

Identifying and mitigating commercial risk: Lessons from recent case law

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Introduction and outline

- Contract formation
 - Formation by email
 - Oral amendments
- Duty of good faith
 - Timing and scope
- Specific clauses
 - Forum selection and choice of law clauses

Contract formation – Email agreements

Vancouver Canucks Limited Partnership v. Canon Canada Inc., 2015 BCCA 144

- Parties entered into negotiations to renew existing agreements
- Dispute concerned whether there was a binding new agreement
- Court upheld finding that parties had entered into a new sponsorship agreement through emails sent between them:
 - Emails contained the **essential terms** of the new sponsorship agreement
 - Canon wanted to continue its sponsorship agreement with the “same rights and benefits” as before and the Canucks agreed
 - While the parties had understood that a formal written agreement would be executed by the parties after review by each party’s legal department, such **execution was a mere formality**
 - Sponsorship **benefits were implement** by the Canucks and Canon accepted those benefits notwithstanding that the agreement had not been executed

Contract formation – Email agreements

Coco Homes Inc. v. Caleron Properties Ltd., 2017 ABQB 15

- Court found that an exchange of emails formed a binding settlement agreement, based on the words and conduct of each party's counsel

Pintar Manufacturing Corp. v. Consolidated Wholesale Group Inc., 2011 ONCA 805

- Court found that personal guarantee had been entered into by way of emails
- All of the elements necessary to create a binding guarantee were present: the amount of debt was clear, the debt had crystallized, the appellant knew the terms of the contract giving rise to the debt, and the appellant provided an email signature

C&S Associates UK Ltd. v. Enterprise Insurance Company Plc, 2015 EWHC 3757

- Dealt with whether a contract between an insurance claims handler and an insurance provider was varied by an exchange of emails
- Court found the parties intended to be bound by their exchange, despite contemplating that their agreement would later be recorded in a formal contract

Contract formation – Email agreements

- Practical implications:
 - Negotiating parties (lawyers or business representatives) should understand that a binding agreement can be reached by email
 - Possible email caveat:

“Nothing in this email communication constitutes a binding agreement until all terms are agreed and finalized in writing and a written agreement is executed by the parties.”

Contract amendment – Oral amendments

- No oral amendment clauses (particularly in entire agreement clauses) are common:

“No change or modification of this agreement is valid unless it is in writing and signed by each party.”

- Recent English and Nova Scotia case law suggest that (certain) courts may enforce an oral agreement or amendment in the face of such a clause
 - Based on principle of party autonomy and freedom to contract
- BUT – recent Ontario case law continues to emphasize the importance of entire agreement clauses

Contract amendment – Oral amendments

Globe Motors Inc. v. TRW Lucas Varity Electrics Steering Ltd., [2016] EWCA 396

- Court rejected the idea that an anti-oral agreement provision needed to be enforced for the benefit of commercial certainty
- A general principle of English law is that absent statutory or common law restrictions, parties have the freedom to contract
 - An anti-oral agreement clause cannot undermine that freedom

Contract amendment – Oral amendments

Archibald v. Action Management Services Inc., 2015 NSCA 103

- Clause required that any waiver of the lease in question be in writing
- Issue was whether this precluded the parties from agreeing orally that the tenants would be released from their obligation to pay further rent
- Court held that the first step is to determine if the no waiver or no oral amendment clause applies to the circumstances
- In this case, the no waiver clause did not apply to the circumstances

Contract amendment – Entire agreement clauses

But...

Parc Downsview Park Inc. v. Penguin Properties Inc., 2017 ONSC 4533

- Court stated that where there is an entire agreement clause there can be nothing beyond the written contract which informs the substance of the agreement
 - In this case, the entire agreement clause contained specific anti-oral agreement language
 - In applying this rule, the court held that there could be no action for negligent misrepresentation based on an oral inducement, as it would be outside the written provisions of the contract
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- Entire agreement clauses still prevent relying on **past** representations or agreements (*Treats v. Burloak*, 2017 ONSC 5692)

Contract amendment – Oral amendments

- Practical implications:
 - Continued inclusion of anti-oral amendment clauses in commercial contracts
 - Awareness of oral representations (particularly after entering into the contract)

Duty of good faith

Connor v. Scotia Capital Inc., 2017 ONSC 2804

- Court explained that the duty of honesty and good faith in *Bhasin v. Hrynew*, 2014 SCC 71, does not extend to contract negotiation
- *Bhasin* focuses solely on performance

Bank of Montreal v. Javed, 2016 ONCA 49

- Appellants argued that *Bhasin* modified the test for unconscionability by requiring the court to import “a general organizing principle of good faith and recognizing a duty to perform contracts honestly”
- Court rejected this proposition

Duty of good faith

- Courts have given a narrow interpretation to *Bhasin*
- Practical implications:
 - Keep in mind that the opposing party has no obligation to negotiate in good faith
 - Still need to include any specific terms that you want (can't necessarily rely on the duty of good faith)
 - Agreements to negotiate in good faith

Forum selection clauses

- Common contractual term
- *Z.I. Pompey Industrie v. ECU-Line NV*, 2003 SCC 27
 - Required “strong cause” to get around a forum selection clause
- Recent case law has addressed the difference between commercial and consumer contracts

Jurisdiction clauses continued

Douez v. Facebook, 2017 SCC 33

- SCC refused to enforce a forum selection clause in the context of an online consumer contract because of public policy considerations (namely, gross inequality of bargaining power and greater interest of Canadian courts in adjudicating cases involving constitutional and quasi-constitutional rights such as privacy)

2Source Manufacturing Inc. v. United Technologies Corporation, 2017 ONSC 4409

- Although *Douez* established a different framework for consumer contracts, the court expressly confirmed that *Pompey* remains the governing authority on the enforceability of forum selection clauses in the commercial context
- Clause in question was enforceable

Forum selection clauses

- Practical Implications:
 - Considerations:
 - Costs
 - Location of witnesses
 - Your assets
 - The other parties' assets
 - Other relevant agreements/corporate structure

Forum selection clauses – related issues

- Mediation and arbitration clauses
 - Gradual escalation
 - Confidentiality
 - Enforcement
- Choice of law clauses
 - Which law is most favourable
 - Proving foreign law

Thank you

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