

Introduction

This book of essays addresses a topic which is paradoxically both familiar and elusive: the long term contract. Contracts of a long duration are of great antiquity, with many trading relationships, such as those in terms of colonialism, spanning over decades. As the Hon Justice Carmel McLure observes in the introductory remarks of her essay, there is no definition of a long term contract and none is required: you know one when you see one.

There are three central concerns affecting the formation, construction, and operation of long term agreements.

The first is that a contract's extended duration creates complexity but is not in and of itself transformative in the sense that established, fundamental principles are altered. Duration does not affect basal content. In other words, fundamental contractual doctrine relating to matters such as interpretation, duties, and damages remain unaffected but become harder to apply to long term agreements and, in the face of the possibility for a combination of applicable doctrines, more difficult to determine with specificity in advance of a particular matrix of circumstances.

The second is that the common law does not inevitably and dogmatically proceed on a predicate for the necessity of substantive fairness. In the absence of such a predicate, the common law has not yielded methods for the alleviation of such unfairness as may arise in view of changed circumstances over the life of a long term agreement. The only doctrines that evolved relate to extreme circumstances. It can reasonably be assumed that, other than perhaps frustration (a topic dealt with in the paper by Professor David Campbell, and subject to insightful commentary by Anthony Patten, in Chapter 5), no common law rule developed a nuanced and distinct response to contracts of an extended duration.¹ It soon became apparent that it was for the parties to decide the mechanisms for their protection, in the interests of certainty, and to anticipate the consequences of changed circumstances. Typical clauses the parties could include in their contracts cover topics such as *force majeure*, the grounds for termination, and provisions enabling the adjustment of prices.

Thirdly, parties may deal with each other for a number of years, even decades, without a formal written instrument. The essence of their bargain

¹ The longer a contract's duration, the greater the likelihood of circumstances arising that were not within the contemplation of the parties at the time of contracting. That is, frustration has more work to do in the context of long term contracts.

This is a preview. Not all pages are shown.