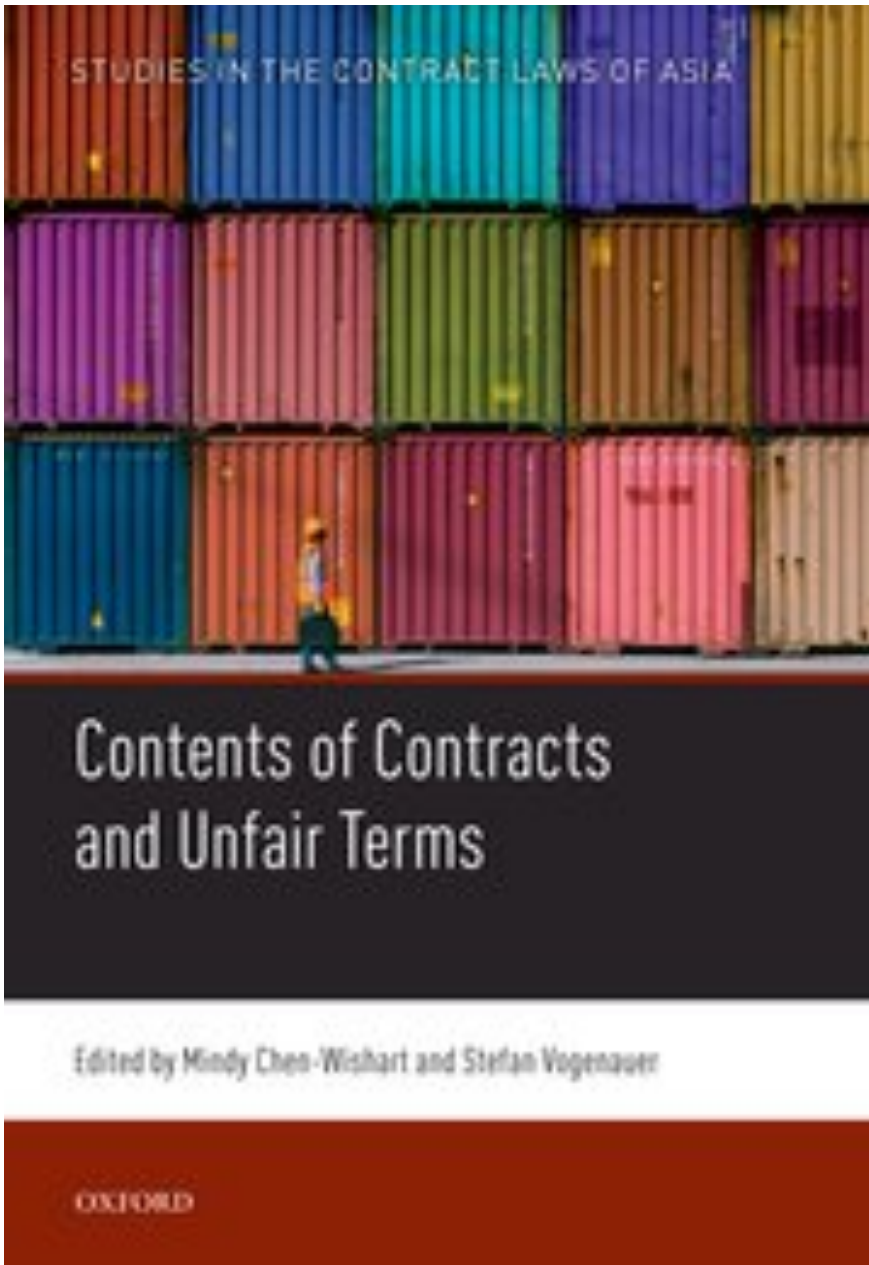


Interpretation of Contracts and Control of Unfair Terms in Asia

Stefan Vogenauer,

Max Planck Law, 7 September 2021



*Studies in the Contract
Laws of Asia*, vol III,
Oxford University Press,
2020

Overview

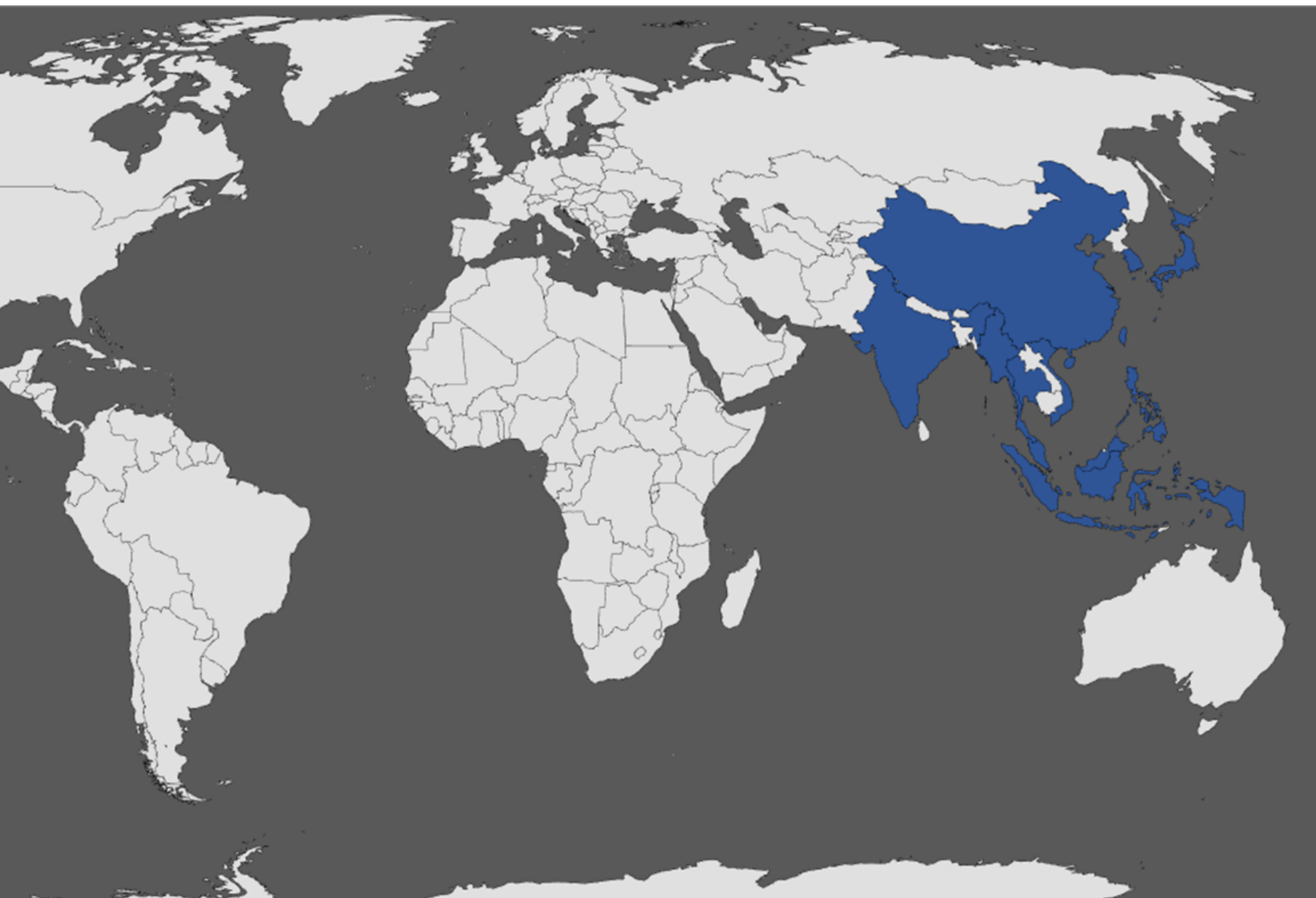
- I. *Studies in the Contract Laws of Asia*
- II. Interpretation of Contracts
- III. Control of Unfair Terms
- IV. Conclusions

I. *Studies in the Contract Laws of Asia*

Studies: Volumes

- I. Remedies for Breach of Contract (2016)
- II. Formation and Third Party Beneficiaries (2018)
- III. Contents of Contracts and Unfair Terms (2020)**
- IV. Validity (2021/22)
- V. Ending and Changing Contracts (2022)
- VI. Public Policy and Illegality (2024)

The project involves ca 150 legal scholars from Asia.



Studies III: Coverage of Jurisdictions

| | | |
|---------------------|---|--|
| China | 1,392,730,000 | 9,770.80 |
| Hong Kong | 7,451,000 | 48,675.60 |
| India | 1,352,617,328 | 2,010.00 |
| Indonesia | 267,663,435 | 3,893.60 |
| Japan | 126,529,100 | 39,290.00 |
| Korea (South) | 51,606,633 | 31,380.10 |
| Malaysia | 31,528,585 | 11,373.20 |
| Myanmar | 53,708,395 | 1,326.00 |
| Philippines | 106,651,922 | 3,102.70 |
| Singapore | 5,638,676 | 64,581.90 |
| Taiwan ⁶ | 23,589,000 | 25,026.00 |
| Thailand | 69,428,524 | 7,273.60 |
| Vietnam | 95,540,395 | 2,566.60 |
| Total | 3,584,682,993 (47.21% of the world population of 7,592,886,796) | |
| Average | | \$19,252 (compared with the world average GDP of \$11,317) |

Studies III: Coverage of Jurisdictions

Population and GDP per capita of subject jurisdiction

Studies: Structure of Individual Volumes

- Introductory chapter, including the questionnaire
- Country reports (one or two per jurisdiction), with hypothetical scenarios
- Concluding comparative chapter
- Bibliography

| | | |
|---|---|----|
| Chapter 1 | Introduction <i>Mindy CHEN-WISHART & Stefan VOGENAUER</i> | 1 |
| CHINA: CONTENTS OF CONTRACTS | | |
| Chapter 2 | The Interpretation of Contract in Chinese Contract Law: A Comparative Perspective <i>YANG Fan</i> | 24 |
| CHINA: UNFAIR TERMS | | |
| Chapter 3 | Regulating Unfair Contract Terms under Chinese Law <i>HAN Shiyuan</i> | 44 |
| HONG KONG: CONTENTS OF CONTRACTS & UNFAIR TERMS | | |
| Chapter 4 | Contract Terms in Hong Kong: Incorporation, Interpretation, Implication, and Unfair Terms <i>Stephen HALL</i> | 62 |

II. Interpretation of Contracts

Interpretation: Themes

1. 'Subjective' and 'objective' approaches

→ 'sharkmeat': falsa demonstratio vs rectification

2. Aids to interpretation

→ recourse to negotiations vs exclusionary rule

3. Priority rules in the event of conflicting aids to interpretation

→ contextualism vs literalism

→ 'supplementary interpretation' vs implied terms

Interpretation: Specific Issues

Path dependencies and legal transfer (terminology, categories, individual solutions):

- ‘double transfers’, eg Indian Evidence Act 1872
- ‘rejected transfers’, eg plain meaning rule in India and Indonesia; exclusionary rule in India; *AG of Belize* in Singapore and Malaysia
- ‘sticky transfers’, eg *AG of Belize* in Hong Kong
- ‘irrepressible transfers’, eg s 157 BGB (good faith interpretation) in Taiwan
- ‘localized transfers’, eg higher threshold for implication of terms in fact in Malaysia und Singapore; the role of good faith in Korea, Taiwan

III. Control of Unfair Terms

Control of Unfair Terms: Themes

1. Policy considerations

→ consumer protection vs protection against standard terms vs protection against types of clause that are typically unfair

2. The basis for judicial control

→ general law of contract vs specific legislation

3. 'flanking measures' (procedures, special tribunals etc)

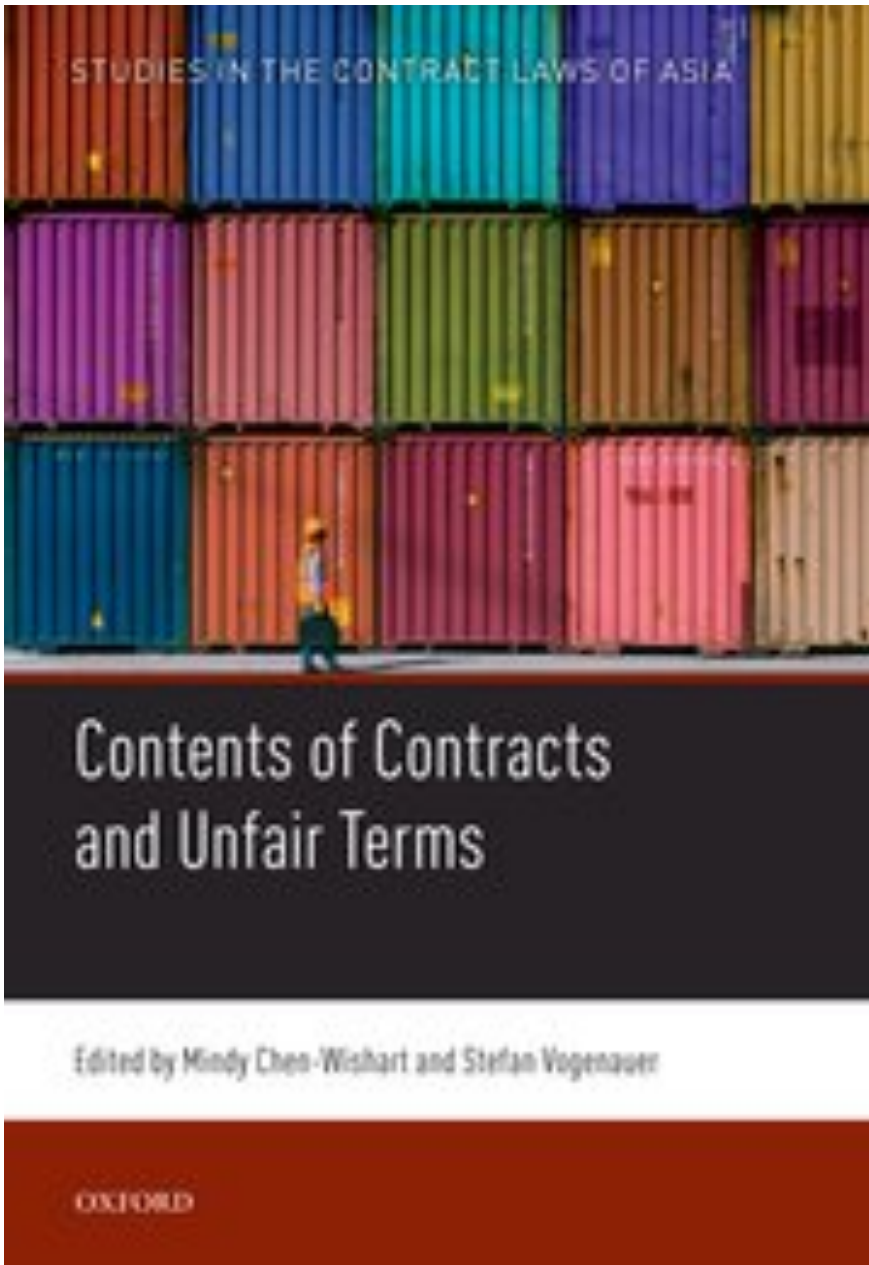
→ 'law in the books' vs 'law in action'

Control of Unfair Terms: Specific Issues

(Limited) path dependencies and legal transfer (terminology, categories, individual solutions):

- ‘sticky transfers’, eg warranties/conditions/innominate terms distinction in Malaysia; narrow doctrine of unconscionability in Singapore
- ‘irrepressible transfers’, eg s 138(2) BGB (usury) in Japan
- ‘localized transfers’, eg modification of UCTA 1977 in Hong Kong: linguistic capacities of the parties to be considered when determining whether term ‘fair and reasonable’; the role of good faith in Korea, Taiwan etc

IV. Conclusions



For a pdf version of the concluding chapter
of volume III:

<http://ssrn.com/abstract=3790700>

[https://www.researchgate.net/publication/
347687653](https://www.researchgate.net/publication/347687653)

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Oxford University Press,
2020

A Theory of Frustration and Its Effect

**Sagi Peari
Zam Golestani**

The Doctrine of Frustration

- Frustration (*force majeure*) = *unforeseen event so serious that it changes contractual situation in fundamental way and makes further performance illegal, impossible or radically different from what was intended, where neither party was aware of event and neither party can be blamed for the event [Davis Contractors v Fareham 1956 AC 696]*
- Mere hardship/ inconvenience/ material loss is not enough

Cases in which a contract can be frustrated:

1. Supervening illegality

- If a change in law after the contract is made renders further performance illegal, contract will be frustrated

2. Death or illness

- If contract is for personal service and party to perform service dies/suffers serious disability or illness

Hello.
I can't make it to
work today.
I'm dead.



Cases in which a contract can be frustrated:

3. Destruction of subject matter

- Where performance rendered impossible by physical destruction of subject matter before performance falls due, contract is frustrated
- E.g. if contract for hire of a building for a concert, and building burns down through no fault of either party: *Taylor v Caldwell* [1863, 122 ER 309]

Cases in which a contract can be frustrated:

4. Other supervening circumstances resulting in radical difference in performance

- *Codelfa Construction* [1982] 149 CLR 337:
 - HCA held that the injunction made it impossible to lawfully perform the contract in a manner that would have complied with construction requirements
 - Performance had become a thing radically or fundamentally different from that undertaken by the contract → frustration

Changes in circumstances that do not amount to frustration:



Tsakiroglou v Noble Thorl [1962] AC 93

- Contract for goods to be shipped from Port Sudan to Hamburg originally via Suez Canal; Suez Canal then closed
- Alternative route increased length of voyage by four weeks and increased costs of shipment
- Extra expense and inconvenience alone could not frustrate the contract

oOh! Media Roadside v Diamond Wheels [2011] 32 VR 255

- License agreement allowing large advertising billboard on roof
- Construction of nearby office building impaired visibility of billboard
- Foreseeable at time contract was concluded that nearby office building was likely to be constructed

The COVID -19 Situation

- In similar to case law delivered in the context of an outbreak of a war, the outbreak of the pandemic itself does not constitute a frustration
- Apparently, contracts formed before 11 March 2020 (the date when the WHO declared COVID-19 as a global pandemic) are particularly relevant to the “frustration” argument
- A party would need to demonstrate that the performance of the contract became impossible, almost impossible, or at least radically different from what the parties originally contemplated



The COVID -19 Situation



Happy Lounge Pty Ltd v Choi & Lee Pty Ltd and Anor [2020] QDC 184

- A contract for the sale of a bar which sold food, alcoholic beverages and provided live music entertainment
- The contract was signed on 26 February 2020. On 23 March 2020, Queensland's government issued a health emergency decree which prohibited the operation of such businesses
- While the buyer invoked the “frustration” argument, the court held that the decree does not deprive the buyer of “..substantially the whole benefit which it was the intention of the parties that it should obtain as consideration for the payment of the purchase price” [34]. Indeed, assets purchased by the buyer included equipment, intellectual property and the liquor license
- Further, the court commented that prior to contract formation, the “...COVID-19 pandemic was widely known to be unfolding and evolving globally, including in Queensland” [35]

Some possible generalisations



- The doctrine seems to relate to certain unforeseeable circumstances which have nothing to do with the parties' conduct
- The threshold of “unforeseeability” seems to be high, very high
- The “unforeseeability” aspect of frustration closely relates, in turn, to the specific terms and conditions of the contract and the circumstances of the particular case at the time of the contract formation
- Finally, the high threshold of “unforeseeability” is closely linked to the performance of contractual obligation. The law requires one to demonstrate that the performance of obligation becomes impossible, almost impossible, or at least radically different than it was contemplated by the parties.

Consequences of Frustration- General Principles

Under the common law approach, frustration means contract termination

This means that the parties are discharged from performing their unperformed contractual obligations



Consequences of Frustration- Restitution?



According to the doctrine of “total failure of consideration”, a party will be entitled to recover a payment made under a contract only if she or he has not received ANY of the performance of the other party [*Fibrosa Spolka Akcyjna v Fairbairn Lawson Combe Barbour Ltd* [1943] AC 32]

The rule in *Fibrosa* may cause injustice to the *payor* of the advanced payments by requiring that the consideration has totally failed; ‘[a] partial failure of consideration gives no claim for recovery..’ (Lord Potter)

The rule in *Fibrosa* may cause injustice to the *payee* by requiring her or him to return the entire sum irrespective of any expenditure in reliance on the contract.

Consequences of Frustration- Restitution?



UK and several Australian states have opted for a more flexible mechanism which aims to fairly distribute and adjust the consequences of frustration between the parties:

Law Reform (Frustrated Contracts) Act 1943 (UK)

Frustrated Contracts Act 1978 (NSW)

Frustrated Contracts Act 1988 (SA)

Australian Consumer Law and Fair Trading Act 2012 (Vic), Pt 3.2

Consequences of Frustration- Restitution?

An important improvement? No, not really...

- Significant judicial discretion
- Normative inconsistencies
- Chronic underuse
- Can be incredibly complex (see, eg, NSW Act)

So, what do we do?





Industry Led Standards, Relational Contracts and Good Faith: Are the UK and Australia Setting the Pace in (construction) contract Law?

David Christie, Séverine Saintier and
Jessica Viven-Wilksch

Three reasons to look at construction contracts

1. *"Construction law has come in from the cold"*

Lord Dyson MR (2016) 32 BCL 160,161

2. *"Owner/contractor/subcontractor failing to understand and/or comply with its contractual obligations has become the number one cause of construction disputes"*

[2021 Global Construction Disputes Report \(arcadis.com\)](https://www.arcadis.com/en/insights/publications/2021-global-construction-disputes-report)

3. Developing ideas around good faith and relational contracts meet developments in construction policy.

Are construction contracts relational?

Classical 'discrete' contracts

- (purchase of building materials or hire of plant)

Classical contracts with express good faith obligations

"Bates" relational

- (i.e. meet the criteria for good faith in Bates)

Management contracts/ Enterprise contracts

- Providing a service in parallel with principal construction work

Partnering/Joint Ventures

- Fiduciary contracts akin to partnerships in appropriate circumstances



Setting the scene in construction contracts

From the first day of this Conference, Professor MacQueen's example from teaching construction industry contracts:

- Tenderer omits the price for one of the items of work to be done
- This is discussed in class and usually there would be discussion before the contract is concluded. This avoids disputes later.

"It may indeed be in the overall best interest of each side to have some awareness of the interests of the other and to take them into account; self-interest can include the interests of others on whom one depends in some way" McQueen, 1999

Question: What if the error comes to light *after* the contract is agreed and work has started?



Party
centric

The case law is *Party – Centric*

- Self interest
- Adversarial
- Short term
- Certainty of obligations



Project
focused

The Policy goal is *Project Focused*

- Cooperative
- 'other regarding' (Gerhart)
- Longer term
- Flexibility



‘a project focussed approach to bridge law and practice’

Construction industry policy and practice

- Mutual trust and cooperation
- Partnering and Alliancing
- Enterprise contracts
- Construction Playbook

Academia and general contract law

- Law on the grounds v law on the books (Mitchell): TAQA v Rockrose (2020)
- Cooperation
- Relational contracts
- Good faith (Al Nehayan v Kent)

Falling into a black hole?

Mutual trust and cooperation

Partnering and Alliancing

Enterprise contracts

Construction Playbook

Relational contracts

Law on the ground/Law in the books

Good faith

Can see the effects but without the vocabulary to fully understand and describe what's going on

'To give effect to the obvious purpose underlying the contract'

*‘To give effect
to the obvious
purpose
underlying the
contract’*

[to] import a duty to have due regard to the **legitimate interests of both parties** in the **enjoyment of the fruits of the contract**. In some circumstances a cynical resort to the black letter or literal meaning of a contractual provision may be taken into account in determining whether there has been a lack of good faith’ *Automasters Australia Pty Ltd v Bruness Pty Ltd* [2002] WASC 286 [388]

It is, rather, a duty to recognise and to have due regard to the legitimate interests of both the parties in the enjoyment of the **fruits of the contract** as delineated by its terms’ *Overlook V Foxtel* (2002) NSWSC 17 [67].

Any relational contract of this character is likely to be of massive length, containing many infelicities and oddities. Both parties should adopt a **reasonable approach** in accordance with what is **obviously the long-term purpose** of the contract. They should **not be latching onto the infelicities** and oddities, in order to disrupt the project and maximise their own gain. *Amey v Birmingham* [2018] EWCA Civ 264 [93].

The doctrinal underpinnings in the literature



Tan's re-orientative relationalism:

'process of making explicit salience and additive changes to the content, structure and priority of rules and standards within a doctrine'

(2019) 39 Legal Studies 98, 105

Our representation

Commercial Flexibility/Collaboration

Organising concept of good faith

Trust,

Communication,

Transparency,

Accountability

Project focus

Our representation: bridging policy and the law

Collaborative flexibility

- Policy goal
- Outcome with relational contracts

Legal Framework

- Good faith
- Honesty, cooperation, loyalty.
- Other regarding values

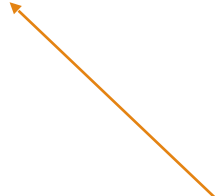
Legal outcomes

- Enforceable implied terms
- Approach to interpretation

How to advise with project focus ?

| Party centric approach | Project focus |
|---|--|
| Maximimise leverage (do you hold onto the knowledge until it is most advantageous?) | Adjudicator or court is not going to favour opportunism |
| Exploit changes in pricing since contract agreed | Follow the contract constructively [here project focus supports operation of the contract] |
| Defensive use of contractual and dispute resolution mechanisms | Adjudication gives quick result – and best where dispute is focussed |

(This advice is still focused on the needs of the client)



Thank you

The Impact of Directive 93/13 in Cypriot Contract Law

Dr. Nicholas Mouttotos

Department of Commercial Law, Faculty of Law
University of Bremen

Historical Overview

- _ British Colony until 1960 – Cyprus Act, Chapter 52 “An Act to make provision for, and in connection with, the establishment of an independent republic in Cyprus” [29th July, 1960].
- _ Constitution was attached to an Order in Council.
- _ Inheritance of the common law system (Law 14/1960).
- _ Independence in 1960 introduced a system of bi-communal administration.
- _ 1963: Turkish Cypriots left their governmental posts.
- _ Operates as in a state of perpetual interimness (Hatzimihail, 2015): prevailing sense of an interim stage which the legal system is perceived to be, until Turkish Cypriots return on their posts.
- _ “Cyprus problem’s” malfunctions spilled over to the legal system by postponing major reform projects.

The Legal System of Cyprus

Cyprus as part of the 'third legal family'

- _ Built upon the 'dual foundations of common law and civil law'.
- _ Adopted the English rules of *stare decisis*.
- _ Procedural law follows common law as all other mixed jurisdictions.

“The inheritance of English law in Cyprus had positive effects in relation to human rights, including property rights. It is no coincidence that despite the blows inflicted upon Cyprus in 1974, the rule of law retained its force, the State survived, helping in the sustenance of the Republic of Cyprus becoming in due course a member of the European Union”. (Pikis, 2017)

_ Judicial approach characterized by cosmopolitanism and a reliance on comparative methodology (Kombos, Shaelou 2019).

_ Receptiveness of foreign influences?

Most of the legislation is imported from abroad with prototypes from Greece and the UK.

Contract Law in Cyprus

_Patterned under English statutory models.

_Law of Contract is contained in Chapter 149 of the Laws of Cyprus, transplant of the Indian Contract Act of 1872.

Article 2(1) General rule of construction.

“This Law shall be interpreted in accordance with the principles of legal interpretation obtaining in England, and expressions used in it shall be presumed, so far as is consistent with their context, and except as may be otherwise expressly provided, to be used with the meaning attaching to them in English law and shall be construed in accordance therewith”. (Chapter 149).

_Resort to English law authorities interpreting analogous statutes.

Contract Law in Cyprus

_All agreements are contracts if they are made by the free consent of the parties competent to contract for a lawful consideration and for a lawful object.

_Underlying premise of Cypriot contract law is that a signed contract which was freely entered into, was enforceable, including all of its terms within the document, irrespective of it being a standard contract used for a multitude of transactions.

_There is no equivalent to the Unfair Contract Terms Act of 1977 found in England and Wales, thus there is no provision for discretion on a court in finding a particular exclusion or limitation clause to be unreasonable.

_As a matter of construction normally an exemption or exclusive clause or similar provision in a contract should be construed as not applying to a situation created by a fundamental breach of contract [Supreme Court of Cyprus (1975) 1 CLR 377].

_Directive 93/13 as a legal irritant.

The Impact of Directive 93/13 on Contract Law in Cyprus

Directive 93/13/EEC (UCTD)- tool aiming at eliminating terms and practices that endanger the building of the Internal Market
fairness → control is subjected as to whether it serves an efficient market.

Interpreting the terms of the contract via Directive 93/13 has become the cornerstone of consumer policy in the Union.

Article 3

1. A contractual term which has not been individually negotiated shall be regarded as unfair if, contrary to the requirement of good faith, it causes a significant imbalance in the parties' rights and obligations arising under the contract, to the detriment of the consumer.

Good Faith Requirement: independent test or linked to significant imbalance test? Does it only require clear conscience (similar to the interpretation of the Cypriot courts) and/or use of transparent procedures or should the legitimate interests of the other party be taken into account? (Howells, Straetmans)

CJEU in C-415/11 *Asiz*: “[...]the national court must assess for those purposes whether the seller or supplier, dealing fairly and equitably with the consumer, could reasonably assume that the consumer would have agreed to such a term in individual contract negotiations.” [paragraph 69]

Significant Imbalance Test: The assessment of a significant imbalance requires an examination as to how a contract term influences the rights and obligations of the parties.

Transparency of Terms: Insofar as contract terms are not plain and intelligible it may lead to finding a contract term unfair under Article 3(1) or can even indicate unfairness.

The Impact of Directive 93/13 on Contract Law in Cyprus

Influence of Directive 93/13 on contract enforcement – Defects in contract formation

- _Pure duty to read as refusal of the legal system to intervene even in cases of undesirable behavior.
- _Contractual interpretation and the importance of *pacta sunt servanda*.
- _Standard form contracts and the issue of consent.
- _EU Law as a tool for contractual modification and enforcement.
- _ *Non est factum* as a defense for unfairness of terms.
- _The good faith requirement was construed in the English law sense of absence of dishonesty without taking into account the significant imbalance test. Therefore, under this interpretation, it seems that both procedural and substantive unfairness are not captured under the test.

The Impact of Directive 93/13 on Contract Law in Cyprus

The Directive before the courts

_ **Article 3(1)** test viewed in line with the common law understanding of an absence of dishonesty. Good faith by the seller or supplier is seen as a *praesumptio iuris tantum*. The burden is upon the consumer to disprove the existence of good faith.

_ Absence of any discussion about good faith as an implied term in contrast with the inroads that the principle has made in English law.

_ Contractual estoppel – signature means acceptance of all terms within the document.

_ No *ex officio* control.

The Impact of Directive 93/13 on Contract Law in Cyprus

_Shifting caselaw? First judgment holding the contract to be void due to plethora of unfair terms (ECLI:CY:EDLEF:2021:A110).

_Fragmented approach – other recent judgments follow the interpretation as set by the Supreme Court by requiring the consumer to rebut the presumption that the seller/supplier acted in good faith(ECLI:CY:EDLEM:2021:A65).

_Lack of adequate and effective means in Cyprus to prevent the continued use of unfair terms in consumer contracts.

_Law codifying/consolidating consumer law in Cyprus - legal standing to the Consumer Protection Service and consumer associations thus aiming at increasing the effectiveness of consumer law (Law 112(I)/2021).

Concluding Remarks:

Courts show an unwillingness to scrutinize the parties' initial allocation, even though such allocation was done in a standardized manner by one party.

What is needed is an effort at integrating the consumer law regime in the general contract law of Cyprus, rather than a new legislative measure which may result in further fragmentation.

Directive 93/13 as a rejected transfer.

Thank you!