

LEGAL SYSTEMS IN ASEAN – SINGAPORE
CHAPTER 5 – BUSINESS LAW (PART 2):
CONTRACT LAW IN SINGAPORE

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TABLE OF CONTENTS

A.	INTRODUCTION	4
B.	CREATION OF CONTRACT	4
	Offer and Acceptance	4
	Offer	4
	Acceptance	5
	Electronic Transactions Act	6
	Certainty and Completeness of Contract	7
	Certainty of Terms.....	7
	Incomplete Agreements	7
	‘Subject to Contract’: Conditional Agreements.....	7
	Severance	8
	Consideration	8
	The Requirement of Nexus	8
	Pre-Existing Duties.....	9
	Promissory Estoppel	11
	Requirements of Promissory Estoppel.....	11
	‘A Shield, Not a Sword’	12
	Intention to Create Legal Relations	13
C.	TERMS OF CONTRACT.....	13
	Identification of Contractual Terms	13
	Incorporation of Contractual Terms	14
	Signature	14
	Notice	14
	Previous Dealing and Custom.....	15
	Implication of Contractual Terms	15
	Terms Implied in Fact	15
	Terms Implied in Law	16
	Terms Implied by Statute.....	16
	Terms Implied by Custom.....	16
	Interpretation of Contractual Terms	17
	General	17

Singapore: Business Law (Part 2): Law of Contract

Admissibility of Extrinsic Evidence for Construction	18
Invalidation of Exception Clauses	19
Invalidation through Common Law	19
Invalidation through Statute	20
D. PRIVITY OF CONTRACT.....	20
Common Law.....	21
The Contract Confers a Benefit on the Third Party	21
The Contract Exempts the Third Party from Liability	22
The Contract Encompasses a Promise not to Sue the Third Party	22
The Contract Imposes a Burden on the Third Party.....	23
Statutory Exception to the Privity Rule	23
CRTPA, Section 2 – the Test of Enforceability	23
CRTPA, Section 3 – Crystallisation of Rights?	25
E. DISCHARGE OF CONTRACT	25
Frustration.....	26
Limiting Principles	27
Effects of Frustration.....	28
Breach of Contract.....	29
Situations where a Breach of the Contract can Lead to Termination.....	29
Innocent Party can Elect to Terminate or Affirm the Contract	30
F. MISTAKE	31
Mistake at Common Law	31
Mutual Mistake.....	31
Unilateral Mistake	31
Common Mistake	34
Mistake in Equity	35
G. MISREPRESENTATION.....	35
Elements of Misrepresentation	36
False Representation	36
The False Representation must be Addressed to the Party Misled	37
Inducement.....	37
Types of Misrepresentation	37
Fraudulent Misrepresentation.....	37
Innocent Misrepresentation	38
Negligent Misrepresentation	38
Remedies.....	38
Rescission.....	39
Damages.....	40
Indemnity.....	43
Exclusion Clauses	43

H.	UNFAIRNESS.....	44
	Duress	44
	Substantive Elements.....	45
	Causation	48
	Legal Effect	48
	Undue Influence.....	48
	Judicial Approach to the Doctrine of Undue Influence	48
	Class 1: Actual Undue Influence	49
	Class 2: Presumed Undue Influence.....	49
	The Doctrine of Infection	51
	Remedies for Undue Influence	53
	Unconscionability.....	53
	Scope of the Doctrine of Unconscionability in Singapore.....	53
	The Requirements of Unconscionability.....	54
I.	ILLEGALITY AND PUBLIC POLICY	55
	Stage 1: Is the Contract Prohibited?	55
	Statutory Illegality	55
	Common Law Illegality	56
	Stage 2: If the Contract is Prohibited, could there nevertheless be Restitutionary Recovery of Benefits Conferred thereunder?	57
	Not in Pari Delicto	58
	Locus Poenitentiae	58
	The ‘Independent Cause of Action’ Exception to Property Claims	58
	Restraint of Trade.....	58
	Reasonableness of Restraint.....	59
	Public Interest.....	59
	Legitimate Proprietary Interests	59
	Severance	60
J.	JUDICIAL REMEDIES FOR BREACH OF CONTRACT.....	61
	Damages.....	61
	Compensatory Principle.....	61
	Types of Losses	61
	Limitations on Recovery	64
	Specific Remedies.....	65
	Action for an Agreed Sum	65
	Specific Performance.....	65
	Injunction.....	65
	Agreed Remedies.....	66
	Liquidated Damages and the Rule against Penalties	66
	Deposits.....	67

A. INTRODUCTION

Contract law in Singapore is largely based on common law jurisprudence from England and Wales. Thus, the rules developed in the Singapore courts mirror those under the English common law to a large extent.

B. CREATION OF CONTRACT

A contract is an agreement which gives rise to obligations that are enforced or recognised by law. A contract is made when one party accepts an offer made by the other party.

Offer and Acceptance

Offer

An offer is an expression of willingness to contract on specified terms, made with an intention that it is to become binding as soon as it is accepted by the person to whom it is addressed.

An offer must be made with the intention to be bound by it. If a statement was made simply as a response to a request for information this can only be an 'invitation to treat', not an offer.

An offer may be held to have been made if the offeror's words and conduct would induce a reasonable person to believe that the offeror had the requisite intention, that is, the intention to make an offer. The words used by one party, whatever his or her real intention may be, are to be construed in the sense in which they would be reasonably understood by the other.¹

1. *Fundamental Change in Circumstances*

There is no definitive pronouncement by the Singapore courts as to whether a fundamental change in the circumstances occurring between the time an offer was made and before it was accepted would cause the offer to lapse. However, local case law sheds some light on what the potential local position might be.

- (a) In *Norwest Holdings Pte Ltd v Newport Mining Pte Ltd* the court took the opinion that the doctrine of offer and acceptance and common mistake were adequate to explain the consequences of changed circumstances that occur after an offer was made and before the offer was accepted.²

¹ *Tribune Investment Trust Inc v Soosan Trading Co Ltd* [2000] 2 *Singapore Law Reports* (Reissue) 407 (Court of Appeal, Singapore).

² *Norwest Holdings Pte Ltd v Newport Mining Pte Ltd* [2010] 3 *Singapore Law Reports* 956 (High Court, Singapore).

- (b) In *Ong & Ong Pte Ltd v Fairview Developments Pte Ltd*, in considering the appellant's argument that a fundamental change in the circumstances freed it from the contract, the Court of Appeal rejected the *Norwest Holdings* approach to hold that the doctrines of offer and acceptance and common mistake cannot properly explain why an offer would lapse in a fundamental change in circumstances.³ The court then stated that 'there seem[ed] to be room for the application of the doctrine of fundamental change in circumstances'.⁴

2. Termination of an Offer

As a general rule, an offer can be withdrawn at any time before it is accepted. Notice of the withdrawal must be given to the offeree.

An offer can be terminated by rejection of the offer. An attempt to accept an offer on new terms not contained in the offer may be considered a rejection of the offer accompanied by a counter-offer. An offeree who makes such a counter-offer cannot later accept the original offer, since a counter-offer 'kills' the original offer.

An offer which is expressly stated to last for a fixed time cannot be accepted after that time. An offer, which has no express provision limiting its duration, terminates after the lapse of a reasonable time.

If an offer expressly provides that it is to terminate on the occurrence of a condition, the offer cannot be accepted after that condition has occurred.

Acceptance

An acceptance is a final and unqualified expression of assent to the terms of an offer. A mere acknowledgement that one has received an offer, or an alternative proposal by the offeree, would not amount to an acceptance. An offer may be accepted by conduct, for example, by supplying or despatching goods in response to an offer to buy them. Although there is a requirement that the acceptance must be unqualified, this does not mean that there must be precise verbal correspondence between the offer and acceptance. For instance, an acceptance can be effective even though it departs from the wording of the offer, if it expresses an alternative term which the law would imply anyway.

1. Communication of Acceptance

Generally, an acceptance has no effect until it is communicated to the offeror. For an acceptance to be communicated, it must normally be brought to the offeror's notice. In exceptional cases, an acceptance may be effective although it is not communicated to the offeror, in the following situations:

³ *Ong & Ong Pte Ltd v Fairview Developments Pte Ltd* [2015] 2 SLR 470 (Court of Appeal, Singapore).

⁴ *Dysart Timbers Ltd v Roderick William Nielsen* [2009] 3 *New Zealand Law Reports* 160 (Supreme Court, New Zealand).

- (a) If an agent of the offeror has the authority to receive the acceptance, acceptance takes effect as soon as the acceptance is communicated to the agent.
- (b) If the communication to the offeror is thwarted by the offeror's own conduct, he or she would be precluded from denying the acceptance was received since it was due to his or her own fault that it was not received.

2. *Acceptance in Unilateral Contracts*

An offer under a unilateral contract is made when one party promises to pay the other party a sum of money, or do some other act, or to forbear from doing something, if the other party does or forbears to do something without making any promise to that effect.

A number of rules apply to the acceptance of an offer of a unilateral contract:

- (a) The offer can be accepted by fully performing the required act or forbearance.
- (b) There is no need to give advance notice of acceptance to the offeror.
- (c) The offer can, like all other offers, be withdrawn before it has been accepted.

Electronic Transactions Act

According to the Electronic Transactions Act (hereafter ETA),⁵ in relation to the formation of electronic contracts, offer and acceptance may be expressed by means of electronic communications.⁶ A contract may be formed when an automated message system is involved.⁷

A proposal to conclude a contract made through one or more electronic communications which are not addressed to one or more specific parties, but is generally accessible to parties making use of information systems, is considered as an invitation to make an offer.⁸

The ETA also details when an electronic communication is despatched and received,⁹ and addresses situations where there are input errors in electronic communications.¹⁰

⁵ Chapter 88, 2011 Revised Edition (hereafter ETA).

⁶ *ibid* section 11(1).

⁷ *ibid* s 15.

⁸ *ibid* s 14.

⁹ *ibid* s 13.

¹⁰ *ibid* s 16.

Certainty and Completeness of Contract

Before a contract can exist, its terms must be certain and the contract must be complete. A contract may be unenforceable for uncertainty or incompleteness even though there has been both offer and acceptance between the parties.

The contract is uncertain if a term in the contract is incomprehensible. The contract is incomplete if certain terms do not (but should) exist such that the non-existence of these terms makes the contract incomprehensible.¹¹

Certainty of Terms

An agreement to enter into a contract later on is not enforceable.¹² Nonetheless, courts do not expect commercial documents to be drafted with utmost precision and certainty. The ambiguity of words is not a reason for not enforcing them as long as the fair meaning of the parties can be extracted. The court will endeavour to give effect to an agreement rather than to strike it down.

Previous courses of dealing between the parties or trade practice may remedy the gaps in the contract. Where sufficient intention to be bound can be inferred from the parties' reliance on the contract, it will be difficult to establish that the contract is void for vagueness or uncertainty.

Incomplete Agreements

A contract is not binding if essential matters, without which the contract is too uncertain or incomplete to be workable, remain yet to be agreed upon. These matters must make the contract unworkable or void for uncertainty to be considered essential.

'Subject to Contract': Conditional Agreements

Whether a conditional agreement (an agreement that is 'subject to contract') creates a binding contract is a matter of construction of the agreement. On the one hand, the phrase 'subject to contract' can be an expression of the parties' desire to draw up a formal document to incorporate the terms agreed for the sake of regularity. On the other hand, this phrase could reflect the parties' intention that there is no binding agreement until the contract is executed.

If the phrase is interpreted to have the former meaning, the absence of an executed formal contract will not prevent a conditional agreement from being a binding contract. However, if the essential terms of the contract have yet to be agreed, this militates against a finding of a concluded contract indicates parties' intention that there be no binding agreement until the contract is executed.

¹¹ *Harwindar Singh s/o Geja Singh v Wong Lok Yung Michael and another* [2015] 4 SLR 69 (High Court, Singapore).

¹² *Harwindar Singh*, *ibid.*

If the particular facts and the language utilised merit it, the court will find that a valid and binding contract has been concluded.¹³ Even if some terms remain to be negotiated, it is possible for parties to have agreed to a contract despite the presence of a 'subject to contract' clause. The question is whether the parties, by their words and conduct, have made it objectively clear that they intend to be bound despite the unsettled terms.¹⁴

Severance

If essential aspects of the transaction are agreed, vague words can be severed from the agreement, with the rest of the agreement enforced.

However, a distinction must be drawn between a contractual clause that is meaningless and a contractual clause that is yet to be agreed. The former type of clause can often be ignored while still leaving the contract good, whereas the latter type of clause may mean that there is no contract at all, because the parties have not agreed on all the essential terms.¹⁵

Consideration

The basic idea of consideration signifies some legally recognised return that is given in exchange for an enforceable promise. Consideration comes in the form of either a benefit conferred by the promisee on the promisor, or a detriment incurred by the promisee, in return for the promisor's promise. It is not necessary that the promisee incur detriment simultaneously with the promisor being conferred a benefit.

The benefit and/or detriment has to be requested by the promisor, in order for there to be a link between the benefit and/or detriment and the promise sought to be enforced.

If the promisee chooses of his or her own volition (and without more) to incur a detriment or confer a benefit on the promisor, this will not constitute sufficient consideration.

While local case law has acknowledged that the doctrine of consideration has become increasingly less relevant, there is no definite pronouncement on the status of the doctrine of consideration in Singapore yet.

The Requirement of Nexus

1. *Past Consideration is Not Good Consideration*

The consideration for a promise must be causally related to the promise itself. Thus, a promise that is given as a mere expression of gratitude for past services

¹³ *AG v Humphreys Estate* [1987] *Hong Kong Law Reports* 427 (Privy Council on appeal from Hong Kong).

¹⁴ *Hughes v Pendragon Sabre Ltd (trading as Porsche Centre Bolton)* [2016] EWCA Civ 18 (Court of Appeal, England and Wales).

¹⁵ *Nicolene Ltd v Simmonds* [1953] 1 QB 543 (Court of Appeal, England and Wales).

is unsupported by valid consideration. Past consideration is not good consideration.¹⁶ However, this is not a definite rule. In some circumstances, past consideration may be seen as good consideration, if the promisee can show that:¹⁷

- (a) the promisee performed the act at the promisor's request;
- (b) it was clearly understood or implied at the time of the request that the promisee would be rewarded for the act; and
- (c) the eventual promise is one that would have been enforceable if it had been made at the time of the act.

Singapore case law has cautioned against taking a strictly chronological view in ascertaining whether consideration is past consideration.¹⁸

2. *The Requirement of Value*

Valuable consideration may consist either in some right, interest, profit, or benefit accruing to one party, or some forbearance, detriment, loss, or responsibility given, suffered, or undertaken by the other party.¹⁹

3. *Consideration Must be Sufficient Although It Need Not be Adequate*

A promise is enforceable as long as something valuable in the eyes of the law is exchanged for it. The value of the consideration need not be equivalent to that of the promise.²⁰ As the courts have no comparative advantage in determining at what price goods should be sold, the courts will not inquire into the actual adequacy of the consideration.

A reciprocal promise that is impossible or uncertain in its performance would not constitute sufficient consideration.

Pre-Existing Duties

1. *Where a Public Duty is Imposed upon the Promisee by Law*

Generally, mere performance of a public duty imposed by law does not, without more, constitute sufficient consideration for the promisor's promise. However, if the promisee provides something more that goes beyond mere performance of a public duty, there would be sufficient consideration.²¹

¹⁶ *In re McArdle (dec'd)* [1951] Ch 669 (Court of Appeal, England and Wales).

¹⁷ *Pao On v Lau Yiu Long* [1980] AC 614 (Privy Council on appeal from Hong Kong).

¹⁸ *Sim Tony v Lim Ah Gee (trading as Phil Real Estate & Building Services)* [1994] 2 SLR(R) 910 (High Court, Singapore).

¹⁹ *Currie v Misa* (1875) LR 10 Ex 153 (House of Lords, United Kingdom).

²⁰ *Chappel & Co Ltd v Nestle Co Ltd* [1960] AC 87 (House of Lords, United Kingdom).

²¹ *Glasbrook Bros v Glamorgan CC* [1925] AC 270 (House of Lords, United Kingdom)

2. *Pre-existing Contractual Duties Owed to a Third Party*

The performance of an existing contractual duty owed to a third party, or the promise to perform such a duty, is generally regarded as good consideration.²²

3. *Pre-existing Contractual Duties Owed to the Other Party*

(1) *Promise to 'Pay More for the Same'*

A promise to 'pay more for the same' refers to the situation where the promisor promises to give the promisee more for the promisee's performance of his or her existing contractual duty.

In *Williams v Roffey Bros & Nicholls (Contractors) Ltd*,²³ the Court of Appeal of England and Wales adopted a more liberal approach, and operated on the basis of a factual definition of consideration:

- (a) If A has entered into a contract with B to do work for, or to supply goods or services to B, in return for payment by B; and
- (b) at some stage before A has completely performed his obligations under the contract, B has reason to doubt whether A will, or will be able to, complete his or her side of the bargain; and
- (c) B thereupon promises A an additional payment in return for A's promise to perform his or her contractual obligations on time; and
- (d) as a result of giving his promise, B obtains in practice a benefit, or obviates a disbenefit; and
- (e) B's promise is not given as a result of economic duress or fraud on the part of A; then
- (f) the benefit to B is capable of being consideration for B's promise, so that the promise will be legally binding.

The acceptance of the broad principle set out above in *Williams v Roffey Bros* into local jurisprudence is uncertain. Local case law has stated that if a factual (as opposed to a legal) benefit or detriment is sufficient consideration, absent exceptional circumstances, it will be too easy to locate some element of consideration between contracting parties. This would render the requirement of consideration otiose or redundant.²⁴ On the other hand, it has also been stated

²² *Shadwell v Shadwell* (1860) 9 CB (NS) 159 (Court of Common Pleas, England and Wales); *Pao On* (n 17).

²³ [1991] 1 QB 1 (Court of Appeal, England and Wales).

²⁴ *Sunny Metal & Engineering Pte Ltd v Ng Khim Eric* [2007] 1 SLR(R) 853 (High Court, Singapore).

that the modern approach in contract law is for courts to be more ready to find the existence of consideration.²⁵

(2) *Promise to 'Receive Less for the Same'*

A promise to receive less for the same involves situations where the promisee owes the promisor a debt, and the promisor agrees to receive less from the promisee in full settlement of the debt.

In the case of *Foakes v Beer*,²⁶ the Court of Appeal of England and Wales decided that where there is a promise to receive less for the same, part payment of a debt cannot constitute sufficient consideration for a promise to discharge the entire debt owed. Some English cases have refused to extend the principle in *Williams v Roffey Bros* (that is, that practical benefit is sufficient consideration) to a *Foakes v Beer* situation. However, recent English case law seems to suggest otherwise.²⁷

At the moment, there seems to be no local decision on this point. However, the Singapore Court of Appeal has mentioned that it would require no great leap of logic to have extended the holding in *Williams v Roffey Bros* to a *Foakes v Beer* situation.²⁸

Promissory Estoppel

Contractual undertakings that induce reliance may be enforceable through the doctrine of promissory estoppel, even in the absence of consideration or satisfaction of formalities. Promissory estoppel is based on the protection of reliance. Its effect is to hold the promisor to his or her promise, protecting the promisee's expectation.

Requirements of Promissory Estoppel

The elements of promissory estoppel are as follows:

- (a) The representor must have made a clear promise or representation to the representee.
- (b) The representee must have acted in reliance on the representor's clear promise.
- (c) It must be inequitable for the representor to resile or back out from the promise.

²⁵ *S Pacific Resources Ltd v Tomolugen Holdings Ltd* [2016] 3 SLR 1049 (High Court, Singapore).

²⁶ (1884) 54 LJQB 130 (Court of Appeal, England and Wales).

²⁷ See, for example, *MWB Business Exchange Centres Ltd v Rock Advertising Ltd* [2017] QB 604 (Court of Appeal, England and Wales).

²⁸ *Gay Choon Ing v Loh Sze Terence Peter* [2009] 2 SLR(R) 332 (Court of Appeal, Singapore).

1. *Clear Promise*

English cases suggest there must be a clear and unequivocal promise that indicates the representor's intention not to insist on his strict legal rights against the representee. No estoppel arises if the language is qualified or imprecise.²⁹ However, this requirement has not been upheld in many Singapore cases.³⁰

2. *Detrimental Reliance*

The representee must have relied on the representor's representation, that is, if the promise is revoked, the representee will be worse off than he or she was before the promise was made.

The local position regarding the requirement of detrimental reliance is unsettled. In *Abdul Jalil bin Ahmad bin Talib v A Formation Construction Pte Ltd*,³¹ the High Court preferred a broad view – that detriment of the kind required for the purpose of estoppel by representation is not an essential requirement and all that is necessary is that the promisee should have acted in reliance on the promise in such a way as to make it inequitable to allow the promisor to act with it. On appeal, the Court of Appeal declined to express an opinion on the correctness of the lower court's preference but noted that, in contrast, there was a 'narrow view' to the effect that detriment was necessary in all cases of promissory estoppel.

In *Lam Chin Kin David v Deutsche Bank AG*,³² the High Court seemed to have accepted detriment as a requirement, but without alluding to the apparently contradictory cases before. On appeal, the Court of Appeal held that even if detrimental reliance was not found, the appellant could still succeed on the basis of the 'broader principle' that 'where the promisor has obtained an advantage from not giving a promise to the promisee, he should not be allowed to resile from his promise on the basis of promissory estoppel'.

3. *Inequitable to Resile*

It would appear that in order for the promisee to avail himself or herself of the doctrine of promissory estoppel, any reliance on the doctrine by the representee must not be accompanied by any inequitable conduct on the part of the representee.

'A Shield, Not a Sword'

English law (and presumably Singapore law) treats promissory estoppel as a 'shield but not a sword'. It applies only where there is a pre-existing contractual or other legal relationship between the parties, and one party promises to give up

²⁹ *Woodhouse AC Israel Cocoa Ltd SA v Nigerian Produce Marketing Co Ltd* [1972] AC 741 (House of Lords, United Kingdom).

³⁰ *Tacplas Property Services Pte Ltd v Lee Peter Michael (administrator of the estate of Lee Ching Miow, deceased)* [2000] 1 SLR(R) 159 (Court of Appeal, Singapore); *QBE Insurance (International) Ltd v Winterthur Insurance (Far East) Pte Ltd* [2005] 1 SLR(R) 711 (High Court, Singapore).

³¹ [2006] 4 SLR(R) 778 (High Court, Singapore).

³² [2011] 1 SLR 800 (Court of Appeal, Singapore).

some of his or her rights under that relationship. Promissory estoppel may be part of a cause of action, but not a cause of action in itself.³³

Although courts have permitted claimants, rather than defendants, to rely on promissory estoppel so that it can be said to operate as a sword, it only does so to prevent the defendant promisor from relying on a defence which (but for his or her promise not to rely on it) would have defeated the promisee's claim. Regardless, the claimant promisee's cause of action arises independently of the promise being enforced by promissory estoppel.

This general position is not without exceptions. In *Walton's Stores v Maher*,³⁴ the High Court of Australia held that the doctrine of promissory estoppel extends to the enforcement of voluntary promises on the footing that a departure from the basic assumptions underlying the transaction between the parties must be unconscionable. This case lays down the proposition that unconscionability is the unifying principle which forms the basis of the different heads of equity incorporated under equitable estoppel. It is currently unclear whether the Singapore courts will adopt this rather radical development.

Intention to Create Legal Relations

An intention to create legal relations is necessary to create an enforceable agreement. This is to be determined by an objective assessment of the relevant facts. Generally, it is presumed that parties do not intend to create legal relations in social and domestic agreements.³⁵ Conversely, in commercial agreements, it is generally presumed that parties intend to create legal relations.

C. TERMS OF CONTRACT

It is only from the terms of the contract that its obligations can be created and liabilities correspondingly imposed.

Identification of Contractual Terms

Contractual terms may be express or implied. Express terms are terms which are set out in the contract. This can be in writing or oral or both. Implied terms are terms that are read into the contract.

The identification of terms depends on an objective assessment of the parties' intentions. Factors that the courts will take into account when ascertaining whether a statement is a term are as follows:

- (a) The importance of the truth of the statement.³⁶

³³ *Combe v Combe* [1951] 2 KB 215 (Court of Appeal, England and Wales).

³⁴ *Walton's Stores v Maher* (1988) 164 *Commonwealth Law Reports* 387 (High Court, Australia).

³⁵ *Choo Tiong Hin v Choo Hock Swee* [1959] MLJ 67 (Court of Appeal, Malaya); *Estate of Lee Rui Feng v Najib Hanbuk bin Muhammad Jalal* [2016] 4 SLR 438 (High Court, Singapore).

³⁶ *Bannerman v White* (1861) 10 CBNS 844 (Court of Common Pleas, High Court, England and Wales).

- (b) The special knowledge of the maker of the statement.³⁷
- (c) The length of time before the contract was entered into.³⁸
- (d) Business efficacy.³⁹

Incorporation of Contractual Terms

A statement in a document can be incorporated into the contract by:

- (a) signature;
- (b) reasonable notice of the written terms; or
- (c) previous dealing or custom.

Signature

Generally, where a party signs a written document, knowing it to be a contract which governs the relations between him or her and the other party, the terms contained within that document are incorporated into the contract, provided there is no problem as to timing. This will be the case even though the party who signed the document was, ignorant of the contents of the document.

However, an exception clause will not be incorporated into the contract if the party seeking to escape the effect of the exception clause can prove that there has been fraud or misrepresentation, notwithstanding the presence of his or her signature.

Notice

Generally, the party seeking to rely on a term must give the other party adequate notice of it. This notice must be:

- (a) given at or before contract formation;
- (b) in a document intended to have contractual effect; and
- (c) reasonable, that is, the notice must be commensurate with the harshness or unexpectedness of the term.

For exception clauses, the more onerous the clause, the greater the requirements will be before the court will find that reasonable notice has in fact been given by the party relying on the exception clause to the other party. The former party must show that he or she took additional reasonable steps to bring the

³⁷ *Oscar Chess Ltd v Williams* [1957] 1 WLR 370 (Court of Appeal, England and Wales).

³⁸ *Routledge v McKay* [1954] 1 WLR 615 (Court of Appeal, England and Wales).

³⁹ *Tan Chin Seng and others v Raffles Town Club Pte Ltd (No 2)* [2003] 3 SLR(R) 307 (Court of Appeal, Singapore).

significance of the exception clause to the other party's notice. In this regard, the former party has to comply with the 'red-hand rule', which states that there would be sufficient notice if the exception clause was 'printed in red ink with a red hand pointing to it or something equally startling'.⁴⁰

However, the principle of drawing the attention of a contracting party specifically to onerous and unusual conditions is not applicable where there is a signed contract with an explicit incorporation of such conditions, notwithstanding that the contracting party did not have a copy of the incorporated conditions and had not read them.⁴¹

Previous Dealing and Custom

Generally, a particular term can be incorporated into a contract if it can be shown that there has been a course of dealing between the parties in which the term has figured, even though the term itself may not have been read or noticed by the party against whom the term is being pleaded. This depends on the presence of evidence that the parties had a common understanding of past transactions.

Implication of Contractual Terms

The court can imply terms into the contract to give effect to the parties' unexpressed intentions. The court must be satisfied that the implied term was necessarily in the minds of both parties, though not expressed in the contract. However, the court will not rewrite the contract for the parties. No terms will be implied in the face of a contrary express term.

Terms Implied in Fact

According to the Court of Appeal's decision in *Sembcorp Marine Ltd v PPL Holdings Pte Ltd*,⁴² implying terms in fact is the process by which the court fills a gap in the contract to give effect to the parties' presumed intentions.

In this case, the Court of Appeal integrated the classic business efficacy test⁴³ and the officious bystander test⁴⁴ set out in English cases into a three-step framework for implying terms into commercial contracts:⁴⁵

- (a) Is there a 'true gap' – that is the parties did not contemplate the issue at all – in the contract that needs to be filled? The court will only consider implying a term in the presence of a true gap.

⁴⁰ *Thornton v Shoe Lane Parking Ltd* [1971] 2 QB 163 (Court of Appeal, England and Wales).

⁴¹ *Press Automation Technology Pte Ltd v Trans-Link Exhibition Forwarding Pte Ltd* [2003] 1 SLR(R) 712 (High Court, Singapore).

⁴² *Sembcorp Marine Ltd v PPL Holdings Pte Ltd* [2013] 4 SLR 193 (Court of Appeal, Singapore).

⁴³ *The Moorcock* (1889) 14 PD 64 (Court of Appeal, England and Wales).

⁴⁴ *Shirlaw v Southern Foundries* [1939] 2 KB 206 (Court of Appeal, England and Wales).

⁴⁵ *Sembcorp Marine* (n 42).

- (b) Is it necessary in the business or commercial sense to imply the term to give the contract efficacy?
- (c) Regarding the specific term to be implied, would the parties have responded 'Oh, of course!' if the term had been put to them at the time of the contract? If so, the term will be implied.

Terms Implied in Law

Courts can sometimes also imply a term into a contract even if doing so would be contrary to the presumed intention of the contracting parties or even if the parties did not plead it. This is justified by general reasons of justice and fairness and public policy.⁴⁶

Terms Implied by Statute

An example of the statutory implication of terms can be found in sections 12 to 14 of the Sale of Goods Act.⁴⁷ For example, section 14(2) provides that when a seller sells goods in the course of a business, there is an implied condition in the contract of sale that the goods supplied to the buyer must be of satisfactory quality.

Terms Implied by Custom

The starting point for the implication of terms by custom is section 94(e) of the Evidence Act,⁴⁸ which allows for proof of custom, provided that it is not repugnant to or inconsistent with the express terms of the contract.

The custom must also be well-established, and if unreasonable, will not bind the parties concerned through an implied term unless it was known to them at the time of when the contract was entered into.

Local jurisprudence suggests that the custom or trade practice has to be well-established and must have been drawn to the other party's attention or had been followed without exception for a substantial period for a term to be implied under it. A requirement of constructive knowledge seems to be required.

However, it also has been suggested that it is highly unlikely that custom will play a significant role in the local context. One procedural factor that operates against local custom and usage is the parol evidence rule, which is invoked quite frequently. This rule generally prevents parties who have entered into a written contract from trying to argue that the contract's terms should be understood in a certain way by relying on parol or verbal evidence such as discussions that took place before the contract was signed.

⁴⁶ *Jet Holding Ltd v Cooper Cameron (Singapore) Pte Ltd* [2006] 3 SLR(R) 769 (Court of Appeal, Singapore).

⁴⁷ Cap 393, 1999 Rev Ed.

⁴⁸ Cap 97, 1997 Rev Ed.

Interpretation of Contractual Terms

General

Interpretation is a process where the parties' intentions as expressed in the contract are objectively ascertained. It is essentially a matter of construction to ascribe the reasonable understanding of the words against the relevant factual background. The context allows a choice to be made objectively between possible but different meanings of ambiguous words, and in allowing the conclusion that the parties had used the wrong words.

In Singapore, the general approach to the interpretation and construction of contracts is set out in *Zurich Insurance (Singapore) Pte Ltd v B-Gold Interior Design and Construction Pte Ltd*:⁴⁹

- (a) The aim of the exercise in construction of a contract or other document is to ascertain the meaning that it would convey to a reasonable business person.
- (b) The objective principle is critical in defining the approach the courts will take. Courts are concerned usually with the expressed intentions of a person. The standpoint adopted is that of a reasonable reader.
- (c) The exercise in construction is based on a holistic approach. Courts are not excessively focused upon a particular word, phrase, sentence, or clause; the emphasis is on the document or utterance as a whole.
- (d) The exercise in construction is informed by the surrounding circumstances or external context. Courts are prepared to look beyond the four corners of a document, or the bare words of an utterance. It is permissible to have regard to the legal, regulatory, and factual matrix that constitutes the background in which the document was drafted or the utterance was made.
- (e) Within this framework, due consideration is given to the commercial purpose of the transaction or provision. Courts have regard to the overall purpose of the parties with respect to a particular transaction, or the reason why a particular obligation was undertaken.
- (f) A construction, which entails that the contract and its performance are lawful and effective, is to be preferred.
- (g) Where a particular species of transaction, contract, or provision is one-sided or onerous, it will be construed strictly against the party seeking to rely on it.

⁴⁹ *Zurich Insurance (Singapore) Pte Ltd v B-Gold Interior Design & Construction Pte Ltd* [2008] 3 SLR(R) 1029 (Court of Appeal, Singapore) (“*Zurich Insurance*”).

- (h) A construction that leads to very unreasonable results is to be avoided unless it is required by clear words and there is no other tenable construction.
- (i) A specially agreed provision should override an inconsistent standard provision that has not been individually negotiated.
- (j) A more precise or detailed provision should override an inconsistent general or widely expressed provision.

Admissibility of Extrinsic Evidence for Construction

Locally, extrinsic evidence is admissible for interpreting contracts, but this is limited to the Evidence Act. As the Court of Appeal held in the *Sembcorp Marine* case:⁵⁰

- (a) The admissibility of extrinsic evidence is generally governed by the rules of evidence and not by the rules of contractual interpretation.
- (b) The rules governing the admissibility of extrinsic evidence in Singapore are to be found first in the Evidence Act, then in the common law.
- (c) The general admissibility of extrinsic evidence under section 94(f) of the Evidence Act must be read together with the exclusionary provisions of the Evidence Act, in particular, sections 95 and 96.
- (d) Extrinsic evidence of surrounding circumstances is generally admissible under section 94(f). However, extrinsic evidence in the form of parol evidence of the drafter's intentions is generally inadmissible unless it can be brought within the exceptions in sections 97 to 100 of the Evidence Act.

To buttress the evidentiary qualifications to the contextual approach, *Sembcorp Marine* also imposed four requirements of civil procedure:

- (a) Parties who contend that the factual matrix is relevant to the construction of the contract must plead with specificity each fact of the factual matrix that they wish to rely on in support of their construction of the contract.
- (b) The factual matrix in which the facts in point (a) above were known to both or all the relevant parties must also be pleaded with sufficient particularity.
- (c) Parties should in their pleadings specify the effect which such facts will have on their contended construction.

⁵⁰ *Sembcorp Marine* (n 42).

- (d) The obligation of parties to disclose evidence would be limited by the extent to which the evidence are relevant to the facts pleaded in points (a) and (b) above.

The context cannot be used as an excuse by the court concerned to rewrite the terms of the contract according to its subjective view of what it thinks the result ought to be in the case at hand. The court must ascertain, based on all the relevant objective evidence, the intention of the parties at the time they entered into the contract. In this regard, the court should ordinarily start from the working position that the parties did not intend that the term(s) concerned were to produce an absurd result.⁵¹

Invalidation of Exception Clauses

Invalidation through Common Law

If an exception clause in a contract is considered unreasonable due to how a court construes the contract, the clause will not be regarded as incorporated into the contract. Alternatively, the *contra proferentem* ('against the offeror') rule may be applied. This rule states that where a particular species of transaction, contract, or provision is one-sided or onerous, it will be construed strictly against the party seeking to rely on it.⁵²

Some principles regarding the application of the *contra proferentem* rule to exception clauses are as follows:⁵³

- (a) If a clause contains language that expressly exempts the party relying on the exception clause from the consequence of his or her own negligence, then subject to the Unfair Contract Terms Act,⁵⁴ effect must be given to the clause. If it does not, the court will go on to apply the second and third limbs below.
- (b) The court must consider whether the words are wide enough, in their ordinary meaning, to cover negligence on the part of the party relying on the exception clause. If doubt arises as to whether the words are wide enough, the doubt must be resolved against the party relying on the clause. If this has been satisfied, the court will go on to apply the third limb below.
- (c) The court must consider whether the exception clause may cover some kind of liability other than negligence. If there such liability is covered, the clause will generally be held not to extend to negligently inflicted loss.

⁵¹ *Y.E.S. F&B Group Pte Ltd v Soup Restaurant Singapore Pte Ltd (formerly known as Soup Restaurant (Causeway Point) Pte Ltd)* [2015] 5 SLR 1187 (Court of Appeal, Singapore).

⁵² *Zurich Insurance* (n 43).

⁵³ *Marina Centre Holdings Pte Ltd v Pars Carpet Gallery Pte Ltd* [1997] 2 SLR(R) 897 (Court of Appeal, Singapore), endorsing *Canada Steamship Lines Ltd v The King* [1952] AC 192 (Privy Council on appeal from Canada).

⁵⁴ Cap 396, 1994 Rev Ed.

Invalidation through Statute

1. *Unfair Contract Terms Act*

Even if an exception clause is incorporated into a contract and its meaning is objectively determined to either exclude or limit liability in the way contended for, the clause may still fail due to the operation of the Unfair Contract Terms Act (hereafter UCTA).⁵⁵

The UCTA's approach to exception clauses can result in two main outcomes: the exception clause may be wholly inoperative, or it may be operative if it passes the 'reasonableness' test. According to the UCTA, the factors to be taken into account when considering whether an exception clause is 'reasonable' are as follows:⁵⁶

- (a) The relative equality of bargaining power between the parties.
- (b) Whether a party received an inducement to agree to the exception clause, or in accepting it has an opportunity of entering into a similar contract with other persons without having to accept a similar exception clause.
- (c) Whether the aggrieved party knew or ought reasonably to have known of the existence of the exception clause (having regard, among other things, to any custom of the trade and any previous course of dealing between the parties).
- (d) Whether it was reasonable or practicable at the time of the contract to expect compliance with the exception clause.

2. *Consumer Protection (Fair Trading) Act*

The Consumer Protection (Fair Trading) Act (hereafter CPFTA)⁵⁷ envisions the consumer being in a weaker bargaining position as compared to the vendor or supplier. It provides a framework for consumers to seek recourse against vendors and suppliers, over and above any rights that they may already have under general law.⁵⁸

D. PRIVACY OF CONTRACT

The doctrine of privity states that a person who is not a party to a contract (hereafter referred to as a third party) cannot enforce any rights or obligations that arise under the contract.

⁵⁵ *ibid.*

⁵⁶ *Lee Chee Wei v Tan Hor Peow Victor* [2007] 3 SLR(R) 537 (Court of Appeal, Singapore).

⁵⁷ Cap 52A, 2009 Rev Ed.

⁵⁸ *Speedo Motoring Pte Ltd v Ong Gek Sing* [2014] 2 SLR 1398 (High Court, Singapore).

Common Law

The Contract Confers a Benefit on the Third Party

Where the promisor promises the promisee to confer a benefit on the third party, if the promisee wishes to sue the promisor to enforce the benefit, he or she would face the obstacle of the doctrine of privity.

Although the doctrine of privity may prevent the third party from suing on the contract due to the lack of privity, the doctrine does not stop the promisee from suing the promisor. If the promisee is successful in suing the promisor, he or she can recover damages for the breach, which can then be transferred to the third party.

Alternatively, if specific performance of the contract is granted in favour of the promisee, mandating the promisor to fulfil his or her obligations to the third party, the third party would similarly be able to benefit substantially from the contract. However, the third party's ability to obtain damages or specific performance will depend on the willingness of the promisee to sue the promisor in the first place.

1. *Exceptions Allowing the Promisee to Recover Substantial Damages*

If the court finds that the promisee had suffered no real loss, as opposed to the third party whose benefit the contract was made, nominal damages may be awarded instead, since a party can only be compensated in damages for losses that he or she actually suffered. Nevertheless, there are exceptions as seen below that allow the promisee to recover substantial damages.

(1) *Narrow Ground*

The 'narrow ground' permits the promisee to recover substantial damages on behalf of the third party. As an exception to the privity rule, the promisee is allowed to recover damages for the losses of the third party when:⁵⁹

- (a) the parties to the contract must reasonably foresee or contemplate that some proprietary interest will be passed between the promisee and the third party;
- (b) the promisee must account to the third party; and
- (c) there should not be any available legal remedies to the third party.

(2) *Broad Ground*

The 'broad ground' permits the promisee to recover substantial damages on its own account on the basis that he or she is recovering for his or her own loss, that is, the promisee's performance interest has been harmed by the promisor's

⁵⁹ *Family Food Court v Seah Boon Lock* [2008] 4 SLR(R) 272 (Court of Appeal, Singapore).

breach. Such claims are independent of whether or the third party can sue the promisor.

It has been stated that the broad ground is more consistent with principle and the only problem that can arise is double liability.⁶⁰

The Contract Exempts the Third Party from Liability

The doctrine of privity prevents third parties from taking advantage of valid exception clauses in the main contract between the promisor and the promisee. However, exception clauses can be enforced by third parties under certain conditions.

Singapore adopts the approach set out in *The Eurymedon*⁶¹ and *The New York Star*,⁶² where the legal efficacy of the so-called 'Himalayan clause' was affirmed. Such a clause fulfils the following five requirements:⁶³

- (a) The contract makes it clear that the third party was intended to be protected by the exception clause.
- (b) The contract makes it clear that the promisee, in addition to contracting on its own behalf, was also contracting as agent for the third party.
- (c) The promisee has the authority from the third party to enter into the contract, or the third party later ratifies this act of the promisee.
- (d) The third party could provide consideration to the promisor.
- (e) The clause was in line with any applicable statute.

The Contract Encompasses a Promise not to Sue the Third Party

Another legal device to circumvent the problem of privity in the context of exception clauses is to specifically include in the contract a promise that the promisor will not sue the third party.

If the promisor sues the third party, then the promisee may apply to the court under section 3(f) of the Civil Law Act⁶⁴ for a stay of the promisor's proceedings against the third party on the ground that to allow the action to proceed would be tantamount to an abuse of the process of the court as well as the committing of a fraud upon the applicant.

⁶⁰ *Chia Kok Leong v Prosperland Pte Ltd* [2005] 2 SLR(R) 484 (Court of Appeal, Singapore).

⁶¹ *New Zealand Shipping Co Ltd v A M Satterthwaite & Co Ltd* (*The Eurymedon*) [1975] AC 154 (Privy Council on appeal from New Zealand).

⁶² *Port Jackson Stevedoring Pty Ltd v Salmond and Spraggon (Australia) Pty Ltd* (*The New York Star*) [1981] 1 WLR 138 (Privy Council on appeal from Australia).

⁶³ *Scruttons v Midland Silicones Ltd* [1962] AC 446 (House of Lords, United Kingdom).

⁶⁴ Cap 43, 1999 Rev Ed.

The requirements for a promise not to sue the third party to be enforceable are as follows:

- (a) There was a clear promise to not sue the third party, that is, the exception clause must be sufficiently wide to cover the third party.
- (b) The promisee had sufficient interest in the enforcement of the promise, the threshold being that if the suit were to proceed, the interests of the promisee would be jeopardised. While this principle is not settled, the stronger the causal link in this respect, the better the chances of claiming that the promise not to sue the third party is enforceable.

The Contract Imposes a Burden on the Third Party

Generally, no burden of a contract can be unilaterally imposed on the third party. However, there are exceptions in the cases of agency, restrictive covenants and bailment on terms.

Statutory Exception to the Privity Rule

The Contract (Right of Third Parties) Act (hereafter CRTPA)⁶⁵ was introduced as an additional statutory exception to the privity rule. The CRTPA creates a statutory right of enforcement for the third party in a contract to which he or she is not a party, supplementing the common law 'exceptions' which are unaffected by the privity rule. The CRTPA can be excluded by agreement between the parties.

Broadly speaking, there are three elements to take note of in the application of the CRTPA:

- (a) Does the third party meet the qualifying criteria set out in section 2 of the CRTPA?
- (b) Have the third party's rights crystallised, or can the contracting parties agree (as between themselves) to vary or rescind those rights?⁶⁶
- (c) What are the defences that can be raised against the third party's assertion of his statutorily-created rights under the contract?⁶⁷

CRTPA, Section 2 – the Test of Enforceability

A third party may enforce a term in the contract, subject to further limitations and restrictions elsewhere in the CRTPA, when two conditions are satisfied:

⁶⁵ Cap 53B, 2002 Rev Ed.

⁶⁶ *ibid* s 3.

⁶⁷ *ibid* ss 4–7.

- (a) There must be express identification of the third party in the contract; and
- (b) there must be the contractual intention that the third party has the legal right to enforce the specific term.

1. *Identification of Third Party*

The threshold requirement under section 2(3) of the CRTPA is satisfied only if the third party is expressly identified by 'name', 'class' or 'description'. The third party need not be in existence at the time the contract is concluded. However, if the third party cannot be ascertained at the time the right of enforceability accrues to the third party, the contract may become unenforceable for lack of certainty.

2. *Intention to Give Enforceable Rights to Identified Third Party*

To demonstrate an intention to give enforceable rights to an identified third party:⁶⁸

- (a) The contract has to expressly confer the right to sue on the third party;⁶⁹ or
- (b) the term in the contract has to purport to confer a benefit on the third party and there is nothing in the contract to show that the parties had not intended the third party to be able to sue.⁷⁰

Pertinently, there is a rebuttable presumption in favour of the third party where the term purports to confer a benefit on him or her.⁷¹ Whether the term purports to confer a benefit is a matter of contractual interpretation.⁷² If, on an objective construction of the contract with appropriate consideration of the facts, there is an intention to confer benefit on the third party, the burden of proof rests on the party who invoked the presumption to show, on a proper interpretation of the contract, that the parties did not actually in fact intend the term concerned to be enforceable by the third party. Such intention had to be manifested at the time of contract formation.

In rebutting the presumption, the factors to be taken into consideration are as follows:

- (a) The parties' negative intention, that is, evidence to the contrary.

⁶⁸ *ibid* s 2(1); see *Columbia Asia Healthcare Sdn Bhd v Hong Hin Kit Edward* [2014] 3 SLR 87 (High Court, Singapore).

⁶⁹ CRTPA, *ibid* s 2(1)(a).

⁷⁰ *ibid* s 2(1)(b).

⁷¹ *ibid* s 2(1)(b) read with s 2(2).

⁷² *CLAAS Medical Centre Pte Ltd v Ng Boon Ching* [2010] 2 SLR 386 (Court of Appeal, Singapore).

- (b) Contractual silence, that is, the lack of specific provisions by the parties.
- (c) The degree of specificity with which the third party has been identified.
- (d) Industry practice and understanding of contractual arrangements.
- (e) The existence of some alternative recourse for third parties, for example, a chain of contracts or direct rights of action.

CRTPA, Section 3 – Crystallisation of Rights?

Section 3(1) of the CRTPA defines situations when the contracting parties lose their right to vary or terminate the contract in a way which extinguishes or alters the third party's rights, unless the third party consents to it:

- (a) When the third party communicates assent to the term to the promisor;
- (b) actual reliance of the third party on the term, and the promisor has actual knowledge of this reliance; or
- (c) actual reliance of the third party on the term, and this reliance was reasonably foreseeable to the promisor.

However, parties may rely on express contractual terms to preserve their rights to rescind or vary the contract without the third party's consent.⁷³

E. DISCHARGE OF CONTRACT

A contract can be discharged by performance of the contract, by agreement, by the presence of a contractual breach, and by frustration. The last two situations where a contract can be discharged will be explained in separate sections below.

Discharge by performance occurs when the parties to the contract have completely performed all of their rights and obligations under the contract. As it is impossible for parties to perform the obligations entirely and precisely, it is recognised at common law that *de minimis* breaches, that is, minor deviations in performance, may be treated as if precise performance had been rendered.

Discharge by agreement occurs when the parties come to a mutual agreement that the contract be brought to an end. Parties can contractually provide for when the contract can be brought to an end by including express termination clauses⁷⁴ or clauses that state the term (or duration) of the contract.

In the event the parties do not expressly provide in their contract for instances where the contract can be brought to an end, they can enter into a subsequent

⁷³ CRTPA (n 65) s 3(3).

⁷⁴ For details, see the 'Breach of Contract' section below.

agreement to discharge the original contract. This may take the form of a release under seal, an 'accord and satisfaction', or an exchange of mutual promises that the terms of the original contract are no longer binding on either party. An 'accord and satisfaction' occurs when both parties agree (that is, the accord) that one party will give up its claim for relief with respect to the other party's non-performance of the original contract in exchange for an agreed consideration given by the other party. The agreed consideration (that is, the satisfaction) can be something that has already been done, or something which is to be done in the future.

Other issues relating to discharge of the original contract by subsequent agreement include the issues of whether fresh consideration is needed if the original contract involves part payment of a debt, and whether the subsequent agreement has to comply with formalities.

Frustration

Frustration occurs whenever the law recognises that, without the default of either party, a contractual obligation has become incapable of being performed because the circumstances in which performance is called for would render the required performance a thing radically different from what which was undertaken by the contract.⁷⁵

Distilled into its essence, a contract is discharged by frustration because the situation the parties now find themselves in is beyond the scope of the contractual obligation and the liabilities that the parties have taken upon themselves and expect of each other, pursuant to the terms of the contract.

Under the 'construction theory' set out in the United Kingdom House of Lords' judgment in *Davis Contractors Ltd v Fareham Urban District Council*⁷⁶ which was explicitly adopted by the Singapore Court of Appeal in *Lim Kim Som v Sheriffa Taibah bte Abdul Rahman*,⁷⁷ the court must:

- (a) construe the contract terms in light of the nature of the contract and of the relevant surrounding circumstances when the contract was made to determine the scope of the original rights and obligations; and
- (b) compare this with a literal enforcement of the obligations in the new circumstances to see whether it is radically or fundamentally different from the original rights and obligations.

A contract may only be discharged by frustration where there is a gap in the contractual allocation of the risks of gains and losses arising from non-performance of the contract in light of the state of affairs following occurrence of the supervening event in question.

⁷⁵ *Davis Contractors Ltd v Fareham Urban District Council* [1956] 1 AC 696 (House of Lords, United Kingdom).

⁷⁶ *ibid.*

⁷⁷ [1994] 1 SLR(R) 233 (Court of Appeal, Singapore).

Examples of ‘frustrating circumstances’ include:

- (a) Supervening illegality, that is, some new legal rule that makes it unlawful to fulfil the obligations in the contract.⁷⁸
- (b) Physical impossibility of performing the contract.
- (c) Destruction of the subject matter of the contract.⁷⁹
- (d) The death or incapacity of a contracting party in a personal contract.⁸⁰
- (e) The impossibility of obtaining some material required for performance of the contract from a particular source.⁸¹
- (f) The impossibility of a method of performance.⁸²
- (g) Frustration of the purpose or adventure.⁸³
- (h) A situation radically different from that which was in the contemplation of the parties at the time of entry into the contact.⁸⁴
- (i) A significant delay affecting the performance of the contract.

A mere change in profitability of a contract or an increase in a burden upon a party under a contract is not enough to discharge that party from performing the contract.⁸⁵

Limiting Principles

1. *No Self-induced Frustration*

Even if the supervening event is sufficiently fundamental and its risk not allocated by the contract to one of the parties, frustration is barred if the claimant’s own deliberate or negligent conduct has brought about the alleged frustrating event.

⁷⁸ *Lim Xue Shan v Ong Kim Cheong* [1990] 2 SLR(R) 102 (High Court, Singapore).

⁷⁹ *Taylor v Caldwell* (1863) 3 B & S 826 (High Court, England and Wales).

⁸⁰ *Notcutt v Universal Equipment Co. (London) Ltd* [1986] 1 WLR 641 (Court of Appeal, England and Wales).

⁸¹ *Alliance Concrete Singapore Pte Ltd v Sato Kogyo (S) Pte Ltd* [2014] 3 SLR 857 (Court of Appeal, Singapore).

⁸² *Tsakiroglou & Co Ltd v Noble Thorl GmbH* [1962] AC 93 (House of Lords, United Kingdom).

⁸³ *Amalgamated Investment & Property Co Ltd v John Walker & Son Ltd* [1977] 1 WLR 164 (Court of Appeal, England and Wales).

⁸⁴ *Davis Contractors* (n 75).

⁸⁵ *Glahe International Expo AG v ACS Computer Pte Ltd* [1998] 2 SLR(R) 764 (High Court, Singapore).

2. Foreseeability?

In Singapore, seemingly conflicting statements have been made by the courts as to whether foreseeability should be an obstacle to frustration.

In *Glahe International Expo AG v ACS Computer Pte Ltd*,⁸⁶ Judge of Appeal L P Thean noted how the doctrine of frustration operated at a completely different level from a *force majeure* clause. This has been taken as authority for the proposition that, in Singapore at least, the occurrence of a supervening event does not discharge the contract by frustration where that event has actually been foreseen or where it was reasonably foreseeable because the likelihood of it was sufficiently high. However, *Lim Kim Som v Sheriffa Taibah bte Abdul Rahman*⁸⁷ seems to suggest the contrary. Notably, this case has not been cited nor referred to in subsequent Court of Appeal cases.

3. Contractual Provision by the Parties

According to the Court of Appeal in *RDC Concrete Pte Ltd v Sato Kogyo (S) Pte Ltd*, '[t]he most important principle with respect to *force majeure* clauses entails, simultaneously, a rather specific factual inquiry: the *precise construction* of the clause is paramount as it would define the *precise scope and ambit* of the clause itself. The court is, in accordance with the principle of freedom of contract, to give full effect to the intention of the parties in so far as such as clause is concerned.'⁸⁸

Effects of Frustration

1. Common Law

At common law, once the court concludes that the supervening event is indeed a frustrating one, the contract is said to automatically come to an end – in other words, it has been discharged.

The termination of the contract does not, however, have any retrospective effect. The contract is therefore treated as having been in effect from the time of its formation up until the occurrence of the supervening event. Obligations due to be performed prior to that event would continue to be due, whereas obligations arising after from the supervening event would be discharged.

2. Frustrated Contracts Act

Section 2(2) of the Frustrated Contracts Act⁸⁹ provides a mechanism to apportion monetary benefits that might have accrued to one of the contracting parties. It provides that all moneys paid or payable prior to the discharge of the

⁸⁶ *Glahe International Expo AG v ACS Computer Pte Ltd* [1999] 2 SLR(R) 945 (Court of Appeal, Singapore).

⁸⁷ *Lim Kim Som* (n 77).

⁸⁸ *RDC Concrete Pte Ltd v Sato Kogyo (S) Pte Ltd* [2007] 4 SLR(R) 413, [54] (Court of Appeal, Singapore).

⁸⁹ Cap 115, 2014 Rev Ed.

contract in question by frustration shall, for sums already paid, be recoverable; and for sums payable, shall continue to be payable.

On the other hand, section 2(3) provides for an apportionment mechanism for non-monetary benefits.

Breach of Contract

A breach of contract is committed when a party without lawful excuse fails or refuses to perform what is due from him or her under the contract, or performs defectively or incapacitates himself or herself from performing.

There are five main situations where a breach of contract can give rise to a right to terminate the contract.⁹⁰ These situations are as follows.

Situations where a Breach of the Contract can Lead to Termination

There are three situations in which a breach of the contract can lead to its termination:

- (a) *Situation 1.* The contract clearly and unambiguously states that the innocent party will be entitled to terminate the contract upon the occurrence of certain events. If such a specified event occurs, the innocent party can terminate the contract.
- (b) *Situation 2.* The contract does not clearly and unambiguously state that the innocent party will be entitled to terminate the contract upon the occurrence of certain events. However, the defaulting party, by his or her words or conduct, renounces the contract inasmuch as he or she clearly conveys to the innocent party that he or she will not perform its contractual obligations at all. In such a situation, the innocent party is entitled to terminate the contract.
- (c) *Situation 3.* The contract does not clearly and unambiguously state that the innocent party will be entitled to terminate the contract upon the occurrence of certain events. However, if the intention of the parties to the contract was to designate the term breached as a term that is so important that any breach, regardless of the actual consequences of such a breach, would entitle the innocent party to terminate the contract (that is, it was a condition of the contract), then the breach of that term can entitle the innocent party to terminate the contract.

Conversely, if the parties' intention was to designate the breached term as one that is not so important such that no breach of the term will ever entitle the innocent party to terminate the contract (even if the actual consequences of such a breach are extremely serious),

⁹⁰ *RDC Concrete* (n 88).

then the term would be a 'warranty'. Breach of a warranty will not entitle the innocent party to terminate the contract.

To determine whether a contractual term is a condition, the following non-exhaustive factors should be considered:

- (i) Whether a statute classifies a specific contractual term as a condition.
 - (ii) Whether it is expressly stated that the contractual term is a condition.
 - (iii) Whether judicial precedent (case law) has shown that the contractual term is a condition.
 - (iv) Whether the transaction involved is a mercantile transaction. Case law suggests that courts are more likely to classify contractual terms as conditions in such contexts, especially where they relate to timing.
- (d) *Situation 4.* The contract does not clearly and unambiguously state that the innocent party will be entitled to terminate the contract upon the occurrence of certain events. However, if the breach gives rise to an event that deprives the innocent party of substantially the whole benefit which it was intended that he should obtain from the contract, then the innocent party is entitled to terminate the contract.
- (e) *Situation 5.* When there is an anticipatory breach, that is, where the defaulting party indicates his or her intention not to perform its contractual obligations before the time fixed for performance, the innocent party can terminate the contract, provided the nature of the breach falls within one of the situations in situations 1 to 4 above.

Innocent Party can Elect to Terminate or Affirm the Contract

If a contractual breach gives rise to a right to terminate, the innocent party can elect to either terminate the contract or affirm the contract and continue with contractual performance. The innocent party has to inform the defaulting party of his or her election clearly and unambiguously.

If the innocent party elects not to exercise his or her right to terminate, he or she will be estopped from terminating the contract at a later stage. There is a reasonable period of time for the innocent party to decide whether to terminate or affirm the contract. However, if he or she does nothing for too long, he or she will be treated as having affirmed the contract.

In the event the innocent party is not entitled to terminate the contract or, if he or she is so entitled and elects not to terminate the contract, the innocent party can nevertheless claim damages as of right for loss resulting from the breach.

F. MISTAKE

At law, the effect of mistake is to make a contract void, but this rule is confined within very narrow limits. In equity, mistake has a wider scope, but its effect is less drastic.

Mistake at Common Law

At common law, mistake is a vitiating factor which renders agreements void.

Mutual Mistake

In a case of a mutual mistake, both parties to the contract have misunderstood each other. Thus, they did not consent to what they thought the contract should be.

In *Wellmix Organics (International) Pte Ltd v Lau Yu Man*,⁹¹ the High Court stated that the doctrine of mutual mistake ‘overlaps completely [...] with the doctrine of offer and acceptance, dealing with the issue of the formation of a pre-existing transaction as opposed to a mistaken payment simpliciter’. Thus, a mutual mistake is ‘simply the result of a lack of coincidence between offer and acceptance’ – ‘both parties are at cross-purposes and hence, no agreement or contract has been formed as a result’.⁹²

Unilateral Mistake

1. *Unilateral Mistake of Identity*

Cases involving mistake of identity seem to deal with situations where ‘I dealt with X, not you’, as opposed to ‘I would not have dealt with you’. The emphasis is on an intention to deal with a particular person to the exclusion of others.

Leading academics have advocated four elements to show that there is no contract due to mistaken identity:

- (a) The mistaken party must show that he or she intended to deal with some person other than the one he or she contracted with.
- (b) The other party knows that the mistaken party did not intend to contract with him or her.
- (c) At the time of contract formation, the identity of the contracting party must have been fundamental to the mistaken party.

⁹¹ [2006] 2 SLR(R) 117 (High Court, Singapore).

⁹² *ibid* [58].

- (d) The mistaken party took reasonable steps to verify the identity of the party.

(1) *Face-to-face Communications*

There is a rebuttable presumption in face-to-face transactions that the mistaken party intended to deal with the person before him physically;⁹³ a valid contract would be deemed to have been concluded in the absence of any evidence to the contrary. To rebut this presumption, evidence must be adduced to prove that the person seeking to set aside the contract actually intended to deal with a certain specific person and that person only, whose identity was thus of crucial importance.

However, there has been a difference of approach between the British cases *Phillips v Brooks*⁹⁴ and *Lewis v Avery*⁹⁵ on the one hand, and *Ingram v Little*⁹⁶ on the other. While these cases all involved analogous facts, in the former two cases the contracts were held to be voidable, and in the latter case, void.

In *Shogun Finance v Hudson*,⁹⁷ however, the conflict seems to have been resolved in favour of voidability, unless the contract is in writing. The House of Lords of the United Kingdom held that the presumption against a contract being void for mistaken identity in face-to-face dealings is a strong one; and two of the judges even doubted the possibility of rebutting this presumption, though Lord Walker of Gestingthorpe was prepared to accept it in wholly exceptional cases – for instance, where the fraudster impersonates a person known to the mistaken party whose senses are impaired. Particularly, the holding of *Ingram v Little*⁹⁸ was also doubted.

(2) *Written Communications*

The names of the parties to the contract assume greater significance in a contract that has been reduced to writing. When a contract is reduced to writing, it can only be between the persons named in a written contract as the parties to the contract; the party with whom the mistaken party intended to contract with has to be existing and identifiable.⁹⁹

Notably, in *Shogun Finance*, Lord Walker held that ‘to extend the principle to cases where the only contract was by written communication sent by post or by email would be going far beyond identification by sight and hearing. Where there is an alleged contract reached by correspondence, offer and acceptance must be

⁹³ *Phillips v Brooks Ltd* [1919] 2 KB 243 (High Court, England and Wales); *Lewis v Avery* [1972] 1 QB 198 (Court of Appeal, England and Wales); *Shogun Finance v Hudson* [2004] 1 AC 919 (House of Lords, United Kingdom).

⁹⁴ *Phillips v Brooks*, *ibid.*

⁹⁵ *Lewis v Avery* (n 93).

⁹⁶ *Ingram v Little* [1961] 1 QB 31 (Court of Appeal, England and Wales).

⁹⁷ *Shogun Finance* (n 93).

⁹⁸ *Ingram v Little* (n 96).

⁹⁹ *Cundy v Lindsay* (1878) 3 App Cas 459 (House of Lords, United Kingdom), affirmed in *Shogun Finance* (n 93).

found if they are to be found at all, in the terms of the document.’¹⁰⁰ While this statement was merely *obiter* and did not form part of the reasoning that led to the case’s outcome, it has the effect of subsuming situations involving email correspondences under the ambit of written correspondences.

2. *Unilateral Mistake as to Terms*

This situation occurs where one contracting party is under a mistake as to the terms of the contract, and that the other contracting party knows of the mistake. Generally, there is no contract where one party knows that the other is labouring under a mistake in relation to the terms of the agreement and fails to inform that other party of the mistake.

(1) *Mistake as to Terms Compared with Mistake as to Fact*

The general rule at common law is that if one party has made a mistake as to the terms of the contract, and the other party knows of that mistake, then the contract is not binding. Although the parties appear, objectively, to have agreed to the terms, they are actually not in agreement. Thus, the objective principle is displaced and the court admits evidence to show that what each side subjectively intended to agree by way of terms.

On the other hand, if one party has made a mistake about a fact on which he or she bases the decision to enter into the contract, and the other party is aware that the first is mistaken as to this fact but that fact does not form a term of the contract itself, then the contract will be binding.¹⁰¹

(2) *‘Snapping Up’ Cases*

Generally, a party will not be entitled to ‘snap up’ an offer which he or she knew was not intended by the party who made the offer and that this party was under a mistake as to the terms of the contract. In *Chwee Kin Keong v Digilandmall.com Pte Ltd*¹⁰² the High Court held that the essence of ‘snapping up’ lies in ‘taking advantage of a known or perceived error in circumstances which ineluctably suggest knowledge of the error’; a ‘typical but not essential defining characteristic of conduct of this nature is the haste or urgency with which the non-mistaken party seeks to conclude a contract; the haste or urgency with which the non-mistaken party seeks to conclude the contract; the haste is induced by a latent anxiety that the mistaken party may learn of the error and as a result correct the error or change its mind about entering into the contract’.

On the facts, the plaintiffs were fully conscious that ‘an unfortunate and egregious mistake had indeed been made by the defendants’. The defendant had mistakenly altered the price of commercial laser printers on its website from close to \$4,000 to \$66. The six plaintiffs had ordered 1,606 printers and they claimed that there were entitled to the benefit of their good bargain. In coming

¹⁰⁰ *Shogun Finance*, *ibid* [188].

¹⁰¹ *Statoil ASA v Louis Dreyfus Energy Services LP* [2008] 2 Lloyd’s Rep 685 (High Court, England and Wales).

¹⁰² [2004] 2 SLR(R) 594 (High Court, Singapore).

to the conclusion that the contracts were vitiated by mistake, Judicial Commissioner V K Rajah took into account the following factors:

- (a) The ‘stark gaping difference’ between the price posted and the ‘market price’ of the printers.
- (b) The fact that the plaintiffs were ‘well-educated professionals – articulate, entrepreneurial and quite bluntly, streetwise and savvy individuals’.
- (c) The circumstances in which the printers were purchased – the orders were placed in the ‘dead of the night’ with ‘indecent haste’, and the email exchanges between the plaintiffs demonstrated that they were ‘clearly anxious to place their orders before the defendants took steps to correct the order’.

As to the nature of the ‘knowledge’ required, while the High Court in *Chwee Kin Keong* stated that deemed or constructive knowledge would also suffice, the Court of Appeal subsequently held that for the contract to be void (in so far as unilateral mistake at common law is concerned), there needs to be actual or Nelsonian knowledge.¹⁰³ A party will be deemed to be wilfully blind when he or she had failed to make inquiries when there is a ‘real reason to suppose the existence of a mistake’. This may not be a very exact test, but ‘[a]t the end of the day, the court must approach it sensibly. The court must be satisfied that the non-mistaken party is, in fact, privy to a “real reason” that warrants the making of an inquiry’. In cases of actual knowledge, there is no consensus *ad idem*. In the absence of actual knowledge on the part of the non-mistaken party, a contract should not be declared void under the common law as there would then be no reason to displace the objective principle. However, constructive knowledge would also count – this can be linked to criminal law, where wilful blindness is elevated to attract the same culpability as knowledge.

In *Wellmix Organics*,¹⁰⁴ the High Court acknowledged the Court of Appeal’s findings, but made the observation that the line between actual and constructive knowledge can be blurred, especially in cases concerning wilful blindness, which may well be a high (or even the highest) degree of constructive knowledge.

Common Mistake

Such situations involve contracts entered into based on a fundamentally mistaken assumption. However, this is a narrow doctrine. Locally, for the doctrine of common mistake to be successfully evoked, two preconditions must be met:¹⁰⁵

- (a) There must have been no allocation of risk to either party of the contract; and

¹⁰³ *Chwee Kin Keong v Digilandmall.com Pte Ltd* [2005] 1 SLR(R) 502 (Court of Appeal, Singapore) (hereafter *Chwee Kin Keong* (CA)).

¹⁰⁴ *Wellmix Organics* (n 91).

¹⁰⁵ *Olivine Capital Pte Ltd v Chia Chin Yan* [2014] 2 SLR 1371 (Court of Appeal, Singapore).

- (b) the mistake is not attributable to the fault of either party

The requirements to determine if the contract can be voided on the ground of common mistake are then as follows:¹⁰⁶

- (a) The mistake, relating to law or facts, must be shared by both parties before the contract was concluded; and
- (b) the mistake must render the subject matter fundamentally different from that which the parties contracted on as constituting the basis of their contract.

Mistake in Equity

The fact that a contract founded on common mistake is not a complete nullity (that is, not void by the common law doctrine of mistake) does not result in the claimant having no relief at all. In fulfilment of the principles of equity, the court will interfere in two aspects:

- (a) It will, if it thinks fit, set aside the contract on such terms as are just, whether it is void at common law or otherwise. A contract not void under common law for unilateral mistake may still be voidable under equity if (i) there was constructive knowledge on the part of the non-mistaken party, or (ii) it would be unconscionable or improper for the non-mistaken party to insist on the contract's continued performance.
- (b) It rectifies a written contract or deed that does not accurately record the agreement made by the parties.

Singapore recognises mistake in equity.¹⁰⁷ A precondition prior to the operation of common mistake in equity is that the party seeking relief should not be at fault, and the substantive requirement to invoke common mistake in equity is that 'the misapprehension was fundamental'.¹⁰⁸ It appears from case law that it is relatively easier to obtain a remedy based on common mistake in equity compared to the invocation of the doctrine of common law.

G. MISREPRESENTATION

A misrepresentation is a false representation of past or existing fact, which materially induces the innocent party to enter into the contract in reliance on it.¹⁰⁹

¹⁰⁶ *ibid.*

¹⁰⁷ *Chwee Kin Keong (CA)* (n 103); *Olivine Capital* (n 105).

¹⁰⁸ *Solle v Butcher* [1950] 1 KB 671 (Court of Appeal, England and Wales).

¹⁰⁹ *Tan Chin Seng v Raffles Town Club Pte Ltd* [2003] 3 SLR(R) 307 (Court of Appeal, Singapore).

Elements of Misrepresentation

The elements of misrepresentation are as follows:

- (a) There must be a false representation;
- (b) the misrepresentation must be addressed to the party misled; and
- (c) the party misled must be induced by the false representation to enter into the contract.

False Representation

The plaintiff must allege and prove that the representation was false or untrue, that is, the asserted facts do not correspond with the facts as they exist. Given the ambiguity of words and the varying contexts, half-truths would amount to a false representation.¹¹⁰ A party's conduct can also amount to misrepresentation.¹¹¹

A advertising puff – exuberant and exaggerated language employed by a salesperson – is not a representation.¹¹²

An opinion is not a representation; it is the opinion maker's subjective judgement as to the particular matter based on his present state of knowledge.¹¹³ On the other hand, a statement of fact is a statement of the truth of that matter. However, while a statement may be one of opinion or belief, it may by implication involve a statement of fact. If the facts on which an opinion is based are within the knowledge of the person stating the opinion, he or she may be taken to have represented that those facts exist.¹¹⁴ In this light, if that person has or professes to have some special knowledge or skill as to the matter stated, the statement is likely to be treated as one of fact.¹¹⁵

A representation as to the future does not of itself give rise to any cause of action, unless it is binding as a contract. Thus, a statement of intention to do something in the future is not actionable by itself.¹¹⁶

However, a statement of future intention might contain an implicit representation that (a) its maker has an honest belief in the statement; (b) its maker had reasonable grounds to make the statement; or (c) the maker had the present intention to carry out the matters expressed in the statement.¹¹⁷

¹¹⁰ *Dimmock v Hallett* (1866) LR 2 Ch App 21 (Court of Appeal, England and Wales).

¹¹¹ *Walters v Morgan* (1861) 3 De G F & J 718, 45 ER 1056 (Court of Chancery, England and Wales); *Spice Girls Ltd v Aprilia World Service BV* [2002] EWCA Civ 15 (High Court, England and Wales).

¹¹² *Tan Chin Seng* (n 109).

¹¹³ *Bisset v Wilkinson* [1927] AC 177 (Privy Council on appeal from New Zealand)

¹¹⁴ *Smith v Land & House Property Corporation* (1884) 28 Ch D 7 (Court of Appeal, England and Wales).

¹¹⁵ *Esso Petroleum Ltd v Mardon* [1976] QB 801 (Court of Appeal, England and Wales).

¹¹⁶ *Tan Chin Seng* (n 109).

¹¹⁷ *Deutsche Bank AG v Chang Tse Wen* [2013] 4 SLR 886 (Court of Appeal, Singapore).

The False Representation must be Addressed to the Party Misled

The representation must be made by the representor to the representee. If the representee were unilaterally misled, there would be no legal remedy in misrepresentation.¹¹⁸

Inducement

The representee must establish an adequate causal link between the statement and his or her subsequent entry into the contract. Causation is satisfied so long as the representation played a real and substantial part and operated on the representee's mind.¹¹⁹

Generally, there is inducement if the representee:

- (a) is aware of the statement;
- (b) does not know that the statement is untrue;
- (c) relied on the statement; and
- (d) does not have reasonable grounds for doubting the accuracy of the statement.

The fact that the representee could have verified the accuracy of the statement is not fatal to a claim in misrepresentation. Whether the representee depended on his or her own investigations or the representation depends on a finding of fact. A party who has made a false representation cannot escape its consequences just because the innocent party has made his or her own inquiry or due diligence, unless the innocent party has come to learn of the misrepresentation when entering into the contract.¹²⁰

Types of Misrepresentation

Fraudulent Misrepresentation

The elements of fraudulent misrepresentation are as follows:¹²¹

- (a) There must be a representation of fact made by words or conduct;
- (b) the representation must be made with the intention that it should be acted upon by the plaintiff;
- (c) it must be proved that the plaintiff had acted upon the false statement;

¹¹⁸ *Eng Hui Cheh David v Opera Gallery Pte Ltd* [2009] SGCA 49 (Court of Appeal, Singapore).

¹¹⁹ *Jurong Town Corp v Wishing Star Ltd* [2005] 3 SLR(R) 283 (Court of Appeal, Singapore).

¹²⁰ *ibid.*

¹²¹ *Panatron Pte Ltd v Lee Cheow Lee* [2001] 2 SLR(R) 435 (Court of Appeal, Singapore).

- (d) it must be proved that the plaintiff suffered damage by doing so; and
- (e) the representation must be made with knowledge that it is false. It must be wilfully false, or at least made in the absence of any genuine belief that it is true.

The requisite standard of proof in establishing fraudulent misrepresentation is high.

Innocent Misrepresentation

Innocent misrepresentation is a misrepresentation that is made without fault, neither fraudulently nor negligently. Common law provides no liability for innocent misrepresentation given that no tort is committed. However, this is subject to the Misrepresentation Act (hereafter MA).¹²²

If the misrepresentation does not fall under the MA, it may be termed as a wholly innocent misrepresentation.

Negligent Misrepresentation

To show negligent misrepresentation at common law, the elements of proximity – reasonable foreseeability of harm, knowledge of reliance, and assumption of responsibility – are required. As the claimant is essentially seeking to prove negligence, the burden of proof lies on the claimant until a *prima facie* case of negligence is made out on a balance of probabilities. The main case in this regard is *Hedley Byrne & Co Ltd v Heller & Partners Ltd*.¹²³

There is a difference between negligent misrepresentation at common law and negligent misrepresentation under the MA. Liability for negligent misrepresentation at common law depends on the existence of some special relationship between the parties, such as a solicitor and client relationship. The burden of proof lies on the party who founds his or her action on the misstatement. On the other hand, under s 2(1) of the MA, there is no need for the existence of any special relationship and the burden of proof is reversed. The party who made the misrepresentation has to show that he or she had reasonable grounds to believe that the fact represented was true.¹²⁴

Remedies

Upon proof of an operative misrepresentation, the representee has several remedies open to him or her:

- (a) Rescission of contract entered into as a result of the misrepresentation.

¹²² Cap 390, 1994 Rev Ed (hereafter MA).

¹²³ [1964] AC 465 (House of Lords, United Kingdom).

¹²⁴ *Ng Buay Hock v Tan Keng Huat* [1997] 1 SLR(R) 507 (High Court, Singapore).

- (b) Damages, either on the basis of being induced to enter into the contract by the misrepresentation, or on the basis that the misrepresentation had become a term of the contract. In the latter instance, the cause of action lies in breach of contract.

Rescission

The innocent party can rescind the contract as long as there are no bars to rescission, and he or she has communicated an intention to rescind to the representor, although this last requirement is not necessary in certain situations.

This equitable remedy, while always available regardless of the type of misrepresentation involved, is only available as of right if the misrepresentation was fraudulent. In other instances, it is granted at the court's discretion.

1. *Bars to Rescission*

There are several situations where rescission will not be available to the innocent party:

- (a) Affirmation.
- (b) Impossibility of *restitutio in integrum*.
- (c) The involvement of third parties.
- (d) Lapse of time.
- (e) To allow rescission would be inequitable.¹²⁵

(1) *Affirmation*

The representee cannot rescind the contract if he or she affirms the contract after becoming aware of the falsity of the representation.¹²⁶ Whether affirmation can be established is highly dependent on the facts.¹²⁷

(2) *Impossibility of Restitutio in Integrum*

Where it is impossible to restore the parties to their original positions (known in Latin as *restitutio in integrum*), rescission will not be granted. Nevertheless, precise restoration is not necessary and courts are empowered to do what is practically just,¹²⁸ including taking an account of profits and giving allowances to substantially restore the parties to the status quo.

¹²⁵ MA (n 122) s 2(2).

¹²⁶ *Long v Lloyd* [1958] 1 WLR 753 (Court of Appeal, England and Wales).

¹²⁷ *Jurong Town Corporation v Wishing Star* (n 119).

¹²⁸ *Vadasz v Pioneer Concrete* (1995) 184 CLR 102 (High Court, Australia).

(3) *Involvement of Third Parties*

Where a third party has acquired the subject matter of the contract in good faith and without any notice of fraud on the representor's part, his or her rights will prevail over those of the original owner,¹²⁹ since the initial contract between the representor and the representee is merely voidable and subsists until set aside by the representee.

In cases of fraud, the title to the subject matter would often have passed to an innocent third party before the fraud was discovered. In such cases where the court has to choose between two innocent parties, the court will exercise its equitable jurisdiction in favour of the third party. However, where the representee acts before the third party has acquired rights to the subject matter, the courts will find in favour of the representee.

(4) *Lapse of Time*

Where the right to rescind is not exercised within a reasonable time after the conclusion of the contract, rescission will be barred,¹³⁰ as it is indicative of an affirmation. However, this is a fact-specific inquiry and does not apply to fraudulent misrepresentation.

(5) *Allowance of Rescission is Inequitable*

Under section 2(2) of the MA, a court (or an arbitrator) may declare the contract subsisting and award damages in lieu of rescission if it is of the opinion that it would be equitable to do so.

The court has previously declined to order rescission under section 2(2) where the misrepresentation in question did not go to the heart of the agreement and no harm was suffered by the plaintiff, when there was little advantage to be gained through rescission as the parties would have to go back to litigation, and the chances of a better outcome were low.¹³¹

Damages

The common law remedy of damages is not awarded as a right in misrepresentation cases. Whether damages can be obtained and the quantum of damages obtainable depends on whether the misrepresentation is fraudulent, negligent or innocent.

1. *Fraudulent Misrepresentation*

In cases of fraudulent misrepresentation, the aim awarding damages is to put the plaintiff in the position which he or she would have been in had the tort not been committed – that is, the aim is to protect the plaintiff's reliance interest.

¹²⁹ *Car and Universal Finance Co Ltd v Caldwell* [1965] 1 QB 525 (Court of Appeal, England and Wales).

¹³⁰ *Leaf v International Galleries* [1950] 2 KB 86 (Court of Appeal, England and Wales).

¹³¹ *Tiong Swee Eng v Yeo Khee Siang* [2015] 3 SLR 1141 (High Court, Singapore).

Some guidelines laid out by case law in awarding damages for fraudulent misrepresentation are as follows:¹³²

- (a) The defendant is bound to make reparation for all the damage directly flowing from the transaction.
- (b) Although such damage need not have been foreseeable, it must have been directly caused by the transaction.
- (c) In assessing such damage, the plaintiff is entitled to recover by way of damages the full price paid by him or her, but he or she must give credit for any benefits that he has received as a result of the transaction.
- (d) As a general rule, the benefits received by the plaintiff include the market value of the property acquired as at the date of acquisition. This rule is not to be inflexibly applied where to do so would prevent him or her from obtaining full compensation for the wrong suffered.
- (e) Although the circumstances in which the general rule should not apply cannot be comprehensively stated, it will not normally apply where either (i) the misrepresentation has continued to operate after the date of the acquisition of the asset so as to induce the plaintiff to retain the asset; or (ii) the circumstances of the case are such that the plaintiff is, by reason of the fraud, locked into the property.
- (f) The plaintiff is entitled to recover consequential loss caused by the transaction.
- (g) The plaintiff must take all reasonable steps to mitigate his or her loss once he or she has discovered the fraud.

Ultimately, damages for fraudulent misrepresentation are awarded on the tortious measure. This would include all loss that flowed directly as a result of the entry by the plaintiff in reliance upon the fraudulent misrepresentation into the transaction in question, regardless of whether such loss was foreseeable.

2. *Innocent Misrepresentation*

Common law provides no right to damages for innocent misrepresentation. However, it is possible to obtain damages under the MA.

¹³² *Wishing Star Ltd v Jurong Town Corp* [2008] 2 SLR(R) 909 (Court of Appeal, Singapore).

3. *Negligent Misrepresentation*

In cases of negligent misrepresentation, damages seek to put the plaintiff in the position he or she would have been had the tort not been committed. However, as it is governed by the tort of negligence, the representor will only be liable for damages that are reasonably foreseeable.

In Singapore, there is a requirement of a ‘special relationship of proximity’ between the parties.¹³³

4. *Damages under the Misrepresentation Act*

Damages may be awarded for misrepresentation under the MA. Under section 2(1), the representor can be liable in damages to the representee unless he or she can prove that he or she had reasonable grounds to believe, and did believe up to the time that the contract was made, the truthfulness of his statement. Under section 2(2), the court has the discretion to award damages in lieu of rescission.

(1) *Section 2(1)*

Under section 2(1) of the MA, a special relationship of proximity is not necessary to ground liability provided a contract was established.

An action for damages under the MA is a statutory tort action attracting the rules for damages in the tort of deceit, which are more generous as to consequential loss. For negligent misrepresentation under the MA, the representee is entitled to the fraud measure of damages under the tort of deceit. Moreover, unlike damages for the tort of negligence at common law, claims under the MA are not restrained by the remoteness principle. This allows for wider recovery of damages.

The burden of proof under the MA is reversed from that in a common law action for negligence. Under the MA, the representor must prove that he or she had reasonable grounds for his or her belief in making the statement.

Section 2(1) only imposes liability on a representor who is a party to the contract. Thus, an agent making the representation does not incur personal liability to the representee.

(2) *Section 2(2)*

The MA was intended to deal with the fact that at common law there was no remedy given for innocent misrepresentations except the drastic remedy of rescission. Thus, section 2(2) serves to give the court the discretion to award damages in lieu of rescission; it is not for the claimant to invoke section 2(2) to claim damages.

¹³³ *Hedley Byrne* (n 123); *Baumann Xiaoyan v Tong Lian Joo* [2011] SGHC 178 (High Court, Singapore).

In exercising discretion under section 2(2), the court will consider the following factors:

- (a) The nature of the misrepresentation.
- (b) The loss that would be caused to the representee if the contract was upheld.
- (c) The loss that would be caused to the representor if rescission was allowed.

The Court of Appeal of England and Wales has suggested that the damages to be awarded may be measured based on the cost of cure, or the contractual measure (that is, the difference between the actual value received and the value which the property would have had, had the representation been true).¹³⁴

Section 2(3) of the MA requires any awards under section 2(2) to be considered when making awards under section 2(1). This prevents double recovery.

Indemnity

A representee who rescinds a contract may bring a claim for an indemnity, claiming that it is entitled to be indemnified against obligations incurred by relying on the misrepresentation. Such a claim is used more for innocent misrepresentation where there is no claim for damages under common law, and where the representor is likely able to discharge his or her burden under section 2(1) of the MA.

Exclusion Clauses

The contract may contain a clause excluding liability for pre-contractual misrepresentations. Such clauses are principally caught by section 3 of the MA – a term purporting to exclude or limited liability for consequences of a misrepresentation is generally not allowed unless the term satisfies the requirement of reasonableness in the UCTA.

A person can never exclude liability for his or her own fraudulent misrepresentation.¹³⁵

A distinction must be made between clauses defining liability and clauses limiting or excluding liability. A term that restricts the authority of the agent from making any representations merely defines liability. It does not exclude liability.¹³⁶ On the other hand, a term disclaiming responsibility for statements made by the agent is an exclusion clause.¹³⁷

¹³⁴ *William Sindall Plc v Cambridgeshire County Council* [1994] 1 WLR 1016 (Court of Appeal, England and Wales).

¹³⁵ *S Pearson & Son Ltd v Dublin Corporation* [1907] AC 351 (House of Lords, United Kingdom).

¹³⁶ *Overbrooke Estates Ltd v Glencombe Properties Ltd* [1974] 1 WLR 1335 (High Court, England and Wales).

¹³⁷ *Cremdean Properties v Nash* [1977] 2 EGLR 80 (Court of Appeal, England and Wales).

1. *Entire Agreement Clauses*

Entire agreement clauses state that the written contract constitutes the entire agreement, and that no statement or representation made by either party has been relied upon by the other in agreeing to enter into the contract. The burden of proof lies on the party seeking to rely upon the entire agreement clause. With regards to entire agreement clauses, there are two conflicting views:

- (a) An entire agreement clause has to make it manifestly clear that the purchaser had agreed only to have a remedy for a breach of warranty and that the vendor's liability for damaging untrue statements was excluded before such a clause can be effective in excluding liability for pre-contractual misrepresentations. Even if it were effective, it would still be subject to section 3 of the MA.¹³⁸
- (b) An acknowledgement of non-reliance in an entire agreement clause is capable of operating as an evidential estoppel. The party who has given the acknowledgement cannot assert in subsequent litigation against the party to whom it has been given that it is not true. Section 3 of the MA does not apply.¹³⁹

H. UNFAIRNESS

Duress

Historically, the common law only recognised an extremely narrow form of duress. The recognition of economic duress is a radical advancement on the pre-existing law. It is also consistent with developments in the broader economic and commercial context.

However, due to the need to strike a balance between the maintenance of certainty (particularly in commercial transactions) and the achievement of fairness, the doctrine is in a constant state of flux.

In this area, the Singapore approach largely follows the English approach. Where an agreement is procured under duress by the illegitimate pressure of a party, that agreement is voidable and liable to be set aside by the other party. For an agreement to be procured under duress, three criteria have to be satisfied:

- (a) There has to be a threat made by one party to the other.
- (b) The threat must be accompanied by a demand for a promise which, if satisfied, nullifies the threat.
- (c) The other party must perceive the threat as real and accede to the demand, accordingly agreeing to the promise.

¹³⁸ *Thomas Witter Ltd v TPB Industries Ltd* [1996] 2 All ER 573 (High Court, England and Wales).

¹³⁹ *Watford Electronics Ltd v Sanderson CFL Ltd* [2001] 1 All ER (Comm) 696 (Court of Appeal, England and Wales).

- (d) In legal proceedings, a defence of economic duress must be specifically pleaded.¹⁴⁰ Whether duress can be made out is ultimately a very fact-specific inquiry.¹⁴¹

Substantive Elements

Two substantive requirements have to be satisfied to successfully rely on the doctrine of economic duress:¹⁴²

- (a) Since duress is concerned with the nature of the pressure, the threat, or the demand accompanying the threat, must be made in such a manner as to render the pressure illegitimate.
- (b) The person at whom the threat is directed at must be affected by the threat such that his or her will is coerced

Both these requirements must be viewed as an integrated process.

1. *The Requirement of Illegitimate Pressure*

The first requirement for economic duress is that there must have been illegitimate pressure applied by the alleged wrongdoer. While ‘illegitimacy’ generally encompasses unlawful acts, beyond that, the scope of its reach is unclear. Notably, in *E C Investment Holding Pte Ltd v Ridout Residence Pte Ltd*,¹⁴³ the court held that where acts are lawful in themselves, it would be ‘extremely difficult’ to prove economic duress simply because the doctrine of economic duress generally requires proof of illegitimate pressure, as opposed to mere commercial pressure. There remains a distinct and discernible difference between what is ‘illegitimate’ and what is ‘unconscionable’; what is unconscionable is not necessarily illegitimate.

A threat independent of a demand cannot amount to duress. It needs to be accompanied by a demand – express or implied – to have any relevance with regard to the doctrine of duress.

(1) *Unlawful Threat or Unreasonable Demand*

Where either the threat is unlawful according to criminal or civil law, or the demand is unreasonable, the pressure exerted, being a composite of the two, would generally be regarded as illegitimate.

¹⁴⁰ *Lee Kuan Yew v Chee Soon Juan* [2003] 3 SLR(R) 8 (High Court, Singapore).

¹⁴¹ *Sharon Global Solutions Pte Ltd v LG International (Singapore) Pte Ltd* [2001] 2 SLR(R) 233 (High Court, Singapore).

¹⁴² *Universe Tankships Inc v Monrovia v International Transport Workers Federation* [1983] AC 366 (House of Lords, United Kingdom).

¹⁴³ *E C Investment Holding Pte Ltd v Ridout Residence Pte Ltd* [2010] 2 SLR 232 (High Court, Singapore).

However, the fact that the threat is lawful does not necessarily make the pressure legitimate. An unreasonable demand accompanying a lawful threat may still render the pressure exerted illegitimate.

(2) *Exception: a Threat to Breach a Contract*

A significant exception to the proposition that a threat to do an unlawful act will render the pressure exerted illegitimate is a threat to breach a contract.

All threats to breach a contract are *prima facie* unlawful, if one is to give effect to the strict liability nature of contractual rights that reside reciprocally in the other contracting party. Therefore, the law adds a further gloss on the applicable test in this particular area by asking if the threatened breach of contract was 'reasonable'.

Locally, as illustrated in *Sharon Global Solutions Pte Ltd v LG International (Singapore) Pte Ltd*,¹⁴⁴ the accepted position is that a threat to breach a contract, whilst an unlawful act, does not always render the pressure exerted illegitimate. However, this is a fact-specific inquiry. On the facts of the case, considering the parties' intention to co-operate in the venture and the cause of the plaintiff's demand, the court held that it was clear that the plaintiff was not seeking to exploit the situation to increase its profits when it informed the defendant that it would not charter the vessel unless the latter agreed to share the additional costs. In the circumstances, the defence of economic duress was not made out since the plaintiff's declaration should be regarded as a legitimate notice of its inability to perform, rather than an illegitimate threat.

(3) *Lawful Threat and Reasonable Demand*

Generally, a threat of lawful action – that is, an act that the person making the threat is legally entitled to do – with a reasonable demand does not amount to making illegitimate pressure.¹⁴⁵

Mere commercial pressure, as opposed to illegitimate pressure, is insufficient to make out a case of economic duress. It is, however, very difficult to distinguish mere commercial pressure from illegitimate pressure amounting to economic duress.

In *Tam Tak Chuen v Khairul bin Abdul Rahman*,¹⁴⁶ the High Court identified four general factors that may render the threat of a lawful action, such as commercial pressure, illegitimate:

- (a) The threat involves an abuse of the legal process.
- (b) The threat is not made *bona fide*.

¹⁴⁴ *Sharon Global Solutions Pte Ltd v LG International (Singapore) Pte Ltd* [2001] 2 SLR(R) 233 (High Court, Singapore).

¹⁴⁵ *Lee Kuan Yew v Chee Soon Juan* [2003] 3 SLR(R) 8 (High Court, Singapore).

¹⁴⁶ *Tam Tak Chuen v Khairul bin Abdul Rahman* [2009] 2 SLR(R) 240 (High Court, Singapore).

- (c) The demand is unreasonable.
- (d) The threat is considered unconscionable in the circumstances.

2. *The Requirement of Coercion of Will*

The second requirement for duress is that there must have been coercion of the will. According to the ‘overborne will theory’, in order for the doctrine of economic duress to be pleaded successfully, there must be coercion of the will that vitiates consent.¹⁴⁷ However, this has received academic criticism for being too simplistic, and that it suggests a kind of ‘automatism’ on the part of the party allegedly coerced. The contrary view is commonly termed as the ‘illegitimate pressure theory’, where the focus is on the illegitimacy (if any) of the pressure exerted by the alleged stronger party.

More recent Singapore decisions appear to hold that the ‘illegitimate pressure theory’ is to be preferred. In *Wu Yang Construction Group Ltd v Zhejiang Jinyi Group Co Ltd*,¹⁴⁸ for instance, the High Court rejected the older analysis of the overborne will theory and adopted the view of ‘coercion’ or ‘vitiation of consent’ from the ‘perspective of pressure that so distorts the voluntariness of the consent of the party that is the alleged victim of economic duress that the law regards such pressure as illegitimate’.

A threat combined with a demand falling short of illegality that does not amount to a coercion of the will is insufficient for a contract to be avoided.

Whilst the doctrine of duress is concerned with the legitimacy of the pressure, this is insufficient to establish duress – ‘it is incumbent on the party raising it to show that the duress placed it in a position where it was compelled to accede to the other party’s demands’.¹⁴⁹

In Singapore, the factors set out in *Pao On v Lau Yiu Long*¹⁵⁰ were endorsed in *Tam Tak Chuen*¹⁵¹ – ‘[i]n determining whether there was coercion of will such that there was no true consent, it is material to inquire whether the person alleged to have been coerced did or did not protest; whether, at the time he was allegedly coerced into making the contract, he did or did not have an alternative course open to him such as an adequate legal remedy; whether he was independently advised; and whether after entering into the contract he took steps to avoid it’.

¹⁴⁷ *Occidental Worldwide Investment Corp v Skibs A/S Avanti, Skibs A/S Glarona, Skibs A/S Navalis (The ‘Siboen’ and the ‘Sibotre’)* [1976] 1 Lloyd’s Rep 293 (High Court, England and Wales).

¹⁴⁸ *Wu Yang Construction Group Ltd v Zhejiang Jinyi Group Co Ltd* [2006] 4 SLR(R) 451 (High Court, Singapore).

¹⁴⁹ *Sharon Global Solutions Pte Ltd v LG International (Singapore) Pte Ltd* [2001] 2 SLR(R) 233 (High Court, Singapore).

¹⁵⁰ *Pao On* (n 17).

¹⁵¹ *Tam Tak Chuen* (n 146) [62].

Causation

In the past, the appropriate test for causation was a 'but for' test to ascertain whether illegitimate pressure was a 'significant cause' of the transaction.¹⁵²

After *Tam Tak Chuen*,¹⁵³ the local approach seems to involve a reversal of the burden of proof. This approach was subsequently adopted in *E C Investment Holding*.¹⁵⁴ Under this approach, once the plaintiff has proved the first element of duress – that is, the exertion of illegitimate pressure – it is up to the defendant to disprove the second element – that the pressure contributed nothing to the plaintiff's decision to execute the decision, and his or her consent was not vitiated.

Legal Effect

If duress is successfully pleaded, the contract will be rendered voidable. However, even if the court would otherwise have held the contract concerned to be voidable for economic duress, the victim might be prevented from rescinding the contract if he or she is found to have affirmed the contract.

Undue Influence

Undue influence is defined as the exploitation of a relationship of influence to obtain an undue advantage.¹⁵⁵ Undue influence results in a contract being voidable.

Judicial Approach to the Doctrine of Undue Influence

Singapore's judicial approach towards finding undue influence can be set out as follows:

- (a) *Class 1.* Actual undue influence.
- (b) *Class 2.* Presumed undue influence (which is rebuttable).
 - (i) *Class 2A.* Automatic irrebuttable presumption that the relationship is one of trust and confidence.
 - (ii) *Class 2B.* Requires proof that the relationship is one of trust and confidence.
 - (iii) Transaction calls for an explanation.

¹⁵² *Huyton SA v Peter Cremer GmbH & Co* [1999] 1 Lloyd's Rep 620 (High Court, England and Wales); *Sharon Global Solutions* (n 141); *Lee Kuan Yew v Chee Soon Juan* (n 140).

¹⁵³ *Tam Tak Chuen* (n 146).

¹⁵⁴ *E C Investment Holding* (n 143).

¹⁵⁵ *R v AG for England and Wales* [2004] 2 NZLR 577 (Privy Council on appeal from New Zealand)

The legal burden of proof is always on the party alleging undue influence. While Singapore adopts the class 1/class 2 division, undue influence can be proved with and without the use of presumptions.

Class 1: Actual Undue Influence

In a class 1 situation, the party relying on a plea of actual undue influence must show that:¹⁵⁶

- (a) The other party to the transaction had the capacity to influence the complainant.
- (b) The influence was exercised.
- (c) The exercise was undue.
- (d) The exercise brought about the transaction.

Instances where actual undue influence was found include the following:

- (a) *Mooka Pillai Rajagopal v Khushvinder Singh Chopra*.¹⁵⁷ The defendant lawyer had threatened to make life difficult for the client if the latter did not sell property to him.
- (b) *Tan Teck Khong v Tan Pian Meng*.¹⁵⁸ The son had persuaded his enfeebled mother who had suffered a stroke to enter into various transactions with him, or for his behalf.

Class 2: Presumed Undue Influence

1. *Class 2A: Automatic Irrebuttable Presumption that the Relationship is of Trust and Confidence*

Established types of relationships that would satisfy class 2A are these:

- (a) Parent–child. (However, a relationship between a parent and an adult child will not satisfy this class.)¹⁵⁹
- (b) Guardian–ward.
- (c) Doctor–patient.
- (d) Lawyer–client.

¹⁵⁶ *Pek Nam Kee v Peh Lam Kong* [1994] 2 SLR(R) 750 (High Court, Singapore).

¹⁵⁷ [1996] 3 SLR(R) 210 (Court of Appeal, Singapore).

¹⁵⁸ [2002] 2 SLR(R) 490 (High Court, Singapore).

¹⁵⁹ *Rajabali Jumabhoy v Ameerali R Jumabhoy* [1997] 2 SLR(R) 296 (Court of Appeal, Singapore); *Orix Capital Ltd v Personal Representative(s) of the Estate of Lim Chor Pee (deceased)* [2009] 4 SLR(R) 1062 (High Court, Singapore).

- (e) Religious adviser–disciple.
- (f) Trustee–beneficiary.
- (g) Director–company.

2. *Class 2B: Proof that the Relationship is of Trust and Confidence Required*

To bring a matter within a class 2B situation, the degree of trust and confidence must be such that the party in whom it is reposed ‘is in a position to influence’ the party who reposed it.¹⁶⁰ The relationship must be of such trust and confidence so as to allow the stronger party ‘to be in a position of ascendancy’, or such that ‘the weaker party’s autonomy is impaired to a serious and exceptional degree’.¹⁶¹

In *Susilawati v American Express Bank Ltd*,¹⁶² the plaintiff executed a charge over all the moneys in her account to secure her son-in-law Tommy’s liabilities to the defendant bank. The plaintiff commenced action for losses incurred from the execution of charge on the basis, inter alia, that the charge was procured by Tommy’s undue influence over her. However, the court held that undue influence was not made out on the facts – ‘[t]he plaintiff did not blindly follow Tommy’s advice and clearly made independent financial decisions’.¹⁶³ Moreover, ‘[t]he dynamics of the relationship between Tommy and the plaintiff suggested that the plaintiff was the dominant person in the relationship’; Tommy would ‘invariably obey the plaintiff and was sensitive to her moods because he depended to a large extent on the plaintiff for his financial backing’.¹⁶⁴

3. *Transaction Calls for an Explanation*

A transaction calls for an explanation when it ‘cannot be reasonably accounted for on the ground of relationship, charity or other ordinary motives on which ordinary men act’.¹⁶⁵ Generally, the larger the transaction or gift, the more difficult it is for the transaction to be explained by ordinary motives. For example:

- (a) In *Hammond v Osborn*,¹⁶⁶ an elderly man gave away some 92% of his liquid assets to a lady who assisted him as he became increasingly infirm. This transaction also made him liable for capital gains tax of £50,000 to the point that he would be unable to meet the costs of his own care. On the facts, the court found undue influence.

¹⁶⁰ *Goldsworthy v Brickell* [1987] 1 Ch 378 (Court of Appeal, England and Wales).

¹⁶¹ *Susilawati v American Express Bank Ltd* [2008] 1 SLR(R) 237 (High Court, Singapore).

¹⁶² *ibid*.

¹⁶³ *ibid* [31].

¹⁶⁴ *ibid* [34].

¹⁶⁵ *Allcard v Skinner* (1887) 36 Ch D 145 (Court of Appeal, England and Wales).

¹⁶⁶ *Hammond v Osborn* [2002] Wills & Trusts L Rep 1125 (Court of Appeal, England and Wales).

- (b) On the other hand, in *Susilawati*,¹⁶⁷ the court found that the mother-in-law had secured her son-in-law's liabilities because she was close to her daughter and wanted to give her son-in-law a final chance pursuant to his repeated pleas for financial assistance. Thus, the claim in undue influence was not made out.

4. *Rebutting the Presumption*

The presumption of undue influence can be rebutted if it can be shown that the claimant's consent to the transaction was genuinely free and informed. This is primarily shown through proof that the claimant received adequate independent legal advice, though it can also be proved otherwise.¹⁶⁸ The advice must be 'relevant and effective to free the donor from the impairment of the influence and to give him the necessary independence of judgement and freedom to make choices with a full appreciation of what he was doing'.¹⁶⁹

Thus, the advice must be:

- (a) independent;
- (b) given with knowledge of the claimant's vulnerability and material aspects of the negotiation;
- (c) effectively communicated; and
- (d) competent.

*Overseas-Chinese Banking Corp Ltd v Tan Teck Khong (committee of the estate of Pang Jong Wan, mentally disordered)*¹⁷⁰ serves as a negative example. In that case, a mother had executed a mortgage under the undue influence of her son. The court found that the solicitor acting for the mother had been negligent in failing to discharge her duty to ensure that the mother had adequately understood the document that she had executed. Thus, the presumption was not rebutted.

The Doctrine of Infection

Under the doctrine of infection, if the knowledge of the wrongdoing can be 'brought home' to the creditor, the creditor will not be allowed to enforce its rights under the contract, as those rights would be 'infected' by the guilty party's conduct. The guarantor or surety would be allowed to set aside the transaction concerned, with the effect that the creditor would be treated as if it had actually perpetrated the undue influence itself.

¹⁶⁷ *Susilawati* (n 161).

¹⁶⁸ *Inche Noriah v Shaik Allie bin Omar* [1929] AC 127 (Privy Court on appeal from the Straits Settlements).

¹⁶⁹ *Niersmans v Pesticcio* [2004] EWCA Civ 372 (Court of Appeal, England and Wales)

¹⁷⁰ *Overseas-Chinese Banking Corp Ltd v Tan Teck Khong (committee of the estate of Pang Jong Wan, mentally disordered)* [2005] 2 SLR(R) 694 (High Court, Singapore).

The test for such ‘infection’ scenarios was set out in the *Susilawati* case¹⁷¹:

- (a) Has the claimant proved what is necessary for the court to be satisfied that the transaction was affected by the defendant’s undue influence?
- (b) Was the lender put on inquiry?
 - (i) In the United Kingdom, the settled test is that the lender is put on inquiry in all non-commercial cases, such as where a wife offers to stand as guarantor for her husband’s debts.¹⁷²
 - (ii) However, in Singapore, the courts still look behind the substantive character of the transaction concerned, rather than take a blanket approach. Thus, in *Hsu Ann Mei Amy (personal representative of the estate of Hwang Cheng Tsu Hsu, deceased) v Overseas-Chinese Banking Corp Ltd*,¹⁷³ the court looked at certain ‘red flags’ – for example, whether the affected party looked dazed at a meeting, or whether the affected party appeared more relaxed without the other party in a meeting with the bank’s officers – to determine if the bank was put on notice.
- (b) If so, did the lender (such as a bank) take reasonable steps to satisfy itself that that there was no undue influence?
 - (i) The lender has to check directly with the guarantor and inform him or her that the lender will require confirmation from a solicitor that the guarantor had been advised.
 - (ii) The lender has to provide information to the solicitor advising the guarantor on the purpose of the loan, the debtor’s indebtedness, and so on.
 - (iii) If the lender has cause to believe that the guarantor is under the debtor’s undue influence, it should inform the solicitor of its suspicions.
 - (iv) The lender has to obtain the solicitor’s written confirmation that the guarantor has been advised about the nature and effect of the transaction in the absence of the debtor and for a sufficient duration to meaningfully explain the nature and/or effect of the guarantee, emphasise the seriousness of the risk to the guarantor, discuss her financial means of repayment, and clearly state that the guarantor has a choice to proceed.

¹⁷¹ *Susilawati* (n 161).

¹⁷² *Royal Bank of Scotland v Etridge (No 2)* [2002] 2 AC 773 (House of Lords, United Kingdom).

¹⁷³ *Hsu Ann Mei Amy (personal representative of the estate of Hwang Cheng Tsu Hsu, deceased) v Overseas-Chinese Banking Corp Ltd* [2011] 2 SLR 178 (Court of Appeal, Singapore).

Remedies for Undue Influence

A finding of undue influence renders a contract voidable, and it can be rescinded at the option of the party pleading undue influence. The parties will be restored to their original positions through restitution.

Unconscionability

The doctrine of unconscionability is equitable in origin. This doctrine, under English law, is seemingly confined within a relatively narrow compass. On the other hand, recent developments in the Australian jurisprudence suggest a potentially broader role for this doctrine.

Scope of the Doctrine of Unconscionability in Singapore

There has yet to be any definitive pronouncement on the scope of the doctrine of unconscionability in the local context. However, it appears that a narrower doctrine of unconscionability is part of Singapore law.

In the High Court decision of *Lim Geok Hian v Lim Guan Chin*,¹⁷⁴ Judge of Appeal L P Thean rejected the broader doctrine of inequality of bargaining power mooted by Lord Denning, the Master of the Rolls, in *Lloyds Bank Ltd v Bundy*.¹⁷⁵

In *Pek Nam Kee v Peh Lam Kong*,¹⁷⁶ only the narrower English position (premised on cases like *Fry v Lane*¹⁷⁷ and *Cresswell v Potter*¹⁷⁸) was cited to the Singapore High Court. The Court noted that notwithstanding the other alleged victim was less highly educated, '[t]his does not necessarily make him ignorant'; indeed, this victim was 'not easily cowed' and 'was able to display independence of mind'. Thus, the narrower English approach appears to have been adopted.

In contrast, a Singapore decision where a broad approach towards the doctrine of unconscionability was adopted (at least implicitly) is *Fong Whye Koon v Chan Ah Thong*.¹⁷⁹ Justice Warren Khoo held that the defendant had entered into an unconscionable bargain. While recognising that the leading decision cited pertained to the narrower situation concerning expectant heirs, Justice Khoo opined that '[h]owever, the principle has been extended to all cases in which the parties contracting do not meet on equal terms'. He then immediately proceeded to cite *Blomley v Ryan*,¹⁸⁰ an Australian High Court case, which seemingly adopted a much broader approach than the English cases. However, this judgement was ambiguous, since Justice Khoo also cited the English decision of *Fry v Lane*¹⁸¹ which adopts a narrower approach.

¹⁷⁴ *Lim Geok Hian v Lim Guan Chin* [1993] 3 SLR(R) 183 (High Court, Singapore).

¹⁷⁵ *Lloyds Bank Ltd v Bundy* [1975] QB 326 (Court of Appeal, England and Wales).

¹⁷⁶ [1994] 2 SLR(R) 750 (High Court, Singapore).

¹⁷⁷ (1888) 40 Ch D 312 (High Court, England and Wales).

¹⁷⁸ [1978] 1 WLR 255 (High Court, England and Wales).

¹⁷⁹ [1996] 1 SLR(R) 801 (High Court, Singapore).

¹⁸⁰ (1956) 99 CLR 362 (High Court, Australia).

¹⁸¹ *Fry v Lane* (1888) 40 Ch D 312 (High Court, England and Wales).

After the High Court case of *Rajabali Jumabhoy v Ameerli R Jumabhoy*,¹⁸² the pendulum seemed to swing back to the narrower application of unconscionability. There, the court stated that ‘inequality of bargaining power as between the parties to the contract is not in itself sufficient to have the contract subsequently set aside’; ‘whilst it would be too limiting in the modern world to always insist in plaintiffs making a claim of unconscionability qualifying as poor and ignorant, one cannot, in the absence of these disadvantages, proceed on unconscionability unless [...] there are such circumstances of oppression or abuse of confidence present as would cry out for the intervention of a court of equity’.

More recent Singapore decisions have confirmed the narrow application of the doctrine of unconscionability. In *E C Investment Holdings*¹⁸³ the High Court agreed that the uncertain concept of ‘special disability’ recognised in Australian law towards the application of unconscionability would undermine contractual certainty. The court went further on to state explicitly that it ‘did not think unconscionability as a vitiating factor in contract forms any part of Singapore law’, as ‘[w]e already have the doctrines of undue influence, constructive fraud in equity and even *non est factum* in contract for the protection of the weak, the very young and the ignorant. To do more and put forward a fledging doctrine of unconscionability, without some considered, comprehensive and rational basis, and which the Court of Appeal itself recognises is not without its own specific difficulties [...] would be in my respectful view to inject unacceptable to inject unacceptable uncertainty in commercial contracts and in the expectations of men of commerce’.

The Requirements of Unconscionability

There have been different judicial pronouncements of the requirements of unconscionability.

- (a) In *Fry v Lane*,¹⁸⁴ the requirements of unconscionability are as follows: (i) whether the plaintiff is poor and ignorant; (ii) whether the sale was at a considerable undervalue; (iii) whether the vendor had independent advice.
- (b) In *Cresswell v Potter*,¹⁸⁵ the first requirement was altered slightly to whether the plaintiff is poor (that is, a member of a lower income group) and ignorant (that is, less highly educated). The court also stated that the three requirements are not the only circumstances that will suffice; ‘there may be circumstances of oppression or abuse of confidence which will invoke the aid of equity’.

¹⁸² [1997] 2 SLR(R) 296 (High Court, Singapore).

¹⁸³ *E C Investment Holding* (n 143).

¹⁸⁴ *Fry v Lane* (n 181).

¹⁸⁵ *Cresswell v Potter* (n 178).

- (c) In *Alec Lobb (Garages) Ltd v Total Oil Great Britain Ltd*,¹⁸⁶ the three requirements were stated as follows: (i) one party has been at a serious disadvantage to the other, whether through poverty, or ignorance, or lack of advice, or otherwise, so that circumstances existed of which unfair advantage could be taken; (ii) this weakness of the one party has been exploited by the other in some morally culpable manner; (iii) the resulting transaction has not been merely hard or improvident, but overreaching and oppressive.

The formulations in *Cresswell v Potter*¹⁸⁷ and *Alec Lobb*,¹⁸⁸ although not identical, are, in the final analysis, consistent in substance. More specifically, they also suggest three elements which restrict the doctrine of unconscionability: an oppressive bargain, the bargaining weakness of the weaker party, and the unconscionable behaviour of the stronger party in exploiting this bargaining weakness and bringing about the oppressive bargain.

I. ILLEGALITY AND PUBLIC POLICY

Generally, two Latin maxims dominate the doctrine of illegality:

- (a) *Ex turpi causa non oritur action* – from a dishonourable cause, an action does not arise.
- (b) *In pari delicto potior est condition defendantis* – in equal fault, better is the condition of the defendant.

While this may be perceived as a harsh approach, ‘the focus was not on achieving justice between the parties. The defendant may be equally undeserving, and it was not for his sake that the rule operated. Rather, it was premised on the unworthiness of the plaintiff and the broader public policy in protecting the integrity of the courts.’¹⁸⁹

Stage 1: Is the Contract Prohibited?

While the law of illegality and public policy in the law of contract has traditionally been divided into statutory illegality and common law illegality, the common thread running through both areas is that the first stage of the inquiry is to ascertain whether the contract (as opposed to merely the conduct) is prohibited. If the contract is prohibited, it will be void and unenforceable.

Statutory Illegality

Where it is alleged that the contract is prohibited by statute, the court will have to examine the legislative purpose of the relevant provision to determine if the

¹⁸⁶ *Alec Lobb (Garages) Ltd v Total Oil Great Britain Ltd* [1983] 1 WLR 87 (High Court, England and Wales).

¹⁸⁷ *Cresswell v Potter* (n 178).

¹⁸⁸ *Alec Lobb (Garages)* (n 186).

¹⁸⁹ *Ochroid Trading Ltd v Chua Siok Lui (trading as VIE Export & Export)* [2018] SGCA 5 at [25] (Court of Appeal, Singapore).

contract (and not just the conduct) was prohibited; ultimately, this is a question of statutory interpretation.

Where the statutory prohibition is clear, this would be a situation of 'express prohibition'. In so far as the category of 'implied prohibition' is concerned, the court will be slow to imply the statutory prohibition of contracts. In other words, a contract will not be held to be impliedly prohibited by statute unless there is a 'clear implication' or 'necessary inference' that this was what the statute intended.

Common Law Illegality

In so far as illegality at common law is concerned, the question is whether the contract falls foul of one of the established heads of common law public policy, which include:

- (a) Contracts prejudicial to the administration of justice.
- (b) Contracts to deceive public authorities.
- (c) Contracts to oust the courts' jurisdiction.
- (d) Contracts to commit a crime, tort or fraud.
- (e) Contracts prejudicial to public safety.
- (f) Contracts prejudicial to the status of marriage.

1. *The Proportionality Principle*

Notably, there is also a category of contracts illegal at common law comprising contracts, which are not unlawful *per se*, but are entered into for the object of committing an illegal act. Examples include:¹⁹⁰

- (a) Contracts entered into with the object of using the subject-matter of the contract for an illegal purpose.
- (b) Contracts entered into with the intention of using the contractual documentation for an illegal purpose.
- (c) Contracts which are intended to be performed in an illegal manner.
- (d) Contracts entered into with the intention of contravening a statutory provision, although not prohibited by that provision *per se*.

Under this particular category of contracts, the application of the doctrine of illegality is subject to the limiting principle of proportionality, that is, where a

¹⁹⁰ *Ting Siew May v Boon Lay Choo* [2014] 4 SLR 820 (Court of Appeal, Singapore).

contract is entered into with the object of committing an illegal act, the general approach that the courts should take is to examine the relevant policy considerations underlying the illegality principle so as to produce a proportionate response to the illegality in each case.

Factors relevant to assessing proportionality include:

- (a) Whether allowing the claim would undermine the purpose of the prohibiting rule.
- (b) The nature and gravity of the illegality.
- (c) The remoteness or centrality of the illegality to the contract.

This factor relates to how closely the unlawful conduct is connected to the particular claim. Some real or central (and not merely remote) connection must be demonstrated by the party relying on the defence of illegality between the contract concerned and the unlawful intention. A key indication as to whether the illegality is too remote from the contract lies in whether any overt step in carrying out the unlawful intention was taken in the contract itself.

- (d) The object, intent and conduct of the parties.
- (e) The consequences of denying the claim.

Proportionality is not simply one of the factors to be considered, but applies as an overarching principle for the court to determine whether denial of the relief sought is a proportionate response to the illegality.

It is also pertinent to note that this balancing exercise is ‘only confined to a very limited sphere’ – it applies only in relation to common law illegality and only to the category of contracts which are not prohibited *per se* but entered into with the object of committing an illegal act.¹⁹¹

Stage 2: If the Contract is Prohibited, could there nevertheless be Restitutionary Recovery of Benefits Conferred thereunder?

At the outset, relief accorded by the courts in such contexts is only by way of restitution and only restitution – they do not allow the plaintiff to enforce or profit from the illegal contract.

There are at least three possible avenues for restitutional recovery:

- (a) Not *in pari delicto*.
- (b) *Locus poenitentiae*.

¹⁹¹ *Ochroid Trading* (n 189).

- (c) The ‘independent cause of action’ exception to property claims.

Not in Pari Delicto

This applies where the plaintiff is less blameworthy than the defendant. However, this maxim only applies in the following established situations:¹⁹²

- (a) Where the relevant legislation which prohibited the contract was a ‘class protection statute’ that was intended to protect the class of persons to whom the plaintiff belonged.¹⁹³
- (b) Where the plaintiff entered into the contract on the basis of fraud, duress or oppression.¹⁹⁴
- (c) Where the plaintiff entered into the illegal transaction as a result of a mistake as to the facts constituting the illegality.¹⁹⁵

Locus Poenitentiae

The doctrine of repentance (or timely repudiation) enables a party to an illegal contract to obtain restitutionary recovery of benefits that he or she has transferred pursuant to that contract before the illegal purpose is effectuated. However, there is still uncertainty as to what constitutes ‘repentance’ – is genuineness necessary, or will voluntariness of withdrawal suffice?

The ‘Independent Cause of Action’ Exception to Property Claims

This avenue is premised on recovery through an independent cause of action. It is the flip side of the ‘reliance principle’, the notion that a plaintiff cannot succeed if he or she has to ‘rely on’ the illegal transaction in order to make out his cause of action.

Recovery through an independent cause of action is permitted despite the illegality of the underlying contract as the plaintiff is not relying on the illegal contract in a substantive legal manner.

Restraint of Trade

Contracts in restraints of trade are generally contrary to public policy considerations under the common law such as the freedom of contract and right to bargain, and are therefore *prima facie* illegal. However, there are several exceptions. Contracts in restraint of trade will be enforceable if:

¹⁹² *ibid.*

¹⁹³ *Kiriri Cotton Co Ltd v Ranchhoddas Keshavji Dewani* [1960] AC 192 (Privy Council on Appeal from Eastern Africa); *Tokyo Investment Pte Ltd v Tan Chor Thing* [1993] 2 SLR(R) 467 (Court of Appeal, Singapore).

¹⁹⁴ *Smith v Bromley* (1760) 2 Doug KB, 99 ER 441 (High Court, England and Wales); *Shelley v Paddock* [1980] 1 QB 348 (Court of Appeal, England and Wales).

¹⁹⁵ *Aqua Art Pte Ltd v Goodman Development (S) Pte Ltd* [2011] 2 SLR 865 (Court of Appeal, Singapore).

- (a) They are reasonable in the interests of the parties.
- (b) They are reasonable in the interests of the public.
- (c) The party imposing the restraint must have a legitimate proprietary interest to protect.
- (d) The unreasonable restraint is severable, with the effect that the rest of the contract is 'rescued' and can be enforced.

Reasonableness of Restraint

Generally, reasonableness is determined at the time the restraint was entered into, not at the time the dispute arises. Factors that may be considered by the court include the area and duration of the restraint, the activities restrained, and whether consideration was given for the restraint.¹⁹⁶

Public Interest

There is a public interest in controlling unreasonable restraint of trade because the public has an interest in every person carrying on his or her trade freely. It is also in the public interest for a person to be free to work, as his or her skills can be tapped on and it is ideal for a person to work so as to be able to sustain his or her family.

Locally, it has been held that the public interest aspect of reasonableness should be kept distinct from the individual interest, and that the public interest factor should take into account 'the impact of local circumstances'.¹⁹⁷ For instance, a restraint which, if upheld, would give one party a monopoly on certain businesses in Singapore would not be in the public interest.

Legitimate Proprietary Interests

Restraint clauses can be agreed upon to protect legitimate proprietary interests, which may vary depending on the context.¹⁹⁸ In the context of a sale of a business, the main legitimate proprietary interest is that of goodwill. In the employment context, the approach taken is generally stricter; the following list of legitimate proprietary interests recognised by the courts is not exhaustive:

- (a) *Trade Secrets*. Notably, trade secrets should be distinguished from an employee's own talent or knowledge. The employee is free to use the latter even if he or she had acquired his skills from the employer.

¹⁹⁶ *CLAAS Medical Centre Pte Ltd v Ng Boon Ching* [2010] 2 SLR 386 (Court of Appeal, Singapore).

¹⁹⁷ *Man Financial (S) Pte Ltd v Wong Bark Chuan David* [2008] 1 SLR(R) 663 (Court of Appeal, Singapore).

¹⁹⁸ *ibid.*

- (b) *Trade Connections*. This refers to ‘personal knowledge of (and influence over) the customers of the employer’.¹⁹⁹
- (c) *Maintenance of a Stable and Well-trained Workforce*.

Severance

Generally, where the illegality is confined to an identifiable portion of the contract, the courts may strike out the offending portion and uphold the remaining terms. However, the availability of severance is subject to several limits:

- (a) The illegality must not have tarnished the whole contract.
- (b) Severance must not be contrary to public policy.
- (c) After severance, the contract must retain its identity. Put another way, severance must not alter the nature of the contract, nor should it remove essential parts of the contract.
- (d) The courts will not re-write a contract – while they can delete illegal portions of the contract, courts should not insert any clauses in their places.

Severance can be used to rescue an unreasonable restraint. In *Man Financial (S) Pte Ltd v Wong Bark Chuan David*,²⁰⁰ the court mentioned two *obiter* possibilities:

- (a) ‘*Cut Out*’. This refers to severance of an entire clause, leaving the rest of the contract valid and enforceable. This approach is not possible if the clause represents the main consideration given for the promise, and taking it away will change the nature of the contract.
- (b) ‘*Cut Down*’. This refers to severance of part of a clause. This approach is subject to the ‘blue pencil test’ – ‘the court concerned must be able to run, as it were, a “blue pencil” through the offending words in that clause without altering the meaning of the provision and, of course, without rendering it senseless (whether in a grammatical sense or otherwise)’. To prevent courts from rewriting the contract for the parties, the ‘blue pencil test’ is very strict; for example, the term *10 years* can only be cut down to *1 year* by omitting the zero, but it cannot be changed to *5 years*.

¹⁹⁹ *ibid.*

²⁰⁰ *ibid.*

J. JUDICIAL REMEDIES FOR BREACH OF CONTRACT

When a term of a contract has been breached, the law offers several remedies to the aggrieved party. These include damages, specific remedies and agreed remedies.

Damages

Damages refer to a monetary award to be paid to a person as compensation for loss or injury. It is usually given as of right in circumstances where a term of validly formed contract has been breached. In cases where the contract was found to be void, it will only be given at the court's discretion.

Compensatory Principle

Generally, the award of damages for breach of contract is to compensate the aggrieved party for the loss he or she has suffered; it is not to deprive the defaulting party of the gains which has obtained as a result of the breach of contract. It is premised on the notion of corrective justice, to restore the plaintiff to his or her *status quo ante* or original position.²⁰¹

However, there are exceptions to the general compensatory principle:

- (a) Where there is a breach of fiduciary duty, the fiduciary is required to cough up his or her profits; the principal is clearly entitled to restitutionary damages.
- (b) Where the defendant profits from the use of property belonging to the defendant.
- (c) In exceptional circumstances, such as where damages would be an inadequate remedy.²⁰²

Types of Losses

Generally, the interests which contractual damages may protect are expectation interest, reliance interest and restitution interest.

1. *Expectation Interest*

Expectation interest can either be measured by the cost of cure, or the diminution of value and loss of amenity. However, the latter has the effect of compromising performance interest. Academics have argued that courts should be slow in using this substitutionary measure and to allow the cost of cure where possible.

Generally, non-pecuniary losses are not recoverable – 'a contract breaker is not liable for distress, frustration, anxiety, displeasure, vexation, tension or

²⁰¹ *Friis v Casetech Trading Pte Ltd* [2000] 2 SLR(R) 511 (Court of Appeal, Singapore).

²⁰² *Attorney General v Blake* [2001] 1 AC 268 (House of Lords, United Kingdom).

aggravation caused to the innocent party by the breach of the contract'.²⁰³ For instance, in *Kay Swee Pin v Singapore Island Country Club*,²⁰⁴ it was held that as long as an important object of the contract was to give pleasure and/or minimise distress, non-pecuniary damages can be awarded upon breach.

With regards to the time for assessing loss, the general position is that damages will be assessed at the time of breach.²⁰⁵ However, this is not an absolute rule; instances of departure include the following:

- (a) Where goods have been destroyed or have become unsellable in the course of transportation.²⁰⁶
- (b) Courts are generally willing let the innocent party elect to wait and see if the party announcing that it will breach the contract will eventually perform its obligations.²⁰⁷
- (c) Courts may also take into account any future supervening event beyond the date of breach which might have otherwise affected a party's ability to perform, such as frustration or an activation of a *force majeure* clause.²⁰⁸ However, this is quite controversial.

2. *Reliance Interest*

Under certain circumstances, the court may adopt the 'reliance' measure to calculate the aggrieved party's loss. Reliance loss refers to the expenses incurred in preparing to perform or in part performance of the contract, which has in the circumstances been rendered useless by the breach. This measure aims to quantify how much the victim had expended or forgone by relying on the contract being performed.

However, where awarding reliance interests would result in placing the party in a better position than if the contract had been performed, it would generally not be allowed.²⁰⁹

While the plaintiff has an unfettered right to elect whether to claim for expectation loss or reliance losses,²¹⁰ a claimant cannot claim both expectation and reliance interests.²¹¹

²⁰³ *Arul Chandran v Gartshore* [2000] 1 SLR(R) 436 (High Court, Singapore).

²⁰⁴ [2008] 4 SLR 288 (High Court, Singapore).

²⁰⁵ *Johnson v Agnew* [1980] AC 367 (House of Lords, United Kingdom).

²⁰⁶ *The Hansa Nord* [1976] QB 44 (Court of Appeal, England and Wales).

²⁰⁷ *Radford v De Froberville* [1977] 1 WLR 1262 (High Court, Chancery Division, England and Wales).

²⁰⁸ *The Golden Victory* [2007] AC 253 (House of Lords, United Kingdom).

²⁰⁹ *C & P Haulage Co Ltd v Middleton* [1983] 1 WLR 1461 (Court of Appeal, England and Wales).

²¹⁰ *CCC Films (London) Ltd v Impact Quadrant Films Ltd* [1985] Q.B. 16 (High Court, Queen's Bench Division, England and Wales).

²¹¹ *Anglia Television Ltd v Reed* [1972] 1 QB 60 (Court of Appeal, England and Wales); *Van Der Horst Engineering Pte Ltd v Rotol Singapore Pte Ltd* [2006] 2 SLR(R) 586 (High Court, Singapore).

The fundamental principle of compensation applies to claims in reliance loss as well – ‘[t]he focus is therefore on promised performance. This principle comes from the idea that recovery for reliance loss is an alternative means of protecting the expectation interest of the plaintiff’.²¹²

3. *Restitutionary Interest*

Generally, there are four elements to a claim for restitutionary interest:

- (a) The defendant has received a benefit or enrichment.
- (b) The enrichment was at the plaintiff’s expense.
- (c) There is a legally recognised ‘unjust’ factor which justifies the reversal of the enrichment, namely:
 - (i) Total failure of consideration.²¹³
 - (ii) *Quantum meruit* (for services) or *quantum valebat* (for goods).
 - (iii) Exceptional circumstances resulting in disgorgement of all the defaulting party’s gains.²¹⁴
 - (iv) Exceptional circumstances resulting in disgorgement of some of the defaulting party’s gains.²¹⁵
- (d) There is an absence of defences to the claim.

A plaintiff may also claim damages for loss of chance under a claim for restitutionary interest. A plaintiff who is unable to prove a lost expectation will usually seek damages for loss of chance. In some cases, even though a plaintiff cannot prove a loss on a balance of probabilities, he or she can recover damages (discounted somewhat) for a loss of a chance to make a gain.

Locally, it has been held that once causation has been established for loss of a chance, all that needs to be shown is that the chance lost was real or substantial.²¹⁶ There is no need to prove exact certainty of loss; where the plaintiff has attempted its level best to prove its loss and evidence is cogent, the court should allow him or her to recover the damages claimed.²¹⁷

²¹² *Out of the Box Pte Ltd v Wanin Industries Pte Ltd* [2012] 3 SLR 428 (High Court, Singapore).

²¹³ *Fibrosa v Fairbairn* [1943] AC 32 (House of Lords, United Kingdom).

²¹⁴ *AG v Blake* [2001] 1 AC 268 (House of Lords, United Kingdom).

²¹⁵ *Wrotham Park Estate Co v Parkside Homes Ltd* [1974] 1 WLR 798 (High Court, England and Wales).

²¹⁶ *Asia Hotel Investments Ltd v Starwood Asia Pacific Management Pte Ltd* [2005] 1 SLR(R) 661 (Court of Appeal, Singapore).

²¹⁷ *Robertson Quay Investment Pte Ltd v Steen Consultants Pte Ltd* [2008] 2 SLR(R) 623 (Court of Appeal, Singapore).

Limitations on Recovery

1. *Remoteness of Damage*

The classic British case defining remoteness is *Hadley v Baxendale*,²¹⁸ which held that damage is not too remote in contract where it is:

- (a) damage that arises in the usual course of things; or
- (b) damage that was within the contemplation of the parties at the time of the making of the contract given the parties' actual knowledge of the facts or circumstances.

This approach has been endorsed in Singapore.²¹⁹

2. *Mitigation*

The victim is expected to take reasonable steps to mitigate his or her loss. If he or she fails to do so, he or she will not be compensated for the losses suffered that he or she failed to mitigate.

The doctrine of mitigation does not apply to an innocent party's right to elect between affirming or terminating a contract following a repudiatory breach.²²⁰ However, if he or she decides to terminate the contract, he or she will be bound by the rules of mitigation. Conversely, if he or she elects to affirm the contract, he or she will not be bound by the rules of mitigation – in such a case, there is no breach to begin with. The claim then becomes a claim in debt, and the requirement of mitigation does not apply.

3. *Contributory Negligence*

Damages may be reduced if there was contributory negligence on the victim's part. There is some controversy as to when it should be applicable, but there is general agreement that it is not relevant to every breach of contractual duty.²²¹

Currently, it appears that contributory negligence can only operate as a defence where there was a coincidence between the breach of the duty of care in contract and tort (that is, where the breach also constitutes a tort).²²²

²¹⁸ *Hadley v Baxendale* (1854) 9 Exch 341, 156 ER 145 (Exchequer Court, England and Wales).

²¹⁹ *Robertson Quay Investment* (n 217); *MFM Restaurants Pte Ltd v Fish & Co Restaurants Pte Ltd* [2011] 1 SLR 150 (Court of Appeal, Singapore).

²²⁰ *MP-Bilt Pte Ltd v Oey Widarto* [1999] 1 SLR(R) 908 (High Court, Singapore).

²²¹ For more on contributory negligence, see the *Contributory Negligence and Personal Injuries Act* (Cap 43, 2002 Rev Ed).

²²² *Forsikringsaktieselskapet Vesta v Butcher* [1986] 2 All ER 488 (High Court, England and Wales); *Fong Maun Yee v Yoong Weng Ho Robert* [1997] 1 SLR(R) 751 (Court of Appeal, Singapore); *Jet Holding Ltd v Cooper Cameron (Singapore) Pte Ltd* [2006] 3 SLR(R) 769 (Court of Appeal, Singapore).

Specific Remedies

Action for an Agreed Sum

Here, instead of asking the court to calculate his or her damages, the victim is simply asking for the agreed price of goods he or she has delivered, or for the agreed price for services rendered. In an action for an agreed sum, there is no need to quantify the loss, or question if the loss is too remote. However, a claim for an agreed sum can nevertheless be defeated such that no award is given at all. Notably, a claim for the sum agreed in the contract should be differentiated from a claim in damages or for liquidated damages which are dependent upon a breach.²²³

Specific Performance

Specific performance is an equitable remedy which orders the wrongdoer to perform a specified contractual obligation. It is not given as of right, and is used according to the court's discretion. For specific performance to be granted, damages must be shown to be an inadequate remedy.²²⁴

However, given that specific performance is an equitable remedy, it is subject to a number of 'bars', such as the following:

- (a) Specific performance is usually refused on the grounds where it would cause severe hardship to the defendant.²²⁵ This principle is even extended to third parties – specific performance will not be awarded where it causes undue hardship to a third party.²²⁶
- (b) Specific performance will not be granted where continuous contractual duties are concerned, and these duties require constant supervision by the court to enforce proper performance.²²⁷
- (c) Specific performance is not usually granted for contracts which involve services of a personal nature.

Injunction

An injunction is an order from the court to have the wrongdoer either to do or not to do something. Injunctions can be prohibitory (wrongdoer not to do something); or mandatory (wrongdoer to do something).

²²³ *Stansfield Business International Pte Ltd v Vithya Sri Sumathis* [1998] 3 SLR(R) 927 (High Court, Singapore).

²²⁴ *Co-operative Insurance Society v Argyll Stores* [1998] AC 1 (House of Lords, United Kingdom).

²²⁵ *Patel v Ali* [1984] Ch 283 (High Court, England and Wales).

²²⁶ *E C Investment Holding* (n 143).

²²⁷ *Co-operative Insurance Society v Argyll Stores* [1998] AC 1 (House of Lords, United Kingdom).

Very exceptionally, a *quia timet* injunction tells a person to do or not to do something even before the conduct that might be thought to amount to a breach of contract has taken place. These are very seldom ordered; perhaps only where the plaintiff convinces the court that it cannot wait until the breach because the consequences to him or her will be so dire that he or she will be unable to recover from them.

Agreed Remedies

Agreed remedies are remedies which are agreed between the parties to the contract, without having the courts assess the appropriate remedy required. Nevertheless, these remedies are still subject to the scrutiny of the courts where necessary.

Liquidated Damages and the Rule against Penalties

Parties may, instead of leaving the court to assess the damages, stipulate the amount of damages to be paid in the event of breach. The enforceability of a liquidated damages clause is subject to the rule on penalties. Traditionally, the formulation of the rule on penalties posits that the enforceability of a liquidated damages clause turns on whether it represents a 'genuine pre-estimate of the loss'.

The following guidelines propounded in *Dunlop Pneumatic Tyre Co Ltd v New Garage and Motor Co Ltd*²²⁸ were endorsed locally in *CLAAS Medical Centre Pte Ltd v Ng Boon Ching*:²²⁹

- (a) The clause is a penalty clause if the sum stipulated for is extravagant and unconscionable in amount in comparison with the greatest loss that could conceivably be proved to have followed from the breach.²³⁰
- (b) The clause is a penalty clause if the breach consists only in not paying a sum of money, and the sum stipulated is a sum greater than the sum which ought to have been paid.
- (c) There is a presumption that the clause is a penalty clause when 'a single lump sum is made payable by way of compensation, on the occurrence of one or more or several events, some of which may occasion serious and others but trifling damage'.
- (d) However, it is no obstacle to the sum stipulated being a genuine pre-estimate of damage, that the consequences of the breach are such as to make precise pre-estimation almost an impossibility. On

²²⁸ *Dunlop Pneumatic Tyre Co Ltd v New Garage and Motor Co Ltd* [1915] AC 79 (House of Lords, United Kingdom).

²²⁹ *CLAAS Medical Centre Pte Ltd v Ng Boon Ching* [2010] 2 SLR 386 (Court of Appeal, Singapore).

²³⁰ For an example, see *Hong Leong Finance v Tan Gin Huay* [1999] 1 SLR 755 (Court of Appeal, Singapore).

the contrary, that is just the situation when it is probable that pre-estimated damage was the true bargain between the parties.

Deposits

A deposit is a sum of money that acts as guarantee that the contract shall be performed. The rule against penalties does not apply to deposits.

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