A Special Relationship in Contract? Key Similarities and Differences Between U.S. and English Law

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Although contract law in both the United States and England originates from the same common law tradition, key differences have developed in how certain principles are interpreted and applied. Recognizing and understanding these differences is essential for effectively navigating transactions across these jurisdictions. One of the key features of United States Contract Law is the Uniform Commercial Code (the UCC). The UCC is a comprehensive set of laws that govern commercial contracts in the United States. It is a model code that has been adopted by all 50 states and its purpose is to promote consistency and efficiency in business activities throughout the country. England has no direct equivalent to the UCC, relying instead on a combination of statutes and case law to regulate contracts. This note will explore six major areas of divergence: (1) good faith obligations, (2) reasonable vs. best endeavours, (3) limitation of liability and indemnity provisions, (4) material breach, (5) assignment and novation, and (6) punitive damages.

Obligation to Use Good Faith

The United States legal system has a structured approach to the duty of good faith. Under the UCC § 1-304, every commercial contract imposes a duty of good faith in performance and enforcement. This duty is often implied into each contract regardless of explicit contract language, particularly in contracts governed by the UCC, such as those involving the sale of goods. The concept is also relevant in maritime law, where good faith obligations are frequently applied.

By contrast, English law does not recognize an overarching duty of good faith in contracts. English courts may imply a duty of good faith in “relational contracts,” which require, among other things, a long-term relationship between the parties, an intent to perform their roles with integrity and fidelity to their bargain, and mutual trust and confidence. It is not common for English contracts to include express good faith provisions and courts are generally reluctant to impose such obligations where they are not explicitly stated. Where there is an express good faith provision in the contract, it will be interpreted in its commercial and contractual context to determine what obligations it imposes.

Obligation to Use Reasonable/Best Endeavours

In England, “reasonable endeavours” and “best endeavours” are recognized as two distinct legal standards. The term “reasonable endeavours” imposes the lower of the two standards. It requires one to take reasonable steps to achieve an objective while balancing effort with cost and the party's own commercial interests. It does not normally require a party to sacrifice its own commercial interests. The term “best endeavours” imposes a higher standard, which requires a party to take all steps within its power which a prudent, determined and reasonable counterparty, acting in its own interests and desiring to achieve that result would take to achieve the goal, even at considerable inconvenience or expense. A “best endeavours” obligation may require a party to act in a manner contrary to its own commercial interests.

By contrast, the laws of the United States do not tend to distinguish between “reasonable endeavours” and “best endeavours.” Instead, courts will often use the term “best efforts,” which is interpreted based on the language of the contract, industry standards and implied duties of diligence and fair dealing. The scope of magnitude of this “best efforts” obligation can vary depending on the jurisdiction and contractual context.

Limitation of Liability and Indemnity Provisions

In England, when businesses contract with consumers, the law imposes requirements to protect consumers. Where businesses contract with each other, The Unfair Contract Terms Act 1977 (UCTA) restricts how certain liabilities can be excluded or limited, for example, that such limitation of liability clause is reasonable. However, UCTA does not apply to international supply contracts, or to contracts where English law is the governing law of the contract only by the parties’ choice but the governing law would otherwise have been the law of some other country but for the parties’ choice.

Courts in England have enforced exclusions and limitations of liability clauses and indemnities in contracts between commercial parties governed by English law, subject to some exceptions on public policy grounds, such as fraud. However, the language of the exclusion or limitation of liability clause or indemnity must be clear and unambiguous. If, for example, such parties intend an exclusion or limitation clause to apply irrespective of the other party’s negligence, tort, breach of contract or breach of statutory or other duty, it is prudent for this to be expressly stated in the contract.

In the United States, courts are also inclined to enforce exclusion and limitation of liability and indemnity clauses, particularly when these clauses are clear, unambiguous and not contrary to public policy. In the United States, indemnity provisions in a contract frequently include a duty to defend, hold harmless and release a party from liability. In England, indemnity clauses may also include a duty to defend, indemnify, hold harmless and release the other party from liability.

A related variation between the two legal systems is in their treatment of “indirect and consequential losses.” In the United States, indirect and consequential losses are commonly interpreted to include lost profits and revenues stemming from a breach of contract. English law takes a different approach, often treating lost profits in a business context as a direct rather than an indirect loss. In an English law contract, a clause intended to exclude or limit liability or provide an indemnity for loss of profits, revenues, etc., whether considered a direct or indirect loss under English law, should state that expressly in the contract.

Material Breach

English law does not have a strict definition for “material breach.” Instead, courts will conduct a fact-specific analysis and look to the contract language. Courts will assess whether the breach is a “material breach” considering a number of factors including the nature of the contract, the specific obligations involved, what the breach consists of, its impact on the innocent party and the circumstances in which the breach arises. A breach of contract does not need to go to the “root” of the contract and deprive the innocent party of substantially the whole benefit of the contract to be a “material” breach. The flexibility in this interpretation by the court makes the standard less rigid than it is in the United States.

The United States, on the other hand, applies a more rigid concept of “material breach,” which occurs when a breach either substantially defeats the contract’s purpose or deprives a party of an

expected benefit. The concept in the United States is closer to the doctrine of repudiation than it is in England. The consistent definition makes for more predictable dispute resolution in the United States.

Assignment and Novation

While the meaning of “assignment” differs between English and United States law, both legal systems share the same interpretation of a “novation.” In England, an assignment of a contract transfers the rights (i.e., the benefits) under a contract, but does not automatically transfer the obligations of the contract.

By contrast, in the United States, an assignment transfers both the rights and the obligations. However, while the assignee becomes responsible for performing the original party’s obligations under the contract, the original party also remains secondarily liable for performance of the contract. Unless there is an express prohibition on assignment in the contract, the consent of all parties is not required for an assignment in England nor the United States.

To transfer both the rights and obligations in a contract while also releasing the original party from any obligation to perform requires a novation. A novation fully releases the original contracting party from liability and requires the consent of all parties to the contract. Here, English law and United States law are the same.

Punitive Damages

In England, punitive damages are quite rare. They are awarded only in limited circumstances, such as in tort cases where the defendant has acted willfully or dishonestly to create the plaintiff’s injury. Punitive damages are unavailable for breach of contract cases in England, regardless of the severity or willfulness of the breach. Lastly, punitive damages are decided by judges in England, rather than by juries.

Courts in the United States award punitive damages more frequently and in larger amounts than what is seen in England. Unlike in England, it is the juries who decide on and determine punitive damage awards in the United States. Punitive damages are typically not allowed for breach of contract in the United States unless the breach constitutes an independent tort. The independent tort most commonly alleged in breach of contract actions is fraud, and making a promise without a present intention to perform may constitute fraud, which is considered a tort in most jurisdictions.

Conclusion

While both legal systems share a common law foundation, their approaches to contract law diverge in certain key areas as highlighted in this note. The United States imposes broader good faith obligations and awards punitive damages more frequently. English law makes a distinction between reasonable and best endeavours, takes a different approach to assignments and novation, and has a more flexible approach to interpreting some concepts such as material breach that are more rigid in the United States. Both United States and English law enforce exclusion and limitation of liability clauses and indemnity clauses in contracts between commercial parties provided that such clause is clearly drafted, unambiguous and is not against public policy. Understanding the differences between these two legal systems is essential when drafting and negotiating contracts across these jurisdictions.

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