Common Law: Not So Common?

by Lim Chee Yong and Teh Wai Fung

With world energy consumption forecasted to rise by nearly 50% between 2018 and 2050[1] and cross-border infrastructure projects of unprecedented ambition (such as the Belt and Road Initiative), it is more important than ever that energy players understand the jurisdictions in which they transact. We aim here to summarise the key distinctions between common law and civil law systems, which energy players should appreciate.

Geographical spread

Although many countries combine either common or civil law with another legal system (such as Islamic law), the CIA World Factbook records that there are broadly 150 civil law, and 80 common law, jurisdictions. Generally, whereas common law is found only in the UK and the Commonwealth, civil law spans Asia, Continental Europe, the United Arab Emirates (UAE), Qatar, and most of Africa and South America, among others.

Sources of law

The overarching difference between common law and civil law lies in the importance given by each system to its various sources of law.

An English export, common law was gradually birthed when judges dispatched to hear disputes around England recorded their decisions centrally, which judges hearing subsequent disputes were then bound by precedent to follow — hence the "common" law. Thus, despite a modern trend towards formal legislation, common law's focus remains on resolving disputes at hand by "judge-made law".

Meanwhile, civil law's heavy reliance on formal codes originates from the rediscovery during the Enlightenment of the "*Corpus Juris Civile*", a 6th century AD codification of Roman law. On this basis, Continental European countries, such as Napoleonic France in 1804, devised national, systematic and rational codifications of law. A central tenet of civil law is thus the belief that legal codes can address all scenarios without reference to precedent.

Substantive differences

Below are the six key differences between the contract law of common law jurisdictions and that of civil law jurisdictions.

Good faith in contracts

Firstly, civil law jurisdictions impose a general duty of good faith on parties to a contract, reflected in the European Court of Justice's recognition of it as a "*principle of civil law*".[2] The French and German Civil Codes extend the duty of good faith even to the negotiation and formation of contracts.[3] Similar duties of good faith are also imposed by default under the UAE Civil Code,[4] the Fundamental Principles of Japan's Civil Code[5] and China's Contract Law.[6] In practice, the duty may require, for instance, one party to inform the other of material aspects relevant to the proper assessment, understanding or performance of the contract.

In contrast, common law jurisdictions generally impose no such default duty. Although once mooted by the English High Court,[7] the possibility was all but dismissed by the English Court of Appeal in subsequent decisions.[8] While a duty of good faith may be implied by law into certain categories of contract (such as insurance contracts) or contracts whose construction, background and context permit such implication, parties to all other contracts must expressly include the duty if they wish to incorporate it.[9]

1 "EIA projects nearly 50% increase in world energy usage by 2050, led by growth in Asia", *Green Car Congress* (25 September 2019) <https://www.greencarcongress.com/2019/09/20190925-eia.html>.
2 Case C-489/07 *Pia Messner v Firma Stefan Krüger* [2009] ECR I-7315 at [26], [29] and [30].
3 French Civil Code, Articles 1104 and 1112; German Civil Code, Sections 157, 242 and 311.
4 UAE Civil Code, Article 246(1).
5 Japanese Civil Code, Fundamental Principles, Article 1(2).
6 Contract Law of the People's Republic of China, Article 6.
7 *Yam Seng Pte Ltd v International Trade Corporation Ltd* [2013] EWHC 111 (QB).
8 *Mid Essex Hospital Services NHS Trust v Compass Group UK and Ireland Ltd (Trading as Medirest)* [2013] EWCA Civ 200; *MSC Mediterranean Shipping Co SA v Cottonex Anstalt* [2016] EWCA Civ 789.
9 *Mid Essex Hospital Services*, *supra* n 8, at [105]; *Aseambankers Malaysia Bhd & Ors v Shencourt Sdn Bhd & Anor* [2014] 4 MLJ 619 (CA) at [322] and [329].

Withholding of obligations and proportionality of breach

Secondly, the right of one party to withhold performance where the other is in breach is generally a feature of civil law, not common law. However, this right must be understood together with the civil law principle of proportionality of breach. Under the French Civil Code, a party may refuse or suspend performance only if its counterparty's (anticipated) non-performance is "sufficiently serious".[10] Similarly, the UAE Civil Code prohibits exercise of the right when in pursuit of interests disproportionate to the harm which the counterparty would suffer.[11]

In comparison, common law jurisdictions confer no such right as a matter of law. For it to apply, it must be expressly provided for by contract.[12] Accordingly, faced with a counterparty's repudiatory breach (explained below), an innocent party may elect only between accepting the breach and terminating the contract, or affirming the contract and remaining itself bound to perform its obligations as before.[13] Only in the very specific circumstance of reciprocal promises to be performed simultaneously do the Malaysian Contracts Act 1950, Section 52 and the Indian Contract Act 1872, Section 51 allow performance to be withheld.

Rights of termination and proportionality of breach

Thirdly, whereas common law contractual termination rights may generally be exercised by reference solely to their express words, civil law jurisdictions impose additional "extracontractual" requirements. For instance, under the UAE Civil Code, a separate notice of default must be served prior to the actual notice of termination.[14] A court order must then be obtained to validate the termination, a requirement that can be dispensed with only by the express agreement of both parties.[15] Substantively, the right of termination must be exercised in accordance with the overarching civil law principles of good faith and proportionality of breach discussed above.[16]

In common law jurisdictions, rights of termination tend to arise in two ways. The first is by contractual termination clauses, usually for either convenience or default. In line with common law's transactional, adversarial character, such clauses may be invoked for any reason so long as there has been strict compliance with their express requirements.[17] The second is by acceptance of a "repudiatory breach" — refusal to render performance before it is due or has been completed[18] — or "fundamental breach" — where the promise violated is of major importance[19] or breach of it deprives the innocent party of substantially the whole benefit of the contract.[20] Although governed in Malaysia by the Contracts Act 1950, Section 40, this merely codifies the established English case law on the topic.

Decennial liability

The fourth distinction is decennial liability, a principle unique to civil law jurisdictions, by which for 10 years from project completion, architects, contractors, designers and engineers ("**construction professionals**") are jointly and severally liable for a building's partial or total collapse, or any defect threatening a structure's safety and/or stability.[21] Unlike professional negligence in common law (requiring actual negligence to be proven to establish liability), decennial liability is strict (i.e. automatic) even in the event of unforeseen site conditions, requiring no proof of actual fault or negligence. Further, claims founded on decennial liability are typically subject to a limitation period for bringing actions of one to three years from collapse or discovery of the defect.[22]

10 French Civil Code, Articles 1219 and 1220.
11 UAE Civil Code, Articles 106(c) and 247.
12 *Lubenham Fidelities & Investment Co v South Pembrokeshire District Council and Wigley Fox Partnership* (1986) 6 ConLR 85 (EWCA Civ) at 108-110; *Kah Seng Construction Sdn Bhd v Selsin Development Sdn Bhd* [1997] 1 CLJ Supp 448 (HC), at 457h-458d.
13 *Ibid*.
14 UAE Civil Code, Articles 271 and 272(1).
15 UAE Civil Code, Articles 271 and 272(2).
16 UAE Civil Code, Articles 106(c) and 246(1).
17 *Afovos Shipping Co SA v Pagnan and another; The Afovos* [1983] 1 All ER 449 (UKHL); *Nirwana Construction Sdn Bhd v Pengarah Jabatan Kerja Raya Negeri Sembilan Darul Khusus & Anor* [2008] 4 MLJ 157 (CA) at [6]; *Central Provident Fund Board v Ho Bock Kee* [1981] 2 MLJ 162 (SGCA) at 165C-F.
18 *Johnson v Agnew* [1980] AC 367 (UKHL) at 392E-F; *Damansara Realty Bhd v Bungsar Hill Holdings Sdn Bhd* [2011] 6 MLJ 464 (FC) ("*Damansara Realty*") at [62]-[63]; *Theresa Toyat & Anor v KHL Sdn Bhd* [2015] 5 MLJ 31 (CA) at [45].
19 *Damansara Realty*, *supra* n 18; *Theresa Toyat*, *supra* n 18, at [45].
20 *Photo Production Ltd v Securicor Transport Ltd* [1980] AC 827 (UKHL) at 849D-H.
21 UAE Civil Code, Article 880; Qatar Civil Code, Article 711.
22 UAE Civil Code, Article 883; and Jordanian Civil Code, Article 791.

In cases of collapse, liability is fairly self-evident. Rather, the more fertile ground for disputes concerns the threshold beyond which a defect is regarded to affect a structure's safety and/or stability. Notably, any attempt to exclude or limit decennial liability by agreement is void,[23] including an employer's or owner's express approval/acceptance of the defective building or fixed structure. Given the wide-ranging potential implications of decennial liability, construction professionals should take out decennial liability insurance when working in and with civil law jurisdictions.

Force majeure

Fifthly, common law and civil law differ in their treatment of *force majeure*. *Keating on Construction Contracts* explains *force majeure* as:[24]

> "...all circumstances independent of the will of man, and which it is not in his power to control ... thus, war, inundations and epidemics are cases of force majeure; it has even been decided that a strike of workmen constitutes a case of force majuere"

A typical *force majeure* clause operates to exonerate a party for non-performance of a contract upon the occurrence of certain contractually specified events deemed to be wholly beyond parties' control. In this way, *force majeure* clauses serve as a mechanism to apportion commercial risk between contracting parties where traditional protections, such as insurance, are viewed as insufficient. It is in their interpretation of *force majeure* that common law and civil law diverge.

In common law jurisdictions, whether a contracting party may invoke *force majeure* as a defence is not a matter of statute, but rather depends on whether the contract expressly confers such a right. This is precisely why contracts in common law jurisdictions often contain *force majeure* clauses.

Parties in civil law jurisdictions may also include *force majeure* clauses in their contracts, but these clauses are in addition to the codified right to invoke *force majeure*, implied into all contracts as a matter of law. However, whilst the scope of *force majeure* in a clause can by its wording be narrowed or expanded, *force majeure* in a Civil Code tends to be limited to circumstances where performance of the contract is no longer possible.[25] It follows that mere hardship or commercial difficulty, such as where a bargain is no longer economically viable, does not fall under the umbrella of *force majeure*.

A further noteworthy distinction is that in common law systems, clauses tend to be drafted such that a *force majeure* event triggers the termination of the whole contract. This can be contrasted with civil law systems where anything less than total impossibility absolves parties of liability for non-performance of only the affected contractual obligation, leaving the remaining obligations in effect.[26]

Contract adaptation

Sixthly and lastly, the concept of contract adaptation (as distinct from avoidance upon frustration[27] or *force majeure* termination) is especially pertinent to long-term contracts, such as Power Purchase Agreements. A myriad of political and economic uncertainties, accentuated in cross-border transactions, can unexpectedly alter investors' risk exposure throughout a project's lifespan. Parties may find themselves burdened by contractual obligations which abrupt changes in circumstance have suddenly rendered economically unfavourable. Although express hardship clauses may allow realignment of contractual rates, the position becomes complicated where a contract is silent.

Generally, short of finding a contract void for frustration,[28] common law courts cannot of their own volition vary a term even where a party faces unforeseen extreme difficulty in performing a contract. Applying *pacta sunt*

23 See, for example, UAE Civil Code, Article 882.
24 Keating on Construction Contract, 10th Ed., para 20-166 at page 793; See also *Lebeaupin v Crispin* [1920] 2 K.B. 714 at 718.
25 French Civil Code, Articles 1218 and 1351; UAE Civil Code, Article 273.
26 UAE Civil Code, Article 273(2).
27 Contracts Act 1950, Section 57(2); *Taylor v Caldwell* (1863) 27 JP 710 (QB).
28 *Ibid*; *Constantine (Joseph) Steamship Line Ltd v Imperial Smelting Corpn Ltd, The Kingswood* [1942] AC 154 (HL) ("*Constantine (Joseph) Steamship*") at 163.

servanda strictly, if parties had intended to provide for periodic or reactive revision, they ought to have recorded such intention as part of the contract during formation.[29]

Unlike common law courts, civil law courts have greater powers upon demand by one of the parties to modify the effects of a contract (or set it aside) on the basis of unforeseen circumstances which drastically change the parties' initial bargain and render performance unworkable without such modification.[30] Having said this, civil law courts will likely be reluctant to rewrite the bargains and apportionment of contractual risk freely undertaken by parties. Such powers are only to be exercised in exceptional circumstances.

In both common and civil law jurisdictions, parties may expressly agree to extend an arbitrator's powers to include ruling in accordance with equity and good conscience in parallel with the applicable jurisdiction's law.[31] Indeed, most major international arbitral institutions' rules contain express provisions upholding these powers if parties have expressly agreed to them in the contract.[32] In this way, entering into an arbitration agreement is a useful method by which parties to cross-border transactions may incorporate a more flexible mechanism to accommodate extreme situations.

Knowledge is power: The informed energy investor

In this era of globalisation where cross-border transactions and foreign business ventures abound, first-time investors and seasoned corporations alike can easily be caught off guard by daunting and even hidden risks and challenges. In the same way that a thorough appreciation of a market's customs, culture and etiquette is integral to achieving business success, a deep understanding of a jurisdiction's legal nuances is equally, if not more, crucial in order to avoid pitfalls. **LH-AG**

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29 *British Movietonews Ltd v London and District Cinemas Ltd* [1952] AC 166 (HL) at 168; *Constantine (Joseph) Steamship*, *supra* n 28, at 185.
30 The Netherlands' New Civil Code, Article 6.5.3.11; Joseph Perillo, "Force Majeure and Hardship Under the UNIDROIT Principles of International Commercial Contracts" (1997) 5 Tul J Int' L & Comp 5, at 10.
31 *Home and Overseas Insurance Co Ltd v Mentor Insurance Co (UK) Ltd (in liquidation)* [1990] 1 WLR 153 (EWCA), at 165D-F.
32 UNIDROIT Principles, Article 6.2.3; ICSID Convention, Article 42(3).