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(articles included in this part are linked to the LexisNexis platform)

CONTENTS

Articles

[The Canadian Doctrine of Good Faith Contractual
Performance: Further Clarification](#)

— *John D McCamus*

1

In 2014, in *Bhasin v Hrynew*, the Supreme Court of Canada recognised an underlying principle of contract law requiring parties to perform their contractual obligations in good faith that is manifest in four specific rules of general application: that parties cooperate in the achievement of the agreement's objectives, that discretionary powers are to be exercised in good faith, that parties refrain from evasion of their obligations and a new duty requiring honesty in performance. In two recent decisions, *Wastech* and *Callow*, the Supreme Court returned to these issues. This paper examines their implications for the relationship between the underlying principle and the existing rules, the content of the abuse of discretion rule, the application of the duty of honesty to misleading conduct, the nature of the necessary linkage between the dishonest conduct and the contractual performance, and the measure of damages applicable in a case of contractual dishonesty.

[Interpretation and Implication: A New Zealand Development](#)

— *David McLauchlan*

28

This article discusses the recent rulings by the New Zealand Supreme Court in *Bathurst Resources Ltd v L&M Coal Holdings Ltd* [2021] 1 NZLR 696 concerning the admissibility of evidence of prior negotiations and subsequent conduct as an aid to the interpretation of a written contract and the law relating to implied in fact terms.

[Assessing Damages for Loss of Chance](#)

— *Benjamin Liu*

41

This article is prompted by two recent New Zealand cases in which one of the key issues was whether the loss of chance concept should be applied in respect of hypothetical human actions. On both occasions, the New Zealand Court of Appeal preferred the all-or-nothing balance of probabilities approach over the loss of chance approach. This article challenges the correctness of the reasoning in each case and advances two propositions. First, in cases where the contract between the parties has specified a mechanism under which a third party is to make a decision over an objective matter, the court can make that decision. Therefore, there is no need for the court to invoke the loss of chance approach to evaluate the probability of the third party's decision. By contrast, if the subject matter of the decision is subjective or discretionary in nature, the court must apply the loss of chance approach to evaluate the likelihood of the third party's decision. The second proposition advanced is that, contrary to the prevailing view, a strong case can be made that the loss of chance approach is applicable if the plaintiff's contention concerns its own hypothetical action. Moreover, if the plaintiff's contention concerns the defendant's hypothetical action, the loss of chance approach should apply.

Force Majeure and Covid-19: A Critical Assessment of Key Issues under the Chinese Civil Code

— *Yi Wang, Mimi Zou and Zhicheng Wu*

61

In 2020, Covid-19 and related prevention and control measures brought significant disruptions to commercial transactions globally, which have seen the force majeure doctrine invoked in many resultant contractual disputes. In China, the tumultuous year of 2020 also saw the enactment of the long-awaited Civil Code, a historical milestone in its legal system. This paper analyses how the Civil Code and recent guiding opinions of the Chinese Supreme People's Court address key issues of contract law concerning force majeure and the related doctrine of change of circumstances as applicable to Covid-19 related contractual disputes. We conclude that force majeure provisions will be cautiously applied by Chinese courts in this context, while change of circumstances is likely to be apply in more cases as it provides courts with the flexibility to modify the parties' contractual obligations.

Contract Law and Financial Regulation in China: An Illegality Perspective

— *Chao Xi*

79

The dynamics between Chinese contract law and regulatory legislation have most prominently played out in the past four decades in respect of the question of what counts as an illegal contract or a contract that is contrary to public policy. This article depicts the unique evolutionary trajectory of the Chinese law on illegality and public policy as applied to financial contracts and transactions. It demonstrates that until recently Chinese law had generally evolved towards insulating contractual freedom and uncertainty from the intrusion of financial regulation in particular and regulatory legislation in general. The recent elevation of financial regulation to become China's foremost policy priority, however, has resulted in a reassessment of this approach. Financial regulatory rules have been recharacterised as embodiments of public policy. Consequently, Chinese contract law seems to have been mobilised as a tool to achieve national policy objectives. Notable though it is, this reassessment does not seem penetrating and all-encompassing.