Russian CC a contract is an agreement between two or several persons on establishing, changing, or terminating civil-law rights and duties. The general provisions on obligations (Arts 307–419 Russian CC) are applied to obligations arising from contract, unless otherwise provided in the Russian CC or the rules on individual types of contracts contained in the Russian CC.

The parties may conclude a contract that is regulated by the law or not. To a contract that is not regulated by a statute or any other legal acts the general provisions on obligations are applicable. In such a case the rules on individual types of contracts shall not be applied; this does not exclude the possibility of application of rules on analogy of statute to specific relations of the parties to the contract.

The parties may conclude a contract that contains elements of various contracts provided by the statute or other legal acts (a mixed contract). The rules on contracts

whose elements are contained in the mixed contract shall be applied to the parties' relations under the mixed contract unless otherwise follows from an agreement of the parties or the nature of the mixed contract. The terms of the contract shall be determined at the discretion of the parties except for cases where the content of the respective term is prescribed by a statute or any other legal acts.

In cases in which a term of a contract is provided by a legal rule that is applied to the extent unless otherwise specified by agreement between the parties, the parties may by their agreement exclude its application or establish a different term from the one provided in the contract itself. In the absence of such an agreement the term of the contract shall be determined by a legal norm. The terms of the contract shall be determined at the discretion of the parties except for cases when the content of the respective term is prescribed by a statute or any other legal acts (Article 422 Russian CC).

In cases in which a term of a contract is provided by a legal rule that is applied to the extent unless otherwise specified by agreement between the parties (a dispositive rule), the parties may by their agreement exclude its application or establish a different term from the one provided in the contract itself. In the absence of such an agreement the term of the contract shall be determined by a legal rule.

A contract must comply with rules obligatory for the parties which are established by a statute and any other legal acts (imperative rules) in effect at the time of its conclusion. In cases where after the conclusion of a contract a statute is adopted establishing rules obligatory for the parties other than those that were in effect upon conclusion of the contract, the terms of the concluded contract shall remain in force except in cases when it was established in the statute that its effect extends to relations arising from previously concluded contracts.

A contract under which a party must receive payment or other counter performance in return for the performance of its duties is considered as a compensated contract, i.e. contract for value. An uncompensated contract is one under which a party has the duty to provide something to the other party without receiving payment or anything else in return. A contract is presumed to be compensated unless otherwise follows from a statute, other legal acts, the content or the nature of the contract.

Performance of a contract shall be paid for at a price established by agreement between the parties. In cases provided by a statute, prices (tariffs, valuations, rates, etc.) shall be applied which are established or regulated by state bodies empowered for this and (or) by the bodies of local self-government. Change of price after conclusion of a contract is allowed in cases and on conditions provided by the contract, a statute or in a manner established by a statute. In cases when in a compensated contract a price is not provided and may not be determined proceeding from the terms of the contract, performance of the contract must be paid for at the price that is usually taken for analogous goods, work, or services under comparable conditions.

A contract is considered as concluded if an agreement has been reached on all the essential terms of the contract among the parties in the form required in appropriate cases. The essential terms are those on the subject of the contract, terms that are named in a statute, any other legal acts as essential or necessary for contracts of the given type as well also all those terms with respect to which by declaration of one of the parties an agreement must be reached.

A contract may be concluded by the sending of an offer by one of the parties and its acceptance by the other party. A party that has accepted from another party full or partial performance under a contract or in another manner has confirmed the effectiveness of the contract shall not have the right to demand the declaration of this contract as not concluded if the making of such a demand, taking into account the specific circumstances, would contradict the principle of good faith.

An offer is considered to be a proposal addressed to one or several concrete persons. It should sufficiently definite and express the intent of the person who has made the proposal to consider himself having concluded a contract with the addressee by whom the proposal will be accepted. The offer must contain the essential terms of the contract. The offer shall bind the person who sent it from the time of its receipt by the addressee. An offer received by an addressee cannot be revoked during the time period established for its acceptance, unless otherwise provided in the offer itself or follows from the nature of the proposal or the situation in which it was made.

An acceptance is considered to be the response of a person to whom an offer is addressed on its acceptance. An acceptance must be full and unconditional. A reply on consent to conclude a contract on terms other than proposed in the offer is not considered an acceptance; such reply is recognized as refusal to accept and, at the same time, as a new offer. Silence shall not be acceptance, unless otherwise follows from a statute, an agreement of the parties, custom, or from prior business relations of the parties.

The taking by a person who has received an offer, within the time period established for its acceptance, of actions in the fulfillment of the terms of a contract indicated in it (shipment of goods, provision of services, doing of work, payment of the appropriate sum, etc.) shall be considered as acceptance, unless otherwise provided by a statute, other legal acts, or indicated in the offer. The contract is considered concluded if the acceptance is received by the person who has sent the offer within the limits of the time period indicated in it. When a time period for acceptance is not defined in a written offer, the contract is considered to be concluded if the acceptance is received by the person who has sent the offer before the end of the time period provided by a statute or other legal acts, or if such a time period has not been established—in the course of time normally necessary for this.

According to the Russian law a contract may be concluded in any form, unless a statute for contracts of the given type has established a defined form. There is an important exception to this general rule. Articles 11 and 29 of Vienna Sales Convention that allow a contract of sale to be made in any form other than in writing do not apply if any contracting party has its place of business in Russian Federation since the relevant declaration under Article 96 of the Convention had been made. If the parties have agreed to conclude a contract in a defined form, it shall be considered concluded after giving it the agreed form, although this form was not required by a statute for contracts of the given type. A contract in written form may be concluded by the compilation of one document signed by the parties and also by the exchange of letters, telegraphs, telexes, faxes, or other documents, including electronic ones. The written form of a contract shall be considered observed if a written proposal to conclude a contract has been accepted. In the cases provided by a statute or agreement

by the parties, a contract in written form may be concluded only by the compilation of one document signed by the parties to the contract.

2.1.2 Negotiation

The Russian civil law now provides for special rules relating to contract negotiation (Article 434.1 Russian CC). As a matter of principle every person is free in the conduct of negotiations on the conclusion of a contract and is not liable if an agreement is not achieved. However, upon entry into negotiations on the conclusion of a contract, in the course of their conduct, and on their completion, the parties have the duty to act in good faith, in particular not to enter into negotiations on the conclusion of a contract or their continuation in the clear absence of an intention to conclude an agreement with the other party. According to the law (Article 434.1 Russian CC) the following shall be presumed to be bad faith acts in the conduct of negotiations:

- (1) supplying the other party incomplete or inaccurate information including silence on circumstances that, by virtue of the nature of the contract, should be brought to the other party's attention;
- (2) surprising and unjustified termination of negotiations on the conclusion of a contract under circumstances that the other party to the negotiations could not reasonably expect.

A party that conducts or interrupts negotiations on the conclusion of a contract in bad faith, has the duty to compensate the other party for the losses caused by this. The losses subject to compensation by the bad-faith party include the expenses borne by the other party in connection with the conduct of negotiations on the conclusion of a contract and also in connection with the loss of the possibility of conclusion of a contract with a third party. If, in the course of negotiations on the conclusion of a contract, a party receives information that is transferred to it by the other party as confidential, it shall have the duty not to disclose this information and not to use it in an improper manner for its own purposes regardless of whether a contract is concluded. For violation of this duty it must reimburse the other party damages caused as the result of disclosure of the confidential information or use of it for its own purposes.

Parties may conclude an agreement on the manner of conducting negotiations. Such an agreement may make specific the requirements for good-faith conduct of negotiations, establish the manner of distribution of expenses for the conduct of negotiations, and other similar rights and duties. An agreement on the manner of conducting negotiations may provide a penalty for violation of the provisions provided in it. Terms of an agreement on the manner of conducting negotiations limiting liability for bad-faith actions of the parties to the agreement shall be void.

Since the regulation of negotiation as well as a number of other rules had been introduced into the Russian CC just recently⁵ the Russian Supreme Court provided some clarifications with regard to interpretation of the new rules.⁶ It is confirmed that parties who are conducting negotiations are presumed to be acting in good faith. It was stated that, in itself, terminating negotiations with no grounds for doing so is not evidence of a party's bad faith. The Supreme Court has clarified that liability for conducting negotiations in bad faith is a type of tortious liability. In the light of this, the courts may impose the liability provided by Article 434.1 CC only in cases when a contract was not entered into. If there is a contract entered into by and between the parties, specific remedies are applicable most notably the possibility to have the contract invalidated because of mistake, fraud, threats, duress and gross disparity or remedies for the corresponding type of obligations.

2.1.3 Integrity of Writing

The Russian Civil Law does not provide for special rules relating to the enforcement of 'merger clauses' or 'entire agreement' clauses, which determine that the written version contains the entire result of their negotiations. Usually the courts and arbitration follow the general rules on observance of formal requirements and the enforceability of contract terms. So far there has been no considerable case law on this point in Russian jurisprudence.

A transaction in written form must be made through the compilation of a document expressing its content and being signed by the person or persons making the transaction or by persons properly empowered by them. Transactions of legal persons with one another and with citizens must be made in simple written form. Non-observance of the simple written form of a transaction shall deprive the parties of the right, in case of a dispute, to rely for confirmation of the transaction and its terms upon the testimony of witnesses, but shall not deprive them of the right to adduce written and other evidence.

2.1.4 Standard Terms

The Russian CC contains the rules relating to the situation when the contract is made with the help of standard terms. It indicates that as standard terms are considered

⁵ See *Федеральный закон «О внесении изменений в часть первую Гражданского кодекса Российской Федерации» от 8 марта 2015 года № 42-ФЗ* (Federal Law "On Amending Part One of the Civil Code of the Russian Federation" dated 8 March 2015 No. 42-FZ).

⁶ See *Постановление Пленума Верховного Суда Российской Федерации "О применении судами некоторых положений Гражданского кодекса Российской Федерации об ответственности за нарушение обязательств" от 24 марта 2016 г. № 7* (Resolution of the Plenum of the Supreme Court of the Russian Federation "On court practice applying certain provisions of the Civil Code of the Russian Federation concerning liability for a breach of obligations" of 24 March 2016 No. 7).

the terms developed by a party for contracts of the respective type and published in the mass media. Standard terms may be applied to the relations of the parties as customs. Standard terms may be stated in the form of a standard contract or of another document containing these terms. Cases concerning conflict between different standard terms that used by the parties, i.e. “battle of forms” problem, have not been reported to take place in Russian court practice so far. However, it would be possible to admit that in the situation where the parties have reached agreement on essential terms the Russian courts would recognize the contract as concluded.

Another point that deserves attention as regards the legal effect of standard terms is the application of the rules of the Russian CC concerning contract of adhesion. According to Article 428 CC a contract of adhesion is a contract whose terms are determined by one of the parties in printed forms or other standard forms and that may be accepted by the other party not otherwise than by adhering to the proposed contract as a whole. The party adhering to the contract shall have the right to demand the rescission or change of the contract if the contract of adhesion, though not contradicting a statute or other legal acts, deprives this party of rights usually given under contracts of such type, excludes or limits the liability of the other party for the violation of obligations or contains other terms clearly burdensome for the adhering party, that it, on the basis of its reasonably understood interests, would not have accepted if it had the possibility of participating in the determination of the terms of the contract. The same rules shall be applicable also if within the process of conclusion of a contract other than a contract of adhesion, the terms of the contract are determined by one of the parties, and the other party is put in a position essentially hindering agreement on modified terms of the contract, by virtue of clear inequality of negotiating possibilities.

2.2 *Formation: Specific Topics*

2.2.1 Pre-contractual and Post-contractual Understandings and Agreements on Further Negotiation Between the Parties

Such documents as “Memorandum of Understanding”, “Letter of Intent”, “Comfort Letter” or other documents of preliminary character which the parties often produce in the course of contract negotiations are known and used in the commercial practice of Russian companies in their dealings with foreign partners. However, the number of cases where such documents are used in practice has been quite limited so far. The reason is that mainly business deals in Russian commercial practice are not so complicated as to resort to pre-contractual documents. As far as legal effect of such instruments is concerned, there have been neither special statutory rules nor case law on this point available in Russia so far. However, it could be admitted that in such situations in commercial practice in Russia the courts would be concentrating on content analysis for this kind of documents to look for availability of firm obligations by the parties taking into consideration the ways of expressing and formulating their

positions in the documents. Generally, courts due to their formalistic traditions would be more likely to consider as binding what is written in the document unless otherwise specified in the text.

2.2.2 Preliminary Contract

The Russian CC includes special rules concerning preliminary contract. To this category of obligations belongs a contract under which the parties have the duty to conclude in the future a contract (the basic contract) providing in particular for the transfer of property, performance of work, or the rendering of services on the terms determined by the preliminary contract. A preliminary contract has to be concluded in the form established for the basic contract, and if no form has been established for the basic contract, then it has to be done in written form. Non-observance of rules on the form of a preliminary contract makes it void. A preliminary contract must contain terms allowing the establishment of a subject and also terms of the basic contract with respect to which by declaration of one of the parties agreement must be reached in the conclusion of the preliminary contract.

In the preliminary contract a time period shall be indicated, by which the parties are obligated to conclude the basic contract. If such a time period is not defined in the preliminary contract, the basic contract is subject to conclusion within one year from the time of conclusion of the preliminary contract. In cases when a party that has concluded a preliminary contract fails to conclude the basic contract, then the other party shall have the right to apply to court with a demand for compulsion to conclude a contract. In this case the contract shall be considered concluded on the terms indicated in the decision of the court from the time of entry into legal force of the respective decision of the court. A party that has unjustifiably refused to conclude a contract must compensate the other party for the losses caused by this.

A demand for compulsion to conclude the basic contract may be made within six months from the time of non-performance of the obligation for the conclusion of the contract. In case of disagreements between the parties about the terms of the basic contract, such terms shall be determined by the court. The basic contract in this case shall be considered concluded from the time of entry into force of the decision of the court or from the time provided in the decision of the court. The obligations provided by the preliminary contract shall be terminated if by the end of the time period in which the parties must conclude the basic contract it is not concluded or one of the parties does not send the other party a proposal to conclude this contract.

2.2.3 Contract with Open Terms

In accordance with the Russian Civil Code (Article 421 para 5) the parties may conclude the contract where they do not determine a term. In this case the terms shall be determined by the customs applicable to the relations of the parties. The Russian Civil Code also includes special provisions relating to a contract which is considered

by the Code to be a contract with open terms although the definition of this contract does not correspond to the idea of contract with terms deliberately left open in Article 2.1.14 of the UNIDROIT Principles of International Commercial Contracts. This contract is titled in the text of the Code “framework contract”. According to Article 429.1 Russian CC a framework contract (alternatively called as contract with open terms) is a contract that defines general terms of legal relations of the parties that can be detailed and clarified by the parties in the course of concluding individual contracts, by submission of requests of one of the parties or in another manner on the basis of or in performance of the framework contract. The general terms contained in the framework contract shall be applied to relations of the parties not regulated by individual contracts, including in case of the non-conclusion by the parties of separate contracts, unless otherwise indicated in individual contracts or derives from the nature of the obligation.

2.2.4 Option Contract

Russian law also has regulations concerning another obligation of preliminary character, i.e. option contract (Article 429.3, 429.4 Russian CC). These are dispositive rules applicable where the legal notion of option is used by the parties in their relations. By way of an agreement on granting an option for the conclusion of a contract one party by means of an irrevocable offer grants the other party the right to conclude one or several contracts on the terms provided by the option. This party shall have the right to conclude a contract by acceptance of such offer in the manner, in the time periods, and on the terms that are provided by the option.

An option for the conclusion of a contract may provide that an acceptance will be possible only upon the occurrence of a condition defined by such an option, including one depending upon the will of one of the parties. In the case when an option for the conclusion of a contract does not establish a time period for acceptance of an irrevocable offer, this time period shall be considered equal to one year, unless otherwise derives from the nature of the contract or customs. Unless the option for the conclusion of a contract has provided otherwise, payment under it shall not be counted toward payment under the contract concluded on the basis of the irrevocable offer and shall not be subject to return in case of no acceptance.

An option for the conclusion of a contract must contain terms allowing the determination of the subject and other essential terms of the contract subject to conclusion. The subject of the contract which is subject to conclusion may be described in any manner allowing it to be identified at the time of acceptance of the irrevocable offer. An option for the conclusion of a contract shall be concluded in the form established for the contract subject to conclusion.

An option for the conclusion of a contract may be included in another agreement unless otherwise derives from the nature of such agreement. The rights under an option for the conclusion of a contract may be assigned to another person unless otherwise provided by this agreement or derives from its nature. The peculiarities

of individual types of options for the conclusion of a contract may be provided by a statute.

Under an option contract, one party, on terms provided by this contract, shall have the right to demand from another party in the time period established by the contract the taking of actions provided by the option contract (including the payment of monetary assets and the transfer or taking of property); moreover, if the empowered party does not make a demand in the indicted time period, the option contract shall be terminated.

An option contract may provide that a demand under the option contract shall be considered as made in case of the occurrence of circumstances defined by such a contract. The contract may provide that for the right to make a demand under an option contract a party pays the monetary amount with the exception of cases when the option contract, including one concluded among commercial organizations provides for its uncompensated nature, or if the conclusion of such a contract was conditioned on another obligation or other interest protected by statute deriving from the relations of the parties. Upon termination of an option contract, payment shall not be subject to return, unless otherwise provided by the option contract. The peculiarities of individual types of option contracts may be provided by a statute or in the manner provided by a statute.

2.2.5 Electronic Contracting

In the Russian Federation the use of electronic means as regards international commercial contracts is regulated by the UN Convention on the Use of Electronic Communications in International Contracts (New York, 2005) which was ratified by the Russian Federation in 2014.⁷ The Convention entered into force on March 1, 2013. Upon acceptance, the Russian Federation declared that: (1) in accordance with Article 19, para 1, of the Convention, the Russian Federation shall apply the Convention when the parties to the international contract have agreed that it applies; (2) in accordance with Article 19, para 2, of the Convention, the Russian Federation will not apply the Convention to transactions for which a notarized form or State registration is required under Russian law or to transactions for the sale of goods whose transfer across the Customs Union border is either prohibited or restricted; (3) the Russian Federation understands the international contracts covered by the Convention to mean civil law contracts involving either foreign citizens or legal entities, or a foreign element.

The key provisions of the Convention could be summarized as follows. The Convention applies to all electronic communications exchanged between parties whose places of business are in different States when at least one party has its place of business in a Contracting State. It may also apply by virtue of the parties' choice. Contracts concluded for personal, family or household purposes, such as

⁷ http://www.uncitral.org/uncitral/en/uncitral_texts/electronic_commerce/2005Convention_status.html.

those relating to family law and the law of succession, as well as certain financial transactions, negotiable instruments, and documents of title, are excluded from the Convention's scope of application.

The Convention sets out criteria for establishing the functional equivalence between electronic communications and paper documents, as well as between electronic authentication methods and handwritten signatures. Similarly, the Convention defines the time and place of dispatch and receipt of electronic communications, tailoring the traditional rules for these legal concepts to suit the electronic context and innovating with respect to the provisions of the Model Law on Electronic Commerce. Moreover, the Convention establishes the general principle that communications are not to be denied legal validity solely on the grounds that they were made in electronic form. Specifically, given the proliferation of automated message systems, the Convention allows for the enforceability of contracts entered into by such systems, including when no natural person reviewed the individual actions carried out by them.

The Convention further clarifies that a proposal to conclude a contract made through electronic means and not addressed to specific parties amounts to an invitation to deal, rather than an offer whose acceptance binds the offering party. Moreover, the Convention establishes remedies in case of input errors by natural persons entering information into automated message systems. Also the Convention allows contractual parties to exclude its application or vary its terms within the limits allowed by otherwise applicable legislative provisions.

According to the Russian CC (Article 434 para 2) a contract may be concluded by the exchange of electronic documents transmitted by communications channels allowing the reliable establishment that the document proceeds from a party to the contract. An electronic document transmitted by communications channels is understood as information, prepared, sent, received or stored, with the aid of electronic, magnetic, optical, or analogous means, including exchange of information in electronic form and electronic mail. The use of an electronic signature in the making of a transaction, or any other means equivalent to an actual handwritten signature is allowed in cases and by the procedure provided by a statute, other legal acts, or an agreement of the parties. The Federal Law "On Electronic Signature"⁸ provides that electronic signature shall be considered as equivalent to the signature on paper and can be applied in any relations in accordance with the law of the Russian Federation.

⁸ See *Федеральный закон «Об электронной подписи» от 6 апреля 2011 года № 63-ФЗ с изменениями от 23 июня 2016 года* (Russian Federation Federal Law "On Electronic Signature" of 06.04. 2011 No. 63-FZ (as amended on 23.06.2016)).

3 Validity of Contracts

3.1 *Validity—Overview*

3.1.1 General Provisions on Validity

The validity (invalidity) of the contract is regulated by the rules on validity of transactions contained in the Russian CC (Article 166–181). Although the concept of invalidity of contracts in the Russian law corresponds to the ideas on which continental legal system approach to validity of contracts is based the Russian law does not introduce such tradition for this system requirement as “*causa*”. Neither has the Russian law the rule on availability of “consideration” for making a binding contract as is the case of countries belonging to common law system.

A transaction is invalid on bases established by law or by virtue of declaration by a court (an avoidable transaction) or independently of such declaration (a void transaction). A claim for declaring an avoidable transaction as invalid may be presented by a party to this transaction or by another person indicated by the law. An avoidable transaction may be declared invalid if it violates the rights or the interests of the person disputing the transaction including having entailed unfavorable consequences for that person.

In cases when in accordance with the law a transaction is sought to be avoided in the interest of third persons, it may be declared invalid if it violates such persons’ rights or protected interests. A party from whose conduct transpires a will to keep a transaction in force has no right to seek to avoid this transaction on a basis of which this party knew or should have known in expressing its will.

A claim for recognizing the consequences of invalidity of a void transaction may be presented by a party to the transaction, and in cases provided by the law, also by another person. A claim for declaring the invalidity of a void transaction independently of application of the consequences of its invalidity may be satisfied if the person presenting such a claim has an interest protected by the law for a declaration of this transaction as invalid.

A court shall have the right to apply the consequences of invalidity of a void transaction on its own initiative, if this is necessary for the protection of public interests, and in any other cases provided for by statute. A statement on the invalidity of a transaction shall not have legal significance if the person claiming the invalidity of the transaction is acting in bad faith, in particular if its conduct following the conclusion of the transaction provided a basis for others to rely on the validity of the transaction.

The Russian Civil Code contains numerous provisions concerning different grounds of invalidity and the consequences of invalidity of a transaction (Chapter I, Subchapter 4, Section 2). The main rule is that an invalid transaction does not entail legal consequences except for those that are connected with its invalidity and is invalid from the time of its making. A person that knew or should have known the motivations

for the invalidity of an avoidable transaction shall not be considered as invalid after the declaration of this transaction as s/he acted in good faith.

In case of invalidity of a transaction, each of the parties shall have the duty to return to their counterparty everything received under the transaction and, in case of impossibility of returning in kind what had been received (including the use of property, work done, or services provided) to compensate for its value, unless other consequences of the invalidity of the transaction are provided by the law. If from the nature of an avoidable transaction it follows that it may only be terminated for the future, the court shall terminate its effect for the future by declaring the transaction to be invalid,. The court shall have the right not to apply the consequences of the invalidity of a transaction if their application would contradict public order. The partial invalidity of a transaction shall not entail the invalidity of other parts, if it is possible to suppose that the transaction would have been made without the inclusion of its invalid part.

A party that has accepted from a counterparty the performance under a commercial contract and in such case has not either completely or partially performed its own obligation, shall not have the right to demand the declaration of the contract as invalid, with the exception of cases of declaration of a contract as invalid on the grounds of mistake, fraud, threats and gross disparity, nor if the other party performance was connected with the clear bad faith of this party.

In the case a commercial contract is declared invalid on request of one of the parties, then the general consequences of invalidity of the transaction shall be applied unless other consequences of invalidity are provided by the parties' agreement being concluded after declaration of the contract as invalid and not affecting the interests of third persons and also not violating public interests.

3.1.2 Mistake, Fraud, Threats and Gross Disparity as Grounds for Avoidance

A transaction made under the influence of a mistake may be declared invalid by a court on demand of a party that acted under the influence of mistake if the mistake was so essential that this party, reasonably and objectively evaluating the situation, would not have made a transaction if it had known of the actual state of affairs. The mistake shall be considered sufficiently essential in particular if:

- (1) a party made an evident misstatement, slip of the hand, typographical error, etc.;
- (2) a party was mistaken with respect to the object of the transaction, in particular with respect to its qualities considered as essential in business transactions;
- (3) a party was mistaken with respect to the nature of a transaction;
- (4) a party was mistaken with respect to a person with whom the party was entering into the transaction or with respect to a person bound by the transaction;

- (5) a party was mistaken with respect to the circumstances that it mentioned in its declaration of will or from the presence of which the party obviously proceeded in making the transaction for the other party.

A mistake with respect to the motivations of a transaction is considered as not sufficiently essential for declaration to avoid the transaction itself. A transaction may not be declared invalid because of mistake if the other party give consent to maintaining the force of the transaction on those terms on the apprehension of which the party who acted under the influence of a mistake proceeded. In such case, in refusing to declare the transaction invalid, in its decision the court shall indicate these terms of the transaction. A court may refuse to declare a transaction invalid if the mistake under the influence of which a party to the transaction acted could not have been recognized by a party acting with usual care and taking into account the content of the transaction, circumstances, and peculiarities of the parties. A party on whose demand the transaction is declared invalid has the duty to compensate the other party for the resulting positive harm with the exception of cases when the other party knew or should have been aware of the mistake including if the mistake arose as the result of circumstances for which it is responsible. A party on whose demand a transaction is declared invalid has the right to demand compensation of the damages caused by the other party if it demonstrates that the mistake arose as a result of circumstances for which the other party is responsible.

A transaction made under the influence of duress or threat may be declared invalid by a court on demand of the victim. A transaction made under the influence of deception may be declared invalid by a court on demand of the victim. Intentional silence on circumstances on which a person should have communicated with such degree of good faith as was required by circumstances of commercial practice shall also be considered as deception. A transaction made under the influence of deception of the victim by a third party may be declared invalid on suit of the victim on the condition that the other party or the person to whom a unilateral transaction was directed knew or should have been aware of the deception. It shall be considered, in particular, that a party is aware of deception if a third person guilty of deception was either its representative or employee, or aided it in making the transaction. A transaction on extremely unfavorable terms that a person was compelled to make as a result of a confluence of harsh circumstances that the other party used (an unconscionable transaction) may be declared invalid by a court on suit of the victim. An invalid transaction does not entail legal consequences except for those that are connected with its invalidity and is invalid from the time of its making. A person that knew or should have been aware of the bases of the invalidity of an avoidable transaction shall not be considered after the declaration of this transaction as invalid, as she acted in good faith.

In case of invalidity of a transaction, each of the parties shall have the duty to return to the counterparty everything received under the transaction and in case of impossibility of returning in kind what was received (including the use of property, work done, or services provided) to compensate for its value, unless other consequences of the invalidity of the transaction are provided by a statute.

In addition, losses caused to the victim shall be compensated by the counterparty. The counterparty to the transaction shall bear the risk of accidental loss of the object of the transaction.

3.1.3 Illegality

A transaction made knowingly against the bases of the legal order or morality of the Russian Federation shall be void. In cases provided by the law a court may recognize as revenue to the budget of the Russian Federation everything received under such a transaction by parties acting intentionally or apply other consequences established by the law. In cases provided by the law a court may take as revenue to the budget of the Russian Federation everything received under such a transaction by parties acting intentionally or apply other consequences established by the law.

A transaction violating the requirements of a statute or other legal act shall be avoidable, unless it follows from a statute that other consequences of the violation that are not connected with the invalidity of the transaction shall be applied. A transaction violating the requirements of a statute or other legal act and thereby infringing upon the public interest or the rights or the interests of third persons protected by a statute shall be void unless it follows from a statute that such a transaction is avoidable or other consequences of the violation that are not connected with the invalidity of the transaction must be applied. With regard to the public interest referred to in Articles 166 and 168 of the Code, the Supreme Court noted that unlawful contracts or contracts infringing upon the rights of entities of a public nature do not necessarily constitute violations of the public interest.

3.2 *Validity—Specific Topics*

3.2.1 Public Permission

Generally, the law of the Russian Federation does not require the permission of any government body for making international commercial contracts by Russian companies with their foreign partners. Special licenses are required only for transactions with particular goods which are limited in the economic turnover to insure public interests.

The Russian CC also provides for general rules connected with the necessity to have permission (consent) from either a public body or a private person. Hence, a transaction made without the consent of a state body or a body of local self-government the necessity of receipt of which is provided by the law shall be avoidable unless it follows from the law that it is void or does not entail legal consequences for the person authorized to give consent to it in the absence of such a consent. Unless a statute has provided otherwise, an avoidable transaction made without the consent required by statute of a third person, a body of a legal person, or of a state body or

body of local self-government, may be declared invalid if it is shown that the other party to the transaction knew or should have been aware of the absence at the time of making the transaction of the necessary consent of such a person or of such a body. A person who has given the consent necessary by force of law for the making of an avoidable transaction shall not have the right to avoid it on a basis of which this person knew or should have known at the time of expressing consent.

3.2.2 Covenants in Restraint of Trade

Legal regulation of market activities in the Russian Federation has been much influenced—both in substance and in practice—by the previous lack of market relationship in the national economy grounded on centralized planning system. The Russian law relating to restraint of trade, which at first was adopted only about twenty years ago, is based on ideas and solutions similar to the law in the states that have experience and developed law relating to this subject. Another specific feature of this practice is that until now the main players in trade relations in the country have been state-owned enterprises dominating on the market in many respects. The number of small and medium companies and their role on the market has not been significant so far. Actually, current national economy in the Russian Federation could hardly be characterized as developed market. At present it is only undergoing a transition to a market-oriented system. This is one of the main reasons of quite high degree of legal uncertainty in application of statutory regulation connected with restraint of trade in the Russian Federation at present. That is why addressing some instances of positive law in the field would be most helpful.

According to the Russian Federation Law “On Protection of Competition”⁹ now in force, agreements restricting competition are prohibited. These include:

- (1) fixing or maintaining prices (tariffs), discounts, markups (surcharges) and (or) additions to prices;
- (2) increasing, reducing or maintaining prices in course of competitive bidding;
- (3) dividing the goods market according to a geographic principle, quantity of sales or purchases of the goods, the mix of goods or a composition of buyers or sellers (customers);
- (4) reducing or terminating production of the goods;
- (5) refusing to conclude contracts with particular sellers or buyers (customers);
- (6) fixing reselling prices of the goods, except if the seller fixes the maximum reselling price of goods for a buyer;
- (7) obligation of buyers not to sell the goods of an economic entity that is a competitor of the seller but whose prohibition does not apply to the agreements on organizing sales of goods by a buyer under a trademark or other means of individualization of the buyer or producer;

⁹ See *Федеральный закон «О защите конкуренции» от 20 июня 2006 года № 135-ФЗ (в редакции 2017 года)* (Federal Law “On Protection of Competition” of 20 June 2006, No. 135-FZ (as amended in 2017)).

- (8) the terms that lead or can lead to restricting competition. In particular, agreements imposing disadvantageous contract conditions upon a counteragent or irrelevant to the contract subject (unreasonable requirements to transfer financial funds, other property, i.e. property rights as well as consent to conclude a contract subject to including provisions in the contract regarding goods, in which the counteragent is not interested, and other requirements); fixing different prices (tariffs) for the same goods without economic, technological and other justifications; preventing other economic entities to either enter or abandon goods market; fixing terms and conditions for membership (participation) in professional and other associations.

The parties conducting commercial activities must not coordinate their activities if such coordination leads to any of the consequences restricting competition. Nevertheless, “vertical” agreements in written form are permitted if these agreements are agreements of commercial concession. Also “vertical” agreements are permitted if the share of each party on the market of goods that is subject to a “vertical agreement” does not exceed twenty percent.

The provisions prohibiting restriction of competition which are provided by the law do not apply to agreements between the parties of the same group, if one of them has established control with regard to another party, or if such parties are under control of a single person. According to the Law, control in this connection means possibility of a physical person or a legal entity to directly or indirectly (through a legal entity or several legal entities) determine decisions made by another legal entity, through one or several actions: (1) managing over 50% of the overall number of votes falling into the voting stocks (shares) of the charter capital of a legal entity; (2) exercising the functions of an executive body of a legal entity. The rules on prohibition of restrictive practices do not apply to joint venture agreements performed with the prior consent of governmental antimonopoly agency and obtained in accordance with the Law.

The Law on “On Protection of Competition” also provides that agreements restricting competition can be recognized as permissible if they do not create for particular persons opportunity to eliminate competition in the relevant goods market, do not impose restrictions superfluous for achievement of the goal of these agreements and also if they result or can result in: (1) perfection of production, sale of goods or stimulation of technical, economic progress or rising competitive capacity of the Russian goods in the world market; (2) obtaining of benefits (advantages) by consumers which are proportionate to the benefits (advantages) obtained by agreements.

The parties intending to conclude an agreement which can be recognized permissible have the right to make a written application to the governmental antimonopoly agency to verify compliance of the draft agreement with the requirements of the antimonopoly legislation. The antimonopoly agency initiates and reviews the cases of violation of the antimonopoly legislation. To suppress actions that lead or can lead to preventing, restricting, eliminating competition and (or) infringing the interests of other persons (economic entities) in the field of business activities or infringing the interests of indefinite range of consumers, the antimonopoly authority issues a written

warning to terminate violating the antimonopoly law. If a warning is not executed within the established period of time the antimonopoly authority must make a decision to initiate a case on violating the antimonopoly law. For examination of each case of violation of the antimonopoly legislation, the antimonopoly agency establishes a commission for examination of the case of violation of the antimonopoly legislation in accordance with the special administrative procedures provided by the Federal Law “On Protection of Competition”. The decision of the governmental antimonopoly agency may be appealed to the competent *arbitrazh* court. The exclusive jurisdiction for disputes relating to application of antimonopoly laws belongs to the *arbitrazh* courts where the violation of the law took place.

Contract clauses that would be found as restricting the competition are considered void as they are illegal. Since the market relationships in Russia are now at the initial stage of development it is not possible now to identify particular trends in court practice relating to application of appropriate anti-competition rules to commercial contracts.

3.2.3 Severability

Whether some contractual terms are contrary to mandatory rules, what would be the legal effect for the rest of contract and to what extent would contravention of these terms influence the validity or enforceability of the entire contract the Russian CC gives quite definite answer which are contained in the general regulation of invalidity of transactions.

Article 180 Russian CC provides that the invalidity of part of a transaction shall not entail the invalidity of the other parts if it is possible to suppose that the transaction would have been made without the inclusion of its invalid part. This rule is applicable to relations of the parties to the contract.

There is also a rule in the Russian CC concerning the partial invalidity of a transaction in specific situations. In this case the rule is provided directly in Article 329 para 2, Russian CC. That is the case where the parties of the contract agreed on application of a particular method of security to the performance of obligation arising from the contract. According to the Russian civil law the performance of obligations may be secured by a penalty, pledge, retention of a thing of the debtor, surety, an independent guaranty, earnest money, a security payment, and other means provided by a statute or the contract. The legal effect of the rule is that the invalidity of an agreement on security for performance of the obligation shall not entail the invalidity of the agreement from which the principal obligation arose.

4 Interpretation of Contracts

4.1 *Interpretation—Overview*

4.1.1 The General Approach to Interpretation

The present rule on contract interpretation had been introduced into the Russian civil law only with adoption of the new version of the Civil Code in 1994. Until that time Russian law did not know any regulation concerning interpretation of contracts. The reason was that contracts in economic area were concluded almost exclusively by state organizations and they were subject to mandatory rules provided by governmental decrees. The principle of freedom of contract was not permitted and the parties had no opportunity to draft their contracts in accordance with their interests. Actually, interpretation of the terms of concluded contracts meant interpretation of legislative texts. And only in the field of foreign trade where the principle of freedom of contract was allowed in making international commercial contracts the situation was different.

In dealing with disputes arising from international commercial contracts arbitral tribunals followed principles and rules worked out and adopted in international practice relating to interpretation of ambiguous terms of the contracts. Most frequently the arbitration court dealing with this problem approached to it first from the necessity of seeking to establish common intention of the parties. Less often literal interpretation had been used.

Introduction of market economy and liberalizing business activities in the Russian Federation which took place after the dissolution of the Soviet Union in the beginning of nineties of twentieth century the formulation of the rules for contract interpretation had become urgent. From the very beginning of this process Russian courts had not had at all the experience of interpreting contracts made on the bases of freedom of contract. In many instances they tended to continue to be very formalistic in dealing with commercial disputes and they were mainly reluctant to recognize freedom of the parties to formulate the terms of the contract differently as compared with what was provided by the legislative text. Admittedly that was the reason why the approach based on the preference of literal interpretation had been adopted in the Civil Code (Article 431 CC). However, at the same time the rule which should be used in interpreting unclear contract terms also does not exclude the necessity of seeking to determine an “objective” meaning of words and expressions if literal interpretation would be of no help in order to establish their meaning. Hence, it may be concluded that the Russian law accepts both existing main approaches for contract interpretation but determines the priority order between them.

The rule of contract interpretation in the Civil Code reads as follows. In the interpretation of the terms of a contract a court shall take into account the literal meaning of the words and expressions contained in it. The literal meaning of a term of a contract, in case the term is not clear, shall be established by comparison with the other terms and the sense of the contract as a whole. If these rules do not allow

the determination of the content of the contract, the real common will of the parties must be ascertained, taking into account the purpose of the contract. In such a case, all surrounding circumstances shall be taken into account, including negotiations and correspondence preceding the contract, the practice established in the mutual relations of the parties, customs, and the subsequent conduct of the parties.

A criterion of reasonable man in similar conditions that is applied often in many jurisdictions to determine the meaning of ambiguous contract terms does not belong to the instrumentality of the Russian courts and there are no reported cases where the court referred to this criteria in interpretation of contract. Russian courts do not usually use Latin legal maxims with the purpose to support the court's conclusion as to the established meaning of unclear words or expressions.

In current domestic court practice disputes connected with interpretation of contracts do not come up very often due to above mentioned specificities of Russian commercial practice. However, it is worth mentioning that sometimes in interpreting contract terms courts are inclined to apply the principle of good faith as one of the fundamental principles of the Russian civil law when they need to determine the meaning of particular terms in the contract. Russian legal doctrine has just recently started to pay more attention to different aspects of law connected with interpretation of contracts.

On the other hand, in the practice of international commercial arbitration in the Russian Federation and, in particular, in ICAC arbitration practice arbitral tribunals quite often rely on interpretation rules from Chap. 4 of the UNIDROIT Principles of International Commercial Contracts ("Interpretation") when they confront with problems of interpretation related to the terms of international commercial contracts. In such cases common intention of the parties is prevailing in determining the meaning of the contract or some of its terms.

4.1.2 The Relationship Between Interpretation, Supplying Omitted Terms, and Implying Terms or Obligations

Neither Russian positive law nor court practice distinguishes between the process of determining the terms of a contract, and process whereby such terms are interpreted. Being very formalistic, Russian courts are reluctant in the process of contract interpretation to construct the contents of its terms. If a question comes up which has not been agreed by the parties when concluding the contract the court applies dispositive rules provided for in the Civil Code for a specific type of contract and if the disputed relationship is not covered by specific regulation the court supplements the contract with general rules applicable to any type of contract. If there is neither specific nor general rule in the Civil Code to be available to deal with this problem the contract will be supplemented by the terms provided by the customs applicable to the respective relations of the parties.

4.1.3 The Interpretation of Standard Terms

There are no special interpretation rules applicable to standard terms in Russian law. As a matter of fact, in practice, in cases when there a contradiction between individually-agreed and standard terms occurs, preference is given to the latter. In international commercial arbitration in Russia corresponding interpretation rules which are the part of UNIDROIT Principles are applied quite frequently.

4.2 Interpretation—Specific Topics

4.2.1 The Language of the Contract

According to Russian *arbitrazh* and civil procedure Codes all submissions and documents presented to the court should be in Russian language. Documents and written evidence in foreign language have to be translated and notarized. In present Russia cases where the courts have to deal with commercial documents drafted in more than one language are very rare. Admittedly in case of inconsistency in the texts of the contract in different languages the Russian court would most likely prefer to rely on Russian version of the text. As the actual practice shows in arbitration disputes linguistic discrepancies are likely to be dealt with on the grounds of Article 4.7 providing that where a contract is drawn up in two or more language versions which are equally authoritative, i.e. in case of discrepancy between the versions, a preference is attributed to the interpretation according to the version in which contract was originally drawn up.

4.2.2 Recitals or Preambles

Including recitals into the text of the contracts and dividing the text of the contract into recitals and operative part are not common within Russian domestic commercial practice. It is hardly possible to identify cases when such questions have come up in domestic court practice. In international commercial contracts which usually include arbitration clauses and concluded by Russian businesses sometimes recitals are included into the contracts when foreign partners, especially from common law countries, insist on that. The legal impact of recitals and their significance for the interpretation of the rest of the contract text would be dependent in the first place on the agreement of the parties to that effect. In the absence of such agreement they would most probably be treated like any other terms of the contract.

5 Content of Contracts

5.1 *The Content of Contracts—Overview*

5.1.1 Duties of Parties with Regard to the Operation or Performance of the Contract

The general provisions on obligations as provided in the Russian Civil Code (Chapter III<Subchapter 1) shall be applied to obligations arising from international commercial contract unless otherwise provided by an applicable international agreement (for instance—CISG), the rules contained in the Civil Code and other statutes on individual types of contracts. In the absence of such special rules the general provisions on obligations and contracts have to be applied.

The seller has the duty to transfer to the buyer goods whose quality corresponds to the contract of purchase and sale. In case of absence of terms on the quality of the goods in the contract of purchase and sale, the seller has the duty to transfer to the buyer goods suitable for the purposes for which goods of such type are usually used. If, upon conclusion of the contract the seller was made aware by the buyer of the concrete purposes for acquiring the goods, the seller has the duty to transfer to the buyer goods suitable for use in accordance with these purposes. In case of sale of goods by sample and/or by description, then the seller has the duty to transfer to the buyer goods that correspond to the sample and/or description.

Performance of a contract is paid for at a price established by agreement of the parties.

In the establishment and performance of an obligation and after its termination the parties have the duty to act in good faith, considering the rights and lawful interests of each other, mutually rendering necessary support for achieving the purpose of the obligation and also providing one another the necessary information (Article 307 Russian CC). The Supreme Court has recently reaffirmed in its review of the court practice in applying the general rules of the Civil Code on obligations that persons will be presumed to be acting in good faith until otherwise proven.¹⁰ A court may find that a party did not act in good faith based on a well-grounded statement of the other party. In the absence of such a statement, if the court finds that the party's actions deviate significantly from good faith behavior, it may decide to investigate whether the party acted in good faith. In this case, the court shall render judgment based on the circumstances to which the parties did not refer.

An obligation does not create duties for persons who are not participants in it as parties (for third persons). In cases provided by a statute, other legal acts, or

¹⁰ See *Постановление Пленума Верховного суда Российской Федерации от 22 ноября 2016 № 54 «О некоторых вопросах применения общих положений Гражданского кодекса Российской Федерации об обязательствах и их исполнении»* (Resolution of the Plenum of the Supreme Court of the Russian Federation “On some questions of application of general provisions of the Civil Code of the Russian Federation about obligations and their performance” of 24 November 2016 No. 54).

by agreement of the parties, an obligation may create rights for third persons with respect to one or both parties to an obligation.

An alternative obligation is an obligation under which the debtor has the duty to take one, two or several actions (or to refrain from taking actions), the choice among which belongs to the debtor unless a statute, other legal acts, or the contract has granted the right of choice to the creditor or a third person.

An elective obligation is an obligation under which the debtor is granted the right to replace the basic performance with another (elective) performance provided by the terms of the obligation. In case the debtor exercises its right for replacement of the performance provided by the terms of the obligation, it shall have the duty to accept the corresponding performance of the obligation from the debtor.

5.1.2 Obtaining Certainty with Regard to What Has to Be Performed and for What Period

Obligations must be performed in a proper manner in accordance with the terms of the obligation and the requirements of a statute, other legal acts, and in the absence of such terms and requirements—in accordance with customs or other usually made requirements.

In case of non-performance by a debtor of an obligation the creditor shall have the right to demand in court the performance of the obligation in kind, unless otherwise provided by the present Code, other statutes, the contract or the nature of the obligation. The court on demand of the creditor shall have the right to award in its favor a monetary amount (para 1 of Article 330) in case of non-performance of the aforesaid judicial act in an amount determined by the court on the basis of the principles of justice, proportionality, and the impermissibility of extracting benefit from unlawful or bad faith conduct (para 4 of Article 1).

If an obligation provides for or makes possible the determination of the day of its performance or the period in the course of which it must be performed (including in the case if this period is calculated from the time of the performance of obligations by the other party or the occurrence of other circumstances provided by a statute or a contract), the obligation shall be subject to performance at this day or, respectively, at any time within the limits of such time period. In cases when an obligation does not provide a time period for its performance and does not contain terms making possible the determination of this time period and likewise when the time period of performance is defined as the time of demand, the obligation must be performed in the course of seven days from the day of making by the creditor of a demand for its performance, unless an obligation for performance within another time period is provided by a statute, other legal acts, the terms of the obligation or the nature of the obligation. In case the creditor does not make a demand for the performance of such an obligation within a reasonable period of time, then the debtor shall have the right to demand from the creditor to accept the performance, unless otherwise provided by a statute, other legal acts, the terms of the obligation or the nature of the obligation. The protection by a creditor of its rights shall not free the debtor

from responsibility for non-performance or improper performance of the obligation (Chapter 25). The debtor shall bear the expenses for performance of an obligation unless otherwise provided by a statute, other legal acts, a contract, the nature of the obligation, customs or other usually-made requirements.

Unless otherwise provided by agreement of the parties or follows from customs or the nature of an obligation, a debtor shall have the right in performance of an obligation to demand proof that performance is being accepted by the creditor itself or by a person authorized by it and shall bear the risk of the consequences if such a demand is not presented.

If a debtor under an alternative obligation (Article 308.1) having the right of selection has not made a selection within the limits of the time period provided for this, including by way of performance of an obligation, the creditor at its option shall have the right to demand from the debtor the taking of the respective action or refraining from taking the action. If the right of selection under the alternative obligation is granted to the creditor or a third person and such a creditor or a third person have not made a selection within the period of time established for this, then the debtor shall perform the obligation at its choice.

If a debtor under an elective obligation (Article 308.2) has not started basic performance by the established time the creditor shall have the right to demand basic performance of an obligation. Rules on the performance of an alternative obligation (Article 320) shall be applied to the obligation providing for the taking by the debtor of one of two or several actions if it cannot be recognized as an elective obligation.

Performance of an obligation of one of the parties is reciprocal if conditioned upon the performance of its obligations by the other party. In case of failure of the obligated party to make the performance of the obligation provided by the contract or in the presence of other circumstances obviously indicating that such performance will not be made within the established time period, the party upon whom the reciprocal performance lies has the right to suspend performance of its obligation or to refuse to perform this obligation and to demand compensation for losses.

If the performance provided by the contract for an obligation is not made in full, the party upon whom the reciprocal performance lies has the right to suspend performance of its obligation or to refuse performance in the part corresponding to the performance not made. Neither party to an obligation by the terms of which reciprocal performance of the obligation is provided shall have the right to demand performance in court without having made the performance due from it to the other party.

5.1.3 Conditions

Russian law provides the regulation of transactions made in accordance with traditional continental law approach (Article 157 Russian CC). These rules also apply to all kinds of contracts including international commercial contracts since contracts are treated as bilateral transactions.

Transaction shall be considered as made on a precedent condition if the parties have placed the arising of rights and duties in dependence upon a circumstance with respect to which it is unknown whether it will occur or not (suspensive condition). Transaction shall be considered as made on a subsequent condition, if the parties have placed the termination of rights and duties in dependence upon a circumstance with respect to which it is unknown whether it will occur or not (resolutive condition).

If the occurrence of a condition is hindered in bad faith by a party to whom the occurrence of the condition is disadvantageous, then the condition shall be considered as having occurred. If the occurrence of a condition is aided in bad faith by a party to whom the occurrence of the condition is advantageous, then the condition shall be considered as not having occurred.

The Russian Civil Code includes another rule concerning conditional obligations which was introduced by the latest amendments of the Civil Code. Hence, Article 327.1 directly allows parties to condition the performance of their obligations in the situation which seems to be excluded by the general rule relating to transactions made on a condition and even goes against it. In accordance with the new provision concerning conditional obligations the performance of obligations and also the conduct, change, and termination of specific rights under a contractual obligation may be conditioned on the making or non-making by one of the parties to an obligation of specific actions or the occurrence of other circumstances provided by contract, including those fully dependent upon the will of one of the parties.

For the time being there is no relevant and stable court practice in this respect. Russian *arbitrazh* courts after the introduction of Article 327.1 showed in their practice inclination to recognize the legal force of contractual conditions dependent upon the will of one of the parties. The main arguments used in such cases to support this attitude usually were principles of freedom of the contract and good faith.

5.2 *The Content of Contracts—Specific Topics*

5.2.1 Warranties

In 2015 the Russian Civil Code was amended by including some new legal notions and techniques borrowed from common law that had been unknown to Russian legal system in any period of its development. One of them is regulation of the legal effects of a contractual undertaking arising by agreement that something is true or that a certain state of affairs exists, in other words something which is referred to in common law as “warranties and representations”. In the Russian Civil Code it is referred to as “assurances on circumstances” (Article 431.2 Russian CC). This regulation provides for the following.

A party that on the conclusion of a contract or before or after its conclusion gave the other party inaccurate assurances on circumstances having significance for the conclusion of a contract, its performance or termination (including relating to the subject of the contract, powers for its conclusion, correspondence of the contract to

the law applicable to it, the presence of the necessary licenses and permissions, its financial condition or relating to a third person) shall have the duty to compensate the other party on its demand for the losses caused by the inaccuracy of such assurances or to pay the penalty provided by the contract.

Declaration of a contract as not concluded or invalid in and of itself shall not prevent the occurrence of the above-mentioned consequences. Liability shall occur if the party that provided the inaccurate assurances proceeded on the basis that the other party would rely on them or had reasonable bases to proceed on such an assumption. A party that relied on inaccurate assurances by a counterparty that had significance for it, along with a demand for compensation for damages or recovery of a penalty shall also have the right to cancel the contract unless otherwise provided by agreement of the parties. A party that concluded a contract under the influence of deception or essential misapprehension caused by the inaccurate assurances given by the other party, has the right to demand declaration of the contract as invalid, instead of cancelling the contract.

The consequences provided by this provision shall be applied to a party that gave inaccurate assurances in the conduct of entrepreneurial activity and also in connection with a corporative contract or a contract on the alienation of shares of stock or investment shares in the charter capital of a commercial company regardless of whether or not it knew of the inaccuracy of such assurances, unless otherwise provided by agreement of the parties. In the cases of "assurance on circumstances" it shall be presumed that the party that provided inaccurate assurances knew that the other party would rely on such assurances.

There is no reported case law relating to application of this provision of the Russian Civil Code since business people in Russia take advantage of this legal techniques quite rare so far.

The regulation concerning contract warranties is traditionally included in the rules of specific contracts. The good illustration is the sales contract. The seller has the duty to transfer to the buyer goods whose quality corresponds to the contract of sale. In case of the absence in the contract of terms on the quality of the goods, the seller has the duty to transfer to the buyer goods suitable for the purposes for which goods of such type are usually used. If the seller at the concluding of the contract was made aware by the buyer of the concrete purposes for acquiring the goods, the seller has the duty to transfer to the buyer goods suitable for use in accordance with these purposes.

Goods that the seller has the duty to transfer to the buyer must correspond to the requirements as provided by the Civil Code at the time of their transfer to the buyer, unless another time of determining the correspondence of the goods to these requirements is provided by contract, and within the limits of a reasonable period of time they must be suitable for the purpose for which goods of such a type are usually used. A guaranty of quality of goods extends also to all its component parts (or constituent manufactures), unless otherwise provided by the contract.

Unless otherwise provided by the contract of sale, the guaranty time period for a constituent manufacture is considered equal to the guaranty time period for the basic manufacture and starts to run simultaneously with the guaranty term for the

basic manufacture. For goods transferred by the seller in place of the goods in which defects were discovered during the guaranty time period, a guaranty time period of the same length is established as for those for which they were replaced, unless otherwise provided by the contract.

A statute may provide a duty to define a time period at the expiration of which the goods are considered unsuitable for use for their regular purpose (time period of suitability). Goods for which a time period of suitability is established must be transferred by the seller to the buyer in a manner so calculated that they can be used for their regular purpose before the expiration of the time period of suitability, unless otherwise provided by a contract.

5.2.2 Indemnification

Another legal concept borrowed in 2015 by the Russian Civil Code from common law was “indemnity”. Article 406.1 Russian CC now provides that the parties to an obligation within commercial activity may by their agreement provide for the duty of one party to compensate for property losses of the other party that have arisen in case of the occurrence of circumstances defined in such agreement and not connected with a violation of an obligation by its party (losses caused by the impossibility of performance of an obligation, making of claims by third parties or bodies of state authority to a party or to a third party indicated in the agreement and so on). The agreement of the parties must define the amount of compensation for such losses or the manner of determining the amount.

The court may not reduce the amount of compensation for the losses provided for by the present Article with the exception of cases where it is proved that a party intentionally facilitated an increase in the amount of losses. The losses provided for by the present Article shall be compensated regardless of the declaration of the contract as not concluded or invalid unless otherwise provided by agreement of the parties. In the case if the losses arose in connection with the unlawful acts of a third party, the claim of the creditor against this third person for compensation for losses shall pass to the party that has compensated for such losses. These rules are also applied in the cases if the term on compensation for losses is provided in a corporative contract or in a contract on alienation of shares of stock or investment shares in the charter capital of a commercial company a party to which is a physical person.

Since this regulation has been quite new for the Russian civil law the Supreme Court of the Russian Federation provided the following clarification with regard to application of it by the courts. The regime by which indemnified costs are reimbursed is close to that by which damages caused by a breach of contract are reimbursed. Thus, a claimant must prove that it actually incurred the costs indemnified or will inevitably incur them in future and there is a causal link between the circumstance stated in the contract and the reimbursement of the amount. An indemnity provision may be established only for a case in which circumstances occur that relate to an obligation or the subject matter of it and that are not a breach of an obligation.

As a consequence, a term of a contract will be unenforceable if it provides for the reimbursement of an indemnified amount when circumstances occur that in no way relate to the contract or for which one of the parties is responsible. If the contract states a figure that is to be reimbursed, this does not mean that a creditor can recover the amount in question without adducing proof that it has actually incurred costs in that amount.

6 Performance of a Contract

6.1 *Performance of a Contract—Overview*

6.1.1 Performance in General

The time of performance. The Russian Civil Code (Article 314) provides that if an obligation provides for or makes possible the determination of the day of its performance or the period in the course of which it must be performed (including in the case if this period is calculated from the time of the performance of obligations by the other party or the occurrence of other circumstances provided by a statute or a contract), the obligation shall be subject to performance at this day or, respectively, at any time within the limits of such time period.

In cases when an obligation does not provide a time period for its performance and does not contain terms making possible the determination of this time period and likewise when the time period of performance is defined as the time of demand, the obligation must be performed in the course of seven days from the day of making by the creditor of a demand for its performance unless an obligation for performance within another time period is provided by a statute, other legal acts, the terms of the obligation or derives from customs or the nature of the obligation. In case of the creditor not making a demand for the performance of such an obligation within a reasonable period of time, the debtor shall have the right to demand from the creditor to accept the performance, unless otherwise provided by a statute, other legal acts, the terms of the obligation or derives from customs or the nature of the obligation.

A debtor shall have the right to perform an obligation early unless otherwise provided by a statute, other legal acts or the terms of the obligation or follows from its nature. However, early performance of obligations connected with the conduct by its parties of entrepreneurial activity is allowed only in cases when the possibility of performing the obligation early is provided by a statute, other legal acts or the terms of the obligation or derives from customs or the nature of the obligation.

The place of performance. According to Article 316 Russian CC if the place of performance of an obligation is not defined by the law or contract, does not determined by customs or the nature of the obligation, performance must be made:

on an obligation to transfer goods or other property envisioning its carriage—at the place of property submission to the first carrier for its delivery to the creditor; on other obligations of an entrepreneur to transfer goods or other property—at the place of property manufacture or storage if this place was known to the creditor at the time the obligation arose;

on a monetary obligation for the payment of cash money—at the residence place of a creditor at the time the obligation arises or, if the creditor is a legal person, at its location at the time the obligation arises;

on a monetary obligation for the payment of non-cash funds—at the location of the bank (or its branch or subdivision) serving the creditor, unless otherwise provided by a statute;

on all other obligations—at the residence place of the debtor or, if the debtor is a legal person, at its location.

If after the arising of an obligation, the place of its performance has changed, in particular if the place of residence of the debtor or creditor has changed, the party upon whom such change depended shall have the obligation to compensate the other party for the additional expenses and also undertake the additional risks connected with the change of the performance place of the obligation.

The manner of performance. A creditor shall have the right not to accept performance of an obligation in parts, unless otherwise provided by a statute, other legal acts, or terms of the obligation or follows from customs or the nature of the obligation (Article 311 Russian CC).

Unless otherwise provided by agreement of the parties or follows from customs or the nature of an obligation, a debtor shall have the right in performance of an obligation to demand proof that performance is being accepted by the creditor itself or by a person authorized by it and shall bear the risk of the consequences of the non-presentation of such a demand.

If a representative of a creditor acts on the basis of powers contained in a document that was made in simple written form, the debtor shall have the right not to perform the obligation to this representative until receipt of confirmation of its powers from the one represented, in particular until the presentation by the representative of a notary certified power of attorney, with the exception of cases indicated in a statute or cases when the written power was presented by the creditor directly to the debtor or when the powers of the representative of the creditor are contained in the contract between the creditor and the debtor.

The creditor shall have the duty to accept performance proposed for the debtor by a third person if performance of the obligation was placed by the debtor on this third person. If a debtor has not placed the performance of the obligation on the third person, a creditor shall have the duty to accept performance proposed for the debtor by such a third person in the following cases:

- (1) the debtor has missed the deadline for performance of a monetary obligation;
- (2) a third person is under the risk of losing its right to the property of the debtor as the result of the levying of execution on this property.

A creditor shall not have the duty to accept performance proposed for a debtor by a third person if the obligation of the debtor to perform the obligation personally follows from a statute, other legal acts, the terms of an obligation, or its nature. In cases if, in accordance with the present Article, performance of an obligation by a third person is allowed, the third person shall have the right to perform the obligation also by putting the debt on deposit with a notary or making a set-off with observation of the rules established by the present Code for a debtor. The rights of the creditor under the obligation shall pass to a third person that has performed an obligation of the debtor in accordance with Article 387 of the present Code. If the rights of a creditor under an obligation have partly passed to a third person, they may not be used by the third person to the creditor's harm, in particular such rights do not have priorities in cases of their satisfaction at the expense of a secured obligation or in case of insufficiency of assets for satisfaction of the claim in full amount.

If a third party has performed an obligation of the debtor that is not a monetary obligation, the third party should bear the liability.

6.1.2 Hardship

Russian Civil Code (Article 451 Russian CC) contains the rules on legal consequences of the situation of hardship which were drafted to a certain extent under the influence of corresponding provisions from the UNIDROIT Principles of International Commercial Contracts. Unfortunately, after the adoption of these rules there was a trend in quite unstable market conditions to use this regulation not to try to adjust contracts to the new situation but to terminate existing contracts, thus keeping business relations for the benefit of both parties.

Russian rules on hardship provide that a substantial change of circumstances from which the parties proceeded in the conclusion of the contract shall be a basis for its change or rescission unless otherwise provided by the contract or derives from its nature.

A change of circumstances shall be considered substantial when these have changed to the extent that, if the parties could have reasonably foreseen this, the contract would not have been concluded by them at all or would have been concluded on significantly different terms. If the parties have not attained agreement on bringing a contract in accordance with substantially changed circumstances or on its rescission, the contract may be rescinded or, upon the bases provided by para 4 of the present Article, changed by a court on demand of an interested party if the following conditions are present simultaneously:

- (1) at the time of the conclusion of the contract the parties proceeded on the basis that such a change of circumstances would not occur;
- (2) the change of circumstances was brought about by causes that the interested party could not overcome after they arose with the degree of care and caution that was demanded by the nature of the contract and the conditions of commerce;

- (3) the performance of a contract without any change in its terms would disturb the correlation of the parties' contract-related property interests and would entail such damage for the interested party that it, to a significant degree, would be deprived of that which it had the right to expect upon conclusion of the contract;
- (4) it does not follow from customs or the nature of the contract that the risk of change of circumstances is borne by the interested party.

In case of rescission of a contract as the result of substantially changed circumstances, a court, on demand of one of the parties, shall determine the consequences of rescission of the contract proceeding from the necessity of just distribution among the parties of the expenditures borne by them in connection with the performance of this contract. A change in the contract in connection with a substantial change in circumstances shall be allowed by decision of a court in exceptional cases when the rescission of the contract would contradict societal interests or cause damage to the parties, significantly exceeding the expenditures necessary for performance of the contract on the terms changed by the court.

The most recent cases of application the above rule on hardship in Russian court practice were connected with the determining of the effect of changing of the exchange rate of local currency on the performance of contracts. Although the loss in the value of the currency was rather unusual (25–30%) the Supreme Court did not accept such situation as change of circumstances triggering application of corresponding rules on hardship.

7 Non-performance (Breach of Contract)

7.1 Non-performance (Breach of Contract)—Overview

7.1.1 Non-performance in General

Chapter 25 of the Russian Civil Code (Article 395–406) provides the rules on liability non-performance of obligations of any kind. These rules apply as general norms in cases of breach of international commercial contracts unless the law provides special rules for particular types of contracts. The Civil Code nevertheless distinguishes such types of breach of the contract as debtor's delay (Article 405) and creditor's delay (Article 406). It also expressly provides for the debtor's liability for actions by its employees in performance of its obligation and for non-performance or improper performance of an obligation by third persons to whom performance was entrusted.

Almost completely rules relating to regulation of the consequences of the breach of contract have dispositive nature and there is a very limited number of mandatory rules available in this field. The basic rule of the liability for the breach of the contract reads that a debtor shall have the duty to compensate the creditor for the losses caused by the non-performance or improper performance of the obligation. Unless otherwise provided by the law, the creditor may use other available means of

protection of violated rights (remedies) and will not deprive it of the right to claim from the debtor compensation for losses caused by the non-performance or improper performance of an obligation.

In case of violation by the debtor of an obligation to refrain from the taking of a defined action (a negative obligation), regardless of compensation of damages the creditor shall have the right to demand the cessation of the corresponding action if this does not contradict the nature of the obligation. This demand may be presented by the creditor also in the case of appearance of an actual threat of violation of such obligation.

The Supreme Court emphasized in one of its resolutions that parties' failure to observe the principles of reasonableness and good faith may lead to a court's refusal to provide judicial protection to the party that committed the breach of the contract.¹¹

The law or contract may provide for different interrelation between the right to recover damages and the right to claim the payment of penalty. The most frequent variants used in commercial practice are the following: recovery only of a penalty; losses being recovered in full sum above a penalty; leaving to the creditor the choice between recovery of losses or the payment of a penalty.

If the losses caused to a creditor by the unlawful use of its monetary assets exceed the due sum of interest, it shall have the right to demand compensation for losses in the part exceeding this sum from the debtor. In the case when an agreement of the parties has provided a penalty for non-performance or improper performance of a monetary obligation, the interest shall not be subject to recovery, unless otherwise provided by the law or the contract. Calculation of interest (compound interest) shall not be allowed unless otherwise established by the law. In commercial relationship the application of compound interest shall not be allowed unless otherwise provided by the law or a contract.

Payment of a penalty and damages in case of improper performance of an obligation shall not free the debtor from the performance of the obligation in kind, unless otherwise provided by the law or contract.

Before the presentation of claims against a person who bears liability supplementary to the liability of another person who is the principal debtor (subsidiary liability), the creditor must make a claim against the principal debtor. If the principal debtor has refused to satisfy a claim of the creditor or the creditor has not received from him in a reasonable time period a response to a claim presented, this claim may be presented to the person bearing subsidiary liability.

The creditor shall not have the right to demand the satisfaction of its claim against the principal debtor from the person bearing subsidiary liability if this claim can be satisfied by way of setoff of a counterclaim against the principal debtor or by the recovery of funds by an incontestable procedure from the principal debtor. A person

¹¹ See *Постановление Пленума Верховного суда Российской Федерации от 22 ноября.2016 № 54 «О некоторых вопросах применения общих положений Гражданского кодекса Российской Федерации об обязательствах и их исполнении»* (Resolution of the Plenum of the Supreme Court of the Russian Federation On some questions of application of general provisions of the Civil Code of the Russian Federation about obligations and their performance" of 24 November 2016 No. 54).

bearing subsidiary liability must, before satisfying a claim presented by a creditor, warn the principal debtor of this and if a suit is made against such a person, involve the principal debtor in participation in the case. On the contrary, the principal debtor has the right to raise against the subrogation claim of the person who is liable subsidiary, the defenses that it had against the creditor.

Provisions relating to the determination of the bases of liability for the breach of contractual obligations are formulated in the way traditional for continental law approach. Namely, a person who has not performed an obligation or who has performed it in an improper manner shall bear liability in case of fault (intent or negligence) except for instances when the law or contract provides other bases of liability.

A person shall be recognized to be not at fault if with the degree of care and caution that was required of him/her by the nature of the obligation and in accordance with customs of commerce she/he has taken all measures for the proper performance of the obligation. Absence of fault must be proved by the person who has violated an obligation. However, this rule is applicable only to the relationships between persons who are not involved in commercial activities. A person being involved in commercial activities who has not performed an obligation or has performed an obligation in an improper manner shall bear liability unless s/he proves that proper performance became impossible as the result of extraordinary circumstances unavoidable under the given conditions.

A debtor who has delayed performance shall be liable to the creditor for the losses caused by the delay and for the consequences of an impossibility of performance that accidentally occurred during the delay. Debtor shall not be considered to have delayed while an obligation cannot be performed as the result of delay by the creditor.

Article 406 Russian CC provides that creditor shall be considered to have delayed (*mora creditoris*) if it has refused to accept proper performance offered by the debtor or has not taken actions provided by the law or the contract or deriving from customs or the nature of the obligation if due to the lack of these actions the debtor could not perform his obligation.

A creditor shall not be considered to have delayed in the case if the debtor was not in a condition to perform the obligation regardless of the fact that the creditor did not take the actions provided for by the first subparagraph of the present paragraph.

Delay by a creditor shall give the debtor the right to compensation for the losses caused by the delay, unless the creditor proves that the delay occurred due to circumstances for which neither itself nor the persons upon whom by force of a statute, other legal acts, or delegation of the creditor the acceptance of performance was placed, are liable. Under a monetary obligation, the debtor is not obligated to pay interest for the time of delay by the creditor.

Unlike CISG and UNIDROIT Principles of International Commercial Contracts the Russian Law does not provide for the regulation of the situation where an aggrieved party by notice allows the party in breach an additional period to perform. Either it does not share the concept that a non-performing debtor may “cure” non-performance or it undoes breach of contract.

7.1.2 The Right to Specific Performance (Whether Monetary or Non-monetary Obligations)

Under Russian civil law as a general rule the creditor is entitled to claim specific performance. Hence, in case of a debtor's non-performance of an obligation the creditor shall have the right to claim in the court the performance of the obligation in kind, unless otherwise provided by the law or the contract or derives from the nature of the obligation (Article 308.3 Russian CC).

On demand of the creditor, the court shall have the right to award in its favor a monetary amount in case of non-performance of the aforesaid judicial act in an amount determined by the court on the basis of the principles of justice, proportionality, and the impermissibility of extracting benefit from unlawful or bad faith conduct. The protection by a creditor of its rights shall not free the debtor from responsibility for the non-performance or improper performance of the obligation.

The Supreme Court has confirmed that it is possible to assert claims for the enforcement of an obligation to supply goods if such goods are able to be bought on the market. At the same time, if the violated right may be properly protected only by way of the obligation being performed in kind, then a claim for performance in kind cannot be denied. As a general rule, if the debtor does not have the specific item, this makes it impossible for the creditor to bring an action to take possession of it from the debtor. In this case, the creditor has a right to claim for its losses to be reimbursed. However, if the specific item is, in particular, leased out, supplied to be used free of charge, or handed over for storage, this does not preclude a creditor who acquired the title to the item from pursuing a claim to transfer the item to the creditor's ownership against a debtor who disposed of the item.¹²

Payment of a penalty and compensation for losses in case of improper performance of an obligation shall not free the debtor from the performance of the obligation in kind, unless otherwise provided by the law or the contract. Compensation for losses in case of non-performance of an obligation and payment of a penalty for its non-performance shall free a debtor from performance of the obligation in kind, unless otherwise provided by the law or the contract. Refusal by a creditor to accept performance that because of delay has become no longer of interest for it and also payment of penalty established for the case of cancellation shall free the debtor from performance of the obligation in kind.

7.1.3 The Right to Terminate a Contract Due to Non-performance

An obligation shall be terminated in full or in part on the bases provided by the law or contract. An obligation is terminated by impossibility of performance if the impossibility was caused by a circumstance that arose after the occurrence of the obligation for which none of the parties is liable. In case of a debtor's impossibility of performance for an obligation caused by actions for which the creditor was at

¹² *Ibid.*

fault, the latter shall not have the right to demand return of what was performed by it under the obligation.

Termination of an obligation on the initiative of one of the parties shall be allowed only in cases provided by the law or the contract. Upon request of one of the parties, a contract may be changed or rescinded by decision of a court in case of a substantial breach of the contract by the other party (Article 450 Russian CC). A breach of a contract by one of the parties shall be considered substantial if it entails for another party such damage that to a significant degree it is deprived of what it had the right to expect when the contract was concluded.

Russian law has no concept of “anticipatory breach” of contract but Article 393.1 Russian CC provides that if non-performance or improper performance by a debtor of a contract has entailed its early termination and the creditor has concluded an analogous contract to replace it, the creditor shall have the right to claim from the debtor compensation of damages in the form of the difference between the price provided in the terminated contract and the price for comparable goods, work, or services under the terms of the contract concluded in place of the terminated contract.

If the creditor has not concluded an analogous contract in place of the terminated contract, but with respect to the performance provided by the terminated contract there is a current price for comparable goods, work, or services, the creditor shall have the right to claim from the debtor compensation for damages in the form of the difference between the price provided in the terminated contract and the current price.

The relevant current price in such situation is the price taken at the time of termination of the contract for comparable goods, work, or services at the place where the contract was to be performed, and in the absence of a current price, a price that was taken in another place and which may serve as a reasonable substitute (taking into account transport and other additional expenses). Satisfaction of the claims in connection with termination of obligation shall not free a party that has not performed an obligation or has performed it improperly from compensation for other losses caused to the other party.

7.1.4 The Right to Damages

A debtor shall have the duty to compensate the creditor for the losses caused by the non-performance or improper performance of the obligation. Losses are determined in accordance with the rules provided by the Russian CC (Article 15). These provisions provide the general approach for regulation of the consequences of any breach of obligations. Payment of damages for the breach of the contract is considered as a form of liability for non-performance of obligations and it means rules relating to the bases of liability for non-performance of obligations are to be applicable. In particular, they provide that any person whose right has been violated may demand full compensation for the losses caused to it (Article 393 Russian CC). The law or a contract may provide for compensation for losses in a lesser amount. Losses or damages include the expenses that the person whose right was violated made or must

make to reinstate the right that was violated, the loss of or injury to its property (real damage), as well as any unreceived income that this person would have received under the usual conditions of commercial turnover if its right had not been violated (lost profit). If the person who has violated a right has received income thereby, the person whose right has been violated has the right to demand—along with other losses—compensation for forgone benefit in a measure not less than such income.

Compensation for losses in full amount means that as the result of their compensation the creditor must be put in the position in which it would have been if the obligation had been performed properly. Unless otherwise provided by a statute, other legal acts, or the contract, in determining losses, the prices that shall be taken into account shall be those existing at the place where the obligation was to be performed on the day of voluntary satisfaction by the debtor of the claim, of the creditor or if the claim was not satisfied voluntarily—on the day of filing the suit. Proceeding from the circumstances, a court may satisfy a claim for compensation for losses taking into account the prices existing on the day of making a decision. In determining the lost profit, the measures taken by the creditor to receive it and the preparations made for this purpose shall also be considered.

The amount of losses subject to compensation must be established with a reasonable degree of reliability. A court may not refuse the satisfaction of a claim of a creditor for compensation for losses caused by non-performance or improper performance of an obligation solely on the basis that the amount of damages may not be established with a reasonable degree of reliability. In such a case the amount of losses subject to compensation shall be determined by the court taking into account all the circumstances of the case, principles of justice and proportionality of liability for the committed breach of an obligation.

In case of non-performance by the debtor of an obligation to refrain from the taking of a defined action (a negative obligation), the creditor shall have the right to demand the cessation of the corresponding action regardless of compensation of damages, if this does not contradict the nature of the obligation. This demand may be presented by the creditor also in the case of appearance of an actual threat of violation of such obligation.

To a great extent the rules relating to liability for the breach of obligations described above were introduced into the Russian CC just in 2015.¹³ In order to ensure the correct application of amendments to the Russian CC in the court practice, the Supreme Court of the Russian Federation adopted a special resolution to clarify particular issues of liability for a breach of obligations.¹⁴ Since the adoption of this

¹³ See *Федеральный закон «О внесении изменений в часть первую Гражданского кодекса Российской Федерации» от 8 марта 2015 года № 42-ФЗ* (Federal Law “On Amending Part 1 of the Civil Code of the Russian Federation” dated 8 March 2015 No. 42-FZ).

¹⁴ See *Постановление Пленума Верховного суда Российской Федерации “О применении судами некоторых положений Гражданского кодекса Российской Федерации об ответственности за нарушение обязательств” от 24 марта 2016 г. № 7* (Resolution of the Plenum of the Supreme Court of the Russian Federation “On court practice applying certain provisions of the Civil Code of the Russian Federation concerning liability for a breach of obligations” of 24 March 2016 No. 7).

resolution its provisions have been applied in judgments passed by lower courts in Russia. The Supreme Court highlighted the standard and burden of proof of damages, underscoring that when a certain amount of damages is claimed, it is sufficient to prove their existence to a reasonable level of certainty. It pointed out that the claimant must provide only evidence which establishes to a reasonable extent the plausibility of the amount of the damages and the existence of a causal connection between the non-performance or defective performance and the damages. The Supreme Court also stressed that damages must be estimated as accurately as possible. Furthermore, if the damage for which compensation is claimed is a customary consequence of the breach of the obligation, the existence of the causal connection will be assumed. It is sufficient for a claimant to prove that the losses it has incurred represent an ordinary consequence of a breach of the obligation. The Supreme Court concludes that a lawsuit must not be dismissed solely on the grounds that the exact amount of damages cannot be calculated. In such a case, the courts have to apply the principle of fairness and estimate damages proportionally to the severity of the breach.

The Civil Code provides that the rate of interest to be paid by the defaulting party in case of delay in performance of monetary obligation shall be determined by key rate published by the Central Bank of the Russian Federation. If the damage resulting from the performance delay of monetary obligation are more than the key rate, the creditor has the right to claim from the debtor the difference between the key rate and the amount of actual damage sustained by the creditor. The question of the currency in which compensation is to be paid is not addressed in the Civil Code.

7.2 Non-performance/Breach—Specific Topics

7.2.1 Exemption/Exclusion Clauses

For individual types of obligations and for obligations connected with a defined type of activity the law may limit the right of a creditor to full compensation for damages (limited liability). An agreement on limiting the amount of liability of a debtor under a contract of adhesion or other contract in which the creditor is a person acting as a consumer is void if the amount of liability for such type of obligations or for such violation is determined by the law and if the contract is concluded before the occurrence of the circumstances entailing liability for non-performance or improper performance of the obligation. An agreement concerning limitation or exclusion of liability in the contract concluded in advance for the intentional breach of an obligation is null and void.

The Supreme Court confirmed that it is possible to limit a debtor's liability by agreement of the parties, based on the principle of freedom of contract, and also clarified the exceptions where liability cannot be limited. There is a great practical significance in the clarification of how an intentional breach is defined. A debtor may prove that it lacked intention if it exercised a minimum level of care and diligence in performing the obligation.

Adhering to the approach adopted earlier in current court practice in terms of need, when a legal rule is interpreted taking statutory regulation of the particular type of contract the Supreme Court stated that limiting liability would not be permitted if this limitation contradicts the essence of the statutory regulation of the relevant type of obligation.¹⁵

7.2.2 Force Majeure

A person who in the course of his/her commercial activities has not performed an obligation or has performed an obligation in an improper manner in the conduct of entrepreneurial activity shall bear liability unless s/he proves that proper performance became impossible as the result of *force majeure*, i.e., extraordinary circumstances unavoidable under the given conditions. Such circumstances do not include, in particular, violation of obligations by the debtor's contract partners, absence on the market of goods necessary for performance, nor the debtor's lack of necessary monetary assets. The Supreme Court made it clear that *force majeure* does not cancel the debtor's obligation if performance is still possible after events of *force majeure* have ended. However, the creditor can terminate the relevant contractual relationship when due to the delay caused by *force majeure* it has lost its interest in performing the obligation. The debtor is not liable for damages caused by the delay, but must take reasonable action to reduce damage caused to the claimant by *force majeure*—in particular, by notifying the claimant of the occurrence of *force majeure* and, in the event of non-compliance, reimbursing the claimant for damage suffered. The Supreme Court also underlined that when a *force majeure* circumstance arises a debtor has to notify a creditor of such circumstance. In turn, the creditor has the right to repudiate the contract when force majeure circumstances occur.¹⁶

7.2.3 Agreed Payment for Non-performance

Traditionally Russian law applies the principle that an agreed payment for non-performance of the contract is a monetary sum that a debtor must pay to the creditor in case of non-performance or improper performance of an obligation, in particular in case of a delay in performance. It may have the character of a penalty (or forfeiture

¹⁵ See *Постановление Пленума Высшего арбитражного суда Российской Федерации «О свободе договора и ее пределах» от 14 марта 2014 года № 16* (Resolution of the Plenum of the Supreme Arbitrazh Court of the Russian Federation (“On freedom of contract and its limits” dated 14 March 2014 No. 16. The Supreme Arbitrazh courts of the Russian Federation merged with the Supreme Court of the Russian Federation in 2015).

¹⁶ See *Постановление Пленума Верховного суда Российской Федерации “О применении судами некоторых положений Гражданского кодекса Российской Федерации об ответственности за нарушение обязательств” от 24 марта 2016 г. № 7* (Resolution of the Plenum of the Supreme Court of 24.03.16 No. 7 “On courts applying certain provisions of the Civil Code of the Russian Federation concerning liability for a breach of obligations”).

or fine). In general, penalty is treated as having no exclusive character. It means that when a certain sum of money is agreed by the parties to be paid in case of the breach of contract (penalty) all damages sustained by the creditor as the result of the breach of contract have to be compensated in the amount not covered by the penalty. The law or contract may provide for different interrelation between the right to recover damages and the right to claim the payment of penalty. The most frequent variants used in commercial practice are recovery only of a penalty, recovery of losses in full sum in excess of a penalty, the creditor's choice of either damages or penalty.

Claiming payment of a penalty the creditor has no duty to prove that damages were inflicted to him. The creditor has not the right to claim payment of a penalty if the debtor is not liable for the non-performance or improper performance of the obligation. An agreement concerning a penalty must be made in written form regardless of the form of the principal obligation. Nonobservance of the written form shall entail the invalidity of the agreement on the penalty.

If a penalty subject to payment is clearly disproportionate to the consequences of violation of an obligation, a court shall have the right to reduce the penalty. If an obligation was violated by a person conducting business activity, the court shall have the right to reduce the penalty if such reduction is requested by the debtor. The reduction of a penalty agreed in the contract and subject to payment by a person conducting business activity shall be allowed in exceptional cases if it is shown that the award of a penalty in the amount provided by the contract may lead the creditor to gaining unfounded profit. These rules shall not affect a debtor's right to reduce its liability nor the right of a creditor to compensation for losses in connection with the termination of the contract.

In contemporary practice the courts apply sequentially the positions of the Supreme Court allowing the issue of reducing a penalty to be examined only upon an application by the defendant and if the defendant supplies necessary evidence that the penalty is disproportionate.

7.2.4 Consequential Losses

Russian law does not distinguish consequential damages as a special kind of contract damages. In general lost profit legally is considered as a part of recoverable damages in case of breach of the contract. All general requirements to enforceability of damages claimed in case of the breach of contract like basis of liability, burden of proof, casual link between the breach of the contract and the damage, etc. are applicable to the recovering of lost profit.

Consequential damages such as loss of a chance have not been distinguished either in the legislation or in court practice in Russian Federation. No cases have been reported in which this issue has been addressed.

8 Limitation Periods

8.1 The Rights or Remedies Subject to Limitation Periods

In the Russian civil law the regulation of limitation periods is a part of national material law. Limitation of actions is understood as the time period for protection of a right on suit of the person whose right has been violated. Limitation periods apply to all kinds of claims in civil law relations including the right to claim damages due to non-performance, to claim performance, to withhold performance, or to terminate the contract.

8.2 The Extent to Which the Rules Relating to Limitation Periods Are Mandatory

The Russian law treats all regulation relating to limitation of actions as mandatory. Article 198 CC determines that the time periods of limitation of actions and the procedure for calculating them may not be changed by agreement of the parties. Hence, the parties to the contract may not modify or deviate from periods established by the law. Notwithstanding this, the Russian rules are not considered to be mandatory in the context of international private law and in the case where foreign law is applicable to the contract as a result of an agreement of the parties the rules on limitation of actions provided in foreign law are applicable even if they are different as compared with the Russian law rules relating to limitation of actions.

8.3 The Extent to Which a Debtor (Obligor) Could Be Prevented from Asserting the Defense of Limitation Due to Inconsistent Behavior or Dishonest Concealment of Facts

In the Russian material law there are no special rules that indicate circumstances that prevent the debtor from asserting the defense of limitation periods. But it is possible that the reference to the general principle of good faith might be taken in account in the process of consideration of recognizing the defense based on expiration of limitation periods.

A claim for the protection of a violated right shall be taken for consideration by a court regardless of the expiration of the time period of limitation of actions. The limitation of actions shall be applied by a court only on request of a party to the dispute, made before the rendering of a decision by the court.

8.4 *The Duration of the General Limitation Period*

The Russian law provides that general period of limitation of actions shall be three years. Besides establishing general limitation period the law determines also that the time period of limitation of actions may not exceed ten years from the day of violation of the right for the protection of which this time period is established. The Russian law provides the rules addressing different situations when limitation periods start to run. Unless otherwise established by a statute, the running of the period of limitation of actions begins from the day when a person knew or should have known of the violation of his/her right and of who was the proper defendant for a suit for the protection of this right.

For obligations with a defined time period of performance, the running period of limitation of actions begins at the end of the time period of performance. For obligations the time-period for performance of which is not defined or is defined as the time of demand, the time period of limitation of actions shall start to run from the day of presenting by the creditor of a demand for performance of the obligation, and if the debtor is granted a time period for performance of such demand, the calculation of the time period of limitation of actions shall begin from the end of such period granted for performance of such demand. In such case the period of limitation of actions in any event may not exceed 10 years from the date of arising of the obligation.

An important aspect of the regulation of limitation of actions is stressed in the law to the effect that the change of persons in an obligation shall not entail a change in the time period of limitation of actions nor the procedure for calculating it. The change of persons in an obligation shall not entail a change in the time period of limitation of actions nor the procedure for calculating it.

For individual types of claims a statute may establish special time periods of limitation of actions that are reduced or longer in comparison with the general time period.

8.5 *The Circumstances Under Which a New Limitation Period Starts to Run or the Running of a Limitation Period is Suspended*

The running of the time period of limitation of actions shall be suspended on condition that the circumstances indicated as grounds of suspension arose or continue to exist during the last six months of the period of limitation of actions or, if this time period is equal to six months or less than six months, then during the running of the time period of limitation of actions. The running of the time period of limitation of actions shall be suspended:

- (1) if the filing of an action was prevented by an extraordinary and unforeseeable circumstance in the given circumstances (*force majeure*);

- (2) if the plaintiff or defendant is in the Armed Forces of the Russian Federation declared a war status;
- (3) by virtue of a postponement of performance of obligations (a moratorium) established by the Government of the Russian Federation on the basis of a statute;
- (4) by virtue of the suspension of the effect of a statute or other legal act regulating the respective relation.

If the parties have turned to a procedure provided by statute for deciding a dispute in an alternative dispute resolution procedure (mediation, conciliation, intermediary procedure, administrative procedure, etc.), the running of the time period of limitation of actions shall be suspended for the period established by a statute for the conduct of such a procedure, and, in the absence of such a time period, for six months from the day of the start of the respective procedure.

The running of the time period of limitation of actions shall continue from the day of termination of the circumstance that served as the basis for its suspension. The remaining part of the time period of limitation of actions, if it is less than six months, shall be extended to six months, or, if the time period of the limitation of actions is equal to six months or is less than six months, to the time period of limitation of actions. The time period of limitation of actions shall not run from the date of application to a court in the established manner for protection of a violated right for the whole time of conducting judicial protection of the violated right.

In case the court leaves the suit without consideration, the term of limitation of actions that began before the filing of the suit shall continue in the general manner, unless otherwise follows from the bases on which the conduct of judicial protection was terminated. If a court leaves a suit that was filed in a criminal case without consideration, the running of the time period of limitation of action that began before the filing of a suit shall be suspended until the entry into lawful force of the verdict-sentence by which the suit was left without consideration.

If after leaving a suit without consideration the unexpired part of the time period of limitation of actions constitutes less than six months, it shall be extended to 6 months with the exception of cases when the basis for leaving the suit without consideration was actions (or was inaction) of the plaintiff.

In exceptional cases, when a court recognizes a compelling reason for letting a time period of limitation of actions pass due to circumstances connected with the personality of the plaintiff (serious illness, helpless condition, illiteracy, etc.), a violated right of a citizen shall be subject to protection. The reasons for letting a time period of limitation of actions pass may be recognized as compelling if they took place in the last six months of the time period of limitation or, if the time period is equal to six months or less than six months, during the time period of limitation.

The time period of limitation of actions shall be interrupted by the taking of actions by the obligated person, thus evidencing the acknowledgment of a debt. After the interruption, the running of the time period of limitation of actions shall start anew; the time that passed before the interruption shall not be counted in the new time period.

8.6 *The Effect of Prescription*

The expiration of a time period of limitation of actions, which a party has requested to be applied, is a basis for the rendering of a decision by the court to dismiss an action. Unilateral actions directed at exercising a right (setoff, direct debiting of monetary funds, levying execution on pledged property in a non-judicial manner, etc.), for which the time period of limitation of action for protection of this right has expired shall not be allowed.

The Russian law does not recognize that the expiration of a limitation period extinguishes the right. That approach has the effect that a debtor or other obligated person that has performed an obligation after the expiration of the time period of limitation of actions shall not have the right to demand the performance back, even if at the time of performance this person did not know of the expiration of the limitation. If before the expiration of the time period of limitation of actions the debtor or other obligated person recognizes its debt in written form, the running of limitation of actions shall begin anew.

A quite substantial point of application of the rules on limitation of actions is the effect of expiration of limitation periods for the creditor's rights regarding the claims which are supplementary to its rights from the main contract. The Russian law provides that with the expiration of the time period of limitation of actions on the main claim the time period of limitation of actions shall be considered to have expired also for supplementary claims (e.g. interest, penalty, pledge, guarantee, etc.), including those arising after the expiration of the limitation of actions on the main claim. In case of missing the deadline for presenting for execution of an execution document on the main claim, the time period of limitation of actions on supplementary claims shall be considered to have expired.

Reference

Maggs PB, Zhiltsov AN (2017) Civil code of the Russian Federation as amended through February 7, 2017. Paperback edn., March 2017

Alexander Komarov is the Head of Department of Private International Law of the Russian Academy of Foreign Trade, Moscow since 1989. From 1993 to 2010 he has been the President of International Commercial Arbitration Court at the Chamber of Commerce and Industry of the Russian Federation (ICAC), which is the principal international arbitration institution in the Russian Federation. As a member of the Council on Legal Reform and Codification of Civil Law at the President of the Russian Federation he participated in the drafting of the new Civil Code of the Russian Federation. He is now a member of Scientific Consultative Council at the Supreme Court of the Russian Federation. He is a Member of the Governing Council of International Institute for Unification of Private Law (UNIDROIT). He was a member of the UNIDROIT Working Group to prepare the Principles of International Commercial Contracts. For many years he served as an expert to the Russian Federation Delegation at the United Nations Commission on International Trade Law (UNCITRAL). He is now an advisory member of the Governing Board of

International Council of Commercial Arbitration (ICCA). He is qualified as CIArb Fellow and Chartered Arbitrator and is listed arbitrator at a number of arbitration institutions in Central and East European countries. During more than three decades he had acted as arbitrator in numerous international proceedings in Russia and other countries.

Indian Report



Nilima Bhadbhade

Abbreviations

AIR	All India Reporter
ARBLR	Arbitration Law Reporter
FB	Full Bench
FC	Federal Court
HC	High Court
IA	Indian Appeals
ICA	Indian Contract Act 1872
Mah LJ	Maharashtra Law Journal
MIA	Moore's India Appeals
PC	Privy Council
QB	Queen's Bench
SC	Supreme Court
SCC	Supreme Court Cases
SCW	Supreme Court Weekly
Supp	Supplement

N. Bhadbhade (✉)
Pune, India
e-mail: nilima.bhadbhade@gmail.com

© Springer Nature Switzerland AG 2022
S. Mancuso and M. Bussani (eds.), *The Principles of BRICS Contract Law*,
Ius Gentium: Comparative Perspectives on Law and Justice 102,
https://doi.org/10.1007/978-3-031-00844-3_6

1 Introduction

1.1 *The Contract Law of India*

The Indian contract law belongs to the common law tradition. The Indian Contract Act of 1872 (referred in this chapter as the ICA) is applied to all contracts. It states the general principles applicable to all contracts, and also special provisions for contracts of indemnity, guarantee, bailment, pledge and agency. The general provisions are about formation of agreement, rules of offer and acceptance, conditions of validity, performance of promises, discharge of contracts, and the remedy of compensation. Separate legislation has been made for special contracts viz. sale of goods, partnership, carriage etc.

The ICA is not a complete code, and does not cover all aspects of contract law. To the extent it is silent, courts have laid down principles, often by reference to English law. Contract law therefore derives from the Act, and from principles laid down by the Supreme Court and the 24 High Courts located in State capitals.

The doctrine of stare decisis applies in India. Judgments of superior courts bind the subordinate courts that have original jurisdiction over most contract disputes. Principles enunciated by a High Court bind courts subordinate to it. It is possible that High Courts take different views about any aspect of contract law. The principles stated by the Supreme Court of India have a binding force throughout the territory of India.

1.2 *The Law Applicable to International Commercial Contracts*

The substantive rules or principles applicable to international commercial contracts are not codified, but recognised by case-law.¹ They are derived from the principles of English law on the subject.

Proper law: An international contract is governed by its proper law. The proper law is the system of law by which the parties intend it to be governed. The system of law expressly chosen by the parties is the proper law of contract, and will apply, unless the choice is not bona fide, or is opposed to public policy. In the absence of express choice, their intention can be inferred from the terms and nature of the contract, and other circumstances, viz. choice of law governing arbitration rules, or its venue, or choice of jurisdiction of the court of a particular country.

In the absence of express or implied choice, the court can derive the proper law objectively by determining what the parties would have intended had they thought about the matter when they made the contract. The court will consider factors such

¹ *National Thermal Power Corporation v Singer Company* AIR 1993 SC 998; *Dhanrajamal Gobindram v Shamji Kalidas* AIR 1961 SC 1285.

as the place where the contract was made (the *lex loci contractus*), the form and object of the contract, the place for performance (the *lex loci solutionis*), the place of business of the parties, choice of jurisdiction of a court of a particular country. The court will find the system of law to which the transaction has its closest and most real connection.

The proper law applies to all aspect of the contract: its validity, effect and interpretation. The proper law refers to the substantive principles of the domestic law of the chosen system and not to its conflict of law rules. The doctrine of *renvoi* is not applicable.

An Indian court can apply foreign law. Foreign law can be proved by opinion of experts in that law, or may be derived by the court with reference to the law and judgments of that foreign legal system.

Application of Conventions: India is not a party to the Convention on Contracts for the International Sale of Goods, the Convention on the Use of Electronic Communications in International Contracts, or the Convention on the Limitation Period in the International Sale of Goods.

1.3 The Forum and Procedures Governing Disputes Arising from International Commercial Contracts

The Indian procedural law will apply to any procedural issues in proceedings involving international commercial contracts. These include laws affecting jurisdiction of courts, procedures before courts, limitation and evidence.

Jurisdiction of courts: A suit for enforcement of contract, including an international commercial contract, can be filed in a civil court in India of the place where the defendant resides or carries on business, or where the cause of action arises—viz. the place where the contract is made, or is to be performed, or is to be paid etc. Special courts or tribunals have been set up for enforcing specific contracts, viz. commercial contracts,² recovery of dues to banks and financial institutions.³ Proceedings in special courts are faster than ordinary courts.

However, if the parties have chosen the jurisdiction of a foreign court, such choice will be respected. Such an agreement is neither affected by public policy, nor is it void under section 28 of the ICA being in restraint of the right of a party to file legal proceedings for enforcing his contract.

² The Commercial Courts, Commercial Division and Commercial Appellate Division of High Courts Act, 2015.

³ Debt Recovery Tribunals under the Recovery of Debts due to Banks and Financial Institutions Act 1993.

Where parties have chosen to approach a foreign court, an Indian court will stay any proceeding filed before it, thus forcing the plaintiff to approach the chosen court. However, the Indian court will continue to exercise jurisdiction if the plaintiff proves that it is just and proper to allow him to continue despite choice of foreign jurisdiction,⁴ viz., for reasons of balance of convenience, or meeting the ends of justice, viz. where the claim will exceed the expenses involved in pursuing proceedings in a foreign court,⁵ or where the bulk of evidence is located in India.⁶

Arbitration: The Arbitration and Conciliation Act 1996 that governs domestic and international arbitrations is based on the UNCITRAL Model Law on International Commercial Arbitration. It underwent very vital amendments in 2015⁷ following the agenda of the government of the 'ease of doing business'.

If the dispute involving an international commercial contract is subject to an arbitration agreement, and a party applies for referring the dispute to arbitration before or at the time of making his first statement of the dispute in the court, the court is bound to refer the dispute to arbitration.

Parties may agree to choose separate laws to apply to arbitration and the contract.⁸ The clause in arbitration about the rules applicable indicates the choice of law for arbitration and the contract.⁹

Parties are free to choose the law of arbitration of any legal system that will apply for resolving their dispute. They can choose also the seat of arbitration. The application of Indian arbitration law depends on the seat of arbitration.

Foreign awards resolving commercial disputes can be enforced in India directly if they are made in 48 convention countries notified by the Central government. Among BRICS countries, Russia and China are notified by the government for this purpose.

Limitation: If a suit is filed or arbitration commenced in India on an international commercial contract, it must be filed within the time limits stated in the Indian Limitation Act 1963. The Act also applies to arbitration proceedings, where the aggrieved party must request reference to arbitration within the time prescribed. But the rule of limitation in a foreign country, where the contract is made, may be set up as a defence to a suit filed in India if the rule has extinguished the contract, and the parties were domiciled in that foreign country during the period prescribed by that rule.¹⁰ The time for filing such a proceeding in a civil court (or in arbitration) in India is three years. The date from which the three years will reckon for various contracts is stated in the law of limitation (para 8.1).

⁴ *Lakshminarayan Ramniwas v Compagnia Genovese D'Esportazione* AIR 1960 Cal 545 (Calcutta HC).

⁵ *Far East Steamship Line v Union of India* AIR 1973 Mad 169 (Madras HC).

⁶ *Lakshminarain Ramniwas v N V Vereenigde Nederlandsche Scheepvaartmaatschappij* AIR 1960 Cal 45 (Calcutta HC).

⁷ With effect from 23 October 2015.

⁸ *Videocon Industries Ltd v Union of India* AIR 2011 SC 2040.

⁹ *Mury Exportation v D Khaitan & Sons* AIR 1956 Cal 644 (Calcutta HC).

¹⁰ Section 11 of the Limitation Act 1963.

Evidence: The Indian Evidence Act 1872 applies to all judicial proceedings filed in Indian courts involving international commercial contracts. The Act states the facts of which evidence can be given, the types of evidence—oral and documentary (including electronic evidence), the party on whom the burden of proof lies, and other rules of admissibility of evidence. These provisions are strict. Although the Act does not apply to arbitrations, the principles underlying these provisions will be followed. Thus, the rule against hearsay or the rule that the original documents must be produced unless its non-availability is explained, will be strictly applied in civil proceedings, but may not be insisted upon during arbitration.

Stamp duty: Agreements, contracts or transfers in writing (called instruments) are liable to pay stamp duty to the government. This is a tax, and a source of revenue to the government. Each State in India either has its own stamp law, or has made special amendments to the central stamp law: the Indian Stamp Act. Some commercial documents are governed by the central Indian Stamp Act.

Any instrument must be stamped at the time it is signed. Stamp duty on instruments coming into a State from outside India must be paid generally within three months after it is received within the State. An unstamped instrument is nevertheless a valid contract or transaction. Not paying stamp duty visits penalty, and also criminal liability if non-payment is deliberate.

1.4 The International Commercial Context: India's Main Trading Partners

China is India's largest trading partner in terms of exports and imports. Imports from China are the highest among its trading partners. The available data for 2020–21 is as follows in Tables 1 and 2.¹¹

Table 1 India's largest trading partners (2020–21)

	Country	Export		Import	
		In USD Million	% Share	In USD Million	% Share
1	China	21,187.15	7.26	65,212.25	16.53
2	United States of America	51,623.14	17.70	28,888.10	7.32
3	United Arab Emirates	16,679.54	5.72	26,622.99	6.79
	India's total exports and imports	291,808.48		394,435.88	

¹¹ Ministry of Commerce, Government of India. Visit <https://tradestat.commerce.gov.in/eidb/default.asp>.

Table 2 Trade of India with its BRICS partners (2020–21)

	Country	Export		Import	
		In USD Million	% Share	In USD Million	% Share
1	Brazil	4,244.94	1.45	3,015.99	0.76
2	China	21,187.15	7.26	65,212.25	16.53
3	Russia	2,655.52	0.91	5,485.75	1.39
4	South Africa	3,934.20	1.35	7,568.20	1.92
	India's total exports and imports	291,808.48		394,435.88	

2 Formation of Contracts

2.1 Formation: Overview

In Indian law, a contract is an agreement enforceable by law. Agreement between parties is essential element of a valid and enforceable contract. A party can show the existence of an agreement by proving the actual agreement, i.e. the parties' agreement over the terms that are certain, or are capable of being made certain. The formation of an agreement can also be proved by an accepted offer.¹² A party can show that he relied on the conduct of the other party showing an intention to be bound by contract.¹³

An accepted proposal is a promise. A promised or set of promises form an agreement. The proposal or its acceptance can be express, i.e. in words, or may be implied, viz., from conduct of parties. The proposal or its acceptance may be made orally or in writing.

Proposal: A proposal is an expression made by one person to another indicating his willingness be bound, with a view to obtaining the assent of the other person.¹⁴ It may be made by the person, or by his agent. It may be made to an individual, or to a group of persons, or to a class of persons, or to the world at large. The proposer must have an intention to be bound by the acceptance, and hence a proposal differs from an invitation to offer. It may be oral or in writing, or expressed by conduct. An advertisement is not an offer, but an invitation. Invitations to tenders, invitations to auctions, quotation for prices, enquiries for quotations, inviting orders are not offers.

Revocation of proposal: An offer can be revoked at any time before its acceptance is complete, and even if the proposal states that it shall be kept open for or will not be revoked before a time specified in the proposal. The proposer can prescribe a

¹² The ICA uses the word 'proposal' for an offer.

¹³ Under Section 3 of the Indian Contract Act, a proposal is communicated by an act or omission of the proposer by which he intends to communicate such proposal, or which has the effect of communicating it.

¹⁴ Section 2(a) of the ICA.

time for acceptance, after which it ends. If no time is prescribed, the proposal ends after a reasonable time. A proposal also ends if it is rejected, or if the other person makes a counter-offer, or on death or insanity of the proposer if it becomes known to the acceptor before his acceptance. The proposer can also prescribe the manner of acceptance, or that he will be bound only after he has received the acceptance. Any direction by the proposer that silence of the other person shall amount to acceptance, is ineffective.

Acceptance: An acceptance must be unconditional, and absolute, i.e., of all the terms of the proposal; else it is a counter-proposal. This is the ‘mirror-rule’. However, if the acceptor has not adhered to the manner of acceptance prescribed in the proposal, the acceptance is effective unless the proposer insists on the prescribed manner.

Communication of acceptance: Communication of acceptance of a proposal concludes the contract. The proposal can be accepted by the person to whom it is made. If the acceptance is sent by post, and presumably by email or any mode that is not instantaneous, the acceptance binds the proposer when posted or sent. An acceptance on the telephone binds the proposer when it reaches him. This rule also decides the place of making the contract, and hence the territorial jurisdiction of the court over any dispute arising from the contract. Thus, the contract is made where the proposer receives the acceptance where the acceptance is spoken on the phone; and the contract is made where the acceptor sends his acceptance if the acceptance is sent by post.

Parties can conclude their contract on the matters they have agreed, and may leave other matters to be concluded on further negotiation.

Form: A contract may be in any form: oral, writing, or in the electronic mode, unless formalities are prescribed by other laws. These formalities include requirements of writing, attestation (witnesses to signatures), or registration. If the terms of the contract are recorded in writing, such instrument becomes liable to payment of stamp duty.

The Constitution of India prescribes that contracts by the Central or State Governments must be in writing, made in the name of the President of India or Governor of that State, and signed by officers duly authorised for the purpose.¹⁵

2.1.1 Negotiation

Contracting parties are free to discuss and negotiate the terms and conditions of their transactions before they have agreed on all terms. These may be prolonged. Each party is able to make demands and counter-demands, to withdraw or change the terms originally proposed, without any obligation. When negotiations fail, there is no liability for breach of contract, or for failure to continue negotiations. Parties are

¹⁵ Article 299 of the Constitution of India.

free to withdraw from negotiations at any time without any liability.¹⁶ Indian law does not impose any obligations on parties to negotiate in good faith. 'Mere silence is not fraud'.¹⁷ All communications exchanged during negotiations do not bind parties as admissions.¹⁸

Parties can make agreement governing the scope or duration of negotiations, and make provisions for imposing obligations of good faith, or 'lock-in' (not withdrawing from negotiations for a stated period of time), or 'lock-out' (not negotiating with any other person for a stated period of time). They can also provide for consequences of breakdown of or withdrawing from negotiations, viz. return of amount.¹⁹

On failure of negotiations, other obligations might follow. The obligation of maintaining confidentiality of information²⁰ exchanged will be enforced, if made expressly; but it can also be implied. Confidential information given by one party to another during negotiations cannot be used for any purpose other than for negotiations. The obligation to maintain confidentiality continues even if negotiations have broken down.

When faced with evidence of prolonged negotiations, there is a difficulty in deciding whether parties have reached their agreement. The court is likely to hold that a contract is made if a party has given his performance under its terms.²¹ Each case will rest on its own facts. The court will consider what the parties wrote, their expression, its meaning, and their actions.²²

2.1.2 Integrity of Writing

Contracting practices show that parties incorporate merger clauses, entire agreement clauses and non-variation clauses in their written contracts.

There is no statutory provisions or any direct authority in Indian law that merger clauses or entire agreement clauses will be enforced. However, the parole evidence rule²³ will apply. If the document is intended to contain the complete terms agreed between the parties, they cannot give extrinsic evidence (oral or in writing) of any other statement that contradicts, adds or subtracts from the terms. The merger or entire agreement clause will be a strong evidence of such intention.

¹⁶ *Haji Mohamed Haji Jiva v E Spinner*, (1900) 24 Bom 510 (Bombay HC).

¹⁷ Explanation to Section 17 of the ICA.

¹⁸ Section 23 of the Indian Evidence Act 1872.

¹⁹ *SMV Agencies Pvt Ltd v Cross Country Heritage Hotel*, CS (OS) 281/2010 decided on 11 April 2013 (Delhi HC).

²⁰ Referred as 'NDA's: Non-disclosure agreements.

²¹ *Geo-Group Communications INC v IOL Broadband Ltd*, 2010 AIR SCW 209.

²² *Rickmers Verwaltung GmbH v Indian Oil Corporation* AIR 1999 SC 504.

²³ Section 91 of the Indian Evidence Act 1872: When the terms of a contract ... have been reduced to the form of a document, ... no evidence shall be given in proof of the terms of such contract ... except the document itself

Once the document containing the terms is proved, parties cannot set up any oral agreement or statement to add, contradict, vary or subtract from its terms.²⁴ This rule is routinely applied by courts. However, the rule is subject to a number of statutory exceptions. Parties can prove a separate oral agreement on which the writing is silent and not inconsistent with the contract; but the application of this rule depends on the degree of formality of the document. Parties can also prove a oral agreement constituting a condition precedent to an obligation, or a subsequent oral agreement modifying or cancelling the contract. Usages and customs not inconsistent with express provisions can also be proved.

A clause requiring any variation in writing will be enforced as one showing intention of parties, there being no specific statutory provision or direct authority in Indian law dealing with it. Without such clause, a written contract can be varied orally, unless writing is required by law. Even where the contract contains such a clause, if the promisor performs the promise in any manner or at any time prescribed by the promisee, or the promisee accepts performance from a third person, the promise is discharged.

2.1.3 Standard Terms

The ICA does not contain any special rules applicable to standard terms in contracts. Their validity is governed by general rules. A contract in standard form will be enforced even against a party who has signed it, but does not understand its language.²⁵

Where one party denies being bound by a standard term, especially a term excluding or restricting jurisdiction or liability, the party proffering such a term will have to show that it was specifically and adequately brought to the notice of the other party before the contract was made.²⁶

Between printed and hand-written terms on the same document that lead to an ambiguity, the intention in the latter will prevail.²⁷

The existence of agreement or its terms where parties have exchanged their own contract forms with each other in a the battle of forms will be analysed by applying the mirror-rule of the offer-acceptance analysis. Each modification suggested by one party will be a counter-offer. However, since the law recognises that offer or acceptance can happen by conduct, any the conduct of performance would amount of acceptance of the terms of the 'last' form that follows.

However, mandatory provisions in statutes enacted for protection of weaker parties, or for regulating business will override terms that conflict with such provisions. The provisions of the Consumer Protection Act 2019 that ensures for a consumer remedies for defective goods or services will apply despite clauses

²⁴ Section 92 of the Indian Evidence Act 1872.

²⁵ *Rameswar Nathany v Nurul Haq Choudhury* AIR 1949 FC 78 (Federal Court).

²⁶ *Mukul Dutta Gupta v Indian Airlines Corpn* AIR 1962 Cal 311 (Calcutta HC).

²⁷ *China Cotton Exporters v Beharilal Ramcharan Cotton Mills Ltd* AIR 1961 SC 1295.

excluding or restricting liability for defects in standard forms used in most consumer contracts.

2.2 *Formation: Specific Topics*

2.2.1 **Pre-contractual and Post-contractual Understandings and Agreements on Further Negotiation Between the Parties**

Memorandum of Understanding: The term ‘Memorandum of Understanding’ or MOU is used by parties as a term of common usage, but it has not been defined in Indian law. Its effect depends on the intention of parties as reflected from its contents. As the name suggests, it is a record of the understanding reached, and is expected to contain a broad statement of the agreement. It is a preliminary understanding reached by parties, and parties anticipate a later contract under the terms that are understood. But if its terms are certain enough to enforce, it can be enforced as a contract. Agreements styled as MOUs have been enforced by courts.

Despite being an broad understanding an MOU can contain terms agreed that can be enforced, viz., non-disclosure agreement, liability of preliminary expenses, reimbursement of expenses if further negotiations fail etc. To that extent, the MOU will be enforced.²⁸

An MOU that stipulates that the parties will negotiate further cannot be enforced, being in the nature of an agreement to agree.²⁹

Letter of intent (LOI): A letter of intent merely indicates a party’s intention to enter into a contract with the other party in future. A letter of intent is not intended to bind either party ultimately to enter into any contract.³⁰

Letters of intent will contain points of agreement. As the name suggests, these are letters that indicate an intention. Parties expect that a formal contract will happen later. Whether LOIs are binding depends on its terms. If it expressly indicates an intention not to be bound, or indicate further that negotiation are to happen, it is not a contract. If there is no express statement, its enforceability as a contract is a matter of the interpretation of the document, and to be ascertained from the intention of the parties, language of the agreement, nature of the transaction and all other relevant circumstances.³¹ If the LOI is acted upon for some time, the court is likely to hold that there exists a contract.³²

²⁸ *SMV Agencies Pvt Ltd v Cross Country Heritage Hotel*, CS (OS) 281/2010 dec on 11 April 2013 (Delhi HC) (A document titled ‘Basis of Negotiation’).

²⁹ *HG Krishna Reddy & Co v MM Thimmiah* AIR 1983 Mad 169 (Madras HC).

³⁰ *Dresser Rand SA v Bindal Agro Chem Ltd* AIR 2006 SC 871; *Rajasthan Co-op Dairy Federation Ltd v Maha Laxmi Mingrate Marketing Service Pvt Ltd*, (1996) 10 SCC 405.

³¹ *Dresser Rand SA v Bindal Agro Chem Ltd* AIR 2006 SC 871 (the letter merely provided that the offer will be kept open).

³² *Bhoruka Power Corpn Ltd v State of Haryana* AIR 2000 P&H 245 (Punjab and Haryana HC).

Letter of comfort: Letter of comfort is a document that indicates one party's intention to try to ensure that another party complies with the terms of a financial transaction without guaranteeing performance in the event of default. It suggests lack of contractual intention. Thus, a comfort letter may be written by a parent company to a lender giving comfort to the lender about a loan made to its subsidiary. Such a letter merely states a present fact relating to the parent company's intentions, and lacks of contractual intention.³³

Agreement to negotiate further with a particular party (a 'lock-in'), and the agreement not to negotiate with a third party (a 'lock-out'): No party can be compelled to continue to negotiate. There is no precedent in Indian law stating the enforceability of an agreement to negotiate with the other party, and the Indian law is expected to take a position that such agreements are too vague to enforce.³⁴ An agreement to negotiate with each other in good faith cannot be enforced. However, Indian law will recognise and enforce by an injunction an agreement not to negotiate with a third party until a specified period.

2.2.2 Electronic Contracting

The Information Technology Act 2000 follows the UNCITRAL Model law on Electronic Commerce. Section 10A of the Act gives legal recognition to the making of a contract in the electronic mode. It provides that proposals, acceptances, and their revocation, when expressed in electronic form, will not be deemed to be unenforceable solely on the ground that such electronic form or means was used for that purpose. Electronic form means any information generated, sent, received or stored in media, computer memory etc. However, some contracts that cannot be made in the electronic mode: negotiable instruments, powers-of-attorney, trusts, wills and contracts for sale or conveyance of immovable property.

Under this Act, any matter required by law to be in writing can be made available in electronic form. An electronic record is despatched when it enters a computer resource outside the control of the originator. It is received, (i) if the addressee has designated a computer resource when the electronic record enters the designated resource, and it is deemed to have been despatched at the place where the originator has his place of business, and (ii) if the addressee has not designated a computer resource, when the electronic record enters the computer resource of the addressee, and is deemed to be received at the place where the addressee has his place of business. If there is no place of business, the usual place of residence must be reckoned for the purpose. A company is deemed to have its place of residence at the place where it is registered.

³³ *United Breweries (Holding) Ltd v Karnataka State Industrial Investment* AIR 2012 Kant 65 (a mere recommendatory letter) (Karnataka HC).

³⁴ *SMV Agencies Pvt Ltd v Cross Country Heritage Hotel*, CS (OS) 281/2010 dec on 11 April 2013 (Delhi HC) (an agreement styled as 'Basis of Negotiation').

Section 4 of the ICA lays down the postal rule: that “communication of an acceptance is complete as against the proposer, when it is put in a course of transmission to him, so as to be out of the power of the acceptor”, and “as against the acceptor, when it comes to the knowledge of the proposer.” An acceptance sent by email squarely falls within this provision. If this provision were to apply to an acceptance sent by email, the contract is concluded when the email leaves the computer resource of the sender.

Another view is to apply to such correspondence the principles applied to communication through instantaneous modes of communication. In *Bhagwandas v Girdharlal*,³⁵ the Supreme Court departed from the postal rule while dealing with communication of acceptance on the telephone, and held that acceptance on the telephone is communicated when it is received by the offeror. It applied the principle adopted in the *Entores* case³⁶ in the English law for telex as a means of instantaneous communication. The importance of the rule lies not only to decide whether a contract has been made, but also the place where it is made. The court at the place where the contract is made will have jurisdiction to decide the matter. The Allahabad High Court has decided that acceptance is complete where it is received.³⁷ Until the question is settled by the Supreme Court, courts in other states are free to apply the postal rule in Sect. 4 or the instantaneous mode rule in the case of *Bhagwandas v Girdharlal*.

The time for which the offer will remain open is governed by the general law. The law does not provide for any time. The time will be governed by the terms of the offer, else it stands revoked on the lapse of reasonable time.³⁸ An offeror has an absolute right to revoke the offer even where he has promised not to revoke it, or has agreed not to withdraw it before a specified time, unless such promise is supported by consideration.³⁹

If the offer stipulates a period of time, time will run from the date the offeree receives the offer, unless the offer stipulates that time shall run from the date of the offer, or its transmission. There is no special rule for electronic mode of communication. Time limits are based on the despatch from or receiving electronic message into the computer resource, and not on actual retrieval of the message by the addressee.

An offer cannot be accepted since it lapses. Thus, if the email of acceptance does not reach the offeror while the offer is in force for reasons beyond the control of the offeree, the acceptance is ineffective. It is not necessary for the offeror to inform the offeree that it has been received after the offer has lapsed. Such purported acceptance will be a counter-offer. The time at which the electronic message reaches the offeror is discussed above.

A contract can be made as an automated transaction, i.e., a transaction made by computers without human intervention. The question whether an automated message can operate to create a contract is more a question of attribution, i.e., who will be

³⁵ *Bhagwandas Goverdhandas Kedia v Girdharlal Parshottamdas* AIR 1966 SC 543.

³⁶ *Entores Ltd v Miles Far East Corporation* [1955] 2 QB 327.

³⁷ *P R Transport Agency v Union of India* AIR 2006 All 23 (Allahabad HC).

³⁸ Section 6(2) of the ICA.

³⁹ *Visweswaradas Gokuldas v BK Narayan Singh* AIR 1969 SC 1157.

responsible for it. A transaction made by “an information system programmed by or on behalf of the originator to operate automatically” is attributed to its originator.⁴⁰

The Information Technology Act 2000 also enables use of electronic signatures. It also provides for the norms that such a signature should meet. Secure electronic signatures, viz. digital signatures, issued by Certifying Authorities under the Act have a presumption of integrity and genuineness under the evidence law.⁴¹ Where an electronic record is an agreement with electronic signatures, it is presumed that such electronic record was concluded by affixing electronic signatures of parties.⁴²

3 Validity of Contracts

This section deals with various issues that could affect the validity of a contract, even though the above-mentioned requirements for its formation, and more specifically for establishing agreement, have been met.

3.1 Validity—Overview

3.1.1 General Provisions on Validity

A contract is an agreement that can be enforced. To be enforceable, it has the following requirements which broadly follow the English law: (i) the parties must be competent, (ii) their consent to the contract must be free, (iii) the promise must have a ‘consideration’, (iv) the object and consideration are valid, and (v) it is not declared void by the ICA or any other law.⁴³ Except where consent is not free, the agreement without any of these requirements is void, i.e., not enforceable. Parties are not prevented by the contract law from performing them, unless any other law specifically prohibits or punishes performance.

Competency: Competency of individuals and other legal persons is declared in other laws. An individual is competent after completing 18 years of age,⁴⁴ and if he is of sound mind. The power of companies, societies, statutory bodies and governments⁴⁵ and like bodies to make contracts is stated in the statutes that create them.

Consideration: As a country with background of common law, a promise will be enforced if it is supported by consideration. Consideration is something that the

⁴⁰ Section 11 of the Information Technology Act 2000.

⁴¹ Section 85B of the Indian Evidence Act 1872.

⁴² Section 85A of the Indian Evidence Act 1872.

⁴³ Section 10 of the ICA.

⁴⁴ The Indian Majority Act 1875.

⁴⁵ Article 298 of the Constitution of India.

promisee, or any other person, has done or promised or forborne at the request of the promisor.⁴⁶ It may not necessarily be a quid pro quo between the parties; acts of third parties are valid consideration to support a promise. Indian law of consideration has special features. Firstly, past acts are valid consideration. Secondly, consideration need not be provided by the promisee, but by any other person. Thirdly, consideration need not be adequate, or equivalent to the performance enforced by the promisee. Consideration must be lawful. A promise to gift or donate is unenforceable, except if it is writing and registered between close relatives. Parties are not prevented from performing promises without consideration. When performed, they become completed gifts.

Intention to create legal relation: An intention to create legal relations is necessary, and is manifest in the definition of a 'proposal'. Such intention will be generally assumed in agreements of transactions involving commercial relations⁴⁷; but may not be assumed in an agreement in the context of family or social relations.

Possibility of performance: An agreement to do an act impossible in itself is void.⁴⁸ Performance of a promise will be considered impossible if it is impossible in the nature of things.

However, if the terms show that a party warranted the existence of continued existence of the subject matter, and undertakes to deliver or pay or perform in any event, he takes the risk of such performance not being possible, and cannot avoid liability for an initial impossibility. A contracting party who contracts to do something, takes the risk of the performance becoming difficult or impossible.

If the promisor knew or might have known that the promise is impossible or unlawful, while the promisee did not know, the promisor must compensate the promisee for non-performance.⁴⁹

3.1.2 Mistake, Fraud, Threats and Gross Disparity as Grounds for Avoidance

Parties are said to consent when they are *ad idem*, i.e., when they agree upon the same thing, and in the same sense, on all aspects of their transaction. If they have an apparent agreement, but are not *ad idem*, there is no agreement.

Free consent: Their consent must also be free. Elements that vitiate consent enumerated in the ICA are: coercion, undue influence, fraud, misrepresentation and mistake. Courts have been shy of recognising other factors that vitiate consent, viz. unconscionability and unfairness as affecting validity of a contract,⁵⁰ but these factors are

⁴⁶ Section 2(d) of the ICA.

⁴⁷ *Comr of Wealth-Tax v Abdul Hussain Mulla Muhammad Ali* AIR 1988 SC 1417.

⁴⁸ Para 1 of Section 56 of the ICA.

⁴⁹ Para 3 of Section 56 of the ICA.

⁵⁰ *Central Inland Water Transport Corporation Ltd v Brojo Nath Ganguly* AIR 1986 SC 1571.

relevant in the grant of discretionary reliefs like specific performance,⁵¹ injunction, rectification or cancellation.⁵²

Although a contract is valid even if the consideration is inadequate, that is not equivalent to the promise of the party enforcing the contract, inadequacy of consideration is an important factor considered by a court when one party challenges a contract for lack of free consent.

Mistake: An agreement caused by the mistake shared by both parties is void.⁵³ It is discovered to be void later. This is a mutual mistake, shared alike by all parties. Here the parties are agreed about the same thing in the same sense, but under an assumption which is false.⁵⁴ On the other hand, common mistake occurs when the parties misunderstand each other and are at cross purposes. Such mistake negates consent, because there is no agreement.

The mistake that nullifies the agreement must be one of an existing fact, and not of an expectation or a future event.⁵⁵ The fact must be essential to the agreement, and not collateral. It is essential that the party would not have contracted if he had realised his mistake. The agreement is void if the mistake is about the existence, substance or essence of the subject matter, rather than its quality or attributes; existence of the state of things that form the assumption; title or rights. There is no mistake where there exist reasonable grounds for belief, or where the facts could be easily verified.⁵⁶

Where the assumptions made by parties about circumstances affecting the agreement turn out false, the agreement must be interpreted to find whether they intended that neither party will be bound, or any one of them will be bound, or both will not be bound.⁵⁷

A contract cannot be avoided because parties made a mistake about any Indian law.

A self-induced mistake does not avoid a contract. A party cannot avoid a contract because he held an erroneous belief about any material aspect of the transaction,⁵⁸ or because his expectations were wrong. That is a unilateral mistake, i.e., mistake of one party. However, if a party to a contract causes the other party to commit a mistake, however innocently, or wilfully acquiesces in the other party's mistake, is equivalent to misrepresentation.⁵⁹

In cases where the parties have agreed clearly about the terms but there is mistake in recording it in the document such that the document does not convey the true meaning or reflect their true intention, and they have do not correct it, the court can

⁵¹ Since 1 October 2018, specific performance a general, rather than an exceptional, remedy, and is no longer discretionary. See para 7.1.2 below.

⁵² Reliefs granted under the Specific Relief Act 1963.

⁵³ Section 20 of the ICA.

⁵⁴ *ITC Ltd v George Joseph Fernandes* AIR 1989 SC 839.

⁵⁵ *Chandanmull Jhaleria v Clive Mills Co Ltd* AIR 1948 Cal 257 (Calcutta HC).

⁵⁶ *AP Kochudevassy v State of Kerala* AIR 1982 Ker 90 (Kerala HC).

⁵⁷ *ITC Ltd v George Joseph Fernandes* AIR 1989 SC 839.

⁵⁸ Unilateral mistake: Section 22 of the ICA.

⁵⁹ Section 18(3) of the ICA.

rectify the document.⁶⁰ A payment made under mistake can be ordered to be returned as a quasi-contractual obligation, even if the mistake is of one party, or one of law.⁶¹

An agreement affected by mutual mistake is later discovered to be so, and any person that has received any advantage under such agreement must restore it, or make compensation for it, to the person from whom he received it.⁶²

Ordinarily, a person signing a written contract cannot avoid it on the ground that he did not read it or understand it, or that it was in a language that he does not understand.⁶³ However, the doctrine of *non est factum* applies to written contracts. When a person signs a written contract, understanding it to be a document of a totally different nature, he can ask to set it aside not on the ground of fraud or misrepresentation that caused him to sign, but because it is a nullity, and hence void.⁶⁴

Fraudulent representation: A contract can be avoided if consent is caused by a false representation about a material fact that has been wilfully made with intention to deceive, or when not warranted by information of the maker, even though he believes it to be true.⁶⁵ Innocent misrepresentation gives no remedy, unless it has caused another to commit a mistake. An express warranty can impose liability for innocent misrepresentation.

It includes a breach of duty which even without intention to deceive, gains an advantage to the person committing it, if it misleads the other.

There is ordinarily no duty to speak. 'Mere silence is not fraud', unless there is duty to speak. This covers non-disclosure. A duty to speak arises when there is a relationship of confidence between the parties, and is deemed to exist in contracts of insurance. Active concealment is fraud.

Unjustified threats: Threats that amount to coercion vitiate consent. Coercion occurs in two situations:

- (i) committing or threatening to commit an offence under the Indian Penal Code 1868.⁶⁶ In view of this definition, threats to commit offences under other criminal statutes will not amount to coercion. Threats to commit acts that do not constitute offence do not affect free consent.
- (ii) detaining or threatening to detain any property to the prejudice of another: thus a release is vitiated if it is obtained by refusing to handing over property to its legitimate claimant. Although this is economic duress, the statement is narrow. Consent is not free only if property has been detained.

⁶⁰ Section 26 of the Specific Relief Act 1963.

⁶¹ Section 72 of the ICA.

⁶² Section 65 of the ICA.

⁶³ *Naba Kishore Lal Singh Deo v Panchanan Mahto* AIR 1930 Pat 601 (Patna HC).

⁶⁴ *Ningawwa v Byrappa Shiddappa Hireknrabar* AIR 1968 SC 956; *Dularia Devi v Janardan Singh* AIR 1990 SC 1173.

⁶⁵ Section 18 of the ICA.

⁶⁶ A comprehensive statute defining general offences in relation to property, human body, currency, etc.

The contract can be avoided if the consent is caused by coercion. It is not necessary to prove fear of any evil or damage. While threats to break a contract cannot affect consent, threats of filing false criminal prosecution amount to coercion.

Economic duress or threats do not vitiate consent. Courts have refrained from recognising new grounds vitiating consent. However, these will be relevant in the grant of discretionary reliefs, like injunction, affecting contracts.⁶⁷

Undue influence: A party whose consent is caused by undue influence can avoid the contract. Undue influence occurs when one party, standing in a dominating relationship with the other, uses his position to obtain an unfair advantage over the other. Such dominating position will arise where one holds a real or apparent authority over the other, or stands in a fiduciary relation with the other, or makes a contract with a person whose mental capacity is affected by age, illness or bodily or mental distress. Advice or persuasion that makes a person agree to do a thing is not undue influence.

The relative position of parties, economic disparity, inexperience of one party, unequal bargaining power or disparity in the advantage gained under a contract, are not relevant on the question of consent to contract, but are important factors considered by a court while granting or refusing discretionary reliefs.

Effect: An agreement caused by a mutual mistake is void. The agreement cannot be enforced, and the defendant can set up mistake as a defence in a suit for enforcing the contract. There is an obligation of restitution. The party that has received any advantage, must return it or compensate for it, to the party from whom he received it.⁶⁸ The victim can also ask, but need not, for a decree for cancellation of instrument.

Coercion, undue influence, misrepresentation and fraud make the contract voidable;⁶⁹ it is valid until avoided. The victim can opt to avoid the contract by communicating his decision to the other party. The victim of misrepresentation and fraud can also insist that the contract shall be performed, and he be placed in a position as if the representation were true. For example: *A* fraudulently informs *B* that *A*'s estate is free from encumbrance, and *B* buys the estate relying on the statement. The estate is subject to a mortgage. *B* can either avoid the contract, or may insist on its being carried out, and the mortgage-debt redeemed. The promisee can seek specific performance, or can also claim compensation.⁷⁰ The victim of fraud can claim damages for tort of deceit.

It is for the victim to rescind the contract, and not the court. Hence communicating the decision of rescission is enough, but the victim can also seek the remedy of rescission from the court.

Acts showing acceptance or affirmation of the contract defeat the right of rescission.

⁶⁷ *Dai-ichi Karkaria Pvt Ltd v Oil and Natural Gas Commission* AIR 1992 Bom 309 (Bombay HC).

⁶⁸ Section 65 of the ICA.

⁶⁹ Sections 19 and 19A of the ICA.

⁷⁰ *Sorabshah Pestonji v Secretary of State for India* AIR 1928 Bom 17 (Bombay HC); *RC Thakkar v Gujarat Housing Board* AIR 1973 Guj 34 (Gujarat HC).

The party rescinding the contract must restore the benefit under the contract. His inability to restore does not affect his right to avoid.

3.1.3 Illegality

An unlawful agreement is void, and cannot be enforced. An agreement is unlawful if.

- (i) it is forbidden by law, i.e., it violates a statute that prohibits it or makes it punishable, viz., where the transaction involves controlled goods and is made without permission;
- (ii) it would defeat the provisions of law, viz., it attempts to evade taxation laws, or to contract out of the benefits given by a statute;
- (iii) it involves injury to the person or property of another, viz. forming bidding rings, or
- (iv) the court regards it as immoral or opposed to public policy, viz., agreement to finance litigation.

Whether the agreement is lawful or not is determined by the proper law of contract. If the proper law is Indian law, the agreement will be void if it is unlawful for reasons mentioned above.

If the agreement is lawful by the proper law, Indian courts will refuse enforcement if (i) its performance is unlawful by the law of the country where it is to be performed,⁷¹ or (ii) if the agreement violates the public policy of India, especially if the agreement is to be performed in India. But an Indian court will be slow to invoke public policy in cases involving a foreign element.⁷²

Consequences of unlawfulness: The potential consequences of infringing mandatory rules depends on the source of the rule. Also, the extent to which unlawful agreement will be enforced essentially differs with each case because the severity or unlawfulness is not the same in each case.

The nature and effect of statutory prohibition varies. If the statute prohibits an agreement, it is void from the beginning, and will not be enforced. If a criminal statute punishes the making of an agreement, prohibition is implied, and the agreement cannot be enforced. In both these cases, the purpose of the prohibition or penalty must be seen. If the purpose is not prohibiting the transaction, but, for example, safeguarding revenue or maintaining law and order, the contract can be enforced. A statute meant for protection of a class of contracting parties might allow enforcement by such party.

A contract can be enforced if the unlawful part can be separated (see Sect. 3.2.3 below).

⁷¹ *Rabindra N Maitra v Life Insurance Corpn of India* AIR 1964 Ca1 141 (Calcutta HC).

⁷² *Rattanchand Hirachand v Askar Nawaz Jung* (1991) 3 SCC 67; *Renusagar Power Co Ltd v General Electric Co Ltd* AIR 1994 SC 860.

If an agreement is prohibited by law, both parties are expected to know the law, and neither party will get any remedy. Whether the obligation of restitution arises on an unlawful transaction is not clear, and different courts have taken different views. But a Court has the power to work out the equities and impose terms upon parties.⁷³ The court can grant a remedy to the party not aware of unlawfulness.⁷⁴

The Supreme Court has stated⁷⁵ that a party to an unlawful agreement can get relief in the following cases:

- (i) where the illegal purpose has not yet been substantially carried out before it is sought to recover the money paid or goods delivered in furtherance of it;
- (ii) where the plaintiff is not *in pari delicto* with the defendant;
- (iii) where the plaintiff does not have to rely upon the illegality to make out his claim.⁷⁶

A court can also grant a decree of rescission if the contract is unlawful for causes not apparent on its face, and the defendant is more to blame than the plaintiff.⁷⁷

An agreement prohibited by statute does not get legalised if the law prohibiting it is repealed.⁷⁸

An agreement to lend funds for litigation is not by itself opposed to public policy,⁷⁹ even if the lender seeks a share in the subject matter of litigation.⁸⁰ It will be unenforceable if it is inequitable and extortionate.⁸¹ Even where a court holds it against public policy, it can order recovery of money lent or expenses incurred, rather than the enforcing the promise agreed.⁸²

3.2 Validity—Specific Topics

3.2.1 Public Permission

Parties may agree to a condition precedent for formation of a contract. The contract is not formed and obligations do not arise until the contingency occurs. Such contingency affects formation of the contract.

⁷³ *Asaram v Ludheshwar* AIR 1938 Nag 335 (Nagpur HC: FB).

⁷⁴ *Janardhanan v Sreedharan* AIR 1985 Ker 199 (Kerala HC).

⁷⁵ *Sita Ram v Radha Bai* AIR 1968 SC 534; *Kedar Nath Motani v Prahlad Rai* AIR 1960 SC 213.

⁷⁶ *Surasaibalini Debi v Phanindra Mohan Majumdar* AIR 1965 SC 1364.

⁷⁷ Section 27 of the Specific Relief Act 1963.

⁷⁸ *Raptakos Brett And Co Pvt Ltd v Modi Business Centre (Pvt) Ltd* AIR 2006 Mad 236 (Madras HC); *Gh Mahd Matoo v Gh Rasool Sofi* AIR 2005 J&K 48 (Jammu and Kashmir HC).

⁷⁹ *Dara Shapurji v Askarai Begum* AIR 1954 Hyd 98 (Hyderabad HC).

⁸⁰ *Kunwar Ram Lal v Nil Kanth* (1893) 20 IA 112 (Privy Council).

⁸¹ *Kunwar Ram Lal v Nil Kanth* (1893) 20 IA 112 (Privy Council).

⁸² *Kunwar Ram Lal v Nil Kanth* (1893) 20 IA 112 (Privy Council); *Ratanchand Hirachand v Askar Nawaz Jung* AIR 1976 AP 112 (Andhra Pradesh HC); *Kamrunnisa v Pramod Kumar Gupta* AIR 1997 MP 106 (Madhya Pradesh HC).

In other cases, parties make a contract, but make its performance, or the performance of one or other party, dependent on the happening of a future uncertain event. These are 'contingent contracts' under the ICA.⁸³

The ICA makes special provisions for 'contingent contracts', i.e., the contracts the performance of which depends on the happening or non-happening of uncertain events.⁸⁴ Contracts in which performance is subject to permissions will be governed by these provisions. If performance is dependent on the happening of a future uncertain event, it can be enforced when the event happens. If the event becomes impossible, the contract 'becomes void'. When the contract becomes void, it can no longer be enforced.

Thus, where a promise must be performed if permission is obtained, it can be enforced when permission is obtained. It becomes void when permission is refused. The contract law does not make any provision who must apply for permission.

Obligation to obtain public permissions: There is no general provision in the law stating which party is responsible to obtain public permission. Parties can make express provision about the obligation for obtaining any public permission. Such obligation can be absolute, where one party undertakes to obtain such permission. If the permission is not obtained, the promisor will be liable to compensate.⁸⁵ It can also be contingent, that is to say, performance of the contract will depend on the obtaining of the permission. In such a case, if permission is not obtained, the contract will become void. Whether the obligation is absolute or contingent depends on interpretation of the contract.⁸⁶ Thus, where goods will be taken delivery 'as and when ... received from the mills', does not mean 'if and when'; it is an absolute obligation.⁸⁷ The language used by the parties might be interpreted as a stipulation of the time of performance.⁸⁸

If the obligation is contingent, there is no undertaking by either party that the event shall occur. However, a term may be implied that one party will use all reasonable efforts to bring about the event, without any absolute undertaking that the efforts would succeed.⁸⁹

Without express provision, such obligation can be implied from the other terms of the contract, or the nature of promises made under the contract.⁹⁰ Often, the obligation rests on the law under which permissions are required. Thus, import licence by implication must to be obtained by the importer, i.e., the purchaser of goods.

⁸³ The operation of the provisions relating to contingent contracts is not limited to permissions. It applies to any uncertain future event on which performance is dependent.

⁸⁴ Sections 32 to 36 of the ICA.

⁸⁵ *Chandnee Vidyawali Madden v CL Katyal* AIR 1964 SC 978.

⁸⁶ *Ganga Saran v Firm Ram Charon Ram Gopal* AIR 1952 SC 9.

⁸⁷ *Hurnandrai Fulchand v Pragdas Budhsen* AIR 1923 PC 54 (Privy Council).

⁸⁸ *Rojasara Ramjibhai Dahyabhai v Jani Narottamdas Lallubhai* AIR 1986 SC 1912.

⁸⁹ *Motilal v Nanhelal* AIR 1930 PC 287 (Privy Council); *Nathulal v Phoolchand* AIR 1970 SC 546.

⁹⁰ *Nathulal v Phoolchand* AIR 1970 SC 546; *Motilal v Nanhelal* AIR 1930 PC 287 (Privy Council).

The obligation for obtaining the permission is distinct from (i) the obligation to apply for it, (ii) the obligation to pursue procedures, and (iii) the expenses required to obtain it. Parties can decide that application be made by one party, and the procedure will be pursued by the other, or that the expenses will be borne by the other.

Parties can make express provisions about the time within which permission shall be sought, and must be obtained. If permission is not applied for within that time, the promisor will be liable for breach. If permission is applied for, but not obtained within the specified time, the contract will 'become void'.

If parties have not specified any time for permission, it is implied that the permission must be obtained within reasonable time.⁹¹

Parties may provide for the consequences of refusal of permission, whether the permission is required for validity of contract, or for performance; viz., refund of amount, reimbursement of expenses, or liquidated damages.

Else, the contract 'becomes void', i.e. it will not be enforced. There is no need to terminate the contract. All parties are automatically discharged. However, when any contract 'becomes void', the party that has received any advantage must return it or compensate it to the person from whom he received it.⁹²

3.2.2 Covenants in Restraint of Trade

An agreement in restraint of trade limits the freedom of one or all contracting parties to work or carry on their profession or business in some way.

Section 27 of the ICA provides agreements restraining any person from carrying out a lawful profession, trade or business of any kind is to that extent void. Unlike other legal systems, all such agreements are void under Indian law, whether the restraint is partial or absolute, and even if reasonable; unless they fall within statutory exceptions. The provision was enacted when trade in India was not developed, and needed protection. This absolute restraint has been heavily criticized as a very rigid rule. The Law Commission of India has recommended allowing restraint that is reasonable.⁹³

A restraint operating during the continuance of the contract is valid. The following restrictions are valid as not being in restraint of trade: (i) an employee shall not take up another employment during the term of his employment⁹⁴; (ii) a dealer or franchisee shall not deal in products other than those of a manufacturer or franchisor while he continues to be the dealer or franchisee.⁹⁵ A restraint operating after termination of the contract is void, even if necessary for protecting the legitimate interest of the

⁹¹ *HPA International v Bhagwandas Fateh Chand Daswani* AIR 2004 SC 3858.

⁹² Section 65 of the ICA.

⁹³ The Law Commission of India, Thirteenth Report, 1958, para 55.

⁹⁴ *Niranjan Shankar Golikari v Century Spg and Mfg Co Ltd* AIR 1967 SC 1098.

⁹⁵ *Gujarat Bottling Co Ltd v Coca Cola Co* AIR 1995 SC 2372.

promisee. A 'garden-leave clause' operating after the termination of employment was held void.⁹⁶

Such restraint is void if the contract (with international element or connection) is to be performed in India, even though it may be valid under the proper law.⁹⁷

Contracts between employers not to entice employees of each other are not affected by this restraint, because such clauses restrict parties, and not their employees.⁹⁸

Statutory exceptions recognise restraints. These are:

- (1) A party selling the goodwill of a business can agree with the purchaser of that business not to do similar business within specified period and within specified local limits so long as the purchaser carries on that business. This is valid if the court considers it reasonable, having regard to the nature of the business.
- (2) Restraints agreed between partners of a partnership not to do any other business while he is partner, or after ceasing to be partners or dissolution of the partnership firm.

The covenant for restraint of trade may be enforced by an order of injunction that restrains the breaching party, or by an order of damages. The burden of justifying the covenant in restraint of trade, or of proving reasonableness lies upon the person who so alleges.⁹⁹ Such clauses receive a narrow interpretation.¹⁰⁰

3.2.3 Severability

The ICA recognises the principle of severability. An agreement that is void as being in restraint of trade or restraint of legal proceeding is expressly void only 'to that extent'.¹⁰¹ Thus, the term in the contract that imposes such restraint is void, but the remaining contract will be enforced. If different clauses in an agreement are separable, the fact that one clause is void does not affect enforcement of the other clauses.¹⁰²

If the object or consideration of the contract is unlawful in part, and the lawful object or consideration of the agreement can be separated from the unlawful, the

⁹⁶ *VFS Global Services (P) Ltd v Suprit Roy* (2008) 3 Mah LJ 266 (Bombay HC).

⁹⁷ *Taprogge Gesellschaft mbH v IAEC India Ltd* AIR 1988 Bom 157 (Bombay HC); *Oakes & Co v Jackson* (1876) 1 Mad 134 (Madras HC).

⁹⁸ *Wipro Limited vs Beckman Coulter International* 2006 (3) ARBLR 118 Delhi (Delhi HC).

⁹⁹ *Hukmi Chand v Jaipur Rice and Oil Mills Co* AIR 1980 Raj 155 (Rajasthan HC).

¹⁰⁰ *Superintendence Co of India Pvt Ltd v Krishan Murgai* AIR 1980 SC 1717.

¹⁰¹ Sections 27 and 28 of the ICA.

¹⁰² *Dip Narain Singh v Nageshar Prasad* AIR 1930 All 1 (Allahabad HC: FB).

lawful part of the contract can be enforced.¹⁰³ Other provisions of the ICA also encourage severance, and enforcement of the lawful part.¹⁰⁴

If an agreement has resulted in a completed transfer, and the agreement is in part unlawful, the transfer can be split, and upheld in part. Thus, in a ‘ready forward’ contract in securities the ready part was enforceable, although the forward part of the contract was unlawful as prohibited.¹⁰⁵

In this exercise, the Court shall not write a new contract for the parties.¹⁰⁶

There will be no severance if the transaction is prohibited by statute, or it involves serious moral turpitude.¹⁰⁷

4 Interpretation of Contracts

4.1 Interpretation—Overview

Courts in India apply the ‘subjective’ test of interpretation. The purpose of interpretation is to ascertain the common intention of the parties at the time they made their contract. This task begins with the primary rule: that the meaning of any matter in a document must be ascertained from the document itself. This requires the court to gather intention from the meaning of the words being interpreted, because these are the words of their express intention. Oral evidence about their intention cannot be given. The Court may take the assistance of the dictionary, unless the meaning is too obvious.

Contextual approach: Although the language of the document might be plain, evidence can be allowed under Proviso 6 to Section 92 of the Indian Evidence Act 1872 to show in what manner the language of a document is related to existing facts. This is also a clear exception to the strict application of the parole evidence rule. This permits a Court to look at the language used by the parties in the context, i.e., the surrounding circumstances, in which it was used. Such contextual approach dates back to 1856, when the Privy Council held that “[d]eeds and contracts of.. India ought to be liberally construed”.¹⁰⁸ The approach is summed from this oft quoted statement¹⁰⁹:

¹⁰³ Section 24 of the ICA; *BOI Finance Ltd v Custodian* AIR 1997 SC 1952.

¹⁰⁴ Set of promises, one legal and other illegal: Section 57 of the ICA; Alternative promises, one legal and the other illegal: Section 58 of the ICA.

¹⁰⁵ Under the Securities Contracts (Regulation) Act 1956: *Bank of India Finance Ltd v Custodian* AIR 1997 SC 1952.

¹⁰⁶ *Kristodhone Ghose v Brojo Gobindo Roy* (1897) ILR 24 Cal 895 (Calcutta HC).

¹⁰⁷ *Asaram v Ludheshwar* AIR 1938 Nag 335 (Nagpur HC: FB).

¹⁰⁸ *Hunoomanpersaud Panday v Mussumat Babooee Munraj Koonweree* (1856) 6 MIA 392 (Privy Council).

¹⁰⁹ *Balkishen Das v W F Legge* (1899) 27 IA 58 (Privy Council).

... [the case must] be decided on a consideration of the contents of the documents themselves with such extrinsic evidence of surrounding circumstances as may be required to show in what manner the language of the document is related to existing facts.

This context might include the manner in which words in local languages are used, the background and capability of the parties, their knowledge about the business or the words used in the contract, and the nature of the transaction, and also whether the parties are businessmen or partners of a particular trade.

Thus, language in a commercial document will be read as ordinary men of prudence dealing in commercial matters would perceive it. A court will attempt to retain efficacy of the document, construe it broadly, attempt to give full effect to its terms, and will avoid interpreting any term as meaningless.¹¹⁰

Some contracts will be strictly construed: e.g., indemnity,¹¹¹ power of attorney,¹¹² agreement in restraint of trade.¹¹³

The extent to which extrinsic evidence can be given under the parole evidence rule is stated in Sections 91 and 92 of the Indian Evidence Act 1872. Section 91 provides that when the terms of a contract are contained in a document, no evidence can be given to prove those terms except the document itself. This applies where the document contains all terms agreed. Section 92 provides that once such document is proved, no oral statement or agreement can be proved to vary, contradict, substitute or add to its terms. However oral evidence can be given to show the context in which the language is used.

Resolving ambiguity: Factors outside the language of the document cannot be considered when the terms are clear. If the terms appear uncertain, they can be, made certain'.¹¹⁴ This clearly allows parties to give evidence of all circumstances which make terms clear and enforceable. Courts will also endeavour to interpret a contract so that it is valid, rather than invalid due to uncertainty.

Even by the rules of interpretation, in cases of ambiguity, the court can look at prior negotiations, contemporaneous conduct of parties, prior documents and communications, antecedent contracts, subsequent conduct, and all other 'surrounding circumstances'.

The document will be interpreted against the party who has prepared the document, or has put it forth. This principle of interpreting *contra proferentem* applies only in cases of ambiguity.¹¹⁵ When the language is clear, an exemption clause binds parties.¹¹⁶

¹¹⁰ *Dhanrajamal Gobindram v Shamji Kalidas & Co* AIR 1961 SC 1285.

¹¹¹ *State Bank of India v Mula Sahakari Sakhar Karkhana Ltd* AIR 2007 SC 2361.

¹¹² *Syed Abdul Khader v Rami Reddy* AIR 1979 SC 553.

¹¹³ *Superintendence Co of India Pvt Ltd v Krishna Murgai* AIR 1980 SC 1717.

¹¹⁴ Section 29 of the ICA.

¹¹⁵ *General Assurance Society Ltd v Chandmull Jain* AIR 1966 SC 1644.

¹¹⁶ *Bharati Knitting Co v DHL Worldwide Express Courier Division of Airfreight Ltd* AIR 1996 SC 2508.

Other canons of interpretation: Other practical rules or canons govern interpretation. A document must be construed as a whole, and by giving a harmonious construction to all provisions in the document. The name given to the document does not decide the true relationship between parties, and it must be determined from the recitals and all terms of the document.¹¹⁷

In case of inconsistency between the printed and the hand-written or manuscript matter, the court must first attempt to derive meaning from both; but if this does not provide an answer, the handwritten words prevail over the print.¹¹⁸ In other cases, conflict between two provisions that cannot be reconciled, the earlier will prevail over the later. Where one meaning renders the contract void and unenforceable, and another meaning does not, the latter will be preferred.

A Court can also correct wrong grammar or spelling, reject meaningless words, or words left in by mistake, or are immaterial.

Implied terms: The ICA provides for implied contracts, i.e. where offer or acceptance, or both, are not expressed in words, or are implied from conduct of parties. But it does not provide for implication of terms on matters that the parties have not expressly agreed. An Indian Court may refer to terms implied in the English law as a fact relevant to implying terms in a particular contract. Thus, where the contract does not state the place of payment, the ‘debtor must seek the creditor’.¹¹⁹

Courts will imply terms to supplement express terms, and to give full effect to the intention of the parties. Terms will especially be implied when the contract cannot work without them. Implying terms is a task different from interpretation, though a court might be required to construe one term before supplying the implied term.

Sources of implied terms are many:

- (1) Implied as a fact by courts in particular contracts for a class of contracts: Such terms will be implied for giving effect to the mutual intention of the parties at the time of making the agreement. A term may be implied to give business efficacy to the transaction. Thus, a term was implied in a CIF contract that the seller must procure an import licence to enable the buyer to clear goods from the port.¹²⁰ The court will also imply a term to cure an oversight. Courts have implied terms requiring one or the other party to bring permissions, when the parties had failed to make provision in express terms.¹²¹ Courts will also imply term that are “so obvious as would go without saying”, which are so obvious that the parties can be considered to have taken them for granted.¹²² Thus, if the contract does not state the price for goods sold, it can be calculated on the

¹¹⁷ *Narsingerji Gyanagerji v Panuganti Parthasaradhi Rayanim Garu* (1924) 51 IA 305 (Privy Council); *State of Gujarat v Variety Body Builders* AIR 1976 SC 2108.

¹¹⁸ *China Cotton Exporters v Beharilal Ramcharan Cotton Mills Ltd* AIR 1961 SC 1295.

¹¹⁹ *Soniram Jeetmull v R D Tata and Co Ltd* AIR 1927 PC 156 (Privy Council).

¹²⁰ *R V Narayanaswami Chetti v Soundararajan and Co* AIR 1958 Mad 43 (Madras HC).

¹²¹ *Motilal v Nanhelal* AIR 1930 PC 287 (Privy Council); *Nathulal v Phoolchand* AIR 1970 SC 546.

¹²² *Pragdas Mathuradas v Jeewanlal* AIR 1948 PC 217 (Privy Council).

basis of parties' previous course of dealings.¹²³ If goods for part of a lot stated in approximate quantity, and the goods delivered are less or more, price will be refunded or extra price paid.¹²⁴

Such implication is circumscribed by two important restrictions. Firstly, no term will be implied that is inconsistent with the express terms, or where the terms show that the parties intend to omit the proposed term, especially when they can be assumed to know the circumstances in which they would have agreed to state it expressly, and have not done so. The more formal the writing of the contract, the less willing will the court be to imply a term.¹²⁵ Secondly, the power to imply is confined, and a term will not be implied simply because it is reasonable.

- (2) Implied on the basis of custom or usage that applies to such contracts, classes of contracts, or the particular trade or industry. The ICA specifically preserves usages or customs that are not inconsistent with its provisions.¹²⁶ Oral evidence of customs and usages is also admissible as an exception to the parole evidence rule.¹²⁷
- (3) Implied on the basis of Codes affecting particular trades as part of mercantile usages and practices.¹²⁸ The Supreme Court has also recognised¹²⁹ the Uniform Customs and Practices for Documentary Credits¹³⁰ formulated by the International Chamber of Commerce as part of mercantile customs and practices although parties had not incorporated these in their contract.
- (4) Implied by statutes: Many special statutes affecting particular contracts expressly imply terms into such transactions.¹³¹ These are default terms, and will apply to all contracts of that category, unless there is a contrary express provision in the contract. The party relying on such terms need to plead it in the plaint. Such implication may be stated under different expressions: "implied condition", "implied warranty", "implied contract". "unless a different intention appears", "unless a contrary intention appears", or "unless expressly agreed".

¹²³ *HDFC Bank Ltd v Delhi Gymkhana Club Ltd* AIR 2013 Del 10 (Delhi HC).

¹²⁴ *Devi Prasad Khandelwal & Sons v Union of India* AIR 1969 Bom 163 (Bombay HC).

¹²⁵ Proviso 2 to Section 92 of the Indian Evidence Act 1872 requires the court to consider the degree of formality of the document.

¹²⁶ Section 1 of the ICA.

¹²⁷ Proviso 5 of Section 92 of the Indian Evidence Act, 1872.

¹²⁸ *Mcdermott International Inc v Burn Standard Co Ltd* 2006 AIR SCW 3276.

¹²⁹ *Federal Bank Ltd v V M Jog Engineering Ltd* AIR 2000 SC 3166.

¹³⁰ Article 1 of the Uniform Customs and Practices for Documentary Credits provides that these rules apply "when the text of the credit expressly indicates that it is subject to these rules".

¹³¹ E.g., The Sale of Goods Act, 1930, the Transfer of Property Act, 1882.

The party relying on an implied term must plead it in his plaint, and must prove all facts from which it can be implied. Such implication, and oral evidence leading to it, is accepted as an exception to the parole evidence rule.¹³²

Interpretation of standard terms: There are no statutory rules governing interpretation of standard terms. these are interpreted according to the rules of interpretation stated above. Exclusion clauses or limitation clauses, viz., those that limit jurisdiction or liability will be strictly construed, and in case of ambiguity, interpreted *contra proferentem*.

4.2 Interpretation—Specific Topics

4.2.1 The Language of the Contract

Language of the contract: There is no mandatory provision requiring that a contract be drafted in any particular language. Hindi is the official language. Out of the many languages used in India, twenty-one are recognised by the Constitution of India.¹³³

Business language is generally English. Business and commercial contracts, except those restricted in operation in any particular geographical area, will be made in the English language. State statutes might require translation in the respective local language where contracts must be filed before public authorities of that State.

Parties making contract versions in multiple languages can make express provision about the official version that will prevail over other versions.

Where a court must deal with a contract made in a language that the judge does not understand, the party relying on the contract will provide a correct translation. Translations can be certified by Notaries.

As a general rule, a party cannot avoid any condition in a contract because he did not understand the language. He is assumed to know and understand its contents.¹³⁴ It is for him to seek explanation of the contract terms in a language that he understands. But he can avoid any condition if he can show that he signed the contract on an assurance given by the other party. However, where the relationship between the parties is one of good faith, the burden will lie on the party relying on the document that it was explained to the other party in the language that the other party understands.¹³⁵

¹³² Provisos 2, 3 and 5 of Section 92 of the Indian Evidence Act 1872.

¹³³ The division of India into its States is primarily based on languages. Each of the 29 States will have its own official language.

¹³⁴ *Rameswar Nathany v Nurul Haq Choudhury* AIR 1949 FC 78 (Federal Court).

¹³⁵ *Krishna Mohan Kul v Pratima Maity* AIR 2003 SC 4351.

4.2.2 Recitals

Recitals: Recitals in a document that form the preliminary statement in the document setting out the purpose of the contract, the background and other important facts (but are not the terms of the contract) can be used to ascertain the intention of the parties, and to interpret the terms. They will naturally provide the context in which the document will be interpreted. But the recitals cannot control the terms, if the terms are clearly stated.¹³⁶

5 Content of Contracts

5.1 The Content of Contracts—Overview

5.1.1 Duties of Parties with Regard to the Operation or Performance of the Contract

It is implied that each party shall do all that is necessary to secure the performance of the contract.

Parties can make a provision in their contract about the extent to which cooperation of one party will be required for the performance by the other party. This may take form of ‘active’ participation, like giving approvals or permissions that will facilitate performance, or providing facilities for performance etc. Unless there is an obligation to cooperate so expressed in the contract, or implied into the contract, a party can remain passive, and need not do anything. He must, however, afford to the promisor reasonable facilities required for the performance, else the promisor is discharged.¹³⁷ He must also not prevent performance by the promisor, else the promisor can rescind the contract.¹³⁸

Indian law does not recognise a general obligation of good faith in the performance of a contract. Parties may incorporate such obligation expressly in their contract.

The ICA (general provisions) does not have any provision informing the nature of the promise. It merely provides: parties must perform, or offer to perform, their respective obligations.¹³⁹ The diligence of performance depends on the nature of obligation undertaken by the promisor. A party promising to take best efforts must take those efforts that a reasonable person would exert in those circumstances. An obligation to achieve a result is stricter, and must be fulfilled, in order to avoid liability

¹³⁶ *Commissioner of Income-tax Mysore v Shah Mohandas Sadhuram* AIR 1966 SC 15.

¹³⁷ Section 67 of the ICA.

¹³⁸ Section 53 of the ICA.

¹³⁹ Section 37 of the ICA.

for breach, or to claim performance of the other party. A promisee can rely on trade usage or custom in his expectation of the performance.

5.1.2 Obtaining Certainty with Regard to What Has to Be Performed and for What Period

Quality of performance: If the parties have not described the quality of the performance of a promise in their contract, the court will imply it from other circumstances of the contract, viz. the other terms of the contract, the price agreed, the degree of risk involved, and the qualifications and expertise of the promisor. If the subject matter of the contract is mentioned, but not its description, extrinsic evidence can be admitted to show the description. The agreement is not discarded as void for uncertainty, if it is 'capable of being made certain'.¹⁴⁰

The law relating to sale of goods is more explicit in its provisions. In a contract for sale of goods, there is no implied condition that goods shall be reasonably fit for the purpose of the buyer, unless (i) the buyer has, expressly or impliedly, made known to the seller the purpose, and has relied on the seller's skill or judgment, and it is the seller's business to sell such goods, or (ii) goods are sold under their trade name.¹⁴¹ A bailee must take as much care of the goods as he would of his own goods.¹⁴² An agent must conduct the business of agency with as much skill as possessed by persons engaged in similar business, and with reasonable diligence.¹⁴³ A carrier must exercise due diligence and care in the carriage of the consignment.¹⁴⁴

Price: Price is an important term of a contract. If parties have made provision for the amount and the mode and time for payment of price, price must be paid accordingly. Parties may fix the price at the time of their contract, or may agree about the manner in which it will be determined. The price may be left to be decided by a third party. In such a case, if the third party fails to fix the price, it will be decided by the court.

Failure by parties to state the price in their contract does not render the agreement void for uncertainty. If the amount of price is not expressed in the contract, a term can be implied for payment of reasonable price.¹⁴⁵ If the contract is for sale of goods,¹⁴⁶ the price can also be determined by course of dealings between the parties. If price is neither fixed, nor can it be determined, the buyer must pay a reasonable price. In case

¹⁴⁰ Section 29 of the ICA. Illustration (c) to the section states: "A, who is a dealer in coconut-oil only, agrees to sell to B 'one hundred tons of oil'. The nature of A's trade affords an indication of the meaning of the words, and A has entered into a contract for the sale of one hundred tons of coconut-oil".

¹⁴¹ Section 16 of the Sale of Goods Act 1930.

¹⁴² Section 152 of the ICA (Separate chapter about bailments).

¹⁴³ Section 222 of the ICA (Separate chapter about agency).

¹⁴⁴ Section 17 of the Carriage by Road Act 2007.

¹⁴⁵ *Gulabchand Gambhirmal v Kudilal Govindram* AIR 1959 MP 15 1 (Madhya Pradesh HC); *HDFC Bank Ltd v Delhi Gymkhana Club Ltd* AIR 2013 Del 10 (Dehli HC).

¹⁴⁶ Section 9 of the Sale of Goods Act 1930.

of dispute, the court will fix the price. If the terms of the agreement provide that the price shall be fixed by the valuation of a third party, and the third party fails to make the valuation, the agreement is avoided, however the buyer must pay the reasonable price for the goods delivered.

Termination of contract: Whether a contract which makes no provision for its termination is perpetual, or is nevertheless possible of termination by notice, depends on its interpretation. It is a question of ascertaining the common intention of the parties. Indian courts will avoid binding parties permanently to their contract, unless such intention is express, or can be clearly implied from the other terms of the contract.

If the contract provides for termination by notice but does not prescribe any notice period, it is implied that the notice shall be reasonable. Where the duration of a contract has not been specified, a term can be implied that the contract can be terminated by giving reasonable notice,¹⁴⁷ especially if it is a commercial transaction.¹⁴⁸ The Supreme Court has held that where a contract could not be terminated after a specific condition was fulfilled, could be terminated before that condition occurred.¹⁴⁹

5.1.3 Conditions

Contingent conditions, whether conditions precedent or conditions subsequent, may produce different effects:

- (i) **Conditions precedent preventing formation of a contract.** Parties make an agreement with a condition that the contract shall be conditional on another person joining as party to it. Where a promissory note is, by its express terms, payable on demand, that is at once, the obligation under the note attaches immediately. A collateral oral agreement not to make a demand until a specified condition is fulfilled, has the intention and effect of suspending the coming into force of that obligation which is the contract contained in that note.¹⁵⁰ Parties may agree that a compromise shall be effective only after all pending proceedings in courts are withdrawn.¹⁵¹ Any oral agreement attaching a condition precedent to attaching any obligation under any contract may be proved as an exception to the parole evidence rule.¹⁵² In such a case, a contract does not come into existence unless the contingency occurs.

¹⁴⁷ *Sohrabji Dhunjibhoy Medora v Oriental Government Security Life Assurance Co Ltd* AIR 1946 PC 6 (Privy Council); *T V Sundaresan v Provincial Government* AIR 1946 Nag 273 (employment) (Nagpur HC); *International Oil Co v Indian Oil Co* AIR 1969 Mad 423 (distributorship) (Madhya Pradesh HC).

¹⁴⁸ *Rajasthan Breweries Limited v Stroh Brewery Company* AIR 2000 Del 450 (Delhi HC).

¹⁴⁹ *Her Highness Maharani Shantidevi P Gaikwad v Savjibhai Haribhai Patel* AIR 2001 SC 1462.

¹⁵⁰ *Rowland Ady v Administrator General* AIR 1938 PC 198 (Privy Council); *Narandas Morardas Galiwala v S P A M Papammal* AIR 1967 SC 333.

¹⁵¹ *Niranjan Samal v Tirilochan Kuar* AIR 1956 Ori 81 (Orissa HC).

¹⁵² Proviso (3) to Section 92 of the Indian Evidence Act 1872.

Whether an acceptance made 'subject to formal contract' concludes the contract, or the agreement becomes legally binding only after signing formal document, depends on the intention of the parties. In deciding whether a contract is a concluded contract or not, the essential question is to find out whether the formal document is of such a nature that it was the very condition of the contract or whether it was commemorative of the evidence on the point.¹⁵³

- (ii) ***Performance or liability of one party or both parties is dependent*** on the happening or non-happening of a specified uncertain event, e.g. a contract for transfer 'subject to permission' of an authority, or an insurer's promise to pay policy amount. Where parties have made the performance of any promise dependent on the happening any uncertain future event, the performance can be enforced only after the event happens. If the event becomes impossible, the contract becomes void, i.e., it is rendered unenforceable. Thus a guarantor is liable only if the principal debtor commits default in payment of his debt. A sale that cannot happen without permission will be completed only after permission is granted. If the permission is refused, the contract cannot be enforced. If parties have prescribed a time for the happening of the event, and the event does not occur within that time, the contract becomes void. Parties can also agree that if an uncertain event occurs, the contract is discharged. If the condition is contingent on the happening of an uncertain future event, these are 'contingent contracts'.¹⁵⁴ Such condition may be subject to an event which is dependent on the will of a person, e.g. a contract to purchase shares being made conditional on the purchaser being appointed sole agent by the company.¹⁵⁵

Such conditions may be express or implied. Thus, a contract between a tenderer and his sub-contractor executed in anticipation of acceptance of tender is contingent on the tender being accepted.¹⁵⁶

Whether a condition agreed between the parties is a contingent condition or an absolute obligation is a matter of interpretation.

- (iii) Parties may provide for the discharge of any contractual obligation on the happening of a contingency within a particular time. Thus an agreement for purchase of property may be subject to approval of title by the purchaser's lawyer.¹⁵⁷ This is a concluded contract with a condition.

¹⁵³ *Harichand Mancharam v Govind Luxman Gokhale* AIR 1923 PC 47 (Privy Council); *Hukum Chand v Ram Bahadur Singh* AIR 1933 PC 156 (Privy Council).

¹⁵⁴ Chapter 3 of the Indian Contract Act 1872 states all provisions relating to contingent contracts.

¹⁵⁵ *Jaunpur Sugar Factory Ltd Re* AIR 1925 All 658 (Allahabad HC).

¹⁵⁶ *UP Rajkiya Nirman Nigam Ltd v Indure Pvt Ltd* AIR 1996 SC 1373.

¹⁵⁷ *Panem Venkanarayana Sastry v Rajupalli Chinna Yella Reddy* AIR 1959 AP 256.

5.2 *The Content of Contracts—Specific Topics*

5.2.1 Warranties

Indian law recognises the distinction between conditions and warranties, although the ICA does not make any express provision.¹⁵⁸ A condition is a statement of fact, or a promise, which forms an essential term of the contract. A warranty is a less important term that does not entitle the innocent party to treat the contract as repudiated, but only gives him a claim for compensation. Whether a term agreed is a condition or a warranty is a matter of interpretation. Whether a condition is contingent¹⁵⁹ or of absolute performance is also a matter of interpretation.¹⁶⁰ The interpretation of a particular term will tell whether it is a present promise to be performed at a later date, or a promise that creates no present obligation and is to be performed only on happening of a contingency.¹⁶¹

Indian law also recognizes the distinction between a representation and a warranty, the latter being a term of the contract.¹⁶² A representation merely induces the representee to enter into the contract. A warranty is a contractual promise that states that a fact is true or that a state of affairs exists. If it is breached, the other party is entitled to remedies for breach. If it warranty is truly a condition, i.e. the basis of the contract as in the case of an insurance contract, the aggrieved party can end the contract. In case of breach, the aggrieved party can ask for compensation, whether the term broken is a warranty or a condition. When made a warranty, the party stating the fact is liable even if the statement is made inadvertently and without fraud.

Whether a statement in a contract amounted to a representation or a term would be a matter of construction of that statement; however parties' express classification in the contract will be relevant in deciding the effect of the statement. There is no judgment of any court of record¹⁶³ that provides rules or principles for such construction. In a given case, and Indian court is likely to follow the English law and consider the following features: how important is the truth of the statement, the time that has elapsed between the statement and the making of the contract, whether the party making the statement in a better position to know the truth of the statement than the other party. In final analysis, the court will consider whether parties intended to impose contractual liability for accuracy of the statement.

The Sale of Goods Act 1930 states implied conditions and warranties in a contract of sale of goods. It describes a warranty thus: "A warranty is a stipulation collateral

¹⁵⁸ They are expressly defined and stated in the Sale of Goods Act 1930.

¹⁵⁹ Chapter 3 of the ICA provides for contingent contracts and their resolution.

¹⁶⁰ *Ganga Saran v Firm Ram Charan Ram Gopal* AIR 1952 SC 9; *Hurnandrai Fulchand v Pragdas Budhsen* AIR 1923 PC 54 (Privy Council); *Navnitlal & Co v Kishanchand & Co* AIR 1956 Bom 15 (Bombay HC).

¹⁶¹ *Jethalal C Thakkar v RN Kapur* AIR 1956 Bom 74 (Bombay HC).

¹⁶² *All India General Insurance Co Ltd v S P Maheshwari* AIR 1960 Mad 484 (Madras HC).

¹⁶³ Supreme Court or High Court, the principles of whose judgments are binding on subordinate courts.

to the main purpose of the contract, the breach of which gives rise to a claim for damages but not to a right to reject the goods and treat the contract as repudiated".¹⁶⁴ Whether a stipulation in a contract of sale is a condition or a warranty depends in each case on the construction of the contract. A stipulation may be a condition, though called a warranty in the contract.¹⁶⁵ Conditions are implied that the seller has the right to sell the goods, that goods sold by description or sample shall correspond the description or to the sample.¹⁶⁶ If goods are purchased from a seller who deals in the goods of that description, there is an implied condition that goods are fit for the buyer's purpose (if the purpose is made known to the seller), and that the goods are of merchantable quality.¹⁶⁷ There are implied warranties that the buyer shall enjoy quiet possession of the goods, and that the goods are free from any charge or encumbrance.¹⁶⁸

5.2.2 Indemnification

An indemnity clause is one under which the indemnifier undertakes an original and independent obligation to pay for the loss or liability which the indemnity-holder has incurred or suffered. The obligation to indemnify may arise out of a contract of indemnity, express or implied, or from an obligation resulting from the relation between the parties, or by statute.

The obligation to indemnify can arise in many situations. A contract of indemnity under the ICA, which is one situation, is a promise of one party to save the other party from loss caused by the conduct of the promisor, or of any other person, e.g. a contract to indemnify against the consequences of any proceedings which a third party might take against the indemnity-holder. An indemnity may be given against losses caused by events, viz. in insurance contracts.

A contract of indemnity may be implied. Where a seller transfers a property to a purchaser with a direction to the purchaser to pay off a third person, a contract of indemnity may be implied.¹⁶⁹

The obligation to indemnify may arise from a legal or equitable duty to indemnify in a particular set of circumstances. Thus, where X does something at the request of Y, which act in itself is not manifestly tortious to the X's knowledge, and such act injures the rights of Z, X is entitled to indemnity from Y.¹⁷⁰

¹⁶⁴ Section 12 of the Sale of Goods Act 1930.

¹⁶⁵ Section 12 of the Sale of Goods Act 1930.

¹⁶⁶ Sections 14(a) and 16 of the Sale of Goods Act 1930.

¹⁶⁷ Section 16(1) and (2) of the Sale of Goods Act 1930.

¹⁶⁸ Section 14(b) and (c) of the Sale of Goods Act 1930.

¹⁶⁹ *Tilak Ram v Surat Singh* AIR 1938 All 297 (Allahabad HC:FB); *Mehdalunnissa Begum v Halimatunnissa Begum* AIR 1939 Pat 194 (Patna HC); *Kaliyammlal v Kolandavela Goundar* AIR 1918 Mad 1135 (Madras HC).

¹⁷⁰ *Secretary of State v Bank of India* AIR 1938 PC 191 (Privy Council).

The right to indemnity is also given by statutes dealing with particular transactions. Consignors are liable to indemnify carriers against losses, damage or expenses caused by incorrect or incomplete particulars and statements furnished by the consignors.¹⁷¹ Liability to indemnify arises among partners, in favour of agents or employees, and many other relationships.

An indemnifier is ordinarily called upon to meet the claim after the indemnity-holder has actually suffered actual loss. However, “if the indemnified had incurred a liability and that liability is absolute, he is entitled to call upon the indemnifier to save him from that liability and pay it off”.¹⁷² This principle finds important application in the refusal of courts to stop payments on performance guarantees issued by banks.

The scope, extent and limit of liability under an indemnity depends on the nature and terms of the contract.

6 Performance of a Contract

6.1 *Performance of a Contract—Overview*

6.1.1 Performance in General

The general principle that parties must perform or offer to perform their respective promises requires parties to perform their promise at the time agreed. If no time is specified for performance of any promise, that promise must be performed within reasonable time. What is reasonable time is a question of fact in each case. However, if no time is specified for repayment of loan, it is repayable forthwith.

If time is specified for any promise, and that promisor fails to perform it at that time, the promisee is entitled to compensation for non-performance. Such failure does not end the contract; and if the promisor offers performance after the specified time, the promisee is bound to accept the performance, else be liable for compensation for non-acceptance. It is important that the promisee should assert his right for compensation when he receives the delayed performance for the reason mentioned below.

The promisee has the right to terminate the contract for the promisor's failure to perform on specified time, only if it appears to be the intention of parties that time is of the essence of the contract, which is a fact to be decided with reference to all facts and circumstances of the case. These factors are: express provision to that effect in the contract, the nature of subject matter, the purpose of making the contract, and all

¹⁷¹ Clause 10(2) of Pt III, ch I of the Rules in the Second Schedule of the Carriage by Air Act 1972; Indian Carriage of Goods by Sea Act, 1925, schedule, art. III, entry 5; Multi-Modal Transportation of Goods Act, 1993, s. 12(2); Railways Act, 1989, s. 64.

¹⁷² *Gajanan Moreshwar Parelkar v Moreshwar Madan Mantri* AIR 1942 Bom 302 (Bombay HC); *Profulla Kumar Basu v Gopee Bullabh Sen* AIR 1946 Cal 159 (Calcutta HC); *Ramalingathudayan v Unnamalai Achi* AIR 1914 Mad 655 (Madras HC); *Abdul Majeed v Abdul Rashid* AIR 1936 All 598 (Allahabad HC); *Chunibhai Patel v Natha Bhai Patel* AIR 1944 Pat 185 (Patna HC).

other circumstances. Over time, courts have categorised contracts in which time is or is not presumed to be of the essence. Generally, time is of the essence in commercial contracts for promises to deliver goods, or perform services, but not for promises to make payment.¹⁷³ In contracts of building construction, or transfers of immovable property, time is presumed not to be of essence.

The decision to terminate the contract is tricky, because the court before which such question will be carried might not support the termination on consideration of above factors. Promisees are therefore well advised to give a reminder or opportunity to the promisor about the performance.

Moreover, if indeed time is of the essence, and the promisee has not terminated the agreement, the promisee cannot refuse to accept performance tendered by the promisor. If he does accept it, he loses his right of compensation unless he has asserted his claim while accepting performance.

Unless agreed otherwise, each party must bear the cost of his own performance.

Reciprocal promises: When both parties have outstanding promises at the time of making the contract, these are reciprocal promises. The parties can provide whether these are to be performed simultaneously, or in a specified order. Reciprocal promises in entire contracts are independent. In other transactions, performance of promises by a party may be dependent on the other party's promises. The question whether the promises are dependent or independent is a question of construction.

Where promises are to be performed simultaneously, neither party need perform, unless the other is ready and willing to perform his promise. This does not require the other party to tender performance, it is sufficient if readiness and willingness exists. Thus, in a claim for damages for non-delivery, the plaintiff has to show that he is ready and willing, and his capacity to pay or a reasonable preparation for securing the purchase price.¹⁷⁴ Nor is it necessary for a seller of goods to have them in his possession; it is enough if he has such control of them that he can get them delivered.¹⁷⁵

Where the promises are dependent, and the order of performance is expressly fixed by the contract, promises must be performed in that order. If it is not expressly fixed, they must be performed in that order which the nature of the transaction requires: e.g., work must be completed before claiming payment.¹⁷⁶

If the promisor of the first promise in such order fails to perform, the promisor of the second promise in the order need not perform, and can claim performance

¹⁷³ In contracts for sale of goods, Section 11 of the Sale of Goods Act 1930 provides: Unless a different intention appears from the terms of the contract, stipulations as to time of payment are not deemed to be of the essence of a contract of sale. Whether any other stipulation as to time is of the essence of the contract or not depends on the terms of the contract.

¹⁷⁴ *Dina Nath Dutt v Mahavir Gupta* AIR 1958 Punj 289 (Punjab HC); *Ganesh Das-Ishar Das v Ram Nath* (1927) 9 Lah 148 (Lahore HC).

¹⁷⁵ *Firm Kanwar Bhan-Sukha Nand v Firm Ganpat Rai-Ram Jiwan* AIR 1926 Lah 318 (Lahore HC).

¹⁷⁶ *JG Hashman v Lucknow Improvement Trust* AIR 1927 Oudh 616 (Oudh HC).

from the promisor of the first promise. The right to terminate arises only if the non-performance amounts to repudiation of the entire contract.

If one party prevents the other party from performing the promise, the party prevented need not perform his promise, and can rescind the contract, and claim compensation.

Partial performance: ICA makes an express provision that a tender of performance must be such that the person to whom it is made must be able to ascertain that the tenderer is able to do the whole of what he is bound to do.¹⁷⁷ Thus the tender is valid if it can assure the promisee that the whole will be performed.

If the contract is for sale of goods, the buyer of goods is not bound to accept delivery in instalments unless it is otherwise agreed.¹⁷⁸

A debtor must tender the full amount of debt; if he tenders less, the creditor may, but is not bound to, accept the part payment as payment on account. A creditor can decline to receive payment in instalments, and if he does decline, the interest on the amount does not stop.¹⁷⁹

In all cases, the promisee may accept delivery or payment before or after the specified time.

Place of performance: The proper place for performance is the 'place at which the promise ought to be performed'.¹⁸⁰ Thus the place may be expressly agreed, or may be implied from the transaction. However, it is an accepted rule that for the payment of money, the debtor must seek the creditor.¹⁸¹

If parties have not fixed a place for performance, the promisor must apply to the promisee to fix the place, and perform it at that place.¹⁸²

In a contract for sale of goods, the parties may agree whether it is for the buyer to take delivery from the seller or the seller is to send the goods to the buyer. If there is no agreement, the place of delivery is the place where the goods are at the time of sale, and if they are to be manufactured, where they are manufactured.¹⁸³

Payment of amounts: There is no provision in any law requiring payments in any particular form. Parties can agree about the mode of payment, the currency of payment and exchange rate. Payment must be offered in the mode expressly or impliedly authorised by the contract. But if the promisee prescribes another manner, mode or time of payment, and the promisor opts to perform it as directed, the promisor is discharged irrespective of the terms of the contract. Payment can also be made by transfer entries.¹⁸⁴

¹⁷⁷ Section 38(2) of the ICA. Tender of performance is called 'offer to perform' under the ICA.

¹⁷⁸ Section 38(1) of the Sale of Goods Act 1930.

¹⁷⁹ *Behari Lal v Ram Ghulam*, (1902) 24 All 461 (Allahabad HC).

¹⁸⁰ Section 47 of the ICA.

¹⁸¹ *Soniram Jeetmull v R D Tata and Co Ltd* AIR 1927 PC 156 (Privy Council).

¹⁸² Section 49 of the ICA.

¹⁸³ Section 36(1) of the Sale of Goods Act 1930.

¹⁸⁴ *Narayandas Shreeram Somani v Sangli Bank Ltd* AIR 1966 SC 170.

Following the policy and move of the government of restricting circulation of cash, and provisions imposing disabilities¹⁸⁵ and penalties¹⁸⁶ attaching to cash payments, cash no longer remains the acceptable mode of payment. Moreover, no person should accept an amount of Rs. 2,00,000 or more, except by an account payee cheque or bank draft or through the electronic clearing system:

- (i) In aggregate from one person in a day.
- (ii) In respect of a single transaction.
- (iii) In respect of transactions for one event or occasion from a person.
- (iv) Cash payment exceeding this limit of Rs. 2,00,000 attracts a penalty equal to the amount received.

A creditor may refuse to accept a cheque or negotiable instrument since payment is not immediate. A demand draft guarantees payment and is considered as equivalent to payment in cash.¹⁸⁷ Specific types of electronic payment transfers funds immediately to the use of the creditor. If a cheque or other negotiable instrument is tendered for payment, whether under the contract terms or not, it is presumed that the creditor has accepted it as a conditional or qualified payment. This means that if the cheque or instrument is dishonoured, consequences arise as if no payment was made.

Money tendered must be in Indian Rupees, unless it is payable in another currency under the terms of the contract. Receiving amounts or making payments in foreign currency will require compliance of foreign exchange control regulations. Payment in currency is exchanged at the rate of exchange at the time of payment of debt.¹⁸⁸

An Indian court can pass a decree for an amount expressed in foreign currency, making the payment subject to the permissions under foreign exchange regulations.¹⁸⁹

Appropriation of payments: Where a debtor owes several distinct debts to the creditor, and makes payment, the rules of appropriation of payments apply.¹⁹⁰ If the debtor intimates to the creditor, expressly or by implication, the particular debt to which the payment shall be applied, and the creditor accepts the payment, it is applied to the debt so specified. If the debtor has not so intimated, the creditor may apply the payment to any lawful debt, even if it is barred by limitation. If neither the debtor nor the creditor appear to have made such appropriation, the payment is applied to debts in order of time, even if barred by limitation.

¹⁸⁵ Under Section 40(A)3 of the Income Tax Act 1961, Assessee of income-tax who carry on business are not allowed deduction of any cash expenditure exceeding Rs. 10,000.

¹⁸⁶ Under Section 269ST of the Income Tax Act 1961, no person should accept an amount of Rs. 2,00,000 or more, except by an account payee cheque or bank draft or through the electronic clearing system: (i) In aggregate from one person in a day, or (ii) In respect of a single transaction, or (iii) In respect of transactions for one event or occasion from a person. Cash payment exceeding this limit of Rs. 2,00,000 attracts a penalty equal to the amount received.

¹⁸⁷ *Sohan Singh v Sarwan Singh*, (1996) 5 SCC 759.

¹⁸⁸ *Renusagar Power Co Ltd v General Electric Co Ltd* AIR 1994 SC 860.

¹⁸⁹ *Forasol v Oil and Natural Gas Commission* AIR 1984 SC 241.

¹⁹⁰ Sections 59–61 of the ICA.

Amount received by the creditor towards a single debt is first applied to the interest, and then to the principal amount.

6.1.2 Hardship

Hardship that makes performance difficult or expensive, does not excuse performance in the Indian law, unless the performance has become impossible because of unforeseen supervening impossibility.¹⁹¹ The word ‘impossible’ is not restricted to physical or literal impossibility of performance, but also covers cases where the performance becomes impracticable and useless from the point of view of the object and purpose which the parties had in view.¹⁹² If performance becomes impossible, the contract ‘becomes void’, and is automatically discharged without need of termination.

Hardships like non-availability of raw material, transport or facilities, strikes and lockouts or other labour problems, increase in prices or inflation, or any other factor which the promisor could have foreseen, do not discharge performance.

Hardship affected the grant of the discretionary relief of specific performance, where grant of relief would involve hardship on the defendant which he did not foresee, and its non-performance would not involve such hardship on the plaintiff.¹⁹³ Since 1 October 2018, specific performance is no longer an exceptional or discretionary remedy, and is available to any plaintiff who seeks it.¹⁹⁴

7 Non-performance (Breach of Contract)

7.1 *Non-performance (Breach of Contract)—Overview*

7.1.1 Non-performance in General

Breach under Indian law. Indian law does not classify breaches into types; however consequences of breach can differ. Some kinds of breach are as follows:

- (i) defective performance, i.e., failing to meet the standard of performance agreed,
- (ii) doing an act which the promisor has promised to abstain from doing,
- (iii) failure to perform on time,
- (v) refusal to perform, i.e., repudiation of obligations,
- (vi) preventing the other party from performance.

Right to rescind for breach. While each of above entitles the promisee to claim damages (called compensation in the ICA), the promisee can rescind (terminate) the

¹⁹¹ Section 56 of the ICA.

¹⁹² *Satyabrata Ghose v Mugneeram Bangur & Co* AIR 1954 SC 44.

¹⁹³ Section 20(2)(b) of the Specific Relief Act 1963, a provision repealed in 2018.

¹⁹⁴ See para 7.1.2 below.

contract only on grounds (iii), (iv) and (v). He can terminate for failure to perform on time only if the parties have intended that time shall be of the essence of the contract.¹⁹⁵

There are other occasions when by reason of non-performance by one party (promisor), the other party (promisee) need not perform his promise. These are:

- (i) in case of independent reciprocal promises of simultaneous performance, where one party is not ready and willing to perform his promise;
- (ii) in case of dependent reciprocal promises, where the promisor of the former promise fails to perform, its promisee need not perform his promise;
- (iv) where one party has rescinded the contract, the other party need not perform;
- (v) where the promisee neglects or refuses to afford to the promisor reasonable facilities for the performance of his promise, the promisor need not perform.

Fault or notice not necessary. The state of mind of the party breaking his contract is irrelevant. The promisee claiming compensation need not prove any fault of the promisor in addition to non-performance.

In Indian law, the promisee need not give an opportunity to the promisor, whether before claiming compensation, or before rescinding the contract, unless the parties have agreed so.

Promisee's inability to claim remedies: A promisee cannot claim contractual remedies for non-performance by the promisor in the certain circumstances. These are:

- (i) the promisee is not ready and willing to perform his own reciprocal promise of simultaneous performance, or has not performed his promise that must be performed first before claiming the promise broken;
- (ii) where the promisee has prevented the promisor from performing the promise;
- (iii) where the promisee has failed or refused to give facilities to the promisor for completing the performance.

The promisor is not debarred from offering performance where he has failed to perform in time. The promisee is bound to accept delayed performance offered by the promisor unless he has rescinded the contract. Thus where the promisor has failed to perform at the specified time, he can offer performance again, which the promisee must accept. However, the promisor cannot offer to cure his defective performance, unless the promisee agrees to accept such cure; this is a fresh contract. The Indian law does not require the promisee to give one more chance to the promisor to cure his defective performance.

The promisee may give more time to the promisee, or remit or dispense with performance or any part of the performance. He may do so before breach. When he does so, the original obligation is discharged. When he gives more time, or dispenses with any performance after breach, the breach to that extent stands waived by the promisee. The Indian law does not require the promisee to give more time to the promisor.

¹⁹⁵ Para 6.1.1 above.

7.1.2 The Right to Specific Performance (Whether Monetary or Non-monetary Obligations)

Traditionally, Indian law relating to grant of reliefs of specific performance or injunction has followed the common law, making them exceptional and discretionary remedies. The Specific Relief (Amendment) Act, 2018,¹⁹⁶ has made a radical change in the law relating to these remedies.

These can also be granted by an arbitral tribunal.

A promisee of a debt, whether for repayment of loan or for price of goods sold or amount due on bonds, is entitled to the amount as an 'agreed sum'. He sues for performance of that which is agreed, but his is not a suit for specific performance. If conditions for entitlement of that amount are fulfilled, the promisee of a debt is entitled to the whole amount. There is no element of discretion in its grant.

Specific performance, as a decree to perform the very promise agreed, was granted as an exception in those cases where compensation was either inadequate or unascertainable.¹⁹⁷ Under the amendment of 2018, specific performance is no longer an exceptional remedy. Anyone who wishes to seek it can ask for it, and will be granted by the court. However, a court will not grant specific performance of a contract that will require constant supervision, nor will compel performance of personal contracts. Traditionally, reliefs of specific performance and injunctions are granted or refused in the exercise of discretion, where undue advantage to the plaintiff or undue hardship to the defendant were relevant. After 2018, these remedies are no longer discretionary.

An order of specific performance can be enforced in different ways.¹⁹⁸ Where enforcement can be achieved by an appointee of the court, such appointee can satisfy the decree, viz. signatures on a sale deed. In other cases, the order can be enforced by orders that will deter the judgment debtor from disobedience, viz. by attachment of his property, and in rare cases by ordering his detention in civil prison. The executing court has the powers to order that the performance shall be carried out by the promisee decree-holder through a third party at the cost of the judgment debtor-promisee.

Indian law does not recognise the right of the promisee to have the promise performed at the expense of the promisor, except during execution proceedings as stated above. Where the promisee has got the work done by himself or through a third party, he can claim the amount he spent under the general principles of award of damages, subject to the tests that apply to the grant of damages of causation, contemplation and mitigation. The Amendment of 2018 recognises the remedy of 'substituted performance' that gives to the promisee the right to claim from the promisor any amount he spends for getting the promise fulfilled by himself or through any third party. This right is subject to procedural requirements of giving opportunity to the other party to perform.

¹⁹⁶ Which came into force on 1 October 2018, and will apply to all proceedings filed after this date.

¹⁹⁷ Section 10 of the Specific Relief Act 1963.

¹⁹⁸ Order 21 rule 32 of the Code of Civil Procedure 1908.

Although an order to replace or repair cannot be enforced for above reasons, the consumer courts can order suppliers to repair or replace goods or services under the Consumer Protection Act 1986.

7.1.3 The Right to Terminate a Contract Due to Non-performance

The ICA allows termination of contract, referred in the ICA as rescinding or putting an end to the contract, for the following breaches:

- (i) failure to perform the contract where time is of the essence; if time is not of the essence, the promisee can 'make time of essence' by giving notice to the promisor indicating that time is of essence and that the promisee will terminate the contract.
- (ii) anticipatory breach, i.e., refusal by a party to perform the contract in its entirety, i.e. repudiation of contractual obligations; it is a matter of fact in each case whether the breach indicates repudiation of all outstanding obligations of the promisor under the contract.
- (iii) preventing the other party from performing his promise.

In all these circumstances, the contract does not terminate automatically upon breach, but the party aggrieved by the breach must give notice of rescission to the other party. The rescission is effective when the other party receives such notice.¹⁹⁹ It continues in force until it is rescinded. Hence any performance offered after breach but before termination cannot be rejected by the promisee. The right is lost if the promisee has expressed or committed acts that indicate acquiescence in the continuance of the contract. Amounts expressly kept as security deposits can be forfeited.

When a contract is rescinded under the provisions of the ICA, the party rescinding the contract must return, or restore to the extent possible, the benefit that he has received from the other party. If the benefit cannot be returned, the court can order him to pay compensation instead. He can pursue his claim for compensation for breach.

Indian law does not recognise a right to terminate for failure to provide assurances.

Termination clauses in the contract may provide for termination with or without reasons, by one or either party, and to take effect immediately, or after a specified time after notice. Such termination clauses are valid and have been upheld by courts.²⁰⁰ Indian law does not provide for exercise of good faith in the exercise of these powers; however, a government or governmental authorities cannot terminate contracts in an arbitrary manner.²⁰¹ Where parties have made a contract that does not stipulate its period, the right to terminate can be implied.

¹⁹⁹ Section 66 of the ICA.

²⁰⁰ *Central Bank of India Ltd v Hartford Fire Insurance Co Ltd* AIR 1965 SC 1288; *Her Highness Maharani Shantidevi P Gaikwad v Savjibhai Haribhai Patel* AIR 2001 SC 1462.

²⁰¹ *Gujarat State Financial Corp'n v Lotus Hotels Pvt Ltd* AIR 1983 SC 848; *Haryana Financial Corporation v Rajesh Gupta* AIR 2010 SC 338.

The procedure for such notices of termination prescribed by the contract must be strictly followed.

Acts done before rescission or termination are valid, and must be paid for.²⁰² Promises that are not performed come to an end.

7.1.4 The Right to Damages

The party that suffers by breach is entitled to compensation for any loss or damage caused to him by the breach from the party who has broken the contract.²⁰³ This right is not dependent on any fault of the party committing breach. The aggrieved party may sue only for compensation, or may claim compensation in the alternative or in addition to specific performance. The remedy of compensation is not subject to exercise of discretion by the court. However it is restricted by the three requirements discussed below, i.e., of causation, contemplation and mitigation. The party claiming compensation must prove that the contract is broken, that breach has caused him loss or damage, and the extent of loss or damage.

Compensation is granted to put the aggrieved party in a position as if the contract was performed. Under this principle, for example, the plaintiff can claim the expenses he incurred, loss of profits, the costs and expenses incurred in curing breach. The aggrieved party need not have actually suffered any expense. Compensation is awarded as a difference between the hypothetical financial position that he would have been in if the contract had been performed, and the financial position he is in after breach. Thus, difference between contract price and market price is a normal measure of compensation. Compensation can be claimed and granted for non-monetary loss or damage; and an extent of conjecture or surmise in assessment of such loss cannot be avoided.

A plaintiff is not entitled to all losses he has suffered from the breach. The remedy of compensation is subject to three important limitations.

Firstly, the plaintiff can claim loss or damage is caused by the breach, but not for remote or indirect losses.

Secondly, the defendant is liable for those losses which naturally arose from the breach (i.e. natural damages like difference between contract and market price, loss of interest for non-payment of money, costs of completing performance by a third party), or which were actually or presumed to be in contemplation of parties at the time they made the contract as likely to result from the breach (i.e., special damages, like loss of profits).

And thirdly, in estimating the loss, the means which existed of remedying the inconvenience caused by the non-performance of the contract must be taken into account. Thus, if the plaintiff has failed to take reasonable steps to mitigate, the

²⁰² Union of India v Maddala Thathiah AIR 1966 SC 1724.

²⁰³ Section 73 of the ICA, that follows the principles laid down in the English case of *Hadley v Baxendale* (1854) 9 Exch 341.

amount of compensation will be reduced. Indian law does not recognise reduction of claim on account of acts of the aggrieved party.

Simple interest, and compound interest if agreed, is payable if provided under the contract, or under a custom or statutory provisions. However, a person who delays paying any amount to a small scale or ancillary industrial undertaking for goods supplied or services rendered is liable to pay compound interest on the amount payable.²⁰⁴

In other cases, interest will be awarded only from the date the creditor gives notice to the debtor demanding interest. Ordinarily, interest is not allowed on the amount of damages arising out of breach of contract.²⁰⁵

A Court has power to decide payment of interest for the time the proceedings is pending under the Code of Civil Procedure 1908.²⁰⁶ An arbitral award for the payment of money can include interest at a reasonable rate for the period between the date the cause of action arose until the date of the award.²⁰⁷

Court can order payment of amounts in foreign currency. This is subject to compliance with laws relating to foreign exchange regulations.²⁰⁸

7.2 *Non-performance/Breach—Specific Topics*

7.2.1 *Exemption/Exclusion Clauses*

Exemption, exclusion or limitation clauses are valid in Indian law. These will include clauses that exclude or limit liability, or clauses that limit jurisdiction of courts and the like. There is no statutory provision in Indian law giving protection against unfair contract terms.

The party enforcing such a clause must show that the clause was agreed to with attention. This means the clause will bind a party if that party was given reasonable notice of its existence. If so, it binds the other party, even if that party is illiterate or not familiar with the language of the document. Placing conditions on the website, referring to those conditions in tickets, and making conditions available to those who want them are sufficient notice of conditions.²⁰⁹ But if these clauses are communicated to the party after the contract is made, they do not have any effect. Thus, conditions excluding liability printed on a receipt issued by a launderer did

²⁰⁴ The Interest on Delayed Payments to Small Scale and Ancillary Industrial Undertakings Act 1993, s. 4.

²⁰⁵ *Ratanlal Khushalrai v. Brijmohan Pralhadka* AIR 1931 Bom 386 (Bombay HC); *Raja Ram Doss Bavaji v Gajapathi Krishna Chendra Deo* AIR 1933 Mad 729 (Madras HC); *Syed Shah Masood Ahmad v. Bikan Mahuri*, AIR 1941 Pat 6; *Grasim Industries Ltd v Union of India* AIR 2011 P&H 32 (Punjab and Haryana HC).

²⁰⁶ Section 34 of the The Code of Civil Procedure 1908.

²⁰⁷ Section 31(7) of the Arbitration and Conciliation Act 1996.

²⁰⁸ The Foreign Exchange Management Act 1999.

²⁰⁹ *InterGlobe Aviation Ltd v N Satchinand* (2011) 7 SCC 463.

not exclude liability for loss because the contract of bailment was complete as soon as clothes were entrusted to the launderer.²¹⁰

A party who seeks to establish liability but is prevented by an exclusion clause can challenge the clause as opposed to public policy, and a court might hold a particular clause as unlawful being opposed to public policy on the facts and circumstances of that particular case. This possibility is based on the premise that the Supreme Court struck down an unfair clause imposed by a large organisation on a party who had no choice but to agree.²¹¹ An exclusion clause excluding liability of an airline carrier was held not opposed to public policy.²¹² There is no precedent in Indian law indicating whether an exclusion or exemption clause could or not protect deliberate or wilful breach, and it might be held void as unlawful being opposed to public policy. But it has been held in the context of a clause excluding liability to pay interest, that it cannot avail to the party at fault.²¹³ Where a contract of bailment provided that the goods in the godown shall be at the risk of the borrower-bailor, the bailee could not avoid liability for negligence resulting in loss of goods while in bailee's possession.²¹⁴

An exclusion or exemption clause will be interpreted strictly or restrictively. Thus, a clause restricting liability for loss or damage of goods in a carriage contract did not apply to loss caused by unauthorised delivery.²¹⁵ A goods vehicle was permitted to carry six workmen. Its insurance did not cover use for carrying passengers in the vehicle except employees, and excluded liability if more employees were carried. At the time of accident, it was carrying some passengers picked up by the driver in the vehicle. It was held that this was not so fundamental a breach as to afford ground to exclude liability. The exclusion clause was read down in the light of the 'main purpose' of the contract.²¹⁶ In case of ambiguity, an exclusion or exemption clause will be interpreted contra proferentem, i.e. against the party that prepared the document or putting forth the document.²¹⁷

Precedent suggests that a clause that limits liability will be enforced against a consumer in proceedings under the Consumer Protection Act 1986.²¹⁸ However, a clause that excludes liability cannot avail to a trader in view of the special statutory remedy available to consumers under this Act for defect in goods or deficiency in services.

²¹⁰ *RS Deboo v MV Hindlekar* AIR 1995 Bom 68 (Bombay HC); *Lily White v R Munuswami* AIR 1966 Mad 13 (Madras HC).

²¹¹ *Central Inland Water Transport Corporation Ltd v Brojo Nath Ganguly* AIR 1986 SC 1571.

²¹² *Indian Airlines Corpn v Madhuri Chowdhuri* AIR 1965 Cal 252 (Calcutta HC).

²¹³ *Ghaziabad Developmeent Authority v Union of India* AIR 2000 SC 2003; (2000) 6 SCC 113.

²¹⁴ *Canara Bank v Bhavani Oil Co* AIR 2004 Ker 273 (Kerala HC).

²¹⁵ *Federal Chemical Works Ltd v Nutso (Nigeria) Ltd* AIR 2001 Del 25 (Delhi HC).

²¹⁶ *BV Nagaraju v Oriental Insurance Co Ltd* (1996) 4 SCC 647.

²¹⁷ *Ghaziabad Developmeent Authority v Union of India* AIR 2000 SC 2003; *National Insurance Co Ltd v Ishar Das Madan Lal* AIR 2007 SC (Supp) 508.

²¹⁸ *Bharathi Knitting Co v DHL Worldwide Express Courier Division of Airfreight Ltd* AIR 1996 SC 2508.

7.2.2 Force Majeure

A contract 'becomes void', i.e., can no longer be enforced, if performance of the contract becomes impossible.²¹⁹ This provision in the ICA lays down a rule of positive law, and the matter is not left to be decided with reference to the intention of parties.²²⁰ A contract becomes impossible when the whole purpose or the basis of the contract has been frustrated by an unexpected event or change of circumstances, not contemplated by the parties when they made their contract,²²¹ or its performance becomes impracticable or useless having regard to the object and purpose the parties had in view.²²² The test of impossibility is whether it is practically impossible for a party to perform the contract within the specified time.²²³ The court has to examine the contract, the circumstances under which it was made, the belief, knowledge and intention of the parties, being evidence of whether the changed circumstances destroyed altogether the basis of the contract and its object.²²⁴

When impossibility occurs, the contract is automatically discharged for all obligations, and does not require termination; one party cannot keep it alive. Any person who has received any advantage under the contract must restore it or make compensation for it to the person from whom he received it.²²⁵ Indian law has no precedent to allow suspension of obligations for temporary impossibility, or for renegotiation of contract following an impossibility.

The doctrine of impossibility does not allow parties a discharge from difficulties or disappointed expectations, or from the ordinary risks of business,²²⁶ or from events that could be within contemplation of parties,²²⁷ or commercial impossibility like extreme increase in costs or difficulties of performance,²²⁸ or where the subsequent event that affected performance was self-induced.²²⁹ If a party disables himself from performing the contract, the other party can terminate it.²³⁰

Parties can incorporate into their contracts clauses that specify circumstances which would excuse non-performance of the contract. These are force majeure clauses, and are enforced. Such clauses can cover events like labour problems, change

²¹⁹ Section 56 of the ICA.

²²⁰ *Satyabrata Ghose v Mugneeram Bangur & Co* AIR 1954 SC 44.

²²¹ *Naihati Jute Mills Ltd v Khyaliram Jagannath* AIR 1968 SC 522; *Satyabrata Ghose v Mugneeram Bangur & Co* AIR 1954 SC 44; *Sushila Devi v Hari Singh* AIR 1971 SC 1756.

²²² *Sushila Devi v Hari Singh* AIR 1971 SC 1756; *Satyabrata Ghose v Mugneeram Bangur & Co* AIR 1954 SC 44; *Ahmad Khan v Shahanshah Jehan Begum* AIR 1973 All 529 (Allahabad HC).

²²³ *DL Sooryaprakasalingam Garu v Shaw Trikam Lal* AIR 1917 Mad 509 (Madras HC).

²²⁴ *Satyabrata Ghose v Mugneeram Bangur & Co* AIR 1954 SC 44; *Naihati Jute Mills Ltd v Khyaliram Jagannath* AIR 1968 SC 522.

²²⁵ Section 65 of the ICA.

²²⁶ *Alopi Parshad & Sons Ltd v Union of India* AIR 1960 SC 588.

²²⁷ *Afshar MM Tacki v Dharamsey Tricamdas* AIR 1947 Bom 98 (Bombay HC); *Man Singh v Khazan Singh* AIR 1961 Raj 277 (Rajasthan HC).

²²⁸ *Keshavlal Brothers & Co v Diwan Chand & Co* AIR 1923 PC 105 (Privy Council).

²²⁹ *Boothalinga Agencies v V T C Poriaswami Nadar* AIR 1969 SC 110.

²³⁰ Section 39 of the ICA.

in prices, non-availability of material etc. which events would not discharge under the doctrine of impossibility. Where they are provided, and the event of force majeure occurs, the contract ends under its own terms,²³¹ and the doctrine of impossibility does not apply.

Whether the clause covers the particular event is a matter of interpreting the clause. These clauses are interpreted by ordinary rules of interpretation. A clause as wide as 'usual force majeure' without specifying any events, was enforced with reference to the surrounding circumstances.²³²

7.2.3 Agreed Payment for Non-performance

The parties to a contract may agree at the time of contracting that, in the event of a breach, the party in default shall pay a stipulated sum of money to the other, or that any amount paid shall be forfeited. S 74 of the ICA provides that if a contract stipulates a sum to be paid if there is a breach, or contains any other stipulation by way of penalty, the party complaining of the breach is entitled, whether or not actual damage is proved to have been caused by the breach, to receive reasonable compensation not exceeding the amount named or as the case may be, the stipulated penalty.

The ICA does not make any distinction between liquidated damages and penalty. In both cases, the measure of amount payable for breach is of reasonable compensation, and the sum stipulated sets the maximum beyond which such amount cannot extend; the Court has the power to reduce the amount stipulated by the parties. It can be expected that a court will give effect to the stipulated amount.²³³ Parties cannot exclude judicial review of the amount stipulated.²³⁴ Such provisions are void as being in restraint of legal proceedings.²³⁵

Where compensation is stipulated, unliquidated damages for that breach cannot be claimed. If a specific breach is not covered by the provision of liquidated damages in the contract, unliquidated damages can be awarded.²³⁶ Parties can also stipulate different amounts for different specified breaches.²³⁷

This amount can be claimed only if the party claiming it has suffered loss or damage.²³⁸ Loss or damage must be proved. However, a reasonable amount has been awarded where loss is not proved.²³⁹

²³¹ *Goculdas Madhavji v Narsu Yenkuji* (1889) 13 Bom 630 (Bombay HC).

²³² *Dhanrajamal Gobindram v Shamji Kalidas & Co* AIR 1961 SC 1285.

²³³ *Surjit Kaur v Naurata Singh* AIR 2000 SC 2927.

²³⁴ *Bharat Sanchar Nigam Ltd v Motorola India Pvt Ltd* AIR 2009 SC 357.

²³⁵ Under Section 28 of the ICA.

²³⁶ *Steel Authority of India Ltd v Gupta Brother Steel Tubes Ltd*, 2009 AIR SCW 7191.

²³⁷ *Indian Drugs and Pharmaceuticals Ltd v Industrial Oxygen Co Ltd* AIR 1985 Bom 186 (Bombay HC).

²³⁸ *Kailash Nath Associates v Delhi Development Authority* (2015) 4 SCC 136.

²³⁹ *Construction and Design Services v Delhi Development Authority* AIR 2015 SC 1282.

The question whether extent of loss must be proved, has undergone considerable discussion in the past decade in judgments of the Supreme Court. It has observed that if it is difficult to assess compensation, the amount stipulated can be awarded if it is genuine pre-estimate of loss as reasonable compensation.²⁴⁰ If loss can be calculated, the plaintiff must prove the loss he has suffered.²⁴¹ Where a precise pre-estimate of damages is difficult, it strengthens the presumption that the agreed sum is a genuine attempt to estimate the damages.²⁴²

7.2.4 Consequential Losses

The ICA does not use any terms to describe the various types of losses, and hence does not use the term 'consequential losses'. Loss of profits and other similar consequential losses can be recovered under the same principle applicable to compensation for breach under Section 73 of the ICA.

It is usual to call those losses consequential which fall within the second branch of the rule in *Hadley v Baxendale*, also incorporated into Section 73. Consequential losses does not include losses like 'overhead costs, decreased profits and additional management costs arising from delay or disruption caused by one party'. The Supreme Court has held that these are direct.²⁴³

Loss of profits can be claimed as special damages, especially in commercial contracts. Such loss must be proved.²⁴⁴ Thus, where the claim is based on loss of income, the fact that income is earned must be proved. But even in absence of proof of loss, compensation can be awarded of loss of reasonable profits that can be presumed to arise from breach.

A claim for loss of profits is based on conjecture or surmise, and its amount is an estimate, since it cannot be said with certainty whether the contract in issue would have earned profit at all. However, compensation for loss of profits has been calculated as a percentage on contract price,²⁴⁵ on the basis of figure of profits contemplated in submitting estimates in works contracts,²⁴⁶ on the basis of similar works in the vicinity.²⁴⁷ The plaintiff can rely on figures of profits he earned in the previous years.²⁴⁸

²⁴⁰ *Kailash Nath Associates v Delhi Development Authority* 2015 SCC OnLine SC 19; *Oil and Natural Gas Corporation Ltd v SAW Pipes Ltd* AIR 2003 SC 2629.

²⁴¹ *Maula Bux v Union of India* AIR 1970 SC 1955; *Fateh Chand v Balkishan Das* AIR 1963 SC 1405; *Union of India v Rampur Distillery and Chemicals Co Ltd* AIR 1973 SC 1098.

²⁴² *Oil and Natural Gas Corporation Ltd v SAW Pipes Ltd* AIR 2003 SC 2629, (2003) 5 SCC 705; *BSNL v Reliance Communication Ltd*, (2011) 1 SCC 394.

²⁴³ *Mcdermott International Inc v Burn Standard Co Ltd*, 2006 AIR SCW 3276.

²⁴⁴ *State of Tripura v Bina Choudhary* AIR 2007 SC 2169.

²⁴⁵ *AT Brij Paul Singh & Bros v State of Gujarat* AIR 1984 SC 1703.

²⁴⁶ *State of Kerala v K Bhaskaran* AIR 1985 Ker 49 (Kerala HC).

²⁴⁷ *AT Brij Paul Singh & Bros v State of Gujarat* AIR 1984 SC 1703.

²⁴⁸ *Kishan Lal Kalra v NDMC* AIR 2001 Del 402 (Delhi HC).

8 Limitation Periods

8.1 *Limitation Periods—Overview*

The time limit for enforcement of remedies for breach of contracts are stated in the Limitation Act 1963. The Act applies to all proceedings in courts and arbitration. A suit in a civil court or tribunal must be filed within the time limit prescribed for that type of suit. An arbitration proceedings must be commenced within the period of limitation,²⁴⁹ i.e., the date on which request for the dispute to be referred to arbitration is received by the respondent.²⁵⁰ Special laws that give reliefs also prescribe various periods of time for filing claims under those laws, viz. the Consumer Protection Act 1986.

The computation of the period of limitation for filing any proceeding as above is very strict. The proceeding cannot be filed even if there is a delay of one day. However, some laws, like the Consumer Protection Act 1986 allow filing a proceeding after the period of limitation if sufficient cause of delay is shown.

The period of limitation applies to proceedings that must be filed before a court, arbitrator or other tribunal or authority. It also applies to counterclaims made by defendants. The period is counted from the date of 'cause of action'. The Limitation Act 1963 has a Schedule that lists the different types of proceedings, civil or criminal, the time from which the limitation period will be calculated, and the period of limitation for each proceeding.

A proceeding for claiming reliefs under the Consumer Protection Act 1986 is two years. However the Consumer Courts can admit the claim later if sufficient cause is shown.

Limitation law is mandatory: The period of limitation cannot be reduced by agreement. An agreement which limits the time within which any party may enforce his rights, whether in courts or in arbitration, is void. On a plain reading of this provision, there should be no objection to an agreement that stipulates a longer period of limitation; however, it has been held as unlawful under Section 23 of the ICA as tending to defeat the provisions of the Limitation Act.²⁵¹

An agreement extinguishes the rights of any party thereto, or discharges any party thereto from any liability on the expiry of a specified period so as to restrict any party from enforcing his rights is also void.²⁵² Thus, a provision that if demand for arbitration relating to a claim is not made within 90 days, the claim will be extinguished, is void.²⁵³

²⁴⁹ Section 43 of the Arbitration and Conciliation Act 1996.

²⁵⁰ Section 21 of the Arbitration and Conciliation Act 1996.

²⁵¹ *Ballpragada Ramamurthy v Thammanna Gopayya* (1917) 40 Mad 701 (Madras HC); *Jawahar Lal v Mathura Prasad* AIR 1934 All 661 (Allahabad HC:FB).

²⁵² Section 28 of the ICA.

²⁵³ *Central Ware Housing Corporation v Ravi Constructions* AIR 2013 Kant 18 (Karnataka HC).

If a suit or proceeding is not filed within the period of limitation, it is for the court to dismiss it, although limitation is not set up as a defence.²⁵⁴ It is not within the power of parties to condone it. Hence the conduct of the defendant does not affect the question of limitation or defence of limitation.

The limitation law is of strict application. The party filing the proceeding must allege and prove that his proceeding is filed in time.

The promisee may extend the time for performance of any promise, such promise does not need fresh consideration.²⁵⁵ A promise to pay a time-barred debt can be enforced without consideration.²⁵⁶

8.2 *Limitation Periods—Specific Topics*

Periods of limitation: The general period of limitation for suits on contract can be stated to be three years from which the breach occurred, or performance is due, or the promisor has refused to perform.

Part II of the Schedule of the Limitation Act deals with suits relating to contracts, e.g., for wages, for price of goods sold, against a carrier for non-delivery, for price of goods sold, price of goods sold to be paid after expiry of credit, money lent, money deposited, for compensation for breach of promise, on bills of exchange and promissory notes, for specific performance of contract, etc. However, the calculation of time for filing a suit for money lent with no date agreed for payment and for money lent repayable on demand commences from the date of the loan, and not from the date of demand.

The date from which the period of limitation begins is stated in the Schedule. That date is excluded. The period is counted from the next day, and ends on the last day of the period. Thus, if a loan is repayable on 15 June 2016, the last date for filing the suit for its recovery is 15 June 2019.

If the last day so calculated falls on a holiday, or the court is closed, the proceeding can be filed on the next working day.

Fresh period of limitation: A new period limitation commences from the date the defendant has acknowledged his liability, provided the acknowledgment is in writing and made while before the limitation period expired.²⁵⁷ If the period has expired, mere acknowledgment is not enough. The promisor should make a promise to pay the time-barred debt, which will be enforced.²⁵⁸

²⁵⁴ Section 3 of the Limitation Act 1963.

²⁵⁵ Section 63 of the ICA.

²⁵⁶ Section 25 of the ICA.

²⁵⁷ Section 18 of the Limitation Act 1963.

²⁵⁸ Section 25 of the ICA.

A fresh period also commences if the defendant has made a payment towards the debt before the limitation period expired.²⁵⁹ In both these cases, the period of limitation runs afresh from the date of acknowledgment and the payment towards debt.

Suspension of limitation: If the suit is based on fraud of the defendant, or the knowledge of the right or title in the suit is concealed by fraud of the defendant, or the suit is for relief from consequences of a mistake, the period of limitation does not begin to run until the plaintiff has discovered the fraud or mistake.²⁶⁰

Some periods of time are excluded from the period of limitation for filing suit or claims: (i) the time spent in prosecuting with due diligence and in good faith another civil proceeding against the defendant that involves same matter in issue, and the court is unable to entertain it for a cause like defect in jurisdiction²⁶¹; (ii) the time during which the defendant was absent from India.²⁶²

Limitation bars remedy and not the right: In matters relating to contract, the lapse of the period of limitation does not extinguish the right. It merely bars the remedy. Thus, if a debtor has not repaid a loan, and the creditor does not file a suit to claim it within the three years' time that is prescribed, the debt continues to be a debt. It will be shown as such in the accounts of both parties. The debtor's promise to pay it after it is time-barred can be enforced. The creditor can appropriate any payment received from the debtor, unless there is any instruction to the contrary from the debtor, towards any time-barred debt. The creditor cannot file a proceeding for its recover.

References

Further Reading

- Halsbury's Laws of India (2016) Contracts, 2nd edn, vol 9. Lexis Nexis, New Delhi
 Kannak K, Prakash A (eds) (2019) Ratanlal & Dhirajlal: the law of evidence, 27th edn. Lexis Nexis, New Delhi
 Markanda PC (ed) (2018) The law of contract, 4th edn. Lexis Nexis, New Delhi
 Saharay H (2004) Law of carriage of goods by sea and air. Eastern Law House, Kolkata
 Sapre A (ed) (2017) Pollock & Mulla: the sale of goods act, 10th edn. Lexis Nexis, New Delhi
 Sarkar S (ed) (2013) Law of evidence, 18th edn. Lexis Nexis, New Delhi
 Singh G (2012) Principles of statutory interpretation, 13th edn. Lexis Nexis Butterworths Wadhwa Nagpur, New Delhi
 Singh R (2016) Law relating to electronic contracts, 2nd edn. Lexis Nexis, New Delhi

²⁵⁹ Section 19 of the Limitation Act 1963.

²⁶⁰ Section 17 of the Limitation Act 1963.

²⁶¹ Section 14(1) of the Limitation Act 1963.

²⁶² Section 15(5) of the Limitation Act 1963.

Vardhan Y, Narayan C (eds) Pollock & Mulla: Indian contract and specific relief acts, 15th edn. Lexis Nexis, New Delhi
 Wadhwa D, Rajah N (2009) The law of consumer protection, 2nd edn. Lexis Nexis Butterworths Wadhwa Nagpur, New Delhi

List of Cases

Abdul Majeed v Abdul Rashid AIR 1936 All 598 (Allahabad HC)
Afshar MM Tacki v Dharamsey Tricamdas AIR 1947 Bom 98 (Bombay HC)
Ahmad Khan v Shahanshah Jehan Begum AIR 1973 All 529 (Allahabad HC)
All India General Insurance Co Ltd v S P Maheshwari AIR 1960 Mad 484 (Madras HC)
Alopi Parshad & Sons Ltd v Union of India AIR 1960 SC 588
AP Kochudevassy v State of Kerala AIR 1982 Ker 90 (Kerala HC)
Asaram v Ludheshwar AIR 1938 Nag 335 (Nagpur HC : FB)
AT Brij Paul Singh & Bros v State of Gujarat AIR 1984 SC 1703
Balkishen Das v W F Legge (1899) 27 IA 58 (Privy Council)
Ballpragada Ramamurthy v Thammana Gopayya (1917) 40 Mad 701 (Madras HC)
Behari Lal v Ram Ghulam, (1902) 24 All 461 (Allahabad HC)
Bhagwandas Goverdhandas Kedia v Girdharlal Parshottamdas AIR 1966 SC 543
Bharat Sanchar Nigam Ltd v Motorola India Pvt Ltd AIR 2009 SC 357
Bharathi Knitting Co v DHL Worldwide Express Courier Division of Airfreight Ltd AIR 1996 SC 2508
Bhoruka Power Corp Ltd v State of Haryana AIR 2000 P&H 245 (Punjab and Haryana HC)
BOI Finance Ltd v Custodian AIR 1997 SC 1952
Boothalinga Agencies v V T C Poriaswami Nadar AIR 1969 SC 110
BSNL v Reliance Communication Ltd, (2011) 1 SCC 394
BV Nagaraju v Oriental Insurance Co Ltd (1996) 4 SCC 647
Canara Bank v Bhavani Oil Co AIR 2004 Ker 273 (Kerala HC)
Central Bank of India Ltd v Hartford Fire Insurance Co Ltd AIR 1965 SC 1288
Central Inland Water Transport Corporation Ltd v Brojo Nath Ganguly AIR 1986 SC 1571
Central Ware Housing Corporation v Ravi Constructions AIR 2013 Kant 18 (Karnataka HC)
Chandanmull Jhaleria v Clive Mills Co Ltd AIR 1948 Cal 257 (Calcutta HC)
Chandnee Vidyawali Madden v CL Katyal AIR 1964 SC 978
China Cotton Exporters v Beharilal Ramcharan Cotton Mills Ltd AIR 1961 SC 1295
Chunibhai Patel v Natha Bhai Patel AIR 1944 Pat 185 (Patna HC)
Commissioner of Income-tax Mysore v Shah Mohandas Sadhuram AIR 1966 SC 15
Comr of Wealth-Tax v Abdul Hussain Mulla Muhammad Ali AIR 1988 SC 1417
Construction and Design Services v Delhi Development Authority AIR 2015 SC 1282
Dai-ichi Karkaria Pvt Ltd v Oil and Natural Gas Commission AIR 1992 Bom 309 (Bombay HC)
Dara Shapurji v Askarai Begum AIR 1954 Hyd 98 (Hyderabad HC)
Devi Prasad Khandelwal & Sons v Union of India AIR 1969 Bom 163 (Bombay HC)
Dhanrajamal Gobindram v Shamji Kalidas & Co AIR 1961 SC 1285
Dhanrajamal Gobindram v Shamji Kalidas AIR 1961 SC 1285
Dina Nath Dutt v Mahavir Gupta AIR 1958 Punj 289 (Punjab HC)
Dip Narain Singh v Nageshar Prasad AIR 1930 All 1 (Allahabad HC : FB)
DL Sooryaparakasalingam Garu v Shaw Trikam Lal AIR 1917 Mad 509 (Madras HC)
Dresser Rand S A v Bindal Agro Chem Ltd AIR 2006 SC 871
Dularia Devi v Janardan Singh AIR 1990 SC 1173
Entores Ltd v Miles Far East Corporation [1955] 2 QB 327
Far East Steamship Line v Union of India AIR 1973 Mad 169 (Madras HC)

- Fateh Chand v Balkishan Das* AIR 1963 SC 1405
- Federal Bank Ltd v V M Jog Engineering Ltd* AIR 2000 SC 3166
- Federal Chemical Works Ltd v Nutso (Nigeria) Ltd* AIR 2001 Del 25 (Delhi HC).
- Firm Kanwar Bhan-Sukha Nand v Firm Ganpat Rai-Ram Jiwan* AIR 1926 Lah 318 (Lahore HC)
- Forasol v Oil and Natural Gas Commission* AIR 1984 SC 241
- Gajanan Moreshwar Parelkar v Moreshwar Madan Mantri* AIR 1942 Bom 302 (Bombay HC)
- Ganesh Das-Ishar Das v Ram Nath* (1927) 9 Lah 148 (Lahore HC)
- Ganga Saran v Firm Ram Charan Ram Gopal* AIR 1952 SC 9
- General Assurance Society Ltd v Chandmull Jain* AIR 1966 SC 1644
- Geo-Group Communications INC v IOL Broadband Ltd*, 2010 AIR SCW 209
- Gh Mahd Madoo v Gh Rasool Sofi* AIR 2005 J&K 48 (Jammu and Kashmir HC)
- Ghaziabad Developmeent Authority v Union of India* AIR 2000 SC 2003
- Goculdas Madhavji v Narsu Yenkuji* (1889) 13 Bom 630 (Bombay HC)
- Grasim Industries Ltd v Union of India* AIR 2011 P&H 32 (Punjab and Haryana HC)
- Gujarat Bottling Co Ltd v Coca Cola Co* AIR 1995 SC 2372
- Gujarat State Financial Corpn v Lotus Hotels Pvt Ltd* AIR 1983 SC 848
- Gulabchand Gambhirmal v Kudilal Govindram* AIR 1959 MP 151 (Madhya Pradesh HC)
- Haji Mohamed Haji Jiva v E Spinner*, (1900) 24 Bom 510 (Bombay HC)
- Harichand Mancharam v Govind Luxman Gokhale* AIR 1923 PC 47 (Privy Council)
- Haryana Financial Corporation v Rajesh Gupta* AIR 2010 SC 338
- HDFC Bank Ltd v Delhi Gymkhana Club Ltd* AIR 2013 Del 10 (Dehli HC)
- Her Highness Maharani Shantidevi P Gaikwad v Savjibhai Haribhai Patel* AIR 2001 SC 1462
- HG Krishna Reddy & Co v MM Thimmiah* AIR 1983 Mad 169 (Madras HC)
- HPA International v Bhagwandas Fateh Chand Daswani* AIR 2004 SC 3858
- Hukmi Chand v Jaipur Rice and Oil Mills Co* AIR 1980 Raj 155 (Rajasthan HC)
- Hukum Chand v Ram Bahadur Singh* AIR 1933 PC 156 (Privy Council)
- Hunoomanpersaud Panday v Mussumat Babooee Munraj Koonweree* (1856) 6 MIA 392 (Privy Council)
- Hurnandrai Fulchand v Pragdas Budhsen* AIR 1923 PC 54 (Privy Council)
- Indian Airlines Corpn v Madhuri Chowdhuri* AIR 1965 Cal 252 (Calcutta HC)
- Indian Drugs and Phrarmaceuticals Ltd v Industrial Oxygen Co Ltd* AIR 1985 Bom 186 (Bombay HC)
- InterGlobe Aviation Ltd v N Satchinand* (2011) 7 SCC 463
- International Oil Co v Indian Oil Co* AIR 1969 Mad 423 (Madhya Pradesh HC)
- ITC Ltd v George Joseph Fernandes* AIR 1989 SC 839
- Janardhanan v Sreedharan* AIR 1985 Ker 199 (Kerala HC)
- Jaunpur Sugar Factory Ltd Re* AIR 1925 All 658 (Allahabad HC)
- Jawahar Lal v Mathura Prasad* AIR 1934 All 661 (Allahabad HC :FB)
- Jethalal C Thakkar v RN Kapur* AIR 1956 Bom 74 (Bombay HC)
- JG Hashman v Lucknow Improvement Trust* AIR 1927 Oudh 616 (Oudh HC)
- Kailash Nath Associates v Delhi Development Authority* (2015) 4 SCC 136
- Kaliyammal v Kolandavela Goundar* AIR 1918 Mad 1135 (Madras HC)
- Kamrunnisa v Pramod Kumar Gupta* AIR 1997 MP 106 (Madhya Pradesh HC)
- Kedar Nath Motani v Prahlad Rai* AIR 1960 SC 213
- Keshavlal Brothers & Co v Diwan Chand & Co* AIR 1923 PC 105 (Privy Council)
- Kishan Lal Kalra v NDMC* AIR 2001 Del 402 (Delhi HC)
- Krishna Mohan Kul v Pratima Maity* AIR 2003 SC 4351
- Kristodhone Ghose v Brojo Gobindo Roy* (1897) ILR 24 Cal 895 (Calcutta HC)
- Kunwar Ram Lal v Nil Kanth* (1893) 20 IA 112 (Privy Council)
- Lakshminarain Ramniwas v N V Vereenigde Nederlandsche Scheepvaartmaatschappij* AIR 1960 Cal 45 (Calcutta HC)
- Lakshminarayan Ramniwas v Compagnia Genovese D' Esportazione* AIR 1960 Cal 545 (Calcutta HC)

Lily White v R Munuswami AIR 1966 Mad 13 (Madras HC)
Man Singh v Khazan Singh AIR 1961 Raj 277 (Rajasthan HC)
Maula Bux v Union of India AIR 1970 SC 1955
Mcdermott International Inc v Burn Standard Co Ltd 2006 AIR SCW 3276
Mehdalunnissa Begum v Halimatunnissa Begum AIR 1939 Pat 194 (Patna HC)
Motilal v Nanhelal AIR 1930 PC 287 (Privy Council)
Mukul Dutta Gupta v Indian Airlines Corp AIR 1962 Cal 311 (Calcutta HC)
Mury Exportation v D Khaitan & Sons AIR 1956 Cal 644 (Calcutta HC)
Naba Kishore Lal Singh Deo v Panchanan Mahto AIR 1930 Pat 601 (Patna HC)
Naihati Jute Mills Ltd v Khyaliram Jagannath AIR 1968 SC 522
Narandas Morardas Galiwala v S P A M Papammal AIR 1967 SC 333
Narayandas Shreeram Somani v Sangli Bank Ltd AIR 1966 SC 170
Narsingerji Gyanagerji v Panuganti Parthasaradhi Rayaninam Garu (1924) 51 IA 305 (Privy Council)
Nathulal v Phoolchand AIR 1970 SC 546
National Insurance Co Ltd v Ishar Das Madan Lal AIR 2007 SC (Supp) 508
National Thermal Power Corporation v Singer Company AIR 1993 SC 998
Navnitlal & Co v Kishanchand & Co AIR 1956 Bom 15 (Bombay HC)
Ningawwa v Byrappa Shiddappa Hirekrabbar AIR 1968 SC 956
Niranjan Samal v Tirilochan Kuar AIR 1956 Ori 81 (Orissa HC)
Niranjan Shankar Golikari v Century Spg and Mfg Co Ltd AIR 1967 SC 1098
Oakes & Co v Jackson (1876) 1 Mad 134 (Madras HC)
Oil and Natural Gas Corporation Ltd v SAW Pipes Ltd AIR 2003 SC 2629
P R Transport Agency v Union of India AIR 2006 All 23 (Allahabad HC)
Panem Venkanarayana Sastry v Rajupalli Chinna Yella Reddy AIR 1959 AP 256
Pragdas Mathuradas v Jeewanlal AIR 1948 PC 217 (Privy Council)
Profulla Kumar Basu v Gopee Bullabh Sen AIR 1946 Cal 159 (Calcutta HC)
R V Narayanaswami Chetti v Soundararajan and Co AIR 1958 Mad 43 (Madras HC)
Rabindra N Maitra v Life Insurance Corp of India AIR 1964 Cal 141 (Calcutta HC)
Raja Ram Doss Bavaji v Gajapathi Krishna Chendra Deo AIR 1933 Mad 729 (Madras HC)
Rajasthan Breweries Limited v Stroh Brewery Company AIR 2000 Del 450 (Delhi HC)
Rajasthan Co-op Dairy Federation Ltd v Maha Laxmi Mingrate Marketing Service Pvt Ltd, (1996) 10 SCC 405
Ramalingathudayan v Unnamalai Achi AIR 1914 Mad 655 (Madras HC)
Rameswar Nathany v Nurul Haq Choudhury AIR 1949 FC 78 (Federal Court)
Raptakos Brett And Co Pvt Ltd v Modi Business Centre (Pvt) Ltd AIR 2006 Mad 236 (Madras HC)
Ratanchand Hirachand v Askar Nawaz Jung AIR 1976 AP 112 (Andhra Pradesh HC)
Ratanlal Khushalrai v. Brijmohan Pralhadka AIR 1931 Bom 386 (Bombay HC)
Rattanchand Hirachand v Askar Nawaz Jung (1991) 3 SCC 67
RC Thakkar v Gujarat Housing Board AIR 1973 Guj 34 (Gujarat HC)
Renusagar Power Co Ltd v General Electric Co Ltd AIR 1994 SC 860
Rickmers Verwaltung GmbH v Indian Oil Corporation AIR 1999 SC 504
Rojasara Ramjibhai Dahyabhai v Jani Narottamdas Lallubhai AIR 1986 SC 1912
Rowland Ady v Administrator General AIR 1938 PC 198 (Privy Council)
RS Deboo v MV Hindlekar AIR 1995 Bom 68 (Bombay HC)
Satyabrata Ghose v Mugneeram Bangur & Co AIR 1954 SC 44
Secretary of State v Bank of India AIR 1938 PC 191 (Privy Council)
Sita Ram v Radha Bai AIR 1968 SC 534
SMV Agencies Pvt Ltd v Cross Country Heritage Hotel, CS (OS) 281/2010 decided on 11 April 2013 (Delhi HC)
Sohan Singh v Sarwan Singh, (1996) 5 SCC 759
Sohrabji Dhunjibhoy Medora v Oriental Government Security Life Assurance Co Ltd AIR 1946 PC 6 (Privy Council)
Soniram Jeetmull v R D Tata and Co Ltd AIR 1927 PC 156 (Privy Council)

Sorabshah Pestonji v Secretary of State for India AIR 1928 Bom 17 (Bombay HC)
State Bank of India v Mula Sahakari Sakhar Karkhana Ltd AIR 2007 SC 2361
State of Gujarat v Variety Body Builders AIR 1976 SC 2108
State of Kerala v K Bhaskaran AIR 1985 Ker 49 (Kerala HC)
State of Tripura v Bina Choudhary AIR 2007 SC 2169
Steel Authority of India Ltd v Gupta Brother Steel Tubes Ltd, 2009 AIR SCW 7191.
Superintendence Co of India Pvt Ltd v Krishan Murgai AIR 1980 SC 1717
Surasaibalini Debi v Phanindra Mohan Majumdar AIR 1965 SC 1364
Surjit Kaur v Naurata Singh AIR 2000 SC 2927
Sushila Devi v Hari Singh AIR 1971 SC 1756
Syed Abdul Khader v Rami Reddy AIR 1979 SC 553
T V Sundaresan v Provincial Government AIR 1946 Nag 273 (Nagpur HC)
Taprogge Gesellschaft mbH v IAEC India Ltd AIR 1988 Bom 157 (Bombay HC)
Tilak Ram v Surat Singh AIR 1938 All 297 (Allahabad HC :FB)
Union of India v Maddala Thathiah AIR 1966 SC 1724
Union of India v Rampur Distillery and Chemicals Co Ltd AIR 1973 SC 1098
United Breweries (Holding) Ltd v Karnataka State Industrial Investment AIR 2012 Kant 65 (a mere recommendatory letter) (Karnataka HC)
UP Rajkiya Nirman Nigam Ltd v Indure Pvt Ltd AIR 1996 SC 1373
VFS Global Services (P) Ltd v Suprit Roy (2008) 3 Mah LJ 266 (Bombay HC)
Videocon Industries Ltd v Union of India AIR 2011 SC 2040
Visweswaradas Gokuldas v BK Narayan Singh AIR 1969 SC 1157
Wipro Limited vs Beckman Coulter International 2006 (3) ARBLR 118 Delhi (Delhi HC)
Syed Shah Masood Ahmad v. Bikan Mahuri, AIR 1941 Pat 6

Nilima Bhadbhade is presently consultant, writer and trainer. She has been Associate Professor at ILS Law College, Pune University, Pune, India until 2016. Member of Expert Committee appointed by the Government of India, Ministry of Law and Justice, to examine the Specific Relief Act 1963 and to make suggestions for amendment that were carried out from October 2018. She is the author of three revised editions of the treatise Pollock and Mulla's Contract and Specific Relief Acts, and Halsbury's Laws of India: Contracts (both Lexis-Nexis), and Contract Law of India (Kluwer). She conducts workshops about contracting for varied audiences: lawyers, law students and businessmen. Her blog and publications are at <http://obiterdicta.in>.



Lihong Zhang

Abbreviations

ALTCPSCH	2003 Supreme Court's Judicial Interpretations on the Application of Law in the Trials on Contract of Purchase and Sale of Commercial Houses
CAML	2007 Anti-Monopoly Law
CCC	2020 Draft of Chinese Civil Code
CCPL	1991 Chinese Civil Procedure Law
CECL	2008 E-Commerce Law
ESL	2004 Electronic Signature Law
GPCL	1986 General Principles of Civil Law
GPCL	1986 General Principles of Civil Law
JI of LCLFCR	Judicial Interpretation of LCLFCR
JICL (2)	2009 Supreme Court's Second Judicial Interpretation on Contract Law
LCLFCR	2010 Law of the Choice of Law for Foreign-related Civil Relations
SITCCC	2009 Supreme Court's Opinion on Several Issues on Trials of Commercial and Civil Contract under Current Situation

L. Zhang (✉)

East China University of Political Science and Law, Shanghai, People's Republic of China

e-mail: lihong111@gmail.com

© Springer Nature Switzerland AG 2022

S. Mancuso and M. Bussani (eds.), *The Principles of BRICS Contract Law*,

Ius Gentium: Comparative Perspectives on Law and Justice 102,

https://doi.org/10.1007/978-3-031-00844-3_7

1 Introduction

1.1 *Substantive Law Applicable to International Commercial Contracts*

Under Chinese law, an international contract is a contract concerning foreign interests. A contract becomes international under the following conditions: (a) the presence of one foreign contracting party, legal person or other organization or the presence of a stateless person; (b) the habitual residence or main business place of either party or both parties is located outside the Chinese territory; (c) the subject matter is located outside the Chinese territory; (d) the legal facts leading to the establishment, change or termination of the contract take place outside the Chinese territory. An international commercial contract is an international contract between different businessmen (or business entities), so-called “B to B contract”.

On December 11, 1986, China ratified the United Nations Convention on Contracts for the International Sale of Goods (CISG) but reserved its Articles 11 and 1.1(b). Due to such a reservation, China declared that this international convention is applicable in China only for contracts in written form and between CISG state members.

It is worth pointing out that even if Hong Kong, Macau and Taiwan are considered as part of the Chinese territory according to the Chinese official interpretation and international law, but in legal practice, a contract concerning the interests between Mainland of China and the rest of the Chinese territory is also treated in extensive way as an international contract.

The 2020 Chinese Civil Code (CCC), 2010 *Law of the Choice of Law for Foreign-related Civil Relationships* (LCLFCR) and its 2012 related Juridical Interpretation (JI of LCLFCR) issued by Chinese Supreme Court provide the basic rules for the determination of the applicable law in case of disputes of an international commercial contract.

First of all, parties to an international contract have the right to freely choose the applicable law by agreement. However, such agreement cannot produce any legal effects if it is reached after the termination of the court debate in the first instance (Article 8, IJ of LCLFCR). In case they agreed on the applicable law to their contract, in principle, such law shall be applied (Article 41, LCLFCR; Article 467, CCC), even if such law does not have any specific connection with the contract (Article 7, LCLFCR).

Nevertheless, only the Chinese law can be applied and no agreement between parties may preclude its application in the following two cases:

- (a) in the event that some mandatory law provisions provide that Chinese law shall be applied as the proper law for disputes between parties (Article 4, LCLFCR).
For example,

Pursuant to Article 10 of JI of LCLFCR, the parties are obliged to apply the Chinese law as the proper law for the settlement of legal disputes arising from the following

contracts: (a) those concerning the protection of the laborers' rights and interests; (b) those concerning food or public health security; (c) the contracts of environment security; (d) those concerning foreign exchange control and other financial security; (e) those concerning anti-monopoly and anti-dumping.

The Chinese law shall be applied mandatorily in case of disputes arising from a Sino-Foreign Joint Venture Contract, a Sino-foreign Contractual Joint Venture Contract or a Sino-foreign Contract concerning the Exploration or/and Development of Natural Resources, according to which the parties' obligations shall be performed in China (Article, 467, CCC).

Hence, although the parties deliberately produce the point of contact of an international contract to circumvent the mandatory provisions of the laws and regulations of China, their choice-of-law agreement precluding the application of the Chinese law is void (Article 11, JI of LCLFCR).

- (b) if the application of foreign laws causes damages to the social public interests of China, then the Chinese law shall directly replace it as a proper law (Article 5, LCLFCR).

Secondly, unless the parties have agreed on the choice of proper law or a mandatory provision of law directly obliging the parties to apply the Chinese law, the following rules shall be carried out to individuate a proper law for an international commercial contracts:

- (a) in case of disputes concerning the protection of the right over an immovable thing, the law where it is situated shall be applied (Article 36, LCLFCR);
- (b) in case of disputes concerning the protection of the right over a movable thing, the law where the legal facts related to such movable thing take place shall be applied (Article 36, LCLFCR);
- (c) in case of disputes concerning the alienation of real right over a thing under an international transportation contract, the law of destination of transportation is applicable (Article 38, LCLFCR);
- (d) in case of disputes regarding a negotiable instrument, the law of the place of realization of the right related to such negotiable instrument or any other laws with closest relation to it shall be applied (Article 39, LCLFCR);
- (e) In case of disputes on pledges over property right, the law of establishment of such pledges shall be applied (Article 40, LCLFCR).

Thirdly, in case parties have not reached an agreement on the choice of applicable law, no mandatory laws provide the obligations of parties to either directly apply the Chinese law, or to carry out any specific rule to find the proper law, the laws which have the closest relation to the international contract are applicable.

In accordance with Article 41 of ALAFCR, laws having the closest relation with an international contract refer *a priori* to the laws at the habitual residence of the party whose performance of obligations may best reflect the characteristics of this contract, then the laws with other elements with closest connection, which, in legal practice, are considered by the judges as the place of formation of contract, e.g. place where the parties have entered into the contract, the place of negotiation of contract, the place

of performance of the obligation of the parties, the place where the property forming the subject matter of contract is situated, the places of residence of the parties, the countries of their nationalities, the place of establishment of company, the place of main business etc.

The determination of which element is most closely connected with an international contract is under the judges' full discretion. For instance, as far as the international trade contracts are concerned, sometimes the most closely connected element refers to the place of performance of obligation by buyers; however, in other cases it is the seller's place of performance. It is necessary to point out that in e-commerce international contracts the identification of the closest element in relation to the contract has become more and more complex in China. The priority for the protection of non-defaulting parties has increasingly been taken into consideration by the court as a rule for the determination of the element with closest relation to the international commercial contract.¹

1.2 The Forum and Procedures Governing Disputes Arising from International Commercial Contracts

All procedural matters regarding the settlement of any disputes arising from an international commercial contract, including the collection of evidence, the legal effects of evidence and the execution of judgment, shall be exclusively governed by the *lex fori*, i.e. the law of place of court. The individuation of liabilities of contract for the parties, including the quantification of damages that the parties have suffered, falls into the spectrum of substantive law—generally speaking, the application of *lex fori* is excluded.

1.2.1 Determination of the Jurisdiction Forum

There are two ways determining the jurisdiction forum: by law or through the parties' free choice. In case of divergence on the jurisdiction between the parties, these have right to take legal action before the court to determine it.

Determination of the jurisdiction forum by law: Pursuant to Article 266 of Chinese Civil Procedure Law, Chinese courts hold the exclusive jurisdiction to judge the civil litigation in relation to all Sino-Foreign Joint Venture Contracts, Sino-foreign Contractual Joint Venture Contracts and Sino-foreign Contracts regarding the Exploration or/and Development of Natural Resources. Hence, the jurisdictional competence of any foreign court for the above contracts is excluded by the Chinese law.

¹ Liu (2011), 30.

Moreover, parties to an international contract shall follow some specific rules on how to individuate a competent Chinese court among all Chinese courts with possible jurisdiction. In China, there are four different levels of court: ordinary court, intermediary court, high court and the Supreme Court. According to the 2002 *Supreme Court's Judicial Interpretation on the Competence of Jurisdiction on the Trials concerning Foreign Interests*, a first-instance litigation arising from an international commercial contract shall be decided by either an intermediate court or a high court. Therefore, no ordinary court has such jurisdiction. As far as the territory jurisdiction of court on civil disputes arising from an international commercial contract is concerned, the related jurisdiction is under the court of the place where the defendant is domiciled or where the contract is performed (Article 23, CCPL). Beside this general rule, under Chinese Civil Procedural Law the nature of contracts is also a decisive element for the determination of jurisdiction, e.g. an action involving a dispute over an insurance contract shall come under the jurisdiction of the court of the place where the defendant is domiciled or where the insured object is located; the jurisdictional competence over a transportation contract exclusively belongs to the courts of the place of departure or place of destination of transportation.

The Chinese Civil Procedural Law confers Chinese courts some very extensive jurisdictional competence over civil litigation on international commercial contracts. If an action is taken against a defendant without a domicile within the Chinese territory concerning a dispute over a contract or rights and interests in property, if the contract was executed or performed within the Chinese territory, if the subject matter of the action is located within the Chinese territory, if the defendant has distrainable property within the Chinese territory, if the defendant maintains a representative office within the territory of China, then the action may be subject to the jurisdiction of court of the place where the contract was executed, the place where the contract was performed, the place where the object of action is located, the place where the distrainable property is located, the place where the representative office is domiciled (Article 65, CCPL).

The application of the so-called *Forum Non-Convenience* rule has been applied only to cases on tort liability. The need for application of this rule to the litigation on the international commercial contracts is discussed only in doctrine, but still finds no application in legal practice.²

Determination of jurisdiction through the parties' free choice: By reaching an agreement, parties of an international commercial contract are free to grant the power of jurisdiction to any court, including any foreign court, unless the nature of disputes has nothing to do with foreign related interests (for the understanding of foreign related interests, see Sect. 1.1) or the Chinese mandatory laws provide directly the exclusive jurisdiction of a Chinese court over an international contract (see above). In other words, in case there is no relation concerning foreign interests at all, it is

² Ding (2007), 125–132.

inadmissible for the parties to freely choose a foreign court for the judgment of the case and any agreement precluding the jurisdiction of Chinese court is completely void.

It is necessary to point out that if the parties agree on the court's jurisdiction by concluding a specific agreement, this jurisdiction shall be recognized, no matter whether such agreed jurisdiction is connected with the international commercial contract or not. In such a case, the above-mentioned statutory rules on the determination of court jurisdiction in terms of court's level and territorial competence are inapplicable.

Chinese law recognizes the legal effect of tacit understanding on the choice of applicable law. After one party in litigation has advanced its idea on which a proper law shall be applied and the other party does not manifest its objection in continuing the legal proceeding, then the proper law proposed only by one party shall be applied. This is the case of unilateral choice of a proper law by a party to contract.

1.2.2 Arbitration of International Commercial Contracts

The 1995 Chinese Arbitration Law, whose latest amendment took place in 2017, provides the basic rules to govern all domestic and international arbitrations in China. This law draws on the UNICITRAL Model Law on International Commercial Arbitration. Under Chinese law, the effectiveness of the arbitral clause is totally independent from the validity of a contract. The invalidity of a contract does not impact in any way the production of legal binding effects of the arbitral clause within the same contract. In terms of effectiveness, the rules of the Chinese arbitration commission agreed by the parties prevail over the Chinese Arbitration Law, which only provides supplementary functions. A rule of arbitration commission in China is invalid only in case it is against the mandatory law provisions.

Since 1987, China has been a party to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958). The recognition and enforcement of a foreign award is under jurisdiction of a Chinese intermediary court if the party subjected to enforcement has its domicile or if its property is located in China. The recognition and enforcement of the foreign awards in China is regulated principally by Chinese Civil Procedure Law, rather than by the Chinese Arbitration Law.

The well-known international arbitration bodies in China are the China International Economic and Trade Arbitration Commission (CIETAC), the Beijing Arbitration Commission (BAC), the Shanghai Arbitration Commission (SHAC) and the Guangzhou Arbitration Commission (GZAC). The International Chamber of Commerce (ICC), the Hongkong International arbitration commission, the Singapore International Arbitration Commission, the London Court of International Arbitration (LCIA) and the Arbitration Institute of Stockholm Chamber of Commerce are

most-widely-chosen international arbitration bodies by the Chinese parties. China is also a party to international Convention on the settlement of Investment Disputes between States and Nationals of Other States (ICSID Convention). In 2015, upon the initiative of the Chinese government, the China-Africa Joint Arbitration Centre (CAJAC) was established in Shanghai and Johannesburg as an in-service international platform for the Chinese National Initiative “One Belt, One Road” aiming at settling economic disputes between China and Africa.

1.3 The International Commercial Context: China’s Main Trading Partners

According to the latest statistics reported by the International Trade Centre as of November 13, 2018, China is the world’s largest exporter by value, shipping US\$2.263-trillion-worth products in 2017. About 48.5% of Chinese exports by value were delivered to Asian countries while 22% and 18.9% were respectively sold to North American and European business partners. At 4.2% of Chinese exports were bought by importers in Latin America (excluding Mexico) plus The Caribbean with 4.1% exports to Africa.

15 of China’s top trading partners in terms of export sales in 2017, to which 67.9% of Chinese total exports are delivered, are highlighted below by dollar value and country’s import percentage against the total number of Chinese exports.

1. United States: US\$430.3 billion (19% of total Chinese exports)
2. Hong Kong: \$279.2 billion (12.3%)
3. Japan: \$137.3 billion (6.1%)
4. South Korea: \$102.7 billion (4.5%)
5. Vietnam: \$71.6 billion (3.2%)
6. Germany: \$71.1 billion (3.1%)
7. India: \$68 billion (3%)
8. Netherlands: \$67.1 billion (3%)
9. United Kingdom: \$56.7 billion (2.5%)
10. Singapore: \$45 billion (2%)
11. Taiwan: \$44 billion (1.9%)
12. Russia: \$42.8 billion (1.9%)
13. Malaysia: \$41.7 billion (1.8%)
14. Australia: \$41.4 billion (1.8%)
15. Thailand: \$38.5 billion (1.7%).

So far, China’s trade export to BRICS countries has represented a low percentage in its international commerce.

2 Formation of Contract

2.1 *General Introduction to the Formation of Contract*

2.1.1 Consent, Offer and Acceptance

A contract is an agreement among natural persons, legal persons or other organizations as equal parties for the establishment, modification and extinction of a relationship involving the civil rights and obligations of such entities. Agreements concerning personal relationships such as marriage, adoption, guardianship, etc. shall be regulated by provisions of other laws (Article 464, CCC). A contract is formed only when the parties of the contract mutually express their offer and acceptance and agree upon the main terms (Article 471, CCC). Hence, offer and acceptance are key elements of the contract.

An offer shall contain four elements: first, it represents the expression of an intent made by a specific party and must be externalized. What is only concealed in one's own mind cannot be a valid offer; second, an offer is an expression of intent to enter into a contract with another party. If it is made for a specific party, then it becomes effective when it reaches the offeree in case of a non-conversation form; when it is made in the form of conversation, it becomes effective when the offeree acknowledges its contents (Article 137, CCC). Nevertheless, in exceptional cases, it can also be made towards an unspecified majority, i.e. a public offer.³ A public offer becomes effective when its announcement is published (Article 139, CCC). Third, an offer aims to conclude a contract. The offer becomes legally binding as long as it is accepted by the offeree; fourth, the content of the expression shall be accurate and contain the main terms of the contracts, which shall be clear and precise (Article 472, CCC).

Mailed price lists, public notices of auction and tender, prospectuses, commercial advertisements, etc. are generally considered as invitation for offer rather than offer (Article 473, CCC). Nevertheless, if a commercial advertisement contains indispensable elements of an offer, it shall be also regarded as an offer for unspecified persons. In particular in the contract of sale of a commercial house, the introduction as well as the promise contained in the advertisement shall be regarded as part of the contract, even though they are not recorded in the forthcoming contract (Article, 473). The party shall be liable for damage in case of breach. In spite of this, in terms of law in action, some strict standards are set forth for the qualification of a commercial advertisement as a part of contract. In the majority of judgments, if in a commercial advertisement of real estate for housing the seller declares that the specification on the houses and their facilities has only the purpose of promotion and the parties' rights and obligations shall be determined by the contract, the judges are inclined to deny that such advertisement is an integral part of the contract, given that the content of

³ Yang (2018), 177–190.

a commercial advertisement does not match the requirement of the so-called 'being specific and definite' standard as an integral part of contract.⁴

As far as the product information offered by the e-commerce stores is concerned, scholars maintain that generally speaking such product information is only an invitation to offer. However, if the product information of e-commerce stores includes not only the name, appearance, quality, model and price of the products but also their inventory status, it may be regarded as an offer containing the request for the buyer to limit their purchase only for the remaining quantity of products within its inventory.⁵ In this case, an acceptance is considered formed once a client has submitted its demand of purchase through the electronic system provided by the e-commerce seller.⁶

An effective acceptance contains five elements: (i) it shall be made only by the offeree; (ii) the offeror shall be informed of the acceptance; (iii) the acceptance shall essentially comply with the offer; (iv) an acceptance shall reach the offeror within the time limit prescribed in the offer. A delayed acceptance is regarded as a new offer. However, if the acceptance is delayed due to accidents that the offeror should not be responsible for, the acceptance remains effective, unless the offeror in time notifies that it is not to be bound by the acceptance; (v) an acceptance shall indicate the offeree's intention of being bound with the offeror by the contract (Articles 486, 487 and 488, CCC).

In principle, a contract comes into effect when acceptance becomes effective. Hence, acceptance is irrevocable but may be withdrawn (Article 485, CCC). On the contrary, an offer may be either revoked or withdrawn (Articles 475 and 476 CCC). Under Chinese Law, an acceptance or an offer becomes effective when related notice is received by the offeror. The offer or acceptance may be withdrawn as long as the notice of withdrawal reaches the counterparty before or at the same time when the offer or acceptance is received. The withdrawal of the offer or its acceptance aims to prevent them from coming into effect, whereas the revocation of an offer invalidates an offer that has already come into effect.⁷

It is worth noting that some legal requirements on the form of contract might affect the formation of the contract itself. For example, some laws provide that some kind of contracts shall be concluded in written, registered, approved, publicized or other forms, otherwise they are invalid. However, some exceptions can be made in order to promote transactions. If a contract is to be concluded in written form as required by relevant laws and administrative regulations or as agreed by the parties (Article 502, CCC), and the parties failed to conclude the contract in written form but one party has performed the principal obligations and the other party has accepted them, then the contract shall be considered as already formed (Article 490, CCC). According to the doctrine a contract with defects in its the formation can be 'cured'

⁴ See: Chongqing 5th Intermediate People's Court, judgement No. 00335, 2015; Hainan High People's Court, judgement n. 44, 2012.

⁵ Yang (2018), 177–190.

⁶ See Jiangxi Province Nanchang County People's Court Judgement No. 141, 2015.

⁷ Bu (2016), 38.

by performance, since the recipient's acceptance of the performance offered by the other party shall be regarded as an affirmation of the contract. The recipient is not allowed to retrace its steps back, as in the 'estoppels' established in the Common Law legal system.⁸

2.1.2 Negotiation

In light of the principle of freedom of contract, each party has the right to terminate negotiation at any time, refusing to conclude the contract, except that the contract is concluded by a mandatory order of the State or by the party who has duty to stipulate it under mandatory laws (Article 494, CCC). However, when the parties contact each other or negotiate with the aim of concluding a contract, they actually form a specific combined relationship, in which the act of one party may affect other parties' interests. In light of the principle of good faith, each party is required to bear pre-contractual obligations of assistance, care, protection, loyalty, notice, confidentiality, etc. The party shall be liable for damage if the damage is brought due to its or her fault in conclusion of a contract (Article 500, CCC).

Chinese jurists used to maintain that the party who broke pre-contractual obligations should bear the liability only when the contract was considered still not concluded or became void or invalidated by the order of public authorities, due to the violation of its pre-contractual liability. Recently, according to some judges,⁹ under the Chinese Contract Law, pre-contractual liability is not preconditioned by the failure of contract formation. In their opinion, Article 500 of CCC sets the general principle for the pre-contractual liability, whereas Article 501 of CCC stipulates that whether the contract is concluded or not, the party shall be liable for any damage of the other party caused by disclosure or improper use of the business confidential information obtained during the contract negotiation. That is to say, even though the contract is concluded and comes into effect, the party who violates pre-contractual obligations shall still bear liability for the damage suffered by the other party.

In terms of the quantification of liability that the party shall bear for its violation of pre-contractual duty, the compensation is generally limited to the loss of reliance interest (*Vertrauensinteresse*) that the counterparty has suffered. However, some scholars insist that such compensation may be extended to the loss of performance interest (*Leistungsinteresse*) if the failure of conclusion of contract results from the fault or gross negligence of a party. For instance, in case that due to fault or gross negligence of a party, a contract whose validity is subject to the approval from the public authorities fails to be formed, such party shall assume a pre-contractual liability and compensate not only the reliance interests, but also the performance interests that the counterparty has suffered, given that the latter kind of interests is also expectable.¹⁰

⁸ Cui (2010), 265.

⁹ Huang (2008), 43.

¹⁰ Sun (2018), 179–191.

2.1.3 Integrity in Writing

Merger clauses are concluded expressively in a written contract, by which the following aims shall be fulfilled: the parties declare the completeness of the written agreement so as to exclude precedent or contemporary proofs to supplement, modify or oppose to the written contract. Parties cannot rely on representations made prior to the execution in writing if not incorporated in the contract. Even if their function is well-known in doctrine¹¹ and these frequently occur in Chinese international contracts, no specific rules on merger clauses have been provided by the Chinese Law. CISG Advisory Council Opinion No. 3, which regulates merger clauses in the international sales of goods, is very important for the Chinese legal operators. Sometimes, upon the agreement between the parties or given the guidance of rules of conflict laws, rules regarding merger clauses provided by American law, PICC, Principles of European Contract Law are applicable directly to an Chinese international commercial contract.

2.1.4 Standard Terms

Standard terms are defined as clauses that are prepared in advance for general and repeated use by one party, and which are not negotiated with the other party when the contract is concluded (Article 496, CCC). Chinese law also stipulates some specific regulations. First, the party drafting standard terms shall fulfill obligation of notice and explanation. It is also required to clarify rights and obligations between parties on the principle of equality, as well as inform the other party to note down the exclusion or restriction of liabilities in a reasonable way and explain the standard terms upon request by the other party (Article 496, CCC). Second, the party drafting the standard terms is forbidden to exempt itself from liabilities, increase the other party's liabilities, and deprive the material rights of the other party by means of the standard terms (Article 497, CCC). Last, if standard terms are inconsistent with non-standard terms, the latter shall prevail (Article 498, CCC).

With the rapid development of e-commerce, disputes in matters related to standard clauses in electronic standard contracts are increasing. The Chinese E-Commerce Law (CECL) enacted on September 31, 2018, focuses on governing the standard terms of contract, in particular, the co-called '*click-wrap contract*', which is drafted by the internet service provider in advance for repeated use. In order to continue the shopping, a client is required to manifest its assent by clicking '*I agree to all the precedent clauses*' button before registration or ordering. Upon reading the click-wrap agreement, internet users click '*I agree*' to make the contract effective.¹² The E-Commerce Law clarifies the effects of some usual provocative standard terms in e-commerce agreements. The standard term drafted by e-commerce operators and internet service providers, according to which the contract does not produce

¹¹ Xu et al. (1999), 59.

¹² See Zhang and Zhu (2002), 58.

binding effects even after the payment of price by the customer, is invalid (Article 49, CECL). In case e-commerce operators and internet service providers conclude a jurisdiction agreement, any standard term increasing the liabilities of the counterparty is also invalid, pursuant to Article 3 of 2018 Supreme Court's Judicial Interpretation "*Regulations on Some Issues of Cases Regarding Internet*".

In legal practice, two aspects are usually taken in account to judge the effect of a 'click-wrap agreement': on one hand, as far as the form is concerned, using words, signs, fonts and other remarks specific are required in order to attract the attention of the other party¹³; on the other, the contract shall not contain any terms exempting or restricting the liabilities of the drafting party.¹⁴

Chinese legislature does not set forth any specific rule on the conflict of form, which takes place frequently in international law. However, given that the Chinese Civil Code Law stipulates a 'mirror rule' (Articles 488 and 489, CCC), it is reasonable to conclude that China adopts a restricted 'last-word rule', i.e. in case of acceptance of insubstantial modification to the offer, the contract is concluded by means of acceptance. If the modification made by offeree is substantial, then the contract does not come into effect and the acceptance forms a new offer.¹⁵ The modification relating to the subject matter, quality, quantity, price or remuneration, time or place or manner of performance, liabilities for breach of contract and means of dispute resolution so forth, constitutes the substantial modification of an offer (Article 488). However, some jurists maintain that the internationally accepted 'dump-out rule' shall be adopted, i.e. when the parties propose different standard terms and at the same time the parties agree on other terms of the contract, the contract comes into effect on the grounds of its agreed and substantially identical terms.¹⁶

2.2 *Formation of Contract. Special Themes*

2.2.1 **Understanding and Agreement that Needs Further Negotiation Before and After the Conclusion of a Contract**

The Memorandum of Understanding (MOU), Letter of Intent (LOI), Comfort Letter etc., do not have any legal meaning, except the fact that according to them parties are

¹³ See also Article 6 of 2009 *Supreme Court's Second Judicial Interpretation on Contract Law*.

¹⁴ For instance, in the 2014 case Mr. Qin versus Shanghai Niu Hai E-Commerce Co. Ltd., the judge argues as follows: "the bold service terms are non-exemption clauses. They contain the service rules and the manner of the conclusion of the contract and do not contain terms that exempt or restrict its liabilities. Therefore, they comply with the law. When the new user clicks agreement for registration or the old user clicks service agreement for updating the related system, in both cases, the standard terms comply with business custom. In addition, the website has already created bold font in order to make customers evidently note this term. Therefore, the agreement should be regarded as valid. See Shanghai Pudong District People's Court, Civil Judgment of the first instance, No. 9378, 2014.

¹⁵ Cui (2010), 256; Wang (2021), 70.

¹⁶ See Li and Zhong (2006), 90–100.

liable for concluding the contract within a precise period (Article 495 CCC). Their effects are clarified by means of interpretation on the contractual terms agreed by parties.

Let us take LOI as an example. In a much broader sense, LOI contains several legal categories, such as: offer or invitation of offer; legally binding contract; negotiating documents of any contractual effect. If LOI is signed by only one party, it is regarded as an offer or invitation of offer; if LOI is formed through offer and acceptance, it shall be qualified as a contract in substance and produce its binding effects, no matter whether it is called a reservation contract. According to the generally accepted doctrine a reservation contract is also an independent contract and its effect is identical with that of an ordinary contract. China's juridical practice confirms the effect of reservation as well. The parties shall comply with the reservation and conclude the formal contract, unless there are some specific causes for the exclusion of effectiveness of reservation contract.¹⁷ Narrowly speaking, LOI as a negotiating document is excluded from any contractual effect, since the substantial contents of the contract in LOI aims to record the step-by-step negotiation progress.

As far as such documents are concerned, according to Article 2 of 2003 *Supreme Court's Judicial Interpretations on the Application of Law in the Trials on Contract of Purchase and Sale of Commercial Houses*, if the parties sign purchase letter, order for purchase, letter of reservation, letter of intention, memorandum of understanding and other reservation contracts so as to conclude a contract of sale within a certain period in the future, and if one party does not fulfill the obligation of concluding the contract, the court shall support the claim of the other party requesting the former to bear the liability for breach of contract or the dissolution of the reservation contract and the compensation for damages. This judicial interpretation treats LOI and MOU as reservation contract.

In fact, the liability for the breach of a reservation contract changes from case to case. Generally speaking, it concerns two different kinds of situation: first, in the event that the formal contract is not yet concluded, the non-performance of obligations gives birth to pre-contractual liability; second, if the reservation contract has already come into effect, the non-performance of the contractual obligations leads to liability for breach, rather than pre-contractual liability. Under Chinese Law, the liability for breach of contract and pre-contractual liability may not co-exist. Nevertheless, some jurists maintain that from the point of view of liability for the breach of contract, if the obligation of the party who reserves only refers to negotiation instead of conclusion of contract, due to indefinite content or the party's unwillingness to be bound by the reservation, such 'reservation' has no effect. In conclusion, the breach of such obligations of "reservation" creates only pre-contractual liability and no liability for breach of contract. However, the analogous term "preliminary contract", which is different from reservation contract, refers to the situation in which the parties have already undertaken "contractual obligations".¹⁸

¹⁷ See: Changsha Yuhua District People's Court, judgement No. 1, 2000.

¹⁸ Sun (2018), 188.

2.2.2 Electronic Contract

The electronic contract is governed by a great amount of laws, regulations and normative documents in China.

First of all, the legal effects of an electronic form is legally recognized and safeguarded. Article 469 and Article 512 of the Chinese Civil Code clarifies that ‘written form’ of contract refers to a form such as a written contractual agreement, letter, electronic data text (including a telegram, telex, fax, electronic data and e-mail exchanges) that can tangibly express the contents contained therein. Analogously, in procedure law the electronic data is categorized as a definite form of evidence (Article 63, CCPL).

Secondly, the conclusion of an electronic contract is regulated by the rules on the arrival of offer and acceptance. If a contract is concluded through data-telex, and a recipient designates a specific system to receive the data-telex, the time when the data-telex enters such a specific system shall be the time of arrival; if no specific system is appointed, the time when the data-telex first enters any of the recipient’s systems shall be regarded as the time of arrival (Article 137, CCC). If the contract is concluded in the form of data-telex, the main business place of the recipient shall be the place of formation of contract. If the recipient does not have a main business place, its habitual residence shall be considered to be the place of formation of contract. If parties have agreed otherwise, such agreement shall apply (Article 492, CCC).

The Chinese Law provides that where the parties conclude the contract in the form of letters or data-telex, etc., one party may request to sign a letter of confirmation before the conclusion of the contract, and a contract is deemed to be concluded at the moment when such letter of confirmation is signed (Article 491, CCC). The parties, who conclude the contract in form of letters or data-telex, are not obliged to sign any letter of confirmation, which becomes an option only when the parties agree to do so. According to the 2004 Electronic Signature Law (modified in 2015), the legal effect of any document using electronic signature and data message as stipulated by the parties shall not be denied only because it takes the form of electronic signature and data message. However, this provision is not applicable in the following: (i) documents concerning such personal relations as marriage, adoption and succession; (ii) documents concerning the transfer of such real estate rights and interests as land, house, etc.; (iii) documents concerning stopping water supply, heating supply, gas supply and power supply, and other public utility services; (iv) other circumstances under which electronic documents are not applicable as prescribed by the law and administrative regulations (Article 3, ESL).

Contracts concluded by means of automatic information system are governed specifically by the 2018 E-Commerce Law. Pursuant to its Article 48, the termination of a contract by an e-commerce party or the performance of its obligations by using an automatic information system shall produce legal effects. All parties in e-commerce are presumed to have corresponding civil competence, unless some contrary evidences are sufficient to rebut such presumption. The legislature acknowledges the difficulty making a rule for presumption since it is hard to ascertain the civil competence of the other party in e-commerce, but pays attention to the protection of

the legal rights of the parties and permits them to overturn the presumption by means of counter evidence, so as to maintain the safety in favor of the parties.¹⁹

3 Validity of Contract

3.1 General Introduction to Validity of Contract

3.1.1 General Provisions of Validity of Contract

Under Chinese Law, the obligatory effects and the real effects of contract are clearly distinguished, even if the so-called abstraction principle in field of passage of title is not recognized.

In terms of the obligatory effects of contract, contracts can be classified into four kinds: valid, void, voidable and pending contracts. Nothing is expressly provided by law with regard to the requirement of *causa* or consideration as a constitutive element for the effectiveness of contract. Following the so-called consensualism theory, i.e. the doctrine of contract largely diffused in the Continental Legal System, Chinese law recognizes the agreement expressing the real intent of the parties as a key element for the validity of contract. Accordingly consideration is not a constitutive requirement for the validity of contract whereas a donation is a kind of typical contract under Chinese law (Articles 657-666, CCC).

In the Chinese doctrine, *causa* of contract refers to both the purpose of the parties (subjective *causa*) and the ground on the basis of which a contract is concluded (objective *causa*). The illegal purposes of the party to contract annul the contract. The fact that *Rebus sic stantibus* is recognized expressly by the Article 533 of the Chinese Civil Code and Article 26 of 2009 *Supreme Court's Second Judicial Interpretation on Contract Law*, proves also the adoption of the objective *causa* in Chinese law. Moreover, to certain extent, consideration plays an important role in the transaction of property by the conclusion of contract. For instance, pursuant to the Article 311 of the Chinese Civil Code, the acquisition of ownership by a third party in good faith is subject to the payment of a reasonable price for sale by the third party.

A contract comes into effect at the time of its conclusion, except as otherwise provided by law or otherwise agreed by the parties (Article 136 and 502 CCC). In case of validity of a contract being subject to approval by the public authority or the completion of registration procedure, it becomes effective only after such approval or the completion of procedure, as required by law (Article 502, CCC). In other words, its effectiveness is only pending after its formation.

The conditions that make a contract effective can be divided in two categories: general conditions and specific conditions. The general conditions require the following: (i) the parties shall have corresponding capacity of act at the time of

¹⁹ Yu and Wang (2017), 154.

the execution of the contract; (ii) the parties' expression of intent shall be genuine; (iii) the contract shall be neither against the mandatory provisions of laws and administrative regulations, nor against the public order or good customs. The specific conditions vary as per different circumstances. For instance, a contract of exploitation of offshore petroleum resources in cooperation with foreign parties needs to be approved by relevant administrative authorities.²⁰

In addition, in legal practice and in doctrine,²¹ it is widely accepted that the validity of contract requires for its content to be certain or determinable, and the obligations of the parties under contract shall be realized objectively by human beings or lawfully, although nothing related to these two conditions is provided by Chinese codified law.

3.1.2 Mistake, Fraud, Threat and Gross Disparity as Avoidance

A contract is voidable in the following four circumstances: where it is concluded due to a material misunderstanding (Article 147, CCC); where it is obviously unfair at the moment of its conclusion (Article 151, CCC); where it is concluded due to fraud (Article 149, CCC); where it is concluded under duress of the counterparty or any third party (Article 150, CCC).

Material misunderstanding under Chinese law refers namely to mistakes in the doctrine of continental law. In terms of the criteria of the determination of material misunderstanding, firstly the contract shall be interpreted according to the rule of interpretation of intent, then the legal effects that the parties intend to realize shall be examined so as to determine if such legal effects are consistent with the party's internal intention and if the mistake is considerable. Generally speaking, under Chinese Law, a mistake of motive does not lead to material misunderstanding. However, if the mistake refers to the quality of the party or the essence of the product or other substantial factors, it shall be regarded as a mistake of the expression of intent.²²

Material misunderstanding is caused by the fault of party who express its intent; however, fraud is attributable to the party who cheats others. In general, material misunderstanding and fraud exclude with each other. Notwithstanding this, in case of breach of pre-contractual obligation of notice, the two factors can work together, in the sense that: if the breach of pre-contractual obligation is made intentionally, the

²⁰ Han (2018), 157.

²¹ Han (2018), 164.

²² Wang (2009), 296. In the opinions of some scholars, the private autonomy is the theoretical basis to justify the voidability of contract, since a mistake of intent does not reflect to the real intent of parties. Yet, modern civil theory seeks pluralism of values, which pays also attention to the protection of legitimate expectation of the counterparty. In view of it, in the case that when a party expresses its or her intent with gross negligence and the other party reasonably expects its legal effect, the former shall not be allowed to revoke or modify the legal effects already produced by such civil act. Yang (2016), 35.

disparity of consent shall be determined with reference to legal provisions of fraud; if only negligence exists, the rules of material misunderstand are applicable.²³

Usually, the illegal intent of the person who threatens, rather than the external form of the threat, is taken in consideration by judges to determine the existence of threat. Pursuant to the Articles 149 and 150 of CCC, threat by third parties is also distinguished from fraud from third parties. In case a contract is concluded due to fraud from the third party, the deceived party is allowed to annul the contract only under the condition that it knows or ought to know the fraud. However, the avoidance of contract due to threat does not requires this condition of awareness of the illegal intent of the person who threatens.²⁴

If a contract is evidently unfair when it is formed as a result of one party taking advantage of the other party's distress or inexperience, among others, the aggrieved party shall have the right to request a people's court or an arbitral tribunal to revoke the contract (Article 151, CCC).

In all cases of voidable contracts, the aggrieved party has the right to modify or revoke them within time limit provided by law, through taking a lawsuit before court or arbitration commission (Article 147–151, CCC). A party fails to exercise its right of revocation within one year from the day when the party knows or should have known the cause of revocation, or a party with gross misunderstanding fails to exercise its right of revocation within 90 days from the day when the party knows or should have known the cause of revocation. In any case, if a party fails to exercise its right of revocation within five years from the day of the conclusion of contract, the right of revocation shall be extinguished (Article 152, CCC).

3.1.3 Illegality

Chinese jurists accept the general doctrine of international private law, which defines mandatory rules, or 'directly applicable law', as mandatory positive rules directly applied by the State to foreign-related civil and commercial cases without reference to conflict rules for the sake of safeguarding the public interests in political, economic, social, cultural and other sectors. Article 4 of 2010 *Law of the Choice of Law for Foreign-related Civil Relationship* (LCLFCR) provides the rules for the direct application of mandatory laws above). Chinese law shall be applied to contracts with regard to protection of employee's interests, food or public health security, environmental security or damaging the social public interests of China.

A contract is void in in the following cases: at (i) where the contract is concluded by means of simulation of intent, the manifested intent of contract is void (Article 146, CCC); (ii) the contract harms the interest of other party due to the collusion between the parties to contract (Article 154, CCC); (iii) the contract is against the good customs or public order (Article 153, CCC); (iv) the contract violates a mandatory provision of any law or administrative regulation (Article 153, CCC).

²³ Shang (2017), 137.

²⁴ Zhang (2018), 632–650.

3.2 Validity

3.2.1 Public Permission

The validity of some contract is subject to the approval of administrative authority. This is the case of pending validity of contract under the Chinese Law.²⁵ The usual categories of administrative approval, which is required for the validity of contract, are listed as follows:

- (a) the administrative approval of the content of the contract. For instance, a preliminary contract of sale of a commercial house concluded by a developer of the real estate becomes valid in China only after being approved by the Chinese relevant administrative authorities. The performance of contractual obligations may sometimes be also subject to administrative approval, e.g. the payment in foreign currency to the overseas of China.
- (b) administrative license for specific commercial or industrial activities. According to Article 502 of Chinese Civil Code and Article 10 of 1990 Supreme Court's *First Judicial Interpretation of Contract Law*, any contract, in violation of state's restriction concerning licensing requirement for a particular business sector, or in violation of any law or administrative regulation prohibiting the parties from participation in a particular business sector, is invalid. Nevertheless, recent judgments tends to break through this rule of judicial interpretation, by taking into account different circumstances for the determination of the effects of a contract against the law imposing restriction on particular business sector or license for special industry: if the contract's subject refers to the license for restrictive industry (e.g. transfer of administrative license), the contract is invalid in any way, except in case parties succeed in obtaining the related license or permission before closing the debate of the first-instance final trial (Article 9 of 1999 *Judicial interpretation of supreme court on Contract Law*); if it concerns products whose production or commercialization is subject to an administrative license, the contract may be valid and the reliance interests of the parties in good faith shall be protected.
- (c) the authorization on the civil competence of the party to contract (namely, its qualification) to operate some specific activities. Generally speaking, the lack of such specific authorization for the party's qualification does not affect the validity of the contract.²⁶ In the legal practice, the following two aspects are taken into consideration by the court: (a) the protection of the interests of the parties in good faith; (b) the possibility of curing the defect of qualification, thanks to the execution of the contract or an afterward qualification of the party etc (Articles 5 and 10 of 2019 Supreme Court's *Juridical Interpretation on Contract for Construction*).

²⁵ Bu (2016), 44; Wang (2020), 14.

²⁶ Zhang (2013), 85.

- (d) the examination for safety of product by administrative authorities. Mandatory rules regarding safety of product refers to the control of quality of products. The unexamined, untested or unquarantined product makes the contract defective but not invalid. The parties may remedy their damages by claiming for liability of breach of contract. The competent administrative authorities have the power to impose administrative penalty rather than to invalidate the effect of civil contract (Article 534, CCC).

3.2.2 Covenants in Restraint of Trade

The parties of contract are free to conclude agreements that limit a party's freedom for their own interests, such as exclusive distributorship, non-competition duty. The validity of covenants in the restraint of trade is generally regulated by 2007 Chinese Anti-Monopoly Law (CAML).

Both horizontal monopoly and vertical monopoly is forbidden generally by Anti-Monopoly Law (Articles 13 and 14, CAML). The former refers to monopoly between two or more operators at the same level of production or sales aiming to exclude and limit competition or obtain excessive profits in form of agreement, decision or other forms. The principal agreements of horizontal monopoly are the following: fixing or modification of product price; limit of quantity of production or sales of products, division of market of sales or market of raw materials, limitation of purchase of new technologies or of the development of new technologies or new high-tech products, joint boycott.

A vertical monopoly agreement refers to agreement between two or more operators at different economic level who have no direct competitive relation but have business relation (e.g. the one between provider and seller, wholesaler and retailer) aiming to exclude or limit competition by explicit or implicit means.²⁷ It can generally be divided into two kinds: fixing the price of the products to be sold to any third party and restricting the minimum price of the product to be sold to any third party (Article 14, CAML).

Monopoly agreements are invalid except the fact that they are concluded for a reasonable or lawful purpose. Pursuant to Article 15 of CAML, monopoly agreements are valid if they are concluded (i) to improve technologies or research and develop new products; (ii) to enhance product quality, decrease cost, increase efficiency, unify product specification, standard, or implement division of work based on specialization; (iii) to increase operational efficiency of medium and small operators and enhance their competitiveness; (iv) to save energy, protect environment, assist in disaster relief work, or realize other social public interest; (v) to relieve severe decrease of sales or apparent overproduction during times of economic depression; (vi) to protect legitimate interests in foreign trade and foreign economic cooperation.

In the litigation on the validity of monopoly agreement, the reverse burden of proof shall be applied, according to Article 7 of the 2012 Supreme Court's Judicial Interpretation "*Regulations on Some Legal Problems of Application of Civil Disputes*

²⁷ Zhang (2008), 82.

Arising from Monopoly". The plaintiff only needs to prove the existence of monopoly agreement, whereas the defendant should bear the burden of proof of proving that the agreement does not have any effect excluding or limiting competition, or that it has reasonable or lawful purposes.

3.2.3 Severability

If one part of a contract is invalid, it shall not affect the validity of the other parts and the other parts shall remain valid (Article 156, CCC). Usually, the partial invalidity of contract works in principle, while overall invalidity is just exceptional. The entire contract becomes invalid only when the invalid part affects the other parts. In Chinese legal practice, for the determination of whether partial invalidity affects the validity of other parts, the following three elements shall be taken into consideration together.²⁸

First, the existence of integrality of contract. Any contract is supposed to exist as an integral legal transaction. The application of the partial invalidity rule is preconditioned by the existence of an integral legal act. If an agreement between the parties cannot be regarded as entire legal transaction, then the invalid part cannot affect other clauses. In the same contract, from which the rights of security in favor of the different creditors arise, an invalid part of contract regarding a right of security for a creditor may not invalidate all the other parts of contract. However, generally speaking, a contract of guarantee for the performance of obligation is an ancillary contract of the principal claim-debt contract. Consequently, when the principle claim-debt contract is null and void, the contract of security of credit becomes null and void accordingly (Article 388, CCC and Article 76, CRRL).

Second, the contract is inherently severable. In case that one part of the contract is invalid, the other parts may still exist independently. For the verification of severability of contracts in legal practice, the following elements shall be taken into account: whether multiple clauses exist, whether the different parties are involved in the same legal transaction, whether the performance of obligations provided in the same contract are severable etc.

Third, the ascertainment of the parties' real intent on whether the contract is severable. This is the most important point for determining the severability of a contract. If the cause of invalidity consists in auxiliary or secondary clauses of the contract, the general approach is that the real intent of the parties is to make the contract partially invalid. If the disputes between the parties regard the existence of the entirety of contract, it is necessary to find out what position an impartial and reasonable third party in good faith would take in the same situation. The solution presumably offered by a reasonable *paterfamilias* shall be applied to decide if the partial validity causes the entire invalidity of the contract.

A clause on the severability of contract or alternative terms expressly agreed by the parties always leads to the severability of the contract. In this case, undoubtedly, the partial invalidity of contract does not affect the validity of other parts.

²⁸ Wang (2016), 59.

4 Interpretation of Contract

4.1 Overview

4.1.1 General Approach to Interpretation

Traditionally and theoretically, the interpretation of a contract is based on the real intent of parties to contract, so the subjective approach to the interpretation of contract, i.e. the ascertainment of the real intent of parties, is adopted in China. However, following the tendency of the latest development of contract law in Europe and in order to protect the reliance interests of the party in good faith, under the Chinese Civil Code an objective approach to contract interpretation is adopted. It means that a contract shall be construed in light of good faith, i.e. according to the reasoning and understanding of a third party in good faith. In other words, the authentic intent externally expressed by the parties, shall be taken in consideration by the court more than what concealed in their own minds,

In this sense, in case of any dispute between the parties concerning the content of a contract term, the true meaning thereof shall be ascertained according to the words and sentences used in the contract, the relevant provisions and the purpose of the contract, and in accordance with the relevant usage and the principle of good faith (Article 142, CCC).

The true meaning of the content of a contract under the Article 142 of Chinese Civil Code shall be limited to be understood as the correct interpretation of contract by the parties. An offer of one party does not become a clause of contract, nor does it produce legally binding effects until the other party accepts it. Hence, “the true meaning of the clause of contract” does not refer to internal intent of the parties, rather, it shall be interpreted by external expression, which shall be counter-checked and trusted by the other party. Generally speaking, only this so-called normative intent is recognized by the Chinese law.²⁹

Exceptionally, in terms of interpretation of the contract, a subjective hermeneutic method shall prevail over the objective one. The external expression of the unreal intent of the party does not cause any damages to the reliance interests of the counterparty. For example, even if the offeror’s external expression does not comply with its inner intent, the acceptor understands the offeror’s true inner intent and agrees with the offeror on the grounds of such an understanding. In this case, the acceptor understands the expression of intent on the basis of the offeror’s true internal intent, even though the external expression of the latter is different. The wrong external expression of the inner intent of the offer does not form reliance trust on the part of the acceptor.³⁰ In legal practice, it is the offer, who has externally expressed a different intent from its inner intent, to assume the burden of proof to demonstrate that the acceptor has known or shall have known its real inner intent.

²⁹ Han (2010), 700.

³⁰ Wang (2018), 55.

Chinese Law sets forth the following methods of interpretation to understand them: literary interpretation, systematic interpretation, purpose interpretation, customary interpretation and good-faith interpretation (Article 142, CCC).

Literary Interpretation: Literary interpretation means that the true meaning of the contract, including tacit and implied terms, shall be understood by studying the meaning of used terms and phrases. Generally speaking, the above-mentioned objective approach to interpretation shall be applied. The Supreme Court holds that the primary method to understand the parties' internal true intent shall be to determine the literary meaning of the words, phrases and terms used in a contract, according to the objective reasoning and understanding of any person in good faith. To fill in the gaps of the contract, including tacit and implied terms, literary interpretation shall precede any other interpretative methods.³¹

Overall Interpretation: Overall Interpretation requires that all clauses and additional parts, including tacit and implied terms, should be viewed as an entire body. The meaning of controversial terms shall be determined according to the mutual connection among all the main clauses, additional parts, tacit terms and implied terms, as well as the relationship between a single term and general clauses.³²

Purpose Interpretation: Purpose interpretation means that if a certain word or clause of the contract can be subject to two interpretations, the interpretation that best suits the purpose shall be adopted. The purpose of a contract can be divided in two types. One is called "typical business purpose", which leads to the demanding legal effect that determines the legal nature of contract. Another type consists of the parties' subjective purpose, which changes from case to case, even if the different contracts have the same nature. In view of the Chinese Supreme Court, it can be cited as a criterion for the interpretation only if it concerns a common purpose agreed by the parties, or the general understanding of the reasonable third party in the position of the parties to the contract. No contract may be interpreted only according to an unilateral purpose (or expectation) of one party.³³

³¹ See "Zibo Wanjie Hospital versus China Bank Co. Ltd, Zibo Yibo Fiber Co, Ltd., Wang Jie Holding Co. Ltd.," Supreme Court's Sentence, Civil Section, No. 99 (2007).

³² For example, "Shanghai Chenhao Law Firm versus XinXing Heavy Industries GroudCo.Ltd.," Tianjin Binhai District Court Sentence No. 30278 (2016).

The court holds that in the special legal service agreement, the last part of Article 3 of the contract stipulates that "*After the termination of this contract, if there are still outstanding issues in this dispute, Party A still needs Party B to provide legal services, and Party B is obliged to continue to assist Party A in handling the matter*". Article 6 of the same contract stipulates that "*if Party A entrusts Party B to further provide litigation and arbitration legal services, it shall pay the lawyer's agency fee separately. The consulting service fee for this agreement may be directly deducted from the lawyer's legal fee*". Article 3 of the contract refers to a period of validity clause, while Article 6 is a service fee clause. Considering the integrality of contract, its Article 3 shall be interpreted as a provision on collateral obligations. Consequently, it is understood in implied way that the plaintiff shall assume the obligations.

³³ See "Zaozhuang Mineral Co. Ltd., versus Huaxia Bank Co. Ltd.," Supreme Court judgement, No. 137 (2009).

Customary Interpretation: It means that if all terms and phrases, including tacit and implied terms, used in the contract appear as controversial, they shall be interpreted according to the usages between the parties. One party's unilateral custom is not a criterion for the interpretation of a contract, unless the other party is informed of it and recognizes its legal effects at the moment of conclusion of the contract. It is worth noticing that when the parties do not have any specific agreement, the customs between the parties shall precede any specific customs, e.g. professional customs or local customs, while the specific custom precedes ordinary custom, e.g. national custom. In Chinese legal practice, customary interpretations are applicable together to literary interpretation. For instance, in the case "*Zhou Zhaoquan versus Guangzhou Shejian Real Estate Co. Ltd.*," the agreement of loan establishes that "the period is half year and the related interests is 180,000 yuan". According to the literary meaning and usual customs on loans between parties who are not financial institutes, it is more reasonable to state that half a year refers to the period of the loan, instead of the period of interests.³⁴

Interpretation in Light of Good Faith: It means that the interpretation of contract shall follow the rule of good faith. For instance, for a gratuitous contract the interpretation shall be less strict to the debtor; for onerous contracts, the contract shall be interpreted in accordance with the reciprocity of obligations between the parties. The interpretation in light of good faith requires that the obligations between the parties shall be determined according to the principle of good faith, in case of disputes between the parties. In China's practice, the interpretation of good faith is often adopted in combination with all other hermeneutic methods of interpretation. For instance, in the case of "*Zhang Zhijian and Beijing Fangcun Technology Co. Ltd., versus Yangang Kuanchang Technology Co. Ltd.*," the parties stipulate that "*Fa Ren* (法人) shall bear unlimited joint liability". The Chinese word "*Fa Ren*", as a legal term, refers to a legal person, e.g. the company; however, in vague daily business language, it may also refer to a legal representative of a legal person. Given that *Fangcun Company* is a legal person, if in this case, the word "*Fa Ren*" is interpreted as a legal person in its technical sense, accordingly, *Fangcun Company* shall bear unlimited joint liability for itself in quality of a legal person. This is undoubtedly clear, and it makes no sense to write down this kind of clause in a contract. Therefore, according to the relation between different clauses of the contract, purpose of the contract, the parties' language customs and the principle of good faith, "*Fa Ren*" in this case is deemed to be interpreted as "a legal representative of a legal person".³⁵

³⁴ For instance, in its court decision on "*Zhou Zhaoquan versus Guangzhou Shejian Real Estate Co. Ltd.*," No. 897 (2018), the Supreme court affirms that for the interpretation of words "the period is half year and the related interests is 180,000 yuan" in a loan contract, according to literary meaning and usual custom on loan between the parties, who are not financial institutes, it is more reasonable to hold that half year refers to the period of the loan, instead of period of interests.

³⁵ See "*Zhang Zhijian and Beijing Fangcun Technology Co. Ltd., versus Yangguang Kuanchang Technology Co. Ltd.*," in Beijing High Court judgement No. 438 (2017).

“Specific Clause Prior to General Clause”: Although it is not explicitly provided by law, in doctrine and legal practice,³⁶ the effects of the special clauses of the contract should prevail over those of general clause, unless parties expressly agree otherwise.

Keeping Effectiveness of Contract: The Chinese Law does not stipulate the so-called “keeping effectiveness of contract” rule for the interpretation of contracts. However, in doctrine, any contract shall be interpreted for the purpose of keeping with all possibility the validity of contract. It is inadmissible to interpret any part of contract with the intention of invalidating it, unless the adoption of such rule leads to severe imbalance of rights and obligations between parties.

4.1.2 The Relationship Between Interpretation, Supplying Omitted Terms, and Implying Terms or Obligations

The Chinese law recognizes the legal effects of the tacit and implied terms of contract. Under Chinese Law, the general rules of interpretation of contract are distinguished from the methods of supplying omitted terms and the implying terms or obligations (the so-called gap-filling of contract).

The interpretation of a contract aims to make the meaning of its terms already agreed by the parties clear. However, the gap-filling of contract takes place when some important provisions of the contract are not omitted or implied. The supplementary norms of law are used to facilitate the parties to perform the contract. Two general rules shall be applied in case of supplying the omitted or implied terms or obligations of contract: firstly, the parties’ presumptive intent to fill up the gaps of contract shall be understood and observed. This intent concerns the objective ideas of a reasonable third party in position of the parties to contract; secondly, the principle of good faith shall be always carried out. In this sense, the transaction customs and other elements in conformity with good faith shall be taken in consideration in any case.³⁷

The Chinese Civil Code set outs the rules of interpretation of contract in the first paragraph of Article 142, while the rules regarding gap-filling of contract in its Articles 510, 511, 512 and 513. The rules for gap-filling of contract are:

- (1) Where, after the contract becomes effective, there is no agreement in the contract between the parties on such contents as quality, price or remuneration, or place of performance etc., or such agreement is ambiguous, the parties may agree upon supplementary terms through consultation; if a supplementary agreement cannot be reached, such terms shall be determined in accordance with the relevant provisions of the contract or the transaction practices (Article 510, CCC).

³⁶ Cui (2010), 370. See, also Hunan TV Co, Ltd., v. Liao Qingsheng, Hunan Province High Court, judgement No. 31 (2006).

³⁷ Hao (2015), 54. See also the Article 301 and 302 of CCC.

- (2) If a relevant term of the contract was not clearly prescribed, and cannot be determined in accordance with article 511 of Chinese Civil Code, one of the following provisions applies:
- (i) If the quality requirement is unclear, it shall be determined in accordance with the state standard or industry standard; absent of any state or industry standard, performance shall be fulfilled in accordance with the customary standard or any particular standard in conformity with the purpose of the contract;
 - (ii) If price or remuneration is unclear, it shall be determined in accordance with the prevailing market price at the place of performance at the time of the conclusion of contract and if adoption of a price fixed by the government or based on governmental pricing guidelines is required by law, such requirement shall be satisfied;
 - (iii) where the place of performance is unclear, if the obligation is the payment of money, the performance shall take place at the place where the payee is located; if the obligation consists in the delivery of immovable property, performance shall take place at the place where the immovable property is located; for any other subject matter, the performance shall be at the place where the obligor is located;
 - (iv) If the time of performance is unclear, at any time, the obligor may perform, and the obligee may require performance, provided that the necessary time required for preparation shall be given to the counterparty;
 - (v) If the method of performance is unclear, the performance shall be rendered in a manner which is conducive to realizing the purpose of the contract;
 - (vi) Where the responsibility for the expenses of performance is not clarified, the party fulfilling the obligations shall bear the expenses; And the creditor shall bear the increased expenses of performance if it causes such increase of expenses.
- (3) Pursuant to Article 513 of Chinese Civil Code, the omitted, tacit and implied terms on performance at price fixed by the government shall be applied, which reflects the control from Chinese authority on the private autonomy, under the following circumstance: where a contract is to be implemented at a price established by the government or based on governmental pricing guidelines, if the government adjusts the price during the prescribed period of delivery, the contract price shall be the price at the time of delivery. If a party delays in delivering the subject matter, the original price shall be applied if the price has increased, and the new price shall be applied if the price has decreased. If a party delays in taking delivery or making payment, the new price is applicable if the price has decreased.
- (4) If an electronic contract is concluded through the Internet or other information networks and its subject matter consists in the delivery of the goods through logistics and express delivery services, the time of delivery of the goods shall

be the moment when the consignee signs upon their delivery. If the subject matter of an electronic contract is the supply of services, the time stated in the generated electronic or physical certificate shall be considered as the moment of performance of obligations; where the aforementioned certificate does not specify the time or the stated time is inconsistent with the actual time for providing services, the actual time for providing services shall be considered as the moment of performance of obligations. If the subject matter of an electronic contract is to be delivered via online transmission, the delivery time shall be the time when the subject matter of the contract enters the specific system designated by the other party and can be retrieved and identified. If the parties to the electronic contact have otherwise agreed upon the method and time for delivery of the subject matter, such agreement shall prevail (Article 512, CCC).

4.1.3 Interpretation of Standard Terms

While the clause proposed by one party can be interpreted in different ways, it may be interpreted unfavorably for the party proposing it. This rule is mainly used in the interpretation of standard clauses. If there are different interpretations on the same standard terms, the interpretation against the interests of drafter or provider of the standard terms shall be accepted and applied. In the event of any conflict between standard and non-standard clauses, the latter shall be adopted (Article 498, CCC). If both parties argue about the different meaning of standard clauses, the interpretation shall follow the above-mentioned normal canons of construction. Moreover, if standard terms result from an equal negotiation between parties and are expressly agreed by both parties, then the interpretation shall not be made in favor of any party.³⁸

4.2 Interpretation-Specific Topics

4.2.1 Languages of the Contract

If a contract is concluded in two or more languages and it is agreed that all versions are authentic in meaning, then the words and sentences in each version shall be construed to have the same meaning. In case of any discrepancy in the words or sentences used in the different language versions, these shall be interpreted in light of the purpose of contract (Article 142, CCC). Hence, the following principles characterize the text language in the Chinese Law:

- (a) the prevalence on the different versions of contract, agreed by the parties, shall be always observed and be used as the basis for interpretation. In Chinese legal practice contracts concerning the foreign interests usually state that

³⁸ Cui (2010), 370.

the Chinese version prevails in case of discrepancy between the versions in different languages. If the parties agree that the contract is drafted in one language and its versions in other languages acts just as translation, only the official version shall be taken into consideration.

- (b) in case that parties have not reached any agreement on the prevalence between the different versions, all versions of the contract produce the same effects. Generally speaking, the contract shall be interpreted in accordance with the general rules of interpretation of contract set out in Article 142 of the Chinese Civil Code (see above). There is no rule providing that the version drafted in precedence prevails over those drafted later, regardless of the languages.

The courts may resort to a translator to understand the versions of the contract in foreign languages. Under Chinese Civil Procedure Law, an official translator shall translate into Chinese all legal documents or evidences in foreign languages to be provided to the judges. The translator shall assume legal liability on the authenticity of the translation from the foreign into the Chinese language. The judges are not allowed to interpret the translation, even if they know the foreign languages of the contract. In case of doubt on the translation, they may consult other translators. Not only the content of the contract in foreign languages but also the rules on its interpretation are governed by the proper law.

In the field of contract law, there is no specific rule governing the legal effects of contract drafted in a language which one or more parties are not familiar with. Generally speaking, private autonomy shall be observed in this case, so the party is obliged to realize a translation of a contract proposed by the counterparty into a language with which it is familiar. Only in case a party has suffered damages due to the misunderstanding of the text of contract in a language or the fraud of the counterparty does it have the right to dissolve the contract and/or demand the compensation for the damages, providing all the evidences for its material misunderstanding or the fraud of the counterparty (see above validity of contract).

However, for the consumer's protection, the 1993 Law of Product Liability (modified on December 29, 2018) and the related administrative regulations provide that any product sold in China shall have its information written in Chinese accompanied by the following essential information outside its package: name of product, name and address of producer and seller, classification of quality, ingredients and the percentage of the related ingredients, safety instructions, expiry date, special warning to the consumer required by the law etc.. In case of failure of performance for such obligations by the producers or sellers, then the consumers have the right to return or replace the product, and demand its reparation, as well as the compensation of damages that they have suffered. The producers and sellers are obliged to take the administrative or criminal responsibility.

4.2.2 Recitals or Preambles

As an integral part of contract, the recital of the contract mainly includes “signing parties”, “background”, “time”, “place”, etc. Sometimes, in legal practice, it is also referred to as “considering that” terms.

Signing parties: Signing parties are liable for the validity of the contract and bear the ultimate liability. Generally, the following aspects are taken into consideration in legal practice: (i) the civil liabilities of the signing parties to the international contract under the applicable law. Sometimes the liability of the foreign legal person is different from that of the Chinese one. Therefore, rules related to the liability to foreign commercial body affect the form of signing parties recorded in the preface. For instance, in the corporate law of civil law system, a partnership corporate refers to a legal entity incorporated by both unlimited and limited shareholder. The unlimited shareholder bears unlimited joint liability for the corporate’s debt, whereas the limited shareholder bears limited liability within its share. However, in China, limited partnership corporate is similar to partnership corporate and assumes limited liability, though it is not considered as a legal person; (ii) possible involvement of a contracting party in affiliate transactions. It refers to relationship between controlling shareholder, actual controllers, directors, supervisors, high managers and the corporate either directly or indirectly under their control and other relationship that might incur transfer of interests of the corporate (Company Law 1994, Article 216). Affiliate transaction violates business equity and market competition under market economy and violates the principle of good faith; (iii) involvement of the signing party in tax regulation. If the parties’ main business place is located in China, usually they shall pay taxes for their worldwide income.

Background of Conclusion: Chinese law does not require for the background of the conclusion to be mentioned in the contract. Conventional clauses, e.g. “both parties agree on the following terms based on lawful and equal negotiation” are often used. However, as a rule of thumb, such background is introduced in international contracts. Under the Chinese Law, it serves the need to clarify the basic causes for the conclusion of the contract with the function of clarifying the purpose and interpretation of contract.

Time of Conclusion: Time of conclusion is a key element for the determination of the beginning of the performance of the contract and the correct interpretation in case of discrepancy of the content of the contract among its different versions. If the time for the initial performance of the contract is unclear, the time of conclusion allows the party to request the other party to perform its contractual obligations. This time is also the beginning of the contract’s binding force on both parties. In legal practice, the signing time is also an important point for the judge to determine the liability for breach of contract by the parties and their precontractual liability in the course of negotiation of contract.

Place of Conclusion: The place of conclusion is a key element for the determination of applicable law (for applicable law, see above) and the power of jurisdiction or

arbitration. Article 34 of the Chinese Civil Procedure Law stipulates that in case of a contract or any other property rights dispute, the parties may agree on the jurisdiction of the people's court at the place where the contract is signed, but may not violate the provisions on the level of jurisdiction and exclusive jurisdiction (Article 34, CCPL).

5 Content of Contract

5.1 Overview

5.1.1 Duty of Parties with Regards to the Operation or Performance of Contract

Principle of Collaborative Performance: The parties shall follow the principle of good faith and perform the obligations of notification, assistance and confidentiality according to the nature, purpose and business customs (Article 509, CCC). In China parties shall not only properly perform their contractual obligations, but also shall cooperate with the counterparties in fulfilling their obligations, in accordance with the principle of good faith.

On the one hand, the performance of the contract requires mutual cooperation between the two parties. On the other, this collaboration is always limited. The debtor shall perform the contractual debt and the creditor shall properly accept the payment. When the debtor fulfills its contractual debt, then the creditor has the obligations to create conditions for the acceptance of the performance and provide any necessary convenience. If the debtor cannot perform or cannot fully perform its obligations for any reason, the creditor shall actively take measures to avoid or reduce the loss, otherwise it would be liable for expanded losses.³⁹

The collaborative obligation in the performance of contract is often regarded as an additional obligation under the Chinese Law. For instance, in financial leasing contract, if the vendor does not perform its obligation and the lessee claims for compensation, the lessor shall provide its assistance (Article 471, CCC). In contract for the performance of a work, in case of need, the client shall provide its assistance to the party who orders the work (Article 778, CCC). In particular, it is worth noting that the parties shall void wasting nature resources, polluting the environment and harming the ecology and fulfil their all duties on the protection of environment in their performance of obligations, in accordance with the so-called “Green Principle” of the Chinese Civil Law (Article 509 and 9, CCC)

Full Performance Principle: Pursuant to the Article 509 of the Chinese Civil Code, the parties to the contract shall completely perform their contractual obligations as agreed upon and abide by the principle of good faith, provide the notification and appropriate assistance, as well as safeguard the information's confidentiality that they

³⁹ Cui (2010), 127.

obtain from their counterparty during the transaction. The full performance of obligations shall be fulfilled, in accordance with the nature and purpose of the contract and the transaction practice, the agreed subject matter, its quality and quantity by the appropriate entity at the appropriate time limit for performance, place of performance, and appropriate performance. The Article 465 of Chinese Civil Code underlines the importance of the “*pacta sunt servanda*” principle and continuously the Chinese Supreme Court has been stressing the application of the full performance of obligations.⁴⁰

5.1.2 Obtaining Certainty with Regards to What Has to Be Performed and for What Period

Unclear Quality Requirement: The Chinese Law stipulates two solutions for contractual flaw regarding unclear quality requirement. First, parties may agree upon supplementary terms through consultation (Article 510, CCC). Second, if a supplementary agreement fails to be reached, such terms shall be determined in accordance with the relevant provisions of the contract or transaction practices. If the quality requirement remains unclear, performance shall be in accordance with the state or industry standard, and in the absence of any state or industry standard, quality shall be determined in accordance with the customary standard or any particular standard in conformity with the purpose of the contract (Article 511, CCC).

Unclear Price or Remuneration: Under the Chinese Law, the remedy for unclear price or remuneration is similar to remedy for unclear quality requirement. First, the parties may agree upon supplementary terms through consultation (Article 510, CCC). If a supplementary agreement cannot be reached, such terms shall be determined in accordance with the relevant provisions of the contract or transaction practices. If the price or remuneration remains unclear, the performance shall be fulfilled in accordance with the prevailing market price at the performance place at the time of conclusion of contract, and if the adoption of a price commissioned by the government or based on governmental pricing guidelines is required by law, such requirement is applicable (Article 511, CCC). If the government-fixed or government-directed price is followed in a contract, and if the said price is readjusted within the time limit for delivery as stipulated in the contract, payment shall be calculated against the price at the time of delivery. Where a party has some delay in delivering the subject matter, the original price shall be adopted if the price rises; and the new price shall be adopted if the price falls. If a party has some delay in taking delivery of the subject matter or making payment, the new price shall be adopted if the price rises, and the original price shall be adopted if the price falls (Article 513, CCC).

In legal practice, unclear price is mainly determined by supplementary agreement or market price. For example, in the case of “*Shaanxi Xingyun Mechanic Co. Ltd., versus Rainbow Group Electronic Co. Ltd.*,” the Supreme Court maintains that

⁴⁰ Shi (2020), 52. See also the Guiding Case No. 67 of the Chinese Supreme Court: ang Changlong v. Zhou Shihai, Chengdu City Intermediate Court, judgement No. 1815 (2013).

Rainbow Company has already consulted Xingyun Company with supplementary agreement. If the consultation fails, the price of samples cannot be considered as the price of the formal contract. Hence, the price shall be determined in accordance with the parties' customs. In this case, both parties increased the price of samples according to market price on October 6th, 2004. It seems that this can be treated as both parties' custom. If all the above-mentioned solutions do not work, the price shall be aligned to the market price. In view of this, the price in this case shall be determined according to mutual consultation or market price, even though the most flexible rule is adopted.⁴¹

Unclear duration: Parties are free to establish the duration of a contract. The extension of a contract duration is also subject to the free choice of the parties. However, there are two exceptions. First, if the prohibition for maximum duration for a specific type of contract or under certain circumstance is provided mandatorily by law, the contract becomes invalid after the expiration of such maximum duration. For instance, pursuant to Article 705 of CCC, the duration of any lease contract may not exceed twenty years and if the lease term exceeds twenty years, the part of lease contract beyond such maximum is invalid. Upon expiration of such twenty years of contract duration, the parties may renew the lease, provided that the renewed duration may not exceed twenty years commencing on the renewal date. Second, if duration of contract is not clear, the nature of the contract, its purpose or usage of business between parties shall be defined according to a further agreement between the parties (Article 511 of CCC). Third, if the duration of contract is not determinable in any way, any party to contract has right to resolve the contract at any moment, provided that such notice for resolution shall be notified to the counterparty in reasonable time. Even if this provision is specified by Article 730 of CCC, for a lease contract with unclear duration, in legal practice, this rule is generally applicable for any kind of contract.

5.1.3 Conditions of Contract

Under the Chinese Law, the parties may agree that the effectiveness of a contract is subject to certain conditions. A contract becomes effective when such conditions are accomplished. The contract with dissolving conditions becomes invalid when such conditions are satisfied (Article 158, CCC). If a party improperly prevents the satisfaction of a condition for its own interests, the condition shall be regarded as having been accomplished. If a party improperly facilitates the satisfaction of a condition, such condition shall be regarded as not to have been satisfied (Article 159, CCC).

A suspensive condition determines if the contract comes into effect. A contract with suspensive condition comes into effect at the moment when the condition takes

⁴¹ Shaanxi Xingyun Mechanic Co. Ltd., versus Rainbow Group Electronic Co. Ltd., Supreme Court judgement No. 8 (2008).

place. If the condition does not take place in the end, then this contract does not produce any binding effect.⁴²

A resolutive condition determines the termination of a contract. A contract with resolutive condition comes into effect as long as it is formed, but it loses its effect when the resolutive condition takes place. No matter if the condition of contract is suspensive or resolutive, the satisfaction of a condition of contract does not produce any retroactive effects.⁴³

The effectiveness of contract may be subject to a time limit unless it is not admissible to fix such time limit due to the nature of contract. A contract subject to suspensive time limit becomes effective at the moment when the time limit expires. However, a contract subject to resolutive time limit ceases to be effective at the moment when the time limit expires (Article 160, CCC).

5.2 *Content of Contract-Specific Topics*

5.2.1 Warranties

Defect warranty liability: The seller shall deliver the goods under contract in accordance with the contracted quality requirements. Hence, the seller shall provide warranty against defects of goods in favor of the buyer (Article 615, CCC). Defect warranty liability is strict liability. This is not preconditioned by the seller's subject fault.

The following requirements shall be matched for the seller's assumption of liability for warranty against defects of goods:

- (a) the goods under contract are defective in terms of quality. Defect refers to both inconformity with the quality requirement agreed by the parties (the so-called subjective defects) and inconsistency with legal quality standard (i.e. objective defects).
- (b) the defect exists at the moment of risk transfer. It does not matter whether the target matter is defected at the moment of contract conclusion.⁴⁴
- (c) the buyer is in good faith and does not commit considerable fault. The buyer is not aware of the defect or the defect takes place after conclusion of contract and before risk transfer. If the buyer is aware of the defect or is not aware of the defect due to gross negligence, then the seller does not bear any defect warranty liability.
- (d) the buyer shall perform general obligations of notification on defects of goods.

If an inspection time limit was prescribed, the buyer shall notify the seller of any non-compliance in the quality of goods within such inspection period. If the buyer

⁴² Liang (2017) 183.

⁴³ Zhu (2011) 130.

⁴⁴ Zhou (2014), 108.

has some delay in notifying the seller, the quality of goods is deemed to comply with the contract. If no inspection time limit is prescribed, the buyer shall notify the seller within a reasonable period, commencing on the date on which the buyer discovered or should have discovered non-compliance. If the buyer fails to notify within a reasonable period or fails to notify within two years, commencing on the date when it receives goods, the quality of the goods is deemed to comply with the contract, except the fact that a different notification time limit is agreed by parties or provided by law. However, if the seller knows or should have known the defects, the buyer is not subject to the above-mentioned time limits for the notification (Article 621, CCC).

Remedies of warranty liability against the defect of goods are the following: repairing, substituting, reworking, returning the goods, reducing the price or remuneration (Article 582, CCC).

Warranty against Defects of Right: The seller has the obligation to guarantee that no third party shall claim rights against the buyer over the subject matter delivered unless the law provides otherwise (Article 612, CCC).

The Chinese law adopts the concept “warranty against the defect of right”, namely against the claims of right from any third party, to describe the liability against eviction, i.e. the transferor’s liability to warrant that it is entitled to transferee the right over a thing, which is the object of transaction under the contract, and assume the liability of compensation to the damages that the transferee has suffered in case of satisfaction of claim of the same right from any third party.

For the purchase and sale contract, the Chinese Law clearly sets out the seller’s liability of warranty against the defects of right. The seller is obligated to warrant that the buyer will be free from any third party claim (Article 612, CCC); if the buyer knew or should have known that the subject matter was subject to a third party claim at the time of conclusion of the contract, the seller does not assume such an obligation (Article 613, CCC).

In Chinese legal practice, all these rules on warranty against the defects of right under purchase and sale contract are applicable in any contract related to the transfer of a real right. Under Chinese Law, the transferor is liable for the warranty against defects of right only if the following conditions are satisfied jointly⁴⁵:

- (a) the transferor has the obligations to transfer a real right to other party under the contract;
- (b) the reason for what the transferor is obliged to transfer exists before or at the moment of the conclusion of contract. If the facts arising the transferor’s obligation to transfer such right occur after the conclusion of contract, then the transferor is free from assuming the liability of warranty against defects of right. In this case, the transferor shall bear liability for breach of contract, tort liability or assume the risk of the deterioration or the missing of the subject matter;

⁴⁵ Wu (2014), 129.

- (c) the transferee is unaware of the defects of the rights enjoyed by the transferor at the moment of contract conclusion;
- (d) the fact that the transferor's insufficiency of rights makes it impossible to transfer the real right over thing to the transferee, fails to be cured after the contract conclusion. In case the seller obtains such real rights from a third party, e.g. by purchase or donation, it is exempted from the assumption of this liability;
- (e) such liability is not excluded by any agreement between the parties or by law.

The existence of transferor's fault is not required for the verification of the existence of warranty liability against the defects of right. In other words, it is a strict liability.

To realize the assumption of liability of warranty against the defects of right, the transferee has the right to ask the transferor to eliminate such defects of rights, reduce the price or any other kind of consideration, and demand the compensation to the damages that it has suffered, even to obtain penalty in case of existence of penalty clauses on the assumption of such a liability. In case the main purpose of the contract fails to be realized, then the transferee has also the right to resolve the contract unilaterally, pursuant to Article 563 of the Chinese Civil Code.

5.2.2 Indemnification

The Chinese legislation adopts the term "limitation of liability" or "exclusion of liability" to indicate an "indemnification clause" which is largely applied in common law. Within the legal practice of Chinese business law, the indemnification clause is provided for the allocation of some specific liability for the parties arising from the transaction. Pursuant to Articles 593 of the Chinese Civil Code, if non-performance of obligations is caused by the act of any third party, the defaulting party shall also assume the liability arising from such non-performance. Hence, due to the strict application of contractual liability, the Chinese Law protects the indemnification clause.

It is admissible for the parties to determine a liability cap of contract or/and set forth the clauses to exclude indirect damages (*lucrum cessans*, including loss of profits, loss of data, damages to reputation, any loss or damages under or in connection with contract, wasted management, damages caused by the employees or loss of other staff time etc.) under the condition that such damages are foreseeable by the parties at moment of contract conclusion (Article 584, CCC).

In any case, a clause may not be against public order, good custom and mandatory law. Beyond all circumstances causing contract invalidity (see n. 3 above, under validity of contract), under Article 506 of Chinese Civil Code, the following indemnification clauses are also invalid: (i) excluding one party's liability for personal injury caused to the counterparty. No clause excluding completely or limiting the liability for the personal injury is valid. In legal practice, in terms of damages to personal injuries, any clause setting forth a cap for its compensation, reducing the limit of

action or time limit in relation to the exercise of victim's right of claim, is invalid, even in a medical treatment contract; (ii) excluding one party's liability for property loss caused to the counterparty due to its fraud or gross negligence. The liability for property loss can be limited or excluded by agreement between the parties, except that such property damages are caused due to fraud or gross negligence by one party. In other words, parties are entitled to limit or exclude the liability for property in case the property damages are caused by one party's *culpa levis*.

Given that the principle of good faith governs all fields of contract law, an indemnification clause becomes invalid if it is against good faith. Upon invitation by the parties the court has the power to adjust the compensation established in indemnification clauses, in light of the good faith principle.

No law provisions on consumer's protection invalidates an indemnification clause according to which a consumer shall indemnify a business subject against liability incurred by the former to a third party. However, in case such indemnification clause is drafted in a standard form, its drafter shall fulfill obligation of notice and explanation on rights and obligations between parties on the basis of equality, in particular, inform the counterparty on the exclusion or restriction of liabilities in a reasonable way (Article 496, CCC). Moreover, in case the drafter of the standard terms on indemnification exempts itself from liabilities, increases the counterparty's liabilities, and deprives its material rights, such terms shall be invalid (Article 497, CCC). It is also worth noting that in case of discrepancy between standard and non-standard terms, the latter shall prevail (Article 498 of CCC).

6 Performance of Contract—Overview

6.1 Performance in General

6.1.1 General Rules of Performance

Period of Performance: The obligations can be performed in advance and the debtor has right to give up its benefits arising from the due performance date. Chinese law allows advance performance, provided that this does not harm the debtor's interests (Article 530, CCC). The performance time can be delayed as agreed upon by the parties. If the debtor is temporarily unable to pay due to hardship, the debt can be amortized after the creditor's consent or the Court's sentence (Article 533, CCC).

The debtor can choose any moment to perform its obligations within the period of performance, in case that the due date of performance has not been agreed by the parties, but the creditor shall give the debtor reasonable time for the preparedness of the performance of its obligation (Article 511, CCC). The creditor has no right to decline the acceptance of the debtor's correct and timely performance, but it may reject the debtor's partial performance, provided that partial performance of its obligations does not harm the creditor's interests (Article 531, CCC). In case of

refusal by the creditor, the debtor has right to put the subject matter in escrow and consequently the creditor is also in delay of acceptance. On the contrary, when the creditor demands the debtor to fulfill within the period of performance, the debtor can oppose to performing its undue obligations. After the performance period has lapsed, the debtor failing to perform becomes automatically in delay of performance, which does not require any notification of performance by the creditor, unless the performance of main obligations of the debtor needs the cooperation from the creditor or arises from a negotiable instrument.⁴⁶

Pursuant to Article 525 of the Chinese Civil Code, if both parties have obligations towards each other and there is no order of priority with respect to the performance of obligations, the parties shall perform obligations simultaneously. Each party has the right to reject any demand for performance by the other party prior to the performance by the other party. If the performance of obligations by the party who is to perform first is not fulfilled in conformity with the agreement, the party who performs later has the right to reject the other party's demand for corresponding performance.

Moreover, if there is a priority order with respect to the performance of a bilateral contract and the party who is to perform fails to perform first, the party who shall perform its obligations later has the right to reject the other party's demand for performance. If the performance of the obligations by the party who is to perform first is not in conformity with the agreement, the party who is to perform later has the right to reject the other party's demand for corresponding performance (Article 526, CCC).

Place of Performance: If, after the contract becomes effective, there is no agreement in the contract between the parties on the performance place or the agreement is ambiguous, the parties may agree upon supplementary terms through consultation; if a supplementary agreement cannot be reached, such terms shall be determined in accordance with the relevant provisions of the contract or transaction practices (Article 510, CCC). If the performance place is specifically prescribed by law, mandatory provisions of law prevail.

Where the performance place is still not determined by the above-mentioned methods, the payment of the currency shall be performed at the place where the currency is accepted, i.e. the creditor's place; if the real property is delivered, it shall be performed at the place where the real property is located; and the other subject matter shall be performed at the habitual residence or main business place of the party who shall fulfill such performance (Article 511, CCC).

Manner of Performance: Each party shall fully perform its own obligations as agreed upon, in accordance with the principle of good faith (Article 509, CCC). The performance of obligations by the parties shall be fulfilled as agreed between the parties. Improper performance includes not only the performance not conforming to the terms agreed by the parties, but also performance against good faith. Striking

⁴⁶ Han (2002), 49.

examples of improper performance are the defect of subject matter and unreasonable increase in price etc.⁴⁷

However, if the manner of contract performance is unclear, the obligations shall be performed in a manner which is conducive to fulfilling the aims of the contract (Article 511 CCC). In any case, the determination of a proper manner of performance shall be evaluated also in light of the principle of good faith.

In addition, the burden of performance costs needs to be divided in inherent performance cost and increased performance cost. As for the inherent performance cost, if the burden is either clear or is based on clear provisions by the law, or based on the special agreement between the parties, there is no doubt in performance. If the burden is unclear, it should generally be borne by the party performing the obligation (Article 511, CCC). As for increased performance cost, if this is due to the creditor, e.g. in case of the creditor's delay in performance, it shall be borne by the creditor; if it is due to the debtor, e.g. when the debtor partially performs or performs in advance, it shall be borne by the debtor.

When the debtor's payment is insufficient to pay off all the debts, then the debts that have already expired should be preferentially offset; if several debts are due at the same time, priority is given to secured debts or to the most guaranteed amount; if the guaranteed amount is the same, priority is given to debts with a heavier burden; if the burden is the same, debts are offset in the time order of expiration; if debts expire at same time, they shall be offset in accordance with proportions, unless the creditor and the debtor agree otherwise (Article 20, JICL-2, Article 560, CCC).

In addition, if the debtor has to pay interest and expenses besides the main debts, if payment is insufficient to pay off all the debts and the parties do not reach an agreement, then the people's court shall offset the debts in the following order: (i) expenses related to fulfillment of the obligation; (ii) interests; (iii) the main debts (Article 21, JICL-2, Article 561, CCC).

Hardship: According to Chinese law, in case of grave change of the situation that the parties cannot foresee at the conclusion of the contract, which is not caused neither by force majeure nor by commercial risk, upon the request of the party in hardship, the court holds the power to determine whether to change or terminate the contract according to fairness and the actual situation, if continued performance is obviously unfair for the debtor (Article 26, JICL-2, Article 533, CCC). "Change of circumstance" is the term adopted in Chinese law instead of hardship.

The principle of changed circumstances is preconditioned by the following factors: (1) hardship exists. The fairness of a contract is heavily damaged or its purpose cannot be fulfilled due to incidents, which is neither force majeure nor commercial risk. For instance, when technology has been disclosed to the public, a technology development contract becomes senseless (Article 857, CCC); (2) the hardship takes place after the conclusion of a contract and before its full performance; (3) hardship cannot be attributed to either parties; (4) the parties are not able to foresee the hardship at the moment of conclusion; (5) hardship makes the continued performance of

⁴⁷ Sui (1997), 309.

obligations obviously unfair for the disadvantaged party. Nevertheless, the normal assumption of commercial risk in charge of the parties may not be qualified as hardship.

The party suffering the hardship shall negotiate with the counterparty before going to court to demand the change or termination of contract and the parties shall carry out this so-called “continuous negotiation” in good faith.⁴⁸ Under Article 533 of the Chinese Civil Code, only in case of failure of settlement of the dispute through such “continuous negotiation” between the parties within a reasonable time after the occurrence of hardship do parties have the right to file the application to the court for modification or termination of the contract.

7 Non-performance (Breach of Contract)

7.1 *Non-performance Overview*

7.1.1 Non-performance in General

Chinese law adopts the unified concept of breach of contract, rather than non-performance of contract. If a party fails to perform its obligations under a contract, or its performance does not conform to the terms of contract, it shall bear the liabilities for breach of contract in such way as to continue to perform specific obligations, to provide remedy or compensate the damages that the counterparty has suffered (Article 577, CCC). The defaulting party shall bear the liability for the breach of contract as agreed by the parties, and if there is no agreement in the contract on the liability for the breach of contract or such agreement is not clarified, nor can it be determined accordance with the rules on gap-filling of contract, the adversely affected party may, in light of the nature of the subject matter and the degree of the damages, has the right to request the other party to assume the liability for the breach of contract such as repairing, redoing, replacing, returning the subject matter or reducing the price or remuneration (Article 582, CCC).

Generally speaking a party's fault does not necessarily lead to a party's liability for breach (Article 577, CCC). Strict Liability is adopted in China. If a party's breach is attributable to any third party, the debtor shall nevertheless be liable for breach due to a third party (Article 593, CCC). In the doctrine this rule has been widely criticized⁴⁹ and some scholars have proposed different solutions to limit its adoption. Nonetheless, strict liability of contract is largely applied in legal practice.⁵⁰

⁴⁸ Han (2014), 666.

⁴⁹ Zhou (2012), 161.

⁵⁰ Zhou (2012), 153.

It is worth pointing out that even under the co-called strict liability, parties may be exempted from their liabilities due to force majeure (Article 590, CCC), or as provided by some specific legal regulations (e.g. the compensation liability of carrier in transportation contracts), or changed circumstances (Article 26, JICL-2). However, in some specific circumstances, the Chinese law recognize also the so-called objective custodian's liability, according to which a debtor's failure to return the property in custody automatically leads to its liability for breach, even if it can prove that it has no fault at all, as in case of force majeure. The custodian liability is always applied in cases in which the debtor is obliged to return the property, e.g. lease of things (Article 714, CCC), contracted work (Article 784, CCC), financial lease of things (Article 750, CCC), multi-modal carriage (Article 841, CCC), bailment (Article 894, CCC), agency (Article 927, CCC) etc.

In some specific circumstances, non-performance due to the creditor may affect its own claim of non-performance liability:

- (a) the creditor has obligations of notification, assistance, confidentiality with respect to the debtor according to the principle of good faith (Article 509, CCC). Chinese Contract Law does not generally stipulate exempting circumstances of breach due to the creditor, but the creditor's fault serves to limit the debtor's liability (Article 927, CCC; Article 30, 2003 Supreme Court's *Judicial Interpretation on Contract of Sale and Purchase*; Article 592, CCC). It is generally accepted by scholars that breach due to the creditor in principle does not generate liability of breach.⁵¹ Chinese law provides also some specific regulations on the liability for non-performance due to the creditor in many typical contracts, e.g. sale contracts, tourist contracts, goods transportation contracts, deposit contracts etc. These provisions are applicable by analogy to all other untypical contracts.⁵²
- (b) In case of the creditor's delayed acceptance, the debtor can choose to suspend or place the subject matter in escrow to extinguish its debts (Article 570, CCC); if it is not convenient for the subject matter to be placed in escrow, the debtor can auction or sell it and lodge the price (Article 570, CCC). In the execution of the price fixed by government or determined according to the governmental price guidance, the creditor is subject to a risk of price change due to the delay in receiving the payment, i.e. the lower price shall be applied against the creditor's interest (Article 513, CCC). In addition, for sales contracts, due to the creditor's delay of acceptance of the debtor's performance, the risk of the compensation to damages or loss of the subject matter is transferred to the creditor (Article 605, CCC; Article 11, ALTCPSCH). In other words, if the creditor does not collaborate in acceptance according to the contract and the subject matter is lost due to some reason which is not attributable to the parties, the debtor is free from the obligations of delivery of subject matter, whereas the creditor still shall make the agreed payment. The creditor's delayed acceptance in principle does not generate a right of contract termination. However, in work

⁵¹ Han (2018), 577; Cui (2016), 89; Zhuang (2018), 149.

⁵² Zhuang (2018), 147.

contracts, if the work cannot be completed due to the client's non-performance of contractual duties, the worker can terminate the contract after notification (Article 778, CCC). Pursuant to Article 589 of the Chinese Civil Code, in case the creditor fails to accept the debtor's performance without any justifiable reason, the creditor shall compensate the increased costs that the debtor has suffered and the debtor is free from the payment of interest in the whole duration of the creditor's delayed performance acceptance (Article 589, CCC).

- (c) Any party to a bilateral contract may refuse to perform its own obligations before obtaining the counter-performance and the existence of the right of performance defense precludes the formation of performance delay.⁵³ Regarding the defense of contract non-performance (*exceptio non adimpleti*), Chinese law draws a distinction between the right of simultaneous performance of the obligations (Article 525, CCC) and the right to first demand counter-performance, depending on whether there is an order for the performance of obligations for both parties (Article 526, CCC⁵⁴). The former is based on the fact that performance of obligations by both parties has no priority, while the latter is based on the fact that one party shall perform first. The judges hold the power to recognize these two different rights *ex officio* from case to case.⁵⁵
- (d) In the case of debtor's partial performance of obligations, the creditor shall accept it if such partial performance does not harm the creditors' interests (Article 531, CCC). The creditor's improper refusal to accept the debtor's partial performance is against good faith.⁵⁶
- (e) Pursuant to Article 577 of Chinese Civil Code upon the breach of contract the creditor has the right to demand the debtor to continue to perform its obligations, to take remedial measures, or to compensate its losses. The non-defaulting party has always the right to obtain the continued performance from the counterparty and this creditor's right for continued performance shall be not subject to the debtor's willingness. The Supreme Court has correctly pointed out in its judgment that it is the legal right of creditors to choose to terminate the contract or, alternatively, to request the debtor to continue its performance.⁵⁷ However, this legal right for continued performance shall be excised in a reasonable way and the creditor's abuse of right is not recognized in legal practice. Therefore, in certain circumstances, especially if the debtor's breach is extremely insignificant or due to the nature of the subject matter and the size of the loss, judges may reject the creditor's request for continued performance.

⁵³ Li (2017), 174.

⁵⁴ See "Daqing Kaiming Co. Ltd., versus Hua Rui Technology Co. Ltd.," in Official Gazette of the Supreme Court of PRC, 2015, No. 11.

⁵⁵ Li (2018), 412–413.

⁵⁶ Han (2018), 394.

⁵⁷ See "Guangzhou Xianyuan Real Estate Co. Ltd., versus Guangdong Zhongda Investment Design Co. Ltd., and Guangzhou Yuanxing Real Estate Co. Ltd., and China Investment Group International Financial Co. Ltd.," in the Official Gazette of the Supreme Court of PRC, 2010, No. 8.

- (f) By serving a specific notification, the creditor has the right to provide the debtor with the additional period to obtain the continued performance, and if after the expiration of such a period the debtor fails to fulfill its main performance, then the creditor has the right to terminate the contract (Article 563, CCC). This additional period provided by the creditor shall be reasonable. It is forbidden for the creditor to abuse its right of unilateral contract termination in this case. Chinese Law also stipulates a termination without notification, i.e. the additional period given by the creditor cannot be regarded as necessary precondition for termination. With regards to this, see the “Right of Termination” section.

7.1.2 Right to Specific Performance

Under Chinese law, the creditor’s right of claim for continued performance does not have priority as a remedy for the breach of contract. It is juxtaposed with compensation for damage, claim of compensation for breach and other remedies (Article 577, CCC). The creditor may choose one remedy among them. In case of monetary debt, the creditor has always the right to demand the continued due payment (Article 579, CCC). In case of non-monetary obligations, the creditor is precluded from asserting its right of obtaining the specific performance under the following circumstances (Article 580):

- (a) it is impossible for the debtor to perform its obligation lawfully or in practice. For example, the transaction under contract is prohibited by law or the object of performance is either lost or physically destroyed.⁵⁸
- (b) the subject matter of the obligation is unfit for compulsory performance or the performance expenses are excessively high. The former circumstance takes place when it refers to personal obligation, e.g. association contracts, contract of art shows etc.,. The latter circumstance is deliberated in accordance with the proportion between the debtor’s performance cost and the creditor’s benefit.⁵⁹ However, some court decisions take in consideration the proportion between the debtor’s cost of continuing its performance and the creditor’s benefit as criteria for the evaluation of excessive costs for performance continuation.⁶⁰ The doctrine maintains that cost of other supplementary remedies shall also be considered⁶¹ and shall not be limited to pecuniary cost, e.g. time, service, labor etc.,⁶² The creditor may demand the court to order the debtor to bear the cost due to the third party’s performance if the obligation essentially cannot be enforced by the debtor (Article 581, CCC).

⁵⁸ See Civil Sentence, N. 1366, Sect. 3 of Court of Songjiang District of Shanghai.

⁵⁹ See *Xin Yu Co Ltd., V. S. Feng Yumei*, Official Gazette of Supreme Court of China.

⁶⁰ See Shanghai First Intermediary Court, civil section N. 4, final civil judgement N. 1191 and Case Materials of People’s Court, Vol. 24, 2012; the same opinion is shared by Wang (2017), 138.

⁶¹ Han (2018), 770.

⁶² Yi (2016) 2016a, b, 152.

- (c) the creditor does not demand the debtor to continue performing its obligations within a reasonable period. The determination of such time limit is subject to the judges' full discretion.

In addition, if a party to a contract fails to perform its specific obligations, or its performance fails to satisfy the terms of the contract, it shall bear the liabilities for breach of contract, e.g. to continue to perform its obligations, to take remedial measures, or to compensate for losses (Article 577, CCC).

If quality fails to satisfy the agreement, the damages due to the breach of contract shall be borne as agreed upon by the parties. If there is no agreement in the contract on the liability for breach of contract or such agreement is unclear, nor can it be determined in accordance with the rule of gap filling of contract according to Article 511 of Chinese Civil Code, then the damaged party may reasonably choose to request the other party to bear the liabilities for the breach of contract (e.g. such as repairing, replacing, reworking, returning the goods, or reducing the price or remuneration) in light of the subject matter nature and the degree of loss (Article 582, CCC). In case of impossibility of continued and specific performance due to the obligation nature, the creditor has the right to choose a third party to fulfill the specific performance in replacement of the debtor and the debtor shall pay the costs for such specific performance made by the third party (Article 581, CCC).⁶³

7.1.3 Right to Terminate a Contract Due to Non-performance

Contract Law entitles the parties to terminate the contract under the following circumstances:

- (a) The parties may agree on the conditions for contract termination (Article 562, CCC). Such a clause can be included either in the contract to be terminated or in form of supplementary agreement. If a condition for termination takes place, the right holder may exercise this agreed right to terminate the contract. The termination manner and period may be agreed by the parties.
- (b) If parties do not agree on the right of contract termination, under Article 563 of the Chinese Civil Code the contract may be terminated unilaterally by each party under the following circumstances: (i) if the force majeure is so serious

⁶³ The regulations on the consequences of the debtor's non-performance of obligations in case of enforcement of court decision can be found in procedure law. For monetary debt, the debtor needs to double the credit interest of the creditor during the delay in enforcement of court decision; for other debts, the debtor should pay the compensation for delay (Article 253, CCPL 1991). For failure of enforcement of monetary debt, the court can take direct enforcement measures as sealing, seizure, freeze, transfer, auction, selling, detention, lodgment, forced submission of property or bill, enforced movement from house, enforced withdrawal from land etc., (Articles 242–25, CCPL). In other cases, the court can either take supplementary measures, or entrust the third part to fulfill the debt with the debtor's bearing cost. It is worth noting that for the debt that only the debtor can fulfill, the court may enforce it with fine, detention and other indirect measures. If the circumstance is serious, the debtor shall even bear criminal liability (Article 110, CCPL; Supreme court's Judicial Interpretation on CCPL 1991, Article 505).

- that the purpose of contract cannot be fulfilled; (ii) prior to the expiration of the performance period, the other party expressly states, or indicates through its conduct, that it will not perform its main obligations. This is the case of the so-called anticipatory breach of contract, and only the non-performance of its main obligation entitles the creditor to the right of unilateral termination of contract⁶⁴; (iii) the other party has delayed the performance of its main obligation after such performance has been demanded, and further fails to perform within a reasonable period; (iv) the other party delays performance of its obligations, or improperly breaches the contract: consequently, it is impossible to achieve the purpose of the contract⁶⁵; (v) if obligations under contract shall be performed continuously but the parties have not fixed a due period of such performance, the creditor has right to terminate the contract by serving to the counterparty a notification of unilateral termination in reasonable advance.
- (c) Pursuant to Articles 527 and 528 of Chinese Civil Code, in case the debtor loses or may lose the ability to perform the debts after the conclusion of the contract, e.g. the serious deterioration of the business situation, transfer of property, withdrawal of funds or loss of credit, etc., and thus it may endanger the realization of the creditor's rights, the creditor shall have the right to suspend its performance by notifying the debtor and terminate unilaterally the contract if after the creditor's suspension of performance within a reasonable period of time, the debtor fails to restore its ability to perform its obligations or provide appropriate security for the credit. In this case, the right of contract termination is strictly limited since the right-holder shall provide definite evidence to prove that the other party may lose its ability to perform the debt and provide a timely notice also to the debtor.⁶⁶ In other words, the debtor's simple financial difficulty does not entitle the creditor to excise its right of contract termination.⁶⁷
- (d) In case of hardship, the party in hardship has also the right to terminate the contract unilaterally, under Article 533 of the Chinese Civil Code. (see "Hardship")

The right of unilateral termination of contract may be excised by means of notification, and the contract shall, in principle, be terminated immediately upon the arrival of the notification. If the notification of contract termination indicates the specific due date for the debtor's performance of obligations as agreed by the parties, the contract is deemed to be terminated automatically upon the failure of the debtor's

⁶⁴ See "Peishi Investment Corporate versus Tianjin Metal Instruments Corporate", in Official Gazette of Supreme Court of PRC, 2003, No. 4.

⁶⁵ The Supreme Court holds that if the breached obligations is of mediocre value and the related non-performance does not hinder the buyer from reselling the goods, the purpose of contract cannot be considered unrealizable, consequently, the right of unilateral termination of contract cannot not granted to the party. See Xinjiang Yakun Commercial Co. Ltd., v. Xinjiang Jinghe County Cotton Production Co. Ltd., in Official Gazette of the Supreme Court of PRC, 2006, No. 11.

⁶⁶ See: Peishi Investment Co. Ltd., v. Tianjin Metal Instrument Co. Ltd., in Official Gazette of the Supreme Court of PRC, 2003, vol. 4.

⁶⁷ See: Yu Caixin v. Fujian Huachen Real Estate Co. Ltd., in Official Gazette of the Supreme Court of PRC, 2011, No. 8.

performance within such a date. In case of disputes on the termination of contract between the parties after the creditor serves the related notification, each party may resort to the court or arbitration to confirm the effectiveness of such a notification (Article 565, CCC). The party may also excise its right to terminate the contract without any notification by directly taking a legal action against the counterparty. In this case, the contract shall be terminated upon the counterparty's receiving of the copy for the related complaint or the application for arbitration or court decision (Article 565, CCC).

The right of termination shall be excised within the period agreed by the parties. If the parties do not reach any agreement, Article of 564 of the Chinese Civil Code provides a strict time limit for the right of unilateral contract termination, stating that the right of termination expires if the right-holder fails to excise it within one year from the date on which the right-holder knows or should have known its right of termination or within a reasonable period after the other party's notification on the excise of such right of termination (Article 564, CCC). According to the Supreme Court's interpretation, the "reasonable period" shall be evaluated in accordance with the nature of contract—e.g. in case of the sale contract of a house, such reasonable period corresponds to three months (Article 15, ALTCPSCH). It is worth pointing out that the right of contract termination ceases to exist after the above-mentioned time limit has lapsed, but does not prevent the party from exercising its right of claim for the continued performance, compensation to damages and any other remedies.

Upon termination of the contract, the contractual obligations extinguish and the performance shall cease if the contract has not been performed; if the contract has been performed, a party may, in accordance with the circumstances of performance or the nature of the contract, demand the other party to restore the legal situation to its original state before the conclusion of the contract or adopt other remedial measures, and the party who has suffered damages following the contract termination shall have the right to demand compensation to damages (Article 566, CCC). In case of restoration of the original situation, including but not limited to the return of property, some scholars maintain that the risk of contract shall be born by the party in possession of subject matter.⁶⁸

Under the Chinese Law, the termination of contract does not affect either the parties' right of claim for damage compensation (Article 115, CCC; Article 566, CCC), or the clauses on liquidation or wind-up (Article 567, CCC), or clauses on the settlement of disputes, such as the arbitration or liquidation clause (Article 567, CCC).

7.1.4 Right to Damage

Due to non-performance of obligations, the party who has suffered damages is entitled to request compensation to damages. The related right of claim may arise without the necessity of proving the existence of fault of the debtor. The compensation to

⁶⁸ Han (2018), 684; Cui (2016), 206. For a different position, Zhao (2015), 1172 s.

damages may be claimed separately or together with other remedies. The constitutive elements for compensation to damages include breach of contract, the existence of damage suffered by the creditor, the causality between the breach of contract and the damages, as well as the absence of causes of justification for the exemption of liability for the defaulting party.

The principle of full compensation is adopted in the compensation to damages in China. All damages due to the breach of contract and foreseeable at the moment of conclusion of contract shall usually be compensated. Compensable losses include losses due to the breach of contract and the interest that can be obtained if the contract were executed completely (Article 374, CCC). The compensation to the loss of profit is also admissible. According to the Supreme Court, the loss of production profit, operation profit and loss of profit from the resale of goods may be compensated (Article 9, SITCCC), but the compensable losses of profit do not include loss of earnings or resale expenses caused by market risks.⁶⁹

In principle, compensation for damage is only limited for patrimonial damage. No norm explicitly denies the compensation for emotional damage caused by non-performance of obligations. The Supreme Court has always hold a negative position towards the compensation for the emotional damage arising from the breach of contract.⁷⁰ However, some lower courts have cautiously supported the compensation for emotional distress under certain types of contracts, e.g. the contract for wedding services⁷¹ and the contract for the storage of body ashes.⁷²

Following the tradition of continental law, in order to protect ordinary business operations as well as social and economic stability, the Chinese legislation establishes also limitation on compensation to damages, stating that only losses foreseeable by the a defaulting party at the moment of entering into the contract may be compensated (Article 584, CCC). There is neither a general rule nor a specific law provision on how to determine such predictability on compensable losses. It is at the judges' full discretion. In theory and legal practice, the standard of an objectively rational person, i.e. a person with ordinary capacity of understanding, is applied to evaluate such predictability by the defaulting party in practical contexts. In contracts concerning professional activities (i.e. the so-called *culpa in concreto*) the criteria of experts are applicable.⁷³

Although the liability for the breach of contract is strict and its assumption does not require the existence of fault of the defaulting party, the existence and the degree of fault of the non-defaulting party shall be take into consideration when determining the losses to be compensated. If the party demanding the compensation to damages is

⁶⁹ See: Xinjiang Yakun Commercial Co.Ltd., v. Xinjiang Jinghe County Cotton Production Co. Ltd., in Official Gazette of the Supreme Court of PRC, 2006, No. 11.

⁷⁰ Article 21, Supreme Court on Several Issues on Trial concerning Turistic Disputes; Zheng Xuefeng, Chen Guoqing v. Jiangsu Province People's Hospital, in Official Gazette of the SupremeCourt of PRC, 2004, 8. See also, Han (2018), 782.

⁷¹ See Shangdong Province Dongying City Intermediate Court, judgement No. 97 (2002).

⁷² See Hunan Province Huaihua Intermediate Court, judgement No. 42 (2012).

⁷³ See Han (2018), 796; Cui (2016), 265.

at fault for the occurrence of the damages, it shall also bear the liability in proportion with the degree of its fault—hence, the judges may mitigate or waive the liability of the opposite party (Article 592, CCC; Article 30, ALTCPSCH).

Under Chinese Law, the indemnifying right-holder is obliged to take appropriate measure to limit the extension of damages. In case it fails to take appropriate measures to prevent damage extension, it has no right to claim the compensation for such an avoidable loss (Article 591, CCC).⁷⁴ Any reasonable expense incurred by the non-defaulting party in preventing such extension of the losses shall be borne by the defaulting party (Article 591, CCC).

If the party benefits from the breach of contract by the counterparty, the interest that it obtains shall be deducted from the damages being claimed to be compensated (Article 31, ALTPSCH).

Some specific criteria for the calculation of damages due to breach of contract—even their cap, are provided by the Chinese Law. For instance, in case the parties do not agree upon compensation to the loss of interests due to overdue payment of monetary debt, such compensable interests shall be calculated in accordance with the standard ratio of loans interest by the Chinese central bank (Article 24 2012 *Supreme Court's Interpretation of Sale Contract*; Article 17 and 18, 2003 *Interpretation of Commercial House Contract*; Article 17, 2019 *Interpretation of Construction Contract*). The Supreme Court even sets forth the cap of the compensation of loss of interests in the loan contract between the natural persons, by calculating it on the basis of four times of Loan Prime Rate (LPR) per year issued by the Chinese Central Bank as interest ratio (Article 27, 2021 *Supreme Court's Interpretation on Loan between the Natural Persons*).

Chinese Law does not regulate the calculation currency for compensation, as it is the parties' free choice.

7.2 *Non-performance /Breach—Specific Topics*

7.2.1 *Exemption/Exclusion Clauses*

In principle, the parties are free to agree on the mitigation or exemption of non-performance liability, but with the following limitations.

The related agreement shall meet all requirements of contract validity, otherwise it becomes void or voidable. (see the “Effectiveness of Contract” section).

In particular, the Chinese Law provides that the clauses on exemption or exclusion of liability for the breach of contract are null and void, if they exempt the liability for compensation to the damages for personal injury or those due to fraud or gross negligence by the defaulting party (Article 506, CCC). The voidness of the former exemption clauses results from the necessity of protection for human life and health,

⁷⁴ See Official Gazette of Supreme Court, vol, 1, 2013, 201.

a constitutionally protected personality right, whereas the latter is null since it is against the principle of good faith.

Under Article 499 of the Chinese Civil Code, if the exemption clause of the liability for breach of contract is drafted in standard terms, it becomes void under the following circumstances: (i) in an unreasonable way, the drafting party exempts or mitigates its liability, increases the counterparty's liability or limits the material right of the latter; (ii) the drafting party excludes the counterparty's material rights. In this case, all other rules on the validity of standard terms shall be also applied, including the duty of the drafting party on the notification and explanation of standard terms (see also "Standard Terms"). In legal practice, once the standard clauses of exemption or exclusion of liability for the breach of contract cause a significant imbalance of interests between the parties, the non-drafting party has the right to annul it through litigation or arbitration.⁷⁵

7.2.2 Force Majeure

Chinese legislature clearly defines the force majeure as the objective circumstances causing damages that cannot be foreseen, avoided nor overcome by the party concerned (Article 180, CCC). The constitutive elements of force majeure are the following: (i) it is a difficult situation causing the breach of contract; (ii) at the time of entering into the contract, the debtor cannot foresee or should not have foreseen the occurrence of this difficult situation; (iii) such difficulty is completely and objectively out of the debtor's control, i.e. both the cause and the consequence of such difficulty cannot be avoided by the debtor; (iv) objectively, the debtor cannot overcome such difficulty after its occurrence. These four requirements shall be met completely for the qualification of a legal situation as force majeure. In this sense, the force majeure is distinguished from the change of circumstance so-called "*rebus sic stantibus*". The juxtaposition of these elements makes the application of force majeure very strict under Chinese Law.

The criterion for judging such an unforeseeable impossibility of avoiding and overcoming any difficulty is objective and concrete. Hence, in theory, the debtor's concrete capacity of understanding and dealing with difficulties should be taken as a reference point to evaluate if a force majeure exists. However, in terms of evidence production, it is hard to prove what the debtor's concrete capacity is. In practice, the abstract and ordinary capacity of a common rational person to understand and deal with the difficulty is applied. The existence of force majeure is at the judges' full discretion from case to case. However, in terms of law in action, the force majeure is verified by the court from case to case in a very strict way, given the observance of the "*pacta sunt servanda*" principle (Article 465, CCC).

The causes for force majeure are either natural or social. Force majeure with natural cause refers to acts of God, e.g. floods, droughts, typhoons and earthquakes

⁷⁵ See "Cheng Ruiyu v. Beijing Cite Coffee Co. Ltd.," Jiangsu Province High Court, Sentence No. 271 (2015).

etc., while force majeure with social causes refers to the human act which is out of the debtor's control, e.g. include wars, armed conflicts, riots etc. It is worth noting that in China strike is not recognized as a constitutional right and due to the lack of strike in legal practice, some scholars advocate that it does not constitute a force majeure.⁷⁶ However, in the common opinion, a strike may be qualified as force majeure, if it meets all the *force-majeure* requirements.⁷⁷

Parties are free to stipulate a specific clause on force majeure to clarify the criteria of its verification, limit the ambit of its application and ascertain the relate legal consequences. In practice, such an agreement is used as an ordinary disclaimer clause (see "disclaimer clauses"). In any case, the above-mentioned definition on force majeure is a mandatory norm. If the force majeure defined by the parties is in contrast with this definition provided by the law, any different interpretation on the meaning of force majeure provided by the parties is void.

If the obligor is unable to perform the contract due to force majeure, it shall notify the other party in time and provide evidence showing the existence of force majeure within reasonable time (Article 590, CCC). For the sake of the effectiveness of the proof, related evidence should be generally certified by a notary or any relevant public authorities, rather than by the enterprise or its stakeholders.⁷⁸ The law does not say what the consequences would be if the party failed to notify the counterparty and provide such proof, but in a guiding case published by the Supreme Court, such defaulting party shall be held liable for compensation to the damages caused by the force majeure.⁷⁹

The party who is unable to perform its obligation due to force majeure has the right to exempt itself from liability in part or in whole in proportion to the impact of force majeure that it has suffered, except otherwise provided by law or the force majeure occurring after the party's delay in performance (Article 591, CCC). If force majeure temporarily and partially impacts the perform of the debtor's obligations, it shall continue performing its obligations after the difficulty caused by the force majeure ceases to exist. This debtor's duty to continue its performance in this case shall be carried out independently from the creditor's request for such a continued performance. The parties have also the right to modify the contract upon the occurrence of force majeure (Article 543, CCC), but Chinese law does not stipulate whether the parties shall negotiate on the modification of the contract before resorting to a court or an arbitration institution for the modification of contract if consultation fails. As above-mentioned, in case of change of circumstances, this duty of re-negotiation on the contract between the parties before they start taking legal action as provided by the law (Article 26, JICL-2, Article 533, CCC). In doctrine, this same solution is

⁷⁶ Sui Pengsheng, Study of Contract Law, 1997, 384–385.

⁷⁷ Han (2018), 485.

⁷⁸ Han (2018), 486.

⁷⁹ See "Abdullah Waheed versus China Eastern Airlines Co. Ltd.", Guiding Case No. 51 Issued by the Supreme Court.

suggested to be applied by analogy for the modification of contract in case of force majeure.⁸⁰

If the force majeure is so serious as to make impossible for the parties to realize the purpose of contract, the aggravated party may terminate the contract unilaterally (Article 563, CCC). It is questionable whether the aggrieved party has also the right to terminate the contract unilaterally in this case. In principle, only non-defaulting party is entitled to terminate the contract in this specific case. However, if due to force majeure the debtor becomes partially or temporarily unable to perform its obligations, or continuing the performance of obligations would result in a significant imbalance of interests between the parties and the violation of principle of good faith, the right of termination is granted also to the defaulting party (Article 533, CCC).⁸¹

If the force majeure leads to the debtor's permanent impossibility to perform its obligations, the debtor is free from performing its obligations but the creditor shall fulfill its obligations in accordance with the rule on the burden of risk in bilateral contracts.⁸² For example, in sale contracts, the risk of damage to or loss of a subject matter shall be borne by the seller prior to the delivery of the subject matter and by the buyer after delivery, except as otherwise stipulated by law or agreed upon by the parties. (Article 604, CCC). It is worth reiterating that in any case the debtor may not exempt him/herself from liability in the event the force majeure takes place after its delay in performance (Article 605, CCC).

7.2.3 Agreed Payment for Non-performance

Liquidated damages are largely applied in China. The parties may agree that in case of breach of contract, the defaulting part shall make an agreed payment for liquidated damages. Such liquidated damage agreements between the parties, which are referred to as *penalty*, may consist in a fixed amount or the agreed method of its calculation (Article 585, CCC). If the agreed amount of liquidated damages is below the loss resulting from the breach, the non-defaulting party has the right to petition before the court or arbitration tribunal to increase the amount (Article 585, CCC, Article 28, JICL-2). If the amount exceeds the loss resulting from the breach of contract, the faulting party may file the application for its decrease (Article 585, CCC). Consequently, generally speaking liquidated damages have a compensation nature in China, since they compensate the loss suffered by the non-defaulting party.⁸³ However, they may be also of punitive nature in case the loss suffered by the non-defaulting party is less than the liquidated damages and the request by the defaulting party to reduce its amount is rejected by the court or arbitration tribunal. In the Supreme Court's opinion, the principle function of liquidated damages is compensation, while its

⁸⁰ Han (2018), 487.

⁸¹ See case of sale of shop "Xing Yu Company v.s. Feng Yu Mei", in Supreme Court Official Gazette, vol. 6, (2006). For detailed debates and more court decisions, see Shi and Limei (2019), 40.

⁸² Han (2018), 486.

⁸³ Yao (2017), 156; Cui (2016), 39; Han (2018), 825.

secondary function is punitive (Article 6, SITCCC). As long as liquidated damages are no more than the actual loss that the non-defaulting party has suffered, their nature is punitive.⁸⁴

The debtor's breach of contract immediately entitles the creditor to obtain the payment of liquidated damages, even if the debtor has no fault. The creditor does not need to prove its actually suffered loss.⁸⁵ Hence, the liquidated damages are considered a deterrent to the debtor for non-performance of its obligations. Although regardless of its fault the debtor shall pay the liquidated damages once it fails to perform its obligations, the existence and the degree of the debtor's fault shall always be taken into consideration for the adjustment of the liquidated damages (Article 29, JICL-2).

If parties stipulate the liquidated damages as well as the earnest money, in case of breach of contract by any party the counterparty may alternatively choose one of them (Article 585, CCC). The liquidated damages and earnest money cannot be applied simultaneously.

The adjustment of liquidated damages is subject to the specific request of any party. In any case, the court has no power to adjust it *ex officio* (Article 585, CCC). Even if the judges decide on whether or how to adjust liquidated damages at their discretion, they shall also take in account other factors, i.e. actual loss suffered by the non-defaulting party, the extent of the performance fulfillment of the contract, the degree of the parties' fault and their expected benefits (Article 29, JICL-2). In legal practice, if there is a difference by more than 30% in terms of value between the agreed liquidated damages and the actual loss suffered by the non-defaulting party, then the court will adjust the liquidated damages accordingly.

7.2.4 Consequential Losses

Chinese law adopts the term indirect damages to indicate the consequential loss. Pursuant to Article 584 of Chinese Civil Code, both direct and indirect damages may be compensated under Chinese Law, since the principle of full compensation is applied in China. Direct damages refer to the loss suffered by the non-defaulting party and any extra expenses sustained by it, directly resulting from the debtor's breach of contract. Indirect damages include the lost profit that the non-defaulting party may expect to gain without the occurrence of breach of contract, and the damages claimed by any third party against the non-defaulting party on the basis of the legal relationship between them.⁸⁶ The consequential loss and, more specifically, the lost profit arises from a very wide range of contracts including, but not limited to, sale contracts, service contracts, transportation contracts, investment contracts etc. In the context of international contracts, claims on the compensation to consequential loss take place frequently.

⁸⁴ See Hubei Province Wuhan Intermediate Court, judgement No. 01536 (2015).

⁸⁵ Han (2018), 827.

⁸⁶ Zhu (2003), 223.

As happens to all kinds of compensable losses, the consequential loss suffered by the non-defaulting party, including the interests that it would benefit without the breach of contract, may be compensated only to the extent that the defaulting party is able to foresee or ought to have foreseen at the moment of the conclusion of contract (Article 584, CCC). In other words, all damages unforeseeable by the defaulting party cannot be compensated. In this sense, the Supreme Court affirms that the breaching party shall not be liable for compensation for the losses due to market risks or any other factors unforeseen by any party or caused by some other reason without any causation link to the breach of contract.⁸⁷

The calculation method for lost profit is rather complex in legal practice. The method agreed by the parties shall be applied as a priority⁸⁸ and in the absence of such an agreement, according to the Supreme Court the following rules are applicable:

- the lost profit due to the breach of equipment or material sale contract refers to loss of production profit;
- the lost profit due to the breach of working contract refers to the loss of business operations profit;
- the lost profit resulting from the breach of a sale contract refers to the loss of resale profit (Article 9, SITCCC).

In accordance with Article 29 of the 2012 *Supreme Court's Interpretation on Sale Contract*, lost profit calculation is subject to the rule of the above-mentioned foreseeability on the occurrence of damages, rule of contributory fault, rule of duty to mitigate loss, rule of counterbalance of loss and profit, as provided for by Chinese Contract Law.

Nevertheless, in terms of law in action, the rule of foreseeability on the occurrence of damages provided in Article 584 of Chinese Civil Code is not used in case of compensation for consequential loss, and the court is more inclined to rely on the evidence provided by the parties in relation to the consequential loss suffered by the non-defaulting party.⁸⁹

Although compensation for consequential loss is clearly recognized by the law, the court takes a very conservative and cautious attitude towards it. In legal practice, the petition on the recovery of consequential loss and, more specifically, lost profit is rarely supported by the court for the following two main reasons: on the one hand, the non-defaulting frequently has the difficulty of producing sufficient evidence to prove the existence of consequential loss; on the other, calculating the consequential loss is a very technical, complex as well as time-consuming procedure.⁹⁰ The non-defaulting party shall assume the burden of proof with regards to the total amount of

⁸⁷ See “*Xinjiang Yakun Commercial Co. Ltd., v. Xinjiang Jinghe County Cotton Production Co. Ltd.*”, in Official Gazette of the Supreme Court of PRC, 2006, No. 11.

⁸⁸ See “*Chen Meiqiu versus Xv Jianxion*”, Guangxi Autonomous Region High Court Sentence No. 4 (2007); *Beijing Xuanfu Real Estate Co. Ltd., v. Beijing Huayehang Real Estate Co. Ltd.*, Beijing High Court, Sentence No. 1596 (2009).

⁸⁹ Wu (2012), 70.

⁹⁰ Liu (2013), 88.

lost benefits and damages claimed by the third party due to the breach of contract. In order to mitigate its liability, the defaulting party shall prove that the counterparty is at fault or fails to take appropriate measures to reduce the loss or benefit from the breach of contract (Article 11, SITCCC).

8 Limitation Period

Under Chinese law, the time period includes the time limit period and period of limitation for action. It shall be calculated according to the Gregorian calendar by year, month, day and hour. In case such time period is calculated by year, month and day, the first day of such period shall not be calculated and the period shall be calculated from the following day. On the contrary, if the time period is calculated by hour, the initial hour shall be counted from the beginning (Article 200 and 201, CCC). Where a time period is calculated by year and month, the date of the expiry month shall refer to the corresponding day of such month. If there is no corresponding date for the expiry month, the last day in such month shall be the expiry date of time period (Article 202, CCC). If the last day of the time period falls on a legal holiday, the following day after such legal holiday shall be the last day of the time period. Generally, the expiry day corresponds to the end of such day, but if the expiry time period refers to business time, the ending of such business time on this day is the expiry date (Article 203, CCC).

Under Chinese Law, there is a clear distinction between time limit and limitation of action. The time limit period is applicable for the exercise of the right of withdrawal, revocation, modification, resolution and termination of contract or the right to notification of obligations performance, i.e. the so-called potestative right (*Gestaltungsrecht* in German, Article 199, CCC). No suspension, refreshment and extension of time period is applicable for time limits, but the parties have right to agree on the time limit period (Article 199, CCC); if there is no agreement, it can be determined in accordance with mandatory provisions, business usage or under the judges' discretion (Article 511, 564, CCC). The time limit period shall be counted from the day when the holder of right knows or should know the reason for the exercise of such a right or upon notification by the counterparty (Article 152 and Article 564 CCC). Generally speaking, the time limit for revocation and resolution of contract corresponds to one year (Article 152 and 564, CCC). The right for contract revocation shall be extinguished upon five years from the day when the cause for revocation occurs (Article 152, CCC).

However, the time limit for the exercise of the right of revocation of contract in case of material misunderstanding may be reduced to 90 days from one year, starting from the day when the right holder has known or shall have known the cause of revocation. (Article 152, CCC).

On the contrary, the period of limitation of action is applicable only for the exercise of the right of claim in case of civil right violation. It refers to the time period within which a civil right holder is entitled to take legal action before judges or arbitration

courts to protect its right of claim. In any case, the limitation period of action may neither be modified upon the agreement between the parties nor be abandoned by them in any way.

Generally speaking, the period of limitation for action is applicable exclusively in the exercise of right of claim, namely the right of credit, but for the protection of the real right over things it may be suspended, refreshed and extended as provided by law. The ordinary period of limitation for action is three years and shall be calculated from the day when the creditor knows or should know that its right has been infringed and who the debtor is (Article 280, CCC). In case the parties agree on the installment payment of a debt, the limitation of action shall be calculated from the day when the term for payment of last installment expires (Article 189, CCC). However, with reference to a dispute arising from a contract for the international sale of goods or a technology import or export contract, the period of limitation for action is four years (Article 594, CCC). In addition, under negotiable instruments, i.e. law, insurance law, maritime law and other laws, the period of limitation for action can be changed from its nature as initially stated in the contract. However, in case 20 years have passed since the day of civil rights infringement, the right-holder is not entitled to seek its legal protection before the judges or arbitration court, except that the judges exceptionally approve of its application for a 20-year extension (Article 188, CCC). This maximum period of limitation for action may be neither suspended nor refreshed.⁹¹

The period of limitation for action may be suspended if over the last six months the holder of right has failed to exercise its right for any of the following obstacles: (a) *force majeure*, (b) either the person without legal competence or with limited competence has no statutory agent, or its statutory agent dies, loses legal competence or lacks the power of attorney as requested by law; (c) there is no successor or legacy administrator after the beginning of succession; (d) the creditor is under control of the debtor or any other person; (e) any other obstacle leading to the creditor's impossibility to exercise its right (Article 194, CCC). After the obstacle disappears, the period of limitation shall be calculated continuously after its suspension and expire within 6 months from such discontinuation.

Pursuant to Article 195 of the Chinese Civil Code, the refreshment of period for limitation of action occurs under the following conditions:

- (a) the right holder requests the debtor to perform its obligations;
- (b) the debtor agrees to fulfill the performance of its obligations;
- (c) the right holder institutes a litigation or applies for arbitration;
- (d) other circumstances producing the same effects of the refreshment of limitation of action as those arising from the institution of litigation or application for arbitration, i.g. filing a petition to a public authority to claim the right.

In case the law provides some special rules on limitation of arbitration, such provisions shall prevail over those on limitation of action (Article 198, CCC). So far, the Arbitration Law of the People's Republic of China has not stipulated any special

⁹¹ Zhu (2003), 61.

rules for arbitration. Hence, all rules on limitation of action are also applicable to limitation of arbitration.

As far as the legal effects of expiration period for the limitation of action, the civil right itself does not extinguish but only the right of defense for prescription is granted to the counterparty (Article 192, CCC). In other words, if the debtor performs the obligations after the expiration period for the limitation of action, it may not request any restitution and the creditor has the right to keep such a performance (Article 192, CCC). In any case, the court has no right to apply *ex officio* the rules of limitation of action. The exception claim for the limitation of action is applicable only upon the debtor's request (Article 193, CCC).

References

- Bu Y (ed) (2016) Chinese Civil Law, Beck-Hart-Nomos, Munich
- Cui J (2016) Contract Law, Law Press, Beijing. 崔建远:《合同法》, 法律出版社 2016 年版
- Cui J (2010) Obligation, Tsinghua University Press, Beijing 崔建远等著:《债法》清华大学出版社 2010 年版
- Ding W (2007) Improving the Chinese Jurisdiction system on civil and commercial actions concerning Foreign Interests in Forum of Politics and Law, vol 6 丁伟,《我国涉外民商事诉讼管辖权制度的完善》,载《政法论坛》2007 年第 6 期
- Han S (2018) General introduction to contract law, Law Press, 2018 韩世远:《合法总论》,法律出版社 2018 年版
- Han S (2014) Study of some problems of changed circumstances, in Peking University Law Journal, vol 3, Beijing 韩世远:《情事变更若干问题研究》,载《中外法学》2014 年第 3 期
- Han S (2002) Doctrinal problems of delayed performance, in Tsinghua University Journal, vol 4. 韩世远:《履行迟延的理论问题》,载《清华大学学报》(哲学社会科学版) 2002 年第 4 期
- Hao L (2015) Interpretation of expression of intent, in Northern Legal Science, 2015, No. 5 郝丽燕:《意思表示的解释方法》,载《北方法学》2015 年第 5 期
- Huang S (ed) (2008) Guide and reference of civil sentences, vol 34, Law Press, Beijing 黄松有主编,《民事审判指导与参考》,总第34集,法律出版社 2008 年版
- Ji F (2016) Study of excessive cost due to impossible performance, in Tribune of Political Science and Law, vol 6, Beijing 冀放:《给付不能之履行费用过高问题探析》,《政法论坛》2016a 年第 6 期
- Li J (2018) Deconstruction of defense of anticipatory performance, in The Jurist, vol 5, Beijing 李建星:《先履行抗辩权之解构》,《法学家》2018 年第 5 期
- Li X, Zhong Y (2006) Conflict and application of standard clauses. "Conflict of Form" and conflict law, in Present-day Law Science, vol 2, Beijing. 李先波, 钟月辉:《标准条款之冲突及其适用——“格式之争”与冲突法》,载《时代法学》2006 年第 2 期
- Li Y (2017) Commentary on Art. 66 of the contract law, in Jurists, vol 2, Beijing 李永军:《〈合同法〉第 66 条(同时履行抗辩权)评注》,《法学家》2017 年第 2 期
- Liang H (2017) General Introduction to Civil Law (5th ed.), Law Press, Beijing 梁慧星:《民法总论》(第五版),法律出版社 2017 年版
- Liu Y (2011) Studies on the Difficult Points on Consumer Protection Contracts Concerning the Foreign Interest, in Politics and Law vol. 9, 2011, Beijing 刘益灯, 涉外网络消费中的法律难点问题研究,载《政治与法律》,2011 年第 6 期
- Liu C (2013) Rule on Determination of Compensation to Lucrum Cessant, in Studies of Law, vol 2, Beijing 刘承魁:《违约可得利益损失的确定规则》,《法学研究》2013 年第 2 期

- Shang L (2017) Reconstruction of relationship between pre-contractual liability and fraud. from the perspective of the function of theory of error, in *The Jurist*, vol 4, Beijing 尚连杰:《缔约过失与欺诈的关系再造——以错误理论的功能介入为辅线》,载《法学家》2017年第4期
- Shi H (2020) Significant Development and Renovation in Book on Contract of Civil Code, in *Chinese Law*, vol 4, 2020, Beijing 《合同编的重大发展和创新》,载《中国法学》2020年第4期
- Shi J, Gao L (2019) The defaulting party's right to request the termination of contract, in *Studies of Comparative Law*, vol 2019, Beijing 石佳友,高郦梅,《违约方申请解除合同权》,载《比较法研究》2019年第6期
- Sui P (1997) Study of contract law, Law Press, Beijing 隋彭生:《合同法论》,法律出版社1997年版
- Sun W (2018) Commentary on Art. 42 of contract law (Pre-Contractual Liability), in *The Jurist*, vol 1, Beijing 孙维飞:《〈合同法〉第42条(缔约过失责任)评注》,载《法学家》2018年第1期
- Wang H (2007) Examinations on the impossibility of performance in China, in *Legal Science*, vol 5, Xi'an 王洪亮,《我国给付不能制度体系之考察》,载《法律科学》2007年第5期
- Wang Q (2016) Expression of intent in German law and the latest development of theory on Jurisitic act. Inspiration for the drafting of general part of Chinese civil code, in *Tsinghua law review*, vol 6, Beijing 王琦:《德国法上意思表示和法律行为理论的最新发展-兼论对中国民法总则立法的启示》,在《清华法学》2016年第6期
- Wang T (2018) Rule and meaning of interpretation of expression of intent in Chinese general part of civil code, in *Academic Journal of Zhongzhou*, vol 1, Suzhou 王天凡:《我国〈民法总则〉中意思表示解释的规则及意义》,载《中州学刊》2018年第1期
- Wang Z (2009) General rules of civil law, Peking University Press, Beijing 王泽鉴:《民法总则》,北京大学出版社2009年版
- Wang Y (2020), Critical Points on the Understanding and Application of Book Contract in Civil Code, in *Application of Law*, vol 19, 2020, Beijing 王轶,《民法典合同编理解与适用的重点问题》,载《法律适用》2020年第19期
- Wang L (2021), International Openness of Legislation of Book on Contract in Civil Code, in *Law Review of Economy and Trade*, vol. 4, Beijing 王利明,《具有国际化视野的民法典合同编立法》,载《经贸法律评论》2021年第4期
- Wu X (2012) Reflection and reconstruction of rule on compensation to Lucrum Cessans in contract, in *Studies on Law and Business*, vol 2, Wuhan 吴行政:《合同法上可得利益赔偿规则的反思与重构》,《法商研究》2012年第2期
- Wu Y (2006) Defect warranty liability of goods of the seller, in *Journal of Zhongnan University of Economics and Law*, vol 6, Wuhan 吴志忠:《论出卖人的权利瑕疵担保责任》,载《中南财经政法大学学报》2006年第6期
- Xu G, Song Y, Tan Y, (1999) American contract case law, in Law Press, Beijing 徐昱,宋岳,覃宇:《美国合同判例法》,法律出版社1999年版
- Yang D (2018) Commentary on Art. 14 of contract law (Formation of Offer), in *The Jurist*, 2018, vol 4, Beijing 杨代雄:《〈合同法〉第14条(要约的构成)评注》,载《法学家》2018年第4期
- Yang D (2016) Structure. Civil Juridical Conduct. Representation. Comparative Study on Base of Two French Doctrinal Drafts, in *Eastern Law*, vol 5, Shanghai 杨代雄:《结构·民事法律行为·代理——以法国两部学者草案为基础的比较研究》,载《东方法学》2016年第5期
- Yao M (2017) Commentary on Art. 114 of Contract Law, in *Jurist*, 2017, vol 5, Beijing 姚明斌:《〈合同法〉Art.114评注》,《法学家》2017年第5期
- Yi F (2016) Study on the problems on the excessive costs of performance related to the impossibility of performance, in *Political Science and Law Forum*, vol 6, Beijing 冀放:《给付不能之履行费用过高问题探析》,《政法论坛》2016年第6期
- Yu Z, Wang L (ed) (2017) Survey of application and development of electronic contract, in *China University of Politics and Law Press*, Beijing 于志刚,王立梅主编:《电子合同法律应用与发展调研报告》,中国政法大学出版社2017年版

- Zhang H (2013) Usual types of Mandatory regulations that affect effect of contract, in *People's Judicature*, vol 23. 张华:《影响合同效力的强制性规定常见类型》,载《人民司法》2013年第23期
- Zhang J (2008) On regulations on vertical monopoly agreement, in *Journal of Hunan Normal University*, vol 6, Changsha 张靖:《论纵向垄断协议的规制》,湖南师范大学社会科学学报2008年第6期
- Zhang Y, Zhu X (2002) New contract in cyber time, in *Contemporary Law Review*, vol 12 张渊, 朱晓燕,《网络时代的新契约》,载《当代法学》2002年第12期
- Zhang S (2018) Economic analyze of institution of threat, in *Peking University Law Journal*, vol 3 张淞论:《胁迫制度的经济分析》,载《中外法学》2018年第3期
- Zhang Y, Zhu X (2002) Standard contract of new contractual net in cyber Era, in *Modern Legal Science*, vol 12. 张渊, 朱晓燕:《网络时代的新契约网络格式合同》,载《当代法学》2002年第12期
- Zhao W (2015) Unjust enrichment and return of value in the resolution of contract provided by law, in *Chinese and Foreign Law*, vol 5, Beijing 赵文杰:《论不当得利与法定解除中的价值偿还》,《中外法学》2015年第5期
- Zhou J (2012) Understanding and application of Art. 121 of the contract law, in *Tsinghua University Law Journal*, vol 5, Beijing 周江洪:《〈合同法〉第121条的理解与适用》,《清华法学》2012年第5期
- Zhou Y (2014) Defect warranty liability of goods of the seller, in *Legal Forum*, vol 1, Beijing 周友军:《论出卖人的物的瑕疵担保责任》,载《法学论坛》2014年第1期
- Zhu Y (2003) *China's Civil Law*. Law Press, Beijing
- Zhu Q (2011) *General introduction to civil law*, Peking University Press, Beijing 朱庆育:《民法总论》,北京大学出版社2011年版
- Zhuang J (2018) Impossible performance due to the creditor, in *Legal Science*, vol 5, Xi'an 庄佳园:《债务人原因引起的给付不能》,《法律科学》2018年第5期

Lihong Zhang is Full Professor of Civil Law, Roman Law and Comparative Law at the East China University of Political Science and Law, Shanghai. Director of the Research Center of Roman Law and European Law and Vice-Director of Civil Law Research Center. Vice General Secretary of China's National Society of Civil Law. He has been Visiting Fellow at Singapore National University (2010), Visiting Professor at the University of San Francisco (USA, 2012), "Panthéon-Assas" University of Paris (France, 2017), Universities of Turin (Italy, 2013), Macerata (Italy, 2017), Leuven (Belgium, 2018), Muenster (Germany, 2019) and Jagiellonian University (Poland, 2019). Attorney at Law in China and an arbitrator of Shanghai, Chongqing and Guangzhou Arbitration Commissions, as well as a legal adviser for many international bodies.



Jacques du Plessis

1 Introduction

1.1 *The Substantive Law Applicable to International Commercial Contracts*

The law governing international contracts, sometimes called the proper law, could be determined in a variety of ways.¹ First, the parties could expressly agree on the proper law, subject to some exceptions (see Sect. 3.1.3). This intention is typically reflected in a choice-of-law clause. Secondly, the proper law could be determined by the actual, but tacit or unexpressed intention of the parties.² Thirdly, if no such expressed or unexpressed actual intention can be established, support exists for regarding the law with which the contract is most closely connected as the proper law.³

In determining the proper law, courts take into account factors such as the place where the contract was entered into (the *locus contractus*), the place where the contract has to be performed (the *locus solutionis*), the place where property forming

¹ See generally Forsyth (2012), 327–336; Dendy (2019), para 353.

² See *Representative of Lloyds v Classic Sailing Adventures (Pty) Ltd* 2010 (5) SA 90 (SCA) [21]; Forsyth (2012), 327–329.

³ See Forsyth (2012), 330. The author points out that an alternative approach sometimes favoured by the courts is to identify the parties' 'imputed' intention, but that this approach generally gives rise to similar results as the 'most closely connected law'-approach.

J. du Plessis (✉)
University of Stellenbosch, Stellenbosch, South Africa
e-mail: jedp@sun.ac.za

the subject matter of the contract is situated, or the domicile of the parties.⁴ Sometimes an international commercial contract provides for arbitration and identifies under what set of rules the arbitration is to be conducted, but without specifying the applicable proper law. These rules could then indicate how the proper law is to be established.⁵

The proper law, which generally is a legal system,⁶ governs most aspects of the contract, notable exceptions being the determination whether parties had the capacity to contract, or whether there was consensus, and certain situations of illegality (see Sect. 3.1.3).⁷ While foreign law traditionally had to be proven by leading expert evidence, the position now is that this is unnecessary if a court can ascertain it 'readily and with sufficient certainty'.⁸

Some forms of local legislation apply 'directly', irrespective of what the proper law may provide.⁹ A prominent example is the Consumer Protection Act 68 of 2008 ('CPA').¹⁰ In essence, this Act applies to every 'transaction' occurring within South Africa; a 'transaction' in turn includes an agreement to supply goods or services for consideration, as well as the actual supply of the goods or performance of the services.¹¹ Thus, the CPA applies if the conclusion of the contract *or* its performance occurs within South Africa; it is irrelevant whether the supplier resides in the country or has its principal office there.¹² The mandatory application of the CPA cannot be ousted by a choice-of-law clause, but such a clause could still affect the consumer's common law rights.¹³ However, the clause would be presumed to be unfair to the extent that it seeks to deprive the consumer of these common-law rights if the consumer resided locally at the time the contract was concluded.¹⁴

⁴ See Forsyth (2012), 329–336.

⁵ See for example art 21(1) of the ICC Arbitration Rules (2012), whereby an arbitral tribunal may apply the rules of law which it determines to be appropriate, and art 35 of the UNCITRAL Arbitration Rules (2010).

⁶ See Dendy (2019), para 353. It is unlikely that the proper law could be 'soft law', such as the UNIDROIT Principles of International Commercial Contracts (see Cuniberti 2015, 168). However, parties to an international commercial contract may agree, or an arbitral tribunal may determine that the contract is (also) governed by 'general principles of law', the *lex mercatoria*, or 'general principles of transnational law'. Guidance may then presumably be obtained from 'soft law' instruments.

⁷ See Forsyth (2012), 336–349; *Representative of Lloyds v Classic Sailing Adventures (Pty) Ltd* 2010 (5) SA 90 (SCA) [21].

⁸ Section 1 of the Law of Evidence Amendment Act 45 of 1988. On providing such proof see *Maleth Investment Fund (Pty) Limited v Paget* [2014] 3 All SA 79 (GJ) [28–32].

⁹ See Forsyth (2012), 14–17 on these 'directly applicable statutes'.

¹⁰ Also see chapter 7 of the Electronic Communications and Transactions Act 25 of 2002 (discussed at Sect. 2.2.2).

¹¹ Section 5(1)(a) of the Consumer Protection Act 68 of 2008, read with section 1. The transactions must be 'in the ordinary course of business'.

¹² See section 5(8) of the Consumer Protection Act 68 of 2008; De Stadler (2014a), 5–22.

¹³ See De Stadler (2014a), 5–23; Naudé (2014), reg 44–67.

¹⁴ Regulation 44(3)(bb) issued in terms of the Consumer Protection Act 68 of 2008 (Government Notice No R 293, GG No 34180 of 1 April 2011). See Naudé (2014), reg 44–67.

Various domestic legislative provisions and treaties regulating international trade could impact on international commercial contracts. The International Trade Administration Act 71 of 2002 provides for the International Trade Administration Commission of South Africa to engage in a variety of forms of import and export control, such as issuing permits and imposing duties. These steps must be taken within the framework of domestic law and must also accord with relevant World Trade Organisation rules and agreements.¹⁵ South Africa is party to or a beneficiary under a number of instruments, understandings and agreements aimed at liberalising regional and international trade.¹⁶ South Africa is not a party to the United Nations Convention on Contracts for the International Sale of Goods (CISG), the Convention on the Limitation Period in the International Sale of Goods, or the United Nations Convention on the Use of Electronic Communications in International Contracts.

1.2 The Forum and Procedure Governing Disputes Arising from International Commercial Contracts

When a dispute arises from an international commercial contract, all procedural issues are regulated by the law of the place where the action is instituted (the *lex fori*).¹⁷ Procedural issues in this context include the law of evidence, and the execution of judgments, but not the quantification of contractual damages or prescription.¹⁸

Whether a court has jurisdiction to hear a dispute arising from an international commercial transaction (an issue which has to be determined before the courts may embark on establishing the proper law) depends on a variety of considerations.¹⁹

The relevant forum could be determined by submission, which could be mutual (for example when a contract contains a choice-of-forum clause) or unilateral (by the defendant).²⁰ Sometimes submission would not be sufficient to establish jurisdiction, especially when it is felt that more is required to render the local judgment effective. However, there have been strong pleas for facilitating the local resolution of international trade disputes by not unnecessarily imposing such requirements, for

¹⁵ See <http://www.itac.org.za/home>. For details of South African membership of the WTO see https://www.wto.org/english/thewto_e/countries_e/south_africa_e.htm.

¹⁶ For tables see http://www.dti.gov.za/trade_investment/ited_trade_agreement.jsp. and <http://www.sars.gov.za/Legal/International-Treaties-Agreements/Trade-Agreements/Pages/default.aspx>.

In the BRICS context, the Southern African Customs Union (SACU)-Southern Common Market (Mecosur) Preferential Trade Agreement covers trade between South Africa and Brazil. According to the Generalised System of Preferences (GSP) a number of donor countries, including Russia, aim to benefit beneficiary countries, which include South Africa (see <https://unctad.org/en/pages/PublicationWebflyer.aspx?publicationid=2239>). In 2015 South Africa and China signed a range of trade agreements, and a preferential trade agreement is being negotiated between India and the SACU.

¹⁷ Forsyth (2012), 123.

¹⁸ Forsyth (2012), 23; also see Sect. 8.

¹⁹ Forsyth (2012), 169.

²⁰ Forsyth (2012), 217–220, 230–234, 246.

example by forcing the plaintiff further to attach a foreigner's property to found jurisdiction.²¹ Parties' choice of a foreign forum would not always be respected,²² especially if the aim is to prevent local courts from applying mandatory rules (for example the provisions of the CPA referred to at Sect. 1.1).

If there has not been submission to a forum, the plaintiff may choose the forum; whether a South African court would have jurisdiction to hear the matter depends on a complex variety of circumstances, such as whether the claim sounds in money or relates to property, whether the court has the required power over the defendant (for example whether the defendant is domiciled or resides locally), and whether the cause of action is local or foreign.²³ Depending on these circumstances, it may be necessary for a plaintiff to attach the defendant's property to found or confirm jurisdiction.

The Arbitration Act 42 of 1965 governs domestic and international arbitrations. A significant change has been effected by the adoption of the International Arbitration Act 15 of 2017, which governs all international arbitrations, and essentially incorporates the UNCITRAL Model Law on International Commercial Arbitration into South African law. Adopting this Act could advance South Africa's appeal as an appropriate venue for international arbitration in Africa. South Africa is a party to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958), whereby foreign arbitral awards may be made an order of a local High Court and be enforced; this instrument will also be incorporated in the proposed International Arbitration Act.

The litigation practices before South African courts largely correspond to those in common-law countries. The Arbitration Act 42 of 1965 does not govern the procedure of arbitration; in local arbitrations parties often choose the High Court rules, and it has been said that in international arbitration the rules of the London Court of International Arbitration and of the International Chamber of Commerce (ICC) are popular choices.²⁴ Local arbitration bodies include the Association of Arbitrators, which has a co-operation agreement with the London Court of International Agreement; the Arbitration Foundation of South Africa (AFSA), which provides a variety of arbitration services, and its external arm, Africa ADR (AADR), a regional dispute resolution authority. The China Africa Joint Arbitration Centre (CAJAC) was set up in 2015 to resolve commercial disputes between Chinese and African parties. South Africa is not a party to the International Convention on the Settlement of Investment Disputes (ICSID Convention).

²¹ Forsyth (2012), 231.

²² Forsyth (2012), 218.

²³ Forsyth (2012), 221–234 (on claims relating to money) and 235–246 (on claims relating to property).

²⁴ See <http://www.nortonrosefulbright.com/files/south-africa-25761.pdf>.

1.3 The International Commercial Context: South Africa's Main Trading Partners

China is currently South Africa's largest trading partner in terms of both imports and exports, whereas India is currently the fifth largest source of South African imports. Trade with Russia and Brazil is relatively modest. The available trade data for 2019 in South African Rand is as follows²⁵:

South African Exports January to December 2019

To Brazil:	R 6161 million	(0.5% of total exports)
To Russia:	R 5499 million	(0.4% of total exports)
To India:	R 58,280 million	(4.5% of total exports)
To China:	R 138,690 million	(10.7% of total exports)
Total exports:	R 1,296,993 million	

South African Imports January to December 2019

From Brazil:	R17,146 million	(1.3% of total imports)
From Russia:	R 7661 million	(0.6% of total imports)
From India:	R 62,484 million	(4.9% of total imports)
From China:	R 235,088 million	(18.5% of total imports)
Total imports:	R 1,273,283 million	

2 Formation of Contracts

2.1 Formation: Overview

2.1.1 Agreement: Offer and Acceptance

South African law regards agreement or consensus as the cornerstone of contractual liability. A party could establish such liability by proof of actual or subjective agreement, which means a true meeting of the parties' minds. Alternatively, even if there is no proof of actual consent, contractual liability could still arise if a party can prove that, due to other party's conduct, he reasonably relied on the existence of agreement. Thus, in a signed international standard-term contract of sale, the seller could prove that there was actual agreement on the price and subject matter, and

²⁵ <http://www.sars.gov.za/ClientSegments/Customs-Excise/Trade-Statistics/Pages/Merchandise-Trade-Statistics.aspx>.

further prove that the purchaser was bound by the standard terms, even though the purchaser might have been unaware of these terms, since the seller reasonably relied on assent when the purchaser signed the contract. South African law does not require that a contract must have an underlying cause, or that the contract must be supported by consideration.²⁶

Proof of offer and acceptance could indicate that there is agreement, but it is not essential to show that there was such a process to prove agreement.²⁷ A party making an offer must have the intention to be bound upon acceptance. An advertisement is usually not regarded as an offer, but as an invitation to the addressee to make an offer; however, ultimately it must be determined with what intention the advertisement was placed. The offer can in principle be in any form,²⁸ but must be certain or definite. Consumer legislation requires offers to be in plain and understandable language.²⁹

An offer may be revoked at any moment before the contract is concluded, and it cannot unilaterally be made irrevocable; to achieve this end, the parties have to enter into an option agreement, whereby the offeror undertakes not to revoke the offer.³⁰ The moment of the conclusion of the contract is in principle when the offeror is informed of acceptance, but notable exceptions are electronic contracts (see Sect. 2.2.2), when it is the moment that acceptance is received, and postal contracts, when it is the moment that acceptance is posted. An offer terminates upon rejection or when it is not accepted in a prescribed period or reasonable time.

An acceptance must correspond to, or be a 'mirror'-image of the offer; otherwise it could constitute a counter-offer³¹; the addressee must also adhere to any form of acceptance prescribed by the offeror, for example signature or performing some act.³² However, the offeror may not engage in 'negative option' marketing, by determining that silence would be construed as acceptance. Parties are free to conclude a contract where they have reached sufficient agreement on certain aspects of their negotiations, and wish to leave other matters for further negotiation.³³

2.1.2 Negotiation

Parties are generally free to withdraw from negotiations at any stage prior to the conclusion of the contract. The reason for or motive behind withdrawing is irrelevant.

²⁶ See Sect. 3.1.1.

²⁷ *Bourbon-Leftley v WPK (Landbou) Bpk* 1999 (1) SA 902 (C) 916.

²⁸ Exceptions include contracts for the sale of land (which have to be in writing according to the Alienation of Land Act 68 of 1981), suretyship and donation.

²⁹ Section 22(1)(b) of the Consumer Protection Act 68 of 2008.

³⁰ *Oos-Vrystaat Kaap Bedryf Beperk v Van Aswegen* 2005 (4) SA 417 (O).

³¹ *Seeff Commercial & Industrial Properties (Pty) Ltd v Silberman* 2001 (3) SA 952 (SCA).

³² *Seeff Commercial & Industrial Properties (Pty) Ltd v Silberman* 2001 (3) SA 952 (SCA).

³³ *CGEE Alstom Equipments et Enterprises Electrique, South African Division v GKN Sankey (Pty) Ltd* 1987 (1) SA 81 (A) 92E-G.

There is some support in the case law for requiring good faith (*bona fides*) in the negotiating process,³⁴ but this abstract principle is given very little practical effect.

Theoretically at least, a person could be liable for damages for withdrawing wrongfully and culpably (whether intentionally or negligently) in a manner which causes another party harm, for example by leading such a person to incur wasteful expenditures while having no intention to conclude a contract in due course. This liability would be delictual, which means it would be aimed at placing victims in their prior position, had the wrongful conduct not occurred. It would therefore not place them in the position they would have been in had a contract been concluded, and compensate them for lost profits. But the courts still have to confirm this liability in practice.³⁵

It is recognised, however, that disclosing confidential information provided in the course of negotiations could amount to a delict if a fiduciary relationship exists between the parties; alternatively, disclosure could amount to breach of contract where the parties contractually agreed that information should be kept confidential.³⁶ The courts further recognise negotiating parties could reach partial consensus about matters in which they are already in agreement, and conclude contracts to this effect, leaving the remaining aspects for further negotiation.³⁷

2.1.3 Integrity of Writing

South African law enforces ‘merger clauses’ or ‘entire agreement’ clauses, which determine that the written version contains the entire result of their negotiations. In the absence of such clauses, parties may obtain a similar result by resorting to the *parol evidence* rule. This rule determines that ‘if a document was intended to provide a complete memorial of a jural act, extrinsic evidence may not contradict, add to or modify its meaning’.³⁸ ‘Extrinsic’ evidence means evidence outside the four corners of the written document. This highly contentious rule is often not observed in practice, and is subject to exceptions. A document may be corrected or rectified to reflect a common prior intention, or the rule could be circumvented by showing that a document is only a partial integration, or that the extrinsic evidence can be reconciled with the document. The extent to which extrinsic evidence may be used when interpreting a contract is dealt with at Sect. 4.1.1.

³⁴ See *Meskin NO v Anglo-American Corporation of SA Ltd* 1968 (4) SA 793 (W) 804, which concerned duties of disclosure while negotiating.

³⁵ For critical analysis see Van Huyssteen et al. (2020), 103–110.

³⁶ See *MV Lina, Union Shipping and Managing Co SA v Lina Maritime Ltd* 1998 (4) SA 633 (N) 637H.

³⁷ See Sect. 2.1.1; *CGEE Alstom Equipments et Entreprises Electrique, South African Division v GKN Sankey (Pty) Ltd* 1987 (1) SA 81 (A) 92E-G.

³⁸ See *KPMG Chartered Accountants (SA) v Securefin Ltd* 2009 (4) SA 399 (SCA) [39].

The *parol evidence* rule does not apply to subsequent variations. Parties therefore need not vary a written contract in writing, unless this is prescribed by a ‘non-variation’ clause. South African law traditionally enforces these clauses strictly.³⁹ The options for escaping are very limited: they include preventing enforcement of the ‘non-variation’ clause due to fraud, or showing that there has been a waiver of a right to performance, or acceptance of a substitute performance, without the contract itself being varied. A party would not be able to escape these clauses merely by arguing that their operation is harsh or unfair, or that enforcement would be against good faith.⁴⁰ And the courts have been very circumspect in allowing a party to prevent enforcement of a non-variation clause by resorting to the doctrine of estoppel. The basis for its application would be that such a party has a protectable reliance that the term would not be enforced, and that this reliance stems from a culpable representation by the other party.

2.1.4 Standard Terms

The South African common law does not recognise a set of rules specifically applicable to the formation of standard terms; their validity and operation is governed by general principles. However, some of these principles are particularly relevant in the context of standard terms. For example, where one party was ignorant about a specific term and a reasonable person could not expect such a person to have assented to the term merely by signing the contract containing it, such a term would not be binding.⁴¹

Some support exists for the notion, apparently transplanted from English law, that when a written contract consists partly of ‘printed’ (standard) terms and ‘written’ terms, and reading these terms together gives rise to doubt or ambiguity, the courts will attribute greater effect to the written than to the printed terms.⁴² Presumably, the justification for such a notion is that the written terms would provide stronger proof of the intention of the parties.

South African law has been remarkably unconcerned with the consequences of a conflict between different standard terms used by parties who have reached agreement on essential terms, also known as the ‘battle of forms’ problem. No special rules have been developed to deal specifically with this fact pattern. However, the general principles relating to offer and acceptance determine that a modification by the addressee of an offer amounts to a counter-offer. This suggests that the last set of terms to be presented would be conclusive if followed by some indication of assent,

³⁹ *SA Sentrale Ko-op Graanmaatskappy Bpk v Shifren* 1964 (4) SA 760 (A).

⁴⁰ *Brisley v Drotsky* 2002 (4) SA 1 (SCA).

⁴¹ See *Constantia Insurance Company Ltd v Compusource (Pty) Ltd* 2005 (4) SA 345 (SCA).

⁴² See *Quick v Goldwasser* 1956 (2) SA 525 (SR) 535 and the reference there to *Glynn v Margetson* [1893] AC 351 (HL); Wessels (1951), para 1981.

such as commencement of performance. In other words, it could be said that South African law applies the ‘last-shot’ theory.⁴³

The most important statutory enactment on consumer law, the Consumer Protection Act 68 of 2008, applies to transactions between suppliers and consumers in general, and not only to standard term contracts. However, it is highly relevant to these contracts, since in practice almost all consumer contracts contain standard terms. The application of the CPA to international commercial contracts was considered in Chap. 1.

2.2 Formation: Specific Topics

2.2.1 Pre-contractual and Post-contractual Understandings and Agreements on Further Negotiation Between the Parties

Memorandum of Understanding (MOU): The concept of a “Memorandum of Understanding” (MOU) does not bear a well-established technical meaning in South African law. Its effect depends on the intention of the parties.⁴⁴ Thus, it could be a binding ‘preliminary, short and basic contract’,⁴⁵ which is to be followed by a later contract that could supersede⁴⁶ or incorporate it.⁴⁷ A MOU would be invalid if it is so short that the duties it is supposed to give rise to are vague or uncertain.⁴⁸ A term in an MOU that requires the parties to negotiate further could fail, unless it includes some mechanism whereby certainty could be obtained if there is a deadlock in the negotiations.⁴⁹

Parties could agree that the MOU is to continue if no subsequent contract is concluded. This must be distinguished from the situation where they do not provide such an indication, and further negotiations fail. Again, the intention of the parties is conclusive: it could be that the MOU is to continue, or that it must terminate. Parties could further conclude an MOU, but intend that it should not have immediate effect,

⁴³ Van Huyssteen et al. (2020), 71.

⁴⁴ See for example *Pintado Trading 800 (Pty) Ltd v Fleet Africa (Pty) Ltd* [2010] JOL 25698 (KZD) 5.

⁴⁵ Hutchison and Pretorius (2017), 411. For examples see *Oakdene Square Properties (Pty) Ltd v Farm Bothasfontein (Kyalami) (Pty) Ltd* 2013 (4) SA 539 (SCA); *Registrar of Medical Schemes v Suremed Medical Scheme* 2012 (2) SA 512 (SCA); *Commissioner for the South African Revenue Service v Capstone 556 (Pty) Ltd* [2016] 2 All SA 21 (SCA).

⁴⁶ See *Horn v LA Health Medical Scheme* 2015 (7) BCLR 780 (CC) [19]; *Bavasah v Stirton* [2014] 2 All SA 51 (WCC) [4].

⁴⁷ See *Peel v Hamon J & C Engineering (Pty) Ltd* 2013 (2) SA 331 (GSJ) [11].

⁴⁸ *Mpumelelo Projects Construction CC v Sasol Wax (Pty) Ltd* [2014] JOL 31764 (FB) [42]; see generally Sect. 2.2.1 (iv) below on the validity of an agreement to negotiate further.

⁴⁹ See *Nedbank Ltd v Petch Manufacturing (Pty) Ltd* [2008] JOL 21319 (W) [13].

by making it subject to a suspensive condition.⁵⁰ Alternatively, parties could intend it to be a mere record of negotiations, which only is binding once approved. However, as indicated, this is not the way it is typically applied in practice.

The meaning of a “Memorandum of Agreement” (MOA) likewise has to be determined with reference to the intention of the parties. The term could simply be used to describe a binding contract.⁵¹ However, parties at times conclude a contract and sign a subsequent ‘memorandum of agreement’, which merely serves to record or reflect the prior contract.⁵² Conversely, parties could intend not to be bound at all until a ‘memorandum of agreement’ is signed.⁵³ Finally, parties could agree on certain core terms, with the intention of incorporating them in a more detailed ‘memorandum of agreement’, but still intend to be bound by these core terms if this does not happen.⁵⁴

Letter of Intent (LOI): It has been generally stated that there is no intention to be bound, and hence no contract, when parties create a letter of intent (LOI).⁵⁵ Such an intention would be absent, for example, if the parties only prepare the LOI in the course of negotiations as the basis for, or in anticipation of concluding a future contract.⁵⁶ However, ultimately the legal consequences of a LOI depend on the intention of the parties.⁵⁷ The LOI may for example contain some terms relating to the negotiations that could be intended to be binding,⁵⁸ although a LOI would be invalid if it seeks to oblige parties to conclude a later agreement.⁵⁹ A recordal in a LOI could also be legally relevant, for example by reflecting the parties’ intentions with regard to ownership of property.⁶⁰

Comfort Letter/Letter of Comfort: In South African practice, a ‘letter of comfort’ is used to indicate towards a third party that the party providing the letter will provide some form of support or act in a way beneficial to another party. Examples include a

⁵⁰ See *Mpumelelo Projects Construction CC v Sasol Wax (Pty) Limited* [2014] JOL 31764 (FB) [40]; *Nuclear Fuels Corporation of SA (Pty) Ltd v Orda AG* 1996 (4) SA 1190 (SCA) 1198.

⁵¹ See for example *FJ Mitrie (Pty) Ltd v Madgwick* 1979 (1) SA 232 (D).

⁵² See *McWilliams v First Consolidated Holdings (Pty) Ltd* 1982 (2) SA 1 (A).

⁵³ See *MV Navigator (No. 1): Wellness International Network Ltd v MV Navigator* 2004 (5) SA 10 (C).

⁵⁴ See the example in *Dijkstra v Janowsky* 1985 (3) SA 560 (C) 562–563.

⁵⁵ See *Bourbon-Lefliley v WPK (Landbou) Bpk* 1999 (1) SA 902 (C) 922–923.

⁵⁶ See the examples in *Leiserowitz v Grylls* 1984 (2) SA 834 (C) 835, 843.

⁵⁷ See *City of Johannesburg Municipal Pension Fund v City of Johannesburg* [2005] JOL 15426 (W) [51–61].

⁵⁸ See *Ikamva Architects CC v Coega Development Corporation* [2015] JOL 34289 (ECG) [4, 11, 22] (there the document identified parties to the negotiations and contained certain indemnifications). It is apparently not uncommon in state tender processes to require a letter of intent.

⁵⁹ See *KIA Intertrade Johannesburg (Pty) Ltd v Infinite Motors (Pty) Ltd* [1999] 2 All SA 268 (W) 276; see generally Sect. 2.2.1 (iv) below on the validity of an agreement to negotiate further.

⁶⁰ See *Chevron South Africa (Pty) Ltd v Awaiz at 110 Drakensburg CC* [2008] 1 All SA 557 (T).

holding company indicating that it would support its subsidiary in meeting its obligations,⁶¹ and a seller indicating to a party who provided finance to a purchaser that the seller would ‘resell or remarket the equipment in the event of the sale going sour during the finance period’.⁶² The case law does not clearly reveal the consequences that attach to such a letter, but the intentions of the parties would obviously be of paramount importance.

The agreement to negotiate further with a particular party (a ‘lock-in’) and the agreement not to negotiate with a third party (a ‘lock-out’): South African law is generally not favourably disposed towards agreements that oblige parties to negotiate the conclusion of another argument. The reason is that the duty to negotiate is regarded as too vague to be enforced. However, the obstacle of uncertainty can be overcome if there is some deadlock-breaking mechanism, such as a determination by a third party.⁶³ Merely requiring that negotiations are to be conducted in good faith is not regarded as sufficient to render the duty more certain and hence enforceable, but there are signs that the courts may reconsider this position.⁶⁴ In the light of these considerations, it is unlikely that the courts would therefore recognise an agreement that obliges a party to continue negotiating further with a particular party, to the exclusion of others (a ‘lock-in’). However, there can be no objection in principle to an agreement between negotiating parties that neither of them may conduct parallel negotiations with third parties (a ‘lock-out’), since it is clear what these ‘negative’ duties to refrain from certain conduct entail.

2.2.2 Electronic Contracting

The Electronic Communications and Transactions Act 25 of 2002 (ECTA), which largely draws on the UNCITRAL Model law on Electronic Commerce with Guide to Enactment 1996, applies to any ‘electronic transaction’ or ‘data message’.⁶⁵ In effect it covers the conclusion of contracts by various electronic means, such as the internet, email messages, sms messages, and the like. ECTA must not be interpreted to exclude the common law or other statutory law, including the Consumer Protection Act.⁶⁶

⁶¹ See *Philotex (Pty) Ltd v Snyman* 1998 (2) SA 138 (SCA) 155–156 and compare *Consolidated News Agencies (Pty) Ltd (in Liquidation) v Mobile Telephone Networks (Pty) Ltd* 2010 (3) SA 382 (SCA) [12].

⁶² *Hunt v Liebherr-Africa Managed Pension Plan and Another* (2) [2002] 1 BPLR 2955 (PFA) [15].

⁶³ See *Southernport Developments (Pty) Ltd v Transnet Ltd* 2005 (2) SA 202 (SCA).

⁶⁴ See *Everfresh Market Virginia (Pty) Ltd v Shoprite Checkers (Pty) Ltd* 2012 (1) SA 256 (CC).

⁶⁵ Section 4(1) of the Electronic Communications and Transactions Act 25 of 2002. A ‘data message’ in turn means ‘data generated, sent, received or stored by electronic means ...’, where ‘data’ is defined as ‘electronic representations of information in any form’.

⁶⁶ Section 3 of the Electronic Communications and Transactions Act 25 of 2002. For rulings by the Consumer Goods and Services Ombud on the interaction between the Electronic Communications and Transactions Act 25 of 2002 and the Consumer Protection Act 68 of 2008 see <http://www.cgso.org.za/wp-content/uploads/2015/03/Advisory-Note-ECT-Act-v5pdf.pdf?87ab66>.

Where parties enter into an agreement by way of data messages, it is concluded at the time when and place where the acceptance of the offer was received by the offeror.⁶⁷ A data message is regarded as having been received by an addressee, such as an offeror, when 'the complete data message enters an information system designated or used for that purpose by the addressee and is capable of being retrieved and processed by the addressee'.⁶⁸ Such a message must also be regarded as 'having been received at the addressee's usual place of business or residence.'

There is no prescribed length of time in ECTA during which an offer contained in a data message remains open for acceptance. According to the common law, the general position is that an offer is open for acceptance for the period stipulated therein, or for a period considered reasonable in the circumstances, after which it lapses automatically. South African law does not recognise a default rule that determines the moment from which the period for acceptance runs if the period stipulated is not a specific date, but a 'relative deadline' (for example that acceptance must take place within seven days). However, as pointed out earlier, an offeror may in any event revoke an offer qualified by such a period, unless the offeror is bound by an option agreement to keep it open.⁶⁹

Where an offer has lapsed, it can no longer be accepted. Late 'acceptance' could, however, amount to a counter-offer, which could be accepted by the party who made the initial offer. South African law does not recognise that late acceptance would nonetheless be effective if the offeror immediately informs or notifies the offeree that acceptance is effective. There is also no rule that late acceptance could be effective if the communication containing it shows that it was sent in such circumstances that if its transmission had been normal, it would have reached the offeror in due time. As indicated above, the offeror has to 'receive' the communication of acceptance on time, and this means that the complete data message has to enter the offeror's information system, and has to be capable of being retrieved and processed by the offeror. If these requirements are not met on time, there is no acceptance.

An agreement may be concluded in an 'automated transaction', where use is made of an 'electronic agent', which is defined as 'a computer program or an electronic or other automated means used independently to initiate an action or respond to data messages or performances in whole or in part, in an automated transaction'.⁷⁰

According to section 12 of ECTA, 'a requirement in law that a document or information must be in writing is met if the document or information is (a) in the form of a data message; and (b) accessible in a manner usable for subsequent reference.' Examples of contracts required by law to be in writing include suretyship agreements and unexecuted donations. It has further been held that this provision applies where parties themselves impose formal requirements, for example for consensual

⁶⁷ Section 22(2) of the Electronic Communications and Transactions Act 25 of 2002.

⁶⁸ Section 23(b) of the Electronic Communications and Transactions Act 25 of 2002.

⁶⁹ See Sect. 2.1.1; *Oos-Vrystaat Kaap Bedryf Bpk v Van Aswegen* 2005 (4) SA 417 (O).

⁷⁰ Section 20 of the Electronic Communications and Transactions Act 25 of 2002.

cancellation of a contract.⁷¹ However, certain agreements required by statute to be in writing, for example the sale of land, are excluded from the ambit of this provision, and may therefore not be concluded electronically.⁷²

ECTA further allows for the use of electronic signatures, and prescribes the form such signatures should take in regard to data messages where they are required by law or by the parties. Where it is required by the parties and they did not agree on the type of electronic signature to be used, section 13(3) sets out the requirements the signature has to meet. The courts have interpreted this provision broadly to include the typewritten names of the parties at the foot of email messages, which were used to identify the users.⁷³

Chapter 7 of ECTA bears the heading ‘consumer protection’, and applies to consumers defined as natural persons who are end-users. Significantly in the context of international commercial contracts, the protection provided to consumers under this chapter applies ‘irrespective of the legal system applicable to the agreement in question’,⁷⁴ and any provision in an agreement which excludes any rights provided for in the chapter is void.⁷⁵ Chapter 7 deals with matters such as the duties of suppliers to disclose certain information (section 43), cooling-off periods (section 44), and a failure to perform (section 46). These matters require brief explanation, especially because they provide consumers significant rights of termination.

If a supplier does not comply with certain disclosure requirements set out in section 43, such as the duty to disclose the full price of goods and services, the consumer may cancel the transaction within fourteen days of receiving the goods or services.⁷⁶ Section 44 in turn provides a consumer with a seven-day cooling-off period after receipt of goods or the conclusion of a service agreement.⁷⁷ The five-day cooling off period which the CPA provides in cases of direct marketing⁷⁸ does

⁷¹ See *Spring Forest Trading CC v Wilberry (Pty) Ltd t/a Ecowash* 2015 (2) SA 118 (SCA) [2] read with [17], which refers to section 12(a) of the Electronic Communications and Transactions Act 25 of 2002. Also see Hutchison and Pretorius (2017), 168.

⁷² See section 4(3) of the Electronic Communications and Transactions Act 25 of 2002, and the reference to Schedule 1.

⁷³ *Spring Forest Trading CC v Wilberry (Pty) Ltd t/a Ecowash* 2015 (2) SA 118 (SCA) [23–29].

⁷⁴ Section 47 of the Electronic Communications and Transactions Act 25 of 2002.

⁷⁵ Section 48 of the Electronic Communications and Transactions Act 25 of 2002.

⁷⁶ Section 43(1)(i) of the Electronic Communications and Transactions Act 25 of 2002, read with section 43(3). Transactions covered by Chapter 7 are excluded from the operation of section 33 of the Consumer Protection Act 68 of 2008, which imposes duties of disclosure in cases of ‘catalogue marketing’, when consumer agreements are not entered into in person, and consumers therefore cannot inspect the goods prior to entering into an agreement.

⁷⁷ However, this right is subject to some notable exceptions (see section 44(2) of the Electronic Communications and Transactions Act 25 of 2002); these include financial services, certain goods intended for everyday consumption, goods made to specifications, or goods which are inherently unreturnable. On the question whether all the elements of the transaction have to be electronically concluded see Van Zyl and De Stadler (2017), 16–4.

⁷⁸ See section 16 of the Consumer Protection Act 68 of 2008.

not apply in these circumstances. Finally, in terms of section 46, a consumer may cancel an electronic contract with seven days' written notice if a supplier has failed to execute an order within 30 days after the order was received or within an agreed period.⁷⁹

3 Validity of Contracts

3.1 Validity—Overview

3.1.1 General Provisions on Validity

South African law only recognises that a contract should have a *iusta causa* in the sense that the parties must have the serious intention to be bound. This simply restates the requirement for *consensus* or agreement.⁸⁰ The legal system does not require that a contract must have a specific legally relevant reason or cause for its conclusion or its variation, although a contract concluded for a purpose which is contrary to public policy will be unenforceable or void. South African law further does not require that there must be a counter-performance or *quid pro quo* by a party to whom performance is undertaken; the courts have expressly rejected the doctrine of consideration, and the notion that it could be equated to a *iusta causa*.⁸¹ However, unexecuted contracts of donation have to be in writing to be enforceable.

A contract is invalid if it was 'absolutely' impossible to perform at the time of its conclusion.⁸² The mere fact that a particular debtor 'subjectively' cannot perform does not affect validity, but could result in the denial of the remedy of specific performance. However, where the parties contemplated impossibility at the moment of the conclusion of the contract, it is implied that the parties assumed liability (to pay damages) in the event of non-performance. The boundary between cases of initial impossibility of performance and cases of illegality (see Sect. 3.1.3) is unclear.⁸³

3.1.2 Mistake, Fraud, Threats and Gross Disparity as Grounds for Avoidance

A contract is void if a party made a material and reasonable mistake (a *iustus error*). A mistake is material if it does not relate to the motivation behind or reasons for contracting, but to its content or nature, or to the identity of a contracting party.

⁷⁹ Section 46(1) and (2) of the Electronic Communications and Transactions Act 25 of 2002.

⁸⁰ Hutchison and Pretorius (2017), 13–14.

⁸¹ *Conradie v Rossouw* 1919 AD 279.

⁸² See *Wilson v Smith* 1956 (1) SA 393 (W).

⁸³ See *Wilson v Smith* 1956 (1) SA 393 (W), where it was illegal to sub-divide the property that was sold, yet the case was dealt with as one of initial impossibility.

Whether a mistake is reasonable is influenced by factors such as whether it is known or attributable to the other party, and whether the mistaken party could have avoided it.⁸⁴

A self-induced mistake relating to the motive behind or reasons for concluding a contract does not *per se* affect the validity of a contract. Thus, the purchaser of a business is bound even though he or she mistakenly believed it to be more profitable than it actually is. However, if such a mistake is caused by a material misrepresentation by another party, the contract is voidable and it may be rescinded by the mistaken party. For purposes of seeking rescission it does not matter whether the misrepresentation was intentional (fraudulent), negligent or even innocent. It is only if the victim seeks to claim damages that fault in the form of intent or negligence must be established. A misrepresentation can be made by silence when there is a duty to speak, typically if there is an 'involuntary reliance' by one party on disclosure of facts that lie within his or her exclusive knowledge. Commercial bribery, although akin to fraud, is regarded as a distinct ground for rescission.⁸⁵

Contracts concluded due to duress or unlawful threats of harm, are voidable. Apart from being unlawful, the threat has to be one of considerable evil to the person concerned, or to his or her family, it must induce a reasonable fear of an imminent or inevitable evil, and the pressure used must have caused damage.⁸⁶ South African law still has to determine conclusively to what extent threats of economic harm are actionable. It has been held that 'there would seem to be no principled reason why the threat of economic ruin should not, in appropriate cases, be recognised as duress,' but that such cases are likely to be rare '[f]or it is not unlawful, in general, to cause economic harm, or even to cause economic ruin, to another, nor can it generally be unconscionable to do so in a competitive economy'.⁸⁷ However, some support has been expressed for regarding threats of breach of contract as actionable.⁸⁸

The South African common law does not generally recognise that the validity of a contract is affected merely because excessive advantage was given by one party to another, or because there was a significant disequilibrium between the performances. However, a contract is voidable if advantage-taking amounts to 'undue influence'. The victim must prove that another person obtained an influence which weakened the victim's resistance and made his or her will pliable, and brought the influence to bear in an unprincipled manner in order to prevail upon the victim to agree to a prejudicial transaction which he or she would not normally have entered into freely.⁸⁹ Section 40 of the CPA further proves relief in a variety of cases on unconscionable conduct, some

⁸⁴ A party who seeks to enforce a contract would in turn deny that the requirements of a material and reasonable mistake are met, or would rely on the doctrine of quasi-mutual assent or *Smith v Hughes* principle, which essentially allow a party to establish liability where the other party has created a reasonable reliance of being bound to the contract.

⁸⁵ See Hutchison and Pretorius (2017), 147; *Extel Industrial (Pty) Ltd v Crown Mills (Pty) Ltd* 1999 (2) SA 719 (SCA).

⁸⁶ See *BOE Bank Bpk v Van Zyl* 2002 (5) SA 165 (C) [36].

⁸⁷ *Medscheme Holdings (Pty) Ltd v Bhamjee* 2005 (5) SA 339 (SCA) [39].

⁸⁸ See *Gerolomou Constructions (Pty) Ltd v Van Wyk* 2011 (4) SA 500 (GNP) [24].

⁸⁹ *Preller v Jordaan* 1956 (1) SA 483 (A).

of which merely overlap with duress and undue influence, while others cover various forms of conscious advantage-taking of a consumer's weakness.⁹⁰ Finally, under the common law, inequality of bargaining power may be taken into account when deciding whether the terms or enforcement of a contract would be contrary to public policy (see Sect. 3.1.3).

As indicated above, a material and reasonable mistake could render a contract void, whereas a fraudulent, negligent or innocent misrepresentation inducing a mistake in motive, as well as duress and undue influence, render a contract voidable. A void contract does not give rise to any obligations, and hence cannot be enforced. It also cannot be the basis or legal ground for retaining value given in fulfilment of it, which means that it could give rise to claims for restitution based on unjustified enrichment.

When a voidable contract is rescinded, it too can no longer be enforced, and performances may be reclaimed by way of a process of mutual restitution called *restitutio in integrum*. An aggrieved party's inability to provide restitution does not prevent rescission, but only claiming restitution from the other party. To the extent that the various improper ways of obtaining consent referred to above amount to civil wrongs or delicts (torts), victims could claim damages that would place them in the position they would have been in, had the delict not been committed. South African law does not generally allow a court to adapt a contract in these cases, a notable exception being the order of payment of a reduced contract price where a seller made misleading statements with regard to the quality of the object being sold. It is not settled to what extent a contract may be avoided where the contract exists between the victim and a third party who is not responsible for the improper behaviour that affected consent.

3.1.3 Illegality

Normally, the legality of an international commercial contract is determined by the law applicable to it, or by the 'proper law'.⁹¹ Thus, if South African law is the proper law, the contract could infringe its mandatory law by its terms, the way it is performed, or its purpose being contrary to statutory law or public policy under the common law. However, South African conflict of law rules determine that in certain circumstances the proper law is supplanted by the *lex fori* or law of the country in which the action is brought.

Thus, it has been said that 'where a contract is lawful at its inception, that is according to its proper law, but further performance by one or other of the parties of his or her obligations contravenes statutory law in the local forum, it will not be enforceable there to the extent of the conflict with the *lex fori*' and that '[t]he proper law of a contract will also be displaced by the *lex fori* if performance of the contract would be repugnant to the forum's conceptions of public policy.'⁹² Care must be

⁹⁰ See Du Plessis (2019), 40-1–40-19.

⁹¹ Forsyth (2012), 344 (especially n 172).

⁹² Dendy (2019), para 362.

exercised, however, when interpreting the rule of the *lex fori*, for it must be clear that it would require the contract to be illegal even though it would be valid under the proper law.⁹³ An example of mandatory rules of South African law that may be potentially have such a consequence is the provisions of the Consumer Protection Act (dealt with in Sect. 1.1).

It has not yet been resolved whether South African courts would refuse to enforce a contract which is legal according to its proper law, but illegal in terms of a third system of law with which it is substantially connected, for example through having to be performed there.⁹⁴

The potential consequences of infringing mandatory rules depend on their origins; when the rule derives from statute, it has to be interpreted to establish its consequences, whereas the consequences of violating common-law mandatory rules depend on the rule concerned. A contract or term could be (merely) unenforceable (see for example the covenant in restraint of trade dealt with at Sect. 3.2.2), in which case the courts have no discretion to deviate from this consequence (*ex turpi causa non oritur actio*); it is only if the offending part of the contract may be separated from the rest of the contract that enforcement of the latter part could still be ordered (see Sect. 3.2.3). However, if the contract is void or has no effect, courts have a discretion whether to allow restitution of performances made in fulfilment of it: normally these claims are denied if the transferor is tainted by illegality, but the courts may relax this rule to prevent injustice.

3.2 Validity—Specific Topics

3.2.1 Public Permission

The question who should apply for public permission will generally be answered by interpreting the provision requiring such permission,⁹⁵ or by interpreting the relevant contract. South African law does not, as far as could be established, contain default rules that regulate the position if neither of these avenues indicates who should apply for permission—for example by determining that it is the party with the place of business in the region where permission is required, or the party whose performance requires permission. On the question whether South African courts would enforce

⁹³ Forsyth (2012), 344. On the general principles relating to the application of the *lex fori* further see *Representative of Lloyds v Classic Sailing Adventures (Pty) Ltd* 2010 (5) SA 90 (SCA) [21] sqq.

⁹⁴ Dendy (2019), para 362.

⁹⁵ See for example *Nuclear Fuels Corporation of South Africa (Pty) Ltd v Orda AG* 1996 (4) SA 1190 (SCA), where the relevant legislation (section 49(1) of the Nuclear Energy Act 92 of 1982) provided that, ‘except with the written authority of the Minister, no person shall ... import any source material into or export it from the Republic’. It was clear that the permission had to be obtained by the person seeking to export such materials from South Africa.

requirements for public permission of foreign origin, see Sect. 3.1.3 for the rules of private international law on what laws determine the legality of a contract.

Parties may provide for the eventuality that their contract fails due to the refusal of public permission for its conclusion or performance. Such a provision could take the form of an express or tacit warranty or guarantee,⁹⁶ which, if breached, could result in the party bound by it being liable for damages. Alternatively, parties may insert a condition in the contract that makes its operation contingent upon permission being granted. The non-fulfilment of such a condition would result in the contract being invalid. Where a party interferes with the fulfilment of a condition, it could be deemed to be fulfilled, thereby enabling the innocent party to claim damages.⁹⁷ A contract could also be invalid if the parties agreed on a term called an assumption or supposition, whereby no contract arises if an assumed state of affairs, such as that the contract is permitted, proves to be unfounded.⁹⁸

If the parties do not contractually regulate the consequences of an initial or supervening failure to obtain permission, the common-law rules on impossibility of performance and illegality could come into play. In essence, as indicated earlier, no obligations are created if a contract cannot lawfully be performed at the moment it is concluded. This is called initial impossibility or illegality. However, where parties contemplate that performance may not be possible when the contract is concluded, obligations could arise to pay damages (see Sect. 3.1.1).

Obligations further terminate if they cannot be lawfully performed after the contract came into existence. This, in turn, is called supervening impossibility or supervening illegality.⁹⁹ Again, where parties contemplate supervening impossibility, it could be inferred that they undertook to be liable for such a risk, and hence that a non-performing party may be liable for contractual damages. Failure to disclose that permission is required could amount to misrepresentation by omission, entitling the innocent party to rescind the contract and/or claim delictual damages.

The content of a contractual duty to obtain public permission can be established by interpreting the contract. Where the contract is subject to a condition that permission be obtained, and a party through inaction or delay frustrates its fulfilment by failing to take such steps, the condition could be deemed to be fulfilled (as indicated earlier). Parties are generally liable for their own cost of performance, which presumably also include the costs of ensuring that the performance is permitted. It is not clearly established in South African law that a party is obliged to notify the other party of the outcome of obtaining public permission, but such a duty could be found to exist through a process of interpretation, or possibly through a court finding it to

⁹⁶ See *Nuclear Fuels Corporation of South Africa (Pty) Ltd v Orda AG* 1996 (4) SA 1190 (SCA) 1208, 1210D.

⁹⁷ See *Scott v Poupard* 1971 (2) SA 373 (A), where the one party deliberately withdrew from negotiations with the State that were essential for the operation of the agreement with the other party.

⁹⁸ See *Nuclear Fuels Corporation of South Africa (Pty) Ltd v Orda AG* 1996 (4) SA 1190 (SCA) 1205.

⁹⁹ See *Nuclear Fuels Corporation of South Africa (Pty) Ltd v Orda AG* 1996 (4) SA 1190 (SCA) 1205.

be an implied or *ex lege* term, which gives effect to the underlying value of good faith, since it obliges a party to consider the position of the [other] contracting party. A party who is only obliged to perform once permission has been obtained would presumably also not commit breach of contract through failure to perform on time (*mora debitoris*) as long as such a party has not been informed by the other party that permission has indeed been obtained.

As far as could be established, South African law does not allow either party to terminate the contract if measures to obtain permission were taken, but permission was neither granted nor refused within an agreed period or reasonable time.

Where permission is refused, the contract or its terms are void if permission was essential for its validity due to the rules on impossibility or illegality. Where a party seeks to perform in a manner for which permission is required, but it is not essential for creating a valid contract, the consequences depend on whether performance may be lawfully rendered in another manner. Thus, where a debtor seeks to make a payment using a method for which permission is required, and this is refused, the debtor could still be liable if payment could lawfully be made in another manner. In these circumstances performance is not ‘absolutely’ impossible or illegal.

An agreement to confer a benefit to a public official, for example by paying a commission, to assent to or provide permission for the conclusion or performance of a contract could be illegal if it amounts to bribery or corruption.¹⁰⁰ The main agreement which required the permission for its validity could be unenforceable or void, since the permission has not properly been given; such an agreement may in any event be illegal inasmuch as its purpose is to subvert the proper functioning of the state administration.

3.2.2 Covenants in Restraint of Trade

A covenant in restraint of trade is unenforceable if it violates public interest, and therefore is contrary to public policy (see Sect. 3.1.3 on public policy as the general test for the legality of a contract under the common law).¹⁰¹ Such a covenant would violate public policy if the effect of the restraint would be unreasonable.

The reasonableness of the restraint is first determined with reference to the broader interests of the community. These interests on the one hand require agreements to be enforced (*pacta servanda sunt*), and on the other hand require that unproductivity must be discouraged. However, in practice, courts do not generally pay much attention to these ‘community-based’ policy considerations when considering the reasonableness of the restraint; some effect is in any event given to *pacta servanda sunt* through the rule that the burden of proof is on the party seeking to escape the

¹⁰⁰ See Bradfield (2016), 444–445. For a statutory prohibition see for example section 1(1)(a) of the Corruption Act 94 of 1992.

¹⁰¹ See *Basson v Chilwan* 1993 (3) SA 742 (A) 767–768.

covenant to indicate that it is unreasonable, and not on the party seeking to enforce the restraint to prove that it is reasonable.¹⁰²

The attention of the courts is rather on a second enquiry, whereby the reasonableness of the covenant further is determined by focussing on the interests of the parties. A covenant would be unreasonable if it prevents one party from pursuing his or her interest in freely participating in the commercial and professional world without a protectable interest of the other party being properly served thereby.¹⁰³ One example of such an interest is trade connections, which may be defined as the ‘relationships with customers, potential customers, suppliers and others ...’¹⁰⁴ Merely eliminating competition as such is not regarded as an interest worthy of protection, and it does not matter that the covenant was contracted for to protect an investment of capital or time and attention devoted to the training of an employee.¹⁰⁵ A further set of interests that can be protected by a covenant in restraint of trade are trade secrets or confidential information. In this regard it has been held that ‘[w]hether information constitutes a trade secret is a factual question. For information to be confidential it must be capable of application in the trade or industry, that is, it must be useful and not be public knowledge and property; known only to a restricted number of people or a close circle; and be of economic value to the person seeking to protect it’.¹⁰⁶

The determination whether a covenant is reasonable is made with reference to the moment enforcement is sought (as opposed to when the contract was concluded),¹⁰⁷ and it depends on the facts of each case. An acknowledgement as to the reasonableness of the restraint is not regarded as conclusive. Whether an unequal bargaining relationship existed between the parties is only one factor that could be taken into account in determining reasonableness.¹⁰⁸

Even though a covenant could be unreasonably wide according to its agreed terms, courts may at times enforce it only partially; the party seeking enforcement bears the burden of proof of convincing the courts to order partial enforcement. In making this determination, courts take into account factors such as whether the plaintiff only sought limited enforcement; whether the court is asked to engage in a radical rewriting of the contract; and whether the terms were calculated to be unduly oppressive or

¹⁰² See *Magna Alloys and Research (SA) (Pty) Ltd v Ellis* 1984 (4) SA 874 (A). There has been considerable debate on whether the burden of proof should be on the party seeking enforcement, but there are no compelling grounds for such an exceptional reversal of the onus in these cases; the general position prevails that the party seeking to invalidate an ostensibly valid contract bears the burden of proof with regard to the ground for invalidity; see Du Plessis (2015), 664.

¹⁰³ It has been held that even if a covenant is reasonable between the parties, it could still violate public policy for a reason not particularly related to them. However, it is doubtful what such a reason could be (see Hutchison and Pretorius 2017, 208–209).

¹⁰⁴ *Experian South Africa (Pty) Ltd v Haynes* 2013 (1) SA 135 (GSJ) [17.1].

¹⁰⁵ *Basson v Chilwan* 1993 (3) SA 742 (A) 771.

¹⁰⁶ *Experian South Africa (Pty) Ltd v Haynes* 2013 (1) SA 135 (GSJ) [19]. For examples of protectable confidential information see *Dickinson Holdings (Group) (Pty) Ltd v Du Plessis* 2008 (4) SA 214 (N) [33].

¹⁰⁷ See *Magna Alloys and Research (SA) (Pty) Ltd v Ellis* 1984 (4) SA 874 (A) 898.

¹⁰⁸ *Basson v Chilwan* 1993 (3) SA 742 (A) 768.

were designed to operate *in terrorem*¹⁰⁹ (on the general test for severability further see Sect. 3.2.3).

A covenant in restraint of trade may be enforced by seeking an interdict, and the party in breach may be liable for contractual damages.

3.2.3 Severability

Under South African law, ‘a contract which contains illegal terms ... is devoid of legal effect unless the offending terms are severable’.¹¹⁰ Or, to put it differently, where an illegal term or ‘bad part’ can be severed from the contract, the remaining ‘good part’ could still be valid. It has been said that the principle that determines severability is ‘to have regard to the probable intention of the parties as it appears in, or can be inferred from, the terms of the contract as a whole’.¹¹¹ However, this statement must be approached with some caution. Even though the parties may insert a clause in their contract that each part is severable from the rest, this provision would not be interpreted literally,¹¹² so as to compel the courts to rewrite the contract for the parties. Guided by a probable intention, the courts must ultimately make a determination which leaves terms in place that would be in accordance with public policy.

In determining severability, a number of considerations have featured prominently.¹¹³ The first is the relative importance of the ‘bad part’ of the contract. It has been held that ‘the clauses which are found to be offending should not be material or important or essential to achieve the contracting parties’ ends. If the offending provisions “go to the principal purpose of the contract and are not merely subsidiary or collateral thereto”, the agreement should be considered not to be severable.¹¹⁴ Courts will in this regard look to the substance of the contract, which means the actual significance of the clauses, rather than to any formal or simulated indication of relative significance provided by the parties.

The second factor, which is closely related to the first, is whether in all the circumstances, the agreement would have been entered into, if it had been limited to the

¹⁰⁹ See *Chemsearch (SA) (Pty) Ltd v Borrowman* 1979 (3) SA 1092 (T) 1116D-G; *Den Braven SA (Pty) Ltd v Pillay* 2008 (6) SA 229 (D) [45].

¹¹⁰ *Sasfin (Pty) Ltd v Beukes* 1989 (1) SA 1 (A) 18G.

¹¹¹ *Vogel NO v Volkersz* 1977 (1) SA 537 (T) 548F; *Sasfin (Pty) Ltd v Beukes* 1989 (1) SA 1 (A) 16A; *Citibank NA v Thandroyen Fruit Wholesalers CC* 2007 (6) SA 110 (SCA) [11].

¹¹² *Sasfin (Pty) Ltd v Beukes* 1989 (1) SA 1 (A) 16E; *Advtech Resourcing (Pty) Ltd t/a Communicate Personnel Group v Kuhn* 2008 (2) SA 375 (C) [43].

¹¹³ See *Benlou Properties (Pty) Ltd v Vector Graphics (Pty) Ltd* 1993 (1) SA 179 (A) 189J–190A.

¹¹⁴ *Senwes Ltd v Muller* 2002 (4) SA 134 (T) 143; *Cameron v Bray Gibb & Co (Pvt) Ltd* 1966 (3) SA 675 (R) 677; also see *Benlou Properties (Pty) Ltd v Vector Graphics (Pty) Ltd* 1993 (1) SA 179 (A) 189J–190A.

‘good part’, which was not illegal.¹¹⁵ If the answer to this question, which is essentially one of determining a probable intention,¹¹⁶ is in the negative, then the agreement is not severable. Sometimes, the courts ask whether the various parts of the contract are ‘interlocking’, and they also enquire whether the agreement would still have been entered into, if either of these parts been absent.¹¹⁷

Finally, the courts have enquired whether the ‘bad part’ is ‘grammatically’ or ‘notionally’ severable from the rest of the text.¹¹⁸ The exact relationship between these phrases is not quite clear.¹¹⁹ The former phrase seems to cover the deletion of a particular phrase or wording, while leaving the rest intact (as if the parties ran a blue pencil through it, it is sometimes said).¹²⁰ The latter phrase apparently covers a more abstract or notional rephrasing of the contract to remove the offending part. Again, when engaging in such a notional limitation the courts could be guided by a presumed intention of the parties.

The relationship between the general test for severability in the law of contract (set out above) and the severability enquiry in the context of covenants in restraint of trade (see Sect. 3.2.2) is contested. As indicated above, courts are at times willing to narrow the ambit of such a covenant if it would be unreasonable as a whole. This is not the same enquiry as when a particular aspect of a contract is illegal and it has to be determined whether it can be severed from the rest. But it is not apparent that the underlying enquiries are any different. The distinction may have been relevant in the days when the approach to severability in general was only to remove ‘grammatically’ severable parts, whereas notional severability was possible with these covenants. However, as indicated above, courts nowadays are also willing to remove a notionally severable part of the contract. This in effect is also what courts do when they limit the duration, area or type of business applicable to a covenant in restraint of trade.¹²¹

Section 52(4)(a) of the CPA in essence enables a court to sever the ‘bad’ part of a consumer agreement, provision or notice, or to alter it to the extent required to render it lawful, if it is reasonable to do so having regard to the transaction, agreement, provision or notice as a whole.

¹¹⁵ See *Afrisure CC v Watson NO* 2009 (2) SA 127 (SCA) [35]; *Citibank NA v Thandroyen Fruit Wholesalers CC* 2007 (6) SA 110 (SCA) [12]; *Benlou Properties (Pty) Ltd v Vector Graphics (Pty) Ltd* 1993 (1) SA 179 (A) 190A.

¹¹⁶ See *Pangbourne Properties Ltd v Nitor Construction (Pty) Ltd* 1993 (4) SA 206 (W) 227C.

¹¹⁷ See *Middleton v Carr* 1949 (2) SA 374 (A) 391.

¹¹⁸ See *Benlou Properties (Pty) Ltd v Vector Graphics (Pty) Ltd* 1993 (1) SA 179 (A) 189I-J.

¹¹⁹ See Lubbe and Murray (1988), 287–288.

¹²⁰ See *Jonker v Yzelle* 1948 (2) SA 942 (T) 944.

¹²¹ See *Benlou Properties (Pty) Ltd v Vector Graphics (Pty) Ltd* 1993 (1) SA 179 (A) 189, which refers to grammatical and notional severability.

4 Interpretation of Contracts

4.1 Interpretation—Overview

4.1.1 The General Approach to Interpretation

The traditional approach to interpretation in South African law has been ‘subjective’: according to the ‘golden rule’, courts have to establish the parties’ actual common intention, which first is ascertained by the ordinary meaning of the words they used in the text.¹²² Rather curiously for an approach aimed at establishing the parties’ actual intention, the courts traditionally have limited their ability to allow extra-textual or extrinsic evidence to explain or affect the meaning of these words; thus certain types of evidence is excluded or only allowed in cases of ambiguity. These limitations are especially associated with the controversial ‘parol evidence rule’, received from English law.¹²³

More recently, however, judicial support has been expressed for adopting an ‘objective’ approach to interpretation.¹²⁴ This apparently means that the courts must determine the meaning of a contractual provision from the perspective of a reasonable person in the position of the parties; the courts then consider the language in the context it is used, and more generally and generously allow extrinsic evidence without requiring uncertainty or ambiguity.¹²⁵

While these differences as to the general approach to interpretation remain to be resolved, some practical principles are less contentious. As far as the text itself is concerned, words have to be interpreted in the context of the contract as a whole, and not in isolation¹²⁶; headings may be taken into account, but if they conflict with the body of the contract, the latter prevails¹²⁷ (on recitals see Sect. 4.2.2). As far as extrinsic evidence is concerned, personal evidence as to a party’s actual intention is excluded (this principle could be regarded as an expression of the parol evidence rule referred to above), but it is permissible to adduce evidence of the

¹²² See for example *Cinema City (Pty) Ltd v Morgenstern Family Estates (Pty) Ltd* 1980 (1) SA 796 (A) 804C; *Rand Rietfontein Estates Ltd v Cohn* 1937 AD 317, 326; Lubbe and Murray (1988), 451. If no actual common intention can be established according to this approach, courts necessarily engage in ‘objective’ interpretation (*idem* 463).

¹²³ The ‘interpretation leg’ of this rule governs the interpretation of the terms. The rule further has an ‘integration leg’, which determines what the terms are (i.e. it defines the content, rather than meaning of the contract). The ‘integration leg’ states that when a contract has been reduced to writing and forms an ‘integration’, no extrinsic evidence may be given to contradict, alter, add to or vary the written terms. The rule in effect protects a document that appears complete on the face of it, by preventing courts from considering evidence to the contrary. See Sect. 2.1.3

¹²⁴ See *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA).

¹²⁵ See *Bothma-Batho Transport (Edms) Bpk v S Bothma & Seun Transport (Edms) Bpk* 2014 (2) SA 494 (SCA) [12].

¹²⁶ *Senwes v Van der Merwe* 2012 ZASCA 192 (30-11-2012) [12, 17].

¹²⁷ See *Sentinel Mining Industry Retirement Fund v Waz Properties (Pty) Ltd* 2013 (3) SA 132 (SCA) [10].

‘factual matrix’ in which the contract was concluded. The courts are willing to admit evidence of previous or preliminary negotiations and correspondence between the parties,¹²⁸ as well as evidence of subsequent conduct that indicates how the contract was implemented, and in what sense it was to be acted upon.¹²⁹

A further set of established principles, which, unlike those above, are not directly concerned with the admissibility of evidence, but still could be regarded as being aimed at giving effect to the parties’ intention or adopting the perspective of a reasonable person, are that the contract should be interpreted on the basis that a commercially sensible meaning is to be preferred,¹³⁰ that a meaning that confers validity on the contract is to be preferred over one that does not,¹³¹ and that parties negotiate with each other in good faith, which supports an interpretation that gives rise to a fair, rather than unfair outcome.¹³²

Sometimes, in cases of persistent ambiguity, after applying the principles above, courts resort to rules of interpretation that cannot really be explained in terms of trying to give effect to the parties’ intention or of adopting the perspective of a reasonable person; at best, the purpose is to promote fairness.¹³³ First, the *quod minimum* rule states that ‘in case of doubt, a burden is to be construed as lightly as possible’; in other words, the interpretation which is least onerous to the debtor is preferred.¹³⁴ Secondly, there is the *contra proferentem* rule, which requires that an ambiguous written document must be construed against or less favourably towards its author, who was in a position to avoid the ambiguity.¹³⁵ This rule is particularly relevant in the context of non-negotiated standard term consumer contracts. A statutory version of it is contained in section 4(4)(a) of the CPA, which requires ambiguous terms to be interpreted in favour of the consumer. Section 4(4)(b) in turn effectively prevents suppliers from interpreting certain terms that restrict or exclude a consumer’s rights in a manner which would be surprising to a reasonable person. If the term itself is surprising, it may be possible to escape liability entirely if the consumer’s ignorance or mistake as to its existence is reasonable—see Sect. 3.1.2.

¹²⁸ Subject to the integration leg of the parol evidence rule (discussed above), which would not allow such documents to contradict a document that appears to be an integration (see *Telcordia Technologies Inc v Telkom SA Ltd* 2007 (3) SA 266 (SCA) [115]).

¹²⁹ *Potgieter v Potgieter NO* 2012 (1) SA 637 (SCA) [24].

¹³⁰ See *Ekurhuleni Metro Municipality v Germiston Municipal Retirement Fund* 2010 (2) SA 498 (SCA) [13].

¹³¹ According to the principle of *ut res magis valeat quam pereat* (see *McCullogh v Fernwood Estate Ltd* 1920 AD 204, 209).

¹³² At least in cases of ambiguity—see *South African Forestry Co Ltd v York Timbers Ltd* 2005 (3) SA 323 (SCA) [32].

¹³³ On these ‘tertiary rules’ or ‘guidelines’ of interpretation see Van Huyssteen et al. (2020), 358.

¹³⁴ *Cairns (Pty) Ltd v Playdon & Co Ltd* 1948 (3) SA 99 (A) 122.

¹³⁵ *Cairns (Pty) Ltd v Playdon & Co Ltd* 1948 (3) SA 99 (A) 122–123. The *contra proferentem* rule apparently overrides the *quod minimum* rule.

4.1.2 The Relationship Between Interpretation, Supplying Omitted Terms, and Implying Terms or Obligations

South African law distinguishes between the process of determining the terms of a contract, and the process whereby such terms are interpreted. A popular distinction employed in the first enquiry is between express terms, tacit terms and implied terms.¹³⁶

Express terms are based on the actual intention of the parties. Tacit terms, in turn, could be based on two grounds. One is the parties' actual, but unexpressed intention, which can be established from express terms or surrounding circumstances. The other is their imputed or deemed intention, which is determined by applying the bystander test. This test enquires what the parties would have responded if an 'officious bystander' were to ask them what would happen in certain circumstances. If they would unanimously have confirmed that a proposed term would have formed part of the contract, by commenting that, 'we did not trouble to say that; it is too clear', then that tacit term is regarded as part of the contract.¹³⁷ Tacit terms are not easily inferred by the courts; the mere fact that it may be reasonable or convenient to include such a term is not enough; the parties must, promptly, unanimously and necessarily have responded that the term would have formed part of the contract.¹³⁸

Finally, there are implied terms, which, unlike tacit terms, are not based on the deemed intention of the parties in the circumstances. An implied term is 'essentially a standardised one, amounting to a rule of law which the Court will apply unless validly excluded by the contract itself',¹³⁹ it is 'a term implied by law, a *naturalium* of the contract'.¹⁴⁰ These terms could be explained as giving expression to notions of reasonableness, or to good faith.¹⁴¹ It is not clear where exactly terms implied by trade usage fit in the classification above: the courts have regarded them as terms implied by law,¹⁴² which is understandable when the usage is universal, but such a term could also be based on the imputed intention of the parties, as indicated by the surrounding circumstances with which they are familiar.¹⁴³

¹³⁶ See *Alfred McAlpine & Son (Pty) Ltd v Transvaal Provincial Administration* 1974 (3) SA 506 (A) 532 (although, as indicated, the usage of 'implied term' and 'tacit term' is not consistent); *Wilkins NO v Voges* 1994 (3) SA 130 (A).

¹³⁷ *Maphango v Aengus Lifestyle Properties (Pty) Ltd* 2011 (5) SA 19 (SCA) [17].

¹³⁸ *City of Cape Town (CMC Administration) v Bourbon-Lefley and another NNO* 2006 (3) SA 488 (SCA) [19].

¹³⁹ *Alfred McAlpine & Son (Pty) Ltd v Transvaal Provincial Administration* 1974 (3) SA 506 (A) 532.

¹⁴⁰ *A Becker & Co (Pty) Ltd v Becker* 1981 (3) SA 406 (A) 419.

¹⁴¹ *South African Forestry Co Ltd v York Timbers Ltd* 2005 (3) SA 323 (SCA) [28].

¹⁴² *Alfred McAlpine & Son (Pty) Ltd v Transvaal Provincial Administration* 1974 (3) SA 506 (A) 531G.

¹⁴³ See Bradfield (2016), 190–196.

4.1.3 The Interpretation of Standard Terms

The South African common law does not recognise a distinct set of rules for the interpretation of standard terms. It is established that exemption clauses, which typically appear in standard term contracts, are interpreted using the normal canons of construction set out above.¹⁴⁴ Where standard terms are contained in a consumer contract, the rules of interpretation contained in section 4(4)(a) and (b) of the CPA apply (see Sect. 4.1.1).

4.2 Interpretation—Specific Topics

4.2.1 The Language of the Contract

If a contract is drafted in more than one language and the parties (expressly or tacitly) agree that one version is the main or official version, and the other is merely a translation,¹⁴⁵ there can be no objection in principle to respect such a determination. In the absence of such an agreement, the two or more versions presumably have to be considered together to determine the contents and meaning of the contractual obligations.¹⁴⁶ As far as could be established, there is no rule that the contract which was originally drafted must be preferred if a discrepancy remains between these versions after such a process of joint consideration.

Whichever route is followed, courts and tribunals obviously face a challenge when dealing with a contract drafted in a language with which it is unfamiliar. The adjudicator would at least require a translation of the document.¹⁴⁷ However, it has been held that ultimately the adjudicator has to interpret the original foreign language document with the aid of the translation (or more than one translation, if there is a dispute), and that it cannot restrict itself to interpreting the translation.¹⁴⁸ If, in an international commercial contract, the adjudicator engaged in such a process of interpretation finds that the parties agreed on a particular term, the court has to determine the legal effect of that term in accordance with the proper law governing the contract. Thus, if the proper law governing the contract is South African law, but the

¹⁴⁴ Exemption clauses relating to breach or non-performance are dealt with at Sect. 7.2.1.

¹⁴⁵ See for example *Zhongji Development Construction Engineering Co Ltd v Kamoto Copper Co* 2015 (1) SA 345 (SCA) [46].

¹⁴⁶ See for example *Durban's Water Wonderland (Pty) Ltd v Botha* 1999 (1) SA 982 (SCA) 988, where the court did not decide on particular version of standard terms presented in both English and Afrikaans. However, if only one version is brought to the attention of the court, it would presumably not be obliged to require the other version to be brought to its attention as well (compare *Wittmann v Deutscher Schulverein, Pretoria* 1998 (4) SA 423 (T) 436).

¹⁴⁷ See *Meyer v Hessling* 1992 (3) SA 851 (NmS), where an agreed translation was provided of a contract originally drafted in German.

¹⁴⁸ *Polysius (Pty) Ltd v Transvaal Alloys (Pty) Ltd* 1983 (2) SA 630 (W) 642.

contract is drafted in German, the legal effect of the term is determined in accordance with South African law; the German law relating to the term is irrelevant.¹⁴⁹

As indicated earlier, under the South African common law a party may escape contractual liability due to a material and reasonable mistake, and such a mistake could be the result of a surprising or unexpected term (see Sects. 2.1.4 and 3.1.2). Although there is no authority directly in point as far as could be established, in principle a term could be so surprising as not to be binding if it is drafted in a foreign language, and bears a meaning which a party may not reasonably be expected to understand.

Unlike the National Credit Act,¹⁵⁰ the CPA does not contain provisions that in certain circumstances entitle a consumer to receive notices or documentation in one of the eleven official languages. However, section 22 of the CPA does require that persons who are obliged to produce, provide or display various type of notices or documents to consumers must do so in the manner prescribed or in plain language. The plain language requirement in turn is met if, in essence, it reasonably can be concluded that an ‘ordinary consumer’ of the class of persons for whom the notice or document is intended, ‘with average literacy skills and minimal experience as a consumer of the relevant goods or services’, could be expected to understand the content, significance and import of the notice or document ‘without undue effort’, and having regard to certain circumstances.¹⁵¹ If a notice or document is in a language that is foreign to the ordinary consumers of the class to which it is intended, this may create undue effort for them to understand its content, significance and import, and hence result in non-compliance with the plain language requirement. A supplier who presents terms only drafted in Chinese to a local consumer could therefore fall foul of section 22. The effect of non-compliance with this provision is unclear; the possibility exists that it could influence the validity of a contract, or amount to prohibited conduct that is subject to administrative sanction.¹⁵²

Under section 40 of the CPA, knowingly taking advantage of consumers’ substantial inability to protect their own interests due to their inability to understand the language of an agreement could further amount to unconscionable conduct, which again could influence liability or give rise to administrative relief.¹⁵³ This provision would presumably be of limited impact in the international commercial context when a foreign supplier would typically be unaware of any such inability of a local consumer.

¹⁴⁹ *Polysius (Pty) Ltd v Transvaal Alloys (Pty) Ltd* 1983 (2) SA 630 (W) 643. There the court decided that it would be more convenient for a (foreign) tribunal with knowledge of German to apply South African law, than for a South African court with no knowledge of German to determine the relevant South African law.

¹⁵⁰ Act 34 of 2005; see section 63.

¹⁵¹ Section 22(2) of the Consumer Protection Act 68 of 2008.

¹⁵² See Stoop (2019), 22-13–22-17.

¹⁵³ See Du Plessis (2014), 40-28, 40-34–40-45.

4.2.2 Recitals or Preambles

According to the South African common law, a preamble or recital is generally regarded as subordinate to the operative part or portion of a contract.¹⁵⁴ The implication is that ‘where the operative part is clear and unambiguous, it is to be taken as expressing the intention of the parties and prevails over any suggestion of a contrary intention in the recitals’.¹⁵⁵ The ordinary meaning of the words in the operative part ‘is not to be cut down or restricted because of something appearing in a preamble’.¹⁵⁶

However, ‘where the operative part is doubtful, the recitals can be used to explain its meaning and they may “furnish the key to its true construction”, indeed the recital may operate as a covenant’.¹⁵⁷ It has further been held that it is permissible to resort to the preamble in interpreting the operative part if ‘it is manifestly clear from the preamble that the parties intended the words in the operative portion to bear some meaning other than the ordinary meaning’.¹⁵⁸ Presumably, these cases of manifest differences would automatically be regarded as situations of ambiguity.

South African practice reveals that it can at times be difficult to distinguish between the recital and operative part. The distinction is fairly clear where the recital is placed at the beginning of the contract, and merely sets out its general purpose, and is followed by the operative part, which sets out the obligations. However, sometimes a single sentence in a contract commences with a first part reflecting a party’s willingness to take certain steps, but is followed by a second part, suggesting that no liability would ensue for a failure to do so.¹⁵⁹ It now has to be determined whether the first part, expressing a willingness to take certain steps, amounts to a (mere) recital or whether it is binding, and if so, how it relates to the binding second part. This requires determining the intention of the parties. Although the courts acknowledge that this determination depends on the facts of the case,¹⁶⁰ they have identified certain guidelines that may be of assistance in this regard.

One guideline is whether the first part commences with the words ‘whilst’ or ‘while’ (and presumably also ‘whereas’); this could indicate that the first part is not intended to be binding, and that it simply means ‘notwithstanding that’.¹⁶¹ Another

¹⁵⁴ See Bradfield (2016), 251.

¹⁵⁵ *Woodburn Mansions (Pty) Ltd v Dowell* 1961 (3) SA 893 (N) 899C-D; *Du Plooy v Sasol Bedryf (Edms) Bpk* 1988 (1) SA 438 (A) 454D; *Netherlands Bank of South Africa v Stern NO* 1955 (1) SA 667 (W) 670.

¹⁵⁶ *Netherlands Bank of South Africa v Stern NO* 1955 (1) SA 667 (W) 670C.

¹⁵⁷ *Woodburn Mansions (Pty) Ltd v Dowell* 1961 (3) SA 893 (N) 899C-D.

¹⁵⁸ *Netherlands Bank of South Africa v Stern NO* 1955 (1) SA 667 (W) 670C-D.

¹⁵⁹ For example, a contract with a bank could contain a clause stating that ‘(t)he bank hereby notifies its customers that while it will exercise every reasonable care, it is not liable for any loss or damage caused to any article lodged with it for safe custody ... whether the loss or damage is due to the bank’s negligence or not’ (see *First National Bank of SA Ltd v Rosenblum* 2001 (4) SA 189 (SCA) [3]).

¹⁶⁰ *Consol Ltd t/a Consol Glass v Twee Jonge Gezellen (Pty) Ltd* 2005 (6) SA 1 (SCA) [13].

¹⁶¹ *Consol Ltd t/a Consol Glass v Twee Jonge Gezellen (Pty) Ltd* 2005 (6) SA 1 (SCA) [15]; *Elgin Brown & Hamer (Pty) Ltd v Industrial Machinery Suppliers (Pty) Ltd* 1993 (3) SA 424 (A) 429.

guideline is that a finding that the first (introductory) part is binding should not result in ‘a clear antithesis between the introductory words and the operative parts ...’¹⁶²; such an antithesis cannot in effect deprive the operative part of its force.¹⁶³ For example, if the wording is ‘while we will take care not to cause any loss, we would not be liability for loss’, it would be contradictory to find that the first part means that there is a binding duty not to cause loss, and that breach of such a duty would give rise to liability for it. The two parts would contradict each other.

5 Content of Contracts

5.1 *The Content of Contracts—Overview*

5.1.1 Duties of Parties with Regard to the Operation or Performance of the Contract

If a debtor (obligor) requires the creditor’s (obligee’s) co-operation to perform, the creditor could be under a duty to provide such co-operation. This duty may be regarded as flowing automatically from the debtor’s obligation to perform.¹⁶⁴ Typical examples of when this duty would arise include where the creditor’s co-operation is required to effect delivery of goods or payment, or to gain access to premises for performing services; a party may also be under a duty to assist another in obtaining public permission (see Sect. 3.2.1). These examples concern situations where performance requires ‘active’ co-operation by the creditor; where no active co-operation is required, a creditor could be under a duty to remain passive, and not interfere with performance.¹⁶⁵

South African law does not traditionally recognise that the duty to co-operate gives expression to the underlying value of good faith, but there appears to be no reason in principle to object to such a justification. Parties may of course in any event contractually undertake to exercise or observe good faith in the implementation of a contract.¹⁶⁶

A creditor’s failure to comply timeously with a duty to co-operate could amount to breach of contract (*mora creditoris*). The debtor may seek an order compelling the creditor to provide co-operation.¹⁶⁷ If a failure to co-operate reflects that the creditor

¹⁶² *Consol Ltd t/a Consol Glass v Twee Jonge Gezellen (Pty) Ltd* 2005 (6) SA 1 (SCA) [15].

¹⁶³ See *Elgin Brown & Hamer (Pty) Ltd v Industrial Machinery Suppliers (Pty) Ltd* 1993 (3) SA 424 (A) 429C.

¹⁶⁴ *Martin Harris & Seuns OVS (Edms) Bpk v Qwa Qwa Regeringsdiens* 2000 (3) SA 339 (SCA) [16].

¹⁶⁵ Interference with performance could amount to breach (see Sect. 7.1.1).

¹⁶⁶ See *Silent Pond Investments CC v Woolworths (Pty) Ltd* 2011 (6) SA 343 (D).

¹⁶⁷ *Ranch International Pipelines (Tvl) (Pty) Ltd v LMG Construction (City) (Pty) Ltd* 1984 (3) SA 861 (W) 879.

does not regard itself as bound (irrespective of when performance is to take place), this could in turn amount to another form of breach, other than *mora creditoris*, called anticipatory breach or repudiation. Finally, if the failure to co-operate results in a permanent inability on the side of the debtor to perform, this could amount to breach in the form of prevention of performance.

The distinction between a duty to achieve a certain result, as opposed to the duties of best efforts, does not traditionally enjoy prominence in South African law.¹⁶⁸ At best it is latent, for example when dealing with a contract to provide certain professional services, such as medical care, where the nature of the duty can only be to use best efforts, and not to ensure an outcome (for example that a patient would have to be healed). Perhaps the lack of prominence of the distinction could be ascribed to the fact that it is especially relevant in systems where proof of fault on the side of the debtor is required to establish breach (the significance is that a duty to achieve a result would be an exceptional case where the debtor does not have to be at fault). However, South African law does not generally require the debtor to be at fault. The local point of departure is to interpret the contract to determine the content of the obligations, without any particular need to classify these obligations under these two types of duties.

5.1.2 Obtaining Certainty with Regard to What Has to be Performed and for What Period

Certainty as to quality of performance. Applying the rules of interpretation should normally reveal the required quality of performance. These rules for example allow courts to take into account the factual matrix or context within which the contract was concluded, including usages in the industry or between the parties. Courts will also endeavour to interpret a contract so that it is valid, rather than invalid due to uncertainty (see Sect. 4.1.1).

Specific rules or implied terms (sometimes called residual terms) could determine the quality of performance required for specific types of contracts. Thus, the subject matter of the sale (the *merx*) is warranted to be fit for the purposes for which it is sold, or to be of a reasonable quality, or not to suffer from latent defects; according to the law of lease, the lessor must place and maintain the leased premises in a condition reasonably fit for the purpose for which they are let; and certain services should be performed in a professional manner. The CPA recognises that a consumer has a right to the performance of services ‘in a manner and quality that persons are generally entitled to expect’,¹⁶⁹ and has a right to receive goods that ‘(a) are reasonably suitable for the purposes for which they are generally intended, and (b) are of good quality, in good working order and free of any defects’.¹⁷⁰

¹⁶⁸ For a rare reference to this distinction, in the context of the agreement to negotiate further, see Van Huyssteen et al. (2020), 268 n 51.

¹⁶⁹ Section 54(1)(b) of the Consumer Protection Act 68 of 2008.

¹⁷⁰ Section 55(2) of the Consumer Protection Act 68 of 2008.

Certainty as to price. If the price is neither fixed nor determinable (for example by way of an internal mechanism such as an escalation clause, or with reference to an external market price of a specified commodity, or through a determination by a third party), South African law would only in limited circumstances recognise that the contract is for a reasonable price. If the parties did not expressly agree on a fee or remuneration for services, a court could find that the parties tacitly agreed that the contract is for a reasonable fee or remuneration. Support further exists for the notion that if no such express or tacit agreement exists, ‘the law itself provides that it [the fee or remuneration] should be reasonable’.¹⁷¹ Parties cannot agree to sell for a ‘reasonable price’ or to rent for a ‘reasonable rental’.¹⁷² However, it is expected that the courts will in due course reverse this position: after all, a term stipulating a reasonable price or reasonable rental need not create any more uncertainty than a term stipulating that services are to be performed for a reasonable fee.¹⁷³ Where a party has the discretion to determine another party’s performance (for example when a creditor may vary the interest payable on a loan),¹⁷⁴ such a discretion has to be exercised reasonably.

Certainty as to duration. The consequences of an agreement of indefinite or unstated duration are determined by interpreting the agreement.¹⁷⁵ One possible but rather unlikely consequence is that the parties intended that it should continue in perpetuity.¹⁷⁶ Alternatively, interpreting the contract (or applying the test for inferring the existence of a tacit term) could reveal that the contract is intended to be terminable on reasonable notice,¹⁷⁷ or that it would automatically lapse after a reasonable period of time. It has been held that ‘[t]here is no rule of law to the effect that it is implicit in a contract which may be terminated by notice that it may only be so terminated for a valid commercial reason’, but that ‘[s]uch a term may, of course, be implied on a proper construction of the agreement’.¹⁷⁸ Parties sometimes include an express term to the effect that a contract of indefinite duration is terminable on notice, without requiring it to be for a reasonable period. However, consumer legislation

¹⁷¹ *Chamotte (Pty) Ltd v Carl Coetzee (Pty) Ltd* 1973 (1) SA 644 (A) 649; *Compagnie Interafricaine De Travaux v SA Transport Services* 1991 (4) SA 217 (A) 236.

¹⁷² *NBS Boland Bank Ltd v One Berg River Drive* 1999 (4) SA 928 (SCA).

¹⁷³ See Van Huyssteen et al. (2020), 272–273, where it is suggested that the courts would reconsider the issue ‘perhaps on the basis of construing the reference to a reasonable price or rental as one incorporating the current or market price of the subject matter of the contract’.

¹⁷⁴ *NBS Boland Bank Ltd v One Berg River Drive* 1999 (4) SA 928 (SCA) left open whether such a discretion could exist to determine a purchase price or rental.

¹⁷⁵ *Plaaskem (Pty) Ltd v Nippon Africa Chemicals (Pty) Ltd* 2014 (5) SA 287 (SCA) [11].

¹⁷⁶ See *Plaaskem (Pty) Ltd v Nippon Africa Chemicals (Pty) Ltd* 2014 (5) SA 287 (SCA) [26], where it was held that such a finding is unlikely, in the absence of an express provision to this effect. It is not clear whether a presumption exists against perpetuity (*Putco Ltd v TV & Radio Guarantee Co (Pty) Ltd & Other Related Cases* 1985 (4) SA 809 (A) 827–828 possibly supports such a position).

¹⁷⁷ See *Plaaskem (Pty) Ltd v Nippon Africa Chemicals (Pty) Ltd* 2014 (5) SA 287 (SCA).

¹⁷⁸ *Amalgamated Beverage Industries Ltd v Rond Vista Wholesalers* 2004 (1) SA 538 (SCA) [13].

presumes such a term to be unfair, unless the consumer committed a material breach of contract.¹⁷⁹

5.1.3 Conditions

Suspensive condition (sometimes called a ‘condition precedent’). Under South African law, a ‘suspensive condition of a contract, properly so called, suspends the operation of all or some of the obligations flowing from that contract pending the occurrence or non-occurrence of a specific uncertain future event.’¹⁸⁰ Upon fulfilment of the condition, the contract is enforceable. If the condition fails, in other words if it is clear that it will not be fulfilled, the contract terminates with retrospective effect, unless the parties intend otherwise.¹⁸¹

Resolutive condition. A resolutive condition has the effect that a contract or any of its terms come to an end if an uncertain future event occurs. The fulfilment of a resolutive condition is said to operate retrospectively,¹⁸² which would generally trigger duties of restitution of performances (performances under continuing obligations, such as lease agreements, may be an exception).¹⁸³ If a resolutive condition fails, the contract is unconditional and fully enforceable. If a party deliberately prevents fulfilment of a condition when under a duty not to do so, the condition could be deemed to be fulfilled.¹⁸⁴

5.2 The Content of Contracts—Specific Topics

5.2.1 Warranties

When parties refer to a ‘warranty’ in the South African context, it is essential to determine in what sense they used the term.¹⁸⁵ It has been stated that

‘... the word “warranty” is one of the more unfortunate importations into [South African] law from English legal terminology, because it has so many different meanings. It may mean,

¹⁷⁹ See regulation 44(3)(l) issued in terms of the Consumer Protection Act 68 of 2008 (Government Notice No R 293, GG No 34180 of 1 April 2011).

¹⁸⁰ See *Command Protection Services (Gauteng) (Pty) Ltd t/a Maxi Security v South African Post Office Ltd* 2013 (2) SA 133 (SCA) [10].

¹⁸¹ *Paradyskloof Golf Estate (Pty) Ltd v Stellenbosch Municipality* 2011 (2) SA 525 (SCA) [17].

¹⁸² See *Amoretti v Tuckers Land and Development Corporation (Pty) Ltd* 1980 (2) SA 330 (W), 332–333.

¹⁸³ See Van Huyssteen et al. (2020), 341.

¹⁸⁴ See *Scott v Poupard* (1971) (2) SA 373 (A) 378H.

¹⁸⁵ See *Protea Property Holdings (Pty) Ltd v Boundary Financing Ltd (formerly known as International Bank of Southern Africa Ltd)* 2008 (3) SA 33 (C) [39].

generically, a term of the contract as opposed to a mere puff or representation; or it may mean, specifically, a term not going to the root of the contract as opposed to a condition in the sense of the term going to the root of the contract; or it may mean, in an insurance contract, a term the breach of which entitles the insurer to elect to avoid the policy and repudiate liability; or it may, especially when described as a collateral warranty, mean a term of a contract prior to and inducing the main contract'.¹⁸⁶

To this list may be added the more common definitions of a warranty as 'a term inserted in a contract in favour of a party to extend the liability of the other party beyond what it would normally be',¹⁸⁷ or 'a contractual term by which a contractant assumes absolute or strict liability for proper performance to the extent that she cannot rely on impossibility of performance or absence of fault to escape liability'.¹⁸⁸ For present purposes, and in line with the definition provided in the questionnaire, the emphasis will especially be on the latter, more common meanings.¹⁸⁹

Examples of the contexts in which warranties could arise include situations where a party seeks performance of a quality exceeding that which otherwise would be required (for example that a refrigerator would operate for 10 years—see Sect. 5.1.2); or seeks to hold another party liable even though performance would normally have been excused due to initial or supervening impossibility (see Sects. 3.1.1, 6.1.2 and 7.2.2), or seeks to hold another party liable for representations that otherwise would not have been actionable under the contract (see Sect. 3.1.2). Warranties could also cover a combination of these situations, for example when a seller represents that the object sold has certain qualities.

Warranties could arise from the actual or deemed consent of the parties, and be contained in express or tacit terms. A well-known case on tacit warranties involved the sale of a bull, which, unknown to the parties, was infertile.¹⁹⁰ It was held that the seller tacitly warranted that the bull was of a certain quality, namely that it was fertile, and that the seller was liable for breach of contract (on the test for finding a tacit term see Sect. 4.1.2). The test for inferring such a term is applied strictly; the courts would not find that a warranty arose where a seller merely engaged in 'sales talk' or general laudation ('puffery').¹⁹¹ Criteria that could indicate that the parties tacitly agreed on a warranty where a representation was made include 'the

¹⁸⁶ Bradfield (2016), 183–184.

¹⁸⁷ Hutchison and Pretorius (2017), 217; Lubbe and Murray (1988), 427.

¹⁸⁸ Van Huyssteen et al. (2020), 343.

¹⁸⁹ The definition therefore does not cover a so-called 'warranty' whereby the liability is limited, rather than expanded (for example some manufacturers' warranties, which restrict the period for which liability for defects could be incurred)—see Lubbe and Murray (1988), 428.

¹⁹⁰ *Minister van Landbou-Tegniese Dienste v Scholtz* 1971 (3) SA 188 (A).

¹⁹¹ If a seller makes 'a material statement to the buyer during the negotiations bearing on the quality of the *res vendita* and going beyond mere praise and commendation' (a *dictum et promissum*), the purchaser may claim that the contract price be reduced, or be returned; this liability arises from the Aedilician actions of the law of sale, and is not based on breach of a warranty. See *Phame v Paizes (Pty) Ltd* 1973 (3) SA 397 (A) 418A.

importance of the truth of the statement; the stage of the transaction at which it was made; and whether it was made in response to a query by the representee'.¹⁹²

The consequences of breach of a contractual warranty are that the holder is entitled to remedies arising from breach of contract. The party who provides a warranty is not able to escape liability for breach due to impossibility or absence of fault. The remedies available against such a party in breach include: (a) cancellation or termination in the event of a material breach, followed by restitution; (b) a claim for damages aimed at putting the holder in the position such a person would have been in had there been no breach of the warranty (for example had the representation been true, or had there been full performance as warranted); and (c) a claim of specific performance, aimed at enforcing the warranty, except of course when performance is impossible.

It has been suggested that 'the designation "warranty" is probably best reserved for a term agreed upon by the parties',¹⁹³ but it is commonly used in South African law to describe certain terms that arise by law (*ex lege*). In the common law of sale these include terms arising by law or *naturalia*, such as the 'warranty' which the seller has to provide to the purchaser against eviction, or against latent defects in the subject matter of the sale. The CPA contains provisions that cover similar terrain, for example it protects consumers in cases of eviction (section 44); recognises an implied 'warranty' of quality (section 56) that gives effect to the rights to safe, good quality goods, which are free of latent or patent defects (section 55)¹⁹⁴; and the CPA also provides consumers with a 'warranty' on repaired goods (section 57). The remedies arising from breach of these *ex lege* common-law and statutory 'warranties' would not necessarily be the same as those arising from consensual warranties.¹⁹⁵

5.2.2 Indemnification

South African law sometimes makes use of the term 'indemnity clause' to refer to a term that *excludes liability* of one party towards another, or prevents one party from pursuing a claim against the other.¹⁹⁶ This may more properly be called an exclusionary clause and is considered at Sect. 7.2.1. The focus in this section is on a clause containing an undertaking by one party to *compensate* another for loss or

¹⁹² Hutchison and Pretorius (2017), 122 (pointing out that warranties could also arise because consensus is deemed to exist on objective grounds—see Sect. 2.1.1).

¹⁹³ Van Huyssteen et al. (2020), 343.

¹⁹⁴ The ambit of this 'warranty' extends beyond the parties to producers or importers, distributors and retailers (see De Stadler 2014c, 56-2).

¹⁹⁵ The ambit of these warranties is set out in specialised works on contract, sale and consumer protection (on liability for consequential losses see for example Van Huyssteen et al. 2020, 343–344; also see Sect. 7.2.4).

¹⁹⁶ See for example *Drifters Adventure Tours CC v Hircock* 2007 (2) SA 83 (SCA); *Consol Ltd t/a Consol Glass v Twee Jonge Gezellen (Pty) Ltd* 2005 (6) SA 1 (SCA) [14].

damage, especially where it would arise from a claim¹⁹⁷ by a third party.¹⁹⁸ Examples in the case law of such indemnity clauses are found in sale-of-shares agreements stating that purchasers indemnify sellers against any claims by third parties relating to the obligations of the company,¹⁹⁹ or in building contracts that require of contractors to indemnify employers from losses arising from claims of third parties relating to the execution of the works.²⁰⁰

Whether a clause is an indemnity clause, as defined above, or an exclusionary clause, is ultimately a matter of interpretation (see Sect. 4.1). Use of wording such as ‘indemnity’ or ‘indemnify’ is not conclusive. The distinction can have important implications: for example, in a case where a contractor caused a fire while repairing the employer’s roof, resulting in the destruction of the property, the employer argued that a clause under the heading ‘Indemnities’ only indemnified the contractor from claims by third parties; however, the contractor successfully argued that it also excluded claims by the employer for the negligent destruction of the property; it was in effect an exclusionary clause.²⁰¹

The exact nature of the loss or damage covered by an indemnity clause is likewise a matter of interpretation. The mere fact that it refers to ‘loss or damage’ does not mean that the indemnified party should actually have incurred expenses or paid out money to third parties. A process of interpretation could reveal that it also covers loss or damage ‘sustained as a result of an inescapable obligation to pay money even before the money is actually paid’.²⁰²

And indemnity clause may not be illegal, which means it may not be contrary to public policy under the common law or contrary to legislation (see Sect. 3.1.3). In terms of consumer legislation, a term of a consumer agreement is presumed to be unfair ‘if it has the purpose or effect of forcing the consumer to indemnify the supplier against liability incurred by it to third parties’.²⁰³ This may result in the term being declared unenforceable. Any notice to consumers or provision of a consumer agreement that purports to impose an obligation on the consumer to indemnify the

¹⁹⁷ On the meaning of ‘claim’ see *Avondson Trust (Pty) Ltd v Wouda* 1975 (2) SA 444 (T) 451.

¹⁹⁸ See *Masstores (Pty) Ltd v Murray & Roberts Construction (Pty) Ltd* 2008 (6) SA 654 (SCA) [13]. The focus here is not on ‘indemnification clauses’, as found in insurance contracts, when an insurer undertakes to indemnify an insured against certain losses (see for example *Fourie v Sentrasure Bpk* 1997 (4) SA 950 (NC) 856). Liability in terms of an indemnity clause further differs from liability arising from a suretyship agreement, where the surety undertakes to the holder of the right to stand in for the performance of a principal debtor (see *Leyland Finance Co Ltd v Van Rensburg* 1970 (4) SA 145 (T)).

¹⁹⁹ *Engelbrecht v Khumalo* 2016 (4) SA 564 (GP) [11].

²⁰⁰ See for example *Masstores (Pty) Ltd v Murray & Roberts Construction (Pty) Ltd* 2008 (6) SA 654 (SCA) [4] (although the heading ‘Indemnities’ also covered exclusionary clauses that deprived parties of claims against each other). For a further example see *Pretoria Portland Cement Co Ltd v South African Railways and Harbours* 1979 (2) SA 188 (T) 491.

²⁰¹ See *Masstores (Pty) Ltd v Murray & Roberts Construction (Pty) Ltd* 2008 (6) SA 654 (SCA) [13].

²⁰² *Jonnes v Anglo-African Shipping Co* 1936 Ltd 1972 (2) SA 827 (A) 837.

²⁰³ See regulation 44(3)(e) issued in terms of the Consumer Protection Act 68 of 2008 (Government Notice No R 293, GG No 34180 of 1 April 2011).

supplier or any other person for any cause must be drawn to the attention of the consumer in a manner and form that satisfies certain formal requirements set out in the CPA.²⁰⁴

6 Performance of a Contract

6.1 *Performance of a Contract—Overview*

6.1.1 Performance in General

The time of performance. Performance must take place at the moment determined by the contract. Otherwise, the general rule is that the obligations are enforceable forthwith. However, this rule ‘is subject to the qualification that performance cannot be demanded unreasonably so as to defeat the objects of the contract or to allow an insufficient time for compliance’.²⁰⁵ In effect, the debtor therefore has a reasonable period in which to perform. Since it may be unclear what such a reasonable period could be, the creditor has to give a notice to the debtor indicating when performance is expected; it is only when the debtor does not perform by that moment that the debtor commits breach of contract. Technically, it is said that the creditor must place the debtor in *mora ex persona* by way of a notice of demand.

The debtor must perform fully when the time for performance has been reached; partial performance may be refused.²⁰⁶ When the time for performance is indicated as a period, rather than a specific moment, the debtor presumably must perform at one time, rather than in instalments, which would be more onerous to the creditor. Where a future date has been fixed for payment, it is presumed that it is fixed for the benefit of the debtor, who may therefore pay earlier.²⁰⁷

Where parties’ performances are given in exchange for each other (as in commercial contracts generally), and one party has to perform last, such a party may withhold performance until the other party has performed in full. Where parties have to perform simultaneously, and the one claims performance, the other may raise the defence that the one claiming performance should perform first or tender performance.²⁰⁸ In determining the sequence of performance, the nature of contract could be relevant: for example, the provider of a service, lessor or mandatary typically has to perform first.

²⁰⁴ Section 49(1)(c) of the Consumer Protection Act 68 of 2008.

²⁰⁵ *Mackay v Naylor* 1917 TPD 533, 537–538, approved in *Nel v Cloete* 1972 (2) SA 150 (A) 169F–H.

²⁰⁶ See *BK Tooling (Edms) Bpk v Scope Precision Engineering (Edms) Bpk* 1979 (1) SA 391 (A) 434A.

²⁰⁷ See *Bernitz v Euvrard* 1943 AD 595, 602.

²⁰⁸ See for example *Grand Mines (Pty) Ltd v Giddey NO* 1999 (1) SA 960 (SCA) 965.

Consumer legislation essentially obliges suppliers to perform on ‘the agreed date and at the agreed time, if any, or otherwise within a reasonable time after concluding the transaction or agreement’.²⁰⁹ However, where no date has been provided for or anticipated, the legislation does not (like the common law) expressly require that the consumer has to serve a notice of demand on the supplier to determine a date for performance.

The place of performance. Performance must be made at the place determined by the contract.²¹⁰ Otherwise, it will have to be determined according to the circumstances; there is no general default rule, for example that the creditor must obtain performance at the debtor’s premises, or that the debtor must perform at the creditor’s premises.²¹¹ Relevant circumstances that could indicate the place for performance include where the contract was concluded (for example where a loan was made), trade usage, and the nature of the performance (for example the transfer of land may have to be effected at a particular office).²¹² Support exists for the proposition that if the debtor has to pay a monetary debt by a specific time, but without the place being determined, the debtor must ‘seek out the creditor and pay’.²¹³ Payment cannot be validly effected at a place other than that agreed upon by the parties, unless the creditor consents thereto. This has meant that where a contract of lease determined that the rental was payable at the lessor’s rental agent’s office, but the tenant deposited it into the lessor’s bank account, the tenant did not effect valid payment.²¹⁴

Consumer legislation determines that if a place for performance has not been agreed by the parties, the default rule is that performance must take place at the supplier’s place of business, if the supplier has one, and if not, at the supplier’s residence.²¹⁵

The manner of performance. Performance must be made in the manner determined by the contract. Default rules on certainty as to the quality of performance are dealt with above (at Sect. 5.1.2). The creditor may accept a performance made in a manner other than that determined by the agreement, namely a substitute performance or *datio in solutum*.

Unless agreed otherwise, monetary obligations may be discharged by delivery of notes and coins, with limitations being imposed on the maximum amount that can be

²⁰⁹ Section 19(2)(a)(i) of the Consumer Protection Act 68 of 2008. Also see section 54(1)(a), which grants the consumer a right to timely performance. Terms that grant suppliers unreasonably long periods for performance are deemed to be unfair (regulation 44(3)(p), issued in terms of the Consumer Protection Act 68 of 2008 (Government Notice No R 293, GG No 34180 of 1 April 2011)).

²¹⁰ *Matador Buildings (Pty) Ltd v Harman* 1971 (1) SA 287 (C).

²¹¹ See Bradfield (2016), 498–499.

²¹² See Van Huyssteen et al. (2020), 565.

²¹³ Bradfield (2016), 499.

²¹⁴ *Matador Buildings (Pty) Ltd v Harman* 1971 (1) SA 287 (C). It is unclear why the creditor should be able to reject performance if the creditor has no specific interest in receiving it at a specific place.

²¹⁵ Section 19(2)(b) of the Consumer Protection Act 68 of 2008.

paid by using coins.²¹⁶ It used to be readily inferred that parties agreed that payment could be made by cheque, in which case delivery of the cheque would constitute payment which is conditional upon the cheque being honoured upon presentation.²¹⁷ However, nowadays it is much more probable that parties intend that payment may be effected by way of a bank transfer, which is effective when it can no longer be reversed.

Contractual obligations are sometimes formulated in terms of foreign currency. If payment is to be made locally, and the parties intended that payment may only be made in foreign currency, consent would have to be obtained in terms of exchange control regulations. Otherwise, the debtor is entitled to pay the debt in the local currency (namely in Rand when payment is to take in South Africa), in an amount equivalent to that of the foreign currency, determined at the time of payment.²¹⁸ Payments which involve the exporting of capital from South Africa, whether formulated in a local or foreign currency, may require consent in terms of exchange control regulations.²¹⁹ South African courts are generally entitled to order payment of an amount expressed in a foreign currency.²²⁰

Parties in principle bear the costs of their own performances; ultimately, they are free to allocate these costs differently by agreement, or specific rules could apply to certain types of contract, for example rules on who bears the costs of delivery of the subject matter of the sale.

Where a debtor owes several obligations to the same creditor, performance is applied or 'imputed' to these obligations according to certain general principles.²²¹ If the debtor specifies the obligation to which the performance is allocated, effect is given to such a determination. If the debtor does not specify which obligation is being performed, some authorities recognise that the creditor has the capacity to make such a determination, but support is also expressed for merely entitling the creditor to suggest to the debtor how the performance is to be appropriated.²²² If none of these routes provide a solution, certain default rules apply:

One of the rules is that, if capital and interest are owing in respect of the same indebtedness, a payment must be credited first to the interest then owing by the debtor and then, if not exhausted, to the capital owing by him. ... Other rules are, inter alia, that an enforceable debt is extinguished before an unenforceable one and, as between enforceable debts, that the more onerous debt is extinguished first. A debt secured by a deed of suretyship is classified as an onerous debt. Older debts are settled before more recent ones. Where none of the specific rules applies, the various debts are settled proportionally.²²³

²¹⁶ See section 17 of the South African Reserve Bank Act 90 of 1989.

²¹⁷ *Eriksen Motors (Welkom) Ltd v Protea Motors, Warrenton* 1973 (3) SA 685 (A) 693.

²¹⁸ Bradfield (2016), 477.

²¹⁹ Bradfield (2016), 478. The party seeking to prove that a contract is illegal due to contravention of the regulations bears the burden of proof—see *Pratt v FirstRand Bank Ltd* 2009 (2) SA 119 (SCA).

²²⁰ See *Standard Chartered Bank of Canada v Nedperm Bank Ltd* 1994 (4) SA 747 (A) 775.

²²¹ See Van Huyssteen et al. (2020), 569–570; Bradfield (2016), 569–570.

²²² Van Huyssteen et al. (2020), 569–570.

²²³ *Pfeiffer v First National Bank of SA Ltd* 1998 (3) SA 1018 (SCA) 1025I–1026E.

6.1.2 Hardship

The point of departure in South African law is that a party is only released if performance became absolutely or objectively impossible, as opposed to merely subjectively impossible, when only the particular debtor cannot perform. However, academic support exists for the notion that absolute or objective impossibility must be determined pragmatically, and that it could include situations where performance would be so difficult or onerous that it would be unreasonable to expect the debtor to perform.²²⁴ A standard example is where a seller has to deliver a statue which has fallen in the sea, and which would be prohibitively expensive to retrieve. However, there is no support in the common law for this pragmatic approach to cover cases of hardship arising from, for example, extreme inflation or a dramatic rise in the costs of performance.

While hardship does not result in the termination of obligations, it is a factor that courts may consider when exercising their discretion to award specific performance of a contract.²²⁵

7 Non-performance (Breach of Contract)

7.1 *Non-performance (Breach of Contract)—Overview*

7.1.1 Non-performance in General

The South African common law distinguishes between various types or forms of breach of contract.²²⁶ The classifications are not uniform, but the most prominent examples include breach by way of:

- (i) a failure of a debtor to perform on time (*mora debitoris* or ‘negative malperformance’);
- (ii) a failure by a debtor to render performance in the manner specified in the contract, for example by delivery of defective goods or poor services (‘positive malperformance’); and
- (iii) repudiation, which means when either party evinces an intention not to proceed with the contract (before or after the date for performance).

To these forms of breach the following are often added:

- (iv) preventing or making either party’s performance impossible; and

²²⁴ Van Huyssteen et al. (2020), 204.

²²⁵ *Haynes v Kingwilliamstown Municipality* 1951 (2) SA 371 (A).

²²⁶ See Hutchison and Pretorius (2017), 289–320. For statutory provisions dealing with non-performance of consumer contracts see for example sections 19, 54, 55 and 56 of the Consumer Protection Act 68 of 2008.

- (v) a failure by a creditor to provide the co-operation necessary to ensure performance by the debtor (*mora creditoris*).

The courts generally maintain that it is not necessary to prove that the party in breach was at fault; however, non-performance is excused in cases where performance is absolutely impossible, and some commentators argue that fault is at least at times required (if only indirectly).²²⁷ It further is not generally required that the non-performing party has to give a final deadline for performance; notification requirements only apply to certain forms of breach, for example when no date for performance has been determined (see Sect. 6.1.1).

Certain circumstances could influence a creditor's ability to rely on the debtor's non-performance in order to invoke contractual remedies.

First, if the debtor's non-performance could be ascribed to a failure by the creditor to co-operate with performance, the creditor commits breach in the form of *mora creditoris* (see (v) in the previous paragraph). Any failure on the side of the debtor to perform would then not constitute breach. Furthermore, if the debtor whose performance is not accepted by the creditor in any event can no longer perform due to supervening impossibility, the debtor is discharged from liability, but the creditor is still liable for counter-performance. Thus, if a contractor is supposed to repair a machine for an employer, the employer fails to grant access for the repairs to be effected (and thereby commits *mora creditoris*), and the machine is destroyed in a fire (in which case performance becomes impossible), the contractor is excused from performance, but the employer still has to pay.

Secondly, as indicated earlier (at Sect. 6.1.1), a party to a reciprocal contract may at times withhold his or her own performance to induce the other side to perform their obligations; the withholding party would then invoke the *exceptio non adimpleti contractus*. A creditor may therefore be prevented from claiming performance by a debtor if the creditor is obliged to perform first, or at least to tender performance. However, even though the general point of departure is that parties must perform fully and on time (see Sect. 6.1.1), the courts have a discretion to award a reduced contract price to a party who has performed partially. Such a party would have to prove that the performance is used by the other party, what factors justify exercising this discretion in their favour (for example that they performed in good faith), and what the measure of the reduced price should be (for example the contract price minus costs to cure the incomplete performance).²²⁸ Terms in consumer contracts that deprive a consumer of the right to withhold performance when the supplier does not perform are deemed to be unfair.²²⁹

The following circumstances do not affect a creditor's ability to rely on the debtor's non-performance in order to invoke contractual remedies.

First, the South African common law (unlike Article 7.1.4 PICC) does not recognise a general principle that a non-performing debtor may 'cure' non-performance or

²²⁷ See Hutchison and Pretorius (2017), 292; Van Huyssteen et al. (2020), 385–386.

²²⁸ See *BK Tooling (Edms) Bpk v Scope Precision Engineering (Edms) Bpk* 1979 (1) SA 391 (A).

²²⁹ Regulation 44(3)(m) issued in terms of the Consumer Protection Act 68 of 2008 (Government Notice No R 293, GG No 34180 of 1 April 2011).

undo breach of contract (although the parties could of course contractually provide for such a right).²³⁰ Thus, a party who has not properly performed a service may not insist on a second opportunity to perform, and it is doubtful whether a party who has repudiated the contract can ‘retract’ the repudiation by indicating a renewed willingness to perform.²³¹ Where a debtor commits breach by failing to perform on time, and the creditor consequently elects to terminate the contract, the debtor cannot undo this election by subsequently tendering performance.²³²

Secondly, South African law (unlike Article 7.1.5 PICC) does not recognise specific rules that govern the situation where an aggrieved party by notice allows the party in breach an additional period to perform. However, an aggrieved party who gives such a notice presumably by implication temporarily waives or undertakes not to invoke any right to cancel or terminate the contract due to breach, or to seek an order of specific performance. If the breach takes the form of a failure to perform on time (*mora debitoris*), the aggrieved party may by way of a notice of rescission acquire a right to cancel the contract if performance does not take place in the period specified therein.

However, if breach takes the form of positive malperformance (in which case the breach relates to the manner of performance), the aggrieved party who gives an additional period for performance will not automatically obtain a right to cancel or terminate if the debtor fails to perform properly in the specified period²³³; the aggrieved party may only cancel if the breach is material, or if a right to cancel is provided in the contract.

7.1.2 The Right to Specific Performance (Whether of Monetary or Non-monetary Obligations)

South African law proceeds from the point of departure that a creditor (whether of a monetary or non-monetary obligation) may require actual or specific performance as a primary remedy, rather than as an alternative to damages. However, the courts have a broad, ‘unfettered’ discretion to refuse a claim for performance.²³⁴ Factors that could influence a court not to award such a claim include whether performance is impossible, whether the debtor is insolvent, whether enforcing the obligation would cause undue hardship, and whether the obligation is to perform a personal service. The mere fact that the creditor could conclude a replacement transaction, whereby performance could be obtained from another source, would generally not sway a court to refuse specific performance.

²³⁰ See for example *Telcordia Technologies Inc v Telkom SA Ltd* 2007 (3) SA 266 (SCA) [165]. Only in highly exceptional cases would performance be regarded as inherently of such a nature that it cannot be expected that it will be properly rendered the first time round.

²³¹ See Lubbe (1996), 147; but see *Vromolimnos (Pty) Ltd v Weichbold* 1991 (2) SA 157 (C) 162.

²³² *Boland Bank Ltd v Pienaar* 1988 (3) SA 618 (A) 622–623.

²³³ *Sweet v Ragereghara NO* 1978 (1) SA 131 (D).

²³⁴ See *Benson v SA Mutual Life Assurance Society* 1986 (1) SA 776 (A) 781–783.

In principle, the right to performance includes the right to require repair, replacement or another cure of the defective performance. Somewhat controversially, South African courts have been reticent to order specific performance when they felt that it could be burdensome for the courts to ‘supervise’ performance; examples of this practice include duties to effect repairs.²³⁵ However, consumer legislation expressly entitles consumers to demand that suppliers remedy defects in the quality of services,²³⁶ as well as to demand, under certain circumstances, that suppliers repair or replace failed, unsafe or defective goods.²³⁷

The consequences of not complying with an order of specific performance issued by a court depend on the nature of the obligation. In the event of a failure to comply with an order to pay a monetary amount, the debtor’s property could be attached and sold in execution. Failure to perform an act or failure to honour a duty to refrain from acting could constitute contempt of court. Certain acts could be performed by third parties on behalf of the debtor, for example officials may sign documentation required to transfer land. Under the ‘double-barrelled’ procedure, a creditor may approach the court to demand performance and obtain judgment therefor, but further, in the same action ask the court to set aside the agreement and grant consequential relief, should the defendant fail to comply with the judgment for performance.²³⁸ It is doubtful whether courts may order that the party in breach pays the aggrieved party a penalty or punitive damages upon non-compliance with its orders, as an indirect means of enforcement.²³⁹

7.1.3 The Right to Terminate a Contract Due to Non-performance

South African law only accords an aggrieved party a right to terminate a contract (or exercise a right of ‘cancellation’, as it often is called locally) in certain exceptional cases of breach.

First, the right could be provided for in the contract, in a clause called a *lex commissoria*. Secondly, if a debtor fails to perform on time (commits *mora debitoris*), the creditor may cancel if, on the facts, ‘time is of the essence’. However, a creditor may ‘make’ time of the essence by way of a notice of rescission, which indicates that the creditor will have the right to cancel if the debtor does not perform within a specified period, which must be reasonable. Thirdly, similar principles also apply if the creditor fails to co-operate with performance (commits *mora creditoris*): the debtor will be entitled to cancel if time is of the essence, or if the creditor did not comply with the debtor’s notice of rescission. Fourthly, the aggrieved party would be entitled to cancel if there was positive malperformance that was so serious that such a party cannot be expected to retain the performance and be satisfied with a claim

²³⁵ See *Mink v Vryheid Coal & Iron Co* 1912 NPD 182.

²³⁶ See sections 54(1) and 54(2)(a) of the Consumer Protection Act 68 of 2008.

²³⁷ See sections 56(2)(a) and 56(3) of the Consumer Protection Act 68 of 2008.

²³⁸ *Custom Credit Corporation (Pty) Ltd v Shembe* 1972 (3) SA 462 (A) 470D-F.

²³⁹ See *Woods v Walters* 1921, AD 303, 310.

for damages. Fifthly, a right to cancel also arises if there is breach in the form of repudiation (a form of anticipatory breach), or of making performance impossible, which again is serious or relates to material part of the contract.

South African law does not recognise a mechanism whereby the failure to provide adequate assurances of performance gives rise to a right to terminate the contract; however, such a right could arise to the extent that the failure amounts to breach in the form of repudiation. Consumer legislation entitles a consumer to terminate a contract and seek a refund if delivery was not made by a stipulated or reasonable date and time or location,²⁴⁰ or if the delivered goods are not of the prescribed quality and the consumer returned the goods within six months of delivery.²⁴¹

The right to terminate is to be exercised as indicated in the contract, or otherwise by way of an unambiguous notice, which has to come to the attention of the party in breach. The notice need not specify the correct reason for termination; there just has to be a reason (*falsa causa non nocet*). The right is lost if not exercised within a reasonable period of becoming aware of the circumstances that give rise to it.

Upon termination, executory or unperformed obligations come to an end.²⁴² A party seeking restitution of past performances has to restore or tender restitution of performances received, or of a monetary substitute.²⁴³ This entails that the parties have to return what they received, and not merely the value remaining; however, they may be excused from providing full restitution if the failure to do so can be ascribed to normal deterioration or use, or to inherent defects. The effect of termination is not retrospective where the contract had to be performed over a period of time, and past mutual performances were rendered in full.²⁴⁴

7.1.4 The Right to Damages

Breach of contract may entitle the aggrieved party to claim compensation or damages. The right to damages does not depend on proof of fault on the side of the party in breach (see Sect. 7.1.1), and the right may be exercised on its own, or in conjunction with other remedies. It is also not discretionary, although its measure may be limited by various considerations, as indicated below. To succeed with a claim for damages,

²⁴⁰ Section 19(6) of the Consumer Protection Act 68 of 2008.

²⁴¹ Section 56(2)(b) of the Consumer Protection Act 68 of 2008. Curiously, the right to cancel is not recognised when sub-standard services are rendered; this is probably an oversight (see De Stadler 2014b, 54–57); but the consumer may cancel under the common law (see section 2(10) of the Consumer Protection Act 68 of 2008, which preserves common-law remedies).

²⁴² The principle does not apply to certain rights that have accrued prior to cancellation, independent of the executory part of the contract (see Van Huyssteen et al. 2020, 455–459).

²⁴³ Case law supports not granting a right of termination to aggrieved parties who are unable to provide restitution of their own performances. However, a similar approach is not followed where a contract is terminated due to improperly obtained consent. Such an inability merely precludes claiming restitution of the other party's performance (see Sect. 3.1.2).

²⁴⁴ See Van Huyssteen et al. (2020), 457.

the aggrieved party has to prove that there was a breach of contract, that the breach caused a loss or damage, and what the extent of the loss was.

The general test or formula for determining the extent of the loss is that it is the amount required to place the aggrieved party in the position he or she would have been in had the breach not occurred. It is the difference between the party's current financial position after breach, and the hypothetical financial position he or she would have been in had there been no breach. In practical terms, the test covers lost profits (see Sect. 7.2.4), or expenses arising from or costs incurred in curing the breach.²⁴⁵ Since the focus is on the aggrieved party's financial position, the loss does not include non-pecuniary harm, such as physical suffering or emotional distress.

The availability of a claim for damages and its measure can be influenced by a variety of considerations. First, losses that are causally too remotely connected to the breach are not recoverable. In this regard the South African common law draws a rather elusive and contentious distinction between (a) general damages, which flow naturally and generally from the breach, and are generally recoverable (examples include loss of interest due to non-payment of money),²⁴⁶ and (b) special damages, which are presumed to be too remote and ordinarily are not recoverable, 'unless, in the special circumstances attending the conclusion of the contract, the parties actually or presumptively contemplated that they would probably result from the breach'.²⁴⁷

Secondly, the claim could be reduced if the aggrieved party could have taken reasonable steps to mitigate the harm. However, South African law does not recognise that a claim for damages could be reduced if the harm was in part due to the aggrieved party or if there was contributory negligence; the aggrieved party need only prove that the breach was a cause of the loss.

Courts may order that a claim for damages be paid in a foreign currency if the harm was suffered in that currency.²⁴⁸ However, the party making the payment may have to comply with legislation governing the transfer of currency (see Sect. 6.1.1).

²⁴⁵ See Lubbe and Murray (1988), 697. On the 'concrete approach' to damages, which courts sometimes apply when the general rule above is regarded as too abstract, see Hutchison and Pretorius (2017), 347, Van Huyssteen et al. (2020), 464. This approach focuses on the effect breach had on a particular component of the aggrieved party's estate, for example on a particular asset; a loss could then be quantified by asking what greater value it would have had, were it not for the breach.

²⁴⁶ The liability for interest arises from the moment the debtor is in *mora* (i.e. commits breach by delay); if no rate is agreed, the default rate determined under the Prescribed Rate of Interest Act 55 of 1975 applies. This Act also determines that if the claim is not liquidated, interest runs from the date of demand, or of summons, whichever is earlier (and not from the date of judgment).

²⁴⁷ *Holmdene Brickworks (Pty) Ltd v Roberts Construction Co Ltd* 1977 (3) SA 670 (A) 687. The case law rather controversially supports further requiring that the parties must be taken to have agreed that liability for damages would arise in these special circumstances.

²⁴⁸ *Standard Chartered Bank of Canada v Nedperm Bank Ltd* 1994 (4) SA 747 (A) 774; Van Huyssteen et al. (2020), 480.

7.2 *Non-performance/Breach—Specific Topics*

7.2.1 Exemption/Exclusion Clauses

The point of departure in the South African common law is that exemption clauses are valid.²⁴⁹ This includes clauses that limit or exclude liability for breach or non-performance, or which allow a party to render performance which differs from what the other party may expect. However, there are certain mechanisms that could potentially enable a party to escape these clauses.

First, a party is not bound to a term if it was mistakenly believed that it is not part of the contract, and this mistake is reasonable (a *iustus error*—see Sect. 3.1.2). Conversely, the other party cannot enforce such a term if he or she does not reasonably rely on it being assented to. The fact that a term is surprising (see Sect. 2.1.4) could indicate that the party seeking to escape liability's mistake as to its inclusion was reasonable, or that the party seeking to enforce the term's reliance on it being assented to is unreasonable. But it has been difficult to rely on this avenue of escape: the courts have for example upheld an exemption clause that excluded a hospital's liability for not providing professional medical care; the courts did not regard such a term as surprising, and held that there was no duty to disclose its existence.²⁵⁰ However, this position may be reconsidered. It is difficult to reconcile with case law that invalidates other surprising terms, and ultimately it appears to be contradictory to seek to uphold a term which undermines the very purpose of a contract, namely to create binding duties to perform.²⁵¹

Secondly, under the common law, contractual terms or their enforcement must not be contrary to public policy (see Sect. 3.1.3). As we have seen, the courts apply this test strictly, and would not simply enquire whether the term or its operation is unfair; the provision has to be 'so gratuitously harsh and oppressive that public policy could not tolerate it'.²⁵² Applied to exemption clauses, this test would apparently at least prevent reliance on terms that purport to exclude liability for deliberate, wilful or intentional breach.²⁵³ Uncertainty exists as to the extent to which liability for other forms of breach could be excluded, but in making such a determination, the type of harm for which liability is excluded and the degree of fault could be relevant factors. Thus, the courts have raised the possibility that a clause excluding liability for negligently causing the death of another could be against public policy, since it

²⁴⁹ See generally Van Huyssteen et al. (2020), 344–348.

²⁵⁰ See *Afrox Healthcare Bpk v Strydom* 2002 (6) SA 21 (SCA) [33–36].

²⁵¹ *Hall-Thermotank Natal (Pty) Ltd v Hardman* 1968 (4) SA 818 (D) 835G; but also see the criticism in *Elgin Brown & Hamer (Pty) Ltd v Industrial Machinery Suppliers (Pty) Ltd* 1993 (3) SA 424 (A) 430.

²⁵² *Freddy Hirsch Group (Pty) Ltd v Chickenland (Pty) Ltd* 2011 (4) SA 276 (SCA) [23]. Compare, in this context, the test in Article 7.1.6 PICC that a party may not invoke an exemption clause if it would be 'grossly unfair' to do so.

²⁵³ See Van Huyssteen et al. (2020), 346; but the point is left open in *Sasfin (Pty) Ltd v Beukes* 1989 (1) SA 1 (A) 15G.

subverts the right to life.²⁵⁴ It would be especially problematic if the conduct for which contractual exemption is sought could involve criminal liability.²⁵⁵ Doubts have also been expressed about the enforceability of clauses that exclude liability for negligently causing personal injury, or for causing any form of harm through gross negligence.²⁵⁶ However, these doubts aside, there is no general rule that a term excluding liability for breach, and even serious cases of breach, is per se contrary to public policy. South African law has not adopted the approach of the English common law of invalidating clauses that seek to exclude liability of certain forms of 'fundamental' breach.²⁵⁷

Thirdly, as indicated above, the courts may in cases of ambiguity interpret exemption clauses *contra proferentem*, or 'against' the party who presented it for assent. A proper interpretation of the exemption clause could further reveal that it does not apply: thus, if the clause only excludes liability for a specified type of performance, which turns out to be defective, the clause would not apply where something other than, or different from the specified type of performance is rendered.²⁵⁸

Consumer legislation contains a number of constraints on exemption clauses. First, as far as the process of obtaining consent is concerned, section 49(1)(a) of the CPA provides that any notice to consumers or provision in a consumer agreement that purports to limit in any way the risk or liability of the supplier or any person, must be drawn to the attention of the consumer in a certain manner and form. This section would clearly cover exemptions of the supplier's liability for non-performance or breach.

Secondly, section 51(1)(c) of the CPA 'blacklists' or prohibits terms that purport to exclude liability for losses attributable to the supplier's gross negligence; however, clauses that purport to exclude liability for losses attributable to 'ordinary' negligence are not necessarily valid: they may still fall foul of the general fairness requirement in section 48 of the CPA. Regulations issued under the CPA further 'greylist' certain exemption clauses, which means it presumes them to be unfair. These include a clause which has the purpose or effect of 'excluding or limiting the liability of the supplier for death or personal injury caused to the consumer through an act or omission of that supplier ...', and of 'excluding or restricting the legal rights or remedies of the consumer against the supplier or another party in the event of total or partial breach by the supplier of any of the obligations provided for in the agreement ...'.²⁵⁹ The

²⁵⁴ *Johannesburg Country Club v Stott* 2004 (5) SA 511 (SCA) [12].

²⁵⁵ *Johannesburg Country Club v Stott* 2004 (5) SA 511 (SCA) [12]. Further see *Freddy Hirsch Group (Pty) Ltd v Chickenland (Pty) Ltd* 2011 (4) SA 276 (SCA) [23], where the exemption related to the delivery of food containing prohibited substances.

²⁵⁶ Van Huyssteen et al. (2020), 346.

²⁵⁷ See *Goodman Brothers (Pty) Ltd v Rennies Group Ltd* 1997 (4) SA 91 (W) 103H-104G.

²⁵⁸ See *Freddy Hirsch Group (Pty) Ltd v Chickenland (Pty) Ltd* 2011 (4) SA 276 (SCA) [20].

²⁵⁹ Regulations 44(3)(a) and (b) issued in terms of the Consumer Protection Act 68 of 2008 (Government Notice No R 293, GG No 34180 of 1 April 2011). However, a consumer's remedies based on breach due to failure to deliver goods of a particular quality could be limited where the consumer has been expressly informed that particular goods are offered in a specific condition and the consumer further expressly agreed to accept the goods in that condition, or knowingly acted in a manner

CPA therefore goes further than the common law in limiting a supplier's right to rely on exemption clauses.

Finally, section 4(4) of the CPA contains a statutory version of the *contra proferentem* rule (see Sect. 4.1.1).

7.2.2 Force Majeure

When parties insert a 'force majeure' clause in their contract, its meaning is determined by applying the normal rules of interpretation (see Sect. 4.1).²⁶⁰ Such a process of interpretation could, for example, reveal the anticipated risks it covers, or when risk passes. In the absence of such a clause, the common-law rules apply. South African law does not attach any technical significance to the concept of force majeure as such, but it does recognise that contracts could terminate due to *vis major* (the Latin root of force majeure) and *casus fortuitus*, or inevitable accident, which has been described as a species of *vis major*.²⁶¹

Although the exact relationship between all these terms is not clear, they may be brought home under the general notion of 'supervening impossibility',²⁶² which covers various situations of absolute or complete impossibility, as opposed to (mere) hardship or difficulty of performance (see Sect. 6.1.2).²⁶³ Examples include unavoidable acts of nature, such as lightning and floods, as well as human actions, such as sanctions and strikes.²⁶⁴ Where the State causes performance to be impossible by making it illegal, the situation could be described as one of supervening illegality of performance, but the boundary with supervening impossibility is admittedly indistinct.

The general rule that supervening impossibility of performance excuses performance of a contract is subject to the qualification that in each case it is necessary to 'look to the nature of the contract, the relation of the parties, the circumstances of the case, and the nature of the impossibility invoked by the defendant, to see whether the general rule ought, in the particular circumstances of the case, to be applied'.²⁶⁵

consistent with accepting goods in that condition (see s 55(6) of the Consumer Protection Act 68 of 2008, which deals with these 'voetstoots' or 'as is' clauses).

²⁶⁰ For an example of such a clause see *Consol Ltd t/a Consol Glass v Twee Jonge Gezellen (Pty) Ltd* 2005 (6) SA 1 (SCA) [18].

²⁶¹ See on the concepts generally *Roy v Basson NO* 2007 (5) SA 84 (C); *Gassner NO v Minister of Law & Order* 1995 (1) SA 322 (C) 330.

²⁶² See *MV Snow Crystal: Transnet Ltd t/a National Ports Authority v Owner of MV Snow Crystal* 2008 (4) SA 111 (SCA) [28]; *Nuclear Fuels Corporation of SA (Pty) Ltd v Orda AG* 1996 (4) SA 1190 (SCA) 1205G; Van Huyssteen et al. (2020), 591–599.

²⁶³ Van Huyssteen et al. (2020), 594.

²⁶⁴ See *Roy v Basson NO* 2007 (5) SA 84 (C) 86; *First National Bank of SA Ltd v Rosenblum* 2001 (4) SA 189 (SCA) [10].

²⁶⁵ *MV Snow Crystal: Transnet Ltd t/a National Ports Authority v Owner of MV Snow Crystal* 2008 (4) SA 111 (SCA) [28], quoting *Herman v Shapiro & Co* 1926 TPD 367, 373.

In practical terms, this first means that a party cannot rely on self-created impossibility.²⁶⁶ A party who caused or is to blame for supervening impossibility could commit breach of contract (see Sect. 7.1.1),²⁶⁷ and the aggrieved party may elect to terminate the contract and claim contractual damages.

Secondly, it is unclear to what extent a party may be prevented from relying on supervening impossibility if one or both parties did foresee, or should have foreseen that performance would become impossible. In these circumstances, a party would at least be prevented from relying on supervening impossibility to escape liability if the facts disclose that an express or tacit term was concluded to the effect that such a party assumed the risk of impossibility or warranted performance.²⁶⁸ In this regard the mere fact that a party may have been unable to prevent the impossibility does not imply that he or she could not still have assumed such a risk. However, as we have seen, there are strict requirements for finding tacit terms (see Sect. 4.1.2). Mere foreseeability of impossibility would therefore not be sufficient to warrant inferring the existence of such a term.

Supervening impossibility results in the automatic termination of the obligations; this excludes any claims for performance or damages based on non-performance (unless the debtor was already in delay or *mora*—see Sect. 7.1.1). Where the contract contains reciprocal obligations, the termination of the one obligation due to supervening impossibility could also result in the termination of the counter-obligation.²⁶⁹ Temporary impossibility of performance generally suspends the debtor's duty to perform, and hence also any reciprocal duty to perform, for the duration of the impossibility.²⁷⁰

South African law does not provide for renegotiation of a contract in the event of supervening impossibility. However, some commentators have argued, rather cryptically, that even though this form of relief is not recognised, South African law could still give rise to equitable outcomes through 'purposive construction of the contract, combined with public policy'.²⁷¹

²⁶⁶ *MV Snow Crystal: Transnet Ltd t/a National Ports Authority v Owner of MV Snow Crystal* 2008 (4) SA 111 (SCA) [28].

²⁶⁷ Van Huyssteen et al. (2020), 594.

²⁶⁸ *Nuclear Fuels Corporation of SA (Pty) Ltd v Orda AG* 1996 (4) SA 1190 (SCA) 1206–1207.

²⁶⁹ Van Huyssteen et al. (2020), 593.

²⁷⁰ *World Leisure Holidays (Pty) Ltd v Georges* 2002 (5) SA 531 (W) [7], stating the qualification that a creditor is entitled to treat a contract as being at an end whilst performance is temporarily impossible if 'the foundation of the contract has been destroyed; ... or where all performance is already, or would inevitably become, impossible; ... or where part of the performance has become, or would inevitably be, impossible and he is not bound to accept the remaining performance'; *Niemand v Okapi Investments (Edms) Bpk* 1983 (4) SA 762 (T) 766.

²⁷¹ Bradfield (2016), 548.

7.2.3 Agreed Payment for Non-performance

South African law recognises that parties may agree that a specified sum is to be paid in cases of non-performance; such an agreement is typically referred to as a penalty clause or a *stipulatio poenae*. This term covers agreements intended to facilitate the recovery of damages, as well as agreements intended to operate as a deterrent against non-performance, or to penalize it.²⁷² However, the courts may modify an unfair or excessive penalty clause. In this regard section 3 of the Conventional Penalties Act 15 of 1962 states the following:

If upon the hearing of a claim for a penalty, it appears to the court that such penalty is out of proportion to the prejudice suffered by the creditor by reason of the act or omission in respect of which the penalty was stipulated, the court may reduce the penalty to such extent as it may consider equitable in the circumstances: Provided that in determining the extent of such prejudice the court shall take into consideration not only the creditor's proprietary interest, but every other rightful interest which may be affected by the act or omission in question.

Although they are not penalty clauses in the sense defined above, this judicial discretion also applies to forfeiture stipulations which determine that upon withdrawal from an agreement by one party, any other party forfeits the right to claim restitution of anything performed in terms of the agreement, or remains liable for the performance, notwithstanding the withdrawal.

A penalty clause contained in a consumer contract is deemed to be unfair if it requires of a consumer who fails to fulfil an obligation to pay damages that significantly exceed the harm suffered by the supplier; the burden of proof is on the supplier to show why such a clause is not unfair, and may therefore be enforced.²⁷³

7.2.4 Consequential Losses

A claim for contractual damages based on non-performance could cover loss of profits.²⁷⁴ This follows from the general test (see Sect. 7.1.4) that these damages are the amount required to place the aggrieved party in the position he or she would have been in, had the breach not occurred. If this position is one where the aggrieved party would have made a profit, the loss is recoverable with a claim for damages. This loss of profit could, for example, be suffered by a seller when a purchaser is in default in paying the price, and the contract is cancelled, necessitating the seller

²⁷² See section 1(1) of the Conventional Penalties Act 15 of 1962 ('A stipulation, hereinafter referred to as a penalty stipulation, whereby it is provided that any person shall, in respect of an act or omission in conflict with a contractual obligation, be liable to pay a sum of money or to deliver or perform anything for the benefit of any other person, hereinafter referred to as a creditor, either by way of a penalty or as liquidated damages, shall, subject to the provisions of this Act, be capable of being enforced in any competent court').

²⁷³ Regulation 44(3)(r) issued in terms of the Consumer Protection Act 68 of 2008 (Government Notice No R 293, GG No 34180 of 1 April 2011).

²⁷⁴ *Everett v Marian Heights (Pty) Ltd* 1970 (1) SA 198 (C) 200.

to re-sell at a loss; or if the seller defaults on delivery, it could be the purchaser who suffers a loss, due to being unable to re-sell at a profit. Any gain enjoyed by the aggrieved party through saved expenses due to the non-performance has to be taken into account when calculating a contractual claim for damages based on loss of profits; the 'expectation loss' of such a party is only his or her net profit. However, where a party has incurred expenditure in performing or preparing to perform the contract, these 'wasted' expenditures could be recovered as a 'reliance loss'.²⁷⁵

Loss of profits is sometimes described as a 'consequential loss', although care must be exercised when using the latter concept, since its meaning varies depending on the context in which it is used.²⁷⁶ Sometimes consequential loss or damage is contrasted with 'direct loss' or 'direct damage', which immediately or 'directly' flows from the event causing damage. An example is where a vehicle is damaged: the costs of repair can be claimed as a direct loss; 'consequential loss' in turn flows from such a direct loss, for example when the owner of the damaged car incurs the expense of renting a substitute.

However, consequential loss or damage sometimes bears a different meaning in the context of the law of sale, where certain remedies are provided to the purchaser of defective goods.²⁷⁷ The purchaser could claim 'rehabilitative relief', which essentially is repayment of the purchase price, in contrast to 'consequential loss' as a result of the defect: when goods sold suffer from a latent defect, and these goods are of the seller's own manufacture, the seller 'is liable for consequential loss caused by a latent defect in the goods sold even if he is ignorant of the latent defect, irrespective of whether he is skilled in the manufacture of such goods and irrespective of whether he publicly professes skill or expertise in that regard'.²⁷⁸

While there is no doubt that contractual damages could cover consequential loss taking the form of loss of profits, the application of this principle can be a matter of some complexity.

First, any claim for loss of profits is subject to the general qualification that the damages must not be too remote; in other words, there has to be a sufficiently strong causal connection between non-performance and the loss. As indicated above (at Sect. 7.1.4), South African law draws a problematic distinction between automatically-recoverable 'general damages', which are said to flow naturally from the breach and are deemed to be foreseeable, and special damages, which are only awarded when actually or presumably contemplated or foreseen by the parties as a result of the breach, *and* the parties also agreed to be liable for such damages. Consequential loss, such as loss of profits, are usually regarded as special damages, but there

²⁷⁵ See Hutchison and Pretorius (2017), 343.

²⁷⁶ Hence, any term in a contract that purports to exclude liability for 'consequential loss' has to be interpreted to determine its ambit. See *Adel Builders (Pty) Ltd v Thompson* 1999 (1) SA 680 (SE) 685.

²⁷⁷ See *Consol Ltd t/a Consol Glass v Twee Jonge Gezellen (Pty) Ltd* 2002 (6) SA 256 (C) [57].

²⁷⁸ *D & H Piping Systems (Pty) Ltd v Trans Hex Group Ltd* 2006 (3) SA 593 (SCA) [31].

are exceptional cases where the loss is so ‘direct’ that they could be automatically recoverable as general damages.²⁷⁹

Secondly, any claim for damages based on loss of profits has to be proved with sufficient certainty. This presents particular problems where the loss of profit takes the form of a ‘loss of a chance’,²⁸⁰ which is a special type of prospective or future loss. In this regard, South African law, in line with English law, differentiates between the requirements for proof of causation (considered above), and for proof of the measure or quantum of the claim.²⁸¹ The plaintiff has to prove on a balance of probability that the necessary causal link exists between the breach and the loss of a chance.²⁸² However, the quantum of the claim is not decided on the balance of probability, but by way of ‘estimation’.²⁸³ This rather subtle distinction is illustrated by a case dealing with a client’s claim for damages against a broker, arising from the broker’s poor investment advice, which caused the client to make a loss-making investment. It was held that the client would have to prove on the balance of probability that an alternative investment would have been made, or that there was causation. But once causation was established, the client did not further have to prove the quantum of the claim on the balance of probability; the court could determine the damages by estimating the client’s chances of earning a particular amount from an alternative investment.²⁸⁴

8 Limitation Periods

The extinction of debts, including contractual obligations, by the expiration of time is governed by Chapter III of the Prescription Act 68 of 1969 (“PA”).²⁸⁵

²⁷⁹ See *Victoria Falls & Transvaal Power Co Ltd v Consolidated Langlaagte Mines Ltd* 1915 AD 1, 22–23; *Gloria’s Caterers (Pty) Ltd t/a Connoisseur Hotel v Friedman* 1983 (3) SA 390 (T) 393–394; Van Huyssteen et al. (2020), 410. On the recovery of loss of profits by way of a claim for special damages see *Whitfield v Phillips* 1957 (3) SA 318 (A).

²⁸⁰ See *Sasfin (Pty) Ltd v Jessop* 1997 (1) SA 675 (W) 698; *Jowell v Bramwell-Jones* 2000 (3) SA 274 (SCA) [23]; *Goedhals v Graaff-Reinet Municipality* 1955 (3) SA 482 (C); *Glaser v Millward* 1949 (2) SA 853 (W) 855–856; Lubbe and Murray (1988), 605.

²⁸¹ See *De Klerk v ABSA Bank Ltd* 2003 (4) SA 315 (SCA) [28], approving *Allied Maples Group Ltd v Simmons & Simmons (A Firm)* [1995] 1 WLR 1602 (CA). The *De Klerk* case dealt with a delictual claim for damages, but it is not apparent that different principles would apply, had the damages claim been contractual in nature.

²⁸² See for example *Whitfield v Phillips* 1957 (3) SA 318 (A), where it had to be determined whether the chance of gathering profitable crops of pineapples was too remote.

²⁸³ *De Klerk v ABSA Bank Ltd* 2003 (4) SA 315 (SCA) [28, 29].

²⁸⁴ *De Klerk v ABSA Bank Ltd* 2003 (4) SA 315 (SCA) [29].

²⁸⁵ Common-law rules not in conflict with the Prescription Act 68 of 1969, as well as earlier legislation dealing with debts that arose before 1 December 1970, remain in force, but these provisions are of limited practical application.

8.1 *The Rights or Remedies Subject to Limitation Periods*

The PA does not define a ‘debt’. Until recently, it was said to have ‘a wide and general meaning, and includes an obligation to do something or refrain from doing something’.²⁸⁶ However, the Constitutional Court has qualified this definition, stating that a debt is ‘an obligation to pay money, deliver goods or render services’, and that it does not include ‘every obligation to do something or refrain from doing something, apart from payment or delivery’.²⁸⁷ The Court consequently held that the PA did not apply where a party requested an order compelling another party to commence negotiations with him for determining compensation for the profitable use of an idea.

This narrower interpretation reinforces the notion that the PA also does not apply to powers, for example the power to elect to terminate a contract due to breach, to withhold performance, or to rescind a contract due to improperly obtained consent. The right to claim rectification of a document to reflect the true intention of the parties would presumably also fall outside the ambit of the Act. However, the definition would be broad enough to cover an obligation to pay damages, albeit that uncertainty exists as to whether prescription commences upon breach or when the loss occurs.

8.2 *The Extent to Which the Rules Relating to Limitation Periods Are Mandatory*

In deciding whether parties may undertake to modify or deviate from limitation periods, the courts have focused on the moment when the undertaking is given.

First, parties could at the outset, usually at the time of the creation of a contractual obligation and before prescription commences, undertake not to rely on prescription. The courts still have to decide whether these undertakings are valid under the common law,²⁸⁸ but if they are contained in a consumer agreement they are in any event presumed to be unfair.²⁸⁹

Secondly, parties sometimes extend prescription for a particular period by agreement after prescription has commenced, but before it has run its course. The courts have indicated that these agreements could be valid under the common law, as long as they serve a legitimate personal interest, such as to give parties enough time to settle

²⁸⁶ *Desai NO v Desai* 1996 (1) SA 141 (A) 146.

²⁸⁷ *Makate v Vodacom Ltd* 2016 (4) SA 121 (CC) [92, 93].

²⁸⁸ See *De Jager v ABSA Bank Bpk* 2001 (3) SA 537 (SCA) [16], where the Supreme Court of Appeal expressly left the matter open.

²⁸⁹ See Regulation 44(3)(f) issued in terms of the Consumer Protection Act 68 of 2008 (Government Notice No R 293, GG No 34180 of 1 April 2011).

a dispute; they should therefore not harm public interest by subverting the institution of prescription.²⁹⁰

Thirdly, if prescription has run its course, the courts have maintained that no public interests remain that could be harmed by an undertaking not to rely on prescription, and a party should in principle be free to provide such an undertaking.²⁹¹

8.3 *The Extent to Which a Debtor (Obligor) Could be Prevented from Asserting the Defence of Limitation Due to Inconsistent Behaviour, or Due to Dishonest Concealment of Facts*

If a debtor ‘wilfully’ prevents a creditor from coming to know of the existence of the debt, prescription does not commence until the creditor becomes aware of the existence of the debt.²⁹² In this context the word ‘wilfully’ means ‘deliberately’ or ‘intentionally’, and not that the debtor must have a fraudulent intention to deceive.²⁹³

8.4 *The Duration of the General Limitation Period*

The ‘default’ general limitation period of prescription of debts is three years.²⁹⁴ Prescription commences to run as soon as the debt is due, subject to two exceptions. The first is the exception above of the creditor wilfully preventing the debtor from coming to know the existence of the debt. The second is the exception that ‘a debt shall not be deemed to be due until the creditor has knowledge of the identity of the debtor and of the facts from which the debt arises: provided that a creditor shall be deemed to have such knowledge if he could have acquired it by exercising reasonable care’.²⁹⁵ South African law does not recognize a maximum limitation period, beyond which prescription cannot run, even if this second exception applies. The limitation period is calculated according to the ‘ordinary’ civil method, which treats the calendar

²⁹⁰ *De Jager v ABSA Bank Bpk* 2001 (3) SA 537 (SCA) [17]; also see the rather more extensive interpretation in *Representative of Lloyds v Classic Sailing Adventures (Pty) Ltd* 2010 (5) SA 90 (SCA) [23].

²⁹¹ *De Jager v ABSA Bank Bpk* 2001 (3) SA 537 (SCA) [18–20].

²⁹² Section 12(2) of the Prescription Act 68 of 1969.

²⁹³ *Jacobs v Adonis* 1996 (4) SA 246 (C) 250I–251J.

²⁹⁴ Section 11(d) of the Prescription Act 68 of 1969. Longer periods of up to 30 years apply to certain debts, for example some debts owed to the State and judgment debts (see section 11(a)–(c)). The 30 year-period also applies to arbitration awards that have the status of an order of court as between the parties (*Blaas v Athanassiou* 1991 (1) SA 723 (W) 725).

²⁹⁵ Section 12(3) of the Prescription Act 68 of 1969.

day as the unit and includes the day on which the debt falls due, but excludes the last day of the period.

8.5 The Circumstances Under Which a New Limitation Period Starts to Run or the Running of a Limitation Period Is Suspended

Prescription commences to run afresh when it is ‘interrupted’ by an express or tacit acknowledgement of liability by the debtor,²⁹⁶ or by the service on the debtor of any ‘process’ whereby the creditor claims payment of the debt.²⁹⁷

The completion of prescription is ‘delayed’ when various ‘impediments’ exist. These impediments include the creditor being prevented by superior force, including any law or any order of court from interrupting the running of prescription; the debtor being outside South Africa; and the debt being the object of a dispute subjected to arbitration.²⁹⁸ Whereas the common law simply suspended the running of prescription as long as the impediment lasted, the PA ensures that the creditor has at least one year to take action after the impediment ceased to exist.²⁹⁹

8.6 The Effect of Prescription

According to the PA, a debt shall be ‘extinguished’ by prescription after the lapse of the relevant prescription period.³⁰⁰ The prescription of a principal debt results in a subsidiary debt which arose from such principal debt also being extinguished.³⁰¹ However, payment by the debtor of a debt after it has been ‘extinguished’ by prescription is regarded as valid payment, and the debtor may therefore not reclaim it.³⁰² Despite the wording of the PA, prescription therefore does not result in a complete extinction of the debt, since the prescribed debt could still serve as a basis for retaining a payment. A court (or arbitration tribunal) may further not of its own motion take

²⁹⁶ Section 14 of the Prescription Act 68 of 1969.

²⁹⁷ Section 15 of the Prescription Act 68 of 1969. A ‘process’ is defined in section 15(6) to include ‘a petition, a notice of motion, a rule nisi, a pleading in reconvention, a third party notice referred to in any rule of court, and any document whereby legal proceedings are commenced’.

²⁹⁸ On the meaning of this phrase see *Murray & Roberts Construction (Cape) (Pty) Ltd v Upington Municipality* 1984 1 SA 571 (A) 582; Loubser (1996), 120.

²⁹⁹ Section 13 of the Prescription Act 68 of 1969.

³⁰⁰ Section 10(1) of the Prescription Act 68 of 1969.

³⁰¹ Section 10(2) of the Prescription Act 68 of 1969. However, according to section 13(2), a contractual debt which would have become prescribed before a reciprocal debt which arises from the same contract becomes prescribed, shall not become prescribed before the reciprocal debt becomes prescribed.

³⁰² Section 10(3) of the Prescription Act 68 of 1969.

notice of prescription; the failure of a party to raise prescription could therefore result in the enforcement of a debt, which again points to prescription not ‘extinguishing’ it.³⁰³

However, even though the effect of prescription could be more to exempt a party from performance than to extinguish a debt, the rules of prescription are generally regarded as substantive rather than procedural in nature. This has potentially important implications for litigation involving international contracts. As indicated earlier, South African private international law determines that matters of procedure are governed by the domestic law of the country in which the relevant proceedings are instituted (*the lex fori*), whereas matters of substance (including prescription under the PA) are governed by the law applicable to the underlying transaction.³⁰⁴

References

- Bradfield GB (2016) Christie’s the law of contract in South Africa, 6th edn. LexisNexis
- Cuniberti G (2015) Article 1.4. In: Vogenauer S (ed) Commentary on the UNIDROIT principles of international commercial contracts (PICC), 2nd edn. Oxford University Press
- De Stadler E (2014a) Section 5. In: Naudé T, Eiselen S (eds) Commentary on the Consumer Protection Act. Juta
- De Stadler E (2014b) Section 54. In: Naudé T, Eiselen S (eds) Commentary on the Consumer Protection Act. Juta
- De Stadler E (2014c) Section 56. In: Naudé T, Eiselen S (eds) Commentary on the Consumer Protection Act. Juta
- Dendy M (2019) Conflict of laws. In: Joubert WA (ed), The Law of South Africa (LAWSA), vol 7, no 1, 3rd edn. LexisNexis
- Du Plessis J (2014) Section 40. In: Naude T, Eiselen S (eds) Commentary on consumer protection act. Juta
- Du Plessis J (2015) Illegal contracts and the burden of proof. South Afr Law J 132:664
- Du Plessis J (2019) Section 40. In: Naudé T, Eiselen S (eds) Commentary on the Consumer Protection Act, revision service 4. Juta
- Forsyth CF (2012) Private international law, 5th edn. Juta
- Hutchison D, Pretorius C (eds) (2017) The law of contract in South Africa, 3rd edn. Oxford University Press, South Africa
- Loubser M (1996) Extinctive prescription. Juta
- Lubbe G (1996) Retraction of repudiation: a doctrine writ in water? Stellenbosch Law Rev 7:147
- Lubbe G, Murray C (1988) Farlam & Hathaway: contract—cases, materials, commentary, 3rd ed. Juta
- Naudé T (2014) Section 52, Regulation 44. In: Naudé T, Eiselen S (eds) Commentary on the Consumer Protection Act. Juta
- Stoop P (2019) Section 22. In: Naudé T, Eiselen S (eds) Commentary on the Consumer Protection Act, revision service 4. Juta
- Van Zyl E, De Stadler E (2017) Section 16. In: Naudé T, Eiselen S (eds), Commentary on the Consumer Protection Act, revision service 2. Juta

³⁰³ See section 17 of the Prescription Act 68 of 1969.

³⁰⁴ See Sect. 1.1; Loubser (1996) 210–213; *Society of Lloyd’s v Price*; *Society of Lloyd’s v Lee* 2006 (5) SA 393 (SCA). On international conventions that could govern prescription see Van Huyssteen et al. (2020), 610 n 361.

- Van Huyssteen LF, Lubbe GF, Reinecke MFB, Du Plessis JE (2020) *Contract—general principles*, 6th edn. Juta
- Vogenauer S (2015) Article 5.1.4. In: Vogenauer S (ed) *Commentary on the UNIDROIT principles of international commercial contracts (PICC)*, 2nd edn. Oxford University Press
- Wessels JW (1951) *The law of contract in South Africa* vol 1, 2nd ed. Butterworths

List of Cases

- A Becker & Co (Pty) Ltd v Becker* 1981 (3) SA 406 (A)
- Adel Builders (Pty) Ltd v Thompson* 1999 (1) SA 680 (SE)
- Advtech Resourcing (Pty) Ltd t/a Communicate Personnel Group v Kuhn* 2008 (2) SA 375 (C)
- Afrisure CC v Watson NO* 2009 (2) SA 127 (SCA)
- Afrox Healthcare Bpk v Strydom* 2002 (6) SA 21 (SCA)
- Alfred McAlpine & Son (Pty) Ltd v Transvaal Provincial Administration* 1974 (3) SA 506 (A)
- Allied Maples Group Ltd v Simmons & Simmons (A Firm)* [1995] 1 WLR 1602 (CA)
- Amalgamated Beverage Industries Ltd v Rond Vista Wholesalers* 2004 (1) SA 538 (SCA)
- Amoretti v Tuckers Land and Development Corporation (Pty) Ltd* 1980 (2) SA 330 (W)
- Avondson Trust (Pty) Ltd v Wouda* 1975 (2) SA 444 (T)
- Basson v Chilwan* 1993 (3) SA 742 (A)
- Bavasah v Stirton* [2014] 2 All SA 51 (WCC)
- Benson v SA Mutual Life Assurance Society* 1986 (1) SA 776 (A)
- Bernitz v Euvrard* 1943 AD 595
- BK Tooling (Edms) Bpk v Scope Precision Engineering (Edms) Bpk* 1979 (1) SA 391 (A)
- Blaas v Athanassiou* 1991 (1) SA 723 (W)
- BOE Bank Bpk v Van Zyl* 2002 (5) SA 165 (C)
- Boland Bank Ltd v Pienaar* 1988 (3) SA 618 (A)
- Bothma-Batho Transport (Edms) Bpk v S Bothma & Seun Transport (Edms) Bpk* 2014 (2) SA 494 (SCA)
- Bourbon-Lefitley v WPK (Landbou) Bpk* 1999 (1) SA 902 (C)
- Brisley v Drotsky* 2002 (4) SA 1 (SCA)
- Cairns (Pty) Ltd v Playdon & Co Ltd* 1948 (3) SA 99 (A)
- Cameron v Bray Gibb & Co (Pvt) Ltd* 1966 (3) SA 675 (R)
- CGEE Alsthom Equipments et Enterprises Electrique, South African Division v GKN Sankey (Pty) Ltd* 1987 (1) SA 81 (A)
- Chamotte (Pty) Ltd v Carl Coetzee (Pty) Ltd* 1973 (1) SA 644 (A)
- Chemsearch (SA) (Pty) Ltd v Borrowman* 1979 (3) SA 1092 (T)
- Chevron South Africa (Pty) Ltd v Awaiz at 110 Drakensburg CC* [2008] 1 All SA 557 (T)
- Cinema City (Pty) Ltd v Morgenstern Family Estates (Pty) Ltd* 1980 (1) SA 796 (A)
- Citibank NA v Thandroyen Fruit Wholesalers CC* 2007 (6) SA 110 (SCA)
- City of Cape Town (CMC Administration) v Bourbon-Lefitley and another NNO* 2006 (3) SA 488 (SCA)
- City of Johannesburg Municipal Pension Fund v City of Johannesburg* [2005] JOL 15426 (W)
- Command Protection Services (Gauteng) (Pty) Ltd t/a Maxi Security v South African Post Office Ltd* 2013 (2) SA 133 (SCA)
- Commissioner for the South African Revenue Service v Capstone 556 (Pty) Ltd* [2016] 2 All SA 21 (SCA)
- Compagnie Inter africaine De Travaux v SA Transport Services* 1991 (4) SA 217 (A)
- Conradie v Rossouw* 1919 AD 279
- Consol Ltd t/a Consol Glass v Tweek Jonge Gezellen (Pty) Ltd* 2002 (6) SA 256 (C)
- Consol Ltd t/a Consol Glass v Tweek Jonge Gezellen (Pty) Ltd* 2005 (6) SA 1 (SCA)

Consolidated News Agencies (Pty) Ltd (in Liquidation) v Mobile Telephone Networks (Pty) Ltd 2010 (3) SA 382 (SCA)

Constantia Insurance Company Ltd v Compusource (Pty) Ltd 2005 (4) SA 345 (SCA)

Custom Credit Corporation (Pty) Ltd v Shembe 1972 (3) SA 462 (A)

D & H Piping Systems (Pty) Ltd v Trans Hex Group Ltd 2006 (3) SA 593 (SCA)

De Jager v ABSA Bank Bpk 2001 (3) SA 537 (SCA)

De Klerk v ABSA Bank Ltd 2003 (4) SA 315 (SCA)

Den Braven SA (Pty) Ltd v Pillay 2008 (6) SA 229 (D)

Desai NO v Desai 1996 (1) SA 141 (A)

Dickinson Holdings (Group) (Pty) Ltd v Du Plessis 2008 (4) SA 214 (N)

Dijkstra v Janowsky 1985 (3) SA 560 (C)

Drifters Adventure Tours CC v Hircock 2007 (2) SA 83 (SCA)

Du Plooy v Sasol Bedryf (Edms) Bpk 1988 (1) SA 438 (A)

Durban's Water Wonderland (Pty) Ltd v Botha 1999 (1) SA 982 (SCA)

Ekurhuleni Metro Municipality v Germiston Municipal Retirement Fund 2010 (2) SA 498 (SCA)

Elgin Brown & Hamer (Pty) Ltd v Industrial Machinery Suppliers (Pty) Ltd 1993 (3) SA 424 (A)

Engelbrecht v Khumalo 2016 (4) SA 564 (GP)

Eriksen Motors (Welkom) Ltd v Protea Motors, Warrenton 1973 (3) SA 685 (A)

Everett v Marian Heights (Pty) Ltd 1970 (1) SA 198 (C)

Everfresh Market Virginia (Pty) Ltd v Shoprite Checkers (Pty) Ltd 2012 (1) SA 256 (CC).

Experian South Africa (Pty) Ltd v Haynes 2013 (1) SA 135 (GSJ)

Extel Industrial (Pty) Ltd v Crown Mills (Pty) Ltd 1999 (2) SA 719 (SCA)

First National Bank of SA Ltd v Rosenblum 2001 (4) SA 189 (SCA)

FJ Mitrie (Pty) Ltd v Madgwick 1979 (1) SA 232 (D)

Fourie v Sentrasure Bpk 1997 (4) SA 950 (NC)

Freddy Hirsch Group (Pty) Ltd v Chickenland (Pty) Ltd 2011 (4) SA 276 (SCA)

Gassner NO v Minister of Law & Order 1995 (1) SA 322 (C)

Gerolomou Constructions (Pty) Ltd v Van Wyk 2011 (4) SA 500 (GNP)

Glaser v Millward 1949 (2) SA 853 (W)

Gloria's Caterers (Pty) Ltd t/a Connoisseur Hotel v Friedman 1983 (3) SA 390 (T)

Glynn v Margetson [1893] AC 351 (HL)

Goedhals v Graaff-Reinet Municipality 1955 (3) SA 482 (C)

Goodman Brothers (Pty) Ltd v Rennies Group Ltd 1997 (4) SA 91 (W)

Grand Mines (Pty) Ltd v Giddey NO 1999 (1) SA 960 (SCA)

Hall-Thermotank Natal (Pty) Ltd v Hardman 1968 (4) SA 818 (D)

Haynes v Kingwilliamstown Municipality 1951 (2) SA 371 (A)

Herman v Shapiro & Co 1926 TPD 367

Holmdene Brickworks (Pty) Ltd v Roberts Construction Co Ltd 1977 (3) SA 670 (A)

Horn v LA Health Medical Scheme 2015 (7) BCLR 780 (CC)

Hunt v Liebherr-Africa Managed Pension Plan and Another (2) [2002] 1 BPLR 2955 (PFA)

Ikamva Architects CC v Coega Development Corporation [2015] JOL 34289 (ECG)

Jacobs v Adonis 1996 (4) SA 246 (C)

Johannesburg Country Club v Stott 2004 (5) SA 511 (SCA)

Jonker v Yzelle 1948 (2) SA 942 (T)

Jonnes v Anglo-African Shipping Co (1936) Ltd 1972 (2) SA 827 (A)

Jowell v Bramwell-Jones 2000 (3) SA 274 (SCA)

KIA Intertrade Johannesburg (Pty) Ltd v Infinite Motors (Pty) Ltd [1999] 2 All SA 268 (W)

KPMG Chartered Accountants (SA) v Securefin Ltd 2009 (4) SA 399 (SCA)

Leiserowitz v Grylls 1984 (2) SA 834 (C)

Leyland Finance Co Ltd v Van Rensburg 1970 (4) SA 145 (T)

Mackay v Naylor 1917 TPD 533

Magna Alloys and Research (SA) (Pty) Ltd v Ellis 1984 (4) SA 874 (A)

Makate v Vodacom Ltd 2016 (4) SA 121 (CC)

Maleth Investment Fund (Pty) Limited v Paget [2014] 3 All SA 79 (GJ)
Maphango v Aengus Lifestyle Properties (Pty) Ltd 2011 (5) SA 19 (SCA)
Martin Harris & Seuns OVS (Edms) Bpk v Qwa Qwa Regeringsdiens 2000 (3) SA 339 (SCA)
Masstores (Pty) Ltd v Murray & Roberts Construction (Pty) Ltd 2008 (6) SA 654 (SCA)
Matador Buildings (Pty) Ltd v Harman 1971 (1) SA 287 (C)
McWilliams v First Consolidated Holdings (Pty) Ltd 1982 (2) SA 1 (A)
Medscheme Holdings (Pty) Ltd v Bhamjee 2005 (5) SA 339 (SCA)
Meskin NO v Anglo-American Corporation of SA Ltd 1968 (4) SA 793 (W)
Meyer v Hessling 1992 (3) SA 851 (NmS)
Middleton v Carr 1949 (2) SA 374 (A)
Mink v Vryheid Coal & Iron Co 1912 NPD 182
Mpumelelo Projects Construction CC v Sasol Wax (Pty) Ltd [2014] JOL 31764 (FB)
Murray & Roberts Construction (Cape) (Pty) Ltd v Upington Municipality 1984 1 SA 571 (A)
MV Lina, Union Shipping and Managing Co SA v Lina Maritime Ltd 1998 (4) SA 633 (N)
MV Navigator (No 1): Wellness International Network Ltd v MV Navigator 2004 (5) SA 10 (C)
MV Snow Crystal: Transnet Ltd t/a National Ports Authority v Owner of MV Snow Crystal 2008 (4) SA 111 (SCA)
Natal Joint Municipal Pension Fund v Endumeni Municipality 2012 (4) SA 593 (SCA)
NBS Boland Bank Ltd v One Berg River Drive 1999 (4) SA 928 (SCA)
Nedbank Ltd v Pestana 2009 (2) SA 189 (SCA)
Nedbank Ltd v Petch Manufacturing (Pty) Ltd [2008] JOL 21319 (W)
Nel v Cloete 1972 (2) SA 150 (A)
Netherlands Bank of South Africa v Stern NO 1955 (1) SA 667 (W)
Niemand v Okapi Investments (Edms) Bpk 1983 (4) SA 762 (T)
Nuclear Fuels Corporation of SA (Pty) Ltd v Orda AG 1996 (4) SA 1190 (SCA)
Oakdene Square Properties (Pty) Ltd v Farm Bothasfontein (Kyalami) (Pty) Ltd 2013 (4) SA 539 (SCA)
Oos-Vrystaat Kaap Bedryf Beperk v Van Aswegen 2005 (4) SA 417 (O)
Pangbourne Properties Ltd v Nitor Construction (Pty) Ltd 1993 (4) SA 206 (W)
Paradyskloof Golf Estate (Pty) Ltd v Stellenbosch Municipality 2011 (2) SA 525 (SCA)
Peel v Hamon J & C Engineering (Pty) Ltd 2013 (2) SA 331 (GSJ)
Pfeiffer v First National Bank of SA Ltd 1998 (3) SA 1018 (SCA)
Phame v Paizes (Pty) Ltd 1973 (3) SA 397 (A)
Philotex (Pty) Ltd v Snyman 1998 (2) SA 138 (SCA)
Pintado Trading 800 (Pty) Ltd v Fleet Africa (Pty) Ltd [2010] JOL 25698 (KZD)
Plaaskem (Pty) Ltd v Nippon Africa Chemicals (Pty) Ltd 2014 (5) SA 287 (SCA)
Polysius (Pty) Ltd v Transvaal Alloys (Pty) Ltd 1983 (2) SA 630 (W)
Potgieter v Potgieter NO 2012 (1) SA 637 (SCA)
Pratt v FirstRand Bank Ltd 2009 (2) SA 119 (SCA)
Preller v Jordaan 1956 (1) SA 483 (A)
Pretoria Portland Cement Co Ltd v South African Railways and Harbours 1979 (2) SA 188 (T)
Protea Property Holdings (Pty) Ltd v Boundary Financing Ltd (formerly known as International Bank of Southern Africa Ltd) 2008 (3) SA 33 (C)
Putco Ltd v TV & Radio Guarantee Co (Pty) Ltd & Other Related Cases 1985 (4) SA 809 (A)
Quick v Goldwasser 1956 (2) SA 525 (SR)
Ranch International Pipelines (Tvl) (Pty) Ltd v LMG Construction (City) (Pty) Ltd 1984 (3) SA 861 (W)
Rand Rietfontein Estates Ltd v Cohn 1937 AD 317
Registrar of Medical Schemes v Suremed Medical Scheme 2012 (2) SA 512 (SCA)
Representative of Lloyds v Classic Sailing Adventures (Pty) Ltd 2010 (5) SA 90 (SCA)
Roy v Basson NO 2007 (5) SA 84 (C)
SA Sentrale Ko-op Graanmaatskappy Bpk v Shiftren 1964 (4) SA 760 (A)
Sasfin (Pty) Ltd v Beukes 1989 (1) SA 1 (A)

Sasfin (Pty) Ltd v Jessop 1997 (1) SA 675 (W)
Scott v Poupard 1971 (2) SA 373 (A)
Seeff Commercial & Industrial Properties (Pty) Ltd v Silberman 2001 (3) SA 952 (SCA)
Sentinel Mining Industry Retirement Fund v Waz Properties (Pty) Ltd 2013 (3) SA 132 (SCA)
Senwes Ltd v Muller 2002 (4) SA 134 (T)
Senwes Ltd v Van der Merwe 2012 ZASCA 192 (30–11–2012)
Silent Pond Investments CC v Woolworths (Pty) Ltd 2011 (6) SA 343 (D)
Society of Lloyd's v Price; Society of Lloyd's v Lee 2006 (5) SA 393 (SCA)
South African Forestry Co Ltd v York Timbers Ltd 2005 (3) SA 323 (SCA)
Southernport Developments (Pty) Ltd v Transnet Ltd 2005 (2) SA 202 (SCA)
Spring Forest Trading CC v Wilberry (Pty) Ltd t/a Ecowash 2015 (2) SA 118 (SCA)
Standard Chartered Bank of Canada v Nedperm Bank Ltd 1994 (4) SA 747 (A)
Sweet v Ragereuhara NO 1978 (1) SA 131 (D)
Telcordia Technologies Inc v Telkom SA Ltd 2007 (3) SA 266 (SCA)
Van Reenen Steel (Pty) Ltd v Smith NO 2002 (4) SA 264 (SCA)
Victoria Falls & Transvaal Power Co Ltd v Consolidated Langlaagte Mines Ltd 1915 AD 1
Vogel NO v Volkersz 1977 (1) SA 537 (T)
Vromolimnos (Pty) Ltd v Weichbold 1991 (2) SA 157 (C)
Whitfield v Phillips 1957 (3) SA 318 (A)
Wilkins NO v Voges 1994 (3) SA 130 (A)
Wilson v Smith 1956 (1) SA 393 (W)
Wittmann v Deutscher Schulverein, Pretoria 1998 (4) SA 423 (T)
Woodburn Mansions (Pty) Ltd v Dowell 1961 (3) SA 893 (N)
Woods v Walters 1921 AD 303
World Leisure Holidays (Pty) Ltd v Georges 2002 (5) SA 531 (W)
Zhongji Development Construction Engineering Co Ltd v Kamoto Copper Co 2015 (1) SA 345 (SCA)

Jacques du Plessis is a Distinguished Professor in the Department of Private law at the University of Stellenbosch in South Africa. His fields of interest include the law of contract, the law of unjustified enrichment, legal history and comparative law. He has been awarded an Alexander von Humboldt-Fellowship, a TPR exchange chair at the Catholic University of Leuven, and has held visiting fellowships at the Institute for European Private Law in Maastricht, the Max Planck Institute for Foreign Private and Private International Law in Hamburg and the Institute of European and Comparative Law in Oxford. Professor du Plessis is a Vice-President of the World Society of Mixed Jurisdiction Jurists, a member of the editorial boards of a number of international law journals, and an Associate member of the International Academy of Comparative Law. He is also admitted as an attorney of the High Court of South Africa.

On the Way to the Principles of BRICS Commercial Contracts Law

The Possible Path Towards the Principles of BRICS Commercial Contracts Law



A Comparative Analysis of the National Reports

Salvatore Mancuso

1 Introduction

Please provide a general introduction to how your legal system deals with international commercial contracts, inter alia paying attention to the following:

- *the rules that determine what sources of law are applicable to international commercial contracts, as well as what these sources are (e.g. conventions like the CISG etc.);*
- *the rules that determine which entities (e.g. courts and arbitral tribunals) have jurisdiction over commercial disputes, as well as litigation practices relating to such disputes;*
- *your systems main economic partners (especially the BRICS countries) and some data on the extent of international commerce between them.*

In general, in all the five jurisdictions parties are free to choose the law governing international commercial contracts. In Brazil, the freedom of choice of the parties is limited by reasons of public policy, in Russia public policy can limit the application of foreign law, while China requests the application of Chinese law when the choice of the parties contravenes mandatory provisions of law and when the application of foreign laws may harm the social public interest of China. In India, the choice of

S. Mancuso (✉)
University of Palermo, Palermo, Italy
e-mail: salvatore.mancuso06@unipa.it

the parties is—in principle—respected, but courts may ignore such choice. South African case law supports according the parties a very wide discretion to choose the proper law applicable to an international contract, but it remains to be seen where the limits of this discretion lie.

If no agreement is reached between the parties on the choice of law, the solutions adopted in the five countries differ. In Brazil, the criterion of the *lex loci celebrationis* (place where the obligation is constituted) is preferred. China, India, Russia and South Africa privilege the criterion of the place with which the contract has the closest relation. In addition, it shall be noted that Brazil, China and Russia ratified the United Nations Convention on Contracts for the International Sale of Goods (CISG), even if China applies it only when the contractual parties belong to countries that ratified the Convention.

With reference to contractual disputes resolution, there is a general understanding that arbitration is the instrument mostly used for the settlement of commercial disputes.

All the five countries are signatories of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards. From the website of the New York Convention we learn about the following declarations and reservations. The People's Republic of China will apply the Convention, only on the basis of reciprocity, to the recognition and enforcement of arbitral awards made in the territory of another Contracting State; and only to disputes arising out of legal relationships, whether contractual or not, which are considered as commercial under the national law of the People's Republic of China. Russia declared that it will apply the provisions of the Convention in respect of arbitral awards made in the territories of non-contracting States only to the extent to which they grant reciprocal treatment. India declared, in accordance with Article I of the Convention, that it will apply the Convention to the recognition and enforcement of awards made only in the territory of a State, party to this Convention; and that India will apply the Convention only to disputes arising out of legal relationships, whether contractual or not, which are considered as commercial under the law of India.

Chinese, Indian, Russian and South African arbitration laws applicable to disputes arising from international commercial contracts are based on the UNCITRAL model law on international commercial arbitration, while Brazilian arbitration law was inspired by same model law.

The part about the economic data has been omitted from the present analysis, which is focused on the legal aspects.

2 Formation of Contracts

2.1 Formation: Overview

2.1.1 Agreement: Offer and Acceptance

Q Please indicate in general terms the role your system accords to agreement in the formation of contract; please consider how the system views the relationship between agreement and ‘offer and acceptance’, and whether agreement can be reflected by conduct other than offer and acceptance (see Article 2.1.1). Please further indicate in general terms how a process of offer and acceptance could give rise to a contract in your system. This treatment could include issues such as the following, but it would have to be very brief:*

- *requirements for a valid offer (see Article 2.1.2, and also see Article 1.2 on the general principle of freedom from form or informality; please bear in mind that letters of intent, and memoranda of understanding are dealt with in specific topic Sect. 2.2.1); the withdrawal and revocation of offers, which includes the issue of whether offers can be made irrevocable by a unilateral act or an (option) agreement (Articles 2.1.3, 2.1.4); and the effect of rejection of an offer (Article 2.1.5);*
- *requirements for valid acceptance, how and by when acceptance can take place (e.g. by silence) and when it becomes effective (Articles 2.1.6–2.1.9; bear in mind that electronic contracts are dealt with under specific topic Sect. 2.2.2); when acceptance can be withdrawn (Article 2.1.10); the consequences of a modified acceptance (Article 2.1.11); the effect of writings in confirmation sent after conclusion of the contract (Article 2.1.12); the effect of a party requiring that the contract first has to be in particular form, such as in writing, to be binding (Article 2.1.13; bear in mind that the requirement that the parties first have to reach agreement about certain matters is dealt with in specific topic Sect. 2.2.1).*

In general, in all the five jurisdictions a contract is concluded when an agreement has been reached between the parties on all essential elements with the formalities required.

An offer is considered valid when complete and precise enough to constitute an unequivocal expression of the intent to enter into a contract and it contains the essential terms of the contract concerned. No one of the reporters has indicated that a specific form is required for the validity of the offer. Following the continental law approach, in Brazil, Russia and China the withdrawal of an offer is possible only prior to or at the same time the offer is made, while it cannot be revoked during the time period of its validity if it has been received by the offeree. India and South Africa

follow the common law formulation whereby the offer can be revoked at any moment before the contract is concluded and cannot be made irrevocable unilaterally.

In all the five jurisdictions the acceptance must be full and unconditional. As for the offer, no indication has been provided by any national reporter about a specific form required for the acceptance. The acceptance must reach the offeror within the time limit of the validity of the offer: the Brazilian reporter specified that acceptance is effective upon dispatch by the offeree, while the Indian reporter indicated that the acceptance by a non-instantaneous mode is communicated when it reaches the proposer and it binds when posted or sent. Always in India, an offer that does not specify any time for acceptance, must be accepted within a reasonable time. South African law adopts the point of departure that the offeror must be informed of acceptance. Late acceptance is considered a counteroffer or a new offer in Brazil and China.

2.1.2 Negotiation

Q Please briefly indicate how your legal system deals with the following aspects of how negotiations are to be conducted:*

- *the extent to which a party is free to negotiate, which includes having the right to terminate negotiation without incurring liability; in this regard consider the relevance of whether a party acts in bad faith in either negotiating or breaking off negotiations (Article 2.1.15; please make sure that there are no overlaps with specific topic Sect. 2.2.1, which focuses on agreements and understandings that govern pre- and post-contractual negotiations; the focus here is on situations where there are no such agreements or understandings); and*
- *the extent to which a party may be liable for disclosing or improperly using confidential information provided by the other party (Article 2.1.16).*

In general, in all the five jurisdictions parties are free to withdraw from negotiations at any stage prior to the conclusion of the contract. As usual in continental law jurisdictions, Brazil, Russia and China require a general duty of good faith during preliminary negotiations that shall prevent to enter into contract negotiations if there is no intention to conclude it. In South Africa there is some support in the case law for regarding good faith as an underlying value in the law of contract, but no rule that parties have to act in good faith during negotiations, while in India there is no duty of good faith at all.

Disclosing confidential information, as well as leak or improper use of business secrets, could generally lead to liability and consequent compensation. Business practice introduced specific contracts (confidentiality agreements) to prevent the

disclosure of confidential information, the non-performance of which constitutes breach of contract.

2.1.3 Integrity of Writing

Q Please briefly indicate the extent to which your legal system gives effect to the following terms that deal with the relevance of writing in the formation or variation of contracts. Bear in mind that the issue of when writing is a formal requirement for the conclusion of the contract will already have been dealt with in Sect. 2.1.1 (see the reference there to Article 2.1.13):*

- ‘merger clauses’, which determine that the writing completely embodies the terms agreed upon and that it cannot be contradicted or supplemented by evidence of prior statements or agreements (Article 2.1.17); and
- ‘no-variation except in writing’ clauses, which determine that any modification or termination by agreement has to be in a particular form (Article 2.1.18).

In all jurisdictions but South Africa there are no specific rules regarding the effect and enforceability of merger clauses. In Brazil, although they are commonly recognized in the practice of international commercial contracts, their enforceability in court is uncertain, while in South Africa law expressly enforces merger clauses. In Brazil there is no recognition of parol evidence rule while the principle *pacta sunt servanda* applies; on the contrary, parol evidence rule applies in India. In South Africa the parol evidence rule is a highly contentious rule often not observed in practice, while non-variation clauses are generally enforced strictly.

2.1.4 Standard Terms

Q Please briefly indicate whether your legal system recognises special rules when parties incorporate standard terms in a contract. Bear in mind that this issue may to some extent already have been dealt with in 2.1.1 above, in the context of agreement as a requirement for a valid contract, and how agreement can be established by conduct (see Article 2.1.19). We are unable to deal in any detail with local consumer legislation that could apply to standard terms; but we could at least draw attention to the existence of such legislation and briefly indicate to what extent it could apply to international commercial contracts that are in the standard term format. The focus here could especially be on the following:*

- *the validity of ‘surprising’ terms, i.e. terms which the other party could not reasonably have expected in the type of standard terms involved (see Article 2.1.20);*
- *the consequences of a conflict between a standard term and a non-standard term (Article 2.1.21); and*
- *the consequences of a conflict between different standard terms used by parties who have reached agreement on essential terms, i.e. the ‘battle of forms’ problem (Article 2.1.22).*

Brazil, India and South Africa do not have specific rules about standard terms of a contract. The Russian Civil Code indicates that standard terms are considered the terms developed by a party for contracts of the respective type and published in the press. Chinese contract law defines standard terms of contract as clauses that are prepared in advance for general and repeated use by one party and which are not negotiated with the other party when the contract is concluded.

With reference to surprising terms, the Brazilian reporter refers that if standard terms affect consumers can be deemed invalid by the Court. In India, surprising terms, like exclusion and limitation clauses, will bind only if accepted upon special notice of those terms; while standard form contracts receive a very strict interpretation by courts and are interpreted in favor of the weaker party.

Chinese law sets forth that the party drafting standard terms has a general duty of notification and explanation to the other party. Such party shall draft rights and obligations between parties based on equality, shall adequately inform the other party when exclusion or restriction of liabilities are present and shall explain the standard terms upon request by the other party. The party drafting the standard terms cannot use them to exempt himself from liabilities, increase the liabilities of the other party, or eliminate the material rights of the other party, being otherwise such terms null and void. When the standard terms are inconsistent with non-standard terms, the latter shall prevail.

The question of the battle of forms is not dealt with in Russian, Indian, Chinese and South African law where the general principle applies that any modification of an offer means a counteroffer. In Brazil when there is a battle of forms, and the contract is subject to the CISG, the contract is considered concluded on the basis of exchanged standard terms which are ‘common in substance’. The Indian and the South African reporter specified that the handwritten clauses of the contract prevail over the printed ones. The Chinese reporter states (see 4.1.1 n. 6 of the Chinese report) that the effects of the special clauses of the contract prevail over those of general clauses.

2.2 Formation: Specific Topics

2.2.1 Pre-contractual and Post-contractual Understandings and Agreements on Further Negotiation Between the Parties

Q Please indicate to what extent your system recognises the following understandings or agreements, and what their legal consequences are, including their consequences if parties commence performance even though they are not binding:*

- *Memorandum of Understanding (MOU): On the treatment of the MOU in the PICC see Official Comments to Article 2.1.2 and to Article 2.1.14, especially illustrations 3 and 4; further see the Commentary by Nottage in the Vogenauer Commentary page 269. In your response please pay special attention to the relevance of the intention of the parties in determining the effect of the MOU, and what inference as to their intention could be drawn from the use of this term, as well as from other circumstances, such as statements that ‘the agreement would not be binding until approved’ or ‘until a final agreement is executed’ (see illustrations 3 and 4); further consider the treatment of the related concept of the ‘memorandum of agreement’ (see the illustration in the Official Comment to Article 2.1.13); is the MOA regarded as the same as the MOU in your system; if not, in what way does it differ?*
- *Letter of intent (LOI): On the treatment of the LOI in the PICC see Official Comment to Article 2.1.14; further see Nottage, Vogenauer Commentary page 269. In your response please pay special attention to the relevance of the intention of the parties in determining the effect of the LOI, and what inference as to their intention could be drawn from the use of this term itself, as well as from other circumstances;*
- *Comfort Letter: This example was not discussed, but it is often dealt with the other two above, so we may consider it was well. On the Comfort Letter see Nottage, Vogenauer Commentary at 269, where it is suggested that such a letter indicates ‘to third parties some sort of support for a firm (often within a corporate group) without providing a formal guarantee or indemnity’;*
- *The agreement to negotiate further with a particular party (a ‘lock-in’): For an illustration of the fact pattern of the ‘lock-in’ agreement see Walford v Miles [1992] 2 W.L.R. 174, where the parties negotiated on the sale of a photographic processing business and the potential purchasers alleged that there was an implied obligation on the potential sellers to negotiate with them further in good faith.*

In your response please inter alia consider of what relevance it may be that the agreement expressly determines that such negotiations are to be conducted in good faith, or whether such a duty would be read in by law;

further consider whether such agreements could be concluded expressly or tacitly/be implied in the circumstances;

- *The agreement not to negotiate with a third party (a ‘lock-out’): For an illustrations of the fact pattern of the ‘lock-out’ agreement see Walford v Miles [1992] 2 W.L.R. 174, where it was alleged that the prospective seller agreed that during negotiations the prospective seller would not negotiate with a third party or consider any alternative offer.*

Memoranda of understanding, letters of intent, comfort letters are not regulated by law in Brazil, Russia, India and South Africa, but they are well known in commercial practice. In general, in Brazil, Russia and China they are not considered as legally binding but more as formalization of the parties’ preliminary negotiations, a sort of preparatory agreements, but in China they are considered as preliminary agreements and therefore enforceable when, according to them, the parties agreed to enter into a contract within a determinate period. In general, if from their content the duty of the parties to enter into a contract in the future can be inferred, then they can be considered in these systems as preliminary agreements enforceable in the court in case of non-performance. In India and South Africa their effect depends on the intention of the parties as reflected from its contents. A similar approach is followed in the five jurisdictions for letters of intent and comfort letters.

Lock-in and lock-out agreements seem to be enforceable in India, possibly with a time limitation for the duration of the agreement. South African law in principle does not accept a lock-in agreement, unless there is a deadlock-breaking mechanism, while in China they are not regulated by law but used in the contractual practice. Nothing is reported for Russia. The Brazilian reporter suggests that lock-in and lock-out agreements are ruled within the antitrust context and, outside this context, they are recognized if the parties are equally sophisticated and negotiate with equivalent bargaining power. The Russian reporter seems to consider these kind of agreements as “option contracts”, those agreements where one party makes an irrevocable offer, granting the other party the right to conclude one or several contracts on the terms provided by the option. Then, the option may provide that acceptance will be possible only upon the occurrence of a condition defined by the option, and an option for the conclusion of a contract must contain terms allowing the determination of the subject and other essential terms of the contract subject to conclusion.

2.2.2 Electronic Contracting

Q Please indicate the position in your legal system with regard to the use of electronic means of concluding contracts; inter alia attention could be paid to the following issues:*

- *what is the position in your system with regard to the time and place of conclusion of a contract when electronic means of communication are used? Is it e.g. the moment when and place where acceptance is dispatched to the offeror, received by the offeror, or comes to actual knowledge of the offeror? (see Official Comment 4 to Article 1.10 of the PICC);*
- *what is the position in your system with regard to the length of time an offer made by electronic means is open for acceptance? (see Anderson in Vogenauer Commentary page 304);*
- *what is the position in your system with regard to the moment a time fixed for acceptance begins to run if the offer is made by electronic means; e.g. if an offer by email states that it is open for acceptance ‘within 7 days’, when does this period begin to run? From the moment indicated in the offer or from the moment it is transmitted? (see Article 2.1.8);*
- *what is the position in your system if the offeree’s acceptance only occurs after the time set for acceptance, but this is due to a delay in electronic transmission which cannot be attributed to the offeree? (e.g. if the offeree sends acceptance by email but it only reaches or is read by the offeror after the time set for acceptance due to problems with the email server). Is this still valid acceptance, unless the offeror immediately informs the offeree that it is ineffective since the offer had already lapsed? (see Article 2.1.9 Official Comment Illustration 3; Anderson, Vogenauer Commentary page 311);*
- *may parties in your system agree to use a system capable of setting in motion self-executing electronic actions that lead to the conclusion of a contract without the intervention of a natural person, i.e. does your system recognise ‘automated contracting’? (see Official Comment 3 and illustration 2 to Article 2.1.1); does an automated ‘confirmation of order’ amount to confirmation of receipt of an offer, or to acceptance of it? (see Anderson, Vogenauer Commentary page 286);*
- *to what extent is electronic contracting permissible when it is required that certain contracts have to be in writing to be valid (e.g. typically the sale of land, or providing personal security by way of a suretyship)?; as to the meaning of ‘writing’ in the context of the PICC see Vogenauer Commentary on Article 1.2, page 162; Anderson in Vogenauer Commentary page 259);*
- *to what extent does your legal system regulate contracts that are contained solely in digital documentation, and especially that are signed by way of digital signatures? (see Anderson in Vogenauer Commentary pages 258–260);*
- *are there any other aspects of electronic contracting that may be relevant and especially may have caused problems in the context of arbitration in your legal system?*

India and South Africa adopted a specific legislation which follows the UNCITRAL Model Law on Electronic Commerce, while Russian law on electronic contracts

largely relies on the ratification of the UN Convention on the Use of Electronic Communications in International Contracts. All the three countries explicitly allow the use of electronic signature to enter into an electronic contract.

In particular, the Indian reporter indicated that the electronic record is dispatched when it enters a computer resource outside the control of the originator in line with the general postal rule of acceptance. The reception of the record depends on the designation of a computer resource by the addressee: if the addressee has designated a computer resource the reception happens when the electronic record enters the designated resource, and it is deemed to have been dispatched at the place where the originator has his place of business, otherwise, if the addressee has not designated a computer resource, the reception happens when the electronic record enters the computer resource of the addressee, and is deemed to be received at the place where the addressee has his place of business. If there is no place of business, the usual place of residence must be reckoned for the purpose. When the acceptance is sent by email the contract is concluded when the email leaves the computer resource of the sender. The time for which the offer will remain open is governed by the general law, as there is no special rule for the electronic mode of communication. A contract can be made as an automated transaction, that is through a transaction made by computers without human interventions.

In South Africa the electronic contract is concluded at the time when and place where the acceptance of the offer was received by the offeror. A data message is regarded as having been received by an addressee, such as an offeror, when “the complete data message enters an information system designated or used for that purpose by the addressee and is capable of being retrieved and processed by the addressee”. Such a message must also be regarded as “having been received at the addressee’s usual place of business or residence”. There is no prescribed length of time during which an offer contained in a data message remains open for acceptance. Default common law rules apply, by which an offer is open for acceptance for the period stipulated therein, or for a period considered reasonable in the circumstances, after which it lapses automatically.

In Brazil the default rule is that contracts entered into between absent parties are concluded at the moment when acceptance is dispatched. However, in order to provide greater legal certainty for the parties, who naturally cannot control the operation of a web server, scholars consider contracts entered into via email as concluded at the moment when acceptance is received by the offeror, that is when acceptance arrived in the offeror’s server, regardless of the actual reading of the email. Brazil doesn’t have specific rules about the deadline for acceptance: scholars consider that time to accept the offer begins to run when the offer is received by the offeree.

In China electronic contracts are generally made equal to written contracts as written form includes also data exchange and emails which tangibly express the contents contained therein. The moment of the conclusion of an electronic contract is regulated by the rules on the arrival of offer and acceptance. If a contract is concluded electronically, and a recipient designates a specific system to receive the data, the time when the data enter such specific system shall be the time of arrival; if no specific system is appointed, the time when the data first enter any of the recipient’s systems

shall be regarded as the time of arrival. If the contract is concluded electronically, the main business place of the recipient shall be the place of establishment, and if the recipient does not have a main business place, its habitual residence shall be considered to be the place of establishment.

3 Validity of Contracts

3.1 Validity—Overview

3.1.1 General Provisions on Validity

Q Briefly indicate to what extent your legal system, in addition to agreement, imposes requirements for the conclusion or variation of a contract in the form of*

- a legally relevant reason for concluding the contract (i.e. the type of requirement expressed by ‘cause’ in French law), or
- a counter-performance by a party to whom performance is undertaken (i.e. the type of requirement expressed by ‘consideration’ in the common law) (Article 3.1.2, see Huber in Vogenauer Commentary pages 466–468).

Q Briefly indicate to what extent the validity of a contract in your legal system is influenced by whether it was impossible to perform at the time of its conclusion (Article 3.1.3, see Huber in Vogenauer Commentary pages 469–471).*

Brazilian law restricts the autonomy of the parties and the freedom of the parties to contract to the limits established by the “social function of the contract”. Such “social function of the contract” means the promotion of the common economic welfare and social justice; however, in business transaction, such rule is mitigated, especially after the enactment of Law No 13,874/2019, which gives precedence to the *pacta sunt servanda* principle with consequent minimal intervention in private contracts.

In Russian and Chinese law nothing is provided expressly by law, with regard to the requirement of causa or consideration as a constitutive element for the effectiveness of contract. However, the 2009 Supreme Court’s Second Judicial Interpretation on Contract Law proves the de facto adoption of the objective causa in Chinese law. South African law only recognizes that a contract should have a *iusta causa*, in the sense that the parties must have the serious intention to be bound. This simply restates the requirement for consensus or agreement. South African law does not require that

a contract must have a specific legally relevant reason or cause for its conclusion or its variation. South African courts have expressly rejected the doctrine of consideration.

Following the common law tradition, India requires a valid consideration to enforce a promise. Consideration is something that the promisee, or any other person, has done or promised to do or not to do at the request of the promisor, as acts of parties not to the contract are considered as valid consideration to support a promise. Indian law recognizes past acts as valid consideration, consideration need not be adequate, or equivalent to the performance enforced by the promise, but it must be lawful.

With reference to the validity of a contract when the performance was impossible at the time of its conclusion, the Brazilian reporter underlines that if the object of a contract is impossible, the contract will be deemed null and void; similarly, contracts subject to impossible conditions are considered invalid. Similarly, from the Russian report it can be inferred that Russian law considers this as an invalid transaction that does not entail legal consequences except for those that are connected with its invalidity and is invalid from the time of its making. Also from the Chinese report we understand that when the performance is impossible the contract is invalid, as the validity of contract requires that its content shall be certain or determinable, and the obligations of the parties under contract can be realized objectively by a human being, although nothing related to these two conditions is expressly provided by Chinese law.

In India an agreement to do an act impossible in itself is void. Performance of a promise will be considered impossible if it is impossible in the nature of things. Supervening impossibility is not restricted to physical or literal impossibility of performance, but it covers cases where the performance is impracticable considering the object and purpose of the contract that the parties had in view. However, if the terms show that a party warrants the existence or continued existence of the subject matter and undertakes to deliver or pay or perform in any event, the party assumes the risk of such performance not being possible and cannot avoid liability for an initial impossibility. We find a similar situation in South Africa where a contract is invalid if it was “absolutely” impossible to perform at the time of its conclusion. However, when a party contemplated impossibility at the moment of the conclusion of the contract, in Indian law it is expressly stated that such party will be liable (to pay damages) in the event of non-performance, while in South Africa this is considered implied.

3.1.2 Mistake, Fraud, Threats and Gross Disparity as Grounds for Avoidance

Q Briefly indicate to what extent the following (mainly defects of consent) could influence the validity of a contract in your legal system:*

- *the existence of a mistake, in the sense of an incorrect assumption regarding facts or law, on the side of one or both the parties at the time of its conclusion; inter alia consider what requirements a mistake must meet to have this effect, e.g. whether it must be sufficiently serious or material, or must be attributable to the other party (see Article 3.2.2; we could pay attention to the matters raised in Articles 3.2.3–3.2.4, but that may be too detailed for present purposes);*
- *a fraudulent representation (inter alia consider whether such a representation could be made by non-disclosure; further briefly explain how the system views the relationship between mistake and fraud as grounds for avoidance—see Article 3.2.5, Du Plessis in Vogenauer Commentary 497–498);*
- *an unjustified threat (it may be useful to pay particular attention to whether threats of economic harm, e.g. not to perform a contract to induce modification of its terms, could constitute an unjustified threat);*
- *excessive advantage being given by one party to the other, or significant disequilibrium between the performances; please indicate whether, for purposes of obtaining relief, it would be required that this disparity had to arise from unfair advantage being taken by the one party of the weakness or vulnerability of the other party, e.g. due to economic distress, inexperience or lack of bargaining skill (see Article 3.2.7 and the circumstances listed there).*

Q Briefly indicate the relief which a party may be entitled to due to mistake, fraud, threats and gross disparity, for example avoidance (see Articles 3.2.9–3.2.14) and restitution (Article 3.2.15), damages (Article 3.2.16), and/or adaptation of the contract (see Article 3.2.7), and to what extent such relief could be awarded against third parties (Article 3.2.8).*

Mistake: According to Brazilian law, a contract can be declared null and void due to a substantial mistake that affects the will of one of the contracting parties, and provided that the mistake could be perceived by any person of normal diligence which finds himself under the same circumstances of the transaction. A mistake is substantial when it involves the nature of the transaction, the main object of the declared intent or any of its essential qualities; it involves the identity or essential quality of the person to whom the expression of intent is directed, provided that such mistake has influenced the contract in a relevant manner; or it implicates the sole or main reason for the contract.

In India, an agreement caused by the mistake shared by both parties is also void: this is a mutual mistake, shared alike by all parties. The mistake that nullifies the agreement must be one of an existing fact, must be essential to the agreement, and not collateral. It is essential when the party would not have contracted if he had realized his mistake. The agreement is void if the mistake is about the existence, substance or

essence of its subject matter. On the contrary, a self-induced mistake does not avoid a contract: then, a party cannot avoid a contract in case of a unilateral mistake, when he held an erroneous belief about any material aspect of the transaction, or because his expectations were wrong.

In South Africa too, a contract is void if a party made a material and reasonable mistake. A mistake is material if it does not relate to the motivation behind or reasons for contracting, but to its content or nature, or to the identity of a contracting party; it is reasonable when, for example, the mistake is due to external factors, like when the mistake was attributable to the other party and the mistaken party could have avoided it. Like in India, also in South Africa a self-induced mistake relating to the motive behind or reasons for concluding a contract (that is a mistake which is not material) does not per se affect the validity of a contract. However, if such a mistake is caused by a material misrepresentation by another party, the contract is voidable, and it may be rescinded by the mistaken party.

Under Chinese law, a contract concluded due to a material misunderstanding is voidable. Material misunderstanding under Chinese law refers namely to the doctrine of mistake in continental law.

In Russia, a transaction made under the influence of a mistake may be declared invalid by a court when the mistake is so essential that the party alleging the invalidity, reasonably and objectively evaluating the situation, would not have made a transaction if he had known of the real situation. The mistake is considered essential in particular if a party made an evident misstatement; a party was mistaken with respect to the object of the transaction, in particular with respect to those qualities that are normally considered as essential; a party was mistaken with respect to the nature of a transaction; a party was mistaken with respect to a person with whom the party was entering into the transaction or with respect to a person bound by the transaction; a party was mistaken with respect to the circumstances that he mentioned in his declaration of will or from the presence of which the party proceeded in making the transaction. A court may refuse to declare a transaction invalid if the mistake under the influence of which a party to the transaction acted could not have been committed by a party acting with normal care and taking into account the content of the transaction, the surrounding circumstances, and the peculiarities of the parties.

Fraudulent representation: The Brazilian Civil Code provides that a contract may also be declared null and void on the basis of fraudulent representation, provided that the fraudulent representation is the “cause” of the transaction. In India a contract can be avoided if consent is caused by a false representation about a material fact and has been made willfully with intention to deceive, or when not warranted by the information of the maker, while innocent misrepresentation gives no remedy unless it has caused another to commit a mistake. In South African law it does not matter whether the misrepresentation was intentional (i.e. fraudulent), negligent or even innocent: as long as the misrepresentation by another party is material, the contract is voidable, and it may be rescinded by the mistaken party.

From the Chinese report we understand that a contract concluded on the basis of fraudulent representation is voidable, when fraud is attributable to the party who

cheats another; in general, material misunderstanding, and fraud exclude the validity of the contract. In the case that a contract is concluded due to fraud from the third party, the deceived party is allowed to cancel the contract only under the condition that he knows or ought to know the fraud.

In Russia a transaction made under the influence of fraudulent representation may be declared invalid by a court on demand of the victim. Intentional silence on circumstances on which a person should have communicated with such degree of good faith as was required of him by circumstances of commercial practice shall also be considered as deception. A transaction made under the influence of fraudulent representation by a third party on the victim may be declared invalid on suit of the victim on the condition that the other party knew or should have known of the deception.

Unjustified threat: According to the Brazilian Civil Code threat, also known as coercion or duress, is another available basis for invalidation of a contract when it affects the expression of intent of a party. Threat is a valid ground to cancel the contract if it is unjustified and imbues fear of imminent and significant harm to a party's person, his family, or his assets. In China the contract entered into under the influence of threat is voidable and the cancellation of the contract due to threat does not require the awareness of the illegal intent of the threat. In South Africa contracts concluded due to duress, i.e. unlawful threats of harm, are voidable. Apart from being unlawful, the threat has to be one of considerable evil to the person concerned, or to his or her family, it must induce a reasonable fear of an imminent or inevitable evil, and the pressure used must have caused damage.

Under Russian law a transaction made under the influence of duress or threat may be declared invalid by a court on demand of the victim. No other requirements are provided by the Russian Civil Code.

In India the grounds on which threat can affect the validity of the contract are quite narrow. Threat that amount to coercion vitiates consent, and coercion occurs when committing or threatening to commit an offence under the Indian Penal Code (threats to commit offences under other criminal statutes or to commit acts that do not constitute offence will not amount to coercion) or when detaining or threatening to detain any property to the prejudice of another. Should one of these cases occur, the contract can be avoided.

In Brazil economic harm is recognized by modern literature and case law as sufficient to affect the validity of a contract. In India economic duress or threats do not vitiate consent. South African law still has to determine conclusively to what extent threats of economic harm are actionable; however, some support has been expressed for regarding threats of breach of contract as actionable. In China economic harm cannot be recognized as unjustified threat China. This question is not addressed in Russian law.

Excessive advantage or significant disequilibrium between the performances:

In Brazilian law the concept of the imbalance between the parties requires an objective "disparity" between the obligations or performances assumed by the parties, and a subjective "urgent necessity" or "inexperience" of the harmed party. The

urgent necessity need not solely be related to the economically distressed situation of the aggrieved party, but rather a “contractual necessity”, an impossibility to avoid the contract, while the party’s inexperience can either be assessed broadly or can instead be considered under the circumstances of that specific transaction. Similarly, in China, where a contract is evidently unfair when it is formed as a result of one party taking advantage of the other party’s distress or inexperience it can be cancelled.

In Russia a transaction on extremely unfavorable terms that a person was compelled to make as a result of a confluence of harsh circumstances that the other party used (an unconscionable transaction) may be declared invalid.

Under Indian law, a party whose consent is caused by undue influence can avoid the contract. Undue influence occurs when one party, standing in a dominating relationship with the other, uses his position to obtain an unfair advantage over the other. Such dominating position will arise where one holds a real or apparent authority over the other, or stands in a fiduciary relation with the other, or makes a contract with a person whose mental capacity is affected by age, illness or bodily or mental distress. Contrarily to Brazilian and Chinese law, the relative position of parties, economic disparity, inexperience of one party, unequal bargaining power or disparity in the advantage gained under a contract, are not grounds for avoiding the contract for lack of free consent.

Similarly to India, the South African common law does not generally recognize that the validity of a contract is affected merely because excessive advantage was given by one party to another, or because there was a significant disequilibrium between the performances. However, a contract is voidable if the taking of advantage derives from undue influence. The victim must prove that another person obtained an influence which weakened the victim’s resistance and made his or her will pliable, and brought the influence to bear in an unprincipled manner in order to prevail upon the victim to agree to a prejudicial transaction which he or she would not normally have entered into freely.

As far as the effects of all these defects of consent are concerned, there is a general common view on the fact that contracts concluded on the influence of the facts examined are voidable, with the exception of mistake, the influence of which is considered a ground to declare the contract void in Brazil, India and South Africa. In Russia, defects of consent render the contract void, considered that—as indicated by the Russian reporter—the contract does not entail legal consequences except for those that are connected with its invalidity and it is invalid from the time of its making.

In Brazil, where a defect of consent renders a contract voidable, the aggrieved party may request to avoid the contract and seek compensation for damages (if effectively incurred) against the other party. However, if both parties have engaged in fraud or misconduct, then neither party may claim avoidance or damages. In Russia, if a transaction is declared invalid due to a defect of consent each of the parties shall have the duty to return to the other everything received under the transaction and in case of the impossibility of returning what was received in kind (including when what was received consisted of the use of property, work done, or services provided) to compensate for its value, unless other consequences of the invalidity of

the transaction are provided by a statute. In addition, the losses caused to the victim shall be compensated to him by the other party.

As mentioned above, in India an agreement caused by a mutual mistake is void, the agreement cannot be enforced, and there is an obligation of restitution. Coercion, undue influence, misrepresentation and fraud make the contract voidable; the victim can claim damages for tort and the party rescinding the contract must restore the benefit under the contract. A similar approach can be detected in South African law where a material and reasonable mistake could render a contract void, whereas a fraudulent, negligent or innocent misrepresentation inducing a mistake in motive, as well as duress and undue influence, render a contract voidable. When a voidable contract is rescinded, it too can no longer be enforced, and performances may be reclaimed by way of a process of mutual restitution (*restitutio in integrum*). To the extent that the various improper ways of obtaining consent referred to above amount to civil wrongs or delicts (torts), victims could claim damages that would place them in the position they would have been in, had the delict not been committed. South African law does not generally allow a court to adapt a contract in these cases.

Under Chinese law in all cases of voidable contracts, the aggrieved party have the right to revoke them within time limit provided by law, through bringing a lawsuit before court or through arbitration.

3.1.3 Illegality

Q Briefly set out the general legal framework in your legal system that determines when mandatory rules apply to international commercial contracts (on the meaning of 'mandatory rules' see Official Comments 1 and 3 to Article 3.3.1); in this regard refer specifically to the rules of private international law recognised by your system that make this determination (see Official Comment 5 to Article 1.4); We could also include the following question, but it is admittedly very broad: please further illustrate the operation of this framework by referring to examples of mandatory rules that may be potentially relevant in the context of international commercial contracts and that are:*

- *of national origin (e.g. provisions of domestic law on the use of child labour to manufacture goods—see Illustration 5 to Official Comment to Article 3.3.1; provisions of domestic consumer law that could influence the validity of terms in international commercial contracts; bear in mind that contracts requiring public permission, and limitations in restraint of trade are dealt with in the specific examples below); and*
- *of international or supra-national origin, i.e. those derived from international conventions or general public international law (see Official Comment 1 and 2 to Article 1.4; further see Cuniberti in Vogenauer Commentary pages 168–169, 559–560).*

Q Please further consider in general the potential consequences of the infringement of mandatory rules contained in such a legal framework (Article 3.3.1; Cuniberti in Vogenauer Commentary pages 559–564)); these consequences could relate to:*

- *the limitation on remedies based on breach, e.g. the right to claim enforcement or performance;*
- *the right to adapt the contract;*
- *the right to treat the contract as having no effect, and*
- *the right to claim restitution (Article 3.3.2).*

Under Brazilian law, despite the prevalence given to party autonomy in the international sphere, an international contract must still comply with the mandatory rules established by Brazilian law and must not offend public policy regardless the applicable law chosen by the parties. A similar situation prevails in Russia.

In India, whether the agreement is lawful or not is determined by the proper law of contract. If the proper law is Indian law, the agreement is unlawful if it is forbidden by law, if it would defeat the provisions of law or to contract out of the benefits given by a statute, if it involves injury to the person or property of another, or if the court regards it as immoral or opposed to public policy. If the agreement is lawful by the proper law, Indian courts will refuse enforcement if its performance is unlawful by the law of the country where it is to be performed, or if the agreement violates the public policy of India, especially if the agreement is to be performed in India.

In South Africa, normally, the legality of an international commercial contract is determined by the law applicable to it. Thus, if South African law is the proper law, the contract could infringe its mandatory law by its terms, the way it is performed, or its purpose being contrary to statutory law or public policy under the common law. However, it has not yet been resolved whether South African courts would refuse to enforce a contract which is legal according to its proper law, but illegal in terms of a third system of law with which it is substantially connected. Chinese law is automatically applied in disputes over illegality related to employees' interests, food or public health security, environmental security or damaging the social public interest of China. Here a contract is considered illegal when the parties intended to hide an illegal purpose using a lawful contract, when the contract harms the interest of state or public interests and when the contract violates a mandatory provision set forth in any law or administrative regulation.

With reference to the effects of invalidity, under Brazilian law violation of the mandatory rules determine that a contract is declared null and void and the further consequences will depend on the seriousness and scope of the violation. In Russia too, a transaction whose object is against the bases of the legal order, public interest or morality of the Russian Federation will be declared void.

In India the potential consequences of infringing mandatory rules depend on the source of the rule. Also, the extent to which unlawful agreement will be enforced essentially differs with each case because the severity or unlawfulness is not the same in each case. A similar situation is reported in South Africa, since the potential consequences of infringing mandatory rules depend on their origins; when the rule derives from statute, it has to be interpreted to establish its consequences, whereas the consequences of violating common-law mandatory rules depend on the rule concerned.

3.2 *Validity—Specific Topics*

3.2.1 **Public Permission**

Q Please indicate the legal position in your system in regard to international commercial contracts that require public permission for their creation (validity) or performance; your response could inter alia focus on the following:*

- *who should apply for public permission if the domestic law of the State requiring permission or the circumstances do not indicate this; e.g. should it be influenced by whether a party has its place of business in that region? (see Article 6.1.14);*
- *how a party should comply with a duty to obtain public permission; e.g. should such a party bear the expenses or notify the other party of the outcome? (see Article 6.1.15);*
- *the rights of parties if the measures to obtain permission were taken, but it was neither granted nor refused within an agreed period or reasonable time; e.g. can either party now terminate the contract? (see Article 6.1.16);*
- *the legal position where permission is refused and a) the permission was essential for the validity of a contract or some of its terms, and b) the permission was required to perform the contract, but not essential for creating a valid contract; (see Article 6.1.17).*

*Q*Please consider the consequences of the use of improper means to obtain official permission for a contract (see Illustrations to Official Comment 3 to Article 3.3.1).*

In all the five jurisdictions concerned there is no default rule on the allocation among parties of the responsibility to apply for or otherwise obtain any public permission

for creating or performing obligations under a private contract. Generally, this will be expressly established by the parties in their contract.

However, in each jurisdiction there are some specific regulations related to international trade that allocate the responsibility to obtain public permission between the parties. When public permission is required, there is no default rule allocating between the parties the burden of obtaining the public permission.

Similarly, the forms and deadlines for compliance with the obligation to obtain public permissions are generally included by the parties in the contract itself or may be provided by applicable specific regulations.

If a public permission or authorization is of the essence to the contract, and the relevant public authority refuses to grant such permission, the contract becomes void and cannot be enforced. However, the parties may provide for the eventuality that their contract fails due to the refusal of public permission for its conclusion or performance. If the refusal is attributable to the party that was entrusted with obtaining such permission (due to his/her intention, fault or mere negligence), that party shall be liable for any losses incurred by the other party due to the resulting invalidity of the contract.

Under Brazilian and Chinese law, a party will be exempted from such liability only if the refusal arises from a fortuitous event or force majeure that renders the refusal beyond the control of the responsible party. However, if the permission can be granted at a later date, the contract will not be invalidated, as the contract is deemed valid from the date on which such permission is obtained. Additionally, if the public permission is not essential to the contract, but rather is required only for ancillary and separable obligations, the contract will remain valid with respect to its other provisions.

In South Africa, if the parties do not contractually regulate the consequences of an initial or supervening failure to obtain permission, the common law rules on impossibility of performance and illegality whereby no obligations are created if a contract cannot lawfully be performed at the moment it is concluded come into play.

The use of improper means to obtain public permission (corruption of a public authority, for instance) invalidates such permission. In addition, if the public permission is essential for the contract, then such improper conduct will invalidate the entire transaction as well.

3.2.2 Covenants in Restraint of Trade

Q Please indicate the mandatory rules in your legal system with regard to the validity and consequences of agreements/covenants that limit a party's freedom to engage in a trade, business, profession or occupation, e.g. a clause that restrains a seller of a business from competing with the purchaser for a period of time in a particular region; inter alia, consider the following:*

- *the general test for the validity of such terms;*
- *who bears the burden of proof, and*
- *the relief that may be provided to the restrained party, including enforcing the covenant in a limited or attenuated form.*

Under Brazilian, Russian and Chinese law, covenants in restraint of trade which result in an attempt to restrict competition are generally considered null and void.

Brazilian law considers them acceptable when they constitute the free intention of the parties of equal bargaining power and do not harm free competition in the market.

Russian law provides that agreements restricting competition can be recognized as permissible if they do not create for particular persons opportunity to eliminate competition in the relevant goods market, do not impose restrictions superfluous for achievement of the goal of these agreements and also if they result or can result in perfection of production, sale of goods or stimulation of technical, economic progress or rising competitive capacity of the Russian goods in the world market, or in granting to consumers benefits (advantages) which are proportionate to the benefits (advantages) obtained by the parties by entering into the agreements restricting competition.

In China parties of a contract are free to conclude agreements that limit a party's freedom for their own interests, such as exclusive distributorship, or non-competition agreements, if such covenants in restraint of trade are not prohibited by the 2007 Chinese Anti-Monopoly Law.

Unless they fall within statutory exceptions, agreements restraining any person from carrying out a lawful profession, trade or business of any kind are void under Indian law, whether the restraint is partial or absolute, and even if reasonable. A restraint operating after termination of the contract is void, even if it is necessary for protecting the legitimate interest of the party requesting the restraint.

South African law considers a covenant in restraint of trade as enforceable in principle. The party seeking to escape liability must prove that the covenant is unenforceable because it violates public interest, and therefore is contrary to public policy. Such a covenant would violate public policy if the effect of the restraint was unreasonable. A covenant would be unreasonable if it prevented one party from pursuing his or her interest in freely participating in the commercial and professional world without a protectable interest of the other party being properly served thereby. Merely eliminating competition as such is not regarded as an interest worthy of protection. The determination whether a covenant is reasonable is made with reference to the moment enforcement is sought, and even though a covenant could be unreasonably wide according to its agreed terms, courts may at times enforce it only partially.

3.2.3 Severability

Q Please indicate the position in your legal system when some contractual terms are contrary to mandatory rules, i.e. cases of partial illegality; to what extent would contravention of these rules influence the validity or enforceability of the entire contract, or merely the offending part? In answering this question, reference could be made to the relevance accorded to the probable intention of the parties (e.g. would the parties have concluded the contract without the illegal part?), or to considerations of public policy.*

All the five jurisdictions seem to adopt similar positions in the area of severability. Where a seemingly invalid contract contains the elements required for a valid one, and when it is possible for the interpreter to suppose that the parties would have desired a valid contract without the invalid part, had they known about the illegality, the valid contract will be enforced. In general, the partial invalidity of a contract will not affect its otherwise valid provisions, provided that such provisions are separable from those which are deemed invalid, and that the continuation of the contract is the intention of the parties.

In this respect it is useful to report the clarification made by the South African reporter, by which South African law makes specific reference to the importance of the “bad part” of the contract. It has been held that the clauses which are found to be void should not be material or important or essential to achieve the contracting parties’ ends. If the offending provisions “go to the principal purpose of the contract and are not merely subsidiary or collateral thereto”, the agreement should be considered not to be severable.

4 Interpretation of Contracts

4.1 Interpretation—Overview

Q Please indicate in general terms the approach of your legal system to the interpretation of contracts; inter alia consider the following:*

- *to what extent does the system interpret by seeking to establish the actual ‘subjective’ common intention of the parties, compared to seeking to determine an ‘objective’ meaning of the terms?;*

- *what are the relevant circumstances that regard could be had to when applying the test for interpretation referred to above? (see Articles 4.3 and 4.4 for examples, such as prior negotiations, the contract as a whole, etc.);*
- *to what extent does your system recognise rules (or maxims) to the effect that contracts shall be interpreted to give effect to all terms, rather than to deprive some of their effect (Article 4.5) or that if terms supplied by a party are unclear, an interpretation against that party is preferred? (Article 4.6);*
- *to what extent does your legal system clearly distinguish between interpretation (see Articles 4.1–4.7), supplying omitted terms (Article 4.8), and implying terms or obligations?; what are the sources of these terms or obligations? (see Article 5.1.1, dealing with express or implied obligations, and Article 5.1.2, dealing with various sources of implied obligations);*
- *to what extent does your legal system (unlike the PICC—see Vogenauer Commentary pages 581–582)) recognise specific rules for interpreting standard terms?*

Real intention of the parties: According to the general rules of Brazilian law, priority is given on contract interpretation to the real and subjective intent of the parties, rather than to the literal terms expressed in their agreement. However, Brazilian law provides for an exception known as the “mental reservation”, which occurs when a party’s expressed intent is in conflict with its real intent: in this case, the Brazilian Civil Code will give legal effect to the party’s expressed intent, and, so long as the other party was not aware of that party’s real intent, this real intent will be deemed irrelevant for purposes of contract interpretation.

The purpose of interpretation under Indian law is also to ascertain the common intention of the parties at the time they made their contract. The primary rule is that the meaning of any matter in a document must be determined from the document itself through the meaning of the words being interpreted, because these are the words by which the parties expressed their intention. However, in line with the contextual approach, evidence can be given in what manner language of a document is related to existing facts.

Similarly, the interpretation of contract based on the real intent of parties is adopted in China, so that the interpretation of contract tends to the ascertainment of the real intent of parties.

The traditional approach to interpretation in South African law is “subjective” and courts must establish the parties’ actual common intention, which first is ascertained by the ordinary meaning of the words they used in the text. However, more recently the preferred approach is to adopt an objective test to interpretation, whereby the courts must determine the meaning of a contractual provision from the perspective of a reasonable person in the position of the parties.

In Russian law a more formal approach is adopted, as the interpretation of the terms of a contract takes into account the literal meaning of the words and expressions contained in it. The literal meaning of a term of a contract, in case the term is not

clear, shall be established by comparison with the other terms and the sense of the contract as a whole. If these rules do not allow the determination of the content of the contract, the real common will of the parties must be ascertained, taking into account the purpose of the contract.

Relevant circumstances for interpretation: Under Brazilian law, when interpreting a contract, regard must be had for the duty of good faith and for the common usages of the place at which the contract was concluded. Similarly, in interpreting contract terms, Russian courts are inclined to apply the principle of good faith as one of the fundamental principles of the Russian civil law when they need to determine the meaning of particular terms of the contract.

In China, the 1999 Chinese Contract Law introduced the objective approach to interpretation, so that a contract shall be construed in light of good faith with the consequence that the authentic intent externally expressed by the parties, rather than that concealed in their inner mind, shall be taken in consideration. Chinese law sets forth the following methods of interpretation: literary interpretation, systematic interpretation, purposive interpretation, customary interpretation and good faith interpretation. Literary interpretation means that the true meaning of the contract, including tacit and implied terms, shall be understood through study of the meaning of the used terms and phrases; overall interpretation requires that all clauses and additional parts, including tacit and implied terms, should be viewed as an entire body; purposive interpretation means that when a certain word or clause of the contract can accept more than two interpretations, the interpretation that best suits the purpose of the contract shall be adopted; customary interpretation means that when all terms and phrases, including tacit and implied terms, used in the contract appear controversial, it shall be interpreted according to the usages between the parties; and good faith interpretation refers to the fact that the interpretation of contract shall follow the rule of good faith.

Brazilian and Russian law consider all surrounding circumstances to the contract—including negotiations and correspondence preceding the contract, the practice established in the mutual relations of the parties, customs, and the subsequent conduct of the parties—as elements to determine the real common will of the parties. Indian law allows also the possibility to consider the surrounding circumstances to the contract in addition to the contractual text.

In South Africa the more recent “objective” approach to interpretation referred to above has been accompanied by a more generous approach to adducing evidence; the courts consider the language in the context it is used, and more generally allow extrinsic evidence, such as prior negotiations or subsequent implementation, without requiring uncertainty or ambiguity. However, evidence as to a party’s own intention remains inadmissible.

Unclear terms: In Brazil, interpretation rules regarding unclear terms usually apply in contract involving consumers and require that interpretation must always be in favor of the weaker party. For the other agreements, scholars support the application of systematic and consistent interpretation.

Under Indian law, if the contract terms appear uncertain, parties are allowed to give evidence of all circumstances which make terms clear and enforceable. Courts will also tend to interpret a contract so that it is valid, rather than invalid due to uncertainty. In cases of ambiguity, the document will be interpreted against the party who has prepared the document or has put it forth. In case of inconsistency between the printed and the hand-written or manuscript parts, the court must first attempt to derive meaning from both; but if this does not provide an answer, the handwritten words prevail over the print.

To solve the issue of unclear terms Chinese law resorts to the criterion of overall interpretation mentioned above, by which the meaning of the controversial terms shall be determined according to the mutual connection among all main clauses, additional parts, tacit terms and implied terms, and the relationship between the single term and general clauses. The customary interpretation mentioned above among the criteria for the interpretation of the contract can also help.

In cases of persistent ambiguity, South African law refers to the *quod minimum* rule, which states that “in case of doubt, a burden is to be construed as lightly as possible”; and to the *contra proferentem* rule, which requires that an ambiguous written document must be construed against or less favorably towards its author, who was in a position to avoid the ambiguity.

Contract gaps (omitted terms and implied terms): There is no specific provision in Brazilian law about filling the existing gaps in a contract. The preservation of the contract (*pacta sunt servanda*), good faith and common usages are the guiding principles.

Indian law also does not have statutory rules about matters that are not expressly mentioned in the contractual text. However, courts have implied terms when the contract cannot work without them or when they are so obvious that the parties can be considered to have taken them for granted. No term will be implied that is inconsistent with the express terms, or where the terms show that the parties intended to omit the proposed term. The party relying on an implied term must plead it in his plaint and must prove all facts from which it can be implied.

Chinese law recognizes the legal effects of the tacit and implied terms of contract, where ‘tacit term’ means term based on an actual or presumed intention of the parties, as distinct from terms implied by law. Two general rules shall be applied in case of supplying the omitted or implied terms or obligations of contract: firstly, the parties’ presumptive intent to fill up the gaps of contract shall be understood and observed: this intent concerns the objective ideas of a reasonable third party in position of the parties to contract; secondly, the principle of good faith shall be always carried out.

In South Africa tacit terms could be considered on two grounds. One is the parties’ actual, but unexpressed intention, which can be established from express terms or surrounding circumstances. The other is their imputed or deemed intention, which is determined by verifying that they considered such tacit term as forming part of the contract. Implied terms are not based on the deemed intention of the parties in the circumstances, but a term amounting to a rule of law which the Court will apply unless validly excluded by the contract itself.

Standard terms: There are no specific rules in Brazilian, Russian, Indian and South African law related to the incorporation or interpretation of standard terms in international contracts.

On the contrary, Chinese contract law specifies that when the clause relied on by one party to such a contract can be interpreted in different ways, it shall be interpreted in manner unfavorable to the party who proposes it; if there are different interpretations on the same standard terms, the interpretation against the interests of drafter or provider of the standard terms shall be accepted and applied; in the event of any conflict between standard clauses and non-standard clauses, the latter shall be adopted. However, if the standard terms result from an equal negotiation between parties and expressly agreed by them, the interpretation shall not be made in favor of any party.

4.2 Interpretation—Specific Topics

4.2.1 The Language of the Contract

Q Please indicate the position in your legal system to the interpretation of a contract drafted in more than one language (e.g. does a particular version automatically prevail in the case of discrepancy?; are there exceptions to this rule?; which party bears the burden of proof as to which version prevails?—see Article 4.7).*

Q Please indicate in general terms the approach of your legal system when a contract is drafted in a language with which one or more of the parties is not familiar; e.g. are terms in a foreign language more easily held to be surprising, and hence as not binding? (see Official Comment 3 to Article 2.1.20, including the illustrations there).*

None of the five jurisdictions have mandatory provisions requiring that the contract is drafted in a particular language, or with reference to interpretation when a contract is drafted in more than one language. Parties can make express provisions for the language to be used and the official version that will prevail. This choice will be enforceable, and the interpretation supported by the chosen language will prevail.

In the event that a prevailing language is not chosen by the parties to a multilingual contract, interpreters in Brazil usually tend to apply, as the case allows, the language that is most closely related to the contract.

In Russia where a contract is drawn up in two or more language versions which are equally authoritative there is, in case of discrepancy between the versions, a preference for the interpretation according to a version in which contract was originally drawn up.

In Chinese legal practice, usually, the contracts concerning the foreign interests stipulate that the Chinese version prevails in case of discrepancy between the versions in different languages. In the case that the parties have not reached any agreement on the prevalence between the different versions, all versions of contract produce the same effects.

If a contract is drafted in a language with which one or more of the parties is not familiar, Indian law, as a general rule, maintains that a party cannot avoid any term in a contract merely because he did not understand the language, as he is assumed to know and understand its contents.

Since under the South African common law a party may escape contractual liability due to a material and reasonable mistake, and such a mistake could be the result of a surprising or unexpected term, in principle a term could be so surprising as not to be binding if it is drafted in a foreign language, and bears a meaning which a party may not reasonably be expected to understand. However, there is no direct precedent in point as far as could be established.

There is no specific legal provision under Brazilian law that protects a contracting party from contractual obligations based on his lack of familiarity with the contracting language, provided that the language was freely chosen by the parties. In Chinese law also, there is no specific rule governing the legal effects of contract drafted in a language with which one or more of the parties is not familiar, since the private autonomy shall be observed in this case.

4.2.2 Recitals

Q Please indicate in general terms the approach of your legal system to the relevance of recitals in the interpretation of contracts; we did not define the concept of a recital, but it typically refers to a preliminary statement that sets out the purpose of the contract, for example by stating certain facts, and beginning with the phrase 'whereas ...'; inter alia consider whether the recital may only be referred to as an aid to interpretation in cases of ambiguity, or whether it may automatically be taken into account in such a process.*

Brazil, Russia and China don't have specific provisions with reference to recitals.

In Brazil, recitals can be especially useful for purposes of contract interpretation, determining the true intent of the parties, and identifying the objectives of such agreements, but they cannot be given prevalence over the negotiated terms of a contract.

The Russian reporter states that the legal impact of recitals and their significance for the interpretation of the rest of the contract text would be dependent in the first place on the agreement of the parties to that effect; in the absence of such agreement most probably they would be treated like other terms of the contract, but there is no direct case law on this matter.

The Chinese approach is to consider recitals as an integral part of contract, as they mainly include “signing parties”, “background”, “time”, “place”, etc., all elements that are important for the execution and interpretation of the contract.

In India, recitals in a document set out the purpose of the contract, the background and other important facts, can be used to ascertain the intention of the parties, and to interpret the terms, but are not the terms of the contract.

According to the South African common law, a preamble or recital is generally regarded as subordinate to the operative part or portion of a contract. The implication is that where the operative part is clear and unambiguous, it is to be taken as expressing the intention of the parties, while where the operative part is doubtful, the recitals can be used to explain its meaning.

5 Content of Contracts

5.1 *The Content of Contracts—Overview*

5.1.1 Duties of Parties with Regard to the Operation or Performance of the Contract

Q Please indicate in general terms the approach of your legal system to the following duties that relate to performance of the contract:*

- *duties of co-operation between the parties, especially in the context of long-term contracts; consider whether these duties would include the duty not to hinder the other party (e.g. by failing to provide access to premises to perform work), or would also include duties that require more active-co-operation (see Article 5.1.3, the Official Comment and illustrations, as well as the Vogenauer Commentary pages 621–625; please beware of overlaps with the topic of obtaining public permission in Sect. 3.2.1, where duties of co-operation are also considered); further please indicate how this duty relates to a principle of good faith and fair dealing, inasmuch as the system recognises such a principle;*
- *duties to achieve a certain result, as opposed to the duties of best efforts (Articles 5.1.4 and 5.1.5); inter alia briefly consider whether this distinction is used in your system to assist in determining the obligations of the parties, and what its practical implications are, e.g. whether absence of fault would*

excuse non-performance of a duty to use best efforts, but not a duty to provide a certain result; this distinction would of course not matter if liability for non-performance in your system is generally not fault-based (see Vogenauer Commentary 627–629, and the examples there of arbitral awards dealing with the distinction).

Duty of cooperation: In Brazil, Russia and China the duty of cooperation is seen as an expression of the more general duty to act in good faith.

In particular, Brazilian law considers cooperation between contracting parties as crucial for the development of a fair and balanced contractual relationship. As a result, the duty of cooperation is recognized as one of the secondary duties deriving from the principle of good faith. As such, parties are required to fairly cooperate, regardless of whether or not this duty is expressly required by the contract itself.

Russian law also regards the duty of cooperation as an expression of the more general duty to act in good faith, considering the rights and lawful interests of each other, mutually rendering necessary support for achieving the purpose of the obligation and also providing one another necessary information.

Chinese law considers collaborative performance as the concrete manifestation of the principle of good faith in the field of contract performance, so that the performance of the contract requires mutual cooperation between the two parties.

Indian law leaves it to the parties to decide in their contract about the extent to which cooperation of one party will be required for the performance by the other party. Unless there is an obligation to cooperate expressed in the contract, or implied into the contract, a party can remain passive, and need not do anything. This is because Indian law does not recognize a general obligation of good faith in the performance of a contract and parties must incorporate such obligation expressly in their contract.

South African law traditionally recognizes a duty to co-operate with performance in certain circumstances (and that failure to co-operate could then amount to breach), but it does not clearly recognize that this duty gives expression to the underlying value of good faith. Parties may of course in any event contractually undertake to exercise or observe good faith in the implementation of the contract; however, where no active co-operation is required, a creditor could be under a duty to remain passive, and not to interfere with performance.

Duties to achieve a certain result: Brazilian law distinguishes “result obligations” from “best effort obligations”. Result obligations require a party to deliver or achieve an agreed useful result: if that result is not achieved or delivered by the party then he is presumably liable to pay damages to the creditor, unless the non-performance was not caused by any fault of his own; in result obligations, the burden of proof rests with the party that is responsible for performing the obligation. Conversely, a best effort obligation only requires a party to act with all necessary diligence to obtain an agreed useful result and it does not strictly require of him to actually achieve that result; for disputes involving best effort obligations, the burden of proof rests with the creditor.

The distinction between a duty to achieve a certain result, as opposed to the duties of best efforts, does not traditionally enjoy prominence in South African law.

Nothing has been reported on the subject matter by the Russian, Indian and Chinese reporters.

5.1.2 Obtaining Certainty with Regard to What Has to Be Performed and for What Period

Q Please indicate in general terms the approach of your legal system to the following:*

- *what performance is to be rendered when the quality of performance is neither fixed by nor determinable from the contract (i.e. the required quality cannot be established by normal interpretation); please briefly consider whether performance must meet a particular standard, such as having to be of an ‘average quality’ or fit for a particular purpose (see Article 5.1.6 and Vogenauer Commentary 633–634);*
- *how the price is determined when it is neither fixed or determinable from the contract (see Article 5.1.7; please bear in mind the link with the general requirement of agreement in Article 2.1.1; see Vogenauer Commentary 633–634); and*
- *whether a contract for an indefinite period may be terminated by reasonable notice (Article 5.1.8).*

Quality: Brazilian law does not indicate criteria regarding the quality of performance for obligations in general. Although the quality of performance may not be expressly determined, parties are required to apply the general quality parameters related to a specific kind of contracted performance, considering also the local usages.

The Russian reporter refers only the general principle under which obligations must be performed in a proper manner in accordance with the terms of the obligation and the requirements of a statute, other legal acts, and, in the absence of such terms and requirements, in accordance with customs or other requirements normally made in the same kind of contract.

Under Indian law, if the parties have not described the quality of the performance in their contract, it will be determined from the other circumstances of the contract.

For issues related to quality of performance Chinese contract law says that if a supplementary agreement cannot be reached, the parameters related to the quality of the performance shall be determined in accordance with the relevant provisions of the contract; if the quality requirement remains unclear, performance shall be in accordance with the official standards, failing which performance shall be in accordance with the customary standard or any particular standard consistent with the purpose of the contract.

The South African reporter states that issues related to quality of performance are normally solved through the application of the rules of interpretation. Specific rules or implied terms could also determine the quality of performance required for specific types of contracts.

Price: The Brazilian Civil Code allows parties to enter into a contract without fixing a specific price, provided that they instead establish parameters that will allow its objective determination; if the parties do not fix the price or provide general parameters for its determination, in the absence of any official tabulation of prices, the price will be calculated as the current price generally applied by the seller, and if the seller applies different prices, an average amount will be used. Furthermore, the parties may agree that the price will be fixed by a third person, but if the third person chosen by the parties does not agree to this responsibility, the contract shall have no effect unless the parties agree on another third person to take their place. If the parties do not fix the price for service contracts, it shall be determined in accordance with the usage of the place, and the period and quality of the service. In Brazil and India a sales contract is null and void if the determination of the price is left to the exclusive discretion of one contracting party.

In Russia the performance of a contract is completed through payment of the price established in the agreement by the parties. Nothing is reported for the cases when price is not determined by the parties.

In Indian law, if parties have made provision for the amount and the mode and time for payment of price, it must be paid accordingly. Parties may fix the price at the time of their contract or may agree about the manner in which it will be determined. The price may be left to be decided by a third party, and in such a case, if the third party fails to fix the price, it will be decided by the court. If price is neither fixed, nor can it be determined, the buyer must pay a reasonable price.

According to the Chinese Contract Law, the remedy in the event of an unclear price or remuneration is similar to the remedy that applies if the quality is unclear. If a supplementary agreement cannot be reached, such terms shall be determined in accordance with the relevant provisions of the contract or the transaction practices. If the price or remuneration still remains unclear, 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.

If the price is neither fixed nor determinable (e.g. by way of an internal mechanism such as an escalation clause, or with reference to an external market price of a specified commodity, or through a determination by a third party), South African law would only in some circumstances, such as the conclusion of an agreement to perform services, recognize that the contract is for a reasonable price. Where a party has the discretion to determine another party's performance, such a discretion has to be exercised reasonably.

Duration of contract: In Brazilian law, if a contract provides for indefinite duration, parties commonly agree to a minimum notice requirement for termination; if no minimum term is established in the contract, a party is only allowed to unilaterally

terminate the contract where the law expressly or impliedly permits it. In cases where termination is permitted by law, the contract will terminate once the notice of termination reaches the other party, and no minimum notice requirement applies unless otherwise expressly required by law.

Indian law provides that determining when a contract which makes no provision for its termination is perpetual, or may nevertheless be terminated by notice, depends on its interpretation according to the common intention of the parties. The preference is to avoid binding parties permanently to their contract, unless such an intention is express, or it can be clearly implied from the other terms of the contract. If the contract provides for termination by notice but it does not prescribe any notice period, it is implied that the notice shall be reasonable.

In South Africa also, the consequences of an agreement being of an indefinite or unstated duration are determined by interpreting the agreement. One (rather unlikely) possible consequence is that the parties intended that it should continue in perpetuity. Alternatively, interpreting the contract could reveal that the contract is intended to be terminable on reasonable notice, or would lapse after a reasonable time.

In China, if the duration of contract is not determinable in any way, each of the parties is entitled to terminate the contract at any moment, provided a notice for resolution is served to the counterparty in advance granting a reasonable time lapse for the contract termination.

In Russia the Civil Code does not contain general rules concerning termination of contracts with indefinite period of time. In such situations the courts would likely base the decision applying the principles of good faith and reasonableness.

5.1.3 Conditions

Q Please indicate in general the approach of your legal system to terms that makes a contract or contractual obligation conditional on the occurrence of an uncertain future event (see Article 5.3.1; on the various meanings of 'condition' in civil law and common law systems see Rowan in Vogenauer Commentary page 693); please inter alia consider the following:*

- *the effect of a condition which determines that the contract or term only takes effect if the uncertain future event occurs (i.e. a suspensive condition—see Article 5.3.2(a));*
- *the effect of a condition which determines that the contract or term comes to an end if the uncertain future event does occur (i.e. a resolutive condition—see Articles 5.3.2(b) and 5.3.5);*
- *the consequences if a party interferes with a condition (Article 5.3.3), and the consequences if a party, pending the condition, acts in a way which prejudices the other's party's rights in case of fulfilment of the condition*

(Article 5.3.4—e.g. where a seller of shares in a business under a conditional sale acts in way which prejudices the business).

All five jurisdictions recognize two types of conditions, namely a condition precedent (suspensive condition) and a condition subsequent (resolutive conditions). A suspensive condition subjects the acquisition of the right/effectiveness of a clause to the occurrence of a future event. By contrast, a resolutive condition is one in which the relevant right is already acquired, or a clause is already given legal effect, and the right/clause can be enforced until the occurrence of a future event, at which point it is extinguished. Conditions shall not be contrary to the law, public policy or to the general usages.

With reference to the interference of the party, in all five jurisdictions neither the holder of a right subject to a condition nor any other interested party is permitted to act maliciously in order to either prevent or cause the occurrence of a condition. In these cases, the condition is deemed to have occurred if the disadvantaged party intentionally acts to prevent its occurrence, or to have not occurred if the condition was fulfilled due to an intentional act of the favored party.

5.2 The Content of Contracts—Specific Topics

5.2.1 Warranties

Q Please indicate in general the approach of your legal system to the operation and effect of warranties; we did not in detail consider the meaning of a ‘warranty’, but taking general definitions into account, we could regard it as a contractual undertaking, arising by agreement or law, that something is true or that a certain state of affairs exists (e.g. that goods or services are of a certain quality); the parties or the law may then impose particular forms of liability in the event of non-compliance with such warranty. The PICC Commentary does not define a warranty but at least regards it as conceptually distinct from the condition in the sense used in Sect. 5.1.3, inasmuch as a warranty does not relate to an uncertain future event (see Article 5.3.1 Official Comment 5).*

Despite a different approach in the identification of warranties, there seems to be a general agreement that parties may conclude a contractual undertaking that something is true or that a certain state of affairs exists, and that certain consequences ensue from breach of the undertaking, at least in terms of compensation of the damages/losses suffered by the aggrieved party.

Brazilian law does not provide for a definition or specific provisions regarding warranty clauses (“warranties and representations”). Although warranty clauses are not governed by any specific regulation under Brazilian law, they clearly derive from the duty to observe good faith in the performance of a contract. Therefore, warranty clauses are considered ancillary provisions of the contract, which must be complied with by the parties regardless of any express provisions. Providing false information or violating these clauses may amount to a contractual breach, entitling the affected party to damages.

The Russian Civil Code regulates the legal effects of a contractual undertaking arising by agreement that something is true or that a certain state of affairs exists, in other words the “warranties and representations”, named in the Russian Civil Code as “assurances on circumstances”. A party that on the conclusion of a contract or before or after its conclusion gave the other party inaccurate assurances on circumstances having significance for the conclusion of a contract, its performance or its termination shall have the duty to compensate the other party on its demand for the losses caused by the inaccuracy of such assurances, or to pay the penalty provided by the contract. The party who relied on the inaccurate representation has also the right to cancel the contract unless otherwise provided by agreement of the parties.

Indian law recognizes the distinction between a representation and a warranty, the latter being considered as a term of the contract. A representation merely induces the addressee to enter into the contract. A warranty is a contractual promise that states that a fact is true or that a state of affairs exists. In case of breach, the other party is entitled to remedies for breach; in particular, the aggrieved party can ask for compensation. Whether a statement in a contract amounted to a representation or a term would be a matter of construction of that statement; however, the parties’ express classification in the contract will be relevant in deciding the effect of the statement.

Under Chinese law warranties can arise by agreement or by law. Chinese Contract Law imposes a general duty on a transferor of a right to warranty that no third party shall claim rights against the transferee over the right transferred, unless otherwise provided by law. In case of breach, the transferee has the right to ask the transferor to deal with such claim, reduce the price or the other kinds of consideration, and to demand compensation for the damages he has suffered, or the payment of the penalty should a penalty clauses for such liability exist. In case that the main purpose of the contract fails to be realized, the transferee has also the right to resolve the contract unilaterally.

In South African law warranties could arise from the actual or deemed consent of the parties and be contained in express or tacit terms. Like in India, the consequences of breach of a contractual warranty are that the holder is entitled to remedies arising from breach of contract. The remedies available against such a party in breach include: cancellation or termination in the event of a material breach, followed by restitution; a claim for damages aimed at putting the holder in the position such a person would have been in had there been no breach of the warranty; and a claim of specific performance, aimed at enforcing the warranty, except when performance is impossible.

5.2.2 Indemnification

Q Please indicate in general terms the approach of your legal system to the operation and effect of indemnifications; we did not in detail consider the meaning of the term 'indemnification', but taking general definitions into account, we could regard it as a contractual undertaking to compensate another for loss or damage (e.g. an undertaking of liability to compensate losses caused by employees, subcontractors or (other) third parties).*

Indemnification clauses are not governed by any specific regulation in Brazilian law. Indemnification clauses are also regarded as ancillary provisions under Brazilian law, especially because the obligations contained in these provisions are independently legally enforceable, regardless of what is specifically provided for in a contract, as there are nevertheless several provisions within the Brazilian Civil Code that already contain the obligations that are created by indemnification clauses. Therefore, the insertion of indemnification clauses into contracts governed by Brazilian law is, at least in principle, unnecessary, as the objective of these clauses in contracts governed by Brazilian law is not to create the obligation to indemnify, but rather to emphasize it, or to reallocate compensation duties among the parties, which is permitted under the principle of party autonomy.

The Russian Civil Code provides that the parties to an obligation related to a commercial activity may, by their agreement, provide for the duty of one party to compensate for property losses of the other party that have arisen in case of the occurrence of circumstances defined in such agreement and not connected with a violation of an obligation by a party thereto. The Civil Code does not identify which kind of losses can be compensated. The agreement of the parties must define the amount of compensation for such losses or the manner of determining the amount. Such losses must be compensated, regardless of whether it is declared that the contract was not concluded or was invalid unless otherwise provided by agreement of the parties. The claimant must prove that it actually incurred the costs indemnified or will inevitably incur them in future and that there is a causal link between the circumstance stated in the contract and the reimbursement of the amount. Courts cannot reduce the amount of compensation indicated for the losses.

In Indian law, an indemnity clause is one under which the indemnifier undertakes an original and independent obligation to pay for the loss or liability which the indemnity-holder has incurred or suffered. The obligation to indemnify may arise out of a contract of indemnity, express or implied, or from an obligation resulting from the relation between the parties, or by statute. The scope, extent and limit of liability under an indemnity depends on the nature and terms of the contract.

Under South African law, to establish if a clause is an indemnity clause and the exact nature of the loss or damage covered by an indemnity clause is a matter of interpretation. And indemnity clause shall not be illegal, which means it shall not be contrary to public policy under the common law or contrary to legislation.

The Chinese response to the question focuses on the limits to indemnification (to be dealt with in Sect. 7.2.1 as exclusionary clause), and reports that it is admissible for the parties to determine a cap on liability according to the contract or/and to set forth the clauses to exclude the indemnification of indirect damage. However, this freedom of contract is limited, as such clauses cannot be against public policy, morality and mandatory law.

6 Performance of a Contract

6.1 Performance of a Contract—Overview

6.1.1 Performance in General

Q Please indicate in general terms the approach of your legal system to the following issues relating to when a contract is to be performed:*

- *how the time of performance is established (Articles 6.1.1–6.1.2); in this regard also consider any rules on the sequence of performance where obligations to perform are reciprocal (see Article 6.1.4 and Atamer Vogenauer Commentary page 736);*
- *to what extent a creditor (obligee) may reject an offer to perform only in part at the time when performance is due (Article 6.1.3), or may reject an earlier performance (Article 6.1.5).*

Q Please indicate in general terms the approach of your legal system to determining where a contract is to be performed (Article 6.1.6).*

Q Please indicate in general terms the approach of your legal system to the following issues relating to how a contract is to be performed:*

- *how monetary obligations are to be performed, i.e. how payment is to be made; this includes what instruments or methods to transfer funds may be used (see Articles 6.1.7–6.1.8), and in what currency payment is to be made (see Articles 6.1.9–6.1.10);*
- *how the costs of performance are allocated (see Article 6.1.11);*

- *how, where a debtor (obligor) owes several obligations to the same creditor, it is determined to which obligation a particular performance is to be applied (or ‘imputed’)* (Articles 6.1.12–6.1.13).

Time of performance: There is a general agreement that, first of all, performance shall be made at the time agreed by the parties and indicated in the contract or in any applicable piece of legislation. There is, however, a difference in the principle to be followed if no stipulation is made by the parties.

In Brazil and South Africa, the general rule is that the obligations are enforceable immediately after the conclusion of the contract. In the Brazilian Civil Code such rule is limited, however, by the nature of the obligation, as well as by public policy provisions and common usages, which means that a creditor will not be entitled to require performance if the obligation cannot feasibly be performed immediately. In South Africa the general rule is mitigated by the principle that performance cannot be demanded unreasonably so as to defeat the objects of the contract or to allow an insufficient time for compliance; then, the debtor shall have a reasonable period in which to perform. Since it may be unclear what such a reasonable period could be, the creditor has to give a notice to the debtor indicating by what moment performance is expected; it is only when the debtor does not perform by that moment that the debtor commits breach of contract.

The criterion of reasonableness is also applied in Indian law, as if no time is specified for performance of any promise, that promise must be performed within reasonable time. What amounts to a reasonable time is a question of fact decided case by case. The Indian reporter added that if the time of performance is indicated, and the debtor fails to perform it at that time, the creditor is entitled to compensation for non-performance. However, the non-performance does not end the contract, since if the debtor offers performance after the specified time, the creditor is bound to accept the performance, being otherwise liable for compensation for non-acceptance. Indeed, the creditor is only entitled to terminate the contract for the debtor's failure to perform on the agreed time, if it appears to be the intention of parties that time of performance is of the essence of the contract, which is a fact to be decided with reference to all facts and circumstances of the case. Moreover, if indeed time is of the essence, and the creditor has not terminated the agreement, he cannot refuse to accept performance tendered by the debtor; by accepting it he loses his right of compensation unless he has asserted his claim while accepting performance.

The Russian Civil Code provides that if the contract does not provide a time period for performance and does not contain terms making possible the determination of this time period, and likewise when the time period of performance coincides with the time when the performance is demanded, the obligation must be performed in the course of seven days from the day that the creditor demands performance. If the creditor does not request within a reasonable period of time the performance of the obligation, the debtor shall have the right to demand from the creditor to accept the performance.

With reference to rules on the sequence of performance, there is no specific provision in Brazilian law about reciprocal and simultaneous obligations.

A common principle in Russia, India, China and South Africa—that could be also easily extended to Brazil which also recognizes *pacta sunt servanda* as a general principle—is that when a specified order has been established by the parties, it shall be followed. The Indian and South African reporters added that if the sequence is not expressly indicated, then the obligations must be performed in the order that the nature of the contract requires.

Another common principle reported by India, China and South Africa is that if the obligations shall be performed simultaneously, neither party shall perform unless the other is ready and willing to perform his obligation, and when a party claims performance, the other may raise the defense that the one claiming performance should perform first or tender performance.

As to the partial or earlier performance, some common paths can be detected. In line with their support of the general principle that the debtor must perform fully when the time for performance has been reached, Brazil, Russia, India and South Africa maintain that if the partial performance does not entail the total frustration of the contract, the creditor may accept performance, but is not bound to do so. However, the Brazilian reporter added that the nature of an obligation and the importance conferred by the parties on the time for performance will also determine whether or not a creditor may reject partial performance.

A similar principle is applied in Brazil in cases of early performance. If performance of an obligation on a certain date is of the essence, and the time for performance was fixed for the creditor's benefit, then the creditor may reject an early performance. If, however, the time for performance is fixed for the benefit of the debtor, then the debtor is permitted to perform the obligation at any point up to the agreed upon date for performance without the possibility of rejection by the creditor.

In Russian law the debtor has the right to perform an obligation in advance. Similarly, in South Africa, when a future date has been fixed for payment, the debtor can pay earlier, unless otherwise agreed.

Under Indian law, the creditor may accept delivery or payment before or after the specified time. A creditor can also decline to receive payment in instalments if this is not expressly provided in the contract. In South Africa, when the time for performance is indicated as a period, rather than a specific moment, the debtor presumably must perform at one time, rather than in instalments, which would be more onerous to the creditor.

From the Chinese report we understand that when the parties do not agree upon the time of performance or the agreement is unclear, or the time cannot be determined by supplementary agreement or by related clauses or custom, then the debtor may perform, and the creditor may require performance, at any time, provided that the other party shall be given the time required for preparation.

Place of performance: There is a general agreement that, first of all, performance shall be made at the place agreed by the parties and indicated in the contract.

Where the parties have not agreed on a specific place for performance, in Russia, India, China and South Africa monetary obligations must be performed at the creditor's place of business. Under Brazilian law, regardless of the nature of the obligation (monetary or not), the general rule is that the obligation must be performed at the debtor's place of business.

In Russia, if the place of performance of an obligation is not defined by the law or contract or is not determined by usages or the nature of the obligation, performance must be made at the debtor's place of business. In Indian law, if parties have not fixed a place for performance, the debtor must request the creditor to indicate the place and perform the obligation at that place. Failing the determination of the parties, the place of performance must be determined according to the circumstances.

South African law maintains that if the contract does not determine the place of performance, it must be determined according to the circumstances; there is no general default rule, for example that the creditor must obtain performance at the debtor's premises, or that the debtor must perform at the creditor's premises.

In the Brazilian Civil Code, if the contract provides for two or more places for performance, then the creditor has the right to choose the place for performance that he prefers.

According to the Russian Civil Code, obligations of an entrepreneur to transfer goods or other property shall be performed at the place of manufacture or storage of the property or at the place of submission of the property to the first carrier, if carriage is involved.

In Chinese law, performance related to transfer of goods must be done at the place where the goods transferred are located.

Manner of performance: As far as the form of payment is concerned, Brazilian and Indian laws do not provide any general rules regarding the form of payment for monetary obligations, and parties are free to choose the form of payment, the currency of payment and exchange rate, as long as it is permitted by law. The Brazilian Civil Code, however, is very restrictive regarding permissible currencies for payment obligations, and requires that any monetary obligations performed in Brazil must be paid in national currency.

The Indian and South African reporters specified that payment must be offered in the manner expressly or impliedly agreed in the contract. But the creditor can request or accept a different manner, or time of payment, and with the performance the debtor is discharged irrespective of the different indications in the contract. In China, if the performance of the obligation by the party who is performing is not in conformity with the agreement, the other party may refuse the performance, except when the incorrect or partial performance is not detrimental for him. Moreover, if the performance of the obligations of the party who is to perform first is not in conformity with the agreement, the party who shall perform later has the right to reject the other party's demand for corresponding performance. Finally, if the manner of performance of contract is unclear, the obligations shall be performed in a manner which is suitable to realize the purpose of the contract.

In all five jurisdictions parties are free to allocate the costs of performance of the obligations. However, different approaches are followed if the parties refrain from making such choice.

In Brazil, the costs involved in the performance of obligations are presumed to be borne by the debtor; if, however, an increase in such costs is attributable to the creditor, then the creditor will be responsible for the cost of that increase.

Unless agreed otherwise, in Indian, Chinese and South African law each party must bear the cost of his own performance. Chinese law has a separate system for the increased performance costs: if they are due to the creditor, as when the creditor delays in accepting performance, they shall be borne by the creditor; if they are due to the debtor, as when the debtor partially performs or performs in advance, such costs shall be borne by the debtor.

Regarding the allocation or imputation of payments—which occurs when a debtor owes two or more obligations to the same creditor (whether monetary or otherwise)—there is a general understanding that if the debtor specifies the obligation to which the performance is allocated, effect is given to such a determination. If the debtor does not specify the debts to which the payment should be applied, the position in Brazil, India and South Africa is that the creditor may apply the payment to any of the debtor's obligations (in India even if the debt is barred by limitation).

If neither the debtor nor the creditor made such an imputation, the rule on legal imputation under Brazilian law is that the payment will be applied to those obligations which first became payable and matured. However, if all obligations became payable and matured at the same time, then the payment will be imputed to the most burdensome obligation. In India, the payment is applied to debts in order of time, even if barred by limitation. In South Africa, an enforceable debt is extinguished before an unenforceable one and, as between enforceable debts, that the more onerous debt is extinguished first; older debts are settled before more recent ones. Where none of the specific rules applies, the various debts are settled proportionally.

Finally, if the obligation involves a principal amount and the accrual of interest, in Brazil, China, India and South Africa the payment will be credited first to the interest charges and then to the principal amount. In Brazil, this happens unless otherwise stipulated or the creditor issues a discharge regarding the principal amount. In China, before interest the expenses related to fulfillment of the obligation are first paid.

The Chinese system contains some of the criteria already indicated for the other jurisdictions. When the debtor's payment is insufficient to pay off all the debts of the same kind, the debt that has already expired will be first paid; if several debts are due at the same time, priority is given to the most secured debt; if debts are equally secured, priority is given to debts with a heavier burden; if the burden is the same, the debts are paid in the time order of expiration; if the debts will expire at same time, they shall be paid proportionally, unless the creditor and the debtor agree otherwise.

6.1.2 Hardship

Q Please indicate in general terms the approach of your legal system to the effect of 'hardship', which occurs when, after conclusion of the contract, events fundamentally alter the equilibrium of the contract due to increase in the costs of performance or decreases in the value of performances received (see Articles 6.2.1–6.2.3); inter alia consider to what extent the availability of relief depends on the foreseeability of the events, on whether the events could have been prevented, and on whether the risk of the events was assumed by a party; further consider whether hardship could give rise to a right to request negotiations or to withhold performance, and whether courts could adapt or invalidate the contract.*

There is a general consensus on the fact that hardship can be invoked if the situation giving rise to the hardship has arisen after the conclusion of the contract (a supervening circumstance), the parties could not have been foreseen it at the time of the conclusion of the contract, and such situation fundamentally alters the equilibrium of a contract resulting in an excessive burden being placed on one of the parties involved. Termination (or renegotiation) of the contract must be sought in court, which by extension implies the failure of the parties to achieve a consensual agreement regarding termination or renegotiation.

Brazilian law requires that the contract must be a long-term contract, and due to the emphasis in Brazilian law on the preservation of the contract, hardship situations are considered very strictly, especially in cases where contract termination is sought. In particular an extremely serious imbalance must exist, and that the supervening causes must be truly extraordinary and unforeseeable at the time of contracting.

Russian rules on hardship add that a change of circumstances shall be considered substantial when they have changed to the extent that, if the parties could have reasonably foreseen this, the contract would not have been concluded by them at all or would have been concluded on significantly different terms.

In Indian law, in general, events that do not determine a fundamental alteration in the equilibrium of a contract, but a simple difficulty do not excuse performance, unless parties have agreed so.

In Chinese law hardship exists when it makes the performance of contract obviously unfair or unable to fulfill the purpose of contract, other than when the fairness of contract is heavily damaged.

7 Non-performance (Breach of Contract)

7.1 Non-performance (Breach of Contract)—Overview

7.1.1 Non-performance in General (Chapter 7 PICC Section 1 = Articles 7.1.1 to 7.1.7)

Q Please indicate in general terms the approach of your legal system to what constitutes non-performance or breach of contract, in the sense of a failure by a party to perform a contractual obligation (see Article 7.1.1); for example, does it recognise a ‘unitary’ concept of non-performance or breach of contract, or does it recognise various types of breach, such as a failure to perform on time, a failure to render proper performance, anticipatory breach, etc.?*

Q Please indicate in general terms the approach of your legal system to the effect of the following circumstances on a creditor’s (obligee’s) ability to rely on non-performance to invoke contractual remedies:*

- *where the creditor (obligee) caused the debtor’s (obligor’s) non-performance (see Article 7.1.2; it may be that in some systems this issue would have been dealt with under the previous question, as a form of breach, i.e. mora creditoris in civil law);*
- *where the creditor (obligee) is party to a reciprocal contract and the debtor (obligor) is withholding performance to induce the creditor to perform an obligation which it in turn owes to the debtor first (i.e. the other party invokes the exceptio non adimpleti contractus of civil law—see Article 7.1.3; inter alia indicate the consequences if there has been partial performance, but the other party still withholds performance);*
- *where the non-performing debtor (obligor) has indicated a willingness to cure non-performance. i.e. asks for a ‘second chance’ (see Article 7.1.4);*
- *where the creditor (obligee) who is aggrieved by non-performance has given the debtor (obligor) an additional period for performance (see Article 7.1.5).*

Non-performance in general: In Brazil, Russia and China breach of contract exists when an obligation is not fulfilled by the debtor as indicated in the contract. This definition is very broad to include breaches of both positive and negative obligations.

In Brazilian and Russian law, the concept of breach comprises breaches of both positive and negative obligations. The Brazilian Civil Code provides that for positive obligations the time at which a party is considered in breach is on the maturity date. Conversely, for negative obligations the breach occurs at the time when the party performs an act from which it should have abstained. A party is in breach when he

does not perform an obligation (if the party is the debtor) or refuses to accept/receive such performance (if the party is the creditor) in accordance with the time, place or form established by the law or by the contract. The Russian Civil Code distinguishes breach of the contract as arising from the delay of the debtor and the delay of the creditor. Almost all rules relating to regulation of the consequences of the breach of contract have a dispositive nature and a very limited number of mandatory rules apply in this field.

Under Chinese law the debtor still bears liability for breach even if such breach is attributable to a third party.

Conversely, Indian and South African law identify the events which constitute breach of contract. In India consequences of breach can differ. Both reporters identified the followings as acts of breach:

- (i) a failure to meet the standard of performance as agreed in the contract ('positive malperformance' in South African law);
- (ii) a failure of a debtor to perform on time (*mora debitoris* or 'negative malperformance' in South African law);
- (iii) a failure by a creditor to provide the co-operation necessary to ensure performance by the debtor or, more in general doing an act which the creditor should abstain from doing (*mora creditoris* in South African law);
- (iv) refusal to perform before or after the date for performance (repudiation of obligations in South African law);
- (v) preventing the other party from performance or making it impossible.

In the event of a breach, the five jurisdictions agree that the debtor will be liable to compensate the creditor for the losses/damages caused by the non-performance or incorrect performance of the obligation.

In case of violation by the debtor of an obligation to refrain from the taking of a defined action (a negative obligation, and also in the case of appearance of an actual threat of violation of such obligation), under Russian law the creditor shall have the right to demand the cessation of the action if this does not contradict the nature of the obligation, and such remedy does not exclude a claim for damages.

Despite the different approach indicated, the positions in the five jurisdictions are ultimately converging on the general idea of breach as non-fulfilment or improper fulfilment of contractual obligations, which can be committed either by the debtor or by the creditor, and that generates the duty of compensation of damages/losses generated together or alternatively to other remedies available in each jurisdiction.

Mora creditoris: In all the five jurisdictions the non-performance of his obligation by the debtor does not constitute breach if it is due to the failure by the creditor to co-operate with performance by refusing to accept proper performance tendered by the debtor in the form, place or manner stipulated by the contract, or by refusing to take the actions provided by the contract or the law.

With regard to the consequences, the Brazilian and Chinese reporters mention that the debtor is relieved of any obligation to preserve the goods, with the addition by the Chinese reporter that the risk of damage or loss of the subject matter shall

be transferred to the creditor, and in case of loss of the goods the debtor will be freed from the fulfilment of his obligation. Both the Chinese and the South African reporters mention that the creditor is still liable for counter-performance. However, in China the creditor's fault serves to limit the debtor's liability, while in South Africa the debtor is discharged from liability if performance is no longer possible.

Furthermore, the Brazilian Civil Code also explains, within the legal consequences of a creditor's refusal to accept payment in conformity with the contract, that if the value changes between the date of performance and date on which payment is actually received by the creditor, then the creditor is obligated to accept payment based on the value that is more favorable to the debtor.

The Russian Civil Code provides that the delay caused by the creditor shall give the debtor the right to compensation for the losses caused by the delay, unless the creditor proves that the delay occurred due to circumstances for which he is not liable.

Finally, Chinese Contract Law provides that the creditor's delayed acceptance does not generate—in principle—the right of termination, but the creditor shall compensate the debtor for any increased cost, while the debtor is not liable to pay interests.

Exceptio non adimpleti contractus: Here the reports seem to diverge, even if in all jurisdictions the *exceptio non adimpleti contractus* can be advanced in case of existence of simultaneous obligations owed by both parties to the contract.

The Brazilian Civil Code has an abstention approach, in that it requires each party to abstain from claiming performance from the other until it has satisfied its own contractual obligations. However, the mere existence of simultaneous obligations owed by both parties to the contract is, by itself, an insufficient basis for the *exceptio* to be claimed. There must also be a reciprocity, interdependence, correspondence between the obligations owed by the parties in order to prevent either party from demanding performance from the other. This direct correspondence and reciprocity are also required for cases involving partial performance of an obligation. Since the obligations must be related, the aggrieved party is not obliged to execute the performance to the extent that it corresponds to the unfulfilled obligation owed by the other party, and the remaining contractual provisions will still be considered valid and enforceable.

Under Indian law a creditor cannot claim contractual remedies for non-performance by the debtor if the creditor is not ready and willing to perform his own reciprocal obligation of simultaneous performance or has not performed his obligation that must be performed first before claiming the other party's performance.

Regarding the defense of non-performance of contract (*exceptio non adimpleti contractus*), in Chinese law a party to a bilateral contract may refuse to perform his own obligation before the other party fails to perform his one, and the exercise of the *exceptio* precludes the delay in performance. On the subject matter Chinese law distinguishes the right to raise the defense simultaneously and the right to raise the defense following the order of performance of the obligations of both parties. The former is based on the fact that there is no priority for the performance of the

obligations of both parties, while the latter is based on the fact that one party shall perform the obligation first according to the law or to an express or implied agreement between the parties.

In South Africa a party to a reciprocal contract may at times withhold his or her own performance to induce the other side to perform their obligations (i.e. invoke the *exceptio non adimpleti contractus*). A creditor may therefore be prevented from claiming performance by a debtor if the creditor is obliged to perform first, or at least to tender performance.

The Russian Civil Code provides the following rules concerning reciprocal performance of an obligation. In case of non-performance of the contractual obligation by the one of the parties, the party upon which the reciprocal performance lies has the right to suspend performance of its obligation or to refuse to perform this obligation and to demand compensation for losses. Neither party to a contract where reciprocal performance is provided shall have the right to demand performance in court without having made his performance available to the other party.

Cure of non-performance by the debtor: While in Brazil, China and South Africa cure of non-performance by the debtor is only a possibility, since the creditor is not bound to accept the debtor's request in this respect, in India the debtor is not debarred from offering performance where he has failed to perform in time, since the creditor is bound to accept delayed performance offered by the debtor unless the creditor has rescinded the contract.

The Brazilian Civil Code provides for the general rule that a breach can usually be cured by either party. Specifically, a debtor may cure its breach by spontaneously offering the performance of the obligation, plus the amount of losses incurred by the creditor up to the date of such offer, but the performance must still be useful to the creditor even after the breach in order for cure by the debtor to be permissible and performance must still be objectively and subjectively possible. Similarly, a creditor may cure his breach by spontaneously offering to accept the payment, but he will remain liable for damages caused to the debtor through the breach up to the date when the offer is made.

Russian Law does not share the concept that a non-performing debtor may "cure" non-performance.

In India the debtor cannot offer to cure his defective performance, unless the creditor agrees to accept such cure.

Chinese law, however, requires creditors to choose the most appropriate relief, having regard to the contract and the size of the loss. Therefore, in certain circumstances, especially if the default is extremely minor, it may not be acceptable for the creditor to reject the debtor's request for curing non-performance. If the debtor chooses to accept the request for the cure of non-performance, it shall not be regarded as a waiver of other liabilities for breach of contract. In particular, damages that are not eliminated by the cure of non-performance can still be claimed.

Additional period for performance: Brazilian and Russian law do not provide specific rules for the situation where an aggrieved party by notice allows the party in breach an additional period to perform.

Under Indian law the creditor may give more time to the debtor, or remit or dispense with performance or any part of the performance before breach. When he does so, the original obligation is discharged. When the creditor allows more time, or dispenses with any performance after breach, the breach to that extent stands waived by the creditor.

Under Chinese law, if the creditor gives additional period for performance by notification, the creditor can terminate the contract when the additional period expires, and the debtor does not yet perform his main duties. However, this period shall be “reasonable”.

In South Africa an aggrieved party who gives such a notice presumably by implication temporarily waives or undertakes not to invoke any right to cancel or terminate the contract due to breach, or to seek an order of specific performance.

7.1.2 The Right to Specific Performance (Whether Monetary or Non-Monetary Obligations) (Chapter 7 PICC Section 2 = Articles 7.2.1–7.2.5)

Q Please indicate in general terms the approach of your legal system to claiming performance of an obligation (whether of a monetary or non-monetary nature); in your answer please inter alia deal with the following:*

- *what factors may be relevant when it has to be determined whether performance may be ordered (see Article 7.2.2); please avoid overlapping with the answers to the sections on hardship (6.1.2) and force majeure (7.2.2);*
- *whether the right to performance includes the right to require repair, replacement or another cure of the defective performance (Article 7.2.3); and*
- *what the consequences are when a party does not comply with an order of specific performance (Articles 7.2.4–7.2.5).*

A common approach to specific performance is followed in all five jurisdictions. This remedy represents one of the remedies to which the creditor may resort in alternative with other possible remedies. In Brazil and Russia these other remedies could take the form of the termination of the contract, in South Africa specific performance is an alternative remedy to termination (cancellation) and damages, while in China it is juxtaposed with continued performance, compensation for damage, claim of compensation for breach and other remedies. Until October 2018, in India specific performance was an exceptional remedy that courts could grant on a discretionary basis where compensation was either inadequate or was unascertainable. After October 2018, specific performance is neither exceptional, nor discretionary, in Indian law.

In particular, the Brazilian reporter specified that the determination of whether to claim specific performance or termination of the contract will depend on the type of breach involved. Specific performance is available in cases involving relatively minor breaches, where neither the object of the performance, nor the interest of the aggrieved party has been extinguished. The Brazilian Civil Code does not specify the manner of specific performance that a creditor (aggrieved party) may seek in the event of a breach. This broader scope of the available types of specific performance is designed to achieve the same practical result which would have been obtained if the obligation had been fulfilled in accordance with the contract. The choice of possible performances, as well as the decision to seek either specific performance or termination, lies in the sole discretion of the aggrieved party, since it is his/her interest at issue. Accordingly, the debtor (party in breach) must comply with the creditor's decision.

In Chinese law right of claim of performance does not have priority as a remedy, and when the law stipulates specific remedies, or in the event of hardship, the creditor's right to claim for performance shall be excluded. Moreover, for non-monetary debts, the creditor is precluded from asserting his right of obtaining the specific performance when it is impossible for the debtor to perform his obligation, when the subject matter of the obligation is unsuitable for compulsory performance or the performance expenses are excessively high, and when the creditor does not require performance within a reasonable period.

In South African law courts have a broad discretion to refuse a claim for performance that, in principle, includes the right to require repair, replacement or another cure of the defective performance.

With regard to the consequences when a party does not comply with an order of specific performance, Brazilian and Russian law grant the creditor the right to claim a monetary amount from the breaching party in case of non-compliance with an order of specific performance, an amount that in Brazil is calculated for each day of non-compliance, and in Russia is determined by the court.

In Indian law an order of specific performance can be enforced by an appointee of the court, who directly performs the decree, or by orders of a civil nature that will deter the debtor from disobedience (civil detention). The executing court has the powers to order that the performance shall be carried out by the creditor/decreed-holder through a third party at the cost of the debtor.

With reference to the consequences of the debtor's non-performance of an order of specific performance in Chinese law, the principle to be followed is that the creditor can demand the court to order that a third party performs the obligation on behalf of the debtor who shall bear the costs related to the third party's performance.

The consequences of not complying with an order of specific performance issued by a South African court depend on the nature of the obligation. It is doubtful whether courts may order that the party in breach pays the aggrieved party a penalty or punitive damages upon non-compliance with its orders, as an indirect means of enforcement.

7.1.3 The Right to Terminate a Contract Due to Non-performance (Chapter 7 PICC Section 3 = Articles 7.3.1 to 7.3.7)

Q Please indicate in general terms the approach of your legal system to termination by an aggrieved party of a contract due to non-performance by the other party; in your answer please inter alia deal with the following:*

- *when the right to terminate arises (see Article 7.3.1); especially indicate whether it arises in cases of anticipatory breach (see Article 7.3.3), or a failure to provide assurances (see Article 7.3.4);*
- *how the right to terminate is exercised (see Article 7.3.2); and*
- *the effects of exercising the right to terminate (see Articles 7.3.5–7.3.7).*

When the right to terminate arises: In Brazil, Russia, China and South Africa the right to terminate the contract arises from a substantial breach of the contract by the other party that renders the performance not useful and convenient to the creditor, even if the debtor spontaneously offers to cure. The right to terminate could also arise from a supervening impossibility of the performance if the impossibility was caused by a circumstance that arose after the entering into force of the contract for which none of the parties is liable. South African law also adds the following circumstances: if a debtor fails to perform on time, the creditor may cancel the contract if, on the facts, ‘time is of the essence’; however, a creditor may ‘make’ time of the essence by way of a notice of rescission, which indicates that the creditor will have the right to cancel if the debtor does not perform within a specified period, which must be reasonable. Similar principles also apply if the creditor fails to co-operate with performance: the debtor will be entitled to cancel if time is of the essence, or if the creditor did not comply with the debtor’s notice of rescission. Failure to perform the contract and preventing the other party from performing his obligation are grounds for termination of contract also under the Indian Contract Act.

Under Chinese termination of the contract can be caused by the following events:

- (1) supervening impossibility of performance for which none of the parties is liable (not directly, but with prior notice);
- (2) anticipatory breach of contract before the expiration of performance (directly);
- (3) delays in performance of the main debt (with prior reasonable notice);
- (4) delay in the performance when time is of the essence (directly);
- (5) heavily defective performance, when the performance is so incomplete that the purpose of the contract cannot be fulfilled;
- (6) when the debtor loses or may lose the ability to perform the debt after the conclusion of the contract, the creditor may terminate the contract if the debtor fails to provide appropriate security within a reasonable period of time and fails to restore its ability to perform;
- (7) hardship.

It is also worth mentioning that in Brazil the breach of an ancillary obligation may also give rise to termination of a contract, provided that the obligation is intrinsically connected to the creditor's interest as clearly manifested at the time of contracting, and it is important in order to achieve a fair balance between the obligations of the parties.

The Indian Contract Act allows termination of contract in case of failure to perform the contract where time is of the essence, anticipatory breach (i.e. repudiation of contractual obligations) and preventing the other party from performing his obligation.

In Chinese, Indian and South African law contract can be terminated in case of anticipatory breach of contract before the expiration of performance. Chinese law admits termination also in cases of failure to provide adequate assurances of performance—also known as unsafe defense—when the debtor loses or may lose the ability to perform the debt after the conclusion of the contract and the debtor fails to provide appropriate security within a reasonable period of time and to restore its ability to perform.

Brazilian and Russian law do not have any specific provision governing the issues of anticipatory breach and the failure to provide assurance of performance. Brazilian law rather provides for the right to withhold the performance: when, after the conclusion of the contract, the assets of one of the parties decrease so as to compromise or cast doubt over his ability to perform the obligation, the other party is allowed to withhold its own performance until it receives actual performance or adequate assurance of such performance.

Indian and South African law do not recognize a right to terminate the contract for failure to provide adequate assurances of performance.

How the right to terminate is exercised: There is a general consensus that the contract may provide for the manner in which it can be terminated by one or either party (except for India where it is not necessary to specify a reason in the contract clause), also indicating if termination takes effect immediately, or after a specified time following notice.

If there is no such contractual provision, South African law prescribes that the right to terminate is to be exercised by way of an unambiguous notice, which has to come to the attention of the party in breach; the notice need not specify the correct reason for termination, there just has to be a reason. On the contrary, under Brazilian, Russian and Chinese law the party must seek termination judicially.

In China, in particular, when the exercise of the right of termination is made by way of notification, the contract shall, in principle, be rescinded upon the arrival of the notification. If the other party fails to perform the contract by the time of the expiration of the period allowed for performance, the contract shall be terminated upon the expiration of the prescribed period. When the parties directly exercise the right of termination through litigation or arbitration, if the termination claim is confirmed, the contract shall be terminated upon the delivery of the copy of the statement of complaint or the copy of the application for arbitration or court decision.

Both in China and South Africa, the right of termination should be claimed within a certain period that can be agreed by the parties. If the parties do not agree, the right of termination will expire after a “reasonable period” that in China starts from the arrival of the aggrieved party’s notification of termination and cannot be of more than one year since the holder of the right of termination is aware or shall be aware of the cause of termination, and in South Africa after the aggrieved party became aware of the circumstances that give rise to the right of termination.

Under Indian law, in the circumstances indicated by the Indian Contract Act (namely: failure to perform the contract where time is of the essence, anticipatory breach and preventing the other party from performing his obligation), the contract does not terminate automatically, but the party aggrieved by the breach must give notice of rescission to the other party, and the rescission is effective when the other party receives such notice.

Effects of exercising the right to terminate: There is a common approach on the general effects of termination in the sense of releasing the parties from the obligations set forth in the contract, and, where appropriate, of requiring restitution, in addition to the payment of damages by the breaching party. When the contract had to be performed over a period of time, and past mutual performances were rendered in full, it is not possible to restore the *status quo ante*: then, termination of a contract does not have a retroactive effect, and previously performed contractual obligations shall not be returned by virtue of the termination. When restitution is not possible it can be substituted by an equivalent compensation.

7.1.4 The Right to Damages (Chapter 7 PICC Section 4 = Articles 7.4.1 to 7.4.13)

Q Please indicate in general terms the approach of your legal system to the right of an aggrieved party to recover damages due to non-performance; in your answer please inter alia deal with the following:*

- *whether the right to recover damages is qualified inasmuch as it e.g. depends on proof of fault, or lies in the discretion of an adjudicating body, or may only be exercised in conjunction with certain remedies (see Article 7.4.1);*
- *how damages are quantified, e.g. whether there is a general test for quantification, and to what extent damages cover losses actually sustained and deprivation of gain (see Articles 7.4.2, 7.4.3); further indicate to what extent the measure of damages may be influenced by*
 - *remoteness, or lack of foreseeability of harm (Article 7.4.4);*
 - *the fact that a party may have made a replacement transaction (Articles 7.4.5–7.4.6);*
 - *the harm being due in part to the aggrieved party (Article 7.4.7); and*

- *the possibility that the harm could have been reduced or mitigated by the aggrieved party taking certain steps (Article 7.4.8);*
- *liability for interest (Articles 7.4.9, 7.4.10); and*
- *in what currency damages are to be assessed (Article 7.4.12).*

General remarks: There is a common view that breach of contract may entitle the aggrieved party to claim damages or compensation for the losses arising from the breach from the party who has broken the contract. Reporters are consistent in indicating that the aggrieved party has to prove that there was a breach of contract, that the breach caused a loss or damage, and the amount of the loss or damage. There is also a general agreement on the fact that the aggrieved party can claim damages resulting both from the actual and direct losses deriving from the breach, and also from the loss of profit directly arising from the breach. In this respect Chinese law specifies that only patrimonial damages are covered and compensation shall not exceed the losses actually foreseen or reasonably foreseeable by the party in breach of the contract at the time of entering into the contract, so as to avoid claiming damages where causation is too remote.

In Brazil, China and South Africa, damages can be claimed exclusively or in conjunction with other available remedies.

In Russia, China, India and South Africa the right to damages is not dependent on the proof by the aggrieved party of any fault of the party committing breach, while the Brazilian reporter indicates a breach committed with fault among the main elements that must be met to trigger liability for damages. South African law may also at times allow a party to raise the absence of fault as an excuse for non-performance.

The Brazilian and Chinese reporters mention also the absence of causes of justification—and in particular the Brazilian reporter refers to the losses resulting from force majeure or fortuitous events—as further element to be considered to determine the liability for damages.

Under the Brazilian Civil Code, the party in breach may be required not only to pay damages, but also to pay interest, monetary adjustment and, where applicable, attorneys' fees. The Indian reporter refers that the aggrieved party can claim the expenses he incurred, loss of profits, as well as the costs and expenses incurred in curing breach.

Quantification of damages: All reporters indicated that an assessment of the legal requirements as well as the quantification of damages must be made through judicial or arbitral proceeding and must be based on the proven losses suffered by the party, unless the amount of the damages is pre-determined by the parties in the contract through a penalty clause.

The general criterion for determining the extent of the loss in Russia, India and South Africa is that it is the amount required to place the aggrieved party in the position he would have been in had the breach not occurred and the obligation had

been performed properly. Damages, therefore, cover lost profits, or expenses arising from or costs incurred in curing the breach.

If an aggrieved party culpably contributes to the breach, in Brazil the amount of the losses will be determined based on each party's comparative liability, meaning that the damages owed by the party in breach may be reduced proportionally to the aggrieved party's contribution to the breach; while in China the aggrieved party cannot claim damages for the increased loss, but if appropriate measures are taken to restrain the loss, the parties can claim for compensation of related cost. Indian and South African law do not recognize reduction of claim on account of acts of the aggrieved party, but in both jurisdictions the amount of compensation could be reduced if the aggrieved party could have taken reasonable steps to mitigate the harm.

The Russian Civil Code provides that if non-performance or improper performance by a debtor of a contract has caused its early termination and the creditor has concluded an analogous contract to replace it, the creditor shall have the right to claim damages from the debtor in the form of the difference between the price provided in the terminated contract and the price for comparable goods, work, or services according to the new contract; if the creditor has not concluded an analogous contract in place of the terminated contract, but with respect to the performance provided by the terminated contract there is a current price for comparable goods, work, or services, the creditor shall have the right to claim from the debtor compensation for damages in the form of the difference between the price provided in the terminated contract and the current price.

Liability for interest: According to the Brazilian Civil Code, interest must be paid by the party in breach even if the other party does not actually suffer any actual loss. Interest accrues from the date of maturity of the obligation, or, if not established in the contract, from the extrajudicial demand by the aggrieved party (formal notice of breach) or from the judicial summons of the debtor. As regards the payment of interests, the applicable rate is normally agreed upon by the parties and stated in the terms of the contract. In the absence of a previously agreed rate, the fixed rate then in force for the payment of taxes owed to Brazilian National Treasury will apply.

In China, interests based on the same reason of the damage, shall be deducted from the amount of the damage.

In India, a court will award interest, simple or compound, as agreed between the parties, from the date the amount was due. If parties have not agreed to payment of interest, the creditor must demand it, and will receive it from the date of demand. Interest pending proceedings before a court or arbitrator lie within its jurisdiction as to the award, and the rate. A breach of promise to pay any amount is compensated by an award of interest, and by damages in exceptional situations.

In South Africa, liability for interest arises from the moment the debtor commits breach by delay; if no rate is agreed, the default rate determined by law applies; the same law also determines that if the claim is not liquidated, interest runs from the date of demand, or of summons, whichever is earlier (and not from the date of judgement).

In Russia, in case of non-performance of a monetary obligation interests shall be paid. The rate of interest shall be the key rate determined by the Bank of Russia. These rules shall be applied unless another rate of interest is established by a statute or the contract. If the losses caused to a creditor exceed the sum of interest due to him, he shall have the right to demand from the debtor compensation for losses in the part exceeding this sum.

Currency of assessment: In Brazil, there are no special rules that specify the currency in which the damages must be paid.

Indian and South African courts and arbitrators can order payment of amounts in foreign currency if the harm was suffered in that currency.

Chinese law does not indicate the currency for the calculation of the compensation.

In Russia monetary obligations must be expressed in rubles. The use of foreign currency and also of payment instruments in foreign currency for payments in the territory of the Russian Federation can be allowed in the cases, in the manner, and on the conditions determined by a statute.

7.2 *Non-performance/Breach—Specific Topics*

7.2.1 *Exemption/Exclusion Clauses*

Q Please indicate in general terms the approach of your legal system to the validity and enforceability of exemption clauses; in the response please indicate any general test for the validity of exemption clauses, and illustrate the operation of such a test with reference to examples (e.g. terms that exclude certain forms of fault/culpable conduct, or certain types of injury, or terms that render the obligation to perform effectively meaningless by excusing non-performance—see illustrations in the Official Comment to Article 7.1.6). Also consider whether restrictions on these clauses only apply if they are contained in standard term contracts. If special rules of interpretation apply to exemption clauses, it may also be useful to refer to them briefly here, but avoid overlapping discussions with Sect. 4.1. As far as the meaning of the term ‘exemption clause’ is concerned, please note the following:*

- *The exact meaning of the term ‘exemption clause’ was not discussed, but under Article 7.1.6 PICC it includes clauses that limit a party’s liability for non-performance, or that permit a party to render performance substantially different from what the other party reasonably expected;*
- *Exemption clauses may be distinguished from ‘termination clauses’, which provide an aggrieved party the right to terminate a contract in certain circumstances, since ‘termination clauses’ typically expand rather than*

restrict such a party's rights (see Schelhaas in Vogenauer Commentary 859). A distinction may also be drawn between exemption clauses and 'forfeiture clause', which permit a party to withdraw from a contract on payment of an 'indemnity' (see Article 7.1.6 Official Comment 3).

The regulation of exemption clauses differs significantly in the five jurisdictions considered.

Exemption clauses are not specifically addressed in Brazilian law. Brazilian scholars regard exemption clauses as illegal and unenforceable if they: (i) exempt a party from liability for an intentional breach of contract; (ii) are contrary to mandatory rules or public policy; (iii) apply to the main obligation of the contract, as the party could be exempted from performance as result of their application; or (iv) are directly related to the life or physical integrity of natural persons.

An agreement aimed at limiting or excluding liability in advance for the intentional breach of an obligation is null and void under Russian law.

Exemption, exclusion or limitation clauses are valid in Indian and South African law. In both jurisdictions, the party enforcing these clauses must show that they formed part of the contract, since clauses communicated to the party after the contract is concluded do not have any effect. A party who seeks to establish liability but is prevented by an exclusion clause, can challenge the clause on the ground that it is contrary to public policy. There is no precedent in Indian law indicating whether an exclusion or exemption clause could or not protect deliberate or willful breach, and it might be held void as unlawful being opposed to public policy.

Chinese law in principle recognizes clauses agreed to by the parties to exempt non-performance liability, but the application of exemption clauses might be limited in the following manner. As in Brazilian law, a clause aimed at exempting one party from liability for an intentional breach of contract can be declared void; an exemption clause aimed at exempting personal injury liability, or liability due to intentional or gross negligence, is void; if the exemption clause takes the form of a standard clause, the party providing such a clause must draw the other party's attention to the exemption clause in a "reasonable way" (words, symbols, fonts, etc., which are distinctive enough to attract the attention of the other party) and provide any explanations required by the other party, otherwise the clause is ineffective. Moreover, the provision through which a party seeks exemption from liability, unreasonably increases the liability of the other party, or excludes the main rights of the other party is invalid.

Clauses which limit liability by capping the maximum amount of damages payable by the breaching party are generally enforceable in all five jurisdictions. In Russia the clause becomes null and void if the amount of liability for such type of obligations or for such violation is determined by law and if the agreement is concluded in advance with reference to the intentional breach of an obligation.

7.2.2 Force Majeure

Q Please indicate in general terms the approach of your legal system when non-performance was due to 'force majeure'; inter alia consider the possible effect force majeure has on liability, and more specifically on the duty to pay damages due to non-performance; consider whether steps need to be taken by the party who failed to perform to notify the other party of the impediment and its effect. As far as the meaning of force majeure is concerned, please note the following:*

- According to Article 7.1.7 PICC the term 'force majeure' covers situations where non-performance was due to an (external) impediment beyond a party's control and it could not reasonably be expected of the party to have taken the impediment into account at the time of the conclusion of the contract or to have avoided or overcome it or its consequences. The term 'force majeure' is supposed to be interpreted autonomously in the PICC. The Official Comment adds that force majeure 'covers the ground covered in common law systems by the doctrines of frustration and impossibility of performance and in civil law systems by doctrines such as force majeure, Unmöglichkeit, etc. but it is identical with none of these doctrines.' It further states that 'The term "force majeure" was chosen because it is widely known in international trade practice, as confirmed by the inclusion in many international contracts of so-called "force majeure" clauses.' We are of course not obliged to follow the autonomous meaning accorded to force majeure in the PICC, and it may be that our national systems accord its own meaning to it. However, for purposes of comparing the positions in our respective systems with each other, it does seem desirable that we at least use the PICC formulation as a point of reference;
- Force majeure can apparently overlap with supervening events that cause 'hardship', which is dealt with in Sect. 6.1.2 (see Official Comment 3 to Article 7.1.7, Official Comment 6 to Article 6.2.2; Pichonnaz in Vogenauer Commentary 868, who points out that in the PICC the doctrines address different problems: the provision on hardship is said to be concerned with the right to claim performance, and the provision on force majeure with liability for damages).
- *Q** Although interpretation is dealt with in Sect. 4.1, it may be useful also to consider here the approach of our legal systems to the interpretation of force majeure clauses (see Official Comment 4 to Article 7.1.7, Pichonnaz in Vogenauer Commentary 869–870).

Brazilian, Russian and Chinese law share a common understanding of force majeure, which refers to the objective circumstances that cannot be foreseen, avoided or overcome by the debtor and are outside of his control. The occurrence of the event must be unavoidable, and the debtor is therefore unable to complete the performance.

Both Chinese and Russian law require that when a force majeure event occurs, a debtor shall notify his creditor of such circumstance. On the contrary, the Brazilian Civil Code does not contain a similar provision requiring the breaching party to provide notice of the event, although in practice contracts generally contain such requirement of notification.

Under Chinese and Russian law force majeure does not cancel the debtor's obligation if performance is still possible after the events constituting force majeure have ended. However, the Russian reporter adds that the creditor may terminate the relevant contractual relationship when it has lost its interest in performing the obligation due to the delay caused by force majeure. In Chinese law, if the force majeure leads to the permanent non-performance of the contract, the debtor is released from his obligation, and the type of contract, the situation at the time of the force majeure event occurred and the transfer of the risk of performance according to the contract will be considered to determine possible creditor's rights.

Brazilian law recognizes force majeure as a cause for exemption from liability to pay damages. In order to fully exclude liability, the force majeure or fortuitous event must be the sole cause of the harm suffered by the other party. If a fortuitous event or force majeure occurs after a breach has been committed, then liability for damages will still arise since the breach subjected the performance to the fortuitous event, unless the debtor can prove that the losses would have occurred even if the obligation had been duly performed.

Indian and South African law both recognize that contracts could terminate due to supervening impossibility, which could include cases of force majeure. A contract becomes impossible when the whole purpose or the basis of the contract has been frustrated by an unexpected event or by a change of circumstances, which was not contemplated by the parties when they made their contract, and which renders practically impossible for a party to perform the contract within the specified time, or when a party's performance becomes impracticable or useless having regard to the object and purpose the parties had in view. Supervening impossibility results in the automatic termination of the obligations and excludes any claims for performance or damages based on non-performance. Any person who has received any advantage under the contract must restore it or make compensation for it to the person from whom he received it. The general rule that supervening impossibility of performance excuses performance of a contract is subject in South Africa to the qualification that in each case it is necessary to look to the nature of the contract, the relation of the parties, the circumstances of the case, and the nature of the impossibility invoked by the defendant, to see whether the general rule ought, in the particular circumstances of the case, to be applied. Indian law has no precedent to allow suspension of obligations for temporary impossibility, or for renegotiation of contract following an impossibility; in South Africa, instead, temporary impossibility of performance

generally suspends the debtor's duty to perform, and hence also any reciprocal duty to perform, for the duration of the impossibility.

The Indian reporter also adds that parties can incorporate into their contracts terms that specify circumstances which would excuse non-performance of the contract. These can include force majeure clauses and are enforced. Where they are provided, and the event of force majeure occurs, the contract terminates under its own terms, and the doctrine of impossibility does not apply.

There is a general consensus that a party who caused or is to blame for the occurrence of the force majeure event commits breach of contract, and the aggrieved party may elect to terminate the contract and to claim contractual damages.

7.2.3 Agreed Payment for Non-performance

Q Please indicate in general terms the approach of your legal system to the validity or enforceability of agreements to pay a specified sum in cases of non-performance (see Article 7.4.13); according to the Official Comment to Article 7.4.13, these agreements could be 'intended to facilitate the recovery of damages (liquidated damages according to the common law) or to operate as a deterrent against non-performance (penalty clauses proper), or both'. Inter alia consider whether these agreements are valid in principle, whether they may be subjected to judicial review, and if so, what discretion courts may have to set them aside or only enforce them for a limited sum.*

Please note that the agreements considered here only deal with situations when there has been non-performance (see e.g. Illustration 2 to Article 7.4.1.3 on clauses that allow a party to retain performances already made in the event of default). We are therefore not concerned with forfeiture clauses that are not triggered by non-performance, but permit withdrawing from a contract upon payment of a sum or forfeiting a deposit (see Official Comment 4 and Illustrations 3 and 4 to Article 7.4.13; also see comment at end of Sect. 7.2.1).

Penalty clauses, where the parties agree that a specified sum is to be paid in cases of non-performance, are regarded as valid in all five jurisdictions.

In Brazil, Russia and China the aggrieved party can require payment of the penalty without having to prove that any loss has actually been caused by the breach. In India loss or damage must be proved and—*de facto*—also in South Africa, where the aggrieved party might require payment, but if there is no actual loss courts will not grant any payment.

Under Brazilian and Russian law, the general rule for the application of a penalty clause is that the party incurs such penalty if, through its own culpable conduct, it

fails to perform an obligation under the contract or commits a contractual breach. Therefore, if the breach is not attributable to the party, then the penalty clause cannot be invoked by the aggrieved party.

In Brazil, if the suffered losses surpass the amount fixed by the penalty clause, the aggrieved party is not allowed to claim supplementary damages, unless otherwise agreed in the contract. If the parties have agreed that the penalty clause will not exclude liability for damages in excess of that limitation, the penalty clause will operate as a “minimum amount of damages”, and the aggrieved party is only required to prove the surplus losses that he has suffered due to the breach, as the other losses are already covered through the penalty clause. The amount fixed by the penalty clause may not exceed the amount of the contract’s principal obligation. In general, in Russian law, when a certain sum of money is agreed by the parties to be paid in case of the breach of contract (penalty) all damages sustained by the creditor as the result of the breach of contract have to be compensated in the amount not covered by the penalty. However, in cases where there is an extreme disproportion between the nature of the wrongful conduct and the amount of damages recognized by the penalty clause, both in Brazil and Russia the amount may be reduced accordingly.

The Indian system is slightly different. Indian Contract Act provides that if a contract stipulates a sum to be paid if there is a breach, or contains any other stipulation by way of penalty, the party complaining of the breach is entitled to receive reasonable compensation not exceeding the amount named or as the case may be, the stipulated penalty. The Indian Contract Act, like South African law, does not draw any distinction between liquidated damages and penalty. In both cases, the measure of the amount payable for breach is reasonable compensation, and the sum stipulated sets the maximum beyond which such amount cannot extend. Where compensation is stipulated, unliquidated damages for that breach cannot be claimed. If a specific breach is not covered by the provision of liquidated damages in the contract, unliquidated damages can be awarded. The amount of liquidated damages can be claimed only if the party claiming it has suffered loss or damage.

In all five jurisdictions, if a penalty is clearly disproportionate to the consequences of violation of an obligation or the fixed amount is manifestly excessive considering the nature and purpose of the transaction, a court shall reduce the penalty. In India is expressly forbidden to contractually exclude judicial review of the amount stipulated. In Brazil the contracted amount of the penalty must also be reviewed, and it can be reduced on equitable grounds by a judge or arbitral tribunal if there has been partial performance of the main obligation. In China the request of increase or reduction of the liquidated damages must be raised by a party, as the court cannot proceed autonomously, and the adjustment request cannot be proposed by the party concerned; in particular, as long as the liquidated damages are lower than the losses suffered by the creditor (regardless of the extent), then the creditor can request the court to increase the amount, but the increased amount shall not exceed the actual losses; on the contrary, the debtor can only apply to the court for a reduction if the liquidated damages are “excessively higher” than the losses suffered by the creditor.

The Brazilian reporter also states that if the penalty clause refers to the total non-performance of an obligation, the creditor may choose between the amount of the

penalty and the performance of the obligation. However, if the penalty clause simply refers to the mere breach (for instance, defective or non-satisfactory performance of an obligation), or if it is stipulated as intended to guarantee a particular provision, the creditor may, at his discretion, demand payment of the fixed penalty, together with the performance of the main obligation of the contract.

7.2.4 Consequential Losses

Q Please indicate in general terms the approach of your legal system to consequential losses suffered as a result of non-performance. The meaning of consequential losses in detail was not considered, but Official Comment 2 to Article 7.4.2 essentially equates it to a loss of profits, or the benefit that would normally have accrued to the aggrieved party if there had been proper performance (see Illustration 4). It then adds that the benefit will often be uncertain, so that it will frequently take the form of the loss of a chance. Please indicate in particular the position with regard to:*

- *how consequential losses are proven/the degree of certainty with which these losses have to be established (see Article 7.4.3, which makes special provision for proof when the claim is for loss of a chance; further see the Official Comment to Article 7.4.3 and the illustration there of non-performance of the duty to deliver tender documents in time, resulting in potential loss of the tender; McKendrick in Vogenauer Commentary pages 988–992);*
- *any limitations on recovery of consequential losses due to lack of a sufficiently strong causal link between the non-performance and the harm (see Official Comment 3 to Article 7.4.3), or due to (reasonable) unforeseeability (see Official Comment to Article 7.4.4, and the illustration there of losses arising from late delivery of a machine; for comment see McKendrick pages 993–996).*

The Brazilian Civil Code states that liability for damages covers both the losses actually incurred, and what the aggrieved party reasonably lost in profit from the performance of the obligation or “loss of profits”. The concept of “loss of profit” encompasses consequential damages, since it compensates for future estimated gains that the aggrieved was prevented from receiving. Furthermore, this category of damages is limited by the requirement that there must be a sufficiently strong causal connection between the breach and the loss of the expected profit. Conversely, the possibility to compensate the “loss of chance” is debated under Brazilian law, due to the lack of strong degree of certainty as required for the loss of profits.

Russian and Indian law do not regard consequential damages as a special kind of contractual damages, and, in general, lost profit can be recovered under the same principle applicable to compensation for breach. In South Africa, a claim for contractual

damages based on non-performance could also cover loss of profits, but the damages must not be too remote, so that there has to be a sufficiently strong causal connection between non-performance and the loss. Likewise in China, claims for damages based on non-performance of debts could include the loss of accrued benefits, that is, the benefits that creditors could have obtained if the contract had been properly performed, such a claim could cover loss of profits which have been caused by the breach of contract and which are either foreseen or foreseeable by the party in breach of contract when entering into the contract.

In all five jurisdictions loss of profits must be reasonably and sufficiently proved, and its amount is an estimate. In South Africa, when the loss of profit takes the form of a 'loss of a chance', the plaintiff has to prove on a balance of probability that the necessary causal link exists between the breach and the loss of a chance; however, the quantum of the claim is not decided on the balance of probability, but by way of 'estimation'.

In Chinese judicial practice, loss of profits is rarely awarded, mainly because of the lack of evidence to prove the certainty of profits or the lack of evidence to prove the certainty of profits, or the lack of specific criteria for calculating the loss or gain.

In South Africa any gain enjoyed by the aggrieved party though being saved expense due to the non-performance has to be taken into account when calculating contractual claims for damages based on loss of profits; the 'expectation loss' of such a party is only his net profit. However, where a party has incurred expenditure in performing or preparing to perform the contract, these 'wasted' expenditures could be recovered as a 'reliance loss'.

8 Limitation Periods

8.1 *Limitation Periods—Specific Topics*

Q Please indicate in general terms the approach of your legal system to barring the exercise of contractual rights by the expiration of a period of time, in other words, its approach to limitation periods. In your response please consider the following:*

- *the type of rights/remedies that the limitation periods apply to (e.g. the right to claim damages due to non-performance, to claim performance, to withhold performance, or to terminate the contract; for examples see Wintgen in Vogenauer Commentary pages 1156–1157);*
- *the extent to which the rules relating to limitation periods are mandatory in your legal system, or to which parties may (contractually) modify or deviate from such periods (see Article 10.3, Wintgen in Vogenauer Commentary*

1158, 1165–1168; we specifically considered this issue in the discussion); please further consider the extent to which the rules on limitation could also apply in cases of alternative dispute resolution (see Article 10.7; Wintgen in Vogenauer Commentary pages 1179–1181);

- *the extent to which a debtor (obligor) could be prevented from asserting the defence of limitation due to inconsistent behaviour, or due to dishonest concealment of facts (see Wintgen in Vogenauer Commentary pages 1158–1159);*
- *the duration of the general limitation period, and description of the day from which it is determined; as well as the maximum limitation period (if any), and a description of the day from which it is determined (see Article 10.2);*
- *the circumstances under which a new limitation period will start to run, and the effect when this occurs (see Article 10.4, which deals with the situation where the debtor (obligor) acknowledges the creditor's (obligee's) rights);*
- *the circumstances under which the running of the limitation period is (temporarily) suspended, where suspension means that the period during which these circumstances prevail does not count when calculating the limitation period) (see Articles 10.5, 10.6, 10.8 and the examples mentioned there);*
- *the effect of the expiration of a limitation period, i.e. whether the right is extinguished or the debtor (obligor) is merely granted a right to refuse performance (Article 10.9); whether the expiration of the limitation must be asserted by the debtor before the creditor may exercise the right of set-off (Article 10.10); and whether restitution may be claimed of performance made in (purported) fulfilment of an obligation after expiration of the limitation period (Article 10.11).*

General remarks: Brazilian Civil law provides for two types of limitation periods: prescription and extinction. Under prescription, the lapse of the period affects (extinguishes) the claim by one party (right of a party to claim something), while, on the other hand, extinction affects (extinguishes) the right itself (and not the claim), meaning that, the lapse of a given period extinguishes the right of a party under the contract (perishing of a right).

In Russian law the limitation of actions refers to the time period a person has to judicially (or through arbitration) protect a right which has been violated. The limitation of actions shall be applied by a court only on request of a party to the dispute, made before the rendering of a decision by the court.

The Indian Limitation Act prescribes that suit in a civil court or tribunal must be filed within the time limit prescribed for that type of suit.

Type of rights/remedies that the limitation periods apply to: Under Brazilian and Chinese law, the prescription period applies to rights and remedies (claims) which depend on the other party's conduct. Rights that are under the sole control of one

party and, as a consequence, cannot not be violated by the other party (potestative rights), are in turn subject to extinction period.

In Chinese Law, there is a clear distinction between time limit and limitation of action. The time limit period is applicable for the exercise of right of withdrawal, revocation, modification, resolution and termination of contract or the right to notification of performance of obligations (potestative rights), the parties have right to agree on time limit period, and no suspension, refreshment and extension of time period is applicable for the time limit. On the contrary, the period of limitation of action is applicable only for the claim of rights in case of their violation; it refers to the time period within which a holder of a right is entitled to take legal action before judges or arbitration court to protect his right of claim, and the period of limitation of action may neither be modified upon the agreement between the parties nor be abandoned by them in any way.

In Russian law limitation periods apply to all kinds of claims in civil law relations including the right to claim damages due to non-performance, to claim performance, to withhold performance, or to terminate the contract.

The period of limitation under the Indian Limitation Act applies to proceedings that must be filed before a court, arbitrator or other tribunal or authority; it also applies to counterclaims made by defendants. The period is counted from the date of 'cause of action'.

The South African Prescription Act does not refer to the prescription of remedies or claims, but of "debts", which the courts have interpreted as "an obligation to pay money, deliver goods or render services", and have held not to include "every obligation to do something or refrain from doing something, apart from payment or delivery". This narrower interpretation reinforces the notion that the Act does not apply to powers, for example the power to elect to terminate a contract due to breach, to withhold performance, or to rescind a contract due to improperly obtained consent. However, the definition would be broad enough to cover an obligation to pay damages, albeit that uncertainty exists as to whether prescription commences upon breach or when the loss occurs.

Extent to which the rules relating to limitation periods are mandatory: In Brazil, Russia, India and China all regulation relating to limitation of actions are considered as mandatory and cannot be modified by agreement between the parties.

In Brazil, however, after the expiration of this period, the debtor may expressly or impliedly waive the prescription in favor of the creditor. As regards the extinction period, the limitation may be provided by law or agreed between the parties, and if the limitation is provided by law, then it may not be waived by the parties. However, unlike the prescription, the extinction period may be stipulated by the parties, who may shorten or extend this limitation period in the agreement.

Under South African case law, parties may undertake to modify or deviate from limitation periods, considering the moment when the undertaking is given.

The extent to which a debtor (obligor) could be prevented from asserting the defence of limitation: In Brazilian, Russian and Chinese law there are no special rules that specifically provide for the circumstances where a debtor may be prevented

from asserting the defense of limitation. The Chinese reporter specifies that the debtor needs to take the initiative to put forward the defense as the court cannot take the initiative to apply the prescription *ex officio*.

In India a suit or proceeding is not filed within the period of limitation, it is for the court to dismiss it, although limitation is not set up as a defense.

In China and South Africa, if a debtor deliberately prevents a creditor from coming to know of the existence of the debt, prescription does not commence until the creditor becomes aware of the existence of the debt.

Duration of the general limitation period: The five jurisdictions have different limitation periods, which further vary according to the circumstances.

In the Brazilian Civil Code, the general duration of the prescription period is 10 years, unless the law provides for a shorter deadline. The following shorter prescription periods then apply: in regard to contractual rights, 5 years for the right to claim payable debts arising from particular or public instruments, 3 years for the right to claim payment of credit securities counting from the maturity date of the note, 3 years for the right to claim interests, dividends or ancillary obligations payable in periods no longer than one year, capitalized or not, 3 years for the right to claim reimbursement of unjustified enrichment, and 3 years for the right to claim civil compensation. As for the extinction period, there is no general rule on the duration in Brazilian law, and this is either provided by a specific law or can alternatively be agreed between the parties. In addition, there is no limit to the extinction period, since the general rule is that rights subject to extinction are indefinitely enforceable unless otherwise provided by law or agreed by the parties.

Russian law provides that the general period of limitation of actions shall be three years. Besides establishing the general limitation period, the law also determines that the time period of limitation of actions may not exceed ten years from the date of the violation of the right which this time period seeks to protect.

The Indian Limitation Act has a schedule that lists the different types of proceedings, civil or criminal, the time from which the limitation period will be calculated, and the period of limitation for each proceeding. The general period of limitation for suits on contract in India can be stated to be three years from the date on which the breach occurs, or performance is due, or the promisor has refused to perform.

In China, the limitation period of ordinary litigation is of 3 years, and it starts from the date when the rightsholder knows or should have known the damage to his rights and who his counterpart is. However, for a dispute arising from a contract for the international sale of goods or a technology import or export contract, the period of limitation of action is of 4 years. The ordinary prescription may vary with the special provisions of other laws. It is particularly noteworthy that the limitation for international contracts for the sale of goods and for contracts for the import and export of technology is four years. The maximum period of prescribed limitation for litigation is 20 years, starting from the date of the infringement of rights.

In South Africa the general limitation period of prescription of debts is three years, while lengthier periods apply in certain exceptional cases.

Calculation of the prescription period: In Brazil, the prescription period is counted from the act that gave rise to the claim: the violation of the subjective right. The calculation of the prescription period excludes the first day and includes the last day and, if the last day is a non-business day, the period is extended to the next business day.

Unless otherwise established by a statute, in Russia the running of the period of limitation of actions begins on the day when a person knew or should have known of the violation of his right and of the identity the proper defendant for a suit for the protection of this right. For obligations with a defined time period of performance, the running of the period of limitation of actions begins at the end of the time period of performance. For obligations of which the time period for performance is not defined or is defined as the time of demand, the time period of limitation of actions commences on the day the creditor is presented with a demand for performance of the obligation. If the debtor is granted a time period for performance, the calculation of the time period of limitation of actions shall begin from the end of such period granted for performance of such demand. In such a case the period of limitation of actions in any event may not exceed 10 years from the date of arising of the obligation.

In India, the date from which the period of limitation begins is stated in a schedule of the Limitation Act. That date is excluded. The period is counted from the next day and ends on the last day of the period. If the last day so calculated falls on a holiday, or the court is closed, the proceeding can be filed on the next working day.

Under Chinese law the period of limitation is calculated according to Gregorian calendar by year, month, day and hour. In the case that such time period is calculated by year, month and day, the first day of such period shall not be calculated and the period shall be calculated from the next day; on the contrary, if the time period is calculated by hour, the initial hour shall be counted. Where a period is calculated by year and month, the date of the expiry month shall refer to the corresponding day of such month, if there is no corresponding date in such expiry month, the last day in such month shall be the expiry date of time period. Where the last day of the period falls on a legal holiday, the next day after such legal holiday shall be the last day of the time period.

In South Africa prescription commences to run as soon as the debt is due. South African law does not recognize a maximum limitation period, beyond which prescription cannot run. The limitation period is calculated according to the 'ordinary' civil method, which treats the calendar day as the unit and includes the day on which the debt falls due but excludes the last day of the period.

New limitation period: There is a general consensus that prescription is interrupted, and prescription runs afresh with a new limitation period if the debtor has acknowledged his liability, provided that the acknowledgment is in writing and is made before the limitation period expired. A fresh period also commences if the defendant has made a payment towards the debt before the limitation period expired. In both these cases, the period of limitation runs afresh from the date of acknowledgment or the payment towards the debt.

Under Brazilian law, a new limitation period arises in certain specific circumstances provided by law, namely: summons of the debtor by the judge/arbitrator; protest made within the deadline and form provided by law; reciprocal protests; presentation of debt instrument before inventory or collective insolvency proceedings; any judicial act that contests debtor's breach; and a debt recognition addressed to the creditor by the debtor, by any unequivocal act, including extrajudicial acts. Interruption only affects the prescription period, and not the extinction period, which is neither suspended nor interrupted unless otherwise provided by law.

In Russia, any action evidencing the acknowledgment of a debt is considered suitable to interrupt the limitation period.

Under Indian law, if the period has expired, mere acknowledgment is not enough, as the debtor should make a promise to pay the time-barred debt, which will be enforced.

In Chinese law the refreshment of the period of limitation of action occurs when, before the expiration of the period, the right holder requests the debtor to performance its obligations, the debtor agrees to fulfill his obligations, the right holder starts a litigation or an arbitration, or other circumstances producing equal effects as the institution of litigation or application for arbitration occur.

Suspension of the limitation period: Rules about suspension of the limitation period differ substantially in the five jurisdictions.

In Brazil, when a limitation period is suspended the clock simply pauses at the time of the suspension; when the period resumes running, it will last for the original remaining time. Suspension applies only to prescription and not to extinction. In cases involving joint and several creditors rights, a suspension will only affect other creditors when the obligation is indivisible.

In Russia, the running of the time period of limitation of actions shall be suspended on the condition that the circumstances indicated as grounds of suspension arose or continue to exist during the last six months of the period of limitation of actions. If this time period is equal to six months or less than six months, then the circumstances indicated as grounds of suspension must arise or continue to exist during the running of the time period of limitation of actions. The running of the time period of limitation of actions shall be suspended if the filing of an action was prevented by a circumstance extraordinary and unforeseeable in the given circumstances (force majeure); if the plaintiff or defendant is in the Armed Forces of the Russian Federation put on a war status; by virtue of a postponement of performance of obligations (a moratorium) established by the Government of the Russian Federation on the basis of a statute; by virtue of the suspension of the effect of a statute or other legal act regulating the respective relation. If before the expiration of the time period of limitation of actions the debtor or other obligated person recognizes his debt in written form, the running of limitation of actions shall begin anew.

If the parties have turned to a procedure provided by statute for deciding a dispute in an alternative dispute resolution procedure (mediation, conciliation, intermediary procedure, administrative procedure, etc.), the running of the time period of limitation of actions shall be suspended for the period established by a statute for conducting

such a procedure, and, in the absence of such a time period, for six months from the day of the start of the respective procedure. The running of the time period of limitation of actions shall continue from the day of termination of the circumstance that served as the basis for its suspension. The remaining part of the time period of limitation of actions, if it is less than six months, shall be extended to six months, or, if the time period of the limitation of actions is equal to six months or is less than six months, to the time period of limitation of actions.

In India, if the suit is based on fraud of the defendant, or the knowledge of the right or title in the suit is concealed by fraud of the defendant, or the suit is for relief from consequences of a mistake, the period of limitation does not begin to run until the plaintiff has discovered the fraud or mistake. Some periods of time are excluded from the period of limitation for filing suit or claims, namely: the time spent in prosecuting another civil proceeding against the defendant that involves same matter in issue, and the time during which the defendant was absent from India.

In China, the prescribed limitation for litigation is suspended only in the last six months of the statute of limitations, when the right holder is unable to exercise his rights due to objective obstacles as indicated in the report. When the obstacle disappears, the prescribed limitation is not to continue the calculation, but to make up for a period of 6 months. The 20 years maximum prescription time shall not be subject to regulations of suspension and interruption. The limitation period shall be recalculated from the time when the suspension or the relevant procedure (such as litigation) ends.

In South Africa, the completion of prescription is suspended when the creditor is prevented by superior force, including any law or any order of court from interrupting the running of prescription; when the debtor is outside South Africa; and when the debt is the object of a dispute subjected to arbitration. Whereas the common law simply suspended the running of prescription as long as the impediment lasted, the Act ensures that the creditor has at least one year to take action after the impediment ceased to exist.

Effect of the expiration of a limitation period: In Russia, India and China, in matters relating to contract, the lapse of the period of limitation does not extinguish the right, it merely bars the action to obtain a remedy.

Under Brazilian law, the lapse of the period affects (extinguishes) the claim by one party (right of a party to claim something); on the other hand, extinction affects (extinguishes) the right itself (and not the claim), which means that the lapse of a given period extinguishes the right of a party under the contract (perishing of a right). As for the right to set off, a debt which is still enforceable cannot be set off against a debt whose limitation period has already elapsed.

In Russia, the expiration of a time period of limitation of actions that a party has requested to be applied, is a basis for the rendering of a decision by the court to dismiss an action. Unilateral actions directed at exercising a right, for which the time period of limitation of action for protection of this right has expired shall not be allowed. Russian law provides that with the expiration of the time period of limitation of actions on the main claim the time period of limitation of actions shall be considered

to have expired also for supplementary claims, including those that arose after the expiration of the limitation of actions on the main claim.

According to the South African Prescription Act, a debt shall be “extinguished” by prescription after the lapse of the relevant prescription period. However, payment by the debtor of a debt after it has been “extinguished” by prescription is regarded as valid payment, and the debtor may therefore not reclaim it. Despite the wording of the Act, prescription therefore does not result in a complete extinction of the debt, since the prescribed debt could still serve as a basis for retaining a payment.

The other jurisdictions also share the approach of South African law that a voluntary payment by the debtor of a debt after the expiration of the time period of limitation of actions is valid.

Salvatore Mancuso is a Professor of Comparative Law and Legal Anthropology at the University of Palermo (Italy), and Honorary Professor of African Law at the Centre for African Laws and Society of Xiangtan University (P.R. of China). He is also Associate Member at the Centre for Legal Integration, University of the Western Cape (South Africa) and Visiting Professor at the Somali National University in Mogadishu (Somalia). He holds a Ph.D. in Comparative Law at the University of Trieste (Italy) with specialization on African law. He has been the Chair, Centre for Comparative Law in Africa, University of Cape Town, Professor of Comparative Law and Legal Anthropology at the University of Macau, Adjunct Professor at the Universities of Trieste and Loyola University Chicago, John Felice Rome Center, Visiting Professor at the Universities of Paris I—Panthéon Sorbonne, Limoges, Réunion and Lisbon, and has given lectures in different universities in Europe, Africa and China. He has published and edited some books and several articles on Comparative and African Law. Some of his works on African law have been translated into Chinese, French and Portuguese. He is a member of the International Academy of Comparative Law, and Vice President (Events) of the *Juris Diversitas* group. He is a member of the editorial board of several law journals focused on comparative law and African law.

Further Reading

- Aguiar Dias J (1973) Da responsabilidade civil, vol 2. n 216, 5th ed. Forense, Rio de Janeiro
- Aguiar Júnior RR (1991) Extinção dos contratos por incumprimento do devedor (resolução). Aide, Rio de Janeiro
- Aguiar Júnior RR (1994) A Convenção de Viena e a resolução do contrato por incumprimento. RIL. year 31. n 121. Brasília
- Aguiar Júnior RR (1995) Responsabilidade Civil do Médico. RT 718:33–53
- Aguiar Júnior RR (2011) Comentários ao Novo Código Civil. Da extinção do Contrato, arts. 472 a 480. In: Teixeira, SF (coord) vol 6. t II. 1st ed. Forense. Rio de Janeiro
- Aguiar Júnior RR (2012) A extinção dos Contratos. In: Fernandes W (coord) contratos empresariais: fundamentos e princípios dos contratos empresariais. 2nd ed. Saraiva, São Paulo
- Almeida Costa MJ (1984) Responsabilidade civil pela ruptura das negociações preparatórias de um contrato. Coimbra, Coimbra
- Almeida L (1934) Dos efeitos das obrigações (arts. 928 a 1.078). coment. CC/1916 1060. Freitas Bastos, Rio de Janeiro
- Alvim A (1972) Da Inexecução das Obrigações e suas Consequências. 4th ed. Saraiva, São Paulo
- Amaral Júnior A, Celli Junior U, Veronese LE (2015) A formação dos contratos após a CISG entrar em vigor no Brasil. Uma análise prática aos operadores do direito. In: Schwenzer I, Pereira CAG, Tripodi L (coord) A CISG e o Brasil, Marcial Pons, Curitiba, pp 206–226
- Amaral Neto FSA (2010) A Autonomia Privada como Princípio Fundamental da Ordem Jurídica—Perspectivas Estrutural e Funcional. In: Doutrinas Essenciais de Direito Civil 2:579–606
- Andrade MAD (1974) Teoria geral da relação jurídica, vol 2. Almedina, Coimbra
- Antunes JAE (2012) Direito dos contratos comerciais. Almedina, Coimbra
- Antunes Soares de Camargo A (2003) Essay: the Revised Brazilian Civil Code. U Miami Int'l & Comp L Rev 11:161–166
- Araújo N, Gama L Jr (2012) A escolha da lei aplicável aos contratos do comércio internacional: os futuros Princípios da Haia e perspectivas para o Brasil, escritório permanente da Conferência da Haia de Direito Internacional Privado. RAM 34:11–41
- Araújo N, Spitz L (2013) As principais obrigações do comprador. RAM 37:107–123
- Audit B (1990) La vente internationale de marchandises: Convention des Nation Unies du 11 avril 1980. L.G.D.J, Paris
- Azevedo PP (2011) As prestações do reajustamento. Lugar de pagamento—dívida portable ou querable – mora. Doutrinas Essenciais Obrigações e Contratos. 2:881–887
- Azulay F (1977) Do inadimplemento antecipado do contrato. Editora Brasília/Rio, Rio de Janeiro

- Balakrishnan KG (2008) The role of foreign precedents in a Country's legal system, Lecture at North-western University. <https://www.indialawoffices.com/legal-articles/Impact-of-Foreign-Law-on-Domestic-Judgments>
- Balganesh S (2016) The Constitutionalization of Indian Private Law. In: Choudhry S, Khosla M, Mehta PB (eds) *The Oxford Handbook of the Indian Constitution*. OUP, Oxford, pp 680–696
- Baptista LO (1994) *Dos Contratos Internacionais, Uma visão Prática e Teórica*. Saraiva, São Paulo
- Barbosa Moreira JC (1980) Tutela específica do credor nas obrigações negativas, *Temas de direito processual*. Saraiva, São Paulo
- Barnard J (2017) The role of comparative law in consumer protection law: a South African perspective. *SA Mercantile L J* 29:353–389
- Basso M (1998) *Contratos internacionais do comércio: negociação, conclusão, prática*. 2nd ed. Livraria do Advogado, Porto Alegre
- Becker A (1994) As garantias implícitas no direito brasileiro em perspectiva comparativista. *RDC* 9/69
- Benetti Timm L (2006) Direito, economia e a função social do contrato: em busca dos verdadeiros interesses coletivos protegíveis no mercado de crédito. *Revista De Direito Bancário e Do Mercado De Capitais* 33:15–31
- Bennett TW (1996) African land—an history of dispossession. In: Zimmermann R, Visser D (eds) *Southern cross*. Clarendon Press, Oxford, *Civil and Common Law in South Africa*, pp 65–94
- Berman HJ (1947) Commercial contracts in Soviet Law. *Cal L Rev* 35:191–234
- Bessone de Oliveira D (1997) *Do Contrato, Teoria Geral*, 4th ed. Saraiva, São Paulo
- Betti E (2007) Interpretação da lei e dos atos jurídicos. (trans: Janini, K). *Martins Fontes*, São Paulo
- Betti E (1970) *Teoria geral do negócio jurídico*. T. III (trans: Miranda, F). Coimbra, Coimbra
- Betti E (1943) *Teoria generale del negozio giuridico*. Utet, Turin
- Bhadrabade N (2012) *Contracts – India*. Kluwer, The Hague
- Bianca CM, – Bonell, MJ (1987) *Commentary on the International Sales Law*. Giuffrè, Milano
- Bologna P (2020) Guanxi and litigation in the current chinese market: a perspective from law and society scholarship. In: Fiorentini F, Infantino M (eds) *mentoring comparative lawyers: methods, times, and places*. *Liber Discipulorum Mauro Bussani*. Springer, Cham, 57–74
- Borges GSP, Stringari C (2016) O dever de cooperação na srelações contratuais, *The duty of cooperation in contractual relations*. *RT* 971:145–164
- Botel S (2013) *Fusões & aquisições*. 2nd ed. Saraiva, São Paulo
- Bradfield GB (2016) *Christie's the law of contract in South Africa*, 6th ed. LexisNexis
- Bradford A, Chilton AS, Linos K, Weaver A (2019) The global dominance of european competition law over american antitrust law. *J Emp Stud* 16:731–766
- Briggs A, Burrows A (2018) Formation and third party rights in the Myanmar law of contract. In: Chen-Wishart M, Loke A, Vogenauer S (eds) *Formation and Third Party Beneficiaries*. OUP, Oxford, pp 479–515
- Bu Y (ed) (2016) *Chinese Civil Law*, Beck-Hart-Nomos, Munich
- Bussani M (2019) Strangers in the law: Lawyers' law and the other legal dimensions. *Cardozo L Rev* 40:3125–3184
- Bussani M (2015) The common core of European private law' project two decades after: a new beginning. *Europ Lawyer J* 15(3):9
- Bussani M, Infantino M, Werro F (2009) The common core sound: short notes on themes, harmonies and disharmonies in european tort law. *King's Law J* 20(2):239
- Bussani M, Mattei U (eds) (2007) *Opening up European private law*. Carolina Academic Press, Durham
- Bussani M, Mattei U (eds) (2003) *The common core of European private law*. Kluwer, The Hague
- Bussani M, Mattei U (1997–1998) *The common core approach to European private law*. *Columbia J Europ Law* 3:339
- Campilongo C (2017) History and sources of Brazilian law. In: Deffenti F, Barral W (eds) *Introduction to Brazilian Law*, 2nd edn. Springer, Cham, pp 1–14

- Carvalho de Mendonça JX (1955) *Tratado de Direito Comercial Brasileiro. Parte I—Das Obrigações em matéria comercial. Livro IV—Das Obrigações, dos Contratos e da Prescrição em Matéria Comercial*, vol 6. Freitas Bastos, Rio de Janeiro
- Carvalho Santos JM (2002) *Código Civil (LGL\2002\400) brasileiro interpretado*, vol 12. 9th ed. Freitas Bastos, Rio de Janeiro
- Carvalho MAE (2005) Contratos internacionais: aspectos relevantes. In: *Revista Autor—Política, Economia, Internacional, Cultura e Direito*. year 5. N. 49
- Castellucci I (2012) Legal Hybridity in Hong Kong and Macau. *McGill L J* 57:665–720
- Chandra A, Hubbard WHJ, Kalantry S (2017) The supreme court of India: a people's court? *Indian L Rev* 1:145–181
- Chandru G, Kumar P (2019) International arbitration 2019—India. <https://www.globallegalinsights.com/practice-areas/international-arbitration-laws-and-regulations/india>
- Chen F (2001) The New Era of Chinese contract law: history, development and a comparative analysis. *Brooklyn J Int'l L* 27:153–191
- Chen J (2016) *Chinese law: context and transformation*, 3rd edn. Martinus Nijhoff, Leiden
- Chen L, DiMatteo LA (2018) History of Chinese contract law. In: DiMatteo LA, Chen L (eds) *Chinese contract law. Civil and Common Law Perspectives*. CUP, Cambridge, 3–25
- Chen L, Wang H (2020) Judicial control over arbitral awards in mainland China. In: DiMatteo LA, Potin N, Infantino M (eds) *Cambridge handbook on judicial control of arbitral awards*. CUP, Cambridge, forthcoming
- Coelho FU (2007) *Curso de direito comercial, Direito de Empresa*. Vol 3, 7th ed. Saraiva, São Paulo
- Comparato FK (1967) Obrigações de meio, de resultado e de garantia. *RT*. Vol 386
- Costa V, Tavares Paes Jr A (2019) Brazil: International Arbitration 2019. <https://iclg.com/practice-areas/international-arbitration-laws-and-regulations/brazil>
- Costa Lima C (2007) Reflexões sobre a resolução do contrato na nova teoria contratual. In: Marques CL A *Nova Crise do Contrato, Estudos sobre a Nova Teoria Contratual*. Revista dos Tribunais, São Paulo
- Couto e Silva CV (2007) *Obrigações como Processo*, FGV, Rio de Janeiro
- Cretella Neto J (2010) Da importância do Preâmbulo nos Contratos Internacionais do Comércio. In: *Revista da Faculdade de Direito da Universidade Federal de Minas Gerais*. n. 57
- Cruz GS (2005) Obrigações alternativas e com faculdade alternativa. Obrigações de meio e de resultado. In: Tepedino G (coord) *Obrigações*. Renovar, Rio de Janeiro
- Cui J (2016) *Contract Law*, Law Press, Beijing. 崔建远:《合同法》, 法律出版社 2016 年版
- Cui J (2010) *Obligation*, Tsinghua University Press, Beijing. 崔建远等著:《债法》清华大学出版社 2010 年版
- Cuniberti G (2015) Article 1.4. In: Vogenauer S (ed) *Commentary on the UNIDROIT principles of international commercial contracts (PICC)*, 2nd ed. Oxford University Press
- de Albuquerque Cavalcanti Abbud A (2009) Fifty Years in Five? The Brazilian Approach to the New York Convention. In: Jemielniak J, Miklaszewicz P (eds) *Interpretation of law in the global world: from particularism to a universal approach*. Springer, Cham, 279–301
- de Assis A (2013) *Resolução do contrato por inadimplemento*. 5th ed. Revista dos Tribunais, São Paulo
- de Assis A, De Andrade RA, Pessoa Alves FG (2007) Comentários ao Código Civil Brasileiro, Direito das Obrigações (arts. 421 a 578). In: Alvim A, Alvim T (coord.), *Forense*, Rio de Janeiro
- Dendy M (2019) Conflict of Laws. In: Joubert WA (ed), *The Law of South Africa (LAWSA)*, 3rd ed, vol 7(1). LexisNexis
- De Stadler E (2014a) Section 5. In: Naudé T, Eiselen S (eds) *Commentary on the Consumer Protection Act*. Juta
- De Stadler E (2014b) Section 54. In: Naudé T, Eiselen S (eds) *Commentary on the Consumer Protection Act*. Juta
- De Stadler E (2014c) Section 56. In: Naudé T, Eiselen S (eds) *Commentary on the Consumer Protection Act*. Juta

- Dezalay Y, Garth BG (1996) *Dealing in Virtue*. University of Chicago Press, Chicago-London, International Commercial Arbitration and the Construction of a Transnational Legal Order
- Dias JA (1980) *Cláusula de não indenizar (chamada cláusula de irresponsabilidade)*, 4th edn. Forense, Rio de Janeiro
- DiMatteo LA (2018) 'Rule of Law' in China: The Confrontation of Formal Law with Cultural Norms. *Cornell Int'l L J* 51:391–444 (2018)
- DiMatteo LA, Wang J (2018) CCL and CISG: a comparative analysis of formation, performance, and breach. In: DiMatteo LA, Chen L (eds.) *Chinese contract law. Civil and Common Law Perspectives*. CUP, Cambridge, 466–500
- DiMatteo L et al (2005) *International Sales Law, a critical analysis of CISG Jurisprudence*. Cambridge University Press, Cambridge
- Ding W (2007) Improving the Chinese Jurisdiction System on Civil and Commercial Actions Concerning Foreign Interests in Forum of Politics and Law, vol 6. 丁伟,《我国涉外民商事诉讼管辖权制度的完善》,载《政法论坛》,2007年第6期
- Dozhdev D (2020) Judicial control over Arbitration in Russia. In: DiMatteo L, Potin N, Infantino M (eds) *cambridge handbook on judicial control of arbitral awards*. CUP, Cambridge. Forthcoming
- du Bois F (2004) Introduction: history, system and sources. In: van der Merwe CG, du Plessis JE (eds) *Introduction to the Law of South Africa*. Kluwer, The Hague, pp 1–26
- Du Plessis J (2019a) Section 40. In: Naudé T, Eiselen S (eds) *commentary on the consumer protection act, revision service 4*. Juta
- Du Plessis JE (2019b) Comparative law and the study of mixed legal systems. In: Reimann M, Zimmermann R (eds) *The Oxford Handbook of Comparative Law*, 2nd edn. OUP, Oxford, pp 474–501
- Du Plessis J (2015) Illegal contracts and the burden of proof. *South African Law J* 132:664
- Du Plessis JE (2012) South Africa. In: Smits JM (ed) *Elgar Encyclopedia of Comparative Law*. EE, Cheltenham, pp 814–819
- Erasmus HJ (2004) Law of Civil Procedure. In: van der Merwe CG, du Plessis JE (eds) *Introduction to the Law of South Africa*. Kluwer, The Hague, pp 431–446
- Espolaor Veronese L (2019) *A convenção de Viena e seus reflexos no direito contratual brasileiro*. Almedina, São Paulo
- Estrella Faria JA (2015) Another BRIC in the wall: Brazil joins the CISG. *Unif L Rev* 20:211–242
- Fachin LE (2012) Fato de força maior e o adimplemento contratual. In: *Soluções Práticas – Fachin*. Revista dos Tribunais. Vol 1: 231–276
- Farnsworth A (1999) *Contracts*, 3rd edn. Aspen, New York
- Feldbrugge FJM (1993) *Russian law: the end of the soviet system and the role of law*. Martinus Nijhoff, Leiden
- Ferrari F (2006) Fundamental breach under the UN sales convention: 25 years of Article 25 CISG. In: *25 Journal of Law and Commerce*, pp 489–508
- Filho SC (1996) *Programa de responsabilidade civil*. 1st ed. 2nd cir. n 111. Malheiros, São Paulo
- Fontoura Costa JA, Nusdeo AMO (2012) *As cláusulas de força maior e de hardship nos contratos internacionais*. *Doutrinas Essenciais De Direito Internacional*. 5:555–594
- Forsyth CF (2012) *Private International Law*, 5th ed. Juta
- Frada MAC (1994) *Contrato e deveres de proteção*. Coimbra, Coimbra
- Fradera VMJ (2004) Pode o credor ser instado a diminuir o próprio prejuízo? In: *Revista Trimestral de Direito Civil*. Vol 19
- Fritz KN (2009) A responsabilidade pré-contratual por ruptura injustificada das negociações. *RT*. Vol 883
- Fu J (2011) *Modern European and Chinese contract law: a comparative study of party autonomy*. Kluwer, The Hague
- Gama L Jr (2011) Prospects for the UNIDROIT Principles in Brazil. *Unif L Rev* 16:613–656
- Ge J (2019) *A comparative analysis of policing consumer contracts in China and the EU*. Springer, Cham

- Gomes O (1959) Historical and sociological roots of the Brazilian civil code. *Inter-Am L Rev* 1:331–386
- Gomes, O (2009a) *Contratos*. coord. Brito, E, 26th ed. Forense, Rio de Janeiro
- Gomes O (2009b) *Obrigações*. 17th edn. (at: Brito, E). Forense. Rio de Janeiro
- Gomes O (2010) *Introdução ao Direito Civil*. 20th ed. (at: Brito, E, Brito, RP). Forense, Rio de Janeiro
- Graffi L (2003) Case law on the concept of “Fundamental Breach” in the Vienna sales convention. In: *Revue de droit des affaires internationales/International Business Law Journal*. n 3, Forum Européen de la Communication, Paris
- Grebler E (2005) The convention on international sale of goods and Brazilian law: are differences irreconcilable? *J L & Com* 25:467–476
- Grinover AP (1996) Tutela jurisdicional nas obrigações de fazer e não fazer. In: Teixeira, SF (coord) *Reforma do Código de Processo Civil*. n 2. Saraiva, São Paulo
- Guadagni M (1989) Introduction. In: Guadagni M (ed) *Legal scholarship in Africa: Country reports for the seminar held at the University of Trento on 19–22 September 1988*. University of Trento, Trento, 1989, 3–28
- Guedes GSC (2011) *Lucros cessantes. Do bom-senso ao postulado normativo da razoabilidade*. RT, São Paulo
- Guerrero CAA, Marcondes R (2011) A força executiva das comfort letters. *RDP* 48:363–414
- Halberstam D, Reimann M (2014) Federalism and legal unification: comparing methods, results, and explanations across 20 systems. In: Halberstam D, Reimann M (eds) *Federalism and legal unification: a comparative empirical investigation of twenty systems*. Springer, Cham, pp 3–68
- Halsbury’s *Laws of India* (2016) Volume 9, *Contracts*, 2nd ed. Lexis Nexis, New Delhi
- Hammond G (2016) The legislative implementation of law reform proposal. In: Dyson M, Lee J, Wilson Stark S (eds) *Fifty years of the law commissions: the dynamics of law reform*. CUP, Cambridge, pp 175–188
- Han S (2018) *General introduction to contract law*, Law Press. 韩世远:《合法总论》, 法律出版社 2018 年版
- Han S (2014) Study of some problems of changed circumstances, in *Peking University Law Journal*, 2014, vol 3, Beijing. 韩世远:《情事变更若干问题研究》, 载《中外法学》2014 年第 3 期
- Han S (2002) Doctrinal problems of delayed performance, in *Tsinghua University Journal*, Vol 4. 韩世远:《履行迟延的理论问题》, 载《清华大学学报》(哲学社会科学版) 2002 年第 4 期; Hao L (2015) Interpretation of Expression of Intent, in *Northern Legal Science*, 2015, No. 5 郝丽燕:《意思表示的解释方法》, 载《北方法学》2015 年第 5 期
- Harris HS, Wang PJ, Cohen MA, Zhang Y, Evrard SJ (2011) *Anti-monopoly law and practice in China*. OUP, Oxford
- Hill CA, King C (2004) How do German contracts do as much with fewer words? *Chi-Kent L Rev* 79:889–926
- Honnold JO (1999) *Uniform law for international sales under the 1980 united nations convention*, 3rd edn. Kluwer Law International, The Hague
- Houzhi T (1984) Arbitration—a method used by China to settle foreign trade and economic disputes. *Pace L Rev* 4:519–536
- Huang YL, Chen Y (1999) *Contracts—China*. Kluwer, The Hague
- Huang S (ed) (2008) *Guide and reference of civil sentences*, vol 34, Law Press, Beijing. 黄松有主编,《民事审判指导与参考》, 总第 34 集, 法律出版社 2008 年版
- Hutchison D, Pretorius C (eds) (2017) *The law of contract in South Africa*, 3rd ed. Oxford University Press South Africa
- Ioffe OS (1985) Civil Law. In: Feldbrugge FJM, Van den Berg GP, Bradford Simons W (eds) *Encyclopedia of Soviet Law*. Martinus Nijhoff, Leiden, pp 114–122
- Janssen A, Chau SCK (2018) The impact of the Unidroit principles of international commercial contracts on the Chinese contract law: past, present and future. In: DiMatteo LA, Chen L (eds) *Chinese contract law. Civil and Common Law Perspectives*, CUP, Cambridge, 447–455

- Ji F (2016) Study of excessive cost due to impossible performance, in *Tribune of Political Science and Law*, Vol 6, Beijing. 冀放:《给付不能之履行费用过高问题探析》,《政法论坛》2016年第6期
- Junqueira de Azevedo A (2005) L'influence du droit français sur le droit brésilien. In: Wald A & Jauffret-Spinosi C (eds.) *Le droit brésilien hier, aujourd'hui et demain*. Société de législation comparée, Paris, 456–479
- Junqueira de Azevedo A (2010) Cláusula cruzada de não indenizar (cross-waiver of liability), ou cláusula de não indenizar com eficácia para ambos os contratantes—renúncia ao direito de indenização—promessa de fato de terceiro—estipulação em favor de terceiro. In: *Doutrinas Essenciais de Direito Civil*. Revista dos Tribunais. Vol 4: 561–569
- Junqueira de Azevedo A (2013) *Negócio Jurídico, Existência, Validade e Eficácia*. 4th ed. Saraiva, São Paulo
- Kannak K, Prakash A (eds) (2019) *Ratanlal & Dhirajlal: The Law of Evidence* 27th ed. Lexis Nexis, New Delhi
- Khanderia S (2018a) Commercial impracticability under the Indian law of contract: the UNIDROIT principles as the way forward? *UCL J L & Juris* 7:52–71
- Khanderia S (2018b) Indian private international law vis-à-vis party autonomy in the choice of law. *Oxford U Commonwealth L J* 18:1–15
- Koch R (2004) Fundamental breach: commentary on whether the UNIDROIT principles of international commercial contracts may be used to interpret or supplement article 25 CISG. http://www.cisg.law.pace.edu/cisg/biblio/koch1.html#rk*
- Komarov AS (2011) Reference to the UNIDROIT principles in international commercial arbitration practice in the Russian federation. *Unif L Rev* 16:657–667
- Komarov AS (1996) The UNIDROIT principles of international commercial contracts: a Russian view. *Unif L Rev* 1:247–254
- Kos-Rabcewicz-Zubkowski L (1970) *East European rules on the validity of international commercial arbitration agreement*. Manchester University Press, Manchester
- Kotelnikov A, Kurochkin S, Skvortsov O (2019) *Arbitration in Russia*. Kluwer, The Hague
- Kozolchuk B (2014) *Comparative commercial contracts: law, culture and economic development*. West, St Paul
- Kumar A, Upadhyay R, Jegadeesh A, Chheda Y (2017) interpretation and application of the New York convention in India. In: Bermann GA (ed) *Recognition and Enforcement of Foreign Arbitral Awards*. Springer, Cham, pp 445–476
- Leisinger BK (2007) Fundamental breach—considering non conformity of goods—contribution on international commercial Law. Sellier, München
- Lemes SMF (2010) Homologação de sentença arbitral estrangeira. Lei aplicável. *Convenção das nações unidas sobre a compra e venda internacional de mercadorias (CISG)*. *RAM* 24:155–196
- Li J (2018) Deconstruction of defense of anticipatory performance, in *The Jurist*, vol 5, Beijing. 李建星:《先履行抗辩权之解构》,《法学家》2018年第5期
- Li X, Zhong Y (2006) Conflict and application of standard clauses. “Conflict of Form” and Conflict Law, in *Present-day Law Science*, vol 2, Beijing. 李先波, 钟月辉:《标准条款之冲突及其适用——“格式之争”与冲突法》,载《时代法学》2006年第2期
- Li Y (2017) Commentary on Art. 66 of the contract law, in *Jurists*, 2017, vol 2, Beijing. 李永军:《〈合同法〉第66条(同时履行抗辩权)评注》,《法学家》2017年第2期
- Liang H (2017) *General introduction to civil law* (5th ed.), Law Press, Beijing. 梁慧星:《民法总论》(第五版),法律出版社2017年版
- Liang H (1991) *Obligation*, in Wang J (ed.), *Chinese civil law*, Law Press, Beijing. 王家福主编:《中国民法学·民法债权》[梁慧星],法律出版社1991年版
- Lima A (2011) Responsabilidade do depositário no caso fortuito ou de força maior. In: *Doutrinas Essenciais de Responsabilidade Civil*. Revista dos Tribunais. Vol 2: 791–794
- Lima CC (2005) A resolução do contrato na nova teoria contratual. *RDC*. Vol 42. n 55
- Ling B (2002) *Contract Law in China*. Sweet & Maxwell Asia, Kong Kong

- Liu C (2013) Rule on Determination of Compensation to *Lucrum Cessant*, in *Studies of Law*, vol 2, Beijing 刘承魁:《违约可得利益损失的确定规则》,《法学研究》,2013年第2期
- Liu Q (2019) Chinese ‘Case Law’ in comparative law studies: illusions and complexities. *Asian J Comp L* S14:97–117
- Loubser M (1996) Extinctive Prescription. *Juta*
- Lubbe G (1996) Retraction of repudiation: a doctrine writ in water? *Stellenbosch Law Rev* 7:147
- Lubbe G, du Plessis JE (2004) *Law of Contract*. In: van der Merwe CG, du Plessis JE (eds) *Introduction to the Law of South Africa*. Kluwer, The Hague, pp 243–274
- Lubbe G, Murray C (1988) *Farlam & hathaway: contract—cases, materials, commentary*, 3rd ed. *Juta*
- Macaulay S (1963) Non-contractual relations in business: a preliminary study. *Am Sociol Rev* 28:55–67
- Machado B (1988) *Risco contratual e mora do credor*. Coimbra, Coimbra
- Maggs PB (2009) Reflections of anglo-american legal concepts and language in the New Russian civil code. In: Simons WB (ed) *Private and Civil Law in the Russian Federation*. Martinus Nijhoff, Leiden, pp 197–203
- Maggs PB, Schwartz O, Burnham W (2015) *Law and legal system of the Russian Federation*, 6th edn. Juris, New York
- Magnus U (2004) in Ferrari F, Flechtner H, Brand R, *The Draft UNCITRAL digest and beyond: cases, analysis and unresolved issues in the U.N. Sales Convention*. Sellier, München
- Magnus U (2005–06) The remedy of avoidance of contract under CISG—general remarks and special cases. In: 25 *Journal of law and commerce*
- Maleshin D (2017) *Civil procedure in Russia*, 3rd edn. Kluwer, The Hague
- Mancuso S (2017) *Contract law in the BRICS countries. A comparative approach*. In: Neuwirth RJ, Svetlicinii A, De Castro HD (eds) *The BRICS-Lawyers’ Guide to Global Cooperation*. CUP, Cambridge, pp 217–246
- Markanda PC (ed) (2018) *The law of contract*. 4th ed. Lexis Nexis, New Delhi
- Marinoni LG (2019) *Precedentes Obrigatórios*. 6th ed. Revista dos Tribunais, São Paulo
- Marques CL (2002) *Contratos no Código de Defesa do Consumidor*. 6th ed. Revista dos Tribunais, São Paulo
- Martinez AP (2004) *A Defesa dos Interesses dos Consumidores pelo Direito da Concorrência*. In: *Revista do IBRAC – Direito da Concorrência, Consumo e Comércio Internacional* 11: 67–99
- Martins-Costa J (1999) *A Boa-Fé no Direito Privado—Sistema e Tópica no Processo Obrigacional*, 1st ed. Revista dos Tribunais, São Paulo
- Martins-Costa J (2006) *O método de concreção e a interpretação dos contratos: primeiras notas de uma leitura suscitada pelo Código Civil*. RBDC. n 31
- Martins-Costa J (2009) *Comentários ao Novo Código Civil. Do inadimplemento das Obrigações*. arts. 389 a 420. In: Teixeira SF (coord), vol 5. t. 2. 2nd ed. Forense, Rio de Janeiro
- Martins-Costa J (2012) *Responsabilidade civil contratual. Lucros cessantes. Resolução. Interesse positivo e interesse negativo. Distinção entre lucros cessantes e lucros hipotéticos. Dever de mitigar o próprio dano. Dano moral e pessoa jurídica*. In: Lotufo R, Nanni GE, Martins FR (ed.) *Temas relevantes de direito civil contemporâneo*. Atlas, São Paulo
- Martins-Costa J (2013) *Os Regimes do Dolo Civil no Direito Brasileiro: dolo antecedente, vício informativo por omissão e por comissão, dolo acidental e dever de indenizar*. RT 923:115–143
- Martins-Costa J (2015) *A boa-fé no direito privado, critérios para a sua aplicação*. Marcial Pons, São Paulo
- Mateson JH (2006) *Convergence, culture and contract law in China*. *Minn J Int’l L* 15:329–382 (2006)
- Maximiliano C (1961) *Hermenêutica e Aplicação do Direito*, 7th edn. Freitas Bastos, Rio de Janeiro
- Medina JMG (2010) *Coação Econômica (economic duress)*. RT 02:87–110
- Milgrom PR, North DC, Weingast BR (1990) *The role of institutions in the revival of trade: the law merchant, private judges, and the champagne fairs*. *Econ Pol* 2:1–23

- Minkang G (2010) *Understanding Chinese company law*, 2nd edn. Hong Kong University Press, Hong Kong
- Miragem BNB (2005) Diretrizes interpretativas da função social do contrato. *RDC* 56:22–45
- Miragem BNB (2007) Responsabilidade civil médica no direito brasileiro. *RDC* 63:52–91
- Mo JS (2017) Interpretation and application of the New York convention in China. In: Bermann GA (ed) *Recognition and Enforcement of Foreign Arbitral Awards*. Springer, Cham, pp 183–218
- Monteiro WB (2003) *Curso de Direito Civil*, v. 4: direito das obrigações, 1ª parte. 32nd ed. (at: Dabus Maluf, CA). Saraiva, São Paulo
- Moreira Alves JC (2011) Notas sobre a carta de conforto. In: Von Adamek MV (org) *Temas de direito societário e empresarial contemporâneos—Liber Amicorum Prof. Dr. Erasmo Valladão Azevedo e Novaes França*, 1st ed. Malheiros, São Paulo
- Nain Y, Manish S (2011) Why India Should Opt for CISG. *Indian L J* 4. http://www.indialawjournal.org/archives/volume4/issue_3/article_5.html
- Nalin P (2005) Do contrato: conceito pós-moderno. 1st edn. 5th cir. Juruá, Curitiba
- Narang S (2020) Arbitration and conciliation (Amendment) Act 2019: significant alterations and its impact on Indian arbitration mechanism. *Manag Account* 55(2):46–49
- Naudé T (2014) Section 52, Regulation 44. In: Naudé T, Eiselen S (eds) *commentary on the consumer protection Act*. Juta
- Naudé T, Lubbe G (2001) Cancellation for “Material” or “Fundamental” Breach: a comparative analysis of South African Law, the UN convention on contracts for the international sale of goods (CISG) and the Unidroit principles of international commercial contracts. *Stellenbosh L Rev* 12:371–398
- Neels JL, Fredericks EA (2006) Revision of the Rome convention on the law applicable to contractual obligations (1980): perspectives from international commercial and financial law. *J South African L* 4:121–134
- Nery N Jr (2014a) Execução específica. Emissão de declaração de vontade de um dos contratantes—CPC 466-b e 466-c. *Soluções Práticas De Direito—Nelson Nery Junior*. 9:635–664
- Nery Jr N (2014b) Indenização por lucros cessantes milionária e ilegal. Quantificação por dano que não observou os parâmetros legais. In: *Soluções Práticas – Nelson Nery Júnior*. *Revista dos Tribunais*. Vol 6: 365–390
- Nery Junior N, Santos TR (2011) Renegociação Contratual. *RT*. 906:113–156
- Neto ABC (2011) Alteração Verbal de Contrato Escrito Não Solene. In: *Doutrinas Essenciais Obrigações e Contratos*, vol 3. *Revista dos Tribunais*
- Nevares ALM (2002) O erro, o dolo, a lesão e o estado de perigo no novo Código Civil. In: Tepedino G (coord.) *A parte geral do novo Código Civil*. *Estudos na perspectiva civil-constitucional*, Renovar, Rio de Janeiro
- Neves JGA (2016) A Suppressio (Verwirkung) no Direito Civil. Almedina, São Paulo
- Niranjan V (2016) Legislative competence. The union and the states. In: Choudhry S, Khosla M, Mehta PB (eds) *The Oxford Handbook of the Indian Constitution*. OUP, Oxford, pp 466–486
- Noronha FE (2010) Private international law in India: adequacy of principles in comparison with common law and civil law systems. Universal Law Publishing Co, Delhi
- Nunes Pinto JE (2005) A Confidencialidade Na Arbitragem. *RAM* 6:25–36
- Oda H (2007) *Russian Commercial Law*, 2nd edn. Martinus Nijhoff, Leiden
- Oppong RF (2013) *Private international law in commonwealth Africa*. CUP, Cambridge
- Oppong RF (2007) Private international law in Africa: the past, present and future. *Am J Comp L* 55:677–719
- O’Regan K (1999) The best of both worlds? Some reflections on the interaction between the common law and the Bill of rights in our new constitution. *Potchefstroom Electronic J* 2. <https://doi.org/10.17159/1727-3781/1999/v2i1a2890>
- Orlov V (2019) Legal sources and interpretation in Russian civil law. *Athens J L* 5:117–136
- Orlov V (2017) Updated international private law of Russia. *Athens J L* 3:75–98
- Orlov V, Yarkov V (2017) New Russian arbitration law. *Athens J L* 3:257–280

- Örücü E (2010) General introduction. Mixed legal systems at new frontiers. In: Örücü E (ed) *Mixed Legal Systems at New Frontiers*. Wildy, Simmonds & Hill, London, 1–18
- Osakwe C (2008) *Russian Civil Code – Parts 1–3: Text and Analysis*. Kluwer, The Hague
- Ostendorf P (2010) *International Sales Terms*. Beck, München
- Palmer VV (2010) Two rival theories of mixed legal systems. In: Örücü E (ed) *Mixed legal systems at new frontiers*. Wildy, Simmonds & Hill, London, 19–52
- Parikh S (2012) India: from political federalism and fiscal centralization to greater subnational autonomy. In: Halberstam D, Reimann M (eds) *Federalism and legal unification: a comparative empirical investigation of twenty systems*. Springer, Cham, pp 255–266
- Penteado LC (2006) Figuras Parcelares da Boa-fé Objetiva e venire contra factum proprium. *RDJ* 27:252–278
- Pereira CMS (2015a) *Instituições de Direito Civil, Introdução ao Direito Civil, Teoria Geral do Direito Civil*. vol 1. 28th ed. (at: Moraes, MCB). Forense, Rio de Janeiro
- Pereira CMS (2015b) *Instituições de Direito Civil. Contratos. Declaração Unilateral de Vontade. Responsabilidade Civil*, vol 3. 19th ed. Forense, Rio de Janeiro
- Pereira CMS (2009) *Instituições de Direito Civil, Teoria Geral das Obrigações*. Vol 2. 22nd ed. (at: Gama, GCN). Forense, Rio de Janeiro
- Pereira CMS (1993) *Lesão nos contratos*, 4th edn. Forense, Rio de Janeiro
- Picazo LD, Leon P (1998) *La Compraventa Internacional de Mercaderías – Comentário de la Convención de Viena*, 1st edn. Civitas, Madrid
- Pontes de Miranda FC (1984) *Tratado de Direito Privado. Parte Especial. Direito das Obrigações: Extinção das dívidas e obrigações. Dação em soluto. Confusão. Remissão de dívidas. Novação. Transação. Outros modos de extinção*. t. XXV, 3rd ed. Revista dos Tribunais, São Paulo
- Pontes de Miranda FC (1972) *Tratado de Direito Privado. Parte Especial. Direito das Obrigações: Compra e Venda. Troca. Contrato estimatório*. t. XXXIX, 3rd ed. Borsoi, Rio de Janeiro
- Pontes de Miranda FC (1962) *Tratado de Direito Privado, Parte Especial*. t. XXXVIII. Borsoi, Rio de Janeiro
- Pontes de Miranda FC (1959) *Tratado de Direito Privado. Parte Especial. Direito das Obrigações. Consequências do inadimplemento. Exceções de contrato não adimplido, ou adimplido insatisfatoriamente, e de insegurança. Enriquecimento injustificado. Estipulação a favor de terceiro. Eficácia protetiva de terceiro. Mudança de circunstâncias. Compromisso*. t. XXVI. Borsoi, Rio de Janeiro
- Potenza GP (2013) *Fusões e aquisições: o instrumento de aquisição de empresas do setor sucroalcooleiro: uma visão do comprador estrangeiro*. Almedina, São Paulo
- Proença JCB (2006) *A resolução do contrato no direito civil: do enquadramento e do regime*. Coimbra Ed, Coimbra
- Queen Mary University of London (2019) 2018 International Arbitration Survey: The Evolution of International Arbitration, 2019. [http://www.arbitration.qmul.ac.uk/media/arbitration/docs/2018-International-Arbitration-Survey---The-Evolution-of-International-Arbitration-\(2\).PDF](http://www.arbitration.qmul.ac.uk/media/arbitration/docs/2018-International-Arbitration-Survey---The-Evolution-of-International-Arbitration-(2).PDF)
- Qi D (2020) *The power of the supreme people's court: Reconceptualizing Judicial power in contemporary China*. Routledge, London
- Ramani Garimella S, Ashraful MZ (2019) Commercial Courts in India: All for Ease of Doing Business. In: Kramer X, Sorabji J (eds) *International Business Courts. A European and Global Perspective*. Eleven, The Hague, 195–214
- Reale M (2005) *A história do Novo Código Civil*. RT. Vol 1
- Rebouças, RF (2015) *Contratos Eletrônicos, Formação e Validade – Aplicações Práticas*. Almedina, São Paulo
- Rechsteiner BW (2012) *Direito Internacional Privado. Teoria e Prática*. 15th ed. Saraiva, São Paulo
- Roberts A (2017) *Is international law really international?* OUP, Oxford
- Robinson N (2013) Structure matters: the impact of court structure on the Indian and U.S. Supreme Courts *Am J Comp L* 61:173–208
- Rodrigues S (2002) *Direito Civil, Parte Geral das Obrigações*. Vol 2. 30th ed. Saraiva, São Paulo
- Rodrigues S (1982) *Responsabilidade Civil*. Saraiva, São Paulo

- Rodrigues S (1979) *Dos vícios do consentimento*. Saraiva, São Paulo
- Roppo E (2009) *O contrato*. (trans: Coimbra, A, Gomes, MJ). Almedina, Coimbra
- Rosenn KS (1986) Civil Procedure in Brazil. *Am J Comp L* 34:487–525
- Rosenn KS (1984) Brazil's legal culture: the Jeito revisited. *Fla Int'l L J* 1:1–43
- Rosenn KS (1971) The Jeito: Brazil's institutional bypass of the formal legal system and its developmental implications. *Am J Comp L* 19:514–549
- Saharay H (2004) *Law of Carriage of Goods by Sea and Air*. Eastern Law House, Kolkata
- Salomão Filho C (2013) *Direito concorrencial*. Malheiros, São Paulo
- Salomão Filho C (2006) Breves acenos para uma análise estruturalista do contrato. *RDM*. n 141.
- Salomão Neto E (1988) As operações de crédito documentário, as cartas de crédito e as comfort letters. *RDM*. Vol 123
- San Martín Neira LC (2010) Del “deber” del acreedor de evitar o mitigar el daño. *Università Degli Studi di Roma “Tor Vergata”*, Roma
- Sapre A (ed) (2017) *Pollock & Mulla: The Sale of Goods Act 10th ed*. Lexis Nexis, New Delhi
- Sarkar S (ed) (2013) *Law of Evidence 18th ed*. Lexis Nexis, New Delhi
- Serpa Lopes MM (1961) *Curso de Direito Civil. Fonte das Obrigações: Contratos*, vol 3. 3rd ed. Freitas Bastos, Rio de Janeiro
- Shaohui Z (2008) L'influence des Principes d'UNIDROIT sur la réforme du droit chinois des obligations. *Unif L Rev* 13:153–177
- Shang L (2017) Reconstruction of Relationship between Pre-Contractual Liability and Fraud. From the Perspective of the Function of Theory of Error, in *The Jurist*, vol 4, Beijing 尚连杰:《缔约过失与欺诈的关系再造——以错误理论的功能介入为辅线》,载《法学家》2017年第4期
- Shi J, Gao L (2019) The defaulting Party's right to request the termination of contract, in *studies of comparative law*, Vol 2019, Beijing 石佳友, 高郦梅,《违约方申请解除合同权》,载《比较法研究》,2019年第6期
- Singh G (2012) *Principles of statutory interpretation 13th ed*. Lexis Nexis Butterworths Wadhwa Nagpur, New Delhi
- Singh R (2016) *Law relating to electronic contracts 2nd ed*. Lexis Nexis, New Delhi
- Skvortsov O, Kropotov L (2018) Arbitration changes in Russia: revolution or evolution? *J Int'l Arb* 35:253–265
- Slomp Aguiar A (2011) The law applicable to international trade transactions with Brazilian parties: a comparative study of the Brazilian law, the CISG, and the American law about contract formation. *L & Bus Rev Am* 17:487–553
- Spiegelberger WR (2014) *Enforcement of foreign Arbitral awards in Russia*. Juris, New York
- Stoop P (2019) Section 22 In: Naudé T, Eiselen S (eds) *Commentary on the consumer protection act*, revision service 4. Juta
- Strenger I (2000) *Direito internacional privado*. 4th ed. LTR, São Paulo
- Stringer D (2005) Choice of law and choice of forum in Brazilian international commercial contracts: party autonomy, international Jurisdiction, and the emerging third way. *Columbia J Transnat'l L* 44:975–991
- Su H (ed.), (1992) *Chinese contemporary doctrine of contract law*, Jilin University Press, Beijing 苏惠祥主编:《中国当代合同法论》,吉林大学出版社 1992 年版
- Sui P (1997) *Study of contract law*, Law Press, Beijing 隋彭生:《合同法论》,法律出版社 1997 年版
- Sun W (2018) *Commentary on Art. 42 of Contract Law (Pre-Contractual Liability)*, in *The Jurist*, vol 1, Beijing 孙维飞:《〈合同法〉第 42 条 (缔约过失责任) 评注》,载《法学家》2018 年第 1 期
- Swaminathan S (2018) De-inventing the wheel: Liquidated damages, penalties and the Indian contract act, 1872. *Chin J Comp L* 6:103–127
- Tadeu AS (2011) Responsabilidade civil: nexo causal, causas de exoneração, culpa da vítima, força maior e concorrência de culpas. In: *Doutrinas Essenciais de Responsabilidade Civil*. Revista dos Tribunais. Vol 1: 567–606
- Tallon D (1987) In: Bianca, CM, – Bonell, MJ *commentary on the international sales law*. Giuffré, Milano

- Tepedino G (2011a) Aplicação da exceção de contrato não cumprido. In: Soluções Práticas – Tepedino. Revista dos Tribunais. Vol 2: 213–230
- Tepedino G (2011b) Novos princípios contratuais e teoria da confiança: a exegese da cláusula to the best knowledge of the Sellers. In: Soluções Práticas – Tepedino. vol 2: 425–450
- Tepedino G (2006) Temas de direito civil. t. II. Renovar, Rio de Janeiro
- Tepedino G (2005) Obrigações, Estudos na Perspectiva Civil-Constitucional. Renovar, Rio de Janeiro
- Thomas K (2018) Analysing the notion of ‘Consumer’ in China’s consumer protection law. Chinese J Comp L 6:294–318
- Tu G (2016) Private international Law in China. Springer, Cham
- UNIDROIT (1974) Progressive Codification of International Trade Law – Contracts in General. Study L – Doc. 7. <https://www.unidroit.org/english/documents/1974/study50/s-50-07-e.pdf>
- Ubaldo Miranda CP (2013) Comentários ao Código Civil. Dos Contratos em Geral (arts. 421 a 480). In: Junqueira de Azevedo, A (coord), vol 5. Saraiva, São Paulo
- van der Merwe CG, du Plessis JE, de Waal MJ, Zimmermann R, Farlam P (2012) The Republic of South Africa. In: Palmer VV (ed) Mixed Jurisdictions Worldwide. CUP, Cambridge, pp 95–215
- Van Huyssteen LF, Lubbe GF, Reinecke MFB (2016) Contract – General Principles, 5th ed. Juta
- Van Huyssteen LF, Maxwell CJ (2019) Contracts – South Africa, 6th edn. Kluwer, The Hague
- Van Zyl E, De Stadler E (2017) Section 16. In: Naudé T, Eiselen S (eds), commentary on the consumer protection act, revision service 2. Juta
- Vardhan Y, Narayan C (eds) Pollock & Mulla: Indian contract and specific relief acts 15th ed. Lexis Nexis, New Delhi
- Varela JMA (2015) Obrigações em Geral. Vol 2. 7th ed. Almedina. Coimbra
- Venosa SS (2007) Curso de Direito Civil: Responsabilidade Civil. 7th ed. Atlas, São Paulo
- Verçosa HMD (2010) Contratos Mercantis e a Teoria Geral dos Contratos. O Código Civil de 2002 e a Crise do Contrato. Quartier Latin, São Paulo
- Vieira IA (2011) Plaidoyer por uma aplicação da Convenção de Viena de 1980 relativa à compra e venda internacional de mercadorias no Brasil. In: Vieira IA (org.) Estudos de Direito Comparado e de Direito Internacional Privado, Juruá, Curitiba
- Villaça Azevedo Á (2002) Teoria Geral dos Contratos Típicos e Atípicos. Atlas, São Paulo
- Villaça Azevedo Á (2000) Teoria Geral das Obrigações. 8th ed. Revista dos Tribunais, São Paulo
- Villela JB (2010) Equilíbrio do Contrato: os números e a vontade. RT, vol 900
- Vogenauer S (2015) Article 5.1.4. In: Vogenauer S (ed) Commentary on the UNIDROIT principles of international commercial contracts (PICC), 2nd ed. Oxford University Press
- Wadhwa D, Rajah N (2009) The law of consumer protection 2nd ed. Lexis Nexis Butterworths Wadhwa Nagpur, New Delhi
- Wald A (2014) Dolo acidental do vendedor e violação das garantias prestadas. RT. vol 949
- Wald A (2006) A evolução da responsabilidade civil e dos contratos no direito francês e brasileiro. RT 845:81–94
- Wald A (1999) Le droit comparé au Brésil. Rev Int Dr Comp 51:805–839
- Wang H (2007) Examinations on the impossibility of performance in China, in Legal Science, vol 5, Xi’an 王洪亮,《我国给付不能制度体系之考察》,载《法律科学》,2007年第5期
- Wang L (2002) Study of contract law (vol 1), China Renmin University Press, Beijing 王利明:《合同法研究》(第1卷),中国人民大学出版社2002年版.
- Wang Q (2016) Expression of intent in German law and the latest development of theory on Jurisitic Act. Inspiration for the Drafting of General Part of Chinese Civil Code, in Tsinghua Law Review, vol 6, 2016, Beijing, 王琦:《德国法上意思表示和法律行为理论的最新发展-兼论对中国民法总则立法的启示》,在《清华法学》,2016年第6期
- Wang T (2018) Rule and meaning of interpretation of expression of intent in Chinese general part of civil code, in Academic Journal of Zhongzhou, Vol 1, Suzhou 王天凡:《我国〈民法总则〉中意思表示解释的规则及意义》,载《中州学刊》2018年第1期

- Wang X (2004) *Economic Analyze of Vertical Monopoly Agreement A, Legislation and pragmatic experience of anti-monopoly law*, Tsinghua University Press, Beijing 王晓晔:纵向限制竞争协议的经济分析反垄断法的立法与实践经验, 北京: 清华大学出版社
- Wang Z (2009) *General Rules of Civil Law*, Peking University Press, Beijing 王泽鉴:《民法总则》, 北京大学出版社 2009 年版.
- Wessels JW (1951) *The law of contract in South Africa vol 1*, 2nd ed. Butterworths
- Wethmar-Lemmer M (2016) Applying the CISG via the rules of private international law: Articles 1(1)(b) and 95 of the CISG – analysing CISG Advisory Council Opinion 15. *De Jure (Pretoria)* 49:58–73 (2016)
- World Bank (2017) Russia accelerates reforms pace to improve business climate: doing business report. <https://www.worldbank.org/en/news/press-release/2017/10/31/russia-accelerates-reforms-pace-to-improve-business-climate-doing-business-report>.
- Wu X (2012) Reflection and reconstruction of rule on compensation to *lucrum cessans* in contract, in *Studies on Law and Business*, vol 2, Wuhan 吴行政:《合同法上可得利益赔偿规则的反思与重构》,《法商研究》, 2012 年第 2 期, Art.70 页
- Wu Y (2006) Defect warranty liability of goods of the seller, in *Journal of Zhongnan University of Economics and Law*, vol 6, Wuhan 吴志忠:《论出卖人的权利瑕疵担保责任》, 载《中南财经政法大学学报》2006 年第 6 期
- Xie G (2014) Re-reading Art. 12 of the Contract Law. From the Perspective of Performance Assistant, in *Modern Law Science*, Vol 6 解亘:《再论〈合同法〉第 12 条的存废——以履行辅助人责任论为视角》,《现代法学》, 2014 年第 6 期
- Xie G (2012) On Reservation and Abolition of Art. 121 of Contract Law, in *Tsinghua University Law Journal*, Beijing 解亘:《论〈合同法〉第 121 条的存废》,《清华法学》, 2012 年第 5 期
- Xu G, Song Y, Tan Y (1999) *American Contract Case Law*, in Law Press, Beijing 徐昱, 宋岳, 覃宇:《美国合同判例法》, 法律出版社 1999 年版
- Yang D (2018) Commentary on Art. 14 of Contract Law (Formation of Offer), in *The Jurist*, 2018, vol 4, Beijing 杨代雄:《〈合同法〉第 14 条(要约的构成) 评注》, 载《法学家》2018 年第 4 期
- Yang D (2016) Structure. Civil Juridical Conduct. Representation. Comparative Study on Base of Two French Doctrinal Drafts, in *Eastern Law*, vol 5, Shanghai 杨代雄:《结构·民事法律行为·代理——以法国两部学者草案为基础的比较研究》, 载《东方法学》2016 年第 5 期
- Yao M (2017) Commentary on Art. 114 of Contract Law, in *Jurist*, 2017, vol 5, Beijing 姚明斌:《〈合同法〉Art.114 评注》,《法学家》2017 年第 5 期
- Yefremova M, Yakovlena S, Henderson J (2014) *Contract Law in Russia*. Hart, Oxford
- Yi Fang, (2016) Study on the Problems on the excessive costs of performance related to the impossibility of performance, in *Political Science and Law Forum*, vol 6, Beijing 冀放:《给付不能之履行费用过高问题探析》,《政法论坛》2016 年第 6 期
- Yu P, Gurgel S (2012) Stare decisis in China? The Newly Enacted Guiding Case System. In: Wan M (ed) *Reading the Legal Case: Cross-Currents between Law and the Humanities*. Routledge, London, pp 142–158
- Yu Z, Wang L (ed.), (2017) *Survey of Application and Development of Electronic Contract*, in China University of Politics and Law Press, Beijing 于志刚, 王立梅主编:《电子合同法律应用与发展调研报告》, 中国政法大学出版社 2017 年版
- Zanetti CS (2013a) *A Conservação dos Contratos Nulos por Defeito de Forma*. Quartier Latin, São Paulo
- Zanetti CS (2013b) *O Risco Contratual*. In: Lopez, TA, Lemos, PFI, Junior, OLR (coord) *Sociedade de Risco e Direito Privado. Desafios normativos, consumeristas e ambientais*. Atlas, São Paulo
- Zanetti CS (2012) *A Mitigação do Dano e Alocação de Responsabilidade*. RAM 35
- Zanetti CS (2005) *Responsabilidade pela ruptura das negociações*. Saraiva, São Paulo
- Zhang H (2013) Usual Types of Mandatory Regulations that Affect Effect of Contract, in *People's Judicature*, vol 23. 张华:《影响合同效力的强制性规定常见类型》, 载《人民司法》2013 年第 23 期

- Zhang J (2008) On Regulations on Vertical Monopoly Agreement, in *Journal of Hunan Normal University*, Vol 6, Changsha 张靖:《论纵向垄断协议的规制》, 湖南师范大学社会科学学报, 2008 年第 6 期
- Zhang M (2006) *Chinese Contract Law. Theory and Practice*. Martinus Nijhoff, Leiden
- Zhang M (2000) Freedom of contract with Chinese legal characteristics: a closer look at China's new contract law. *Temp Int'l & Comp L J* 14:237–262
- Zhang Y, Zhu X (2002a). New Contract in Cyber Time, in *Contemporary Law Review*, 2002a, vol 12 张渊, 朱晓燕:《网络时代的新契约》, 载《当代法学》, 2002a年第12期
- Zhang S (2018) Economic Analyze of Institution of Threat, in *Peking University Law Journal*, vol 3 张淞纶:《胁迫制度的经济分析》, 载《中外法学》2018 年第 3 期
- Zhang Y, Zhu X (2002b) Standard Contract of New Contractual Net in Cyber Era, in *Modern Legal Science*, vol 12. 张渊, 朱晓燕:《网络时代的新契约网络格式合同》, 载《当代法学》2002b 年第 12 期
- Zhao W (2015) Unjust Enrichment and Return of Value in the Resolution of Contract provided by Law, in *Chinese and Foreign Law*, vol 5, Beijing 赵文杰:《论不当得利与法定解除中的价值偿还》, 《中外法学》2015 年 5 期
- Zhou J (2012) Understanding and Application of Art. 121 of the Contract Law, in *Tsinghua University Law Journal*, vol 5, Beijing 周江洪:《〈合同法〉第 121 条的理解与适用》, 《清华法学》, 2012 年第 5 期
- Zhou Y (2014) Defect Warranty Liability of Goods of the Seller, in *Legal Forum*, 2014, vol 1, Beijing 周友军:《论出卖人的物的瑕疵担保责任》, 载《法学论坛》2014 年第 1 期
- Zhu Q (2011) *General Introduction to Civil Law*, Peking University Press, Beijing 朱庆育:《民法总论》, 北京大学出版社 2011 年版
- Zhu Y (2003) *China's Civil Law*. Law Press, Beijing
- Zhuang J (2018) Impossible Performance due to the Creditor, in *Legal Science*, 2018, vol 5, Xi'an 庄佳园:《债务人原因引起的给付不能》, 《法律科学》, 2018 年第 5 期
- Zhuikov VM (2009) The supreme court of the Russian Federation and the New Russian Civil Code. In: Simons WB (ed) *Private and Civil Law in the Russian Federation*. Martinus Nijhoff, Leiden, pp 111–118
- Ziegel JS (1984) The remedial provisions in the vienna sales convention: some common law perspectives. In: Bender M (ed) *international sales: the united nations convention on contracts for the international sale of goods*, Galston & Smit