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**Is Certainty in an Uncertain World Delivered by the
Common Law?**

Professor Doug Jones AO

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INTRODUCTION

‘Nevertheless it is of greater importance that well established principles of contract should be maintained than that a particular hardship should be redressed; and I see no way of giving relief to the plaintiffs in the present circumstances except by confiding to the Courts loose powers of introducing terms into contracts which would only serve to introduce doubt and confusion where certainty is essential.’¹

Almost one hundred years ago, Lord Atkin made this comment in the House of Lords decision in *Bell v Lever Bros Ltd*.² It captures the mantra of certainty adhered to in most common law jurisdictions, which serves as a cornerstone of common law contract law. Much of what common law courts and practitioners value about certainty is its ability to create clarity and efficiency in commercial transactions. However, even the most carefully drafted contract cannot anticipate all contingencies. The only thing that is certain is uncertainty.³

When I proposed the outline of this paper, my experience of uncertainty included disputes arising from the volatility of commodity prices, sanctions from the Russia and Ukraine war, Iran, supply chain issues, productivity impacts from the COVID-19 pandemic, and shifting trade policies of the Trump administration. Yet even in the short period between then and the delivery of this keynote, circumstances have dramatically changed. The sudden war in the Middle East has now had, and will continue to have, a profound impact on a range of commercial activities. With the closure of ports and airports in the Middle East region causing disruptions in trade, there is no doubt that uncertainty is at an all-time high in the current geopolitical climate.

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¹ *Bell v Lever Bros Ltd* [1932] AC 161, 229 (Lord Atkin).

² [1932] AC 161.

³ As the Greek philosopher Heraclitus once said: ‘the only constant in life is change’.

It is in this context in mind that it is appropriate to consider the mantra of predictability of the common law. In particular, the common law principles regarding changed circumstances, contract interpretation without regard to extrinsic evidence, no direct acceptance of the doctrine of good faith, and liquidated damages, which among other issues, provide little flexibility to deal with the uncertainties in the present geopolitical environment. In direct contrast are civil law principles, which prioritise adaptability and party autonomy.

At the outset, it is important to recognise both that common law principles vary significantly between jurisdictions in whose legal DNA common law principles can be found, and that there are substantial substantive differences between the legal principles applied in so called civil law jurisdictions.

This paper proceeds in four parts considering each of these issues. It discusses how differences between common law and civil law principles impact the determination of contractual rights in times of uncertainty, and makes some suggestions as to how parties in a common law environment might consider ways in which the flexibility of the civil law can assist them.

BACKGROUND

A Comparative Law

International legal practice requires a firm grasp of comparative law. The need to understand comparative legal principles is critical for the effective practice of construction law. Even for domestic projects of significance, it is rare that a project will be wholly confined, physically and legally, to one jurisdiction. The supply of materials, the design and commissioning of plant, the fabrication outside the project jurisdiction of materials to be incorporated in a project, to identify but a few issues, will inevitably involve consideration of legal principles relevant to the activities necessary for a project conducted outside of its domestic jurisdiction. It may indeed be unlikely that major suppliers will be prepared to accept a governing law in their contracts to that of the project's location. Indeed, in many projects being carried out in jurisdictions where the local law is less predictable or certain than more established legal systems, a law unrelated to the place of the project may well be chosen by the parties for the principal contract for delivery of the project.

Thus, choice of the law to govern contractual relationships is a necessary part of the design of the legal framework for international transactions and international projects. The issues discussed in this paper regarding the capacity of different legal traditions to deal with uncertainty should be part of the consideration of this important question of choice of law, even for local Australian projects. Further, even assuming the adoption of a local law, devising the contractual provisions themselves involves a consideration of whether concepts such as good faith should be incorporated into the contract where the governing law is a local common law system.

This paper is intended to provide a resource for transactional lawyers whose responsibility it is to devise contract structures for transactions and projects which will facilitate their successful completion and allow for the flexibility necessary to deal with uncertainty. However, before proceeding to examine the four core issues considered in this paper, it is important to recall the influence of international instruments which attempt to harmonise common law and civil law principles.

B *UNIDROIT Principles*

Discussion in this paper of the differences in legal principle between common law and civil law jurisdictions assumes that contracts will adopt a domestic law to govern the rights and obligations of the parties. However, this is not always necessary; there is another option.

That option is the *UNIDROIT Principles of International Commercial Contracts* ('*UNIDROIT Principles*'), which codify a globally recognised set of principles of contract law. They were first developed by the International Institute for the Unification of Private Law ('UNIDROIT') in 1994, with the latest edition published in 2016.⁴ The UNIDROIT was created by the League of Nations in 1926 with its seat in Rome, and later became an independent intergovernmental organisation after Italy withdrew its membership from the League in 1937.⁵ The purpose of the UNIDROIT was to modernise and harmonise private law as between different States.⁶ It has had a pivotal role in shaping the field of private law internationally, with its two major projects being the *UNIDROIT Principles* and the predecessors to the *United Nations Convention on Contracts for the International Sale of Goods* ('*CISG*').⁷

Since its creation, the *UNIDROIT Principles* have had a profound impact on international dispute resolution. Comprised of 211 articles, the *UNIDROIT Principles* are based on the 'principle of fair dealing in international trade', and lay down general rules for international commercial contracts independent of any national system of contract law.⁸ The *UNIDROIT Principles* have the dual purposes of being the applicable governing law if chosen by the parties, or being used as a soft law instrument to guide the interpretation of the contract or other international uniform law, such as the *CISG*.

The *UNIDROIT Principles* were commended by the United Nations Commission on International Trade Law ('UNCITRAL') and the Union International des Avocats ('UIA') as an important option in the drafting, interpretation, and resolution of disputes in international

⁴ The name 'UNIDROIT' is the abbreviation of the Institute's name in French, *Institut international pour l'unification du droit privé*.

⁵ Pierre Widmer, 'The International Institute for the Unification of Private Law: Shipyard for World-Wide Unification of Private Law' (1999) 1(3) *European Journal of Law Reform* 181, 182.

⁶ Ibid, citing the *Statute of UNIDROIT* art 1; 'About UNIDROIT', *UNIDROIT* (Web Page) <<https://www.unidroit.org/about-unidroit/#:~:text=PURPOSE.%20The%20International%20Institute%20for%20the%20Unification,principles%20and%20rules%20to%20achieve%20those%20objectives>>.

⁷ Widmer (n 5) 185–6.

⁸ Eckart Brödermann, *UNIDROIT Principles of International Commercial Contracts. An Article-by-Article Commentary* (Kluwer Law International, 2nd ed, 2023) 5, citing M.J. Bonell (Secretariat of the UNIDROIT), P.C.-Misc. 18 (1992). The author also cites the comments of Professor O. Lando at the same discussions of the Working Group in 1992 at page 11: It had 'to be best for international commerce'.

contracts.⁹ Its status as a neutral legal regime has also been recognised by numerous arbitral tribunals and national courts in both common law and civil law jurisdictions. Therefore, it is useful to look, albeit briefly, at the solutions which the UNIDROIT provides in respect of the issues discussed in this paper.

C CISG

Another important uniform law for construction lawyers to bear in mind is the *CISG*. Sale of goods is an important aspect of international construction projects, and thus it is appropriate to acknowledge the impact of the Convention on the parties' contractual rights and obligations. However, at the outset, it must be noted that 'turnkey' contracts, in which a contractor undertakes to design, procure and construct a facility ready for immediate use, are generally excluded from the scope of the Convention under Article 3(2).¹⁰ Nevertheless, the *CISG* is still applicable if the sale of materials or plant do not amount to an exception under Article 3 of the Convention.¹¹

Like the *UNIDROIT Principles*, the *CISG* was formulated in an attempt to unify the law on the international sale of goods. It was hoped that a uniform sales law would reduce transaction costs when negotiating cross-border transactions.¹² It was borne out of the preparatory work of the UNIDROIT, namely, the 1964 Hague Sales Laws (comprising the Uniform Law on the International Sale of Goods and the Uniform Law on the Formation of Contracts for the International Sale of Goods).¹³ Although the Hague Sales Laws did not achieve their intended effect due to a limited number of ratifications, they did lay down the groundwork for UNCITRAL when drafting the *CISG*.¹⁴ An important difference, however, is that the *CISG* integrates both contractual formation and substantive sales law in Parts II and III respectively,

⁹ Brödermann (n 8) 2.

¹⁰ Ingeborg Schwenzer and Ulrich G. Schroeter, 'Introduction' in Ingeborg Schwenzer and Ulrich G. Schroeter (eds), *Schlechtriem & Schwenzer: Commentary on the UN Convention on the International Sale of Goods (CISG) (5th Edition)* (Oxford University Press, 2022) 9; 'Report of the Working Group on the International Sale of Goods on the Work of Its Seventh Session (Geneva, 5–16 January 1976) (A/CN.9/116)' [1976] *UNCITRAL Yearbook* 87, 98. See, eg, *SAA Inter Rao UES v. Empresa Pública Estratégica Corporación Eléctrica del Ecuador CELEC EP* (Final Award, Santiago Arbitration and Mediation Centre, CCS Case No. 3568-18, 29 May 2023) [235]–[239].

¹¹ *United Nations Convention on Contracts for the International Sale of Goods*, opened for signature 11 April 1980, 1489 UNTS 3 (entered into force 1 January 1988) art 3(1) ('*CISG*'): 'Contracts for the supply of goods to be manufactured or produced are to be considered sales unless the party who orders the goods undertakes to supply a substantial part of the materials necessary for such manufacture or production'. Article 3(2) reads: 'This Convention does not apply to contracts in which the preponderant part of the obligations of the party who furnishes the goods consists in the supply of labour or other services.'

¹² Schwenzer and Schroeter (n 10) 6.

¹³ *Ibid* 1; Ingeborg Schwenzer and Edgardo Muñoz, *Global Sales and Contract Law* (Oxford University Press, 2nd ed, 2022) 37 [3.15].

¹⁴ Schwenzer and Schroeter (n 10) 1–2.

whereas the Hague Sales Laws dealt with them separately.¹⁵ Further, the *CISG* does not exhaustively cover all issues arising out of a contract; for example, it does not deal with questions of validity and property.¹⁶ For this reason, international instruments such as the *UNIDROIT Principles* can become valuable to interpret or gap-fill the *CISG*, and domestic law may be useful.¹⁷

The Convention entered into force on 1 January 1988, and as of the time of writing this paper, there are 97 Contracting States to the Convention.¹⁸ Whilst the *CISG* cuts across civil law and common law, its application is dependent on whether the criterion set out in Article 1 is fulfilled, and even if it is, whether it has been derogated from or excluded by the parties under Article 6. Under Article 1, the *CISG* applies automatically if the parties have their places of business from different Contracting States, or the rules of private international law lead to the application of the law of a Contracting State.¹⁹ However, the parties may expressly, by a choice-of-law clause in their contract, or impliedly, in accordance with Article 8, exclude the *CISG* from applying. Even in this context, the difference between common law and civil law jurisdictions is obvious – most Australian and English law contracts explicitly exclude the *CISG*, whereas European law contracts typically allow the application of the *CISG*.

¹⁵ Ibid 3.

¹⁶ Schwenger and Muñoz (n 13) 38 [3.19].

¹⁷ Pascal Hachem, 'Article 7 CISG: Interpretation of Convention and Gap-Filling' in Ingeborg Schwenger and Ulrich G. Schroeter (eds), *Schlechtriem & Schwenger: Commentary on the UN Convention on the International Sale of Goods (CISG) (5th Edition)* (Oxford University Press, 2022) 157 [42].

¹⁸ 'Contracting States', *CISG-online* (Web Page) <<https://cisg-online.org/cisg-contracting-states>>. Interestingly, the United Kingdom is not a Contracting State to the CISG.

¹⁹ *CISG* (n 11) art 1(1). Although the *CISG* is a 'self-executing' treaty, it is still an international treaty, and for jurisdictions which follow a dualist approach, the Convention may have to be incorporated into domestic law for it to be given effect. For example, in Australia, the *CISG* is given the force of law in New South Wales via the *Sale of Goods (Vienna Convention) Act 1986* (NSW) s 5.

I CHANGED CIRCUMSTANCES

The approach taken by contracts to the change of circumstances has been thrown into high relief by recent events, as the numerous Gulf oil producers who have ‘declared force majeure’ in recent weeks would attest.²⁰ The tension between the belief that parties should be held to their bargain, and the reality that the bargain was based on facts that no longer subsist, has sharpened in this age of pandemics, tariffs, and blockaded straits. Consequently, parties, especially in the construction context, have been, and will continue to be, looking across jurisdictions to find new approaches that best reify their desires for protection. This offers the lawyers of the common law world an opportunity to learn something from their civil law counterparts.

The approaches taken by the common and civil law countries are not uniform within either.²¹ Some common law countries condense the entire doctrine of frustration into one, whereas others divide it up into distinct areas of operation. Similarly, the civil law jurisdictions have three related but different doctrines – *force majeure*, hardship and *imprévision* – which they each emphasise to a greater or lesser degree. Nevertheless, a fundamental difference of approach can be detected when the simple question is asked: what happens when the doctrine is successfully invoked? In the common law countries, the answer is invariably that the contract is no longer on foot; the parties are released from their future obligations to perform. By contrast, the answers in the civil law are more diverse – termination, financial compensation, the modification of the contract – but each reflect an empowering of judges or arbitrators to use their discretion to find the most just path forward. This necessarily involves a sacrifice of certainty, but it is, as this Part suggests, a worthy and necessary sacrifice to make in favour of flexibility and justice.

A Frustration

The doctrine of frustration is a comparatively recent arrival to the common law system. Before the mid-1800s, the English courts bound parties to their contractual promises even if those promises had become impossible to perform.²² In *Paradine v Jane*, not even the defendant’s expulsion from his lands during the English Civil War at the hands of the (then-reviled) Royalist

²⁰ At time of writing, QatarEnergy had declared force majeure to its liquified natural gas (LNG) buyers, the Kuwait Petroleum Corporation on sales of crude oil and petroleum products, Bapco on the same, and Shell on LNG deliveries to some, predominately Asian buyers.

²¹ Ben Symons and Joseph Dalby SC, *Force Majeure and Frustration in Commercial Contracts* (Bloomsbury Publishing Plc, 2022) 164.

²² Ibid 184, citing *Thornborow v Whitacre* (1706) 2 Ld Raym 1164, 1165.

commander Prince Rupert could excuse his failure to pay rent.²³ It was not until *Taylor v Caldwell* in 1863 that frustration on account of the physical destruction of the subject matter of the contract – in that case a music hall – was recognised.²⁴ This reluctance to overturn what was seen as the fundamental responsibility of parties to be held to their bargains – *pacta sunt servanda*²⁵ (which is also a theme underlying the civil law concept of good faith, as will be discussed in Part III of this paper) – is reflected in the additional time it took for the doctrine to expand to cases where the fundamental purpose of the contract was destroyed, as paradigmatically occurred in *Krell v Henry* when King Edward VII’s coronation was cancelled.²⁶ In its modern form, frustration intervenes when a supervening event not caused by the fault of either party causes performance to become impossible or illegal, or would lead that performance to produce a radically different approach.²⁷

There is some diversity in approach to this problem across the different common law countries. The United States is notable for dividing the doctrine into two distinct forms, both with the effect of discharging the parties from further performance.²⁸ One, ‘impracticability of performance’, applies in cases of supervening death or incapacity, supervening illegality, and supervening destruction of the contractual object.²⁹ The other, ‘frustration of purpose’, applies when a supervening event frustrated performance in circumstances where there was no fault and the non-occurrence of that event was a basic assumption of the parties’ intent.³⁰ The two forms of frustration thus have distinct areas of operation. For instance, the latter requires interrogation of the parties’ intentions when entering the contract.

By contrast, in the United Kingdom, there is a singular doctrine of frustration that takes effect ‘whenever the law recognises that without default of either party a contractual obligation has become incapable of being performed because the circumstances in which performance is called for would render it a thing radically different from that which was undertaken by the

²³ [1647] EWHC KB J5.

²⁴ (1863) 122 ER 309.

²⁵ Symons and Dalby (n 21) 180–2.

²⁶ [1903] 2 KB 740.

²⁷ Guenter Treitel, *Frustration and Force Majeure* (Sweet & Maxwell, 4th ed, 2021) 1.

²⁸ Yehonatan Givati and Yotam Kaplan, ‘A New Theory of Impossibility, Impracticability, and Frustration’ (2023) 52(2) *Journal of Legal Studies* 377, 378.

²⁹ *Uniform Commercial Code* (United States) § 2-615 (but only in the context of sale of goods); American Law Institute, *Restatement (Second) of Contracts* (1981) § 261 (*Restatement (Second) of Contracts*); see also Vernon Valentine Palmer, ‘Excused Performances: *Force Majeure*, Impracticability, and Frustration of Contracts’ (2022) 70(i1) *The American Journal of Comparative Law* i70.

³⁰ *Restatement (Second) of Contracts* (n 29) § 265.

contract.’³¹ This position was affirmed in Australia in the leading case of *Codelfa Construction*, in which the High Court of Australia approved what it described as a ‘fundamental change in circumstances.’³²

The central and distinctive feature of these common law doctrines, whatever their form and precise terminology, is that they provide for the *discharge* of the contract upon the operation of frustration, without any allowance for its modification to reflect the circumstances that are now prevailing.³³ This rigidity of approach is founded in the desire to provide parties with certainty in their dealings — either the contract will be upheld, or it will not.

B *Force Majeure, Hardship, and Imprévision*

The civil law provides a separate but somewhat analogous remedy to frustration in its doctrine of *force majeure*, which has the same effect of, generally, discharging the need for the parties’ performance of their obligations.³⁴ A representative example is Article 1218 of the *French Civil Code*, which provides that ‘*an event beyond the control of the debtor, which could not reasonably have been foreseen at the time of conclusion of the contract and the effects of which cannot be avoided by appropriate measures, prevents performance of the obligation by the debtor*’ (emphasis added).³⁵ In this regard, the civil law is accommodating of the strict discharge requirements required by the common law jurisdictions.

But the civil law jurisdictions go further with a much broader doctrine of *hardship*, which permits the termination *or adaptation* of the contract when a fundamental change of circumstances has made performance ‘excessively onerous’.³⁶ This has been incorporated into statute in most of Latin America, the Middle East, and Europe. In Italy, for instance, Article 1467 of the *Italian Civil Code* merely requires that performance of the contract have become ‘excessively burdensome’ for its provisions to be adjusted.³⁷ Similarly, the *UAE Civil Transactions Law* states that ‘*the judge may, according to circumstances and by comparing the*

³¹ *Davis Contractors Ltd v Fareham Urban District Council* [1956] AC 696.

³² *Codelfa Construction Pty Ltd v State Rail Authority of New South Wales* (1982) 149 CLR 337 (‘*Codelfa*’).

³³ Ewan McKendrick (ed), *Force Majeure and Frustration of Contract* (Routledge, 2nd ed, 1995) 42.

³⁴ Barry Nicholas, ‘Force Majeure in French Law’ in Ewan McKendrick (ed), *Force Majeure and Frustration of Contract* (Routledge, 2nd ed, 1995) 21.

³⁵ *The Law of Contract, the General Regime of Obligations, and Proof of Obligations: The new provisions of the Code civil created by Ordonnance n° 2016-131 of 10 February 2016 translated into English* (France) art 1218 (‘*French Civil Code*’).

³⁶ Christoph Brunner, *Force Majeure and Hardship under General Contract Principles: Exemption for Non-performance in International Arbitration* (Kluwer Law International, 2008) 393.

³⁷ *Civil Code (approved by Royal Decree No. 262 of March 16, 1942, and amended up to Decree No. 291 of December 7, 2016)* (Italy) (‘*Italian Civil Code*’).

*interests of both parties, reduce the burdensome obligation to reasonable limits, if justice so requires.*³⁸ The same concept has been recognised in European countries including Austria, Spain, and Switzerland. Articles 6.2.1 to 6.2.3 of the *UNIDROIT Principles* reflect the civil law principle of hardship, with the disadvantaged party entitled to request renegotiations.³⁹

One outlier to this trend is Quebec, where the Supreme Court of Canada has held that the failure of the Quebec legislature to turn the doctrine into a legislative rule is indicative of a desire for it not to be incorporated into that mixed civil/common law jurisdiction.⁴⁰ Nevertheless, the principle has been recognised as a general principle of international law by the Iran-United States Claims Tribunal, which considered the overthrow of the Shah's regime to be an event creating the requisite hardship.⁴¹ This widespread adoption can be attributed to two distinct advantages of hardship. First, it has a collaborative effect in that it enables contracts to be kept on foot whilst there is negotiation over modifications to reflect new circumstances.⁴² Secondly, and equally important, it deters parties from unnecessarily terminating their contract. It would be unwise to ask a court to use its discretion to terminate the contract without first attempting to compromise before that very same court.

A very closely related doctrine, albeit with a narrower scope and an operation limited mainly to France and Germany, is *imprévision*.⁴³ Though the term is sometimes used synonymously with hardship, it is best thought of as distinct because both countries rejected any application of the hardship doctrine to civil contracts. Instead, *imprévision* was historically applied only by the administrative law courts, and only to administrative contracts such as those between a company and the state.⁴⁴ *Imprévision* traditionally applies to a fundamental changes of circumstances in relation to these contracts by allowing for termination or modification through the granting of monetary compensation at the order of the court.⁴⁵ *Imprévision* as a doctrine was thus historically softer than *force majeure*, in that it allowed for modification, but more

³⁸ *Civil Transactions Law (Federal Decree-Law No. 25 of 2025)* (UAE) art 249 ('UAE Civil Code').

³⁹ Brödermann (n 8) arts 6.2.1–3.

⁴⁰ *Hydro-Québec v Churchill Falls (Labrador) Corp.* [1988] 1 SCR 1087.

⁴¹ *Questech, Inc. v The Ministry of National Defence of the Islamic Republic of Iran*, Award in Case No. 59 (191-59-1) of 25.09.1985, at 20–22, 9 Iran-U.S. C.T.R. at 122–23, Y.B. Com. Arb. 1986, 283–89; affirmed in *Rockwell International Systems, Inc. v. The Government of the Islamic Republic of Iran (The Ministry of National Defence)*, Award in Case No. 430 (438-430-1) of 05.09.1989, Y.B. Com. Arb. 1990, 239, 243 [92].

⁴² Brunner (n 36) 419.

⁴³ *Ibid* 404.

⁴⁴ *Ibid*, quoting the *Gaz de Bordeaux* case, *Conseil d'Etat* 30.03.1916, D.P. 1916 3:25; Jacques Ghestin, Marc Billiau and Christophe Jamin, *Traité de droit civil: Les effets du contrat* (LGDJ, 3rd ed, 2001) [283].

⁴⁵ *French Civil Code* (n 35) art 1195.

rigid than hardship, as that modification was financial rather than contractual.⁴⁶ Ironically, given its origins, both France and Germany have broadened their doctrines in recent years to apply it to other contracts and thus narrow the difference between *imprévision* and hardship.⁴⁷ This occurred in cases in Germany, where the doctrine is referred to as *Wegfall der Geschäftsgrundlage*, and in statute in France in 2016, when Article 1195 of the *French Civil Code* was amended to allow this doctrine to apply to almost any contract save for securities and financial contracts.⁴⁸ The latter also allows for the possibility of amending the contract as well as, or instead of, providing monetary compensation. However, they still retain the strict requirement that renegotiation occurs before recourse to a judicial solution.⁴⁹ This middle-of-the-road position in France is also very similar to that adopted by the People's Republic of China.⁵⁰

C *Changed Circumstances for a Changed World*

Despite the many differences, in some limited and occasionally illusory ways the contractual provisions of the common law and civil law jurisdictions are converging. Since the beginning of the crisis in the Strait of Hormuz, particular attention has been paid to 'force majeure' clauses in the contracts of common law parties.⁵¹ But these provisions merely have the effect of enumerating a list of those conditions that constitute *force majeure* and render performance unnecessary⁵² – they do not provide for any of the flexibility that exists in the civil law world.⁵³

⁴⁶ A. H. Puelinckx, 'Frustration, Hardship, Force Majeure, Imprévision, Wegfall der Geschäftsgrundlage, Unmöglichkeit, Changed Circumstances' (1986) 3(2) *Journal of International Arbitration* 47, 47.

⁴⁷ Catherine Pédamon, 'The Paradoxes of the Theory of Imprévision in the New French Law of Contract: A Judicial Deterrent?' [2017] (112) *Amicus Curiae* 10, 10.

⁴⁸ Ibid 11; Mitja Kovac and Cristina Poncibò, 'Towards a Theory of Imprévision in the EU?' (2018) 14(4) *European Review of Contract Law* 344, 373, arguing that '[i]n the 21st Century, instability in economic development has become chronic. The latest developments ... seem to confirm that imprévision should no longer be deemed an occasional exception to the binding force of contracts, but as an autonomous theory.'

⁴⁹ *French Civil Code* (n 35) art 1195: 'If a change of circumstances that were unforeseeable at the time of conclusion of the contract renders performance excessively onerous for a party that had not accepted the risk of such a change, that party may ask the other contracting party to renegotiate the contract. The affected party must continue to perform its obligations during the period of renegotiation.'

⁵⁰ *Civil Code of the People's Republic of China* (PRC) adopted at the Thirteenth National People's Congress on 28 May 2020, art 533 ('*Chinese Civil Code*').

⁵¹ Kamal Kashoggi et al, 'Contracts at Risk: Navigating Force Majeure, Hardship and Disruption Clauses in the Wake of the 2026 Iran Conflict', *Ontier Legal Insights* (Web Page, 9 April 2026) <<https://www.ontier.law/en/contracts-at-risk-navigating-force-majeure-hardship-and-disruption-clauses-in-the-wake-of-the-2026-iran-conflict/>>.

⁵² David Green, 'Force Majeure Clauses and International Sale of Goods – Comparative Guidelines for the Common Lawyer' (1980) 8 *Australian Business Law Review* 369, 370–1: '[p]erhaps as a response to the uncertainty of operation of the frustration principle, there has been some judicial encouragement for the practice of using force majeure clauses to define the circumstances in which the parties themselves would require either a termination, suspension or modification of their contractual obligations.'

⁵³ Aubrey Diamond, 'Force Majeure and Frustration under International Sales Contracts' in Ewan McKendrick (ed), *Force Majeure and Frustration of Contract* (Routledge, 2nd ed, 1995) 257.

Furthermore, such *force majeure* clauses have been construed strictly across the common law world: in Australia, where it has been recently reiterated that these are defences to be proven by the party relying on them, rather than clauses that qualify the underlying obligation,⁵⁴ in Hong Kong, where it has been held that the party arguing against *force majeure* does not need to prove much to establish that the other could have taken reasonable steps to avoid frustration;⁵⁵ and much the same has occurred in Canada⁵⁶ and Singapore.⁵⁷ Thus, the protection offered by these clauses generally pales in comparison to that afforded by the civil law doctrine of hardship.

A development of similar character can be observed in mergers and acquisitions contracts with Material Adverse Change ('MAC') clauses, albeit seemingly with the opposite direction of travel. These boilerplate provisions are familiar to common law practitioners and are intended to give a buyer the right to walk away from the deal if, between signing and closing, its target is materially adversely affected.⁵⁸ These clauses have increasingly been used in civil law jurisdictions without any modification, which raises the question of whether these clauses are intended to exclude domestic law, or whether they can complement *force majeure* as a doctrine.⁵⁹ If the former occurs, it can be problematic as it is typically worded to focus on whether the issue was unforeseeable, rather than the civil law norm of examining whether the issue made performance impossible.⁶⁰ During the pandemic, for instance, a MAC clause which ousted the doctrine of *force majeure* would have left a client with little remedy if their purchase was forestalled by a virus-related effect that was foreseeable but nonetheless made the completion of the contract functionally infeasible.⁶¹

Despite the risks of borrowing one jurisdiction's doctrine for use in another, there is still much to commend to a common law practitioner the flexibility that is inherent to the civil law's approach to changed circumstances. As has been often observed, the statutory provisions against unjust enrichment notwithstanding, the '*all-or-nothing consequence of frustration leaves very little room for judicial discretion: discharging a contract may be as unjust to one*

⁵⁴ *Meetfresh Franchising Pty Ltd v Ivanman Pty Ltd* [2020] NSWCA 27.

⁵⁵ *Regent National Enterprises Ltd v Goldlion Properties Ltd (Raiffeisen Zentralbank Osterreich AG intervening)* (2009) 12 HKCFAR 512.

⁵⁶ *Atlantic Paper Stock Ltd v St. Anne-Nackawic Pulp and Paper Company Limited* [1976] 1 SCR 580.

⁵⁷ *Holcim (Singapore) Pte Ltd v Precise Development Pte Ltd* [2009] SGHC 256.

⁵⁸ Peggy Morgan, 'The Big MAC: How Should Courts Approach MAC Clauses in Merger and Acquisition Agreements' (2023) 57(3) *Indiana Law Review* 725, 725.

⁵⁹ Sergio Garcia Long, 'The Big MAC is Back: Comparative and International Issues on Material Adverse Change (MAC) Clause' (2026) 22(5–6) *European Company and Financial Law Review* 712, 735.

⁶⁰ *Ibid.*

⁶¹ *Ibid* 736.

*party as enforcing it would be unjust to the other.*⁶² It is doubtful whether, in most cases, the benefit of certainty a contracting party receives under the doctrine of frustration is worth sacrificing the ability to modify the contract to reflect the new circumstances.

An example of this integration of civil and common law approaches is the *CISG*, which at Article 79(1) provides that *'[a] party is not liable for a failure to perform any of his obligations if he proves that the failure was due to an impediment beyond his control and that he could not reasonably be expected to have taken the impediment into account at the time of the conclusion of the contract or to have avoided or overcome it or its consequences. ... The exemption provided by this article has effect for the period during which the impediment exists.'* This maintains some certainty by simply providing that damages will not be available for the period of the impediment – rather than rewriting the entire contract – but offers a more measured response to the situation than that which would have been offered by its outright frustration.

Article 7.1.7(1) of the *UNIDROIT Principles* is modelled on Article 79 of the *CISG*, and provides that *'[n]on-performance by a party is excused if that party proves that the nonperformance was due to an impediment beyond its control and that it could not reasonably be expected to have taken the impediment into account at the time of the conclusion of the contract or to have avoided or overcome it or its consequences.'* This imports the common law standard of objective foreseeability.⁶³ However, preventative measures which could have been taken must be commercially reasonable, as otherwise the promisor may invoke the hardship clauses in Articles 6.2.1 to 6.2.3, as discussed above in Section B.⁶⁴

⁶² Bashayer Al Majed and Abdulaziz Al Majed, 'Frustration v Imprévision, Why Frustration is so 'Frustrating': The Lack of Flexibility in the English Doctrine's Legal Consequence' (2023) 45(1) *Liverpool Law Review* 25, 46.

⁶³ Brödermann (n 8) art 7.1.7.

⁶⁴ *Ibid.*

II EXTRINSIC EVIDENCE

Common law practitioners and courts are accustomed to beginning with the text and confining themselves to the express terms of the contract — the ‘four corners’ of the page — when resolving a contractual dispute.⁶⁵ Guided by the objective theory of contract, the common law does not concern itself with ‘parol evidence’, such as pre-contractual negotiations and post-contractual conduct by the parties. This infamous parol evidence rule therefore obstructs the common lawyer from considering extrinsic evidence that might otherwise be thought relevant by its civil law counterparts. However, even within common law jurisdictions, fine distinctions emerge as to the ambit of ‘parol evidence’, and whether ambiguity is required before resort can be had to evidence of the surrounding circumstances.

In comparison, the civil law takes a flexible approach, ultimately seeking to give effect to the parties’ subjective intentions, even if not set out in the written agreement between them. That entails that the distinction between the terms of the contract and extrinsic evidence is, in practice, of only secondary importance. This approach may be seen as surprising to a common law practitioner, as it eschews all commercial predictability and essentially allows a written agreement to be altered by evidence other than the contract, such as oral agreements or negotiations. However, there remains doubt as to ‘whether [the parol evidence] rule is actually beneficial to the intended promotion of business stability and legal certainty’.⁶⁶ It is important to recognise that certainty does not always flow from the text alone – rather, context plays a crucial role in obtaining a holistic understanding of the parties’ agreement.⁶⁷

It is the case that the dynamic nature of construction projects is shaped by ongoing negotiations and informal instructions between the parties. As a result, parties may find themselves frequently departing from strict contractual procedures or acting on assumptions not adequately captured in the written contract. In these circumstances, a strict application of the parol evidence rule may favour form over substance, and may generate outcomes which, though superficially certain, are arguably commercially artificial.

⁶⁵ *Mount Bruce Mining Pty Ltd v Wright Prospecting Pty Ltd* (2015) 256 CLR 104, 116 [48] (French CJ, Nettle and Gordon JJ) (*Mount Bruce Mining*): ‘ordinarily [the] process of construction is possible by reference to the contract alone’.

⁶⁶ Andreas Müller, *Protecting the Integrity of a Written Agreement* (Eleven International Publishing, 2013) 33 [3.2.1.2.4].

⁶⁷ James Allsop, ‘Chapter 5: Uncertainty as Part of Certainty’ in Ruth Higgins and Kevin Connor (eds), *The Humanity of Law* (The Federation Press, 2024) 73, 74; James Allsop, ‘The Timeless Search for Certainty and Its Relevance to Maritime Law and Arbitration Law: Where Practical Reality Meets Theory’ (Speech, International Congress of Maritime Arbitrators, 5–10 November 2023) 4 [25].

A Subjective vs Objective Theories of Contract

As a starting point, the civil law gives effect to the common, subjective intentions of the parties. This is because the civil law sees a contract as a product of the parties' actual agreement, or *consensus ad idem*, as opposed to simply a written document. Therefore, the legitimacy of a contract, from the lens of civil law, is what the parties truly intended, as opposed to what has been put down, perhaps imperfectly, on paper. In some, but not all, civil law jurisdictions, the principle of freedom of form provides that a contract need not be concluded in writing and is not subject to other formal requirements, unless other laws regarding consumer protection or property create exceptions.⁶⁸

This essentially describes what was known in Roman law as 'synallagmatic contracts', which were bilateral contracts that failed to satisfy the formal requirements of the named categories of *consensual* contract (sale, hire, partnership or *mandatum*).⁶⁹ All the other Roman contracts – whether verbal, literal, real and consensual – were characterised by strict formal requirements. The synallagmatic contract, however, depended only on consensus between the parties and consideration. These contracts now dominate commerce.

The focus on the parties' subjective intentions is illustrated by the French philosophy of contractual interpretation. Article 1188 of the *French Civil Code* states that '*[a] contract is to be interpreted according to the common intention of the parties rather than stopping at the literal meaning of its terms. Where this intention cannot be discerned, a contract is to be interpreted in the sense which a reasonable person placed in the same situation would give to it*'.⁷⁰ The same rule is mirrored in the *German Civil Code* in Article 133. International instruments adopt the same position, such as Article 4.1 of the *UNIDROIT Principles* and Article 5.101 of the *Principles of European Contract Law* ('PECL').

In comparison, common law jurisdictions accord primacy to the objective intentions of the parties – that is, what a reasonable person would understand the terms to mean. It follows that

⁶⁸ Müller (n 66) 12–13 [2.3.2].

⁶⁹ The term, "synallagmatic contract", is still sometimes used in the common law to denote a generic kind of contract (whether strictly under the law of contract or otherwise) based on mutual consent: see, eg, *Hongkong Fir Shipping Co Ltd v Kawasaki Kisen Kaisha Ltd* [1962] 2 QB 26, 65 (Diplock LJ).

⁷⁰ James Edelman, 'The Interpretation of Written Contracts' (Mr Justice Russell Brown Law Lecture Series, University of Alberta, 9 January 2020) 8. As Edelman J remarked, a key driver of modern French law was RJ Pothier's treatise on the law of obligations. See also *Chartbrook Limited v Persimmon Homes Ltd* [2009] 3 WLR 267, 281–2 [39] (Lord Hoffmann) ('*Chartbrook*'): '... French law regards the intentions of the parties as a pure question of subjective fact, their *volonté psychologique*, uninfluenced by any rules of law. It follows that any evidence of what they said or did, whether to each other or to third parties, may be relevant to establishing what their intentions actually were.'

civil law jurisdictions are far more flexible in allowing the use of evidence of pre-contractual negotiations, post-contractual conduct and other relevant materials extrinsic to the contract itself in ascertaining the true intentions of the parties.

The only time that the common law is not completely blind to the parties' subjective intentions is in the context of common mistake and rectification. A court will remedy a mistaken expression in a written instrument to put into effect the parties' relevant intention, but only if it can be established that 'the parties were in complete agreement on the terms of their contract, but by an error wrote them down wrongly'.⁷¹ Importantly, this remedy is not used to 'manufacture intention for someone who intends nothing, nor to alter the intention of one who intends something and expresses that intention correctly'.⁷² The threshold is therefore high, and as with other equitable remedies, it is a remedy of last resort – there are a number of hurdles a plaintiff must overcome before 'subjective intention' will ever be relevant. By contrast, to the civilian lawyer, it is always immediately relevant. It is this emphasis on objective contractual interpretation which anchors the common law to the rigidity of the parol evidence rule.

B *The Ambit of 'Parol Evidence'*

The common law's parol evidence rule, which affords the utmost respect for the written word, is formalistic, traditional, and the backbone of how the common law upholds 'certainty' when interpreting a written agreement. Though the rule is well-accepted in the common law, in practice, jurisdictions differ as to which types of extrinsic evidence ought to be excluded. Indeed, the substantial variations in how the parol evidence rule operates were the precise reason why it was not adopted in international instruments such as the *CISG*.⁷³

The rule can be traced back at least as far as 1604 in the *Countess of Rutland's Case*, where Popham CJ remarked that '*it would be inconvenient, that matters in writing made by advice and on consideration, and which finally import the certain truth of the agreement of the parties should be controlled by averment of the parties to be proved by the uncertain testimony of*

⁷¹ *Frederick E Rose (London) Ltd v William H Pim Junior & Co Ltd* [1953] 2 QB 450, 461 (Denning LJ). In this passage, it was also stated that: '[i]f you can predicate with certainty what their contract was, and that it is, by a common mistake, wrongly expressed in the document, then you rectify the document; but nothing less will suffice'.

⁷² J.D. Heydon, M.J. Leeming and P.G. Turner, *Meagher, Gummow and Lehane's Equity* (LexisNexis, 5th ed, 2014) 927 [27-010].

⁷³ CISG Advisory Council Opinion No 3, *Parol Evidence Rule, Plain Meaning Rule, Contractual Merger Clause and the CISG*, 23 October 2004, Rapporteur: Professor Richard Hyland, Rutgers Law School, Camden, NJ, USA, [2.4] ('CISG Advisory Council Opinion No 3'), citing Rod N. Andreason, 'MCC-Marble Ceramic Center: The Parol Evidence Rule and Other Domestic Law Under the Convention on Contracts for the International Sale of Goods' [1999] (1) *BYU Law Review* 351, 360–2.

slippery memory.⁷⁴ That is, the document ought to speak for itself. Although the rule was chiefly concerned with conveyancing instruments, it later expanded to the ordinary written contract.⁷⁵ In essence, the rule prevents extrinsic evidence being adduced to add to, vary, or contradict the terms of a contract as they appear in a written document, and also prevents certain types of extrinsic evidence from being used to interpret the terms of a written contract.⁷⁶ The rationale behind not using extrinsic evidence is to preserve the finality and certainty of the written record which the parties have created.⁷⁷

Pre-contractual negotiations and post-contractual conduct are the main forms of extrinsic evidence which the rule seeks to exclude. Evidence of pre-contractual negotiations is generally unhelpful as the parties have yet to reach consensus.⁷⁸ In the United Kingdom, Lord Hoffmann noted how pre-contractual negotiations may be ‘drenched in subjectivity and may, if oral, be very much in dispute’, and proves little more than aspirations.⁷⁹ This traditional sentiment was also echoed by Mason J in *Codelfa*, who said that insofar as pre-contractual negotiations ‘consist of statements and actions of the parties which are reflective of their actual intentions and expectations they are not receivable’.⁸⁰

However, English authority *may* be progressively moving towards a more liberal approach. In the 2009 House of Lords decision of *Chartbrook Limited v Persimmon Homes Limited*, Lord Hoffmann recognised that there are some cases in which the ‘alleged disadvantages of admissibility’ are outweighed by doing more ‘precise justice in exceptional cases’.⁸¹ It was held that it would not be inconsistent with the English objective theory of contractual interpretation to admit evidence of previous communications between parties as part of ‘the background’ which might throw light upon the language used in their written agreement.⁸²

⁷⁴ *Countess of Rutland's Case* (1604) 5 Co Rep 25, 25b, 26a (Popham CJ), cited in *Chartbrook* (n 70) 280 [36] (Lord Hoffmann). Another formulation of the rule was stated by Denman CJ in *Goss v Lord Nugent* (1833) 110 ER 713, 715–16: ‘[i]f there be a contract which has been reduced into writing, verbal evidence is not allowed to be given of what passed between the parties, either before the written document was made, or during the time that it was in a state of preparation, so as to add to or subtract from, or in any manner to vary or qualify the written contract.’

⁷⁵ Müller (n 66) 17–20 [3.2.1.2.1], citing, eg, *Giraud v Richmond* (1846) 135 ER 1172 (Court of Common Pleas 1846).

⁷⁶ Jeannie Paterson and Andrew Robertson, *Principles of Contract Law* (Thomson Reuters, 7th ed, 2025) 328 [12.250]. See also *Codelfa* (n 32) 347 (Mason J).

⁷⁷ Paterson and Robertson (n 76) 343 [13.20], citing Dyson Heydon, *Heydon on Contract* (Thomson Reuters, 2019) [9.140].

⁷⁸ *Prenn v Simmonds* [1971] 1 WLR 1381, 1384 (Lord Wilberforce).

⁷⁹ *Chartbrook* (n 70) 281 [38] (Lord Hoffmann).

⁸⁰ *Codelfa* (n 32) 352 (Mason J).

⁸¹ *Chartbrook* (n 70) 283 [41] (Lord Hoffmann).

⁸² *Ibid* 279 [33].

Nevertheless, Lord Hoffmann was still careful to emphasise that the ‘*the law of contract is an institution designed to enforce promises with a high degree of predictability and that the more one allows conventional meanings or syntax to be displaced by inferences drawn from background, the less predictable the outcome is likely to be*’.⁸³

As regards post-contractual conduct, it is generally inadmissible as it may show what the parties understood the contract to mean, not what a reasonable person would have understood the contract to mean.⁸⁴ It is therefore irrelevant under an objective theory of contract. Notably, however, post-contractual dealings may indicate that a binding contract was in fact made, but this is distinct from using such conduct as an aid to construction of the contract itself.⁸⁵

There is an interesting comparison to be drawn here to another common law jurisdiction, the United States, which does not treat post-contractual conduct as falling within the ambit of its parol evidence rule. Section 2-202 of the *Uniform Commercial Code* (‘UCC’) allows the parties’ written agreement to be explained or supplemented by a ‘course of dealing or usage of trade or by course of performance’.⁸⁶ Indeed, the parties’ conduct after conclusion of the contract is ‘considered the best indication of what they intended the writing to mean’.⁸⁷ This stands in stark comparison against the English and Australian authorities, but is in line with international instruments such as the *CISG*.⁸⁸ This again illustrates the movement of the common law away from a stringent exclusionary rule.

In Australia, a further exception to the parol evidence rule is that extrinsic evidence may be used to identify the terms of a contract that is partly oral, and partly in writing, though this is arguably rare for construction contracts. However, the High Court of Australia has yet to address the question of whether a strict or flexible approach ought to be taken when a contract

⁸³ *Ibid* 280 [37].

⁸⁴ *James Miller & Partners Ltd v Whitworth Street Estates (Manchester) Ltd* [1970] AC 583, 603 (Lord Reid).

⁸⁵ *Access Training Group Ltd v Jane* [2024] NSWCA 204, [64]–[65] (Ward P), citing *Howard Smith & Co Ltd v Varawa* (1907) 5 CLR 68, 78 (Griffith CJ, O’Connor J agreeing at 82–3); *Johnston v Brightstars Holding Company Pty Ltd* [2014] NSWCA 150, [124] (Basten JA, Gleeson JA agreeing at [133]). Such post-contractual dealings may comprise of the conduct of one party known to the other, or communications between the parties, but it cannot be the subjective views or reservations of one party undisclosed to the other.

⁸⁶ *Uniform Commercial Code* (United States) (n 29) § 2-202(a).

⁸⁷ CISG Advisory Council Opinion No 3 (n 73) [1.2.9], citing *Uniform Commercial Code* (United States) (n 29) § 2-202 comment 2.

⁸⁸ See, eg, *CISG* (n 11) art 8(3).

is partly oral, and partly written.⁸⁹ In these circumstances, either a strict or flexible approach may be taken by the courts.⁹⁰

Accordingly, the scope of the parol evidence rule varies among common law jurisdictions, but there appears to be a gradual shift towards a permissive approach to extrinsic evidence holistically. This is further highlighted through the use of evidence to establish the ‘surrounding circumstances’ of a contract.

C Ambiguity and Surrounding Circumstances

An aspect of the parol evidence rule is the ‘surrounding circumstances’ or background information to the transaction. The statement by Lord Wilberforce in *L Schuler AG v Wickman Machine Tool Sales Ltd* is instructive: ‘evidence may be admitted of surrounding circumstances or in order to explain technical expressions or to identify the subject matter of an agreement: or (an overlapping exception), to resolve a latent ambiguity. But ambiguity in this context is not to be equated with difficulty of construction, even difficulty to a point where judicial opinion as to meaning has differed’.⁹¹ It is at this point – namely, what ‘ambiguity’ means – that English and Australian authorities diverge.

In England, evidence of surrounding circumstances is always admissible in construing a contract – for example, the genesis of the transaction, background, context, and the market in which the parties are operating.⁹² A similar position is taken in Singapore⁹³ and Hong Kong.⁹⁴

⁸⁹ In *Equiscorp Pty Ltd v Glengallan Investments Pty Ltd* (2004) 218 CLR 471, the High Court did not address this question. The approach was discussed in Paterson and Robertson (n 76) 329–30 [12.270]. See also *State Rail Authority of New South Wales v Heath Outdoor Pty Ltd* (1986) 7 NSWLR 170, where the Court of Appeal of New South Wales rejected the argument that the oral statements by an officer of State Rail Authority made subsequent to the written contract was enough to constitute a partly oral, partly written contract. At 192, McHugh JA (Kirby P agreeing at 175, Glass JA agreeing at 182) stated that the officer made plain that he had no authority to change any condition of the written contract.

⁹⁰ On a strict approach, primacy should be given to the written document which appears on its face to be the complete record of the parties’ contract. On this view, extrinsic evidence should not be admitted as the parties are presumed to have intended the written contract to embody the whole of their agreement. On a flexible approach, extrinsic evidence may be admitted to determine whether or not the parties truly intended the document to be an exclusive record of their agreement. This leaves the door open to the possibility of oral terms adding to, varying or contradicting the written document. See Paterson and Robertson (n 76) 331 [12.270]. This ‘flexible approach’ has been criticised by the English Law Reform Commission: The Law Commission, *The Law of Contract, The Parol Evidence Rule* (Cmnd 9700, 1986), [2.7].

⁹¹ *L Schuler AG v Wickman Machine Tool Sales Ltd* [1974] AC 235, 261 (Lord Wilberforce), quoted with approval in *Codelfa* (n 32) 348 (Mason J).

⁹² *Reardon Smith Line v Hansen-Tangen* [1976] 1 WLR 989, 995–6 (Lord Wilberforce). Following this case, the House of Lords and the United Kingdom Supreme Court have taken a similar view. See, eg, *Investors Compensation Scheme Ltd v West Bromwich Building Society* [1998] 1 WLR 896, 912–13 (Lord Hoffmann); *Arnold v Britton* [2015] AC 1619.

⁹³ See, eg, *Zurich Insurance (Singapore) Pte Ltd v B-Gold Interior Design & Construction Pte Ltd* [2008] SGCA 27.

⁹⁴ See, eg, *Fully Profit (Asia) Ltd v Secretary for Justice* [2013] HKCFA 40.

In contrast, there is an unsettled debate in Australia as to whether ‘ambiguity’ is a necessary prerequisite before the court can have resort to surrounding circumstances. The ‘true rule’ stated by Mason J in *Codelfa* was that ‘evidence of surrounding circumstances is admissible to assist in the interpretation of the contract if the language is ambiguous or susceptible of more than one meaning’.⁹⁵ However, it was not made clear how such an ambiguity may be identified, only how an ambiguity may be resolved.⁹⁶

In *Western Export Services Inc v Jireh International Pty Ltd*, it was put to the Court that intermediate appellate court decisions had rejected the requirement to ‘identify ambiguity in the language of the contract before the court may have regard to the surrounding circumstances and object of the transaction’.⁹⁷ The High Court expressly stated that to accept such a proposition would require ‘reconsideration’ of the ‘true rule’ pronounced in *Codelfa*, and until the Court ‘disapproves or revises what was said in *Codelfa*, intermediate appellate courts are bound to follow that precedent’.⁹⁸ Although this decision was a refusal for special leave and its precedential value is open to question,⁹⁹ *Codelfa* remains binding High Court authority, and intermediate appellate court decisions, particularly in New South Wales, which took the view that there is no need to cross an ‘ambiguity gateway’ before resorting to extrinsic circumstances, must be read with some circumspection.¹⁰⁰ If such a position is taken, it again marks a step away from the rigidity of the parol evidence rule in common law jurisdictions.

D Moving Past the Four Corners of the Contract

Whilst the common law has made efforts to loosen the application of the parol evidence rule, its efforts pale in comparison to its civil law counterparts, which do not entertain the rule at all. In Germany, for example, there is no parol evidence rule. However, there is a principle in

⁹⁵ *Codelfa* (n 32) 351 (Mason J).

⁹⁶ *Mount Bruce Mining* (n 65) 132 [110] (Kiefel and Keane JJ).

⁹⁷ *Western Export Services Inc v Jireh International Pty Ltd* (2011) 86 ALJR 1, 2 [2] (Gummow, Heydon and Bell JJ) (‘*Western Export Services*’), citing *Franklins Pty Ltd v Metcash Trading Ltd* (2009) 76 NSWLR 603, 618 [19] (Allsop P) (‘*Franklins*’) and *MBF Investments Pty Ltd v Nolan* [2011] VSCA 114, [195]–[204] (Neave, Redlich and Weinberg JJA) (‘*MBF Investments*’).

⁹⁸ *Western Export Services* (n 97) 2–3 [3] (Gummow, Heydon and Bell JJ). The binding force of *Codelfa* was reiterated at 3 [4], citing *Royal Botanic Gardens and Domain Trust v South Sydney City Council* (2002) 240 CLR 45, 62–3 [39] (Kirby J) (‘*Royal Botanic Gardens*’).

⁹⁹ Oliver Jones, ‘Are the High Court’s Reasons for Refusing Special Leave Binding?’ (2013) 87 *Australian Law Journal* 774, 782.

¹⁰⁰ Cf *Cherry v Steele-Park* [2017] NSWCA 295, [79]–[82] (Leeming JA); *Franklins* (n 97) 616–7 [14]–[17] (Allsop P), 622–3 [49] (Giles JA), 663–75 [239]–[292] (Campbell JA); *MBF Investments* (n 97) [195]–[204] (Neave, Redlich and Weinberg JJA); *Masterton Homes Pty Ltd v Palm Assets Pty Ltd* [2009] NSWCA 234, [113] (Campbell JA); *Callide Power Management Pty Ltd v Callide Coalfields (Sales) Pty Ltd* [2008] QCA 182, [64] (Mackenzie AJA).

German customary law (*Vermutung der Vollständigkeit und Richtigkeit der Urkunde*) which presumes the accuracy and completeness of all terms of a writing that have legal effect.¹⁰¹ If the written terms differ from a previous oral agreement, then it is presumed to have been modified by the written terms by mutual consent.¹⁰² In this sense, priority is still accorded to the written instrument over other oral agreements. Nevertheless, as the name suggests, this is merely a presumption that may be rebutted by evidence, and it therefore does not operate as stringently as the parol evidence rule. Japan adopts a similar position.¹⁰³ The *French Civil Code* does incorporate a ‘version’ of the parol evidence rule in Article 1341(1) for ordinary contracts, but ‘all forms of proof are generally available against merchants’.¹⁰⁴

It is telling that international model laws and conventions do not adopt the parol evidence rule or even any presumption of accuracy and completeness of a writing.¹⁰⁵ Article 8(1) of the *CISG* gives primacy to the parties’ subjective intentions over the objective approach in Article 8(2), and Article 8(3) explicitly allows the court or tribunal to give ‘due consideration ... to all relevant circumstances of the case including the negotiations, any practices which the parties have established between themselves, usages and any subsequent conduct of the parties’.¹⁰⁶ Although the parol evidence rule was proposed during the drafting of the Convention, it received little support and was rejected outright by delegates from Austria and Japan on the basis that it would limit the ‘free appreciation of evidence’ by the judge. Therefore, under the *CISG*, the written agreement ‘is one, but only one, of many circumstances to be considered’ when interpreting the terms of the contract.¹⁰⁷ The same permission to consider all relevant circumstances is also made in Article 4.3 of the *UNIDROIT Principles*, which recognises that in applying Articles 4.1 and 4.2, resort may be had to any preliminary negotiations, post-contractual conduct, the nature and purpose of the contract, usages, and more. This is paralleled in Article 2.102 of the *PECL*.

However, the position taken in international conventions does have some resemblance to the common law through the recognition of ‘merger clauses’ or ‘entire agreement clauses’, which

¹⁰¹ Müller (n 66) 35 [3.2.1.3]; CISG Advisory Council Opinion No 3 (n 73) [1.2.8].

¹⁰² Müller (n 66) 35 [3.2.1.3].

¹⁰³ In Japan, there is no equivalent of the parol evidence rule for commercial contracts but likewise adopts a presumption that a written contract is accurate and complete. See Müller (n 66) 36 [3.2.1.3]; CISG Advisory Council Opinion No 3 (n 73) [1.2.8].

¹⁰⁴ CISG Advisory Council Opinion No 3 (n 73) [1.2.8].

¹⁰⁵ Müller (n 66) 36–7 [3.2.1.4], citing Allan Farnsworth, *Farnsworth on Contracts* (Wolters Kluwer, 3rd ed, 2004) 234.

¹⁰⁶ CISG Advisory Council Opinion No 3 (n 73) [2.1].

¹⁰⁷ *Ibid* [2.2].

stipulate that the writing completely embodies the terms on which the parties have agreed and that those terms cannot be contradicted or supplemented by evidence of prior statements or agreements. Article 2.1.17 of the *UNIDROIT Principles* expressly recognises merger clauses, though prior agreements may still be used to interpret ‘the writing’.¹⁰⁸ That is, such prior statements may still be used to interpret the contract, even if they do not have binding force in their own right.¹⁰⁹ This also appears to be the position under civil codes, which have been affirmed by courts.¹¹⁰

The *PECL* also makes explicit reference to merger clauses, but distinguishes between a merger clause which has been individually negotiated and one which has not. In the former case, the clause will bar any prior statements, undertakings or agreements from becoming part of the contract or being used to interpret the contract; in the latter, the clause will only establish a rebuttable presumption that the parties intended any prior statements, undertakings or agreements to not form part of the contract.¹¹¹

By contrast, there is no equivalent recognition of a merger clause in the *CISG*. Indeed, if parties wish to include a merger clause, or also termed an entire agreement clause, this may be seen as a derogation under Article 6 from the norms of interpretation and evidence of the *CISG*.¹¹² The effect of such a clause is to prevent recourse to extrinsic evidence for the purpose of contract interpretation, which runs directly counter to Article 8(3) of the Convention. To ensure that the parties truly intended a merger clause to have this effect, the court or tribunal may still examine all relevant facts and circumstances in accordance with Article 8 – in other words, extrinsic evidence – to decide whether the merger clause represents the parties’ intent.¹¹³

As a result of this stark divergence in approach between the common law and civil law, arbitrators from different backgrounds grapple with the appropriate middle ground to take. In practice, arbitrators are generally reluctant to apply the strict common law rules given their

¹⁰⁸ *UNIDROIT Principles of International Commercial Contracts 2016* art 2.1.17 (‘*UNIDROIT Principles*’).

¹⁰⁹ Victoria Lafite and Alexandre Lamarre, ‘How to Improve the Efficiency of Entire Agreement Clauses? (Global)’, *Association of Corporate Counsel* (Web Page, 6 February 2018) <<https://www.acc.com/resource-library/how-improve-efficiency-entire-agreement-clauses-global>>.

¹¹⁰ *Ibid.* The authors note that the extension of an entire agreement clause to the issue of interpretation of the contract has been refused by courts such as the Court of Appeal of Paris (see Court of Appeal of Paris, 4 March 1980).

¹¹¹ *Principles of European Contract Law 2002* art 2.105(1)–(2) (‘*PECL*’). Further, a party may, by its own statements or conduct, be precluded from asserting a merger clause to the extent that the other party has reasonably relied on them: *PECL* art 2.105(4).

¹¹² *CISG Advisory Council Opinion No 3* (n 73) [4.1].

¹¹³ *Ibid* [4.5]–[4.6].

exclusionary nature, and instead prefer the flexibility provided by civil law.¹¹⁴ While arbitrators remain bound to apply the substantive law governing the dispute chosen by the parties (which will dictate whether the parol evidence rule applies), there is still some latitude in the procedural conduct of the arbitration. For example, an arbitrator might find that extrinsic evidence forms part of the factual matrix relevant to the dispute and should not be excluded for being obviously irrelevant. Alternatively, even within the seemingly rigid confines of the common law, flexible concepts such as ‘background information’ or ‘ambiguity’ offer a pathway for extrinsic evidence to be admissible. In answering this evaluative question, an arbitrator might be prepared to accept that there is ambiguity in the contractual terms, which will allow them to gain the benefit of extrinsic evidence which civilian lawyers are accustomed to.

¹¹⁴ Louis Yi Hang Lau and Darius Chan, ‘Proper Characterisation of the Parol Evidence Rule and its Applicability in International Arbitration’ (2021) 37(4) *Arbitration International* 805, 812.

III GOOD FAITH

During times of unexpected crisis, geopolitical instability, and supply chain disruption, the performance of complex construction projects and other commercial transactions, including long term supply agreements, becomes attended by outcomes, the consequences of which are not easily provided for at the time of contract; and the allocation of the risks becomes difficult, to say the least. In the context of the current global situation, unforeseen events are not exceptional, but inevitable. Especially in a construction project, the interdependency and collaboration of parties are critical and often indispensable to achieve the objective of the contract. It follows that any problems or delay can have flow-on effects on other subcontractors. Therefore, these long-term agreements cannot realistically be performed by adhering rigidly to the express terms, but rather requires parties to cooperate with a minimum standard of honesty, good faith, and reasonableness. Thus, applying the lens of good faith to interpret contracts and adjust rights is crucial to keep commercial operations afloat. After all, commercial law should facilitate commercial endeavours in society, not hinder it.¹¹⁵

As this Part seeks to demonstrate, the prominence of the good faith principle in civil law jurisdictions offers greater flexibility and may achieve outcomes unavailable under common law principles. The civil law embeds this principle of good faith into contracts, whereas the common law would only (and, even then, reluctantly) enforce an express term of good faith. The performance of the parties' agreement is at the forefront of civil law principles, going as far as to act as a barrier to the enforcement of rights if the duty of good faith has been infringed, such as the exercise of a right to terminate.

This Part begins by outlining the rationale behind the difference in approach between civil and common law jurisdictions. It then outlines the contents of the duty of good faith, discusses the reasons why the common law has been hesitant to accept such a principle, and finally, proposes reasons for why the common law should perhaps align itself with international consensus to better deal with uncertainty.

A Playing Fair, Playing Open: A Civilian's Idea of Good Faith

The civil law approach to imposing good faith as an overarching element in contractual dealings has been described by English courts as 'playing fair' or 'putting one's cards face

¹¹⁵ James Allsop, 'Good Faith and Australian Contract Law: A Practical Issue and a Question of Theory and Principle' (2011) 85 *Australian Law Journal* 341, 342 ('Good Faith and Australian Contract Law').

upwards on the table'.¹¹⁶ At first glance, this view may be seen by common law practitioners as being directly opposite to pursuing a party's own interests in a contractual bargain. However, this overlooks how an obligation of good faith, which requires parties to act honestly, reasonably, and cooperatively, can allow all parties to derive a shared commercial advantage. Properly construed, the notion of good faith is not oriented towards the undermining of self-interest, but towards the effective performance of the contract. That is, it does not entail the subordination of one's own self-interest to the self-interest of one's counterparty, but the subordination of one's own self-interest to the communal, 'commercial' interest of the project to which the contract seeks to give effect.

Indeed, the civil law's approach to good faith is grounded in the maxim of *pacta sunt servanda*: agreements must be kept. At its core, civil law focuses on the 'behaviour of the parties' during the course of the contract from formation to performance, and is less concerned with the written obligations in the contractual document itself.¹¹⁷ Whilst the common law prioritises giving effect to the express terms and objective intentions of the parties, the civil law is more concerned with upholding both the letter and spirit of the parties' agreement.¹¹⁸

The concept of good faith derives from Roman law over two thousand years ago,¹¹⁹ and was a cornerstone in fostering collaboration for the mutual benefit of all contracting parties.¹²⁰ Initially, this concept was divided into two types: *bonae fidei* contracts (where judges could have resort to a flexible interpretation of the agreement) and *stricti iuris* contracts (where judges were restricted to the literal terms of the agreement).¹²¹

¹¹⁶ *Interfoto Picture Library Ltd v Stiletto Visual Programmes Ltd* [1988] 2 WLR 615, 621 (Lord Bingham) ('*Interfoto Picture Library*'). Lord Bingham began his judgment at 620–1 with: '[i]n many civil law systems, and perhaps in most legal systems outside the common law world, the law of obligations recognises and enforces an overriding principle that in making and carrying out contracts parties should act in good faith. This does not simply mean that they should not deceive each other, a principle which any legal system must recognise; its effect is perhaps most aptly conveyed by such metaphorical colloquialisms as 'playing fair,' 'coming clean' or 'putting one's cards face upwards on the table.' It is in essence a principle of fair and open dealing.' See also James Allsop, 'Chapter 14: Some Reflections on Good Faith in Contract Law' in Ruth Higgins and Kevin Connor (eds), *The Humanity of Law* (The Federation Press, 2024) 188, 198 ('Some Reflections on Good Faith in Contract Law').

¹¹⁷ Christina Perry, *Good Faith in Contract Law* (Edward Elgar Publishing, 2024) 186 [9.02].

¹¹⁸ *Ibid.* In particular, civil law regards a contract as a 'moral device' with the strong belief that parties should keep to their promises, whereas in the common law, 'a contract is not primarily seen as a moral device, but as an economic one': Perry (n 117) [9.07], citing Jan M. Smits, *Contract Law: A Comparative Introduction* (Edward Elgar Publishing, 2nd ed, 2017) 193. The moral dimension is thus vanishingly small under the common law's concept of a contract.

¹¹⁹ Philippe Stoffel-Munck, 'Chapter 1: Good Faith in Civil Law', in Elliott Geisinger et al (eds), *Good Faith in International Arbitration – Myth, Reality, Label ... or All of the Above?* (Kluwer Law International, 2024) 5.

¹²⁰ Alex Wan and Peng Guo, *Good Faith Obligation: A Comparative Perspective* (Springer, 2024) 19–20, citing Reinhard Zimmermann, *The Law of Obligations: Roman Foundations of the Civilian Tradition* (Oxford University Press, 1996); Raphael Powell, 'Good Faith in Contracts' (1956) 9(1) *Current Legal Problems* 16, 20–1.

¹²¹ Perry (n 117) 187 [9.05].

This division reflects another division in the Roman (Justinian) scheme of contract law: the division between bilateral and unilateral contracts.¹²² By the Middle Ages, however, the distinction between *bonae fidei* contracts and *stricti iuris* contracts faded and good faith became a general principle across all contracts.¹²³ This is because verbal and literal contracts essentially became obsolete. The *stricti iuris* contracts faded away, so all that was left were bilateral, good faith contracts. This good faith obligation later permeated into various European legal systems,¹²⁴ forming the normative basis of all commercial dealings, although the application of this doctrine differs among various countries.¹²⁵ Some scholars have commented that good faith is the most ‘widely prescribed standard of conduct for contracting parties globally’.¹²⁶

This comment finds support in the codification of the duty of good faith in most, if not all, civil law jurisdictions.¹²⁷ For example, in the *German Civil Code*, Article 242 requires an obligor to perform ‘according to the requirements of good faith’, and Article 157 requires contracts to be interpreted ‘as required by good faith’, taking customary practice into consideration. Further, in the *French Civil Code*, Article 1104 requires good faith at all stages of the contracting process, including negotiation, formation, and execution.¹²⁸ Article 1102 of the *French Civil Code* also does not allow contractual freedom to derogate from the rules of public order – that is, the parties cannot waive the duty of good faith as it is a ‘matter of public policy’.¹²⁹

¹²² See generally J. Inst. 3.13 et seq. Unilateral contracts were, as their name suggests, capable of being entered into by one party alone, without the consent of the other party. They became binding as soon as a particular form of words was spoken (in the case of *verbal* contracts) or written (in the case of *literal* contracts). By contrast, bilateral contracts required the *consensus ad idem* of two parties: in the case of the *real* contracts, property had to change hands pursuant to the contract; and in the case of the *consensual* contracts, a particular kind of bargain had to be struck. Although not part of Justinian’s scheme in the *Institutes*, there were also the synallagmatic contracts (as mentioned above in Part II). Each of the bilateral contracts were governed by *bona fides*: that is, they had to be interpreted, and could only be enforced, in accordance with good faith.

¹²³ Perry (n 117) 187 [9.05].

¹²⁴ Ibid 188 [9.06]; Wan and Guo (n 120) 20.

¹²⁵ Sami Tannous, ‘Chapter 3: Transcending the Common/Civil Law Divide: The Role of the Modern International Arbitrator’ in Nayla Comair-Obeid and Stavros Brekoulakis (eds), *The Plurality and Synergies of Legal Traditions in International Arbitration: Looking Beyond the Common and Civil Law Divide* (Kluwer Law International, 2023) 35, 36–7, citing Mariana Pargendler, ‘The Role of the State in Contract Law: The Common-Civil Law Divide’ (2018) 43 *Yale Journal of International Law* 143, 150–1.

¹²⁶ Nicholas C. Seddon, Rick A. Bigwood and Manfred P. Ellinghaus, *Cheshire and Fifoot Law of Contract* (LexisNexis Butterworths, 10th Australian ed, 2012) 465.

¹²⁷ Most representative are the *French Civil Code* (n 35) art 1104 and the *Bürgerliches Gesetzbuch* [Civil Code] (Germany) arts 157 and 242 (‘*German Civil Code*’). Various other codes include, but are not limited to, the *Swiss Civil Code* art 2(1); *Greek Civil Code* art 288; *Italian Civil Code* (n 37) art 1375; *UAE Civil Code* (n 38) art 246(1); *Japanese Civil Code* art 1(2); *Translation of the Civil Code Law No. 131 of 1948* (Egypt) translated 20 July 2025 art 148 (‘*Egyptian Civil Code*’); *Thai Civil and Commercial Code* art 368; *Chinese Civil Code* (n 50) art 7.

¹²⁸ Article 1104 was amended in 2016. Previously, it only imposed a duty of good faith in contractual performance: see Perry (n 117) 198 [9.32].

¹²⁹ Perry (n 117) 198 [9.31].

Moving away from Europe, another civilian jurisdiction worth examining is China, where the principle of good faith has developed in three distinct phases. First, it was a traditional moral concept which was elevated to a formal legal principle in the *Principles of the Civil Law of the People's Republic of China* in Article 4.¹³⁰ Secondly, the 1999 *Contract Law of the People's Republic of China* enshrined good faith as a general principle in Article 6, mandating its application.¹³¹ Finally, good faith has now been integrated into the *Chinese Civil Code*, for example, in Article 7, which recognises good faith as a foundational civil law principle applicable universally across all civil activities.¹³²

Not only is the principle of good faith at the core of civil law jurisdictions, but it also lies at the heart of model laws, principles, and conventions which guide international arbitration and construction disputes. Article 1.7 of the *UNIDROIT Principles* is a good place to start, but it is by no means the endpoint. Article 1.7(1) stipulates that each party must act in accordance with good faith and fair dealing in international trade, and Article 1.7(2) bars the parties from excluding or limiting this duty. The general duty of good faith and fair dealing is also expressed in various other provisions, including the imposition of liability for breaking off negotiations in bad faith,¹³³ implied obligations,¹³⁴ how parties may not act with inconsistent behaviour,¹³⁵ and interference with the fulfilment of a condition.¹³⁶

In the *PECL*, Articles 1.201 and 1.202 outline, respectively, general duties to act in accordance with good faith and fair dealing, and a duty to co-operate to give full effect to the contract.¹³⁷ This is unsurprising given that the *PECL* was intended to serve as a first draft of European

¹³⁰ *General Principles of the Civil Law of the People's Republic of China* (People's Republic of China) National People's Congress, Order No 37, 4 December 1986. Article 4 reads: 'civil activities shall follow the principles of voluntariness, fairness, compensation of equal value, and good faith'. See Wan and Guo (n 120) 60–2.

¹³¹ Article 6 reads: 'The parties shall follow the principle of good faith in exercising their rights and performing their obligations'. See Wan and Guo (n 120) 63–4, citing Chen Nianbing, 'On the Principle of Good Faith—An Analysis from the Perspective of Norms' [2003] (06) *Science of Law (Journal of Northwest University of Political Science and Law)* 59, 62.

¹³² Wan and Guo (n 120) 66. Like other civil codes, 'good faith' is not explicitly defined, but has been interpreted as an amalgamation of legal and moral standards. Generally, it includes good-will, honesty, trustworthiness, that the parties should fulfil promises, balance conflicting interests and collaborate 'to meet the reasonable expectations of all parties involved'. An ambiguous meaning of this principle was argued to allow for flexible application: Wan and Guo (n 120) 68–9, citing Liang Huixing, 'The Principle of Good Faith and Gap Filling' 91(2) *Chinese Journal of Law* 22, 23; Cui Jianyuan, *Analysis of New Contract Law Theory and Cases* (Jilin University Press, 1999) 26–8; Wang Liming, *Studies on Contract Law* (China Renmin University Press, 2002) 163–4.

¹³³ *UNIDROIT Principles* (n 108) art 2.1.15.

¹³⁴ *Ibid* art 5.1.2.

¹³⁵ *Ibid* art 1.8.

¹³⁶ *Ibid* art 5.3.3.

¹³⁷ *PECL* (n 111) arts 1.201, 1.202.

Civil Codes with regards to contract formation, content, performance and non-performance.¹³⁸ However, the drafters also intended it to be a ‘neutral’ set of rules for arbitrators and a basis for legal harmonisation.¹³⁹ Of more general application, however, is Article 7(1) of the *CISG*, which emphasises that the interpretation of the Convention should be framed in accordance with the observance of good faith in international trade.¹⁴⁰ Although the *CISG* does not go so far as expressly providing that contracts must ‘obey the maxim of good faith’,¹⁴¹ it is accepted that the good faith principle applies to the interpretation of the individual contract under the *CISG*.¹⁴²

B *What is ‘Good Faith’?*

The contents of this duty of good faith under the civil law are fairly broad, and typically require that parties owe a duty of care during pre-contractual negotiations, and that any violations of the other party’s legitimate expectations may be punished.¹⁴³ However, these are not implied duties in the sense that the common law would imply a term, but stand as ‘informing principle[s] to shape the content of a particular obligation’ and act as guiding principles where there is no applicable rule.¹⁴⁴ It is thus perhaps more appropriate that the common law should see good faith as a principle of construction, rather than as an implied term, as a way to bring the common law in harmony with its civil law counterparts.

The obligations stemming from good faith begin at the stage of negotiation and continue to the stage of performance, standing in sharp contrast to the common law, which does not regulate pre-contractual conduct.¹⁴⁵ Further, failure of a party to disclose significant information may incur liability if a court considers that such information ought to have been disclosed under

¹³⁸ Perry (n 117) 215 [9.85], citing Ole Lando, ‘Salient Features of the Principles of European Contract Law: A Comparison with the UCC’ (2001) 13 *Pace International Law Review* 339, 340.

¹³⁹ Perry (n 117) 215 [9.85], citing *PECL* (n 111) xvii-xviii.

¹⁴⁰ *CISG* (n 11) art 7(1).

¹⁴¹ Ulrich Magnus, ‘Remarks on Good Faith: The United Nations Convention on Contracts for the International Sale of Goods and the International Institute for the Unification of Private Law, Principles of International Commercial Contracts’ (1998) 10(1) *Pace International Law Review* 89, 89. See also Perry (n 117) 218–19 [9.96], citing Bruno Zeller, ‘The UN Convention on Contracts for the International Sale of Goods (CISG) – A Leap Forward Towards Unified International Unified International Sales Law’ (2000) 12(1) *Pace International Law Review* 79, 92.

¹⁴² Magnus (n 141) 90.

¹⁴³ Perry (n 117) 188–9 [9.08].

¹⁴⁴ *Ibid*, citing Peter Rosher, ‘Good Faith in Construction Contracts: Comparing French and English Contract Law Approaches’ (2020) *International Business Law Journal* 145, 151.

¹⁴⁵ Perry (n 117) 189 [9.09]; Wan and Guo (n 120) 75, citing *Hubei Jinhua Industry Co Ltd v Wuhan Haoyu Real Estate Consulting Co Ltd—Retrial of the Commercial Estate Sale Agency Dispute*, Civil Retrial No 143, 30 April 2014, as an example where the Supreme People’s Court of China held that parties are expected to act in good faith throughout the negotiation process prior to contract formation (this case concerned an agent responsible for selling all real estate properties in a project developed by the contractual counterparty).

good faith.¹⁴⁶ The only obvious counterpart to this pre-contractual obligation in the common law lies in insurance contracts, which impose disclosure obligations on the insured to allow the insurer to know of all material facts, given that it is inherently ‘a contract upon speculation’.¹⁴⁷ Tellingly, these disclosure obligations are sometimes called duties of ‘utmost good faith’ (*uberrima fides*). However, this is an exception to the common law rule. Another instance of the civil law concept of good faith is in relation to termination rights. As civil law jurisdictions find that the ‘ultimate goal is the performance of the contract’,¹⁴⁸ a court will question the reasons why the terminating party acted the way it did, and if the reason was self-serving or in bad faith, the court is more likely to consider the termination as an infringement of the duty of good faith.¹⁴⁹

Good faith in the enforcement of rights is another important aspect of the civil law. For example, Article 2 of the *Swiss Civil Code* mandates that ‘[e]very person must act in good faith in the exercise of his or her rights and in the performance of his or her obligations’,¹⁵⁰ and that the ‘manifest abuse of a right is not protected by law’.¹⁵¹ To act in good faith in accordance with Article 2(1) necessitates a party to display trust, honesty, loyalty, and fairness in its dealings with its counterparty – which is not unfamiliar to other civil law jurisdictions.¹⁵² However, Article 2(2) goes further to allow an arbitrator or judge to refuse to enforce a party’s right against another party if ‘the pursuit of the claim is considered to be abusive’.¹⁵³ Article 2(2) requires the assertion of rights to be blatantly improper, which has been held by the Swiss courts to encompass situations where the party seeking to enforce its rights has engaged in contradictory conduct; the party does not have any interest worthy of protection; the acquisition of the right was dishonest; or if assertion of such a right would lead to a blatant imbalance between the relevant legitimate interests.¹⁵⁴

¹⁴⁶ Perry (n 117) 189 [9.11]; Wan and Guo (n 120) 75–6, citing *Ning v Zhongrong — Partnership Agreement Dispute Civil Application for Retrial Review*, Supreme People’s Court, Civil Final Complaint No 994, 14 December 2022, where the Supreme People’s Court concluded that the parties were expected to perform disclosure obligations even in the absence of a contractual term, in accordance with good faith principles (this case involved information of the financial and business status of the company in question).

¹⁴⁷ Wan and Guo (n 120) 43, citing *Carter v Boehm* (1766) 97 ER 1162, 1184 (Lord Mansfield).

¹⁴⁸ Perry (n 117) 190 [9.13].

¹⁴⁹ *Ibid.*

¹⁵⁰ *Swiss Civil Code* (n 127) art 2(1).

¹⁵¹ *Ibid* art 2(2).

¹⁵² Christoph Müller, *Swiss Contract Law in International Commercial Arbitration* (Cambridge University Press, 2023) 22 [71].

¹⁵³ *Ibid* 22–3 [73].

¹⁵⁴ *Ibid* 23 [74].

In contracts governed by the common law, parties have sometimes inserted the duty to act reasonably and in good faith in exercising their respective rights. This effectively acts as a fetter on a party's right to enforce their contractual right. Such clauses are subject the parties' agreement and sometimes negotiated to ameliorate risks imposed in "hard edged" bespoke contracts.

One of the key concerns the common law has regarding the doctrine of good faith is that its boundaries are blurry and undefined. In 2000, Sir Anthony Mason proposed that good faith should encompass three aspects: (i) an obligation on the parties to co-operate in achieving the contractual objects; (ii) compliance with honest standards of conduct; and (iii) compliance with standards of contract which are reasonable having regard to the interests of the parties.¹⁵⁵ This formulation was adopted by Hodgson JA in *Macquarie International Health Clinic Pty Ltd v Sydney South West Area Health Service*, which concerned an express term that required 'utmost good faith'.¹⁵⁶ Importantly, however, the same case recognised that a 'contractual obligation of good faith does *not* require a party to act in the interests of the other party or to subordinate its own legitimate interest to the interests of the other party' (emphasis added).¹⁵⁷

C *The Reluctance of the Common Law*

Common law jurisdictions, such as the United Kingdom and Australia, do not accept a general notion of good faith in contractual dealings. However, the concept of good faith may not be as far away from the common law as one may think. Commercial relationships are governed by contracts and equitable doctrines such as fiduciary duties, trusts and other forms of legal relationships. At the heart of each commercial relationship lies the 'key ingredients' of trust, reliance, and joint venture.¹⁵⁸ Inevitably, these values have formed the basis of equity, which is especially important in commercial law. Good faith, as an adjacent concept to honesty and fairness, naturally underlies many concepts in both the common law and equity. It is therefore surprising that there remains a real resistance in some common law jurisdictions to the concept of 'good faith' in contract law.

¹⁵⁵ A. Mason, 'Contract, Good Faith and Equitable Standards in Fair Dealing' (2000) 116 *Law Quarterly Review* 66, 69.

¹⁵⁶ Allsop, *Good Faith and Australian Contract Law* (n 115) 349–50.

¹⁵⁷ *Ibid*; *Macquarie International Health Clinic v Sydney South West Area Health Service* [2010] NSWCA 268, [147] (Hodgson JA).

¹⁵⁸ Mark Leeming, 'The Role of Equity in 21st Century Commercial Disputes' (2019) 47 *Australian Bar Review* 137, 149, citing James Allsop, 'Characterisation: Its Place in Contractual Analysis and Related Enquiries' (2015) *Federal Judicial Scholarship* 29, [11].

It has been recognised by English courts that the obligations which would fall under the notion of ‘good faith’ in civil law are addressed in equity, which has developed ‘piecemeal solutions’ to deal with instances of perceived unfairness.¹⁵⁹ In a similar vein, the notion of good faith ‘infuse[s] Anglo-Australian law’: as mentioned above, it is found in equity in trusts and fiduciary duties (and in remedial contexts such as ordering specific performance and injunctions); property law (in particular, in relation to the bona fide purchaser for value without notice); company law; and more.¹⁶⁰ However, one should be cautious to keep good faith in contract law conceptually distinct from the equitable notion of ‘good faith’.¹⁶¹ In a fiduciary relationship or a trust, a fiduciary or a trustee ‘subordinate[s] its interests in favour of its beneficiary’ because their relationship captures the ‘essential element of service or representation of the interests of the other’.¹⁶² But there is no obligation on a commercial party, in a non-fiduciary context, to subordinate its interests to an arm’s length contractual counterparty.¹⁶³

What remains true is that the common law is not a stranger to restraining the powers and duties of parties by the criteria of reasonableness, honesty, and good faith.¹⁶⁴ Conversely, in civilian jurisdictions, the general duty of good faith has actually informed the development of their commercial law.¹⁶⁵ In the civil law, there is no body of ‘fiduciary law’. Fiduciary duties exist implicitly, but in a somewhat ‘fragmented’ manner.¹⁶⁶ Taken together, these parallels in the two types of legal systems underscore the central point that good faith and commercial law are deeply intertwined.

It is perhaps appropriate, then, to address the concerns of the common law with regards to a general duty of good faith. The resistance to good faith in the United Kingdom stems from the view that a general duty to negotiate or perform contracts in good faith is contrary to the

¹⁵⁹ Tannous (n 125) 37–8; Wan and Guo (n 120) 36, citing Roger Brownsword, ‘Two Concepts of Good Faith’ (1994) 7 *Journal of Contract Law* 197; *Interfoto Picture Library* (n 116) 621 (Lord Bingham).

¹⁶⁰ Allsop, Good Faith and Australian Contract Law (n 115) 347, 351.

¹⁶¹ Allsop, Some Reflections on Good Faith in Contract Law (n 116) 195.

¹⁶² *Ibid* 196.

¹⁶³ *Ibid* 195–6. See also *Meinhard v Salmon* (1928) 249 NY 458, 464 (Cardozo CJ): ‘Many forms of conduct permissible in a workaday world for those acting at arm’s length, are forbidden to those bound by fiduciary ties. A trustee is held to something stricter than the morals of the market place. Not honesty alone, but the punctilio of an honor the most sensitive, is then the standard of behavior.’

¹⁶⁴ Allsop, Good Faith and Australian Contract Law (n 115) 351.

¹⁶⁵ Perry (n 117) 214 [9.81].

¹⁶⁶ *Ibid* 213 [9.79], citing Michele Graziadei, ‘Virtue and Utility; Fiduciary Law in Civil Law and Common Law Jurisdictions’ in A. S. Gold and P. B. Miller (eds), *Philosophical Foundations of Fiduciary Law* (Oxford University Press, 2014) 294.

doctrine of freedom of contract.¹⁶⁷ As Lord Browne-Wilkinson remarked in *Dymocks Franchise Systems (NSW) Pty Ltd v Todd*, ‘throughout the common law world it is a matter of controversy to what extent obligations of good faith are to be found in contractual relationships’.¹⁶⁸ The English courts have gone as far as to say that ‘the concept of a duty to carry on negotiations in good faith is *inherently repugnant* to the adversarial position of the parties when involved in negotiations ... [and] unworkable in practice’ (emphasis added).¹⁶⁹ An explicit good faith obligation, it was argued, contradicts the notion that parties to a contract are allowed to maximise their own interests, even if it means competing with their counterparts.¹⁷⁰ Good faith has even been described as a ‘virus’ by English contract lawyers, one that has ‘infected’ the United States, which has been more receptive to such a duty.¹⁷¹

The position in Australia is akin to the United Kingdom. The question of whether or not there should be an implied duty of good faith in contractual performance is yet to be decided by the High Court,¹⁷² but has been discussed by several State courts and the Federal Court.¹⁷³ When analysed through the lens of implied terms, both in fact and at law, the concept of ‘good faith’ has faced significant difficulties, and perhaps rightly so. It is difficult to imply in fact, as the contract will likely be able to operate or be effective without a good faith term.¹⁷⁴ It is also difficult to imply at law, because it requires the term to be necessary for the specific type of

¹⁶⁷ Tannous (n 125) 36.

¹⁶⁸ *Dymocks Franchise Systems (NSW) Pty Ltd v Todd* [2002] UKPC 50, [54] (Lord Browne-Wilkinson); Tannous (n 125) 36, citing Joseph Chitty and H.G. Beale, *Chitty on Contracts* (Sweet & Maxwell, 33rd ed, 2019) §1-046.

¹⁶⁹ *Walford v Miles* [1992] 2 AC 128, 138 (Lord Ackner), cited in Tannous (n 125) 36; see also *MSC Mediterranean Shipping Co SA v Cottonex Anstalt* [2016] EWCA Civ 789, [45] (Moore-Bick LJ): ‘[t]here is ... a real danger that if a general principle of good faith were established it would be invoked as often to undermine as to support the terms in which the parties have reached agreement’.

¹⁷⁰ Wan and Guo (n 120) 38.

¹⁷¹ Gunther Teubner, ‘Legal Irritants: Good Faith in British Law or How Unifying Law ends up in New Divergences’ (1998) 61 *Modern Law Review* 11, 11.

¹⁷² *Royal Botanic Gardens* (n 98) 63 [40] (Gleeson CJ, Gaudron, McHugh, Gummow and Hayne JJ), 94 [156] (Callinan J), 75–6 [88]–[89] (Kirby J). See also *Commonwealth Bank of Australia v Barker* (2014) 253 CLR 169, 195–6 [42] (French CJ, Bell and Keane JJ), 214 [107] (Kiefel J) (*‘Barker’*); Allsop, Good Faith and Australian Contract Law (n 115) 341.

¹⁷³ Paterson and Robertson (n 76) [14.190], citing, eg, *Renard v Minister for Public Works* (1992) 26 NSWLR 234, 263–8 (Priestley JA) (*‘Renard’*); *Hughes Aircraft Systems International v Airservices Australia (No 3)* (1997) 76 FCR 151, 191–3 (Finn J); *Burger King v Hungry Jack’s* [2001] NSWCA 187 (*‘Burger King’*); *South Sydney District Rugby League Football Club v News Ltd* [2000] FCA 1541; *Far Horizons Pty Ltd v McDonalds Australia Ltd* [2000] VSC 310; *Central Exchange Ltd v Anaconda Nickel Ltd* [2002] WASCA 94, [16] (Malcolm CJ), [55] (Steytler J, Wallwork J agreeing at [24]); *Cordon Investments Pty Ltd v Lesdor Properties Pty Ltd* [2012] NSWCA 184.

¹⁷⁴ Elisabeth Peden, ‘Incorporating Terms of Good Faith in Contract Law in Australia’ (2001) 23(2) *Sydney Law Review* 222, 230. The test for implication of a term in fact was set out in *BP Refinery (Westernport) Pty Ltd v Shire of Hastings* (1977) 180 CLR 266, 283. Namely, the term must be reasonable and equitable, necessary to give business efficacy to the contract, so obvious that ‘it goes without saying’, capable of clear expression, and must not contradict any express term of the contract. See also *Codelfa* (n 32) 352–3 (Mason J).

contract, which often requires policy considerations, and courts are generally hesitant to make such a finding.¹⁷⁵

The current position, at least at the State-level in Australia, remains that such a duty can only be implied as a matter of law,¹⁷⁶ for it would be too difficult to imply as a matter of fact.¹⁷⁷ But the High Court has also stated that ‘a court should not imply a new term other than by reference to considerations that are *compelling*’ (emphasis added),¹⁷⁸ and that such a finding ‘[is] not to be made lightly’.¹⁷⁹ As a result, a duty of good faith has only been implied in certain types of contracts, including relevantly building contracts,¹⁸⁰ but also commonly seen in franchise contracts¹⁸¹ and loan contracts.¹⁸² Given this stringent criterion, it is highly improbable that a duty of good faith can be implied at law in an ordinary, arm’s length commercial contract which lacks the special qualities of an insurance or franchise contract. This echoes the view of Australian courts in restraining the concept of good faith to specific categories of relationships, even ones in respect of which equity will intervene.¹⁸³ Thus, the reluctance of the common law seems to be grounded in an unwillingness to interfere with ordinary commercial bargains, unless it is absolutely necessary to do so. This is illustrated in the strict test of implication of terms as outlined above, but also in the context of equity.

In contrast, an alternative approach was proposed by Professor Elisabeth Peden, now a Justice of the Supreme Court of New South Wales, that a duty of good faith should be treated as a principle of construction, as opposed to an implication of terms. This finds support in the civil law, which treats the notion of good faith as an overarching guiding principle. If treated as an aspect of contractual interpretation, it would require a court to construe all contracts on the basis that there is an ‘expectancy of good faith in all terms, unless there is something explicit to suggest otherwise’.¹⁸⁴ This was said to be more preferable than having to satisfy the test of

¹⁷⁵ Peden (n 174) 230; *Byrne v Australian Airlines Ltd* (1995) 185 CLR 410, 440, 448 (McHugh and Gummow JJ). If a term is to be implied at law, it is to be ‘read into the contract as the nature of the contract itself implicitly requires, no more, no less: a test, in other words, of necessity’: *Liverpool City Council v Irwin* [1977] AC 239, 254 (Lord Wilberforce).

¹⁷⁶ See Paterson and Robertson (n 76) [14.210]. See also *Burger King* (n 173) [164] (Sheller, Beazley and Stein JJA).

¹⁷⁷ *Central Exchange Ltd v Anaconda Nickel Ltd* [2002] WASCA 187, [52] (Steytler J).

¹⁷⁸ *Barker* (n 172) 215–16 [114] (Gageler J).

¹⁷⁹ *Ibid* 189 [29] (French CJ, Bell and Keane JJ).

¹⁸⁰ *Renard* (n 173).

¹⁸¹ *Burger King* (n 173).

¹⁸² *Commonwealth Bank of Australia v Renstel Nominees Pty Ltd* [2001] VSC 167.

¹⁸³ See, eg, Mason (n 155) 85, discussing the aversion of courts to allow fiduciary duties to expand into ordinary commercial contexts.

¹⁸⁴ Peden (n 174) 230. Support for this proposition was advanced in *Barker* (n 172) 187–8 [25], 194 [37] (French CJ, Bell and Keane JJ).

implication at law, which is both difficult to satisfy and confined to specific classes of contracts.¹⁸⁵ In comparison, rules of construction can apply to all contracts.¹⁸⁶ It also allows parties to protect their interests by explicitly setting out the sort of performance which is required, which would influence the court's construction as a whole.¹⁸⁷ Arguably, this view allows for much more flexibility, and there is real scope to employ good faith in interpretation in a way that is both permissible and desirable.

However, as with all principles, there are limitations to using good faith as a tenet of interpretation. For example, contractual rights to terminate are sometimes held to be subject to an implied term of good faith and cooperation, such that one party cannot unreasonably bring about the conditions that enliven the express right to terminate. If the same issue is approached through the lens of interpretation, as opposed to implied terms, it may be difficult to infer a condition of good faith into what is otherwise an unqualified right to terminate.

D *The Importance of Adapting*

As alluded to above, other common law jurisdictions have taken a more flexible approach towards good faith. For example, the duty of good faith is implied in all contracts for the sale of goods under the United States *UCC*, except the state of Louisiana.¹⁸⁸ The *UCC* itself was drafted by Karl Llewellyn, who was influenced by German law, especially by flexible doctrines such as 'commercial reasonableness, good faith and unconscionability'.¹⁸⁹ This led to the 'textual underpinnings for good faith' in many provisions of the *UCC*.¹⁹⁰ Indeed, over 50 of approximately 400 sections in the *UCC* mention good faith specifically.¹⁹¹ Courts in the United States impose good faith as a commercial norm, and are prepared to follow the *Restatement*

¹⁸⁵ Peden (n 174) 232.

¹⁸⁶ Ibid 230. The author argues that the doctrine of frustration is also based on construction, and therefore, good faith should be too.

¹⁸⁷ Ibid 238.

¹⁸⁸ Wan and Guo (n 120) 53 n 244. This is because Louisiana only adopted parts of the *Uniform Commercial Code (United States)* given its commercial law is based 'on civil law and the Napoleonic Code rather than common law'.

¹⁸⁹ Ibid 53, citing Ralph J. Mooney, 'Hands across the Water: The Continuing Convergence of American and Australian Contract Law' (2000) 23(1) *University of New South Wales Law Journal* 1, 25.

¹⁹⁰ Allsop, Good Faith and Australian Contract Law (n 115) 348, citing, eg, *Uniform Commercial Code (United States)* (n 29) § 1-203: 'Every contract or duty within this Act imposes an obligation of good faith in its performance or enforcement'.

¹⁹¹ Allan Farnsworth, 'Good Faith in Contract Performance' in Jack Beatson and Daniel Friedman (eds), *Good Faith and Fault in Contract Law* (Oxford University Press, 1997) 153, 155.

(*Second*) of Contracts in implying a general law duty of good faith in the performance of contracts, despite the *Restatement* not being binding.¹⁹²

This codification of the duty of good faith, however, was not the starting point of recognition of such a principle in the United States. From as early as the 1800s, American courts have been willing to recognise the principle of good faith under the common law of each state.¹⁹³ Likewise, the Canadian Supreme Court was prepared to acknowledge the role of good faith as a general ‘organising principle’ of the common law principles governing contracts.¹⁹⁴ The recognition of the duty of good faith in these jurisdictions was explicitly referenced by Priestley JA in *Renard Constructions (ME) Pty Ltd v Minister for Public Works*.¹⁹⁵

Accordingly, there has been incremental movement towards recognising a duty of good faith in Australian courts. The Court of Appeal of New South Wales has readily upheld express duties of good faith in commercial contracts.¹⁹⁶ However, as discussed above, Australian courts are more reluctant to *imply* a duty of good faith if there is no express term in the contract. Crucially, however, it is to be noted that a duty of good faith cannot be implied if the parties have demonstrated a clearly expressed intention that good faith cannot apply.¹⁹⁷ This runs directly

¹⁹² Wan and Guo (n 120) 52; see also Allsop, Good Faith and Australian Contract Law (n 115) 348; *Restatement (Second) of Contracts* (n 29) § 205: ‘Every contract imposes on each party a duty of good faith and fair dealing in its performance and enforcement’.

¹⁹³ Wan and Guo (n 120) 52, citing *Thomas v Fleury* 26 NY 26 (NY, 1862); *Baltimore & Ohio Railroad Co v Brydon* 3A 306 (Md, 1886); *Doll v Noble* 22 NE 406 (NY, 1889); *George W Crouch v Max L Gutmann*, 134 NY 45 (NY, 1892); *Genet v President of Delaware & H Canal Co* 32 NE 1078 (NY, 1893); *Whitson Trustee v Neilson and Co* (1828) 6 S 579; *Loudenback Fertilizer Co v Tennessee Phosphate Co* 121 F 298 (6th Cir, 1903); *New York Central Ironworks Co v United States Radiator Co* 66 NE 967 (1903); *Wood v Lucy, Lady Duff-Gordon* 118 NE 214 (NY, 1917); *Kirk La Shelle Co v Paul Armstrong Co* 188 NE 163 (NY, 1933); *Uproar Co v National Broad Co* 81 F 2d 373 (1st Cir, 1936); *Eline Realty Co v Foeman* 252 SW 2d 15, 18 (KY, 1952); *Brown v Superior Court* 2 12 P 2d 878 (Cal, 1949); *Matzen v Horwitz* 228 P 2d 841 (Cal Ct App, 1951); *Comunale v Traders & General Insurance Co* 328 P 2d 198 (Cal, 1958). See also Allsop, Good Faith and Australian Contract Law (n 115) 347, citing *Railroad Company v Howard* (1868) 74 US 392, 413 (Clifford J); Allsop, Some Reflections on Good Faith in Contract Law (n 116) 199–201.

¹⁹⁴ *Bhasin v Hrynew* [2014] 3 SCR 494, 516 [37] (Cromwell J).

¹⁹⁵ *Renard* (n 173) 263–8 (Priestley JA).

¹⁹⁶ For example, by holding that an obligation to negotiate in good faith was sufficiently certain, and by enforcing an express clause providing for ‘utmost good faith’: Allsop, Good Faith and Australian Contract Law (n 115) 341, citing *United Group Rail Services Ltd v Rail Corporation (NSW)* (2009) 74 NSWLR 618 and *Macquarie International Health Clinic v Sydney South West Area Health Service* [2010] NSWCA 268. Further, in *Aiton v Transfield* (1999) 153 FLR 236, the Supreme Court of New South Wales considered a multi-tiered dispute resolution clause requiring negotiations and mediation, both in good faith. Although Einstein J held that the obligation to negotiate in good faith was certain and valid, the attached mediation clause was void for uncertainty, as it failed to deal with the remuneration of the mediator. Thus, the entire clause was unenforceable as the mediation clause was inseverable: see 271 [174]. Another example is *Thiess Contractors Pty Ltd v Placer (Granny Smith) Pty Ltd* [2000] WASCA 102, where a clause in a mining contract stipulated that the parties ‘agree to act in good faith in all matters relating both to carrying out the works, derivation of rates and interpretation of this document’. The Court of Appeal construed the clause as requiring the parties to agree on rates prior to undertaking work, and to cooperate as far as reasonably possible in doing so: see [33] (Ipp, Steytler, Wheeler JJ). See also Peden (n 174) 233–6.

¹⁹⁷ *Vodafone Pacific Ltd v Mobile Innovations Ltd* [2004] NSWCA 15, [198] (Giles JA).

counter to Article 1.7(2) of the *UNIDROIT Principles*, which disallows parties from excluding the duty of good faith, and also contradicts the view taken by civil law jurisdictions, which do not allow a party to waive the duty of good faith.

As suggested, the common law should embrace the duty of good faith as a general principle in contractual interpretation. Doing so will align with international consensus and better equip common law practitioners to respond to uncertainty in large-scale construction disputes. Recognising the doctrine of good faith as a baseline for the performance of a contract will not undermine the freedom of contract, but will place the parties in a stronger position to realise mutual commercial benefits.

IV LIQUIDATED DAMAGES

Damages is an area of contract law where the interests of parties and the methods of courts sit uncomfortably with one another. This is particularly so in construction contracts, which often deal with complicated projects, large sums in dispute, and a desire by the parties to consider the interests of a variety of stakeholders, many of whom may not be parties to the contract. One approach to circumventing such difficulty is for construction contracts to include *liquidated damages* provisions — clauses in the contract that provide for a particular sum payable upon the breach of a particular provision. These have the potential to remove the question of damage calculation from a dispute, leaving the court with a much narrower and often much simpler job of evaluating whether breach occurred. However, they also have the potential to function not just as a calculation of damage, but as a deterrent against breach or as a limitation of liability, and it is on this point that the common law and civil law courts divide.

This Part will focus on two differences between the approaches of the common law and civil law jurisdictions to liquidated damages. First, the civil law has traditionally held these clauses enforceable, regardless of whether they are also intended to deter breach, a position of contractual literalism which runs deep in the civil tradition. It is a sharp contrast to the common law, which has generally held that these clauses can only be valuable insofar as they are genuine pre-estimates of loss, rather than sums stipulated *in terrorem* of the other party. Secondly, a more recent addition to the civil law approach is its willingness to reduce (and sometimes increase) the damages purportedly pre-estimated in the contract to reflect what it sees as the most just apportionment. This, again, is a divergence from the common law's strict binary requirement that a penalty clause be either enforceable or unenforceable, with no scope for modification. There are, of course, diverse approaches within different common law and civil law countries. Nevertheless, it is suggested that there is, on the whole, an attraction of the civil approach for the construction lawyer.

A The Softening of the Civil Law

The civil law has long been an institution open to the use of contracts to pre-determine the sum paid by a party upon default. The Roman system embraced the use of what it termed *stipulatio poenae* for, *inter alia*, the clause's potential to reduce the difficulty — familiar to today's construction lawyers — of judicial assessment of damages.¹⁹⁸ Justinian's *Institutes* advised

¹⁹⁸ Zimmermann (n 120) 97. See also Flavius Justinian, *The Digest of Justinian*, tr. Alan Watson (University of Pennsylvania Press, Revised, 1998), 46, 5, 11, where Venuleius argues that '[i]n stipulations of this kind, which

lawyers that ‘*it will be best to connect the nonperformance of the act to be performed, or the performance of the act to be omitted, with a pecuniary penalty to be paid in default, lest there be doubt as to the value of the act or omission, which will make it necessary for the plaintiff to prove to what damages he is entitled.*’¹⁹⁹ This spirit was retained in the Napoleonic Code, which provided as a general rule that the ‘penal clause’ be upheld: ‘*[t]he nullity of the principal obligation carries with it that of the penal code.*’²⁰⁰ That Napoleonic system of literal enforceability was carried into modern civil law jurisdictions in Europe and the Middle East.²⁰¹ As evident in the diversity of wording used above, these jurisdictions eschew the bright-line distinction between penalty clauses and liquidated damages sums drawn by the common law. That a clause may have been subjectively intended to operate *in terrorem*, rather than as a genuine pre-estimate of damages, is not of itself seen as a reason to deny the enforcement of the clause.

However, since the 1970s, a substantial shift has taken place in codes across the civil law world, permitting the intervention of the judge to reduce the sum stipulated by such a clause where it is seen as excessive.²⁰² In France, the *French Civil Code* — which had hitherto allowed modification only when the obligation had been partly performed, itself a substantial Napoleonic innovation on a point of law that greatly vexed the Romans — was amended in 1975 to permit such modification. This was a major ‘retreat’ from strict contractual enforcement.²⁰³ It rapidly took effect; by 1978, a Resolution of the Council of Europe was advising States to modify their requirements so that ‘*[t]he sum stipulated may be reduced by the court when it is manifestly excessive. ... Any stipulation contrary to the provisions of this article shall be void.*’²⁰⁴ Provisions to this effect have been adopted in, among other states,

contain a promise of whatever the thing is worth, it is more advantageous to fix a certain sum, since the proof of what each person's interest is is generally difficult, and tends to be reduced to a paltry amount.’

¹⁹⁹ Flavius Justinian, *The Institutes of Justinian*, tr. John Baron Moyle (Clarendon Press, 5th ed, 1913), III, 15, 7.

²⁰⁰ Napoleon Bonaparte, *The Code Napoleon, or the French Civil Code*, tr. George Spencer (Charles Hunter, Law Bookseller, 1824), title III, section VI, art 1226.

²⁰¹ Doug Jones, ‘Navigating Penalties and Liquidated Damages across Common Law and Civil Law Jurisdictions’ (2019) 4 *International Construction Law Review* 526, 536.

²⁰² *Ibid.*

²⁰³ Charles Calleros, ‘Punitive Damages, Liquidated Damages, and *Clauses Penales* in Contract Actions: A Comparative Analysis of the American Common Law and the French Civil Code’ (2006) 32(1) *Brooklyn Journal of International Law* 68, 109.

²⁰⁴ Resolution 78(3) of the Committee of Ministers of the Council of Europe, adopted by the Committee of Ministers on 20 January 1978, art 7.

Italy,²⁰⁵ Germany,²⁰⁶ the People's Republic of China,²⁰⁷ and Russia,²⁰⁸ although Spain remains a rare holdout.²⁰⁹

Today, civil codes empower, and often also require, courts and arbitrators to adjust the amount stipulated as a penalty to a number that would accord with the justice of the case. This has led to a great deal of diversification in what were once very similar codes. Each jurisdiction has its own idiosyncratic list of factors for the court to take into account when deciding whether the liquidated damages sum grossly exceeds compensation. Each also takes its own position on whether to allow courts to *increase* a penalty sum to a sum considered more appropriate. In France, for instance, the Council of Europe's list of factors²¹⁰ has been supplemented by a norm that courts should not award an amount greater than the contract price, and the Court of Cassation has made clear that the amount will not be increased unless specific damages outside the scope of the penalty clause are proven.²¹¹ In the PRC, on the other hand, the expectation is that liquidated damages clauses that exceed 30% of the losses caused will generally be seen as too high.²¹²

A particularly salient divergence has appeared among the Middle Eastern states. In the UAE, as well as Jordan and Oman, the court has been granted the extraordinary power to disregard the liquidated damages clause entirely, even if it be held enforceable, and substitute their own assessment of loss suffered.²¹³ By contrast, other states in the region — Egypt, as well as Algeria, Bahrain, Iraq, Kuwait, and Syria — have hewn more closely to the French approach of only permitting courts to reduce damages by reference to the agreed sum if 'grossly' or 'greatly' exaggerated.²¹⁴ The former's more novel approach is influenced by Islamic jurisprudence, which provides that compensation must not exceed harm.²¹⁵ Though this

²⁰⁵ *Italian Civil Code* (n 37) art 1184.

²⁰⁶ *German Civil Code* (n 127) art 343.

²⁰⁷ *Chinese Civil Code* (n 50) art 585.

²⁰⁸ *Russian Civil Code* arts 330–331.

²⁰⁹ Article 1154 of the *Spanish Civil Code* provides that '[t]he judge shall equitably modify the penalty when the principal obligation has been partly or irregularly performed by the debtor.' It should be noticed that, though this does provide for a power of modification, that is limited to contexts of part or irregular performance, unlike the more general power contained in the modern *French Civil Code*.

²¹⁰ The Explanatory Memorandum to Resolution 78(3); see Larry DiMatteo, 'A Theory of Efficient Penalty: Eliminating the Law of Liquidated Damages' (2008) 38(4) *American Business Law Journal* 633, 653.

²¹¹ *French Civil Code* (n 35) art 1231-5; Cass. 3e civ., 23 October 2012, n° 11-19602, 1255, *Bull.*

²¹² *Supreme People's Court Interpretation on Several Issues Concerning the Application of the General Provisions of the Contract Part of the Civil Code* (PRC) 5 December 2023, art 63.

²¹³ *UAE Civil Code* (n 38) art 390(2).

²¹⁴ See, eg, *Egyptian Civil Code* (n 127) arts 224(1) and 224(2) respectively.

²¹⁵ Mahmoud Dodeen, 'Compensability of Moral Damage in Islamic Contract Law: A Comparative Analysis of the Palestinian, Jordanian and Qatari Civil Codes' (2020) 34 *Arab Law Quarterly* 167, 167–8.

divergence matters less in practice than might be supposed, as courts seem reluctant to use this power,²¹⁶ it is reflective of how changing norms in the civil law jurisdictions have led to diversification of once-standardised procedures.

Nevertheless, the increasing capacity of civil law courts to modify liquidated damages clauses is a great advantage of that system. It further enhances their ability to uphold the clauses agreed by parties. The civil law will only reject them if the party disputing the clause establishes that no loss in fact occurred.²¹⁷ That it has been near-uniformly preferred by internationally harmonised rules reflects how its flexibility is appropriate to the protection of stakeholder interests in complex disputes, such as those that often arise in construction law – for instance, Article 7.4.13 of the *UNIDROIT Principles*.²¹⁸

B *The Common Law's (Further) Reluctance*

The common law is substantially more restrictive in its approach to liquidated damages. Arguably, this originated with the English rejection of the conditional bond, a method of framing obligations not as contractual but as a way to satisfy a debt freely incurred, which avoided the stricter contract law rules in favour of the more creditor-friendly debt procedure.²¹⁹ For at least a century, it was ‘regarded as being very well-established’²²⁰ that courts should, following the approach set out by Lord Dunedin in *Dunlop Pneumatic Tyre Company, Limited v New Garage and Motor Company, Limited*, uphold provisions that were a ‘genuine pre-estimate of loss’ as liquidated damages clauses, whereas those stipulations that were *in terrorem* of the other party are void as penalty clauses.²²¹ There was, and is, no provision for courts to modify the sum. The chief attraction of this system is certainty.²²² In comparison to the civil law, where it may be difficult to evaluate how a clause will be viewed by a court, the common law maintains a relatively simple bifurcation based on predictable rules. In mercantile contracts, this certainty can indeed offer value to the parties.

²¹⁶ Raeesa Rawal, 'Damage Control: Reconciling Deducted Delay Damages and Actual Damages' (2012) 7(3) *Construction Law International* 42, 42.

²¹⁷ Jones (n 201) 540.

²¹⁸ *PECL* (n 111) art 9.509; *UNCITRAL Uniform Rules on Contract Clauses for an Agreed Sum Due upon Failure of Performance*; *UNIDROIT Principles* (n 108) art 7.4.13.

²¹⁹ Jones (n 201) 527.

²²⁰ *Denka Advantech Private Limited & another v Seraya Energy Pte Ltd & another* [2020] SGCA 119, [1] (Andrew Phang Boon Leong JA) ('*Denka*').

²²¹ [1915] AC 79.

²²² Cf *AMEV-UDC Finance Ltd v Austin* (1986) 162 CLR 170, 194 (Mason and Wilson JJ).

However, the utility of this certainty is somewhat cheapened by the difficulty that common law courts have had in finding the supposedly bright line between penalties and liquidated damages. Much discussion has focussed on the divergence between Australia and the United Kingdom that occurred with three decisions in the earlier years of last decade: *Andrews and Ors v Australia and New Zealand Banking Group Limited*;²²³ *Cavendish Square Holding BV v El Makdessi, ParkingEye Ltd v Beavis*;²²⁴ and *Paciocco & Anor v Australia and New Zealand Banking Group Limited*.²²⁵ In *Cavendish*, the United Kingdom Supreme Court held that the tests purportedly established by Lord Dunedin were no more than guidance, and instead adopted the ‘interests’-based approach of Lord Atkinson in the same case of *Dunlop*.²²⁶ Thus, the case of Mr. Beavis in *Cavendish*, who was fined £85 for overstaying his parking by two hours, was resolved against him as ParkingEye was said to have a legitimate interest in deterring overstayers.²²⁷ The High Court of Australia, in *Andrews* and *Paciocco*, was somewhat more cautious, accepting that an interests analysis is often helpful, but stopping short of wholesale adopting it.²²⁸ But in another direction, Australia has been more radical, at least in theory, by reviving an equitable version of the doctrine that could apply to many contract provisions, not just those that apply to breach.²²⁹

A similar range of approaches may be seen across the rest of the common law world. The United States is unique in two respects: it allows the reasonableness of the clause to be considered at the time of breach, not merely the time of contracting,²³⁰ and it is particularly stringent in providing that liquidated damages clauses will only be valid when the damages anticipated to result from a breach are uncertain in quantum or difficult to prove.²³¹ Canada has increasingly directed its attention to the unconscionability of the clause,²³² following recent suggestions that the doctrine is ‘designed for the sole purpose of providing relief against

²²³ (2012) 247 CLR 205 (*‘Andrews’*).

²²⁴ [2015] UKSC 67 (*‘Cavendish’*).

²²⁵ (2016) 258 CLR 525 (*‘Paciocco’*).

²²⁶ *Cavendish* (n 224) [75] (Lords Neuberger and Sumption, Lord Carnwath agreeing), [180]–[181] (Lord Mance); [270]–[279] (Lord Hodge).

²²⁷ *Ibid* [255] (Lord Hodge), [293] (Lord Toulson); Jonathan Morgan, ‘The Penalty Clause: Unlovable but Untouchable’ (2016) 75 *Cambridge Law Journal* 11, 14.

²²⁸ *Paciocco* (n 225) 547 [29] (Kiefel J), 580 [164] (Gageler J), 613 [272] (Keane J); Robert McDougall, ‘Revisiting the Penalties Doctrine: *Paciocco v ANZ*’ (Speech, The Commercial Law Association of Australia, 19 August 2016) 26 [88].

²²⁹ *Andrews* (n 223) 216–17 [10] (French CJ, Gummow, Crennan, Kiefel and Bell JJ); Nicholas Tiverios, ‘A Restatement of Relief Against Contractual Penalties (I): Underlying Principles in Equity and at Common Law’ (2017) 11 *Journal of Equity* 1, 5 (*‘A Restatement of Relief Against Contractual Penalties (I)’*).

²³⁰ *Uniform Commercial Code* (United States) § 718(1); *Restatement (Second) of Contracts* (n 29) § 356(1).

²³¹ *Priebe & Sons Inc v United States* (1947) 332 US 407.

²³² John Enman-Beech, ‘The Penalty Doctrine in Canada’ (2021) 99 *Canadian Bar Review* 504, 523.

oppression.’²³³ A similarly restrictive view of the doctrine prevails in India and its sister jurisdictions,²³⁴ which are like the civil law jurisdictions in that they make no principled distinction between a penalty clause and a liquidated damages clause, but with the opposite effect as they give no general entitlement to damages.²³⁵ The common law jurisdiction hewing closest to the traditional view is Singapore, which has considered and rejected these developments, preferring to retain Lord Dunedin’s formulation as the authoritative statement of Singaporean law.²³⁶ The effect of all of these developments is that it is no longer possible to speak of one common law approach to the penalty doctrine, nor is it as clear as it once was that certainty is enhanced by such a shifting series of approaches.²³⁷

As a result of some of these developments, it has been argued that the difference between civil law and common law approaches to the penalty doctrine is narrower than before.²³⁸ There may be little difference to the end result between a civil law court that reduces a grossly excessive sum and a common law court that characterises the same sum as a penalty and instead substitutes its own assessment of the damages. However, there remain differences in approach. For one, the common law focusses on the bargaining power of the parties at the time of *formation* of the contract, whereas the civil law emphasises the strength and good faith of the parties at the time of the *breach*. For another, the common law court has no answer to the civil court’s power to increase damages above the sum provided for in a contract. It remains true that, as I argued in 2019, ‘the option to modify and adjust the rate at which liquidated damages are levied’ is an attractive one when operating in more complex disputes.²³⁹

At this juncture, it is perhaps appropriate to acknowledge the gap in international instruments as regards liquidated damages. Although the *CISG* governs other contractual issues canvassed in this paper, it is silent on penalty and liquidated damages clauses.²⁴⁰ This is because of the fundamental differences between the common law and civil law at the time of drafting, which

²³³ *Elsley v JG Collins Insurance Agencies* [1978] 2 SCR 916, 937 (Dickson J), cited with approval in *Philips Hong Kong Ltd v Attorney General of Hong Kong* (1993) 612 BLR 49, 57–8.

²³⁴ *Kailash Nath Associates v. Delhi Development Authority* [2015] 4 SCC 136, [40] (Nariman J).

²³⁵ This is itself a controversial doctrine; Malaysia turned away from it in 2018: *Cubic Electronics Sdn Bhd (in liq) v Mars Telecommunications Sdn Bhd* [2018] MLJU 1935.

²³⁶ *Denka* (n 220) [151] (Andrew Phang Boon Leong JA).

²³⁷ Tiverios, A Restatement of Relief Against Contractual Penalties (I) (n 229) 28; Nicholas Tiverios, ‘A Restatement of Relief Against Contractual Penalties (II): A framework for applying the Australian and English approaches’ (2017) 11(2) *Journal of Equity* 185.

²³⁸ See, eg, Antonias C. Dimolitsa, ‘Contractual Remedies: Clauses Pénales and Liquidated Damages Clauses’ in Filip J.M. De Ly and Laurent Lévy (eds), *ICC Dossier No. 5: Interest, Auxiliary and Alternative Remedies in International Arbitration* (Dossiers of the ICC Institute of World Business Law, 2008) 17.

²³⁹ Jones (n 201) 541.

²⁴⁰ Farnsworth, *Farnsworth on Contracts* (n 105) 812 n 5.

were so diametrically opposed that the issue was explicitly left out of the Convention.²⁴¹ This again illustrates the stark divergence between these jurisdictions.

C The Prevention Principle and Approaches to Liquidated Damages

A salient construction law example of why this flexibility may offer great strength is in the different ways that the civil law and common law approach the so-called prevention principle. This provides that if an employer contributes to or causes a delay to the contractor then, absent any relevant extension of time being granted, the employer is unable to claim liquidated damages for any delay.²⁴² This principle results from the inability of common law courts to apportion delay; it is seen as unjust for the employer to be able to recover the full costs of a delay that they are partially responsible for.²⁴³

However, as it stands, the principle causes substantial injustice in the common law. For instance, it may leave an employer empty-handed in cases of delay where their role in causing it was low, or even where their conduct may have been one that was empowered by the contract, as is often the case for variation orders.²⁴⁴ The employer is left bereft of a remedy save for suing for breach, and even then only of a breach of a reasonable time clause that will be implied into the contract.²⁴⁵ Additionally, in England – although not Australia – a contractor will not be able to rely on the prevention principle when the employer caused delay and the contractor failed to raise notice of that delay. The contractor is thus held to be subject to the liquidated damages clause notwithstanding that the employer was the real cause of the delay.²⁴⁶

For example, a contract may have an extension of time clause which is triggered upon default or breach by the employer. However, this clause may make no reference to acts of prevention by the employer which fall short of that threshold. Where such an argument is raised and proven, the prevention principle may arguably divest the employer of the right to liquidated damages and render the time for completion ‘at large’ – that is, the contractor would have a

²⁴¹ Schwenger and Muñoz (n 10) 38 [3.19].

²⁴² *Multiplex Constructions (UK) Ltd v Honeywell Control Systems Ltd (No 2)* [2007] EWHC 447, [47] (Jackson J) (‘*Multiplex*’); *Holme v Guppy* (1838) 3 M&W 387, 389 (Parke B).

²⁴³ *SMK Cabinets v Hili Modern Electrics Pty Ltd* [1984] VR 391, 397 (Starke, Kaye and Brooking JJ).

²⁴⁴ *Percy Bilton Ltd v Greater London Council* [1982] 1 WLR 794, 801 (Lord Fraser); *Multiplex* (n 242) [48] (Jackson J).

²⁴⁵ Doug Jones, ‘Prevention, Time-Bars and *Multiplex Constructions (UK) Ltd v Honeywell Control Systems Ltd (No 2)*’ in Julian Bailey (ed), *Construction Law, Costs and Contemporary Developments: Drawing the Threads Together: A Festschrift for Lord Justice Jackson* (Bloomsbury Publishing, 2018) 335, 338.

²⁴⁶ *Multiplex* (n 242) [103] (Jackson J). Cf *Gaymark Investments Pty Ltd v Walter construction Group Ltd* [1999] NTSC 143, [71] (Bailey J).

reasonable time to complete the work, rather than a date certain established under the extension of time clause. The delay events said to constitute acts of prevention would have to be particularised and proven, raising evidential difficulties, and parties may contest the breadth of the extension of time provision. If the prevention principle does apply, there remains the significant evidentiary challenge of establishing a ‘reasonable time’.

These results are, to say the least, unsatisfactory.²⁴⁷ They are also an area where the civil law has a great deal to offer. The flexibility of its approach to penalty clauses allows these clauses to be upheld, but for the sum of damages awarded to be reduced (or increased) to reflect the relative responsibility of the employer and contractor in causing the delay. For both employer and employee, this approach has much to commend it.

²⁴⁷ Roger Halson, *Liquidated Damages and Penalty Clauses* (Oxford University Press, 2018) 145 [4.75]; James Allsop, ‘The Doctrine of Penalties in Modern Contract Law’ (Singapore Academy of Law Distinguished Speaker Lecture, Singapore, 2 October 2017) 26 [74].

CONCLUSION

Certainty, as the epitome of what the common law pursues, may be considered desirable in the current geopolitical climate. Yet as this paper has demonstrated, the rigidity of the common law approach to changed circumstances, the use of extrinsic evidence in contractual interpretation, good faith, and liquidated damages, is more likely to hinder, rather than facilitate, the performance of construction contracts when navigating times of uncertainty.

By drawing attention to the divergence between common law, civil law, and international instruments, it is suggested that choice-of-law considerations may provide a pathway to more effectively navigating the exigencies of uncertainty in modern times. Lawyers are constantly confronted by the antinomies of rigid, doctrinal purity on the one hand, and the fluctuating reality of human commercial conduct on the other hand.²⁴⁸ To seek out the former without an appreciation of the latter, and of the need to eschew the unattainable ghost of ‘certainty’ for a more flexible approach, may be doomed to commit parties to a less satisfactory path through the marshes of uncertainty.

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²⁴⁸ See James Allsop, ‘Thinking about Law: The Importance of How We Attend and of Context’ (Speech, London, 18 July 2022): ‘All these antinomies are vital for the search (as a lawyer) for the unachievable and the indefinable. The unachievable (but vital) is certainty. The indefinable comprises the moral values that infuse our rules and underpin and inform our sense of justice.’