THE COMPLEX COMMERCIAL LITIGATION LAW REVIEW

Third Edition

Editor
Steven M Bierman

THE LAWREVIEWS

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PREFACE

I am privileged, once again, to be the editor of *The Complex Commercial Litigation Law Review*, now in its third edition. This expanded volume is published at a time when the world grows ever smaller and commercial relationships are the common currency that links countries and cultures across the globe. And, with apologies to the poet Robert Burns, because the best laid plans of commercial counterparties go oft awry, businesses and their legal counsel in every jurisdiction must be familiar not only with the law governing commerce but also must be keenly aware of the legal issues that most frequently arise in commercial disputes. This reality has only come into sharper focus in a year when the global covid-19 pandemic not only has ravaged public health and private lives but also has profoundly unsettled a vast array of commercial relationships, with as yet uncertain ultimate consequences.

I have had the good fortune to practise law for many years as a litigation partner of a global law firm, Sidley Austin LLP, in New York City, one of the world's great commercial and financial centres, and a crossroads where many significant and complex disputes are litigated and tried, whether in our US federal or state courts or arbitrated under the auspices of pre-eminent ADR providers. I also have had the pleasure of working alongside, or opposite, some of the most accomplished disputes practitioners anywhere, whether down the street or halfway around the world, in matters both domestic and cross-border in nature. In serving our respective clients, I would like to think that we have learned from each other, and have become better and more effective for the education. I know I have.

It is with that spirit and intention that we have assembled a truly distinguished roster of leading practitioners to contribute to this third edition, which expands once again the range of jurisdictions from those covered in earlier editions. The authors of this publication are from among the most widely respected law firms in their jurisdictions. Their practices run the gamut of complex commercial litigation experience, and the home jurisdictions about which they write span the world's geography. We hope you will find their experience invaluable and enlightening when dealing with issues arising in commercial litigation in your own experience or practice.

These authors practise in disparate legal systems under dissimilar procedural regimes. One of the great strengths and, we hope, utility, of this volume is that, notwithstanding these differences, we have asked the authors to report on core principles and recent developments in the law of their country concerning the same set of fundamentally important legal issues likely to feature in complex commercial disputes, wherever they may arise. These issues include contract formation and modification; contract interpretation; breach of contract; defences to enforcement; fraud, misrepresentation, and other claims impacting contracts; dispute resolution; and remedies. The emphasis is on the law and practice of each jurisdiction, but discussion of emerging or unsettled issues is included where appropriate.

Whether you are a corporate counsel, a business executive, a private practitioner or a government official, and whether you are facing litigation or arbitration of a commercial dispute, negotiating a contract with an eye toward minimising litigation risk, contemplating how best to prevent, manage, or resolve disputes, or simply interested in learning more about this important area of law as related by seasoned and savvy practitioners, we hope you will find this volume informative, instructive and enjoyable.

Steven M Bierman
Sidley Austin LLP
New York
November 2020

Chapter 25

WASHINGTON, DC AND VIRGINIA

Mark P Guerrera and Robert D Keeling[1]

I OVERVIEW

In this chapter we endeavour to describe many of the foundational, common law contractual doctrines in Virginia and Washington, DC (DC). We consider DC and Virginia together not just because of their geographical proximity, but also because there is substantial similarity between the two jurisdictions. In fact, their core doctrines are often identical – or, at least, nearly so. We have noted differences where they exist, but differences are the exception, not the rule.

This substantial commonality is, at first glance, surprising: DC is a small jurisdiction that does not have a detailed body of contract law, whereas Virginia is a large jurisdiction with a long-standing, well-developed body of contract law. The overlap we found is likely due in part to the fact that both jurisdictions have embraced the objective view of contracts – a development that colours a number of their contractual doctrines. The similarity is also partially due to the fact that courts in DC supplement their case law by relying heavily on the Restatement (Second) of Contracts and the laws of nearby jurisdictions. Because DC courts routinely rely on the Restatement, when Virginia has embraced a position taken in the Restatement (a relatively common occurrence), its views typically line up with those taken by DC.

One of the most notable similarities between the two jurisdictions bears mentioning at the outset. Both jurisdictions robustly enforce contractual duties and limit the availability of defences that can be used to set aside the terms of a valid agreement. As our discussion shows, this has significant consequences for parties litigating in DC and Virginia.

1 Mark P Guererra and Robert D Keeling are both partners at Sidley Austin LLP.

II CONTRACT FORMATION

i Elements

To enter into an enforceable contract in DC, the 'parties must (1) express an intent to be bound, (2) agree to all material terms, and (3) assume mutual obligations'.[2] Like many jurisdictions, including Virginia, DC follows the objective view of contracts.[3] Thus, both intent to be bound, and agreement to material terms, are objective inquiries.[4]

Intent to be bound hinges on whether the parties' 'choice of language . . . manifested a mutual intent to be bound contractually' – a requirement that is established through offer and acceptance.[5] Agreement to material terms is met when each party assents to 'the essential terms of the contract'.[6] Courts performing this analysis consider whether the parties' 'acts manifested agreement as to each material aspect of the [contract],' i.e., whether there was a 'meeting of the minds'.[7]

The third element, mutual obligations, 'exists when each party agrees to do something it otherwise is under no legal obligation to do, or to refrain from doing something it has a legal right to do'.[8] 'An exchange of promises provides sufficient consideration, evidencing mutual obligation'.[9]

The elements in Virginia are similar: 'there must be a complete agreement including acceptance of an offer as well as valuable consideration'.[10] 'Complete agreement' is the Virginia equivalent of 'meeting of the minds'.[11] Under Virginia's objective approach,[12] whether there was mutual assent (i.e., meeting of the minds) rests on the words and actions of the parties, not their 'unexpressed state[s] of mind'.[13]

ii Oral contracts

In both DC and Virginia, the 'proponent of an oral contract has the burden of proving all the elements of a valid and enforceable contract'.[14] Both jurisdictions will enforce an oral contract so long as it does not violate the statute of frauds and the essential elements of a contract

2 *Dyer v. Bilaal*, 983 A.2d 349, 356 (DC 2009).

3 *DSP Venture Grp., Inc. v. Allen*, 830 A.2d 850, 852 (DC 2003); *Phillips v. Mazyck*, 643 S.E.2d 172, 175 (Va. 2007) ('We ascertain whether a party assented to the terms of a contract from that party's words or acts, not from his or her unexpressed state of mind.'); *Commonwealth v. Stewart*, 66 Va. Cir. 135 (2004) ('[u]nder the objective theory of contract, which controls in Virginia').

4 See *Dyer*, 983 A.2d at 356-57; *Brooks v. Rosebar*, 210 A.3d 747, 751 (DC 2019).

5 *Dyer*, 983 A.2d at 357 (quoting *1836 S. St. Tenants Ass'n, Inc. v. Estate of B. Battle*, 965 A.2d 832, 837 (DC 2009)).

6 *Brooks*, 210 A.3d at 751 (quoting *Malone v. Saxony Coop. Apartments, Inc.*, 763 A.2d 725, 729 (DC 2000)).

7 id. (alteration to original).

8 *Dyer*, 983 A.2d at 357.

9 *EastBanc, Inc. v. Georgetown Park Assocs. II, L.P.*, 940 A.2d 996, 1003 (DC 2008).

10 *Snyder-Falkinham v. Stockburger*, 457 S.E.2d 36, 39 (Va. 1995); see also *Sfreddo v. Sfreddo*, 720 S.E.2d 145, 154 (Va. Ct. App. 2012).

11 See *Phillips*, 643 S.E.2d at 175.

12 See *Montagna v. Holiday Inns, Inc.*, 269 S.E.2d 838, 844 (Va. 1980); *Stewart*, 66 Va. Cir. 135.

13 *Phillips*, 643 S.E.2d at 175-76; *Stewart*, 66 Va. Cir. 135.

14 *Stewart*, 66 Va. Cir. 135; see *Dean v. Morris*, 756 S.E.2d 430, 433 (Va. 2014); see also *Ashrafi v. Fernandez*, 193 A.3d 129, 131 (DC 2018).

are satisfied.[15] Notably, courts considering whether an oral contract was formed frequently reference the burden of proof – often to the detriment of the party seeking enforcement.[16] They also vigilantly ensure 'all material terms' were agreed upon.[17]

iii Implied-in-fact contracts, unjust enrichment, and promissory estoppel

'An implied-in-fact contract is a true contract, containing all necessary elements of a binding agreement; it differs from other contracts only in that it has not been committed to writing or stated orally in express terms, but rather is inferred from the conduct of the parties in the milieu in which they dealt'.[18] DC law provides for recovery under an implied-in-fact-contract theory when '(1) valuable services [were] rendered [by the plaintiff]; (2) for the person sought to be charged; (3) which services were accepted by the person sought to be charged, and enjoyed by him or her; and (4) under such circumstances as reasonably notified the person sought to be charged that the plaintiff, in performing such services, expected to be paid'.[19] Virginia applies a slightly different standard: it will enforce an implied-in-fact contract if 'the typical requirements to form a contract are present,' and a contractual relationship can be inferred from 'consideration of [the parties'] acts and conduct'.[20]

Additionally, although it is not a contractual remedy, both jurisdictions provide that an aggrieved party may be able to recover under a theory of unjust enrichment. In DC, the plaintiff must show that he or she '(1) . . . conferred a benefit on the defendant; (2) the defendant retain[ed] the benefit; and (3) under the circumstances, the defendant's retention of the benefit is unjust.'[21] In Virginia, a plaintiff must show that '(1) he conferred a benefit on [the defendant]; (2) [the defendant] knew of the benefit and should reasonably have expected

15 See *Ashrafi*, 193 A.3d at 131; *Kramer Assocs., Inc. v. Ikam, Ltd.*, 888 A.2d 247, 251-52 (DC 2005); see also Va. Code Ann. § 11-2; *C. Porter Vaughan, Inc. v. DiLorenzo*, 689 S.E.2d 656, 660 (Va. 2010); *Dean*, 756 S.E.2d at 432.

16 See, e.g., *Kramer*, 888 A.2d at 251; *Dean*, 756 S.E.2d at 433. In certain contexts, such as trusts and estates and contracts to provide insurance, Virginia courts will require the proponent of an oral contract to show the existence of the contract through 'clear and convincing' evidence. See *Horace Mann Ins. Co. v. Gov't Emps. Ins. Co.*, 344 S.E.2d 906, 909 (Va. 1986) (holding burden was preponderance of evidence because contract was for settlement, not to provide insurance). Compare *Dean*, 756 S.E.2d at 434 (applying a clear and convincing standard), with *Stewart*, 66 Va. Cir. 135 (not applying a clear and convincing standard).

17 See, e.g., *New Econ. Capital, LLC v. New Mkts. Capital Grp.*, 881 A.2d 1087, 1094-96 (DC 2005); *Stansel v. Am. Sec. Bank*, 547 A.2d 990, 993 (DC 1988); *Dean*, 756 S.E.2d at 433.

18 *Boyd v. Kilpatrick Townsend & Stockton*, 164 A.3d 72, 81 (DC 2017) (internal quotations omitted); see *Spectra-4, LLP v. Uniwest Commercial Realty, Inc.*, 772 S.E.2d 290, 293 (Va. 2015).

19 *Fred Ezra Co. v. Pedas*, 682 A.2d 173, 176 (DC 1996) (second alteration in original) (internal quotations omitted); *Boyd*, 164 A.3d at 81. Somewhat confusingly, courts in DC often refer to implied-in-fact contract claims as quantum meruit claims. See, e.g., *Fred Ezra*, 682 A.2d at 176. They are referenced interchangeably because D.C. uses the term quantum meruit to encompass both implied-in-fact contracts and quasi-contractual duties, such as unjust enrichment, which is discussed later in this section. See id.; see also *New Econ. Capital, LLC*, 881 A.2d at 1095 ('Quantum meruit [claims] encompass[ ] both implied-in-law obligations ("quasi contracts") as well as implied-in-fact contracts.' (alterations in original) (internal quotations omitted)). In Virginia, on the other hand, quantum meruit is used in a narrower sense, to refer to the measure of recovery that is available when the plaintiff establishes the existence of an implied-in-fact contract. See *T. Musgrove Constr. Co., Inc. v. Young*, 840 S.E.2d 337, 341 (Va. 2020) (holing quantum meruit was not available where plaintiff failed to show the existence of an implied-in-fact contract).

20 *Spectra-4,* 772 S.E.2d at 295 (alteration in original) (internal quotations omitted).

21 *Peart v. DC Hous. Auth*., 972 A.2d 810, 813 (DC 2009) (internal quotations omitted).

to repay [the plaintiff]; and (3) [the defendant] accepted or retained the benefit without paying for its value'.[22] In other words, in Virginia, '[o]ne may not recover under a theory of implied contract simply by showing a benefit to the defendant, without adducing other facts to raise an implication that the defendant promised to pay the plaintiff for such benefit'.[23]

Unjust enrichment claims operate in the absence of a valid contract.[24] 'One who has entered into a valid contract cannot be heard to complain that the contract is unjust, or that it unjustly enriches the party with whom he or she has reached agreement.'[25] As an equitable remedy, unjust enrichment's use generally 'depends on whether it is fair and just for the recipient to retain the benefit, not on whether the person or persons who bestowed the benefit had any duty to do so'.[26]

Of the two, only DC recognises the doctrine of promissory estoppel.[27] In DC, the doctrine applies when a promise has been made to the plaintiff that (1) the plaintiff detrimentally relied on, and (2) that reasonably induced the plaintiff's reliance.[28] Like unjust enrichment, promissory estoppel is an equitable remedy.[29] Courts will only apply it if 'injustice otherwise [would] not [be] avoidable.'[30] Although 'injustice' is an inherently malleable standard, past decisions have shed some light on its contours. For example, the DC Court of Appeals has held that injustice is not otherwise unavoidable when a plaintiff has already been 'fully compensated' for the alleged injury.[31] Similarly, DC has also held that

22 *Schmidt v. Household Fin. Corp., II*, 661 S.E.2d 834, 838 (Va. 2008).

23 *Nedrich v. Jones*, 429 S.E.2d 201, 207 (Va. 1993) (citing *Mullins v. Mingo Lime & Lumber Co.*, 10 S.E.2d 492, 495 (Va. 1940)); see also *Fid. Nat'l Title Ins. Co. v. Wash. Settlement Grp., LLC*, 87 Va. Cir. 77 (2013) (noting this principle).

24 See *Falconi-Sachs v. LPF Senate Square, LLC*, 142 A.3d 550, 556 (DC 2016) (per curiam); *CGI Fed. Inc. v. FCi Fed.*, Inc., 814 S.E.2d 183, 190 (Va. 2018). Recently, the Virginia Supreme Court offered helpful guidance on the contours of when an unjust enrichment claim will be barred by a valid contract. *James G. Davis Constr. Corp. v. FTJ, Inc.*, 841 S.E.2d 642, 648 (Va. 2020). The Court observed that 'unjust enrichment is not precluded where a valuable performance has been rendered under a contract that is invalid, or subject to avoidance, or otherwise ineffective to regulate the parties obligations.' Id. (internal citation and quotations omitted). Applying those principles to the case at hand, the Court held that '[t]he expressly limited contract here does not foreclose a claim for unjust enrichment when that claim falls outside of the plain terms of the agreement.' Id.

25 *Falconi-Sachs*, 142 A.3d at 556 (internal quotations omitted); *CGI Fed.*, 814 S.E.2d at 190 ('The existence of an express contract covering the same subject matter of the parties' dispute precludes a claim for unjust enrichment.').

26 *Peart*, 972 A.2d at 814 (internal quotations omitted); see *Belcher v. Kirkwood*, 383 S.E.2d 729, 730 (Va. 1989) (noting equitable nature of unjust enrichment); *Po River Water & Sewer Co. v. Indian Acres Club of Thornburg, Inc.*, 495 S.E.2d 478, 482 (Va. 1998) (same); *Fid. Nat'l Title*, 87 Va. Cir. 77 (referring to claim for unjust enrichment as being based on 'equitable principles').

27 *Mongold v. Woods*, 677 S.E.2d 288, 292 (Va. 2009) ('In a trio of cases decided on the same day in 1997, we observed that . . . a [promissory estoppel] cause of action had never been held to exist in the Commonwealth and we expressly declined to create such a cause of action. We have not altered that position.' (internal citations omitted)). But see *Pierce v. Wells Fargo Bank*, 85 Va. Cir. 32 (2012) (calling it 'questionable' whether promissory estoppel is recognised in Virginia).

28 See *Simard v. Resolution Tr. Corp.*, 639 A.2d 540, 552 (DC 1994).

29 See *Moss v. Stockard*, 580 A.2d 1011, 1035 (DC 1990).

30 See *Kauffman v. Int'l Bhd. of Teamsters*, 950 A.2d 44, 49 n.7 (DC 2008) (alterations in original) (internal quotations omitted); *Bender v. Design Store Corp.*, 404 A.2d 194, 196 (DC 1979).

31 See *Moss*, 580 A.2d at 1034.

justice does not require use of a promissory estoppel claim when the estoppel claim merely 'restates' a breach of contract claim.[32] A promissory estoppel claim must, therefore, rely on a non-contractual promise to succeed.[33]

III CONTRACT INTERPRETATION

Because DC and Virginia follow the objective view of contracts, '[w]here the terms in a contract are clear and unambiguous, the contract is construed according to its plain meaning',[34] 'unless it is repugnant to some rule of law or public policy'.[35] A threshold issue then is whether the contract is ambiguous. If the contract is unambiguous, it 'speaks for itself and binds the parties without the necessity of extrinsic evidence'.[36]

Ambiguity is often a central issue at summary judgment. Because unambiguous contracts 'bind[] the parties without the necessity of [considering] extrinsic evidence',[37] courts frequently award summary judgment if the contract is unambiguous.[38] Conversely, because ambiguous contracts often require considering 'the credibility of extrinsic evidence', courts will usually reserve summary judgment if the contract is ambiguous.[39]

Contractual ambiguity is a question of law. Courts in Virginia and DC give contractual language its plain meaning and hold that a contract is ambiguous only when it is 'reasonably or fairly susceptible of different constructions or interpretations, or of two or more different meanings'.[40] It is unambiguous when 'the court can determine its meaning without any other guide than a knowledge of the simple facts on which, from the nature of language in general, its meaning depends'.[41]

Courts use the parol evidence rule to cabin the use of extrinsic evidence. Generally, the rule establishes that when an agreement has been put into writing, extrinsic evidence is inadmissible if the contract is unambiguous.[42] It also prohibits courts from resorting to extrinsic evidence that would contradict the 'the terms of a valid, and plain and unambiguous, written contract'.[43]

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32 See, e.g., *Kauffman*, 950 A.2d at 49.

33 See id.

34 *Plunkett v. Plunkett*, 624 S.E.2d 39, 42 (Va. 2006) (quoting *TM Delmarva Power, L.L.C.*, 557 S.E.2d at 200*)*; *see Tauber v. Quan*, 938 A.2d 724, 729 (DC 2007).

35 *Palmer & Palmer Co. v. Waterfront Marine Constr., Inc.*, 662 S.E.2d 77, 80 (Va. 2008); *Tauber*, 938 A.2d at 729.

36 *Tauber*, 938 A.2d at 729 (internal quotations omitted); see *Babcock & Wilcox Co. v. Areva NP, Inc.*, 788 S.E.2d 237, 249 (Va. 2016) (noting that when the contract is unambiguous, '[i]ts plain meaning [is] . . . thus a question of law for the court, not a question of fact for the jury').

37 *Tauber*, 938 A.2d at 729 (internal quotations omitted); see *Babcock*, 788 S.E.2d at 249.

38 See *Holland v. Hannan*, 456 A.2d 807, 815 (DC 1983); *Babcock*, 788 S.E.2d at 249.

39 See *Holland*, 456 A.2d at 815; cf. *Babcock*, 788 S.E.2d at 249.

40 *Holland*, 456 A.2d at 815 (internal quotations omitted); *James River Ins. Co. v. Doswell Truck Stop, LLC*, 827 S.E.2d 374, 376 (Va. 2019).

41 *Holland*, 456 A.2d at 815 (internal quotations omitted); see *Babcock*, 788 S.E.2d at 234-44.

42 *Abdelrhman v. Ackerman*, 76 A.3d 883, 888 (DC 2013); see *Va. Elec. & Power Co. v. N. Va. Reg'l Park Auth.*, 618 S.E.2d 323, 326 (Va. 2005); *Eure v. Norfolk Shipbuilding & Drydock Corp.*, 561 S.E.2d 663, 667-68 (Va. 2002); *R.K. Chevrolet, Inc. v. Hayden*, 480 S.E.2d 477, 480-81 (Va. 1997).

43 See *Abdelrhman*, 76 A.3d at 888 (internal quotations omitted); *Virginia Elec.*, 618 S.E.2d at 326-27.

Notably, DC courts have struggled to consistently define what qualifies as extrinsic evidence.[44] Language from some cases indicates that anything outside of the contractual language is extrinsic, while other cases allow evidence of 'context'.[45] The cases that allow contextual evidence do so by defining context as non-extrinsic evidence.[46] In the view of those cases, context is 'evidence of the general situation, [such as] the relations of the parties, the subject matter of the transaction, preliminary negotiations and statements made therein, usages of trade, and the course of dealing between the parties.'[47] They then define extrinsic evidence narrowly, as 'direct evidence as to what a particular party intended the language to mean, a subjective question.'[48] At least one recent case indicates that the DC Court of Appeals is likely to take this approach, of distinguishing context from extrinsic evidence, in the future.[49]

Lastly, both jurisdictions courts apply *contra proferentem* – the canon that ambiguities in a contract are construed against the drafter.[50] In the DC hierarchy of interpretative tools, the canon is low on the list: it is 'inferior to extrinsic proof of the parties' agreement, or to other authority revealing that understanding'.[51] Virginia courts will apply the canon only '[i]f the plain meaning is undiscoverable'.[52] The canon is commonly referenced by Virginia courts in insurance cases.[53]

IV DISPUTE RESOLUTION

i Forum selection clauses

Both jurisdictions have embraced the modern rule for enforcement of forum selection clauses: forum selection clauses are 'prima facie valid and [will] be enforced unless enforcement is shown by the resisting party to be unreasonable under the circumstances'.[54] DC courts will generally treat dismissals on the basis of a forum selection clause as a 'non-merits ruling[]

44 See *Abdelrhman*, 76 A.3d at 888-89 (discussing this difficulty).

45 See id.

46 See id.

47 See id. (alteration to original) (internal quotations omitted).

48 See id. (internal quotations omitted).

49 See, e.g., *Nest & Totah Venture, LLC v. Deutsch*, 31 A.3d 1211, 1219-20, 1227 (DC 2011); see also *Abdelrhman*, 76 A.3d at 889 ('It is sometimes said that extrinsic evidence cannot change the plain meaning of a writing, but meaning can almost never be plain except in a context.' (quoting *Ozerol v. Howard Univ.*, 545 A.2d 638, 642 (DC 1988)).

50 See *Am. Bldg. Maint. Co. v. L'Enfant Plaza Props.*, Inc., 655 A.2d 858, 862-63 (DC 1995); *Erie Ins. Exch. v. EPC MD 15, LLC*, 822 S.E.2d 351, 355 (Va. 2019).

51 *Am. Bldg. Maint.*, 655 A.2d at 863 (internal quotations omitted).

52 *Erie Ins. Exch.*, 822 S.E.2d at 355.

53 See, e.g., id.

54 *Yazdani v. Access ATM*, 941 A.2d 429, 431 (DC 2008) (alteration in original) (internal quotations omitted); see *RMBS Recovery Holdings, I, LLC v. HSBC Bank USA, N.A.*, 827 S.E.2d 762, 769 (Va. 2019); *Paul Bus. Sys., Inc. v. Canon U.S.A., Inc.*, 397 S.E.2d 804, 807 (Va. 1990).

which do[es] not preclude filing in the proper jurisdiction'.[55] Because it is a non-merits ruling, DC courts may 'bypass [ ] questions of subject-matter and personal jurisdiction, when considerations of convenience, fairness, and judicial economy so warrant'.[56]

ii Arbitration clauses[57]

In 2008, DC adopted the Revised Uniform Arbitration Act (RUAA).[58] Under the RUAA, DC courts will enforce an agreement to arbitrate unless 'a ground . . . exists at law or in equity for the revocation of a contract'.[59] The party seeking arbitration bears the burden of showing the agreement is valid.[60] Challenges to the validity of an arbitration clause are typically for a court to decide.[61] But challenges to the contract generally will likely be resolved by an arbitrator.[62] Notably, the RUAA 'preserves the . . . severability doctrine'.[63] 'Under that doctrine, even if another provision of the contract, or . . . the contract as a whole, is invalid, unenforceable, voidable, or void, that does not prevent a court from enforcing a specific agreement to arbitrate.'[64]

Virginia, on the other hand, has not adopted the RUAA.[65] Virginia's arbitration statute (the Virginia Uniform Arbitration Act, or VUAA) is an adoption of the Uniform Arbitration Act.[66] Additionally, in Virginia, '[t]he law of contracts governs the question whether there exists a valid and enforceable agreement to arbitrate'.[67] A valid agreement to arbitrate must

55 See *Yazdani*, 941 A.2d at 433.

56 id. (alteration in original) (quoting *Sinochem Int'l Co. v. Malay. Int'l Shipping Corp.*, 549 U.S. 422, 432 (2007)).

57 This section does not address the Federal Arbitration Act, which covers a broad range of arbitration proceedings.

58 See *Menna v. Plymouth Rock Assurance Corp.*, 987 A.2d 458, 462 (DC 2010).

59 DC Code § 16-4406(a).

60 See *Johansson v. Cent. Props.*, LLC, 320 F. Supp. 3d 218, 221 (D.DC 2018). Despite D.C.'s 'strong preference favoring arbitration when a contract contains an arbitration clause,' arbitration clauses can still be waived. See *TRG Customer Sols., Inc. v. Smith*, 226 A.3d 751, 755 (D.C. 2020) ('[L]ike any contract right, the right to arbitrate may be waived – either expressly or by implication.'). In fact, '[a] party to a lawsuit can effect such a waiver by actively participating in the litigation or by taking other actions inconsistent with the right to arbitrate.' Id. *TRG* clarified that any participation in the litigation beyond the minimum necessary to avoid entry of default – e.g., filing an answer to the complaint – is likely 'so inconsistent with the assertion of a right to arbitrate as to waive such a right.' Id.

61 DC Code § 16-4406(b) ('The court shall decide whether an agreement to arbitrate exists or a controversy is subject to an agreement to arbitrate.').

62 See *Menna*, 987 A.2d at 465 n.30 (noting that because an arbitration provision is severable, 'even the validity of a contract containing an arbitration clause is for the arbitrator to decide unless the challenge is directed specifically at the validity of the arbitration clause itself'); see also DC Code § 16-4406(c).

63 *Menna*, 987 A.2d at 465 n.30 (internal quotations omitted).

64 *Johansson*, 320 F. Supp. 3d at 221 (omission in original) (internal quotations omitted).

65 See generally Va. Code Ann. § 8.01-581.01.

66 See *TM Delmarva Power, L.L.C. v. NCP of Va., L.L.C.*, 557 S.E.2d 199, 202 (Va. 2002) ('Virginia adopted the Uniform Arbitration Act in 1986 . . . .').

67 *Mission Residential, LLC v. Triple Net Props.*, *LLC*, 654 S.E.2d 888, 890 (Va. 2008).

contain 'the essential elements of a valid contract at common law'.[68] Moreover, Virginia applies 'no presumption in favour of arbitrability'.[69] 'Rather, the party seeking arbitration has the burden of proving the existence of the agreement.'[70]

V BREACH OF CONTRACT CLAIMS

To establish a breach of contract claim, a plaintiff must show (1) a valid contract, (2) a contractual duty, (3) a breach of that duty, and (4) damages.[71] The third element – breach – is satisfied if 'a party fails to perform when performance is due'.[72] When a contract fails to specify a time for performance, DC law implies that performance must be made within a 'reasonable time'.[73] Additionally, DC and Virginia recognise the doctrine of anticipatory repudiation, under which '[a]n aggrieved party . . . may be entitled to sue prior to breach if the other party has . . . communicated, by word or conduct, unequivocally and positively its intention not to perform'.[74]

VI DEFENCES TO ENFORCEMENT

i Indefinite material terms

A contract 'must be sufficiently definite as to its material terms (which include, e.g., subject matter, . . . payment terms, quantity, and duration) that the promises and performance to be rendered by each party are reasonably certain'.[75] But courts are wary not to push this requirement to 'extreme limits'.[76] They recognise that '[a]ll agreements have some degree of indefiniteness and some degree of uncertainty'.[77] Thus, the material terms need not be 'fixed with complete and perfect certainty.'[78] Rather, an enforceable contract need only have

68 id.

69 id.

70 id.

71 See *Tsintolas Realty Co. v. Mendez*, 984 A.2d 181, 187 (DC 2009); *Sunrise Continuing Care, LLC v. Wright*, 671 S.E.2d 132, 135 (Va. 2009); *Caperton v. A.T. Massey Coal Co.*, 740 S.E.2d 1, 8 (Va. 2013).

72 *Wash. Nat'ls Stadium, LLC v. Arenas, Parks & Stadium Sols., Inc.*, 192 A.3d 581, 586 (DC 2018) (quoting *EastBanc, Inc.*, 940 A.2d at 1004); see *Nowland v. Tri Core, Inc.*, 60 Va. Cir. 469 (2000) (noting that once performance is 'past due and not fulfilled' the proper claim is for breach of contract).

73 *Murray v. Wells Fargo Home Mortg.*, 953 A.2d 308, 320 (DC 2008) (quotations omitted).

74 *Wash. Nat'ls*, 192 A.2d at 586 (internal quotations omitted); see *Bennett v. Sage Payment Sols., Inc.*, 710 S.E.2d 736, 740-41 (Va. 2011); see also *Sangaran v. Sachdeva*, 843 S.E.2d 754, 757 (Va. Cir. 2020) ('When one party has anticipatorily repudiated a contract, the other has the right (1) [t]o rescind the contract altogether, (2) to elect to treat the repudiation as a breach, either by bringing suit promptly, or by making some change of position; or (3) to await the time for performance of the contract and bring suit after that time has arrived.' (internal quotations omitted) (alteration in original)).

75 *Duffy v. Duffy*, 881 A.2d 630, 634 (DC 2005) (omission in original) (quoting *Affordable Elegance Travel, Inc. v. Worldspan, L.P.*, 774 A.2d 320, 327 (DC 2001)); see *Dean*, 756 S.E.2d at 433-34; *R.K. Chevrolet, Inc.*, 480 S.E.2d at 480.

76 *Rosenthal v. Nat'l Produce Co.*, 573 A.2d 365, 370 (DC 1990); see *Dean*, 756 S.E.2d at 433 ('[R]easonable certainty is all that is required.' (alteration to original) (internal quotations omitted)).

77 *EastBanc, Inc.*, 940 A.2d at 1002 (internal quotations omitted); see *Dean*, 756 S.E.2d at 433.

78 *EastBanc, Inc.*, 940 A.2d at 1002 (internal quotations omitted); see *Dean*, 756 S.E.2d at 433.

'[r]easonable definiteness in [its] essential terms'[79] – essential terms must be sufficiently concrete for a 'court to determine whether a breach has occurred and to identify an appropriate remedy'.[80]

ii Statute of limitations

The statute of limitations is frequently raised as a defence in contract litigation.[81] Subject to exceptions, the limitations period begins to run when the breach of contract occurs.[82] In DC, an aggrieved party generally has three years from that time to file a lawsuit.[83] Virginia applies a three-year limit to unwritten contracts, and a five-year limit to written contracts 'signed by the party to be charged'.[84]

iii Duress

Proving duress is challenging. The party seeking the benefit of a duress theory must show '(1) an improper threat and (2) the lack of a reasonable alternative'.[85] Both jurisdictions will limit the range of conduct that constitutes an improper threat.[86] Additionally, DC courts will typically hold that litigation is a reasonable alternative.[87] Parties in DC seeking to show that it was not must provide 'facts establishing specific financial harm' that made it an unreasonable alternative.[88]

79 *Rosenthal*, 573 A.2d at 370; see *Dean*, 756 S.E.2d at 433; *Allen v. Aetna Cas. & Sur. Co.*, 281 S.E.2d 818, 819 (Va. 1981) (per curiam).

80 *EastBanc, Inc.*, 940 A.2d at 1002 (internal quotations omitted); see *Dean*, 756 S.E.2d at 433.

81 See, e.g., *EastBanc, Inc.*, 940 A.2d at 1004; *Kerns v. Wells Fargo Bank, N.A.*, 818 S.E.2d 779, 782-83 (Va. 2018).

82 See *EastBanc, Inc.*, 940 A.2d at 1004; *Kerns*, 818 S.E.2d at 783.

83 See DC Code § 12-301(7).

84 See Va. Code Ann. § 8.01-246.

85 *Osborne v. Howard Univ. Physicians, Inc.*, 904 A.2d 335, 339-40 (DC 2006); *Goode v. Burke Town Plaza, Inc.*, 436 S.E.2d 450, 452 (Va. 1993) ('Duress exists when a defendant commits a wrongful act sufficient to prevent a plaintiff from exercising his free will, thereby coercing the plaintiff's consent.'); see also *ITS Commc'ns, Inc. v. Erlich*, No. 147643, 1997 WL 1070591, at *3 (Va. Cir. Ct. May 8, 1997) (citing *Goode* and noting this principle); *Trainor v. Qwest Gov't Servs., Inc.*, No. 1:18-cv-1557, 2019 WL 3459231, at *7 n.13 (E.D. Va. July 31, 2019) (same).

86 See *Osborne*, 904 A.2d at 339-40 (endorsing the Restatement (Second) of Contract's limited category of improper threats); see *Goode*, 436 S.E.2d at 452-53 (noting that 'the application of economic pressure by threatening to enforce a legal right' does not 'constitute duress').

87 See *Osborne*, 904 A.2d at 340-41.

88 See id. at 341.

iv Contracts against public policy

Absent a situation where a contract is in direct violation of the law, DC courts are extremely reluctant to void contracts on public policy grounds.[89] Indeed, two main instances in which DC courts have been willing to void contracts on the basis of public policy could be characterised as violation-of-the-law cases.[90]

In Virginia, '[t]he meaning of the phrase public policy is vague and variable; courts have not exactly defined it'.[91] Virginia courts have in the past defined it as 'the principle which declares that no one can lawfully do that which has a tendency to be injurious to the public welfare' – an approach that is significantly broader than DC's.[92] However, this broad approach is not without limits, and modern Virginia courts caution that they are not likely to void an agreement unless the 'illegality' of it 'is clear and certain'.[93] For example, although Virginia courts have held that 'pre-injury release provisions relating to personal injury' are void,[94] they have not been willing to void provisions that indemnify a party from personal injury liability.[95]

v Impossibility[96]

Impossibility is rarely applied in either jurisdiction. Generally though, it provides that if 'a promisor's contractual performance is made impossible by a change in character of something to which the contract related, or which by the terms of the contract was made a necessary means of performance, the promisor will be excused, unless he . . . expressly agreed in the

89 See, e.g., *Brown v. 1301 K St. Ltd. P'ship*, 31 A.3d 902, 906-07 (DC 2011) (refusing to 'expand the narrow class of releases deemed violative of public policy to include the disclaimer at issue'); *Moore v. Waller*, 930 A.2d 176, 183 (DC 2007) (expressing 'agree[ment] with the Maryland Court of Special Appeals and with numerous other courts which have held that it does not violate public policy to enforce exculpatory clauses contained in membership contracts of health clubs and fitness centers' (alteration to original)).

90 See *George Washington Univ. v. Weintraub*, 458 A.2d 43, 47 (DC 1983) (refusing to enforce exculpatory clause that sought to waive or modify a tenant's rights 'under the implied warranty of habitability'); *Godette v. Estate of Cox*, 592 A.2d 1028, 1033-36 (DC 1991) (refusing to enforce, in estate context, '[a]n exculpatory clause that excuses self-dealing or attempts to limit liability for breaches of duty' because some of those duties were statutorily imposed).

91 *McIntosh v. Flint Hill Sch.*, 100 Va. Cir. 32 (2018) (unpublished) (quoting *Wallihan v. Hughes*, 82 S.E.2d 553, 558 (Va. 1954)).

92 id. (quoting *Wallihan*, 82 S.E.2d at 558).

93 *Estes Express Lines, Inc. v. Chopper Express, Inc.*, 641 S.E.2d 476, 478 (Va. 2007); *Reading & Language Learning Ctr. v. Sturgill*, 94 Va. Cir. 94 (2016).

94 *Estes Express*, 641 S.E.2d at 478-79.

95 See id. at 478-80.

96 DC courts generally treat impossibility and impracticability as interchangeable. *E. Capitol View Cmty. Dev. Corp. v. Robinson*, 941 A.2d 1036, 1040 n.6 (DC 2008) ('Impossibility and commercial impracticability involve the same considerations.'). 'To establish impossibility or commercial impracticability, a party must show (1) the unexpected occurrence of an intervening act; (2) the risk of the unexpected occurrence was not allocated by agreement or custom; and (3) the occurrence made performance impractical.' Id. at 1040 (internal quotations and footnote omitted).

contract to assume the risk of performance'.[97] The defence will be successful only in limited circumstances: a 'mere inconvenience or unexpected difficulty' is not enough to excuse contractual obligations under this defence.[98]

vi Accord and satisfaction

The last defence we highlight is accord and satisfaction. Accord and satisfaction occurs after formation. When parties to a contract have a dispute but agree to resolve their differences through payment of an amount other than what was originally agreed upon, the 'new' payment 'satisfies' the debtor's original obligation under the contract.[99] A common example of this doctrine is cashing a check that says 'payment in full'.[100] In that situation, the creditor's decision to cash the check may operate as acceptance of the alternative payment.[101] Importantly though, a genuine dispute is a prerequisite.[102] An accord and satisfaction defence will not be successful if a creditor cashes a check that says payment in full, but the parties have not legitimately disputed the amount due before the creditor cashes the check.[103] When an accord and satisfaction claim fails, courts will likely deduct the amount paid from the plaintiff's damages.[104]

VII FRAUD, MISREPRESENTATION AND OTHER CLAIMS

The general rule for fraud in the inducement is that '[i]f a party's manifestation of assent is induced by either a fraudulent or a material misrepresentation by the other party upon which the recipient is justified in relying, the contract is voidable by the recipient'.[105] DC

97 *Long Signature Homes, Inc. v. Fairfield Woods, Inc.*, 445 S.E.2d 489, 491 (Va. 1994) (omission in original) (internal quotations omitted); see *Hampton Rds. Bankshares, Inc. v. Harvard*, 781 S.E.2d 172, 177-78 (Va. 2016). DC phrases its rule slightly differently, swapping 'impossible' for 'impractical'—a difference that is probably the result of the fact that DC courts treat impossibility and impracticality as interchangeable, using both terms in their case law. See *E. Capitol View,* 941 A.2d at 1040 & n.6.

98 *Island Dev. Corp. v. District of Columbia*, 933 A.2d 340, 350 (DC 2007) (internal quotations omitted); see *Long Signature Homes*, 445 S.E.2d at 491 (noting that a temporary impossibility is insufficient); see generally *Hampton Rds.*, 781 S.E.2d at 177-78 (discussing the standard for establishing impossibility).

99 *Double H Hous. Corp. v. David*, 947 A.2d 38, 43-44 (DC 2008) (citing *Pierola v. Moschonas*, 687 A.2d 942, 947-48 (DC 1997)); see Va. Code Ann. § 8.3A-311; see also *Helton v. Phillip A. Glick Plumbing, Inc.*, 672 S.E.2d 842, 843 (Va. 2009).

100 See *Pierola*, 687 A.2d at 947-48; see also *Helton*, 672 S.E.2d at 843.

101 See *Pierola*, 687 A.2d at 947-48; see also *Helton*, 672 S.E.2d at 843.

102 See *Pierola*, 687 A.2d at 947-48; see also *Helton*, 672 S.E.2d at 843.

103 See *Pierola*, 687 A.2d at 947-48; see also Va. Code Ann. § 8.3A-311.

104 See, e.g., *Hooten ex rel. GEICO v. Reed*, 77 Va. Cir. 161 (2008) (stating, after concluding that the accord and satisfaction claim failed, that 'judgment will be entered on the claim of the plaintiff, plus costs, less the amount paid by the defendant'); see also *Ludwig & Robinson, PLLC v. BiotechPharma, LLC*, 186 A.3d 105, 117 (DC 2018) (noting duplicative recovery is prohibited and stating that '[a] plaintiff is entitled to be made whole, but not more than whole' (internal quotations omitted)).

105 *Steiner v. Am. Friends of Lubavitch (Chabad)*, 177 A.3d 1246, 1255-56 (DC 2018) (alteration in original) (quoting Restatement (Second) of Contracts § 164 (1981)); see *Meuse v. Henry*, 819 S.E.2d 220, 230 n.3 (Va. 2018); *Jared & Donna Murayama 1997 Tr. v. NISC Holdings, LLC*, 727 S.E.2d 80, 86 (Va. 2012). In DC, 'a breach of contract claim may not be recast as a tort claim.' *Ludwig*, 186 A.3d at 112 (internal quotations omitted). The duty on which a tort claim, such as fraud or misrepresentation, is based must be 'a duty independent of that arising out of the contract itself.' *Choharis v. State Farm Fire & Cas. Co.*,

courts impose a 'very high standard on sophisticated business entities claiming fraudulent inducement in arms-length transactions'.[106] Such parties must 'establish by clear and convincing evidence that the defendant made a false representation, in reference to material fact, with knowledge of its falsity, and an intent to deceive, and that the plaintiff's reliance [on the alleged material misrepresentations] was reasonable'.[107]

VIII REMEDIES

i Compensatory damages, restitution, and punitive damages

Both states recognise restitution and compensatory damages. Generally, restitution is 'available as an alternative to an action for damages on the contract'.[108] Restitution 'is based upon the principle of unjust enrichment' and 'require[s] the wrongdoer to restore what he has received'.[109] Compensatory damages, on the other hand, do not focus on the unfair gain the wrongdoer received, but rather on the loss the innocent party has incurred.[110] Compensatory damages are generally limited to those damages that 'are the natural consequence and proximate result of [the breaching party's] conduct'.[111] Additionally, although 'mathematical certainty' is not required, 'there must be some reasonable basis on which to estimate damages'.[112]

Punitive damages are 'rare, [but] they may be recovered in' Virginia and DC.[113] They carry a demanding showing: 'the acts of the breaching party' must have been 'malicious, wanton, oppressive or with criminal indifference to civil obligations' and have 'merge[d] with

961 A.2d 1080, 1089 (DC 2008). This rule often creates problems for tort claims arising out of conduct occurring during performance of a contract, but it does not create problems for fraud in the inducement claims. See *Ludwig*, 185 A.3d at 111. Fraud in the inducement seeks to rescind a contract based on conduct that happened before the parties entered into the contract. See id. These claims, consequently, do not risk resting on a contractual duty because no contractual duties existed at the time of the conduct in question. See generally id.

106 *Wash. Inv. Partners of Del., LLC v. Sec. House, K.S.C.C.*, 28 A.3d 566, 575-76 (DC 2011) (internal quotations omitted).

107 Id. at 576 (alteration in original) (emphasis omitted) (internal quotations omitted).

108 See *Lee v. Foote*, 481 A.2d 484, 485 (DC 1984) (per curiam); see also *Ingber v. Ross*, 479 A.2d 1256, 1263 (DC 1984) (identifying equitable nature of restitution); cf. *Wilkins v. Peninsula Motor Cars, Inc.*, 587 S.E.2d 581, 583 (Va. 2003) ('[C]ourt must assure that a verdict, while fully and fairly compensating a plaintiff for loss, does not include duplicative damages.').

109 *Lee*, 481 A.2d at 486 (alteration to original); see *Devine v. Buki*, 767 S.E.2d 459, 467 (Va. 2015).

110 See generally *Mark Keshishian & Sons, Inc. v. Wash. Square, Inc.*, 414 A.2d 834, 841-42 (DC 1980); *Nichols Constr. Corp. v. Va. Mach. Tool Co.*, 661 S.E.2d 467, 471 (Va. 2008).

111 *Exec. Sandwich Shoppe, Inc. v. Carr Realty Corp.*, 749 A.2d 724, 736-37 (DC 2000) (internal quotations omitted); see *Long v. Abbruzzetti*, 487 S.E.2d 217, 219 (Va. 1997); *Bd. of Dirs. of Bay Point Condo. Ass'n, Inc. v. RML Corp.*, 57 Va. Cir. 295 (2002).

112 *Exec. Sandwich Shoppe*, 749 A.2d at 737 (internal quotations omitted); *Nichols Constr. Corp.*, 661 S.E.2d at 472.

113 *Mark Keshishian*, 414 A.2d at 842; see *Kamlar Corp. v. Haley*, 299 S.E.2d 514, 518 (Va. 1983); *Legaspi v. TME Enters., Inc.*, 90 Va. Cir. 209 (2015).

and assume[d] the character of a willful tort'.[114] The second half of this test will likely be strictly enforced: if the breach of contract did not merge with (i.e., constitute) a wilful tort, no claim for punitive damages lies.[115]

ii Liquidated damages

DC and Virginia recognise liquidated damages provisions and will enforce them if they do not constitute a 'penalty'.[116] In Virginia, courts will hold that a provision is a penalty if the 'damage resulting from a breach of contract is susceptible of definite measurement, or where the stipulated amount would be grossly in excess of actual damages'.[117] In DC, the primary inquiry is whether the provision was reasonable 'compensation for breach, viewed as of the time and under the circumstances when it was agreed'.[118] The trend in DC is for courts to recognise liquidated damages provisions so long as 'they do not clearly disregard the principle of compensation'.[119] This is especially true '[w]hen a liquidated damages provision is the product of fair arm's length bargaining, particularly between sophisticated parties'.[120] Lastly, both DC and Virginia have joined the jurisdictions that hold 'the party challenging the enforceability of a liquidated damages clause has the burden of proving that it is a penalty'.[121]

iii Specific performance

Specific performance is an 'extraordinary equitable remedy' that 'rests in the discretion of the court'.[122] It is most often employed in land-sale transactions,[123] and is generally not available in addition to damages.[124] Moreover, courts require that the party seeking specific performance 'must show that he was ready, willing and able to perform the contractual obligations', or that he already performed his obligations.[125]

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114 *Den v. Den*, 222 A.2d 647, 648 (DC 1966); see *Bernstein v. Fernandez*, 649 A.2d 1064, 1073 (DC 1991); *Kamlar Corp.*, 299 S.E.2d at 518.

115 See *Bernstein*, 649 A.2d at 1073-74 (denying punitive liability because '[n]o such merger occurred'); *Kamlar Corp.*, 299 S.E.2d at 518.

116 See *Proulx v. 1400 Pennsylvania Ave., SE, LLC*, 199 A.3d 667, 673 (DC 2019); *Boots, Inc. v. Singh*, 649 S.E.2d 695, 697 (Va. 2007).

117 *Boots*, 649 S.E.2d at 697 (internal quotations omitted).

118 *Proulx*, 199 A.3d at 673.

119 id. (internal quotations omitted).

120 id. at 674 (alteration in original) (internal quotations omitted).

121 *S. Brooke Purll, Inc. v. Vailes*, 850 A.2d 1135, 1138 (DC 2004) (internal quotations omitted); *Boots*, 649 S.E.2d at 697.

122 *Indep. Mgmt. Co. v. Anderson & Summers, LLC*, 874 A.2d 862, 867, 870 (DC 2005) (internal quotations omitted); see generally *Callison v. Glick*, 826 S.E.2d 310, 318 (Va. 2019) ('The specific performance of a contract is not a matter of absolute right, but rests in a sound, judicial discretion.' (quoting *Millman v. Swan*, 127 S.E. 166 (Va. 1925)).

123 See *Saunders v. Hudgens*, 184 A.3d 345, 349 n.5 (DC 2018) ('[T]he remedy of specific performance is almost routinely available to enforce contracts for the purchase of land.' (alteration to original) (internal quotations omitted)); see, e.g., *Callison*, 826 S.E.2d at 320.

124 See *Sanders*, 184 A.3d at 350; *Nichols Constr. Corp.*, 661 S.E.2d at 471 ('Unless specific performance is sought and available, the proper measure of unliquidated damages for breach of a contract is the sum that would put [the plaintiff] in the same position, as far as money can do it, as if the contract had been performed.' (alteration in original) (internal quotations omitted)).

125 *Indep. Mgmt. Co.,* 874 A.2d 870 (internal quotations omitted); see generally *Callison*, 826 S.E.2d at 320 ('He who seeks specific performance bears the burden of proving [ ] that there is a definite contract and

IX CONCLUSIONS

As we noted at the outset, there is significant overlap between DC and Virginia's core contractual doctrines. These jurisdictions take similar approaches to contract interpretation and enforcement. They take an objective view and are extremely reluctant to allow a party to escape contractual obligations simply because performance is inconvenient or burdensome. They have also limited the circumstances in which classic common law defences such as impossibility, public policy and duress apply. Parties litigating in these forums should, therefore, be cautious when seeking to set aside contractual duties; Virginia and DC courts will likely enforce them if they are valid.

that he has performed all that is required of him . . . and that all conditions precedent have been fulfilled.' (alteration and omission in original) (internal quotations omitted)).

Appendix 1

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Mark is a partner in and co-leader of the commercial litigation and disputes group, and represents corporations in government investigations and commercial litigation and disputes. He has tried cases in federal court and before regulatory agencies, and has defended clients in cross-border litigation, arbitration and mediation. Mark has represented clients in the financial services, government contracting, real estate, pharmaceutical, energy and telecommunications industries in litigation involving allegations of fraud and other business torts, breach of fiduciary duty, deepening insolvency, market manipulation, unfair business practices, securities fraud, breach of contract and violations of state and federal statutes, including the False Claims Act and RICO. He also has litigated class action securities matters, government contracts disputes, bid protests and intellectual property disputes. A number of the cases Mark has litigated have involved multibillion-dollar damage claims.

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