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Contract Law: Similarities and Differences in D.C. and Virginia Approaches

by Mark Guerrero and Robert Keeling

Given their geographic proximity, it is perhaps not surprising that there is significant overlap in Washington, D.C., and Virginia's law of contracts. Both jurisdictions are common law jurisdictions, and frequently rely on the Restatement (Second) of Contracts, though D.C. is more likely to turn to the Restatement than is Virginia, which has a longstanding, well-developed body of contract law. **There are many areas, however, where D.C. and Virginia's contract law differ.** This article provides an overview of contract law in each jurisdiction, paying close attention to the similarities and differences between the two.

Contract Law Similarities

Most of the core components of contract law between D.C. and Virginia are identical. Doctrinally, both jurisdictions robustly enforce contractual duties and limit the defenses available to set aside the terms of an otherwise valid agreement.

Both D.C. and Virginia adhere to an objective view of contracts, meaning that when courts are seeking to determine the existence of a valid contract, they will engage in an objective inquiry into each element of contract formation. In D.C., parties create an enforceable contract by "(1) express[ing] an intent to be bound, (2) agree[ing] to all material terms, and (3) assum[ing] mutual obligations."¹ In Virginia, "there must be a complete agreement including acceptance of an offer as well as valuable consideration."² Courts in both jurisdictions undertake an objective inquiry to determine whether each element is satisfied.³ In Virginia, courts look to the actions of the parties, not their unexpressed state of mind when evaluating whether the parties reached complete agreement.⁴ Unwritten (or oral) contracts are generally enforceable in both jurisdictions provided that the contract does not violate statute of frauds, and the party claiming existence of contract can prove each element of a valid and enforceable contract.⁵ Given each jurisdiction's objective view,

forum selection clauses are *prima facie* valid, unless the resisting party can prove that the clause is unreasonable.⁶

When interpreting contractual terms, both D.C. and Virginia afford contractual text its plain meaning unless the text is ambiguous.⁷ Ambiguity is a question of law, and only exists when the language in question is "reasonably or fairly susceptible of different constructions or interpretations, or of two or more different meanings."⁸ Both jurisdictions employ the parol evidence rule, which allows no extrinsic evidence for contractual interpretation unless an ambiguity is found to exist.⁹ — no extrinsic evidence unless ambiguous. As a last resort, courts in both jurisdictions will employ the canon of *contra proferentem*—which construes contractual ambiguities in favor of the non-drafter.¹⁰

A contractual breach occurs when a party fails to perform when performance is due.¹¹ Both jurisdictions also recognize anticipatory repudiation, which allows a party to sue before a breach occurs if the other party has unequivocally and positively communicated its intent not to perform.¹²

Parties have limited defenses to a claim of contractual breach in either D.C. or Virginia. If a contract **lacks reasonably definite material terms**—which includes contract subject matter, payment terms, quantity, and duration—a court may find that the contract is insufficiently concrete and thus, unenforceable.¹³ While the **statute of limitations** is a defense in both D.C. and Virginia, in D.C., all claims for breach of contract must be brought within 3 years of the breach, while Virginia applies a 3-year limitation on unwritten contracts and a 5-year limitation on written contracts.¹⁴ A contract may be unenforceable if one party was forced into the contract by **duress**. The party alleging duress must show (1) an improper threat and (2) the lack of a reasonable alternative.¹⁵ In D.C., litigation is typically considered a reasonable alternative.¹⁶ Parties almost never prevail

on a defense of **contractual impossibility**, which courts in both jurisdictions recognize only when performance of the contract is rendered impossible unless the promisor expressly assumed the risk of performance.¹⁷ In neither jurisdiction will inconvenience nor unexpected difficulty be sufficient to show impossibility of performance.¹⁸ Parties may execute an **accord and satisfaction** after contract formation in order to eliminate a party's contractual obligation to perform.¹⁹ Finally, **fraud in the inducement** only occurs when one party obtains the other party's assent to the contract by either a fraudulent or material misrepresentation.²⁰ In such cases, the party who relied on the fraudulent or material misrepresentation in consenting to the contract may void their contractual obligations.²¹

Finally, both D.C. and Virginia employ largely similar approaches to damages calculations. Restitution and compensatory damages are available in both states. **Restitution damages** are available for damages on the contract, and require the breaching party to restore the benefit he received to the non-breaching party.²² **Compensatory damages** serve to make right any loss suffered by the non-breaching party.²³ **Punitive damages**, although rare, are available from both D.C. and Virginia courts when the innocent party can show that the contractual breach was "malicious, wanton, oppressive or with criminal indifference to civil obligations."²⁴

Both jurisdictions will also enforce contractual **liquidated damages** clauses, unless it constitutes a penalty.²⁵ As in most jurisdictions, **specific performance** is an extraordinarily rare remedy, which is only available when no theory of damages could adequately compensate the non-breaching party.²⁶

Differences in Legal Approaches to Contracts

Despite their overall similarities, practitioners should be aware that there are some distinctions between contracts in D.C. and contracts in Virginia.

First, the two jurisdictions take different approaches to enforcing implied-in-fact contracts. Implied-in-fact contracts are neither committed to writing nor expressed verbally, but are inferred from the conduct of the parties.²⁷ In D.C., courts recognize an implied-in-fact contract only 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."²⁸ Virginia, on the other hand, 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."²⁹

Practitioners should be aware that Virginia does not recognize the doctrine of promissory estoppel.³⁰ Promissory estoppel is an equitable remedy, which is available when the defendant makes a non-contractual promise to the plaintiff, the plaintiff detrimentally relied on the promise, and the promise reasonably induced the plaintiff's reliance.³¹ The non-contractual nature of the promise inducing the plaintiff's reliance is critical to successfully arguing promissory estoppel to D.C. courts.³²

Another major difference between D.C. and Virginia is how each jurisdiction approaches contractual arbitration clauses. D.C. has adopted the Revised Uniform Arbitration Act ("RUAA"), and will enforce an agreement to arbitrate unless "a ground . . . exists at law or in equity for the revocation of a contract."³³ Challenges to the validity of an arbitration clause are typically decided by the court, and the RUAA preserves the severability doctrine, which will not prevent a court from enforcing an agreement to arbitrate

even if another contractual clause or the contract as a whole is found invalid, unenforceable, voidable, or void.³⁴ The Virginia Uniform Arbitration Act ("VUAA"), and the law of contracts governs the question of whether there is a valid and enforceable agreement to arbitrate.³⁵ Virginia also recognizes no presumption for arbitration, placing the burden of proving the existence of an agreement to arbitrate on the party seeking arbitration.³⁶

The final noteworthy difference between the two jurisdictions is their differing approaches to finding that a contract is contrary to public policy. Virginia is more likely to find a contract to be against public policy than is D.C.. In Virginia, courts will make such a finding when the illegality of a contract is clear and certain.³⁷ There are only two instances of D.C. courts voiding a contract on public policy grounds, and in both, the decision can be read as voiding a contract for attempting to contract around otherwise applicable law.³⁸

Parties have limited defenses to a claim of contractual breach in either D.C. or Virginia. If a contract lacks reasonably definite material terms...a court may find that the contract is insufficiently concrete and thus, unenforceable.

To conclude, there is significant overlap between D.C. 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 per-

formance is inconvenient or burdensome. But litigators should also be aware of the differences between the two jurisdictions and should not assume that because D.C. and Virginia share core contractual doctrines, that the jurisdictions are in lock-step on every point. 🏢

Endnotes

- 1 *Dyer v. Bilaal*, 983 A.2d 349, 356 (D.C. 2009).
- 2 *Snyder-Falkinham v. Stockburger*, 457 S.E.2d 36, 39 (Va. 1995).
- 3 *Dyer*, 983 A.2d at 356-57; *Brooks v. Rosebar*, 210 A.3d 747, 751 (D.C. 2019).
- 4 *Phillips v. Mazzyck*, 643 S.E.2d 172, 175 (Va. 2007).
- 5 *Ashrafi v. Fernandez*, 193 A.3d 129, 131 (D.C. 2018); *C. Porter Vaughan, Inc. v. DiLorenzo*, 689 S.E.2d 656, 660 (Va. 2010); *Commonwealth v. Stewart*, 66 Va. Cir. 135 (2004).
- 6 *Yazdani v. Access ATM*, 941 A.2d 429, 431 (D.C. 2008); *RMBS Recovery Holdings, I, LLC v. HSBC Bank USA, N.A.*, 827 S.E.2d 762, 769 (Va. 2019).
- 7 *Tauber v. Quan*, 938 A.2d 724, 729 (D.C. 2007); *Plunkett v. Plunkett*, 624 S.E.2d 39, 42 (Va. 2006).
- 8 *Holland v. Hannan*, 456 A.2d 807, 815 (D.C. 1983); see also *James River Ins. Co. v. Doswell Truck Stop, LLC*, 827 S.E.2d 374, 376 (Va. 2019).
- 9 *Abdelrhman v. Ackerman*, 76 A.3d 883, 888 (D.C. 2013); *Va. Elec. & Power Co. v. N. Va. Reg'l Park Auth.*, 618 S.E.2d 323, 326 (Va. 2005).
- 10 *Am. Bldg. Maint. Co. v. L'Enfant Plaza Props., Inc.*, 655 A.2d 858, 862-63 (D.C. 1995); *Erie Ins. Exch. v. EPC MD 15, LLC*, 822 S.E.2d 351, 355 (Va. 2019).
- 11 *Wash. Nat'l Stadium, LLC v. Arenas, Parks & Stadium Sols., Inc.*, 192 A.3d 581, 586 (D.C. 2018); *Nowland v. Tri Core, Inc.*, 60 Va. Cir. 469 (2000).
- 12 *Wash. Nat'l*, 192 A.2d at 586 (internal quotations omitted); see *Bennett v. Sage Payment Sols., Inc.*, 710 S.E.2d 736, 740-41 (Va. 2011).
- 13 *EastBanc, Inc. v. Georgetown Park Assocs. II, L.P.*, 940 A.2d 996, 1002 (D.C. 2008); *Duffy v. Duffy*, 881 A.2d 630, 634 (D.C. 2005); *Dean v. Morris*, 756 S.E.2d 430, 433-34 (Va. 2014).
- 14 D.C. Code § 12-301(7); Va. Code Ann. § 8.01-246.
- 15 *Osborne v. Howard Univ. Physicians, Inc.*, 904 A.2d 335, 339-40 (D.C. 2006); *Goode v. Burke Town Plaza, Inc.*, 436 S.E.2d 450, 452 (Va. 1993).
- 16 *Osborne*, 904 A.2d at 340-41.
- 17 *E. Capitol View Cmty. Dev. Corp. v. Robinson*, 941 A.2d 1036, 1040 n.6 (D.C. 2008); *Long Signature Homes, Inc. v. Fairfield Woods, Inc.*, 445 S.E.2d 489, 491 (Va. 1994).
- 18 *Island Dev. Corp. v. District of Columbia*, 933 A.2d 340, 350 (D.C. 2007); *Long Signature Homes*, 445 S.E.2d at 491.
- 19 *Double H Hous. Corp. v. David*, 947 A.2d 38, 43-44 (D.C. 2008); Va. Code Ann. § 8.3A-311.
- 20 *Steiner v. Am. Friends of Lubavitch (Chabad)*, 177 A.3d 1246, 1255-56 (D.C. 2018); *Meuse v. Henry*, 819 S.E.2d 220, 230 n.3 (Va. 2018).
- 21 *Id.*
- 22 *Lee v. Foote*, 481 A.2d 484, 485 (D.C. 1984) (per curiam); *Devine v. Buki*, 767 S.E.2d 459, 467 (Va. 2015); *Wilkins v. Peninsula Motor Cars, Inc.*, 587 S.E.2d 581, 583 (Va. 2003).
- 23 *Mark Keshishian & Sons, Inc. v. Wash. Square, Inc.*, 414 A.2d 834, 841-42 (D.C. 1980); *Nichols Constr. Corp. v. Va. Mach. Tool Co.*, 661 S.E.2d 467, 471 (Va. 2008).
- 24 *Den v. Den*, 222 A.2d 647, 648 (D.C. 1966); *Kamlar Corp. v. Haley*, 299 S.E.2d 514, 518 (Va. 1983).
- 25 *Proulx v. 1400 Pennsylvania Ave., SE, LLC*, 199 A.3d 667, 673 (D.C. 2019); *Boots, Inc. v. Singh*, 649 S.E.2d 695, 697 (Va. 2007).
- 26 *Saunders v. Hudgens*, 184 A.3d 345, 350 (D.C. 2018); *Indep. Mgmt. Co. v. Anderson & Summers, LLC*, 874 A.2d 862, 867, 870 (D.C. 2005); *Callison v. Glick*, 826 S.E.2d 310, 318 (Va. 2019); *Nichols Constr. Corp. v. Va. Mach. Tool Co.*, 661 S.E.2d 467, 471 (Va. 2008).
- 27 *Boyd v. Kilpatrick Townsend & Stockton*, 164 A.3d 72, 81 (D.C. 2017); *Spectra-4, LLP v. Uniwest Commercial Realty, Inc.*, 772 S.E.2d 290, 293 (Va. 2015).
- 28 *Fred Ezra Co. v. Pedas*, 682 A.2d 173, 176 (D.C. 1996).
- 29 *Spectra-4*, 772 S.E.2d at 295.
- 30 *Mongold v. Woods*, 677 S.E.2d 288, 292 (Va. 2009).
- 31 *Kauffman v. Int'l Bhd. of Teamsters*, 950 A.2d 44, 49 (D.C. 2008); *Simard v. Resolution Tr. Corp.*, 639 A.2d 540, 552 (D.C. 1994).
- 32 *Kauffman*, 950 A.2d at 49.
- 33 D.C. Code § 16-4406(a).
- 34 D.C. Code § 16-4406(b); *Johansson v. Cent. Props., LLC*, 320 F. Supp. 3d 218, 221 (D.D.C. 2018).
- 35 Va. Code Ann. § 8.01-581.01; *Mission Residential, LLC v. Triple Net Props., LLC*, 654 S.E.2d 888, 890 (Va. 2008).
- 36 *Id.*
- 37 *Estes Express Lines, Inc. v. Chopper Express, Inc.*, 641 S.E.2d 476, 478-80 (Va. 2007).
- 38 *George Washington Univ. v. Weintraub*, 458 A.2d 43, 47 (D.C. 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 (D.C. 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).



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