6

Commitment Risks

ENFORCEABILITY RISKS

A contractual commitment must be enforceable and allow recovery for certain of the losses that result from breach. A defect in the effectiveness of a commitment is a hazard for an obligee and an unpredictable windfall for an obligor.

A fully effective commitment will satisfy three standards:

- First, all the formalities necessary to create it have been completed such that an arbitrator or court will enforce it in accordance with its terms in a proceeding brought by the obligee against the obligor.
- Second, it states the actions that must be completed with such certainty that there can be no reasonable doubt about what is required, and any dispute about what is required can be resolved in favor of an obligee in a summary proceeding.
- Third, the administration of justice—the administration of the substantive and procedural rules applicable to a commitment—by the courts or arbitrators is sufficiently stable and predictable that the parties can expect enforcement of the commitment according to its terms.

Enforceability Hazards

A commitment is "enforceable" when all the requirements have been satisfied for it to be enforceable by the party seeking to enforce it against the party against whom enforcement is or will be sought in the jurisdiction in which enforcement is expected. A party may have to comply with formalities to be an obligor in a transaction, the other party may have to comply with different formalities to be an obligee, both parties may have to comply with additional formalities for the contract to be enforceable, and the terms of the contract may have to comply with substantive standards to be enforceable.

Obligor. A starting point of a list of the formalities to be satisfied for a party to be bound as an obligor is the textbook defenses personal to it. If it is an entity, it must exist; it must have legal capacity to form a contract; it must have authority to form a contract; it must be authorized to form the contract; it must have competence to understand the contract; it must not be laboring under a mistake, fraud, duress, or corruption that vitiates consent; and unless it is capable of waiving and has waived its rights, it must not be a sovereign or similar entity that is immune from legal process. The hazard for the obligee is the existence of any such circumstance at contract formation that entitles an obligor later to disavow its commitment.

Chemical Bank v. Washington Public Power Supply System[1] illustrates how critically important these formalities are to binding the obligor to a commitment. Washington Public Power Supply (WPPS) issued bonds in the face amount of $2.25 billion to finance the construction of two nuclear power plants, the electricity that was expected to be generated from which had been sold to participating utilities. Each such utility had to pay its share of various payments made by WPPS, whether or not the plants generated electricity. Nineteen of these participants were Washington public utility districts and another nine municipal corporations. Their statutory powers authorized them to "enter into contracts or compacts with any operating agency or a publicly or privately owned public utility for the purchase and sale of electric energy or falling waters."[2] If, as the trustee for the bondholders claimed, the cities and districts had authority under the quoted language to agree to pay for a participating interest in the electricity generated by the plants even when no electricity was generated, they were authorized and bound by the agreements. However, that was not the case, as the cities and utility districts successfully claimed; they lacked authority under the quoted language to agree to pay for their participating interests and were not authorized and not bound by the agreements.[3] Similar claims and conclusions were made and drawn concerning other statutory powers granted the cities and districts. At contract formation, the hazard to the bond holders was the districts' and cities' lack of clear authority to pay for their participating interests. The bond holders assumed responsibility for the risk that the contracts might not have been authorized. That hazard would have passed had the courts determined that the districts and municipalities were authorized or, as happened, the hazard would have resulted in harm to the bond holders once the courts determined the districts and cities lacked such authority.

Obligee. An obligor may be bound by its commitment but the obligee may be unable to enforce it because it has failed to satisfy a formality that entitles it to do so. A starting point of a list of such formalities are the licenses and approvals it requires to engage in a business or transaction in which it is engaged and taxes and other fees it may have to pay in connection with such business or transaction. A real estate agent must obtain a license from a real estate licensing board, a lawyer a license from the state bar, a contractor a license from the contractors' licensing board, and a vendor of alcoholic beverages a license from the alcohol beverage control agency. In addition, a government may require all who engage in business in its jurisdiction to register, qualify to do business there, and pay taxes. A person who engages in such activities without the applicable license or registration may be subject to fines, penalties, and other sanctions.

In certain instances, the failure to have the required license or registration when it contracts to engage in such activities may preclude it from enforcing the contract: an unlicensed real estate agent may not collect his or her commission, an unlicensed attorney may not collect his or her fees, an unlicensed taxi company may be unable enforce a contract to buy taxi medallions, an unlicensed lender may be unable to recover the principal loaned and accrued interest, and an unregistered business may be unable to enforce any contracts in the courts of the jurisdiction where it is required to register and pay taxes. The hazard for the obligee in these transactions is the existence of any such circumstance at contract formation that entitles an obligor later to bar the obligee from enforcing the obligor's commitment, except where the obligee is allowed to correct its shortcoming and enforce the contract.

Brack v. Omni Loan Company, Ltd.[4] illustrates the serious consequences of an obligee's failing to comply with such local licensing requirements. Located in Nevada, but through an office in California, Omni loaned between $900 and $1800 each to members of the military who were nonresidents stationed in California. Omni asked the California Commissioner of Corporations to rule that it was not required under California law to obtain a license to make such loans. The commissioner refused the request. Nonetheless, Omni made loans pursuant to agreements that chose Nevada law to govern their terms. A class action was filed against Omni in California by a nonresident military member borrower stationed there, claiming, inter alia, that Omni had failed to comply with the California license requirement. This was a case where the obligee knew of the potential application of, and rejected complying with, a licensing requirement, deciding intentionally to take the risk it might apply. If, as Omni claimed, Nevada, and not California, law applied because California had no fundamental interest in transactions with nonresident military members stationed in that state, Omni would have assumed responsibility for the risk a license was required, but the hazard would have passed. But, as the class plaintiff successfully claimed, California law trumped the Nevada choice of law clause in the loan agreement and Omni was required to have obtained the license; Omni had assumed responsibility for the risk it would have to obtain the license. The contracts made in violation of this requirement were void.[5]

Contract Formation. Every legal system prescribes certain formalities that must be satisfied for an obligor to be bound and for the obligee to have corresponding rights. The basic formalities of contract law are taught in a contract law course: a contract must be embodied in an offer and the offer must be accepted; consideration or an equivalent must be received for it to bind a party, unless the contract is signed under seal or set forth in a deed; and a contract for certain transactions must be in writing and signed by the party against whom enforcement is sought. Other formalities, specific to types of transactions, require more specialized knowledge of the law applicable to those transactions. For example, a disclaimer of warranties in a sale of goods contract may have to be stated in a format that visibly sets it apart from other terms; a guaranty may have to include a statement as to the maximum amount of the guarantor's liability; the description of collateral in the granting clause of a security agreement may have to use specific words to be effective; a sale of securities in an initial public offering requires detailed disclosures about the issuer, its management, its industry and related matters; a franchise contract may have to disclose certain information to the franchisee; a contract between an attorney and the attorney's client may have to disclose how fees will be calculated; and certain clauses may have to be signed or initialed separately from the signature to the contract. Still further formalities may be mandatory for the effectiveness of an agreement or instrument: it may have to be notarized; it may have to be filed, registered, or recorded in designated public registries; and stamp and other taxes may be payable, often based on the value of the transaction. Approval of a government agency might be required. Failure to comply with these formalities may result in liability for fines and penalties and may be a hazard to the enforceability of the contract by the obligee.

Wallace Hardware Company, Inc. v. Abrams[6] illustrates the potential cost of overlooking or ignoring all the potential formalities that may apply to contract formation. Located in Tennessee, Wallace agreed to provide wholesale hardware goods and services to retail hardware stores and a line of credit to buy such goods and services to Tri-County located in Kentucky. The Abrams brothers who owned Tri-County also signed personal guaranties, guaranteeing Tri-County's obligations to Wallace. The contracts chose Tennessee law to govern their terms. The guaranties would not have been valid under Kentucky law because they did not specify the maximum amount guaranteed or the date on which the guaranties terminated, both of which were required under Kentucky law.[7] Had Kentucky law been applicable to the guaranties, notwithstanding their choice of Tennessee law, as the guarantors claimed and the district court judge ruled,[8] Wallace would have borne the consequences of the guaranties not complying with the Kentucky law requirements. It was a risk Wallace most likely overlooked, assuming that Tennessee, not Kentucky, law was applicable. In this case the hazard passed because that assumption proved correct, though not without litigation and an appeal. Wallace could have had the guaranties comply with both Tennessee and Kentucky law so that risk of unenforceability—due to noncompliance with the Kentucky law formalities—was avoided altogether.

Contract Terms. Every legal system circumscribes freedom of contract by voiding or allowing parties to void agreements that violate the system's important policies. Textbook examples with which lawyers are familiar include contracts that facilitate the commission of a crime or tort or violation of a law, contracts that charge interest at a rate in excess of the legal maximum rate, contracts to acquire indebtedness for the purpose of initiating proceedings, and contracts that unfairly restrict competition. Additional examples include liquidated damages that penalize breaches rather than compensating losses; indemnity provisions that violate policies against indemnifying parties for wrongdoing; waivers of rights to minimum wages, class actions, and mechanics liens; and exculpatory clauses and releases from and limitations on liability. In each of these examples, a commitment is fatally defective because it cannot be enforced against the party purportedly bound by it: the lender may have no right to insist upon payment of interest, the obligee may have no right to collect on the debt, the promisee may have no right to insist upon compliance with the restrictions on competition, the nondefaulting party has no right to insist upon payment of the liquidated damages, the indemnified party has no right to indemnification, and the employer has no right to refuse to pay the minimum wage. In addition, the taint of the clause may infect the contract, allowing termination by one or both parties. The hazard to the obligee is creating a commitment that the obligor can void.

National Glass, Inc. v. J.C. Penney Properties, Inc.[9] illustrates what is often the minimal cost to the putative obligee of overlooking or ignoring the potential unenforceability of a contractual term in a jurisdiction whose laws might apply. National Glass, Inc. (NGI), as a subcontractor and supplier of labor and materials for a project located in Maryland for $90,000, petitioned to file a mechanics lien for the $56,579.00 balance. It waived all its mechanic lien rights under a subcontract that chose Pennsylvania law to govern its terms.[10] The waiver was valid under

Pennsylvania, but not Maryland, law. Had the choice of Pennsylvania law been enforceable under Maryland choice of law principles, the mechanics lien waiver would have been enforceable. The contractor would have taken the chance that the choice of Pennsylvania law and the waiver were effective and succeeded; the hazard would have passed. But Maryland law applied, and the mechanics lien waiver was unenforceable, as was held; the contractor's gamble failed.[11] However, because it could not otherwise have eliminated the subcontractor's mechanic lien rights, it lost nothing by including the clause. This was not a case where by modifying the contract the waiver would have been effective under Maryland law. The contractor was not subject to a penalty for including the Pennsylvania choice of law and mechanics lien waiver in the contract. The contractor could hope that, given the uncertainty concerning the enforceability of the choice of law and waiver, the subcontractor would comply with the waiver, just as a putative obligor might complete a task that it has not committed to complete. Whether a party should rely upon the complacency or ignorance of its counterparty is another question, but the strategy of doing so may come at little or no cost to the obligee.

Enforceability Risk Management

Enforceability risks are initially managed by the legal rules that facilitate or impair the enforceability of a commitment, determine when an obligor has satisfied the requirements that bind it to a commitment, and specify the requirements an obligee must satisfy to enforce a commitment. When effective, waivers; choice of law, savings, and severability clauses; and termination rights enable modification of these rules and the risk allocations they effect.

Diligence. Diligence is the most effective method of managing the enforceability risks previously described. Except where there are shortcomings in a legal system, all the requirements that must be satisfied to form a contract that an obligee will be entitled to enforce against the obligor are knowable prior to contract formation. Any enforceability hazards should be identifiable and avoidable before that time. The hazard in *Chemical Bank*[12]—the absence of statutory authority to purchase the participating interests in the plants—would have been difficult to avoid while continuing to participate; however, unless it was eliminated, the plants and bond holders did not have commitments they could enforce. As in previous chapters, this text repeats the importance of thorough diligence while not attempting to detail what it includes in any specific transaction.

Waivers. Subject to certain limitations, at contract formation an obligor may waive certain of the defenses that it may have as a result of the hazards previously described. A shortcoming in an obligor's existence, capacity, authority, and competence at contract formation cannot be waived in the contract since it cannot be bound by such contract. At contract formation, an obligor may be able to waive whatever immunity from legal process it may have. A shortcoming in an obligee's compliance with a requirement that entitles it to enforce a contract might be validly waived, depending upon such matters as whether compliance therewith is intended to protect the obligee. An obligor might agree to pay the obligee fees or other compensation for its performance notwithstanding that the obligee may not have all the required licenses. The obligor might waive any right to refuse to make such payment. Because the purpose of the licensing requirement is to protect the public from individuals plying a trade for which they are not qualified, the waiver may be effective in cross-border transactions in which the individual has a qualification in one jurisdiction but not necessarily in all jurisdictions affected by the transaction.[13]

A waiver cannot breathe life into a contract that is void ab initio for illegality, but it may preserve a contract that is voidable in limited conditions: a guarantor can agree its obligation under a guaranty is absolute and unconditional,[14] and an obligor on a note[15] and a lessee under a lease may likewise do so, by agreeing it will pay as stated in the note or lease come "hell or high water."[16] The absolute and unconditional obligation effectively waives the guarantor's right to terminate an otherwise voidable guaranty.[17] This is also the case for the note or lease obligation, where the hell or high water clause waives the obligor's right to terminate a voidable obligation. A waiver, when effective, puts the parties in the position they would have had had the hazard not occurred in the first instance and allocates to the obligor responsibility for the risk that its commitment may have defects that would otherwise have enabled it to escape liability for failing to fulfill it.

Representations and Warranties. A representation or warranty cannot shift responsibility for the commitment risks previously described. Representations and warranties by an obligor that it exists, it has capacity and authority to execute the contract and to perform its obligations, it has been duly authorized to do so, and it has duly executed the contract are commonplace and purport to affirm the facts so represented and warranted and to allocate to the warrantor responsibility for the risk that the facts so warranted are incorrect. If, however, an obligor does not exist or have the capacity or authority such that it cannot properly execute the contract, it cannot overcome the defect by warranting there is none. No contractual term can be included at contract formation that will allocate to the obligor responsibility for the risk that it lacks existence, capacity, or authority. Similarly, a representation and warranty that the terms are valid and enforceable cannot validate a contract that is void ab initio for illegality, though, like a waiver, it may preserve a contract that is voidable in limited conditions.

Choice of Law Clause. When effective, a choice of law clause can mitigate and eliminate certain of the commitment risks previously described. First, the law of a jurisdiction applicable to an entity might limit or prohibit an entity's waiving its immunity from legal process, while the law of another jurisdiction may permit a more expansive waiver. Second, the law of a jurisdiction may require that certain formalities be complied with for a contract to be valid thereunder, while the law of another jurisdiction may not require such compliance. *Wallace Hardware Company, Inc.*[18] illustrated such a difference in laws: Kentucky law required that a guaranty state the maximum amount and termination date, but Tennessee law did not. Third, the law of a jurisdiction may require that an obligee comply with certain local laws before it can enforce a contract against an obligor, while the law of another jurisdiction may not require such compliance. *Brack*[19] illustrated such difference in laws: California law required that the lenders obtain a license from a California authority, but Nevada law did not. Fourth, the law of a jurisdiction may void or allow the parties to void a term of a contract, while the law of another might not. *National Glass, Inc.*[20] illustrated such difference in laws: Pennsylvania law allowed the waiver of mechanics lien rights, but Maryland law did not. In each of these instances, the agreement to the choice of laws that would enforce a commitment over the law of another jurisdiction that would not effectively waived the fatal defects in the commitment under the laws of the other jurisdiction, to the extent the choice of law was itself enforceable.[21] In *Brack,* the choice of Nevada law was not enforceable in a California court applying California choice of law principles.

Savings Clause. A savings clause rescues a term otherwise illegal or invalid by automatically reforming it to be valid. An example is a usury savings clause in a loan agreement, which states that if the interest rate exceeds the maximum rate permitted by law, the rate will be automatically reduced to the maximum.[22] Another example is a clause that pares back the duration or geographical scope of a covenant not to compete that would otherwise be invalid. By reforming a defective commitment, the savings clause effectively preserves that which is valid from the taint of the offending portion.

A saving clause mitigates and allocates the risk of illegality by limiting the scope of the clause to that which is legal. Where a term or contract may be void or voidable because it violates a policy, the savings clause limits the unenforceability of such term or contract to the portion that is illegal. The party that would have benefited from the illegal or unenforceable term mitigates its loss: only the portion of the bargain that is illegal or unenforceable is lost (and this loss is due to the illegality or unenforceability of the bargain); the portion that is legal or enforceable is preserved. To that extent the balance of the term or contract remains enforceable, the victim of the illegal term or contract assumes or is allocated the risk of illegality when agreeing to a savings clause. Because the savings clause, when effective, insulates the party benefiting from the illegal or unenforceable clause from losses beyond what is illegal or unenforceable, in the absence of other sanctions it has little incentive not to overreach and include such terms.[23] A savings clause might be unenforceable for that reason.[24]

Severability Clause. A severability clause excises an invalid term from the contract while preserving the validity of remainder of the other terms and conditions.[25] Where a savings clause revises the invalid term to be valid, the severability clause removes the term entirely from the contract.[26] Unlike the saving clause, which might not be enforced, the severability clause is generally effective, though its application may be denied in certain instances where the term being excised is fundamental to the contract. The severability clause thus mitigates the potential loss to the obligee from fatal flaws in the obligor's commitment.

Termination. An obligee may prefer to terminate a contract when it finds that the obligor's commitment has one or more of the commitment defects previously described. An obligee who has not materially performed its obligations is unlikely to have a reason to do so under a contract to which its obligor is not bound because at contract formation it did not exist or have the capacity or authority to enter the contract, and these shortcomings cannot be corrected. An obligee who has not materially performed its obligations and is barred from enforcing a contract because it failed to comply with a licensing or other requirement will also have little reason to perform unless it can cure the deficiency. The party who is disadvantaged by the illegality or unenforceability of a term may likewise want the option of canceling the bargain because it will not get all that it anticipated. For example, a loan agreement might state that the agreement will terminate if the interest rate is usurious, and the loans will have to be repaid. The savings clause enables the lender to recover interest to the extent allowed; termination permits it to exit the transaction because it cannot realize the full expected value. Termination enables the obligee to mitigate the losses it might suffer as a result of the obligor's commitment having the defects previously described.

COMMITMENT UNCERTAINTY RISKS

Commitment Uncertainty

Separately, a commitment is certain when its description of the actions required to fulfill it are reasonably clear. A commitment lacks certainty when the terms chosen are susceptible to more than one meaning. This may be due to the words chosen, which are vague or ambiguous, or the legal system, the substantive rules, or the administration of which lack predictability. Chapter 5 describes vague and ambiguous terms used to document uncertain expectations about tasks to be completed. Vague and ambiguous terms may be used even when expectations are certain because of poor drafting or to avoid revealing intentions. An uncertain commitment may result in the obligor having no commitment to do what the obligee expects. A certain commitment will entitle the obligee to a summary judgment or an equivalent order after the briefest of proceedings. An ambiguous commitment will require longer proceedings to decide what actions are required in the circumstances. More evidence may be needed to decide what the parties intended by their choice of words.

Ambiguous terms may be inadvertently chosen to specify a task even though a party has clear expectations of what actions that task includes; their use does not reflect uncertainty about the tasks the party expects to complete or to be completed. They are drafting oversights or shortcuts. The choice is inadvertent when such party is unaware of the potentially different meanings that might be given the term. As a result, it is also unaware of the risk that the term might include actions different from those expected to be performed. The textbook case *Frigaliment Importing Co.*,[27] summarized in chapter 1,[28] is an illustration: the terms used to describe the chickens to be bought and sold included birds suitable for broiling and frying. The seller and buyer each had a specific expectation about the birds that would be delivered, but the words chosen to describe them failed to eliminate other birds that might be delivered instead. The textbook case *Raffles v. Wichelhaus*[29] is another example. The correspondence between the buyer and the seller referred to cotton to be delivered "ex Peerless" from Bombay at Liverpool. Each party clearly had in mind a vessel named *Peerless* departing from Bombay but on different dates. While each party had a quite specific expectation about the vessel from which the cargo was to be delivered, the term "ex Peerless" was thus fatally unclear, covering both vessels. It seems unlikely that in either case either party recognized the potential for "ex Peerless" or "chickens" to have more than one meaning.

Commitment Uncertainty Risk Management

The contract interpretation rules that determine when a term is ambiguous and the admissibility of evidence to understand its meaning allocate responsibility for the risk created by ambiguity. An ambiguity inadvertently included in a contract is equivalent to an oversight hazard. Although the party has a clear expectation of the benefit, task, or commitment it expects to realize or be fulfilled, it misses the ambiguity in its choice of words and the hazard it creates. This is not a case where the ambiguity in the contract attempts to allocate responsibility for the risk of uncertainty in the party's expectations. Inadvertently drafted ambiguity risk is best managed by diligence and the terms described for managing oversight risks in chapter 3: amendments and termination.

COMMITMENT MISTAKE RISKS

The statement of a commitment in a contract may fail to reflect one or both parties' expectations. A party has clear expectations about the terms it expects the contract or other document to include, but such terms are not stated as expected.

Benefits and tasks described in a contract may reflect a party's expectations based on incorrect information, incorrectly processed information, or incorrect assumptions. Those expectations are superseded by expectations formed when the error is discovered. A term may also incorrectly state an expectation formed based on correct information correctly processed, but somehow misstated in the contract. Such errors are:

- preparation mistakes, where a party drafting or preparing a contract omits to include a term, includes the wrong term, or misstates a term in a contract, and
- reading mistakes, where a party does not read or misreads or misunderstands what another party has written in a contract.

Such an error is also a hazard to the commitment because it does not state what the party expected it to state. The hazard to the obligor is that the drafting or reading error will commit it to do more than it anticipated and the hazard to the obligee is that the obligor will be committed to do less than it anticipated. Responsibility for the losses that result from a condition or contingency may have been allocated differently in the contract than one or both parties expected.

Preparation Errors. Preparation errors include clerical, tabulation, calculation, and other drafting errors and omissions in the terms of the offer, acceptance, contract, or related document: for example, writing down as the price per pound what was intended to be the price per ton.[30] *Donovan v. RRL Corp*.[31] further illustrates a clerical error in stating a term. A car dealer advertised in a local newspaper "a 1995 Jaguar XJ6 Vanden Plas," specifying the color and vehicle identification number, but inserting the word "SAVE" for the price. Four days later, the car dealer's advertising manager asked the newspaper to delete the listing for the car and to list a 1994 Jaguar XJ6 with a price of $25,995. Employees of the local newspaper did not replace the listing of the 1995 Jaguar with the description of the 1994 Jaguar, but did replace the word "Save" with the price of $25,995. This amount was $8000 to $10,000 less than the amount for which such car was selling elsewhere. A buyer visited the dealer's lot, inspected the 1995 Jaguar, and offered $26,000, but the dealer countered with $37,000. Expecting to resell the car for $37,995, the buyer refused and sued the dealer for breach of contract. If the dealer was bound by the terms of the advertisement, it assumed responsibility for the risk of the error; if not, responsibility for the risk was borne by the potential buyer.[32] Inadvertently omitting a line item when calculating a price or incorrectly totaling the amount is an example of a tabulation and calculation error. For example, in *M. F. Kemper Construction Co. v. City of Los Angeles*,[33] a contractor, when preparing its bid on a public works project, inadvertently omitted $301,769 from its worksheet, resulting in the bid totaling $780,305, in contrast to three other bids for $1,049,592, $1,183,000, and $1,278,895.[34] Responsibility for the risk of such clerical and tabulation errors is borne by the party preparing the document if it is bound by the mistaken or omitted term[35] and by the other party if the party preparing the document may terminate the contract.[36]

Boston Edison Co. v. Federal Energy Regulatory Commission[37] illustrates how a term can be inadvertently omitted from a complex contract where considerable skill and effort goes into its preparation. A utility constructed a nuclear power plant, the output from which was sold to its thirteen municipal customers pursuant to long-term power purchase contracts. The price at which the electricity was sold consisted of two charges: a capacity charge, the intent of which was to recover the capital and finance costs of construction of the plant, and a monthly energy charge, the intent of which was to recover the operating costs of the plant. A clause in the contract stated the general intention that the customers "would pay 'the sum of all of the costs incurred' by the utility" in the construction and operation of a power plant. The contract also included a detailed list of the items that the utility was allowed to include in its calculation of each of the factors. For example, the interest charges on the financing were limited to the 'weighted average of interest rates of all bond issues existing at the time of commercial operation of the Unit, revised as required to reflect refinancings of debt issues existing at the time of the commercial operation date.'"[38] No mention was made of interest on the financing of additional plant equipment that had been acquired. The utility nonetheless included such interest in its calculation of the monthly charges.[39] The contract was not ambiguous but clear on what could be included in the calculation. Had the utility the right, based on the general statement that it was to recover its costs, to include in the calculation items not specifically listed in the formula, responsibility for the risk of an item having been omitted from the contract would have be borne by the municipal customers. The municipal customers' successful claim that additional amounts not specifically listed in the formula could not be included in the charges, however, implied that responsibility for the risk of such omission was borne by the utility; it was not permitted to include the additional interest in the calculation of the monthly charges.[40]

Review Errors. Review errors are the mirror image of preparation errors: a party may miss a term in a contract or misunderstand what a term says or means. For example, a mortgagor may fail to see that a mortgage specifies one property when it was expected to specify another.[41] A party may understand a term to mean one thing when it means another. For example, a term in a contract that states that its duration is indefinite sometimes means that the contract is terminable at the will of either party. A party that expects a contract to continue forever, past his or her death, misunderstands the meaning of the term.[42] A term that was included but not expected to have been included might be overlooked. A term that was not included but was expected to have been included may have been omitted, and such omission overlooked. The hazard in these instances is the failure to read—parties frequently do not bother to read their contracts before executing them—or to read and understand correctly the terms of the contract or other document that creates the commitment.

Five of the cases in the litigation generated over three and a half decades by a form contract used by National Utility Service (NUS) for its electricity-saving consulting services illustrate such review risks.[43] NUS was hired, in each case, to review its client's electricity bills for some or all of the client's manufacturing facilities and "to submit recommendations for all possible savings and refunds on [the client's] costs of electricity [and] make a detailed analysis of all factors in [the client's] costs and advise where refunds and reductions can be obtained."[44] The client had to approve any recommendation. Any recommendation that was "acted upon" by the client entitled NUS to fifty percent of the client's savings on its electricity bills over five years. In two cases, the clients (Whirlpool and Chesapeake) were already considering specific actions that would increase the power factor at certain plants before they signed NUS's form; they so advised NUS and included clauses in the contract that excluded savings at those plants from the fee. Nonetheless, NUS recommended that these actions be taken and claimed the clients waived the exclusions.[45] Whirlpool prevailed on a directed verdict motion in the first,[46] and Chesapeake defeated NUS's summary judgment motion in the second.[47] In both cases, the clients, having reviewed the form, saw the potential that they would have to pay for electricity savings that did not flow solely from NUS's analysis and recommendations and narrowed NUS's scope of services for which they would have to pay the contingent fee. In each of three other cases, NUS recommended the clients (Callaghan, Sexton, and Blue Circle) apply for a rate different from the one at which electricity was then being delivered, a rate that would result in considerable savings. Callaghan had already requested the lower rate but did not mention this to NUS.[48] Callaghan also used the form letter prepared by NUS to augment its request to the utility for the lower rate. Callaghan spotted the overlap between the services under the NUS form and its prior efforts but did nothing to narrow the scope of services. In another case, the utility had previously advised Sexton of the availability of the lower rate and Sexton omitted to mention this to NUS;[49] and in the third, where Blue Circle would have had to modify its plant to change to the rate recommended by NUS, the utility created a variation of the rate recommended by NUS that Blue Circle could use without changes to its plant.[50] In these latter three cases, the client missed or chose to ignore that NUS was duplicating services the clients were already receiving. NUS claimed it was entitled to its contingent fee and succeeded on a motion for summary judgment in all three cases. Each of Callaghan, Sexton, and Blue Circle could have excluded from the fee the savings that had been or were, during the term of the agreement with NUS, recommended by the clients' utilities, thus linking the effort for which NUS was compensated to its specialized knowledge of energy savings and analysis of the client's operations. Instead, however, Callaghan, Sexton, and Blue Circle accepted the form with no effort to reduce the NUS scope of services. In failing to do so, they created the risk that they would receive and have to pay for tasks performed by NUS that made no contribution to their energy savings. In all five cases, the clients had clear expectations that they would not have to pay NUS for electricity savings that resulted from their own or others' efforts before NUS was hired; in the first two cases, Whirlpool and Chesapeake narrowed the contract to reflect their expectations; and in the last three, Callaghan, Sexton, and Blue Circle failed to do so. Responsibility for the risk of the discrepancy between those expectations and the terms of the contract was borne by them.

Commitment Mistake Risk Management

Contract interpretation rules and the unilateral and mutual mistake of fact doctrines allocate the preparation and review error risks previously described. A commitment that binds an obligor to perform as promised allocates to it responsibility for the risk it may have been mistaken about what was promised in the absence of defenses. The obligee, who cannot expect more or less than was promised, also assumes responsibility for the risk it may have been mistaken about what was promised. The *NUS* and the *Boston Edison Co*.[51] cases illustrate this risk allocation. That risk allocation is trumped by the risk allocations implied by the application of the legal doctrines of unilateral and mutual mistake of fact and good faith and fair dealing: responsibility for the risk is shifted from the party who would otherwise have been bound by the mistaken terms to the other party or both parties. The *Donovan*[52] and *M. F. Kemper Construction Co*.[53] cases illustrate this allocation of responsibility for risk. That risk allocation might be trumped still further by a clause that states the parties are responsible for the completeness and accuracy of the terms and are bound by the terms as stated even if they are mistaken.[54] When effective, the clause allocates responsibility for the risk of mistake to the party who errs in the preparation or reading of the term or contract. But as the *Donovan* and *M. F. Kemper Construction Co*. cases illustrate, this risk allocation might not be enforced in all cases.

Because a preparation or review mistake is inadvertent, it is equivalent to an oversight hazard. Although the party has a clear expectation of the benefit, task, or commitment it expects to realize or be fulfilled, it misstates the term in the case of a preparation error or misses or misreads the word in the case of a review error. Inadvertent mistakes in drafting and review are best managed by diligence and the terms described for managing oversight risks in chapter 3: amendments and termination.

LEGAL SYSTEM RISKS

Legal System Hazards

The institutional framework for creating a commitment—the substantive and procedural rules that govern the transaction and any disputes concerning the parties' rights and obligations, together with the institutions that administer them—reinforces, enhances, or diminishes the certainty of the contractual terms. In the latter case, the rules and institutions are hazards to a transaction.

Substantive Law Uncertainty. The substantive legal rules of jurisdictions applicable to commercial transactions may be sufficiently specific and internally consistent that the commitments that are governed by such rules are clear and the outcome of any dispute under a well-drafted contract reasonably predictable. The more specific and consistent the substantive law that governs commercial transactions, the greater is the predictability of the application of that law in specific cases. English and New York laws applicable to commercial deals are often touted as examples of the former. A legal system's rules can be so broadly and vaguely conceived that the parties cannot understand what is expected under their contract or predict the outcome of any such dispute. Sharia'ah principles of the legal regime in The Kingdom of Saudi Arabia are considered examples of the latter.[55] Because of their high level of abstraction, such rules allow claimants to argue for different outcomes in cases where the outcomes are reasonably predictable in other legal systems. Vague and inconsistent legal rules, like vague terms in a contract, are hazards to a transaction, as the meaning given the terms of a contract may vary from what was expected. Any commitment that is governed by such rules is less certain than one governed by more certain and predictable legal rules.

Even the most advanced legal systems have unsettled or novel questions, the resolution of which is uncertain and possibly finely balanced beforehand.[56] In such cases, more than one outcome is possible, and the legal system has still to decide which it will be. An educated guess or opinion might be given about how such a question will be resolved, but so long as the issue remains undecided, uncertainty exists about the applicable substantive rules of the jurisdiction. In so far as such uncertainty affects a commitment, it is also a hazard to and weakness in that commitment.

U.S. ex rel. Shakopee Mdewankaton Sioux Community v. Pan American Management Co.[57] illustrates such uncertainty. A Native American tribe hired a contractor to manage a gambling operation on the tribe's reservation. The tribe and contractor asked the Bureau of Indian Affairs (BIA) to review and approve the contract. The bureau declined both, deciding that its approval was not required for such a contract, which was compared to a contract for managing a bingo hall on a reservation. Contracts to manage casino operations on reservations were a recent development, and the need for approval had not been decided by the courts. When the validity of the contract was later challenged because such approval was lacking, a court decided the BIA's approval of such management contract had been required, the contract was illegal, and neither the court nor the BIA was estopped from holding it unenforceable. Because the BIA's approval was a legal formality that had to be complied with for the tribe's commitment to be enforceable, the uncertainty at contract formation about the need for that approval was serious shortcoming in the law applicable and a hazard to the transaction.

Administrative Uncertainty, Bias, and Advantages. The administration of the substantive law by the courts, arbitrators, or other authorized institutions can enhance or diminish the certainty of a commitment in a transaction. A consistent, fair, and impartial application of confusing or vague rules can establish predictability and certainty absent in the rules themselves. By examining and comparing decisions resolving transaction disputes, parties can predict the likely outcome of any dispute in their transaction.

Conversely, an opaque, biased, or inefficient administration of the substantive law can undermine the certainty and predictability of clear rules and aggravate the uncertainty of vague rules. The application of Sharia'ah principles in The Kingdom of Saudi Arabia is an example of an administration of justice lacking transparency and predictability, as decisions of the adjudicators are neither cited in later decisions nor publicly reported.[58] An example of bias is a special law enacted in Nicaragua for harms caused by exposure to the chemical compound dibromochloropropane used by U.S. firms in their operations there. The law stipulated that the chemical was conclusively presumed to have caused the sterility in afflicted claimants who had been exposed to the chemical; claimants were entitled to minimum damages; defendants had to post a $100,000 bond to participate in the litigation and $15 million, within 90 days, to guarantee payment of compensation and the plaintiffs' costs; defendants were allowed only three days to answer the complaint, the parties eight days to present evidence, and the court another three days to issue its verdict.[59] Less extreme are the disadvantages a party or class of parties have in court proceedings: employees and consumers may be able to participate in class actions and to have their claims heard by sympathetic juries. The aggregation of claims into a class action gives the employee and consumer plaintiffs leverage they would not otherwise have in any settlement negotiation and litigation because the amount of the claim is multiples of what any single individual might have. The defendant employer and credit card issuer has more to lose if it ignores the claim. The class action plaintiff's attorney whose remuneration is calculated as a percentage of any settlement or verdict is motivated to press the class action case in a way it would not with that of a single individual. The elimination of a jury as the arbiter of facts removes an audience that may be more sympathetic to one party than a judge or arbitrator. Long delays in adjudicating or reaching final resolution of disputes undermines the predictability of the applicable rules because of the potential changes in parties, evidence, and adjudicators during the course of adjudication.[60] Such shortcomings in the dispute resolution process impair certainty of the commitments. As such, they are hazards to both parties, except to the extent unpredictability, bias, and inefficiency tend to favor a one of them.

Multiple Proceedings. The location of parties to a transaction in different jurisdictions nourishes uncertainty about where the proceedings to resolve any dispute will take place. The jurisdictions in which the parties are located are potential choices. Any third jurisdiction that allows one or both parties to initiate proceedings is also a potential choice. The formation of more than one contract between the parties for their deal can result in separate proceedings for each contract unless the disputes concerning the different contracts can be consolidated into a single case.[61] Parties may also have claims that, while related to their contract, do not arise under their contract, such as claims of misrepresentation and fraud. Such claims might be adjudicated in separate proceedings. The jurisdiction in which the assets against which any court judgment may have to be enforced are located is also a potential choice and separate proceeding. Any uncertainties about the body that will resolve and the process it will follow in resolving all the disputes in a transaction are hazards to the commitments in that transaction.

Legal System Risk Management

Choice of Law. A choice of law clause states both parties agree that their contract will be governed by the rules of the legal system they designate in the contract.[62] The validity and meaning of the terms of the contract are determined according to the rules of the designated legal system. Legal rules of a jurisdiction that would void or allow a party to void terms of the contract or add requirements that must be satisfied for the contract to be enforceable can be avoided by choosing the laws of another jurisdiction to govern the contract. This use of a choice of law clause to avoid risks has limitations and itself creates risks. First, the freedom to choose the laws of a jurisdiction to govern a contract is limited; the choice will not always be enforceable.[63] When the enforceability of a choice of law clause is questionable, the clause becomes a hazard to the transaction. Second, the laws of a jurisdiction may apply whatever the contract says about the choice of law because of the location or the parties or assets concerned. Whatever law had been selected to govern the contract, the consent requirement would have remained in *U.S. ex rel. Shakopee Mdewankaton Sioux Community* because the tribe is located in the United States and remains subject to federal law whatever the contract might stipulate to the contrary. There was no system to choose for that contract (with a tribe) that would have enabled the parties to avoid the consent requirement.

A choice of law clause, when effective, also enables parties to avoid the unpredictability of the rules of a legal system risk whose rules are highly vague or undeveloped. The choice of the laws of an alternative jurisdiction with reasonably certain rules eliminates the uncertainty risk associated with the rules that would otherwise apply. If the legal uncertainty favored one party—it was better off with the commitment highly uncertain—the choice of a legal system with certainty favors the other party. The party that uncertainty would have favored foregoes whatever advantage the uncertainty gave it.

Choice of Forum. A choice of forum clause states that disputes arising under a contract will be heard before the courts or arbitral tribunal designated in the contract. An arbitration agreement is an agreement to arbitrate disputes arising under the contract, whereas a choice of forum clause is an agreement to resolve such disputes in a specified forum. Arbitration proceeds under rules and at a location specified by the parties and is a private arrangement between the parties; court proceedings are subject to the procedural rules of the jurisdiction where the court is located and are often public. The choice of arbitration precludes initiating other proceedings, other than to enforce the arbitration agreement and the award, interim measures to preserve the status quo, and other claims expressly excluded by the arbitration agreement.[64] A choice of forum may be exclusive[65] or nonexclusive: the former allows proceedings to be initiated and conducted only in the chosen forum; the latter designates the chosen forum as one in which proceedings may be initiated and conducted but allows proceedings elsewhere.

Choice of forum and arbitration clauses can mitigate the administrative uncertainty and bias risks previously described. Such clauses also implicitly waive any advantage a party would otherwise have in a court proceeding, such as a class action and jury trial.[66] The risk that an arbitration or court proceeding will be incompetently administered or biased in favor of a party is mitigated by choosing an arbitral system or courts that are reputed for their independence, neutrality, and efficient and fair application of the rules. The federal and state courts in New York and the English courts are reputedly examples of such fora for commercial disputes. The International Chamber of Commerce, the London Court of International Arbitration, and the American Arbitration Association reputedly operate well-established and accepted arbitration regimes in international commercial and financial centers. Insofar as one party might be advantaged by uncertainty and bias in the administration of justice, it loses that advantage by the choice of an independent forum for dispute resolution. The arbitration agreement or an exclusive choice of forum clause also mitigate the risks that one or more of the parties will race to initiate litigation in a court most favorable to it, because the sole proceeding must be arbitration or in the chosen forum. The potential for delay that might result from the case being heard in a jurisdiction where delays are protracted will be minimized, if not avoided, by the choice of a forum, the procedural rules and administration of which mandate expeditious dispute resolution. The choice of arbitration under the auspices of a reputable arbitration regime, taken together with provisions for consolidation of related arbitration proceedings and the choice of the New York or English courts as the exclusive forum, mitigate the legal risks previously described.

The choice of forum and arbitration clauses can be a hazard for a party, for example, when a forum or tribunal slants the proceedings toward a party whom the selected judges and arbitrators favor. Similarly, the choice of an arbitral system or courts that are reputed to consistently decide in favor of a class is a hazard for the party not belonging to that class. It indicates a pattern of decision-making unfavorable to that party, even if the selected judges and arbitrators are not proven to have been biased in favor of, to have conflicts of interest favoring, or have been corrupted by the class that prevails.

The risk of multiple proceedings may be mitigated by choice of law and forum clauses and arbitration agreements expanded to include other aspects of the transaction not falling directly under the contract and by clauses that allow multiple proceedings to be consolidated.[67] An expanded choice of law clause, when enforceable, has the effect of directing the court or arbitrator to apply the law of the chosen jurisdiction and precluding the application of the rules of any other jurisdiction to their contract and other aspects of the transaction as to which claims are asserted. Just as a choice of law clause may be expanded to include claims associated with the transaction, such as misrepresentation, fraud, and concealment, an arbitration agreement and a choice of forum clause may be extended to noncontract claims associated with the transaction and potentially even unrelated claims.[68] If the arbitration agreement also allows one or more parties to consolidate additional arbitration proceedings, with other parties and under related contracts, the potential for multiple, conflicting court proceedings is mitigated.

Locating assets against which an arbitral award or court judgment can be enforced in the jurisdiction in which such award or judgment is likely to be issued mitigates the risk of having to initiate separate proceedings in the jurisdiction in which the assets would otherwise be located. The reverse is also possible: a party could agree to resolve disputes under a contract in the courts of the jurisdiction where the counterparty's assets are located. In doing so, however, the party may be foregoing the advantage of having the case heard in its home jurisdiction; it may also be assuming the risks that the procedural rules will favor the counterparty and that there may be bias and corruption in the local courts.

While tangible assets, such as plant and equipment, cannot be relocated to a party's preferred jurisdiction for resolving disputes, certain intangible assets can be. Cash, for example, can be deposited in bank accounts located in the jurisdiction where the creditor is located and prefers to have disputes resolved; and, in principle, a judgment against the obligor should be enforceable against such account. (Obtaining security over the account helps prevent third parties from imposing liens on and trumping the creditor's potential levying on such accounts. It may also provide recourse without having to obtain an arbitral award or judgment.) Ownership of tangible assets located in another jurisdiction may be vested in an entity incorporated in the jurisdiction in which dispute resolution proceedings are favored and the shares or other equity interests of such entity pledged to the creditor in that jurisdiction, enabling the creditor to indirectly enforce its arbitral award or judgment against those assets by levying against such shares or equity interests. If the law of the jurisdiction where the tangible assets are located requires that such assets be owned by an entity formed under that jurisdiction's law and those laws are unclear or tilted against the creditor, it might be possible for that entity to be owned by an intermediate entity formed under the law of still another jurisdiction so that the creditor's objective is achieved: it might have a pledge of shares of an entity formed under the laws of a jurisdiction whose substantive and procedural laws enable it to readily enforce an arbitral award or judgment against those shares. While such complexity creates its own risks—compliance with the laws of several jurisdictions, potential tax liability in more than one country, etc.—it indicates how the risk of multiple proceedings can be mitigated in transactions straddling more than one border.

---

1 99 Wn.2d 772, 666 P.2d 329 (Wash. 1983).

2 RCW 43.52.410; quoted in 99 Wn.2d 772, 783.

3 "The unconditional obligation to pay for no electricity is hardly the purchase of electricity. We hold that an agreement to purchase project capability does not qualify as a purchase of electricity." 99 Wn.2d 772, 784.

4 164 Cal. App.4th 1312, 80 Cal. Rptr.3d 275, 08 Cal. Daily Op. Serv. 9178, 2008 Daily Journal 10 (Cal. App. 2008).

5 *Id*. at 1327.

6 223 F.3d 382 (6th Cir. 2000).

7 Ky. Rev. Stat. Ann. § 371.065(1); quoted in 223 F.3d 382, 398-9. *See* Osborn v. Griffin, 865 F.3d 417, 443-4 (6th Cir. 2017), holding that Kentucky law should be applied.

8 223 F.3d 382, 389.

9 336 Md. 606, 650 A.2d 246 (Md. App. 1994).

10 "Subcontractor hereby waives and releases all liens or right of liens now existing or that may hereafter arise for any and all work or labor performed or material furnished under this Subcontract, upon said facility, or monies due or to become due to Contractor, and agrees to furnish a good and sufficient waiver of lien in proper form for filing from every person or entity furnishing labor or materials for this Project under Subcontractor." 336 Md. 606, 609, 650 A.2d 246, 247.

11 The circuit court dismissed NGI's petition for failure to state a claim upon which relief could be granted because the provision in the subcontract waiving the right to claim a mechanic's lien precluded NGI from obtaining a mechanic's lien. NGI filed a motion for reconsideration of the dismissal. That motion was denied. NGI appealed to the Court of Special Appeals. Prior to that court's consideration of this case, the Maryland Court of Appeals issued a writ of certiorari and dismissed the appeal. Following that dismissal, the circuit court dismissed NGI's petition with prejudice. NGI appealed that final order. The Maryland Court of Appeal reversed that order.

12 *See* text accompanying notes 1–3.

13 "Should property(ies) that are listed on Addendum "A" be located in a state other than the state of Washington then owner expressly acknowledges that they are not knowingly entering into an agreement which is illegal by contracting with real estate broker which is not licensed in state (sic.) where facilities are located. In addition, Client agrees to waive any such provision that would allow for a contest of fees based on the fact the Consultant is not licensed as a real estate broker in the state where facilities are located." Erwin v. Cotter Health Centers, Inc., 135 P. 3d 547, 550 (Wash. App. 2006); rev'd, aff'd 167 P.3d 1112 (Wash. 2007).

14 "By its plain terms, in broad, sweeping and unequivocal language, the guaranty forecloses any challenge to the enforceability and validity of the documents which establish defendant's liability for payments arising under the purchase agreement, as well as to any other possible defense to his liability for the obligations of the Agra businesses." Cooperatieve Centrale Raiffeisen-Boerenleenbank, B.A., & C. v. Navarro, 25 N.Y.3d 485, 494, 36 N.E.3d 80, 15 N.Y.S.3d 277, 2015 N.Y. Slip Op. 04753 (N.Y. 2015).

15 Bankers Trust Co. v. Litton Systems, Inc., 599 F.2d 488 (2nd Cir. 1979), where the lessor's assignment of photocopier leases provided the assignee's rights under the leases would be independent of any claims or offsets against the lessor.

16 "The Lessee's obligation to pay all rent and all other amounts due hereunder and to perform all the terms hereof shall be absolute and unconditional and shall not be affected or reduced by any circumstances, including . . . any set-off, counterclaim, recoupment, defense or other right which the lessee may have against the lessor." Wells Fargo Bank Nw. v. TACA Int'l Airlines, 247 F. Supp. 2d 352, 355 (S.D.N.Y.2003).

17 Cooperatieve Centrale Raiffeisen-Boerenleenbank, B.A., & C. v. Navarro, 25 NY 3d 485, 36 NE 3d 80, 15 NYS 3d 277 (N.Y. 2015); Citibank, N.A. v. Plapinger, 66 N.Y.2d 90 (N.Y. 1985).

18 *See* text accompanying notes 6–8.

19 *See* text accompanying notes 4 and 5.

20 *See* text accompanying notes 9–11.

21 *E.g.*, Hodes v. S.N.C. Achille Lauro, 858 F.2d 905 (3d Cir. 1988), where the plaintiff, a passenger on a vessel, unsuccessfully contended her claims arising out of the death of her husband while aboard the vessel should not be subject to Italian law or heard in an Italian court, as provided in the contract, because, inter alia, the Italian court would enforce the $10,000 limitation on the vessel owner's liability to passengers.

22 *E.g.*, "If the loan secured by this Security Instrument is subject to a law which sets maximum loan charges, and that law is finally interpreted so that the interest or other loan charges collected or to be collected in connection with the loan exceed the permitted limits, then: (a) any such loan charge shall be reduced by the amount necessary to reduce the charge to the permitted limit; and (b) any sums already collected from Borrower which exceeded permitted limits will be refunded to Borrower. Lender may choose to make this refund by reducing the principal owed under the Note or by making a direct payment to Borrower. If a refund reduces principal, the reduction will be treated as a partial prepayment without any prepayment charge under the Note." Robert Joseph Phillips Living Trust v. Scurry, 988 S.W.2d 418, 420 (Tex. App. 1999).

23 *E.g.*, Robert Joseph Phillips Living Trust v. Scurry, 988 S.W.2d 418 (Tex. App. 1999), where the court held the savings clause applied to reduce the rate of interest and preserved the validity of the promissory note.

24 *E.g.*, Richard P. Rita Personnel Services Int'l, Inc. v. Kot, 229 Ga. 314, 191 S.E.2d 79 (Ga. 1972), refusing to reform the covenant not to compete to make it valid.

25 *E.g.*, "Any provision of this Lease which is prohibited or unenforceable in any jurisdiction shall, as to such jurisdiction, be ineffective to the extent of such prohibition or unenforceability, without invalidating the remaining provisions hereof. To the extent permitted by applicable law, Lessee hereby waives any provision of law which prohibits or renders unenforceable any provision hereof in any respect." Frankenmuth Mutual Insurance Company v. Escambia County, Florida, 289 F.3d 723, n.8 (11th Cir. 2002).

26 *E.g.*, Frankenmuth Mutual Insurance Company v. Escambia County, Florida, 289 F.3d 723 (11th Cir. 2002), where a computer lease provided the lease would terminate if the county lessee failed to appropriate funds to pay the rent and the county would not lease or purchase substitute equipment for the remainder of that and the following appropriation period. After the county comptroller, who approved and signed the lease, was fired and charged with malfeasance in connection with the lease, the county clerk who replaced him repudiated the lease, claiming the nonsubstitution clause was invalid under the state constitution and rendered the lease invalid. The court held the inclusion of the severability clause demonstrated the parties' intent that clauses were severable, and the nonsubstitution clause did not go to the essence of the lease. *Id*. at 729.

27 190 F. Supp. 116 (S.D.N.Y. 1960).

28 *See* text accompanying ch. 1, notes 3–14.

29 2 Hurl. & C. 906, 159 Eng. Rep. 375 (Ex. 1864).

30 *E.g.*, Hume v. U.S., 132 U.S. 406, 10 S. Ct. 134, 33 L. Ed. 393 (1889), where a printed form stated the price per pound, the reference to per pound was to be struck and replaced with per shuck, but the change was not made. The contractor claimed it was entitled to 60 cents per pound as stated in the contract, notwithstanding that the price was 40 times the market value of the corn.

31 109 26 Cal.4th 261, 27 P.3d 702, Cal. Rptr.2d 807 (2001).

32 The municipal court held the newspaper advertisement for an automobile was a valid contractual offer that the customer could accept by tendering payment of the advertised price, but in the present case there was no valid offer because defendant's unilateral mistake of fact negated the dealer's intent. The appellate department reversed the judgment for the defendant. The appeal court agreed with the appellate department's holding. The California Supreme Court reversed, holding that while the advertisement would ordinarily be an offer the buyer could accept, the mistake in the advertisement negated the dealer's intent to offer the car at the advertised price. While it was true the dealer had failed to proofread the advertisement and such "an omission might constitute negligence, it does not involve a breach of defendant's duty of good faith and fair dealing that should preclude equitable relief for mistake." *Id*. at 831.

33 37 Cal.2d 696 (Cal. 1951).

34 Two days after the bids were opened, the contractor discovered its omission and withdrew its bid. The bid terms included a provision that stated, "After bids have been opened and declared, except with the consent of the officer, board or City Council having jurisdiction over the bidding, no bid shall be withdrawn. . . ." Nonetheless, the contractor was allowed to cancel its bid. The board refused to allow, and the contractor sued for, cancellation of the bid. The trial court held in favor of the contractor and the California Supreme Court affirmed, holding, "There is no reason for denying relief on the ground that the city cannot be restored to status quo. It had ample time in which to award the contract without readvertising, the contract was actually awarded to the next lowest bidder, and the city will not be heard to complain that it cannot be placed in status quo because it will not have the benefit of an inequitable bargain." *Id*. at 703.

35 In City of Newport News v. Doyle and Russell, Inc., 211 Va. 603 (Va. 1971), the contractor discovered a $100,000 error in his concrete bid and sought to withdraw his bid after the agency had opened the bids. Referring to the quoted clause, the Virginia Supreme Court held the contractor was bound by its bid. "The quoted language is not limited to a mistake of judgment. It plainly means any mistake in the bid, and includes a mechanical mistake. Thus, it was within the contemplation of the parties that the risk of mistake in the bid was to be borne by the bidder. Manifestly, the purpose of the quoted language was to avoid the precise claim now advanced by the defendants [bidder]." *Id*. at 607. But not all courts reach this result. For example, the regulations applicable to the bids in M. J. McGough Co. v. Jane Lamb Memorial Hospital, 302 F. Supp. 482 (S.D. Iowa 1969), stated, "Negligence on the part of the bidder in preparing the bid confers no right for the withdrawal of the bid after it has been opened." *Id*. at 487. The court, citing a number of cases, held, "It is sufficient to say that provisions such as these have been considered many times in similar cases and have never been held effective when equitable considerations dictate otherwise." *Id*.

36 The court characterized the mistake as one of fact and allowed the contractor to withdraw the bid. "As we have seen, such a bid is in the nature of an irrevocable offer or option, but the offer is subject to rescission upon proper equitable grounds, and the cases recognize no distinction between public and private contracts with regard to the right of equitable relief." 37 Cal.2d 696, 704.

37 856 F.2d 361 (1st Cir. 1988).

38 *Id*. at 364.

39 When the utility billed the municipal customers, the latter filed a complaint with the Federal Energy Regulatory Commission for an order declaring such charges impermissible and ordering a refund of those of such charges paid. The commission ruled in favor of the municipal customers, the utility petitioned for a rehearing, the commission denied the motion, and the appeal court affirmed the commission's ruling.

40 Reconciling this provision and the omission of the interest on additional equipment, the court said, "It is true that the parties clearly meant that BECO re-cover all costs as defined in the Contract. There is nothing in the language of the introductory paragraph, however, which exhibits any collective desire to contravene the plain wording of the payment equation and the financing formula, or to treat PAI differently than other items of investment expense." *Id*. at 366.

41 *E.g*., Balistreri v. Nevada Livestock Production Credit Association, 262 Cal. Rptr. 862, 214 Cal.App.3d 635 (Cal. App. 1989), where mortgagors failed to read the deed of trust in which they encumbered one property believing they were encumbering a different property. The trial judge held in favor of the mortgagees in an action to cancel the deed of trust, but the appeal court reversed, holding the mortgagees mistakenly induced the mortgagors to believe they were encumbering the property they expected to encumber, notwithstanding that they had not read the deed of trust. The mortgagors' expectations of the property to be encumbered did not match the deed of trust, which was clearly described the property and did match the mortgagee's expectations. The mortgagee's expectation was thus mistaken.

42 Puretest Ice Cream, Inc. v. Kraft, Inc., 806 F.2d 323 (1st Cir. 1986), where the franchisor's representative told a potential franchisee that "[w]e want you to retire in the business and we want your children to retire in the business." The franchisee claimed the term barred the franchisor from terminating the franchise. The term was held, construed most favorably to the franchisee, to mean the franchise continued indefinitely; it could be terminated at will under Indiana law, which applied. No cause was required for the exercise of such termination right.

43 National Utility Service v. Whirlpool Corp., 325 F.2d 779 (2nd Cir. 1963); National Utility Service v. Northwestern Steel and Wire Co., 426 F.2d 222 (7th Cir. 1970); National Utility Service v. J.R. Sexton, Inc., 1989 W.L.R. 343048 (D. Conn. 1989); National Utility Service v. Callahan Mining Corp., 799 F. Supp. 1004 (N.D. Cal. 1990); National Utility Service v. Blue Circle, Inc., 739 F.2d 52 (2nd Cir. 1992); National Utility Service v. Sunshine Biscuits Inc., (N.J. App. 1997); and National Utility Service v. Chesapeake Corp., 45 F. Supp.2d 438 (D.N.J. 1999).

44 National Utility Service v. Callahan Mining Corp., 799 F. Supp. 1004, 1005.

45 National Utility Service v. Whirlpool Corp., 325 F.2d 779, 780; National Utility Service v. Chesapeake Corp., 45 F. Supp.2d 438, 442.

46 National Utility Service v. Whirlpool Corp., 325 F.2d 779, 781.

47 National Utility Service v. Chesapeake Corp., 45 F. Supp.2d 438, 453.

48 National Utility Service v. Callahan Mining Corp., 799 F. Supp. 1004, 1005.

49 National Utility Service v. J.R. Sexton, Inc., 1989 W.L.R. 343048, 2.

50 National Utility Service v. Blue Circle, Inc., 739 F.2d 52, 55.

51 *See* text accompanying notes 37–40.

52 *See* text accompanying notes 31 and 32.

53 *See* text accompanying notes 33 and 34.

54 *E.g.*, "No plea of mistake in the bid shall be available to the Bidder for the recovery of his deposit or as a defense to any action based upon the neglect or refusal to execute a contract." City of Newport News v. Doyle and Russell, Inc., 211 Va. 603, 604 (Va. 1971). The charter of the City of Los Angeles stated, in part, "After bids have been opened and declared, except with the consent of the officer, board or City Council having jurisdiction over the bidding, no bid shall be withdrawn, but the same shall be subject to acceptance by the city for a period of three months. . . ." 37 Cal.2d 696, 699, 235 P.2d 7 (Cal. 1951).

55 "The legal regime in The Kingdom of Saudi Arabia includes Sharia'ah principles that are often expressed in general terms, providing a Saudi Arabian adjudicatory body with considerable discretion as to how to apply such principles." Affidavit of Mohammed Al-Sheikh quoted in In re Aramco Services Co., No. 01-09-00624-CV., Tex. App. LEXIS 2069, 2010 WL 1241525 (Tex. App. 2010).

56 *E.g.*, Bhatnagar v. Surrendra Overseas Ltd., 52 F.3d 1220 (3d Cir. 1995), where the court acknowledged that the question of whether "extreme delay in an alternative forum renders that forum inadequate for purposes of assessing a forum non conveniens motion" was one of first impression. *Id*. at 1222.

57 616 F. Supp. 1200 (D. Minn. 1985), appeal den. 789 F.2d 632 (8th Cir. 1986).

58 "Previous decisions of Saudi Arabian adjudicatory bodies are not considered to establish a binding precedent for the decision of later cases; the principle of stare decisis is not accepted in The Kingdom of Saudi Arabia. In addition, decisions of various Saudi Arabian adjudicatory bodies are not generally or consistently indexed and collected in a central place or made publicly available." Affidavit of Mohammed Al-Sheikh quoted in In re Aramco Services Co., No. 01-09-00624-CV., Tex. App. LEXIS 2069, 2010 WL 1241525 (Tex. App. 2010).

59 Osorio v. Dole Food Co., 665 F. Supp.2d 1307, 1314–15 (S.D. Fla. 2009).

60 Sablic v. Armada Shipping Aps, 973 F. Supp. 745 (S.D. Tex. 1997), where the court dismissed a motion to dismiss an action filed by a Croatian seaman for an injury that occurred, and for which he was treated, in Colombia while unloading a Panamanianflagged vessel owned by a Panamanian corporation, operated by a Danish corporation, and chartered by a Connecticut corporation. The seaman's employment contract chose Croatian law and provided for disputes to be subject to the Croatian courts. "Croatia is a war-torn country that, while making great strides towards recovery, is simply too unstable for this Court to find it to be an adequate forum for Plaintiff's suit." *Id*. at 748.

61 *E.g.*, Karaha Bodas Company v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara, 364 F.3d 274, 294 (5th Cir. 2004); enforced Karaha Bodas Company v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara, 465 F.Supp.2d 283 (S.D.N.Y. 2006); aff'd 500 F.3d 111 (2nd Cir. 2007). Karaha Bodas Company (KBC), a project company, agreed in one contract with the state-owned oil and gas company, Perusahaan Pertambangan Minyak Dan Gas Bumi Negara (Pertamina), to develop, build, and operate a geothermal electricity generating plant, and with Pertamina in a second contract agreed to sell to the state-owned electricity generating, transmitting, and distributing company, Perusahaan Listrik Negara (PLN), the electricity generated by the plant. After the Indonesian government suspended the project, KBC initiated arbitration against Pertamina and PLN. Disputes under both contracts were to be resolved under the UNCITRAL rules in Geneva, Switzerland, although the contracts did not provide for consolidation of the claims thereunder. The arbitrators consolidated the claims, however; and Pertamina objected to the awards against it on this, among other grounds. The U.S. federal district court held the consolidation was valid in this instance: "Due to the integration of the two contracts and the fact that the Presidential Decrees, the consequences of which are at the origin of the dispute, affected both of them, the initiation of two separate arbitrations would be artificial and would generate the risk of contradictory decisions. Moreover, it would increase the costs of all the parties involved, an element of special weight in the light of difficulties faced by the Indonesian economy, to which counsel for [Pertamina] legitimately drew the Arbitral Tribunal's attention." 364 F.3d 274, 294 (2004).

62 *E.g.*, "This Agreement . . . shall be governed by, and construed in accordance with, the laws of the State of New York, without regard to conflict of laws principles." IRB-Brasil Resseguros, S.A. v. Inepar Investments, S.A., 20 N.Y.3d 310, 982 N.E.2d 609, 958 N.Y.S.2d 689, 2012 NY Slip Op 8669 (N.Y. 2012).

63 *E.g.*, Putnam Leasing Co., Inc. v. Pappas, 2014 NY Slip Op 24283, 46 Misc.3d 195, 995 N.Y.S.2d 457 (N.Y. App. 2014), where a Connecticut leasing company leased a car to a Connecticut resident but provided for the lease agreement to be governed by New York law and for disputes to be heard in the New York courts. The court held that, applying The Restatement (Second) of Conflict of Laws § 187(2), Connecticut, not New York, law should govern the lease. 46 Misc.3d at 202. The court noted an exception existed under General Obligations Law § 5-1401, which has "allow[ed] parties without New York contacts to choose New York law to govern their contracts" if the transaction "in the aggregate" involves "not less than two hundred fifty thousand dollars." The exception was inapplicable to the lease, however.

64 *E.g.*, "You and we retain any rights to self-help remedies, such as repossession. You and we retain the right to seek remedies in small claims court for disputes or claims within that court's jurisdiction, unless such action is transferred, removed, or appealed to a different court. Neither you nor we waive the right to arbitrate by using self-help remedies or filing suit." Sanchez v. Valencia Holding Co., 61 Cal.4th 899, 908, 190 Cal. Rptr.3d 812, 353 P.3d 741 (Cal. 2015).

65 *E.g.*, "It is agreed by and between the passenger and the Carrier that all disputes and matters whatsoever arising under, in connection with or incident to this Contract shall be litigated, if at all, in and before a Court located in the State of Florida, U.S.A., to the exclusion of the Courts of any other state or country." Carnival Cruise Lines, Inc. v. Shute, 499 U.S. 585, 587–88 (1991). "This note shall be construed in accordance with and governed by the laws of the state of New York. Maker irrevocably submits to the exclusive jurisdiction of the state and federal courts located in the state of New York to . . . settle any disputes, which may arise out of or in connection herewith and with the debt documents. . . ." VFS Financing, Inc. v. Elias-Savion-Fox, LLC, 2014 WL 676582, 73 F.Supp.3d 329, 337, 59 Employee Benefits Cas. 2473 (S.D.N.Y. 2014).

66 *E.g.*, "If a dispute is arbitrated, you will give up your right to participate as a class representative or class member on any class claim you may have against us including any right to class arbitration or any consolidation of individual arbitrations." Sanchez v. Valencia Holding Co., 61 Cal.4th 899, 908, 190 Cal. Rptr.3d 812, 353 P.3d 741 (Cal. 2015).

67 *E.g.*, "This Agreement was made and entered into in the State [of] Georgia and all rights and obligations of the parties hereto shall be governed by and construed in accordance with the laws of the State of Georgia." Banek, Inc. v. Yogurt Ventures U.S.A., Inc., 6 F.3d 357, 359 (6th Cir. 1993). The court held the choice of law clause was broad enough to cover the related franchisee's fraud and misrepresentation

claims. “Had these claims only been tangentially related to the franchise relationship, we would be much more inclined to find the choice of law provision not applicable. The claims of fraud and misrepresentation that plaintiff has asserted here are directly related to the franchise agreement.” *Id*. at 363.

68 The following clause was included in a bank account agreement: “Any dispute regarding whether a particular controversy is subject to arbitration, including any claim of unconscionability and any dispute over the scope or validity of this agreement to arbitrate disputes or of this entire [customer] Agreement, shall be decided by the arbitrator(s).” The court held the clause was broad enough to warrant allowing the arbitrator to decide if a tort claim for an injury to the plaintiff was subject to arbitration even though she had closed her account three years before her injury. Hawkins v. Region’s, 944 F. Supp.2d 528, 530 (N.D. Miss 2013).