Introduction

2009 saw many important legal developments in the area of contract law both internationally as well as in Singapore. We set out below a summary of the highlights.

A) Termination of Contract

Contentious contractual cases are based on the failure of a contractual relationship, and thus often involve the termination of a contract. In 2009, a fair number of cases arose which revolved around the issue of termination.

(1) When Does the Right to Terminate Arise?

It is not always clear when a party’s right to terminate a contract arises; not every breach of obligations leads to termination. Two cases covered in 2009 discussed the relationship between breach and the right to terminate.

(i) Sports Connection Pte Ltd v Deuter Sports GmbH [2009] SGCA 22

In this case, the Singapore Court of Appeal discussed the 4 situations in which an innocent party is entitled to treat a contract as discharged as a result of the other party’s breach.

   (i) Where the contractual term clearly and unambiguously states that the innocent party is entitled to terminate upon certain events.
   (ii) Where the other party renounces the contract or conveys that it will not perform its obligations.
   (iii) Where the term breached is a condition of the contract, as opposed to a warranty (“the condition-warranty approach”).
   (iv) Where the breach deprives the innocent party of substantially the whole benefit of the contract (“the Hong Kong Fir approach”).

The Court took the opportunity to clarify that the condition-warranty approach and the Hong Kong Fir approach were not incompatible. The strict condition-warranty distinction could be relaxed to allow for the operation of fairness provided by the Hong Kong Fir approach.

The facts involved the breach of a non-competition clause in a distributorship agreement. The clause was not expressed to allow termination upon breach, nor was it found to be a condition. The breach also did not lead to any substantial deprivation. Therefore, the right to terminate did not arise.

(ii) Alliance Concrete Singapore Pte Ltd v Comfort Resources Pte Ltd [2009] SGCA 34

The Singapore Court of Appeal here had the opportunity to consider whether a party was entitled to terminate a contract based on the other party’s breach when the terminating party
was itself in breach. The approach of the Court in *State Trading Corporation of India Ltd v M Golodetz Ltd* [1989] 2 Lloyd's Rep 277 was adopted, whereby a party is only precluded from relying on a repudiatory breach if it was itself in breach of a condition precedent, and the breach was subsisting at the time of alleged termination.

This case involved the supply of sand from Comfort to Alliance. Alliance had failed to pay certain invoices, and to pressurize them, Comfort suspended the supply of sand, and later sought to terminate the contract. It was held that the obligation to supply sand was not a condition precedent, and did not disentitle Comfort from relying on Alliance’s breaches. However, the Court also found that Comfort was not entitled to terminate the contract merely on the grounds of Alliance’s non-payments.

(2) Exercise of the Right to Terminate

After the right to terminate a contract arises, it still has to be properly exercised in order to result in actual termination. Two cases covered in 2009 serve to remind parties that the right to terminate has to be exercised promptly and in reasonable time in order for termination to be effective.

(i) *Tele2 International Card Company SA & Ors v Post Office Ltd* [2009] EWCA Civ 9

The Respondent in this case had a valid contractual right to terminate its contract with the Appellant. However, it failed to exercise the right even after it knew of the Appellant’s breach and the attendant right to terminate. Instead, it continued to perform its obligations under the contract, only sending a notice of termination after more than a year had passed.

The English Court of Appeal held that this amounted to an affirmation of the contract. Therefore, the Respondent was not entitled to exercise the right of termination, and instead found itself in repudiatory breach of the agreement. This highlights the fact that parties cannot sit on the right to terminate for too long a period, or else they risk their actions being interpreted as affirmation of the agreement.

(ii) *Alchemy Estates Ltd v Judith Caroline Traill Astor* [2008] EWHC 2675 (Ch)

The issue at hand revolved around condition 8.3.3 of the Standard Conditions of Sale (4th edition), which allows a party to a contract for the sale of leasehold property to rescind the contract where the landlord’s consent has yet to be obtained. The English High Court held that this right to rescind had to be exercised promptly, by the contractual completion date, or possibly within a day or two thereafter.

It was found that the provision was meant to allow the parties to assess their positions in the short period of time before the contractual completion date where the landlord’s consent was still uncertain. However, the claimant did not – before the completion date or within a reasonable time thereafter – purport to exercise the right to rescind, instead allowing the sale agreement to remain on foot and encouraging the defendants to continue working towards its completion. Therefore, it was no longer entitled to rely on the right to rescind.

(3) Notice of Default

Where there is a breach of contract which entitles the innocent party to terminate the contract, the contractual provisions often provide that a notice of default must be sent to the other party. A Singapore case in 2009 helpfully laid out some guidelines with respect to service of such notice.
In this case, the Singapore Court of Appeal had to determine whether a deed of settlement was properly terminated on the basis of Party A’s non-compliance with a notice of default served on him by Party B. At the very core of the dispute is the issue of whether the notice of default was properly served on Party A.

This decision of the Court of Appeal reminds us that since failure to comply with a notice of default will on most occasions affect the defaulting party’s rights, the service of the notice must comply strictly with the requirements set out in the agreement. If the mode of service of the notice is not contractually prescribed, then the notice must be brought to the personal attention of the defaulting party. The other party cannot simply conclude that delivery of the notice to the alleged agent of the defaulting party constitutes service on the defaulting party himself in the absence of an express authority to that effect. The circumstances surrounding the case must be carefully looked into to ascertain whether service of notice was indeed properly made, knowing that valuable property rights are at stake.

(4) **Termination Under Contract and Under Common Law**

There are different grounds on which a party can rely on in order to terminate a contract. If the circumstances are contractually provided, it can rely on a contractual right of termination. Otherwise, if there is repudiatory breach, there may also be a common law right to terminate. Two cases covered in 2009 draw attention to the relationship between these two sources of rights, and highlight that the exercise of one does not exclude the exercise of the other.

(1) **Stocznia Gynia S.A v Gearbulk Ltd [2009] EWCA Civ 75**

Gearbulk had entered into an agreement with Stocznia for the provision of vessels, which Stocznia failed to provide. Gearbulk then terminated the agreement pursuant to a termination clause in the contract. The dispute was whether Gearbulk was entitled to common law damages on the basis of Stocznia’s repudiation of the contract, or whether it was limited to the damages provided in the termination clause.

The English Court of Appeal held that the fact that there was an exercise of a contractual right to terminate does not preclude reliance on the right to terminate by common law. Gearbulk’s issuance of a notice of termination under the contract did not amount to an affirmation of the contract, nor did it preclude Gearbulk from treating the contract as discharged at common law.

The Court rightly conceded that where the contract and the general law provide the injured party with alternative rights which have different consequences, the injured party will necessarily have to elect between them and the precise terms in which he informs the other party of his decision will be significant. However, where the rights under the contract and under the general law correspond, no election is necessary. It is sufficient for the injured party simply to make it clear that he is treating the contract as discharged.

(2) **Allphones Retails Pty Ltd v Hoy Mobile Pty Ltd [2009] FCAFC 85**

The facts of the case were such that Allphones was in repudiatory breach of its franchising agreement with Hoy Mobile by withholding commission. However, Hoy Mobile was also in breach of the contract by fraudulently “unlocking” the mobile phones provided. The agreement provided that Allphones was entitled to terminate the contract in the event of fraud.
The Federal Court of Australia overturned the trial judge’s decision, holding that a party who has repudiated a contract may still exercise an express power of termination conferred by the contract. Although common law prevented a party from relying on a breach where it was itself not ready, willing and able to perform, it does not apply where the contract expressly provides for termination.

Therefore, Allphones was allowed to terminate the contract in accordance with the termination provision even though it was itself in repudiatory breach of the agreement under common law.

B) Interpretation of Contracts

One of the more complex and disputed areas of contract law is that of contractual interpretation. Parties often disagree on the proper reading of contractual terms, and 2009 saw a number of cases which dealt with the issue of interpretation.

(1) Admissibility of Pre-Contract Negotiations

Since the landmark Singapore Court of Appeal case of Zurich Insurance (Singapore) Pte Ltd v B-Gold Interior Design & Construction Pte Ltd [2008] 3 SLR 1029, it has been established that Singapore courts will apply the contextual approach to the interpretation of contracts. Therefore, extrinsic evidence is admissible to explain and illuminate written words, even if there is no ambiguity in the provision.

However, pre-contract negotiations and drafts have traditionally been treated warily in terms of admissibility for contractual interpretation. Two cases in 2009 drew attention to the fact that such evidence may in fact be admissible in certain circumstances.

(i) Goh Guan Chong v Aspentech, Inc [2009] SGHC 73

This case is an example of when pre-contract negotiations and drafts may be adduced to interpret the words of a contract. Here, the dispute centered on whether Goh was entitled to a sign-on bonus under his employment contract with Aspentech, even though his employment was terminated. Previous negotiations, drafts and e-mails regarding the final contract were submitted as evidence.

The Singapore High Court reiterated that extrinsic evidence is only admissible where it is relevant, reasonably available to all contracting parties, and relates to a clear and obvious intent. While pre-contract negotiations are unlikely to fulfill these criteria, there is no absolute prohibition against the admissibility of such evidence. Here, the negotiations were held to be admissible as they fulfilled the above test. However, the drafts were inadmissible as they were only drafted by one party and were thus irrelevant; the e-mails were also inadmissible as extrinsic evidence as they were not available to all parties.

The Court also established a further exception to the general inadmissibility of extrinsic evidence. It found that such statements may be used against their maker to show their subjective intention, which may then contradict what the maker asserts to be the objection intention of the parties.

(ii) Chartbrook Ltd v Persimmon Homes Ltd [2009] UKHL 38

The English House of Lords here took a position that whilst pre-contract negotiations are generally inadmissible for the purpose of interpreting the final contract, they may be
admissible as part of the background which may throw light upon what the parties meant by the language used.

This case also stands for the proposition that the rule for when a provision may be construed in a manner inconsistent with its syntax is the same as the rule for when the words of a provision may be construed in a manner inconsistent with their ordinary meaning – it will only be done where something has gone wrong with the language, and it is clear what a reasonable person would have understood the parties to mean. The Court thus added a comma to a contractual term even though it did not exist in the original syntax.

(2) **Implied Terms**

Courts often find themselves having to decide not only the meaning of express terms, but on the possible existence of additional implied terms not expressly stated within the document. The Privy Council found itself in this position as well in the case below and had the occasion to decide on the proper test to be applied in ascertaining whether an implied term existed in an agreement and if so, what.

*Attorney General of Belize & Ors v Belize Telecom Ltd & Anor [2009] UKPC 11*

The Privy Council made an interesting decision when considering the proper test for when an implied test should be read into a contract. It suggested a single test in lieu of the “officious bystander”, “business efficacy” and “goes without saying” tests. Lord Hoffmann took the view that the oft-cited tests were not to be viewed as being any different from or additional to the true objective test which (he held) was simply “whether such a provision [sought to be implied] would spell out in express words what the instrument, read against the relevant background, would reasonably be understood to mean”.

Here, the articles of a company provided that 2 special directors were to be appointed and removed by a special shareholder. The Privy Council took into account the background and determined that it was an implied term that the 2 directors would vacate the office once the special share ceased to exist.

However, it remains to be seen whether this approach will be followed in Singapore. Notably, Andrew Phang J (as he then was) in *Forefront Medical Technology Pte Ltd v Modern-Pak Pte Ltd [2006] 1 SLR 927* seemed to prefer the “business efficacy” test.

(3) **Common Clauses**

There are certain common clauses that always arise in cases, demanding the Court’s interpretation as to their true identity. Two such examples were covered in 2009.

(i) *Lansat Shipping Co Ltd v Glencore Grain BV (The "Paragon") [2009] EWHC 551 (Comm)*

The question of whether a term is to be construed as a penalty clause or a liquidated damages clause is one which is often disputed, particularly because the former is unenforceable. Courts have been slow to find that liquidated damages clauses are actually penalty clauses except on very obvious facts due to the need for certainty and the desire to uphold parties' agreement.

Nonetheless, the English High Court in this case did find a provision within a commercial contract for liquidated damages to be a penal provision. It held that a clause constitutes a penalty if the sum stipulated for is extravagant and unconscionable in amount in comparison with the greatest loss that could conceivably be proved to have followed from the breach.
The penalty clause in the charterparty here provided for payment by the charterer of the prevailing market rate in the event that it rede livered the vessel late. However, the period for which this payment was to cover extended to include 30 days before the final acceptable date for redelivery. The Court held that the loss anticipated was merely theoretical, and that it did not support the penalty to be paid.

Interestingly, the Court held that the provision was penal even though it may have been in keeping with practical industry realities. However, it seems that that in itself is insufficient to save it from being rendered unenforceable on grounds that it is penal in nature.

The reader may be interested to know that the ship-owner had since appealed against the High Court’s decision and the Court of Appeal recently issued a judgment affirming the High Court decision.

(ii) Associated British Ports v Ferryways NV & Another [2009] EWCA Civ 189

This is an English Court of Appeal decision which highlights the importance of being clear about the difference between a guarantee and an indemnity before one begins drafting security documents.

On the facts, the document sought to be enforced did not contain certain boiler-plate provisions normally found in contracts of guarantees – suggesting perhaps that the draftsperson did not intend it to be a guarantee. Yet the key and operative language spoke to a guarantee and not an indemnity. In the end, the nature of the operative language prevailed and the Court held that it was a guarantee.

Interestingly, the document in question was drafted by the general counsel of Associated British Ports who was a solicitor. A reminder perhaps that even experienced commercial lawyers may on occasions forget the importance of (and certainly, the rationale behind) certain boiler-plate provisions until it is too late.

C) Damages for Breach of Contract

The rule for the extent of losses recoverable as a result of a breach of contract has long been accepted to be that established in the seminal case of Hadley v Baxendale. However, a recent decision from England seems to have slightly altered this test.

Transfield Shipping Inc v Mercator Shipping Inc (The Achilleas) [2009] 1 AC 61

The first limb of the Hadley v Baxendale rule allows for recovery of losses arising naturally, that is to say according to the usual course of things, from breach of contract. Usually, there is no need to prove any knowledge on the part of the contract-breaker to succeed in recovery under this limb.

However, the effect of this House of Lords decision would appear to change this as it suggests that even if a claimed loss fell within the 1st limb, the court should go further to enquire, based on the prevailing circumstances at that time, if the type of loss claimed "is one for which a party assumed contractual responsibility ".

Here, the charterers of a vessel were unable to redeliver it on time. The owners had already fixed a follow-on charter, and had to lower the hire rate to persuade the follow-on charterer to maintain the charter despite the late delivery. It was held that the difference between the
charter rates could not be claimed against the first charterer because they could not reasonably be expected to have assumed such responsibility.

Given the unexpected sudden fall in market rate, the holding of the House appears fair. But in overturning the decisions of the High Court and the Court of Appeal to achieve a fair result, the House appears to have tweaked the rule in Hadley v Baxendale and made it a bit more difficult to now succeed in (and easier to defend against) claims for damages – even in respect of losses which come under the 1st limb of the Hadley v Baxendale rule.

**D) Limitation Period for Contractual Claims**

Another issue which often binds parties is that a contractual claim must be brought within the statutorily prescribed limitation period. However, parties can opt out of this limitation period, as discussed in a 2009 Singapore case.

*Cytec Industries Pte Ltd v Asia Pulp & Paper Co Ltd [2009] SGHC 32*

The contractual claim in this case did in fact exceed the period prescribed by the Limitation Act. However, Cytec sought to rely on a provision in the contract which stated that liability was “irrevocable, absolute and unconditional, irrespective of ... any other act, omission or circumstances (including, without limitation, any statute of limitation)”.

The Singapore High Court agreed with Cytec and held that there was no reason why, in principle, a defendant could not elect to forgo the protection afforded by the Limitation Act. If a defendant is at liberty to waive the protection accorded by the Limitation Act by simply not pleading it as a defence after an action has been commenced, there is no reason why he or she could not decide beforehand that he does not need the limitation safeguard, and contract out of it.

**E) Conclusive Evidence Clauses**

The cases covered in 2009 also include an important decision regarding the effectiveness of conclusive evidence clauses – provisions which are quite common in loan documents.

*RBS Coutts Bank Ltd v Shishir Tarachand Kothari [2009] SGHC 273*

In this case, the Singapore High Court had to determine whether the Defendant was liable to pay to the Plaintiff, a private bank, the amount stated in the latter's conclusive certificate of indebtedness. Key to resolving this issue is whether the certificate, issued by the Plaintiff to the Defendant pursuant to the conclusive evidence clause in the parties' agreement, was indeed conclusive evidence and therefore finally determinative of the amount that the Defendant had to pay to the Plaintiff.

In ruling in favour of the Plaintiff, the Court held that a certificate or statement issued pursuant to a conclusive evidence clause is, in the absence of fraud or manifest error on the face of the statement, determinative of the amount due.

However, the Court observed that a party can still challenge the underlying legal basis of the claim even if the same was based on the "conclusive evidence" clause. But it would appear that once the legal basis of the debt has been proved, the debtor cannot then try to go behind the certificate and attempt a challenge on the quantum of this debt.
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We are pleased to announce the relocation of our office effective 25 January 2010. With our new facilities, we look forward to being able to serve you even better.

Our new address, telephone and fax numbers are:

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We would be grateful if you would make arrangements to direct all future correspondence to the above address or fax number with effect from 25 January 2010. Our email addresses remain unchanged.

Please do not hesitate to contact us at info@rajahtann.com if you have any further queries.

Many thanks.