KEY POINTS

- English courts recognise contractual estoppel. New York courts do not recognise that doctrine *per se*, but they achieve similar results by dismissing claims that conflict with contractual representations made in arm's length negotiations.
- Both English and New York courts limit the liability of contracting parties for negligent misrepresentation.
- Unlike English courts, New York courts recognise an implied duty of good faith, but that duty is mostly toothless in commercial disputes between sophisticated parties.

Spotlight

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Limiting liability in London and New York: different doctrines serving the same aim

This article compares the English and New York approach to contract interpretation and to three doctrines that bear on commercial liability: contractual estoppel, negligent misrepresentation and the duty of good faith.

London and New York have long dominated the financial services market, not least because their courts have developed a body of commercial law that fosters predictability for contracting parties and favours defendant financial institutions. This article examines how English and New York courts limit commercial liability, comparing their approach to contract interpretation, contractual estoppel, negligent representation, and the duty of good faith. The focus is on contract and tort cases involving sophisticated parties, rather than cases involving consumers or arising under legislation such as the securities laws.

Overall English and New York courts honour party autonomy, staying close to contract terms and seldom permitting parties to circumvent those terms by suing in tort. Although both court systems construe contracts similarly, practitioners should bear in mind some key doctrinal differences in how those courts approach commercial disputes.

CONTRACT INTERPRETATION

The common law of England and New York evince a strong ethos of freedom of contract in commercial dealings. Courts in both jurisdictions respect party autonomy by giving effect to contract terms and assuming that parties can look after their own interests in negotiating a deal.

Lord Collins articulated the English position in *Belmont Park Investments Pty Ltd v BNY Corp Trustee Services Ltd*:[1]

> "[103] Despite statutory inroads, party autonomy is at the heart of English commercial law. . . . [I]t is desirable that, so far as possible, the courts give effect to contractual terms which parties have agreed."

Deference to party autonomy is at its zenith when disputes arise "between properly advised parties of comparable bargaining power": *Cavendish Square Holding BV v El Makdessi*.[2] In what is perhaps the seminal case in modern times reaffirming the import of party autonomy in the financial markets, Lord Mance stated:

> "The assumption on which most business is conducted is that both parties understand, or avail themselves of advice about, the area in which they are operating and the documentation which they use. Business could not otherwise be carried on." *Bankers Trust International PLC v PT Dharmala Sakti Sejahtera*.[3]

New York takes a similar tack:

> "Freedom of contract prevails in an arm's length transaction between sophisticated parties such as these, and in the absence of countervailing public policy concerns there is no reason to relieve them of the consequences of their bargain." *2 Broadway LLC v Credit Suisse First Boston Mortgage Capital LLC*.[4]

New York law goes so far as to impose an affirmative duty on sophisticated parties to protect themselves from misrepresentations by obtaining prophylactic warranties or investigating the details of the transaction: *Global Minerals & Metals Corp v Holme*.[5] Thus, like English courts, New York courts honour party autonomy by assuming parties can fend for themselves: see *Oppenheimer & Co v Oppenheim, Appel, Dixon & Co*[6] ("If [parties] are dissatisfied with the consequences of their agreement, the time to say so was at the bargaining table.").

In practice, party autonomy means contracting parties are free to agree to the terms they wish, and courts respect that freedom by giving effect to those terms. As a result, English and New York courts are reluctant to make assumptions as to what the parties intended (unless evident from the meaning of the words themselves): see *Re Lehman Bros International (Europe) (In Administration)*;[7] *Beal Savings Bank v Sommer*.[8] That is not to say that courts construing contracts in London or New York are restricted to the terms' dictionary definitions. They instead construe the terms in a manner consonant with the commercial context: compare *Investors Compensation Scheme Ltd v West Bromwich Building Society*[9] (instructing courts to emphasise not only the literal meaning of words, but also what "the parties using those words against the relevant background would reasonably have been understood to mean"), with *Michaels v City of Buffalo*,[10] (instructing courts to "consider [ ] the matter from the perspective of the ordinary business person making an ordinary business contract").

Given the primacy of party autonomy, courts in both systems are wary of implying terms in commercial contracts negotiated at arm's length: compare *Irish Bank Resolution Corp Ltd v Camden Market Holdings Corp & Ors*[11] (reaffirming the "cardinal rule" that an implied term cannot contradict an express term, and expressing reluctance to imply

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terms in a carefully drafted commercial contract even absent a conflict between implied and express terms), with *Reiss v Financial Performance Corp*,[12] ("[C]ourts may not by construction add or excise terms, nor distort the meaning of those used and thereby make a new contract for the parties under the guise of interpreting the writing.").

Although English and New York courts share an affinity for party autonomy and construe commercial contracts similarly, they differ on several doctrines bearing on commercial liability.

CONTRACTUAL ESTOPPEL

The English Commercial Court has developed a doctrine of contractual estoppel, under which parties can stipulate a basis of contracting which they are estopped from denying – even if that stipulated basis flies in the face of the real-world facts. Moore-Bick LJ articulated the rationale in *Peekay Intermark Ltd v Australia and New Zealand Banking Group Ltd*,[13] which involved an investor claim arising from the Russian government's moratorium on foreign debt repayments:

> "There is no reason in principle why parties to a contract should not agree that a certain state of affairs should form the basis for the transaction, whether it be the case or not. For example, it may be desirable to settle a disagreement as to an existing state of affairs in order to establish a clear basis for the contract itself and its subsequent performance. Where the parties express an agreement of that kind in a contractual document neither can subsequently deny the existence of the facts and matters upon which they have agreed, at least so far as concerns those aspects of their relationship to which the agreement was directed. The contract itself gives rise to an estoppel."

Put simply, if a party assents to a given state of affairs in a contract, it is barred from asserting claims that conflict with that state of affairs. If for instance a party agrees that it has not been induced to enter a contract by any representations other than those in the contract itself, it is estopped from asserting it was induced by an extracontractual misrepresentation. Of course, parties executing agreements under English and New York law have long limited liability by including similar provisions – for example, the contract comprises the entire agreement between the parties; there have been no representations other than those set out in the contract; or the parties have not relied on any other representations in entering into the contract. But courts applying contractual estoppel construe such provisions not as exclusion clauses that exempt a party from liability, but rather as factual bases for nonliability, even if those "facts" are untrue. What's more, defendants can invoke contractual estoppel without proving detrimental reliance or that it would be inequitable to excise the provision from the contract, which makes contractual estoppel easier to establish than defences like evidential estoppel.

Although the Supreme Court of the United Kingdom has yet to consider contractual estoppel, and although controversial among commentators, the doctrine received a ringing endorsement from Andrew Smith J in *Creditsuisse International v Stichting Vestia*,[14] describing Moore-Bick LJ's above-quoted statement as "widely accepted as an authoritative statement of the principle of law that has in recent years been dubbed 'contractual estoppel'". And it has been applied a number of times in cases involving banks: eg *Springwell Navigation Corp v JP Morgan Chase Bank*;[15] *Raiffeisen v RBS*;[16] *Titan Steel v RBS*.[17] So it seems settled that contracting parties cannot deny the existence of facts to which they have agreed, even if those facts prove to be demonstrably false. New York has not adopted the doctrine of contractual estoppel *per se*: see *Schepis v Local Union No 17, United Brotherhood of Carpenters & Joiners of Am*.[18] But courts give effect to contractual representations that operate like contractual estoppel in some instances. For example, in *HSH Nordbank AG v UBS AG*[19] – an action in fraud on what was essentially a credit default swap transaction – the appellate court denied the plaintiff's misrepresentation claim because it had disclaimed reliance on extracontractual representations at the time of contracting. The court reasoned:

> "[t]o permit HSH to sue UBS for fraud based on extracontractual representations concerning the risk level of the notes would in effect condone [HSH's] own fraud in deliberately misrepresenting its true intention when it disclaimed reliance on any such representations at the time of contracting": 941 NYS at 70; see also *Citibank v Plapinger*,[20] ("[T]he substance of defendants' guarantee forecloses their reliance on the claim that they were fraudulently induced to sign the guarantee by the banks' oral promise of an additional line of credit. To permit that would in effect condone defendants' own fraud in deliberately misrepresenting their true intention when putting their signatures to their absolute and unconditional guarantee.") (citing *Danann Realty Corp v Harris*[21]).

It is unclear whether the doctrine at play in these cases is waiver, estoppel, or something else. In any event, New York courts give effect to contractual representations of non-reliance between sophisticated parties, yielding results akin to contractual estoppel. Although they apply different doctrines, the English and New York approach to contractual representations is intended to promote predictability in commercial dealings.

NEGLIGENT MISREPRESENTATION

English and New York courts also foster predictability by limiting cases in which financial institutions can be held liable for negligent misrepresentation in dealings with sophisticated parties. Negligence liability can undermine contractual certainty because it enables claims by parties who have no contract with the defendant institution. But both English and New York law lay down a hard road to liability.

Under English and New York law, a party claiming negligent misrepresentation must establish a duty of care. There are two approaches under English law to determine if that duty exists. The first considers whether the defendant has assumed a special

responsibility to the claimant: *Hedley Byrne v Heller & Partners*.[22] The other approach is a threefold test set out in *Caparo Industries v Dickman*:[23]

- whether loss to the claimant was a reasonably foreseeable consequence of what the defendant did or failed to do;
- whether the relationship between the parties was sufficiently close; and
- whether it is fair, just and reasonable to impose a duty of care on the defendant towards the claimant. (If established, a claimant must also prove breach, causation, and foreseeable loss.) Both approaches were applied recently in *Playboy Club London v Banca Nazionale del Lavoro SPA*.[24]

English caselaw makes clear that in the context of financial dealings, contracting parties can prevent a duty of care from arising under either approach – thus insulating themselves from negligence liability – by stating plainly in the contract that this was not intended. In *IFE Fund SA v Goldman Sachs International*,[25] Waller LJ characterised as "hopeless" the "argument that there was some free-standing duty of care", explaining "where the terms on which someone is prepared to give advice or make a statement negatives any assumption of responsibility, no duty of care will be owed".

Even when a duty of care has arisen, the claim may nonetheless fail because courts are wont to delimit the duty's scope: see *In Torre Asset Funding Ltd v Royal Bank of Scotland Plc*[26] In *Torre*, a property investment company collapsed during the financial crisis. It had been funded through several interrelated agreements, including a loan facility agreement and an inter-creditor deed which governed the relationship between lenders at different tiers in the structure. The bank was the agent bank at the mezzanine level and Torre one of the funders at that level. With the collapse Torre was left empty handed. It advanced various claims against the bank, but as regards the collapse, the court held that as agent the bank owed no duties to Torre beyond what could be found in the agreement and inter-creditor deed. As a matter of construction of those contracts the bank's duties were "solely mechanical and administrative in nature". There was a separate claim related to an attempted restructuring before the collapse, and Sales J held that the bank had given Torre an inaccurate and misleading account of the facts: [184]-[185]. However, the claim failed because the scope of the bank's duty was limited to a proposal for Torre to consent to the roll-up of certain interest to maturity. Because the loss for which Torre sought recovery was unrelated to that roll-up, "the negligent misstatement claim fail[ed] by reason of limits upon the scope of the duty of care": [188].

New York courts also keep a tight leash on liability for negligent misrepresentation by requiring plaintiffs to establish a special relationship: see *Financial Guaranty Insurance Co v Putnam Advisory Co, LLC*:[27] *("*"Under New York law, such a duty exists in the commercial context when the relationship of the parties, arising out of contract or otherwise, is such that in morals and good conscience the one has the right to rely upon the other for information.") Generally, "a special relationship does not arise out of an ordinary arm's length business transaction between two parties": *OP Solutions, Inc v Crowell & Moring, LLP*.[28] Cautious parties avoid creating special relationships by writing into the contract that they are dealing with the counterparty at arm's length, they are not acting as the counterparty's adviser, and the counterparty is not relying on any advice they may give: *Nordbank*, 941 NYS at 76. New York courts also hold that when sophisticated parties are involved, the superior knowledge of one does not, without more, create the relationship that negligence demands: *MBIA Ins Corp v Countryside Home Loans, Inc*.[29] Financial institutions concerned about the prospect of negligence suits by third parties may take solace knowing that New York sets a high bar to establish the requisite relationship: see *Anschutz Corp v Merrill Lynch & Co*.[30] The *Anschutz* case involved two sets of claims: one regarding the issuance of securities, and another against the agencies that had rated those securities. Anschutz alleged that those ratings were false and misleading. But because Anschutz did not allege "any direct contact between Anschutz and the Rating Agencies", the court found "no relationship or contact with the Rating Agencies that could remotely satisfy the New York standard" for negligent misrepresentation: 690 F3d at 114-15.

In one case the Second Circuit Court of Appeals reversed the dismissal of a negligent representation claim by a third party: see *Bayerische Landesbank v Alladin Capital Management LLC*.[31] Bayerische had invested $60m in a collaterised debt obligation that Alladin marketed and managed. Bayerische and Alladin were not in privity of contract, but the appellate court ruled that their relationship was sufficiently close because Bayerische relied on representations Alladin made in marketing materials and at face-to-face meetings. Lest financial institutions fear the implications of *Bayerische*, it is worth noting that the Second Circuit did not decide the merits of the negligence claim – it merely permitted it to proceed. Nor did the appellate court appreciably lower the bar for third parties to establish a special relationship. In fact, recent cases have distinguished *Bayerische* and found no special relationship: see *US Bank National Association v BFPRU I LLC*;[32] *Barton v Smartstream Technologies, Inc*.[33] Thus, both English and New York courts promote predictability in commercial dealings by limiting negligence liability for sophisticated parties and permitting them to avoid liability *vis-à-vis* a counterparty by disclaiming in the contract or by notice, any duty of care.

GOOD FAITH

Despite their shared preference for party autonomy and contractual certainty, English and New York courts take opposing approaches to the duty of good faith. English courts are hostile to the duty of good faith on the basis that such a sweeping duty could undermine party autonomy and predictability. It is said that English courts prefer "piecemeal solutions in response to demonstrated problems of unfairness". *Interfoto Picture Library Ltd v Stiletto Visual Programmes Ltd*.[34] There was some softening of this stance by Leggatt J in *Yam Seng Pte Ltd v International Trade Corporation Ltd*[35]

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– the "traditional English hostility towards a doctrine of good faith in the performance of contracts, to the extent that it still persists, is misplaced" – but that was short lived: see *MSC Mediterranean Shipping Co SA v Cottonex Anstalt*;[36] *Mid Essex Hospital Services NHS Trust v Compass Group UK and Ireland Ltd (trading as Medirest)*.[37] In *MSC*, Moore-Bick LJ stated that adopting a duty of good faith could have "far-reaching consequences", including "a real danger that ... it would be invoked as often to undermine as to support the terms in which the parties have reached agreement": [45]. As it stands, parties to commercial contracts governed by English law need not fear liability for breaching an implied duty of good faith.

By contrast, New York was the first of the US to adopt the duty of good faith and has recognised the duty for over a century: *Wigland v Bachmann-Bechtel Brewing Co*[38] ("Every contract implies good faith and fair dealing between the parties to it."). The duty of good faith "precludes each party from engaging in conduct that will deprive the other party of the benefits of their agreement", *Leberman v John Blair & Co*[39] and it is violated if "a party to a contract acts in a manner that, although not expressly forbidden by any contractual provision, would deprive the other of the right to receive the benefits under the agreement", *Don King Products, Inc v Douglas*.[40] Although the duty bars actions not expressly forbidden by the contract, it "cannot be used to add to a party's substantive obligations or to contradict express terms of the agreement": *Higgs v Columbia Univ*.[41]

In practice, the duty of good faith is fairly toothless. New York courts routinely dismiss claims sounding in good faith as duplicative of breach-of-contract claims: see *MBIA Insurance Corp*;[42] *Logan Advisors, LLC v Patriarch Partners, LLC*.[43] And in the commercial context, the duty of good faith will not rescue a sophisticated party from the consequences of its bargain: *Reiss*.[44] Thus, the covenant of good faith is a dull sword for commercial plaintiffs. It is better understood as an interpretative aid courts use to protect promises against "breach of the reasonable expectations and inferences otherwise derived from the agreement": *TVT Records and TVT Music, Inc v The Island Def Jam Music Group*.[45]

CONCLUSION

Commercial law in England and New York is hard law, comprising bright-line rules which generally favour defendant financial institutions and put hurdles in the way of plaintiffs. To be sure, the two jurisdictions have doctrinal differences, most of which are beyond the scope of this article. But the commercial law of England and New York are alike in that commercial claimants seeking to establish liability face a heavy burden. Although the result may seem harsh, the animating principle is certainty: compare *Vallejo v Wheeler*[46] ("In all mercantile transactions the great object should be certainty: and therefore, it is of more consequence that a rule should be certain, than whether the rule is established one way or the other. Because speculators in trade then know what ground to go upon."), with *Banque Worms v BankAmerica International*[47] (explaining the importance of "guarding the security and certainty of business transactions, since to hold otherwise would obviously introduce confusion and danger into all commercial dealings."). Is it any coincidence that London and New York remain leading global hubs for financial services? ■

1 [2011] UKSC 38; [2012] 1 AC 383.
2 [2015] UKSC 67, [2016] 3 AC 1172, at [35] (Lords Neuberger and Sumption).
3 [1996] CLC 518, 531.
4 2001 WL 410074, at *7 (SDNY Apr 23, 2001).
5 824 NYS2d 210, 215-16 (NY App Div 2006).
6 86 NY2d 685, 695 (NY 1997).
7 [2013] EWCA Civ 188, [2014] 2 BCLC 451.
8 8 NY3d 318, 324 (NY 2007).
9 [1988] 1 WLR 896, 913 (HL).
10 85 NY2d 754, 757 (NY 1995).
11 [2017] EWCA Civ 7, [2017] 2 All ER (Comm) 781.
12 97 NY2d 195, 199 (NY 2001).
13 [2006] EWCA Civ 386.
14 [2014] EWHC 3013 (Comm).
15 [2008] EWHC 1186, [2010] EWCA Civ 1221.
16 [2010] EWHC 1392 (Comm).
17 [2010] EWHC 211.
18 989 FSupp 511, 517 (SDNY 1998).
19 941 NYS 2d 59 (NY App Div 2012).
20 66 NY2d 90, 95 (NY 1985).
21 184 NY2d 317, 323 (NY 1959).
22 [1964] AC 465.
23 [1990] 2 AC 605.
24 [2018] UKSC 43, [2018] 1 WLR 4041.
25 [2007] EWCA Civ 811, [2007] 2 Lloyd's Rep 449.
26 [2013] EWHC 2670 (Ch).
27 783 F3d 395, 405 (2d Cir 2015).
28 900 NYS2d 48, 49 (NY App Div 2010).
29 928 NYS 2d 229, 235–36 (NY App Div 2011).
30 690 F3d 98 (2d Cir 2012).
31 692 F3d 42, 46 (2d Cir 2012).
32 230 FSupp3d 253, 269 (SDNY 2017).
33 2016 WL 2742426, at *6 (SDNY May 9, 2016).
34 [1989] QB 433 (Bingham LJ).
35 [2013] EWHC 111 (QB).
36 [2016] EWCA 789.
37 [2013] EWCA Civ 200.
38 222 NY 272 at 277 (NY 1918).
39 880 F2d 1555, 1560 (2d Cir 1989).
40 742 FSupp 741, 767 (SDNY 1990).
41 2009 WL 77880, at *12 (SDNY Jan 5 2009).
42 928 NYS2d at 236.
43 879 NYS2d 463, 466–67 (NY App Div 2009).
44 97 NY2d at 200.
45 244 FSupp2d 263, 278 (SDNY 2003).
46 (1774) 1 Cowp 143, 153 (Mansfield CJ).
47 77 NY2d 362, 372–73 (NY 1991).

Further Reading:

- Globalisation of the European loan markets: interpretative challenges and pitfalls (2017) 3 JIBFL 143.
- English opinion letters on financial documents: reconciling the UK and US approaches in cross-border transactions (2017) 11 JIBFL 681.
- LexisPSL: Participation and syndicated loans: Intercreditor fiduciary duties for lead and agent banks under US law.