Table of Contents

SUBSTANTIVE LAW SIMILARITIES AND PROCEDURAL LAW DIFFERENCES BETWEEN COMMON LAW AND CIVIL LAW SYSTEMS
AN ARBITRATION IN GERMANY

INTRODUCTION ........................................................................................................... 2
BACKGROUND .......................................................................................................... 2
SUBSTANTIVE LAW HISTORY .................................................................................. 2
Culpa in Contrahendo/Estoppel ................................................................................. 4
Good Faith .................................................................................................................. 4
Civil System ............................................................................................................... 7
UNJUST ENRICHMENT AT COMMON LAW v UNJUST(IFIED) ENRICHMENT UNDER THE GERMAN CIVIL CODE .......... 8
PROCEDURAL LIMITS ............................................................................................... 11
The Pleadings ............................................................................................................ 11
Production of Documents inter Parties and by Third Parties ......................... 13
Legitimate forensic purpose comprises 4 points of principle ...................... 14
Conclusion ............................................................................................................... 15
INTRODUCTION
A recent arbitration between a Hong Kong registered IT company (the claimant) and a German public company (the respondent) administered by the Deutsche Institution für Schiedsgerichsbarkeit or German Institution of Arbitration (DIS), highlighted the procedural law differences and substantive law similarities between the civil law and common law systems.

The arbitration clause provided that the law of the arbitration be German Law, and the seat of the arbitration was Frankfurt am Main.

The Arbitral Tribunal comprised two German lawyers, one of whom was a retired State Supreme Court Justice and one Australian Lawyer.

The claimant retained a German lawyer as a consultant to give advice about the local substantive and procedural law.

BACKGROUND
The contractor/applicant was contracted to provide IT support to the respondent in over a hundred countries worldwide, including Asia and South America.

The issues were whether:

1. The contract for the provision of services was wrongfully terminated; and
2. A number of invoices were properly due and payable by the respondent to the claimant, including whether the work for which the invoices were raised had been actually performed.

SUBSTANTIVE LAW HISTORY
Germany is a civil law country. Civil law systems are more prevalent than common law systems. The Central Intelligence Agency World Fact Book numbers civil system countries at 150 and common law countries at 80. Common law systems are only found in countries which are former British colonies or have been influenced by the Anglo Saxton tradition such as the USA, Canada and Australia.
Civil law practitioners assert that their system is more stable and fair than the common law, because the laws are stated explicitly and are easier to discern. Common law practitioners assert that their system is more flexible because it can quickly adapt to circumstances and changing societal needs without the need for parliament to pass legislation.

Many systems are now a mixture of the two traditions giving them the best of both legal worlds.

The common law was developed in England from before the Norman conquest. Different rules and customs operated to regulate life and business in different parts of the country. After 1066 the monarchs commenced to unite the country and to harmonise its laws using the King’s Court. The rules developed in the King’s Court naturally and organically and were rarely reduced to writing.

The civil law developed from Roman law. Particularly a compilation of rules issued by the Emperor Justinian in the 6th century and rediscovered in Italy in the 11th century. During the Enlightenment in the 18th Century, the rules in a number of countries and continental Europe produced a comprehensive legal code.

The substantial historical difference between the sources of civil and common law is that civil law is reduced to a set of rules made by parliament whereas the common law, while it relies heavily on statutes, is primarily what is expressed by judges when deciding cases.

The common law gives judges an active role in developing rules, whereas the civil system less so.

The common law relies on a system of binding precedent, Courts follow the stare decisis in which precedents set by higher courts deciding the same issue, binds lower courts. In civil law systems codes and statutes are designed to cover all eventualities and judges have a more limited role. They apply the law rather than create it and past judgements are no more than loose guides.

The role of judges in the civil systems is also different.

Civil law judges are largely investigators, and control the flow of evidence particularly, in civil cases, whereas in common law cases, judges act as decision makers in adversarial contests between parties who present their arguments in whatever manner they see fit to do.
There are some exceptions in civil law system being written. Areas such as administrative law have been developed by judges, supported by limited legislation. A significant proportion of the judge made civil law is directed to the interpretation of the codes and legislation which underlie it.

**Culpa in Contrahendo/Estoppel**

In German and civil law countries, culpa in contrahendo or “faults in conclusion of a contract” is an important concept in contract law. It is recognised as a duty to negotiate a contract with care and to not lead a negotiating partner to act to his or her detriment before a firm contract is concluded.\(^1\)

The doctrine is similar to estoppel, although judges have required that there be consideration. However, proprietary estoppel applied to real estate affectively creates obligations regardless of the pre-existing contract.\(^2\) The United States Courts have allowed promissory estoppel to function as a substitute for consideration.

**Good Faith**

The central principle in civil law systems in contractual obligations is good faith, which derives from Roman law, and has no exact equivalent in common law. Unconscionability in equity comes close to it.

In German law the obligation of good faith governs the performance of the Contract and creates ancillary obligations, such as the obligation to co-operate; provide documents and make disclosures. It limits the exercise of contractual rights for

---

1 In German Contract Law art. 311 of the German Basic Law provides or Grund Gesetz für die Bundesrepublik Deutschland (BGB) provides:
   (1) In order to create an obligation by legal transaction and to alter the contents of an obligation, a contract between the parties is necessary, unless otherwise provided by statute.
   (2) An obligation with duties under section 241 (2) also comes into existence by
      1. the commencement of contract negotiations
      2. the initiation of a contract where one party, with regard to a potential contractual relationship, gives the other party the possibility of affecting his rights, legal interests and other interests, or entrusts these to him, or
      3. similar business contacts.
   (3) An obligation with duties under section 241 (2) may also come into existence in relation to persons who are not themselves intended to be parties to the contract. Such an obligation comes into existence in particular if the third party, by laying claim to being given a particularly high degree of trust, substantially influences the pre-contract negotiations or the entering into of the contract.”

2 Waltons Stores Ltd v Maher (1988) 164 CLR 387
example, where something is demanded unreasonably, or a party attempts to change its position.⁵

English Courts have been reluctant to recognise a universal implied duty of good faith, other than for some categories of contract, such as employment and fiduciary relationships, in part due to concerns that it could create too much uncertainty because, establishing what the obligation involves can be vague and subjective. The content of the duty of good faith is substantially determined by the context in which the contract was negotiated and sits.

Further, the English Courts have determined that it is contrary to the freedom of Contract. Courts have long been reluctant to interfere with the Contract, where the parties have freely negotiated its terms.

A failure to act in good faith (or not act in bad faith) does not necessarily require fraud or other dishonesty.

Under the German Civil Code⁴ contracting parties are required to observe good faith in both negotiation and performance of the Contract. It is a key provision of German Civil Law and involves more than just acting reasonably. It requires a relationship of trust to be established, based upon commercial dealings of the parties in a particular transaction. There is no definition of what good faith requires under a German Law Contract, but the significant amount of German Case Law which does exist gives a guidance on the legal consequences of good faith in certain situations.

The French Civil Code also contains a requirement that agreements must be performed in good faith.

Many common law jurisdictions recognise a form of good faith duty between contracting parties. For instance, the United States Uniform Commercial Code, which has been adopted by many of the United States, imposes “an obligation of good faith in its performance and enforcement”. Good faith is defined as “honesty in fact in the conduct or transaction concerned”.

For a merchant good faith has a higher standard and means “honesty in fact and the observance of reasonable commercial standards of fair dealing in the trade.”

---

⁵ Zimmermann R and Whittaker S (eds), Good Faith in European Contract Laws (Cambridge studies in international and comparative law, the Common Core of European Private Law, CUP, 2000) p 242

⁴ German Civil Code Art 242 provides “An obligor has a duty to perform according to the requirements of good faith, taking customary practice into consideration”.
Even with a statutory definition, the meaning of the doctrine in the US and its precise scope is unclear. Australia has commenced to recognise the existence of a duty of good faith. In *Greenclose v Westminster Bank* Andrews J at [150] said: “... there is no general doctrine of good faith in English contract law and such a term is unlikely to arise by way of necessary implication in a contract between two sophisticated commercial parties negotiating at arm’s length.

Leggatt J’s judgment in *Yan Seng Pty Ltd v International Trade Corporation Ltd*...is not to be regarded as laying down any general principle applicable to all commercial contracts.” Similarly in *Hong Kong in GDH Ltd v Credit Ltd* “an overriding principle that in making and carrying out contracts, parties should act in good faith” is not an obligation recognised by *Hong Kong Law and in Singapore in Ng Giap Hon v Westcon B Securities* the Court said ‘we cannot accede to the appellant’s argument that this court should endorse an implied duty of good faith in the Singapore context’. Professor Elizabeth Peden, at Sydney University says: “the principle of good faith should be seen not as an implied term, but rather as a principle that governs the implication of terms [and] the construction of contracts generally.

The law seems to be moving towards an implication in commercial contracts of a duty of good faith as a primary organising principle ie manifested through secondary legal routes

The secondary route by which good faith manifests itself include:

1. an express or implied term of the Contract, depending upon its circumstances;
2. implicit good faith consideration condition upon the courts own discretion;
3. an implied duty of honest performance in all contracts, seems to arise particularly in Canada and other common law countries including Australia;
4. implied duties of co-operation, particularly when a dispute arises in all common law countries;

---

6 [2014] EWHC 1156 (Ch)
7 [2008] 5HKLRD 895
8 [2009] SGCA 19
9 United Rail Group (case 1) and *Paciocco and ANZ Banking Group* (2015) FCAFC 50 (April 2015) (case 2)
5. an implied obligation to not withhold consent unreasonably applied in all common law countries. An element in which an ounce of good faith or a breach constitute unconscionable business conduct such as arising out of the consumer and competition laws.

In Paciocco and ANZ Banking Group\(^{10}\) the full court of the Federal Court said: “good faith...conception has been recognised (not by all courts in Australia) as an implication or feature of Australian contract law attending the performance of the bargain and its construction and implied content...

The usual content of the obligation of good faith is [1] an obligation to act honestly; and [2] with a fidelity to the bargain; [3] an obligation not to act dishonestly and not to undermine the bargain entered or the substance of the contractual benefit bargained for; [4] an obligation to act reasonably and with fair dealing having regard to the interest of the parties (which will inevitably at times conflict). The provisions, aims and purposes of the contract objectively ascertained.

None of these obligations require the interest of the contracting party to be subordinated to those of another. It is good faith or fair dealing between the parties by reference to the bargain in its terms that is called for, be they both commercial parties or business dealing with consumers.”

Therefore there seems to be significant shift of the common law countries towards the civil law position, not unnaturally, as a consequence of the number of common law countries doing business with the civil law countries such as the United States (common law) trading with Germany (civil law) and France (civil law) and Australia (common law) trading with China and Japan, both of which have civil based legal systems. The country which stands alone is the United Kingdom.

**Civil System**

The Civil System Courts have interpreted the content of the duty of good faith to include:

1. faithfulness to an agreed purpose;
2. consistent with the reasonableness of the contract;
3. preserving reasonable commercial standards of fair dealing;

\(^{10}\) (2015) FCAFC 50 (April 2015)
4. consistently with the justified expectations of the parties.

English cases have concluded that a lack of good faith involves bad faith. Good faith has a core meaning of honesty. Not all bad faith involves dishonesty, and bad faith conduct could include behaviour which is seen as commercially unacceptable improper and unconscionable but not actually dishonest.

UNJUST ENRICHMENT AT COMMON LAW v UNJUST(IFIED)
ENRICHMENT UNDER THE GERMAN CIVIL CODE

Australian common law does not recognise unjust enrichment as a definitive principle.

In *David Securities Pty Ltd v Commonwealth Bank of Australia*\(^1\) the High Court held that the question of whether monies were paid under mistake of fact or of law, should be returned to a payer, is not to be determined by reference to whether the recipient has been unjustly enriched at the expense of the other party. Unjust enrichment is not a definitive legal principle which can be taken as sufficient premise for direct application in particular payment cases.\(^2\)

Recovery depends upon the existence of the qualifying or vitiating fact, of which mistake is one. Where the factor is present, there is a prima facie liability on the recipient to make restitution. To displace the prima facie liability, the recipient must point to circumstances which the law recognises would make an order for restitution unjust.

For example, the recipient of monies paid under a mistake is entitled to a raise by way of answer, any matter or circumstances which shows that his or her receipt or retention of the payment was or is not unjust.

English and German scholars have written on the defence at change of position as it is understood by English law.

In Australia in *David Securities Pty Ltd v Commonwealth Bank of Australia*,\(^3\) the defence of change of position has not been expressly accepted in Australia, but the Court accepted that if payments made under a mistake were prima facie recoverable, a

---

\(^1\) (1992) 175 CLR at 378-379
\(^2\) See also *Bofinger v Kingsway Group Ltd* (2009) 239 CLR 269 at 299 (86)
\(^3\) (1992) 175 CLR 353 at 384-385
defence of change of position is necessary to ensure that enrichment of the recipient is prevented only in circumstances where it would be unjust.

In *Roxborough v Rothmans of Pall Mall Australia Ltd*¹⁴ the High Court suggested that Australian Law would adhere to the kind of defence, recognised by equity. German law does not have one discrete law of unjust enrichment by which restitution is provided, which the English Courts require. In contractual dealings, under the BGB restitution provisions are contained in the law of obligations; property; family and succession and in other places.

However, the important aspect of the concept is contained in art 812 (1) of the BGB.¹⁵: Zweigert K and Kortz H Introduction to Comparative Law, (3rd Ed) Clarendon Press Oxford 1998 (p539), said: “Art 812 (1) derived from the Roman Condictio which was an action in personam designed to perform an obligation. The formula for the action made no mention of the basis of the Defendant’s obligation. The condictio could be used whenever a specific sum of money or a chattel had to be handed over to the plaintiff, regardless of the source of the obligation to do so.”

The first part of art 812(1) of the BGB provides that a person who, without legal grounds, obtains anything from a person at his expense, either by transfer or otherwise, is bound to give it up to him.

The provision is the first requirement under English law that the recipient benefits at the expense of the other, Goff and Jones¹⁶ said that the principle of unjust enrichment, presupposes three things:

1. that the defendant was enriched by the receipt of a benefit;
2. that the benefit was gained at the plaintiff’s expense; and
3. that it would be unjust to allow the defendant to retain the benefit.

English law does not contain the essential requirement that the transfer of a benefit be without legal ground.


(1) A person who obtains something as a result of the performance of another person or otherwise at his expense without legal grounds for doing so is under a duty to make restitution to him. This duty also exists if the legal grounds later lapse or if the result intended to be achieved by those efforts in accordance with the contents of the legal transaction does not occur.

(2) Performance also includes the acknowledgement of the existence or non-existence of an obligation.

Enrichment in German law traditionally means economic increment to a person’s wealth. An enrichment must be capable of legal justification. In German law any transfer of wealth which occurs without legal reasons can be recovered.

It follows that although ownership of a chattel sold passes under the German conveyancing law, art. 812(1) allows the vendor to demand restitution of the benefit conferred, that is ownership where it later appears that the contract is void. The action is available as long as the person conferring the benefit did not know that he or she was not bound to do so.

Because enrichment in German Law is equated to an addition to a person’s wealth, the duty which arises under art. 812(1) to return money or other benefit because it is not legally justified, is extinguished or reduced, if a benefit no longer exists, is destroyed or is stolen.

The person who buys a car with the money received, and the car is of equal value, there is no loss of enrichment. If the value of the car is less, the purchaser is no longer enriched to the same extent and does not have to pay back all of the money.

What unjust means in this context, was provided by the decision of the House of Lords in Lipkin Gorman (a firm) re Carpmale Ltd in which the defendants changed their position following the receipt of money in circumstances such as mistake was accepted to a defence for a claim for restitution.

The partner of a law firm who had a gambling addiction, presented a cheque drawn on the firm’s bank account to a casino, which cashed it for chips. Because the casino had not given valuable consideration to the firm for the cheque, there was prima facie an entitlement in the firm for restitution.

Under the change of position defence, there was no difficulty, however the casino claimed it acted in good faith and it would be unjust and unfair to order restitution, that is one of a change of position defence. Lord Goff concluded that English law ought to recognise such a defence.

Lord Goff said that the principle was “that the defence (of change of position) is available to a person who’s position has so changed that it would be in equitable in

---

17 Kurt n16 p 582-583
19 Art. 814 of the BGB
20 [1991] 2AC 548
21 Lipkin Gorman (a firm) re Carpmale Ltd [1991] 2 AC 548 at 578
all of the circumstances to require them to make restitution, or alternatively to make restitution in full.”\textsuperscript{22}

The defence is similar to Art. 812 (1).

Essentially, Art. 812(1) confers a right to recover benefit obtained without a need for legal justification, whereas the English Common Law requires legal justification, but the concept is similar.

**PROCEDURAL LIMITS**

**The Pleadings**

The procedural issues commenced at the time the Statement of Claim was delivered to the DIS by the claimant.\textsuperscript{23}

The DIS rules provided:

1. The proceedings commence by the filing of a Statement of Claim with the DIS Secretariat;\textsuperscript{24}
2. The Statement of Claim shall contain:
   2.1 identification of the parties;
   2.2 the relief sought;
   2.3 particulars of the facts and circumstances which gave rise to the claim;
   2.4 a copy of the Arbitration Agreement;
   2.5 nomination of an arbitrator;\textsuperscript{25}
   2.6 particulars of the amount in dispute, as to the place where the arbitration is to take place, the language of the arbitration and the rules governing the substance of the dispute;\textsuperscript{26}
   2.7 if the Statement of Claim is incomplete, the DIS Secretariat\textsuperscript{27} requests the claimant to supplement the Statement of Claim and sets a time with it for compliance;

\textsuperscript{22} Lipkin Gorman (a firm) re Carpmale Ltd [1991] 2 AC 548 at 580
\textsuperscript{23} Schedule 1 of the redacted copy of the Statement of Claim
\textsuperscript{24} DIS Arbitration Laws R6.1
\textsuperscript{25} DIS Arbitration Laws R6.2
\textsuperscript{26} DIS Arbitration Laws R6.3
\textsuperscript{27} DIS Arbitration Laws R6.4
To a common lawyer, the Rules as to the content of the Statement of Claim, calls for a pleading which contains the material facts and particulars in the usual way.\textsuperscript{28} DIS did not issue a request to supplement the Statement of Claim, but nevertheless the respondent complained that the Statement of Claim did not comply with the DIS Rules because it did not look like a Statement of Claim filed in a civil court in Europe, particularly in Germany.

A German Statement of Claim is a narrative document, which in addition to the contents referred to in the DIS Rules, contains:

1. both facts and supporting law, more in the nature of a submission;
2. references to the documents;
3. the witness statements; and
4. annexing documents to be relied upon.\textsuperscript{29}

The Tribunal ruled that the Statement of Claim complied with the DIS rules.\textsuperscript{30}

\textsuperscript{28} See for example: Uniform Civil Procedure Rules 2005 - REG 14.7 (NSW)
Pleadings to contain facts, not evidence
14.7 Pleadings to contain facts, not evidence
(cf SCR Part 15, rule 7; DCR Part 9, rule 3)
Subject to this Part, Part 6 and Part 15, a party’s pleading must contain only a summary of the material facts on which the party relies, and not the evidence by which those facts are to be proved.

\textsuperscript{29} German Civil Law Procedure about Pleadings
Section 129
Preparatory written pleadings
(1) In proceedings in which the parties must be represented by counsel, the hearing for oral argument will be prepared by written pleadings.
(2) In other proceedings, an order given by a judge may direct the parties to prepare the hearing for oral argument by written pleadings, or to record their corresponding declarations with the registry for the files of the court.
Section 130
Content of the written pleadings
The preparatory written pleadings should provide:
1. The designation of the parties and their legal representatives by name, status or business, place of residence and position as a party; the designation of the court and of the subject matter of the litigation; the number of annexes;
2. The petitions that the party intends to file with the court at the session;
3. Information on the factual circumstances serving as grounds for the petitions;
4. The declarations regarding the facts alleged by the opponent;
5. The designation of the evidence that the party intends to submit as proof of any facts alleged, or by way of rebutting allegations, as well as a declaration regarding the evidence designated by the opponent;
6. The signature of the person responsible for the written pleading; if it is transmitted by telefax (telecopier), the signature shall be shown in the copy.
Section 133
(1) The parties are to attach to the written pleadings they are submitting to the court the number of copies of the written pleadings and their annexes that are required for service of same. This shall not apply to any documents transmitted electronically, nor shall it apply to annexes that are available to the opponent in their original versions or as copies.
(2) In the event of documents being served from one attorney on another (section 195), the parties to the dispute are to submit to the court hearing the case, immediately following such service, a copy of their preparatory written pleadings and the annexes.
Production of Documents inter Parties and by Third Parties

Most Common Law Jurisdictions have extensive procedural rules about the production of documents, both interparties by way of discovery, or Notice to Produce and by the third parties at the direction or order of the Court, such as a subpoena.\(^\text{31}\)

In most Common Law jurisdictions, the production of documents is limited by the requirement that the documents or categories of documents which a party seeks to have the other produce are relevant and have a legitimate forensic purpose.

Art. 424
Petition in the event the record or document is to be produced by the opponent
The petition shall:
1. Designate the record or document;
2. Designate the facts the record or document is intended to prove;
3. Designate, as completely as possible, the contents of the record or document;
4. Cite the circumstances based on which it is being alleged that the opponent has possession of the record or document;
5. Designate the grounds based on which the obligation results to produce the record or document. These grounds must be demonstrated to the satisfaction of the court.

\(^{31}\) UCPR Rules 2005 on Discovery and Subpoenas
Order for discovery
(cf SCR Part 23, rule 3 (1), (2) and (3); DCR Part 22, rule 3 (1), (2) and (3))
(1) The court may order that party B must give discovery to party A of:
(a) documents within a class or classes specified in the order, or
(b) one or more samples (selected in such manner as the court may specify) of documents within such a class.
(2) A class of documents must not be specified in more general terms than the court considers to be justified in the circumstances.
(3) Subject to subrule (2), a class of documents may be specified:
(a) by relevance to one or more facts in issue, or
(b) by description of the nature of the documents and the period within which they were brought into existence, or
(c) in such other manner as the court considers appropriate in the circumstances.
(4) An order for discovery may not be made in respect of a document unless the document is relevant to a fact in issue.
Issuing of subpoena
(cf SCR Part 37, rule 2)
(1) The court may, in any proceeding, by subpoena order the addressee:
(a) to attend to give evidence as directed by the subpoena, or
(b) to produce the subpoena or a copy of it and any document or thing as directed by the subpoena, or
(c) to do both of those things.
(2) An issuing officer must not issue a subpoena:
(a) if the court has made an order, or there is a rule of the court, having the effect of requiring that the proposed subpoena:
(i) not be issued, or
(ii) not be issued without the leave of the court and that leave has not been given, or
(b) requiring the production of a document or thing in the custody of the court or another court.
(3) The issuing officer must seal with the seal of the court, or otherwise authenticate, a sufficient number of copies of the subpoena for service and proof of service.
(4) A subpoena is taken to have been issued on its being sealed or otherwise authenticated in accordance with subrule (3).

German Civil Law Procedure about production of documents
Section 134
Inspection of records or documents
(1) Wherever a party is asked to do so in due time, it is under obligation to deposit with the court registry any records of documents that it has at hand and that it has referred to in a preparatory written pleading; it shall be obligated to do so prior to the hearing for oral argument, and to inform the opponent that it has so deposited them.
(2) The opponent may inspect the records or documents within a period of three (3) days. Upon corresponding application being made, the presiding judge may extend or shorten this period.
Legitimate forensic purpose comprises 4 points of principle

A legitimate forensic purpose will be established if a document gives rise to a line of enquiry which is relevant to the issues before the trier of fact, including for the purpose of meeting the opposing case by way of cross-examination:

1. In assessing whether a legitimate forensic purpose exists in relation to documents sought on an early return of subpoena, it must be borne in mind that the necessity for having a document to fairly dispose of the issues at trial might well not become apparent before trial. It may, for example, become apparent when a document is used in cross-examination to refute unforeseen evidence-in-chief. Thus, with a document is “necessary” to fairly dispose of proceedings is to be understood in the broad sense of embracing any document which has value, in the sense of at least apparent relevance, and fairly disposing of proceedings, even if it might not readily be seen, at the pre-inspection stage, necessarily to be admissible in evidence;

2. At least one object of the rule permitting early return of subpoenas is to appraise the parties of the strengths and weaknesses of their case at an early stage. Hence, no narrow view as to the legitimate purposes of a subpoena ought to be taken;

3. There is no requirement that to avoid the stigma of fishing, a party must already have possession of some evidence before issuing a subpoena. Historically the concept of fishing was not concerned with the prior possession of evidence, but rather the prior pleading of issues of which the evidence sought would be relevant. In the interests of a fair trial, litigation should be conducted on the footing that all relevant documentary evidence is available.

In the United States, discovery is generally extensive in scope, and can cover any document brought into existence during the events referred to in the pleadings, although in some states, there are moves to limit the extent of discovery.

---

33 See Brand v Digi-Tech [2001] NSWSC 425
34 See Khanna v Lovell White Durrant [1995] 1 WLR 121 at 123
35 See Bailey & Ors v Beagle Management Pty Ltd & Ors (2001) 105 FCR 136 at 143-144; Chapman v Luminis Pty Ltd [2001] FCA 1580 AT [48]
36 See Bailey (supra) at 143
In Civil Systems the production of documents interparties and by third parties is much more limited to:

1. documents referred to in a pleading;\(^3^7\)
2. documents which prove pleaded facts by reference, as far as possible, to the contents of the document.\(^3^8\)

The production of documents can be ordered following the hearing of a petition. Discovery as such is virtually unknown in a civil system and is only ordered for documents, in very limited circumstances.

The shortcomings of the civil system approach were demonstrated in the arbitration, when production of any documents by the respondent was rejected by the arbitrators when:

1. whether work to support the invoices had been done was put in issue by it;
2. it had control of many of the source documents which supported the applicant’s assertion that it had performed the work, such as time sheets and work orders signed by the respondent’s agent, confirming that the work had been completed.

In some circumstances, the refusal by a Court to order production of documents in these circumstances can facilitate fraud or unconscionable conduct by the party refusing to produce documents.

**Conclusion**

Substantive law concepts of:

1. culpa incontrahendo in Civil Systems and estoppel in Common Law systems;
2. good faith in both systems;
3. enrichment and unjust enrichment,

demonstrate how close in those concepts the two systems are.

Both are directed to achieving justice between the parties but have developed through different processes. Civil Systems by written law and Common Law systems by judge made law.

\(^3^8\) **Effect of default by the obligee**

The default of the obligee in relation to a joint and several debtor is also effective for the other obligors.
The procedural rules are very different and can lead the uninitiated into error and difficulty if it is assumed that the contents of pleadings is the same for both common law and civil systems and the production of documents can easily be achieved in a civil system by reference only to legitimate forensic purposes, without considering the civil law limits on the production of documents.

Chambers

GREG LAUGHTON  SC
13 Selborne Chambers
174 Phillip Street
SYDNEY NSW 2000
glaughton@selbornechambers.com.au
T: 9233 8796  F: 9221 4196
IN THE MATTER OF AN ARBITRATION BETWEEN: 

The Applicant

The Respondent

STATEMENT OF CLAIM

Legend

1. In this Statement of Claim:

1.1 All monetary amounts set out in this Statement of Claim are in $US;

1.2 Amended MSA means the MSA which was the subject of the negotiations between [Redacted] and [Redacted].

1.3 BAFO means best and final offer;

1.4 Contractual Agreements means the contractual arrangements between [Redacted] and [Redacted] including:

1.4.1 The [Redacted] Service Agreement;

1.4.2 The [Redacted] MSA (No. [Redacted]);

1.4.3 The First Interim Agreement for [Redacted];

1.4.4 The Second Interim Agreement for [Redacted];

1.4.5 The Third Interim Agreement for [Redacted] (No. [Redacted]);

1.4.6 The Amended MSA;

1.4.7 The Novation Agreement; and

1.4.8 The [Redacted] MSA.

1.5 DIS means the German Institution of Arbitration;

1.6 First Interim Agreement for [Redacted] means the first interim agreement between [Redacted] and [Redacted] for IT services and support for [Redacted] commencing 1 July 2010 and concluding on 30 September, 2010;
1.7 Hardware Break/Fix means the support services provided by [Redacted] to [Redacted] for which [Redacted] paid [Redacted] a monthly fee;

1.8 [Redacted] means [Redacted];

1.9 [Redacted] Service Agreement means the service agreement between [Redacted] and [Redacted] dated 21 March 2007;

1.10 IT means Information Technology;

1.11 MSA means Master Service Agreement;

1.12 [Redacted] means the [Redacted] entity contracting with [Redacted], as referred to in the Contractual Agreements;

1.13 [Redacted] MSA means the Master Service Agreement between [Redacted] and [Redacted] pursuant to which [Redacted] provided IT services and support to [Redacted] on behalf of [Redacted] signed in March 2010, which commenced on 1st January, 2010, document Reference No [Redacted];

1.14 PO means purchase order;

1.15 SoW means scope of work.

1.16 Second Interim Agreement for [Redacted], means the Second Interim Agreement between [Redacted] and [Redacted] for services from 1 October 2010 to 31 December 2010;

1.17 Services or “the services” means IT services and support;

1.18 [Redacted] means the [Redacted] entity contracting with [Redacted], referred to in the Contractual Agreements;

1.19 [Redacted] Novation Agreement means the agreement made between [Redacted], [Redacted] and [Redacted] pursuant to which the [Redacted] MSA was novated from [Redacted] to [Redacted], effective 1 July 2008;

1.20 [Redacted] Uplift means the 15% additional invoice price for the [Redacted] scope of works above the amounts quoted for and invoiced by [Redacted] for services in the [Redacted] scope of work;
1.21 [Redacted] means [Redacted];

1.22 The IMAC Schedule means the Schedule of charges contained in the [Redacted] for work performed outside of the Hardware Break/Fix scope of work;

1.23 The Negotiations means the negotiations between representatives of [Redacted] and [Redacted] for the terms and conditions upon which [Redacted] would continue to provide IT services and support to [Redacted] on behalf of [Redacted] for 3 years from the commencement of the Amended MSA;

1.24 The [Redacted] uplift means 13% above the amounts invoiced for Services provided by [Redacted] for the [Redacted] scope of work;

1.25 The [Redacted] scope of work means the work detailed in Schedule 1 of the [Redacted] MSA;

1.26 The [Redacted] MSA means the Master Service Agreement entered into between [Redacted] and [Redacted] for the provision IT services and support which ended on 31 May 2009.

1.27 The [Redacted] scope of work means the work detailed in Schedule 1 of the First, Second and Third Interim Agreements for [Redacted];

1.28 Third Interim Agreement for [Redacted] means the Third Interim Agreement Reference No [Redacted] between [Redacted] and [Redacted] for services from 1 January 2011 to 31 March 2011;

1.29 Total Services Delivered Average means the average of all invoices for the total services rendered by [Redacted] to [Redacted] between July 2010 and March 2011, including hardware maintenance, IMAC, tape handling and professional services;

1.30 [Redacted] means [Redacted], a company incorporated in Hong Kong and includes any affiliates associated with [Redacted] referred to in the Contractual Agreements;
1.31 Service Partner List means the list of service partners kept by [blank]; and

1.32 [blank] means [blank], and includes any affiliate or associated corporations of [blank] referred to in Contractual Agreements.

Introduction

2. [blank] is and was at all times material to the events set forth below:

2.1 a limited liability company incorporated according to the Laws of Hong Kong, the registered office of which is at [blank];

2.2 in the business of providing IT services, including designing, implementing, managing and maintaining enterprise IT Equipment for [blank] and Other Enterprise class equipment on a worldwide basis; and

2.3 as such is able to sue in its own name.

3. [blank] is and was at all times material to the events set forth below:

3.1 a limited liability company incorporated according to the laws of Germany, the registered office of which is at [blank];

3.2 a wholly-owned subsidiary of [blank], and operated as the corporate customer arm of [blank];

3.3 in the business of operating information and communication technology systems for multi-national corporations and public sector institutions, using sub-contractors, such as [blank]; and

3.4 as such is liable to be sued in its own name.
Relief Sought

4. [Redacted] claims the following relief:

The Invoices Claim:

4.1 An award in favour of [Redacted] against [Redacted] in the sum of $4,000,243.41 for unpaid invoices as set out in Schedule 1 to this Statement of Claim;

The Interest Claim

4.2 An award in favour of [Redacted] for interest on the sum of $4,000,243.41 as calculated in Schedule 1 attached to this Statement of Claim up to and including 31 October 2013 and continuing until paid;

Damages claim for failure to pay invoices

4.3 Alternatively, an award of damages equivalent to the value of the invoices and interest set forth in Schedule 1 to this Statement of Claim for breach of Clause 17 by [Redacted] of its obligation to pay [Redacted] for its entitlement under the Contractual Agreements for work and labour done and materials supplied as set out in Schedule 1;

The Culpa in Contraendo Claim

4.4 An award of damages as set forth in Schedule 2 in this Statement of Claim;

The Wrongful Termination Claim

4.5 An award of damages for the wrongful termination of the Contractual Agreements by [Redacted] as set forth in Schedules 3 and 4 of this Statement of Claim;

The Misrepresentation Claim

4.6 Further and alternatively, an award of damages in favour of [Redacted] against [Redacted] for misrepresentation in accordance with Schedules 2, 3 and 4 of this Statement of Claim
The Breach of Clause 44.1 Claim

4.6 An award of damages as set forth in schedules 3 and 4 of the Statement of Claim for breaches by [redacted] of Clause 44.1 of the [redacted] MSA.

The breaches by [redacted] of schedule 16 of the [redacted] MSA

4.7 An award of damages as set forth in Schedule 5 to this Statement of Claim for breaches by [redacted] of Schedule 16 of the [redacted] MSA.

The Costs Claim

4.8 An award of costs in favour of [redacted] against [redacted] for the arbitration and the dispute resolution processes under the Contractual Agreements between [redacted] and [redacted].

Further and other orders claim

4.9 Interest on all awards of damages in favour of [redacted] against [redacted];

4.10 Such further and other award as the arbitral tribunal deems appropriate.

Summary of damages claimed

<table>
<thead>
<tr>
<th>Claim</th>
<th>Paragraph No.</th>
<th>Amount</th>
<th>Schedule No.</th>
</tr>
</thead>
<tbody>
<tr>
<td>1. The Invoices Claim</td>
<td>27-34</td>
<td>$4,000,243.41</td>
<td>1</td>
</tr>
<tr>
<td>2. Interest on unpaid invoices as 31.10.13</td>
<td>35-36</td>
<td>$307,304.80</td>
<td>1</td>
</tr>
<tr>
<td>3. The Damages for work and labour done and materials supplied</td>
<td>37-39</td>
<td>$4,000,243.41 plus interest to 31.10.13 $307,304.80</td>
<td>1</td>
</tr>
<tr>
<td>4. The Culpa in Contrahendo/variation of contracts claim</td>
<td>40-54</td>
<td>$627,682.31 plus interest $47,640.68</td>
<td>2</td>
</tr>
<tr>
<td>5. The Misrepresentation Claim</td>
<td>55-63</td>
<td>$4,674,278.40 plus interest &amp; $1,698,375.95 plus interest</td>
<td>3</td>
</tr>
<tr>
<td>6. The Wrongful Termination Claim</td>
<td>64-67</td>
<td>$4,674,278.40 plus interest &amp; $1,698,375.95 plus interest</td>
<td>3</td>
</tr>
<tr>
<td>7. Breaches by [redacted] of clauses 44.1 of the MSA Claim</td>
<td>68-72</td>
<td>$4,674,278.40 plus interest $1,698,375.95 plus interest &amp; $4,738,415.80 plus interest</td>
<td>3</td>
</tr>
</tbody>
</table>

- 6 -
<table>
<thead>
<tr>
<th>8. Breaches by [redacted] of Schedule 16 of the MSA</th>
<th>73-76</th>
<th>$4,738,415.80 plus interest</th>
<th>5</th>
</tr>
</thead>
<tbody>
<tr>
<td>Total Claims</td>
<td>Invoices</td>
<td>$4,000,243.41</td>
<td></td>
</tr>
<tr>
<td></td>
<td>Interest to 31.10.13</td>
<td>$307,304.80</td>
<td>$4,307,548.21 (including interest 31.10.13)</td>
</tr>
<tr>
<td></td>
<td>Damages</td>
<td>$4,674,278.40</td>
<td>$11,111,070.15 (plus interest)</td>
</tr>
<tr>
<td></td>
<td></td>
<td>$1,698,375.95</td>
<td>$15,418,618.36 (total plus interest on damages)</td>
</tr>
<tr>
<td></td>
<td></td>
<td>$4,738,415.80</td>
<td></td>
</tr>
<tr>
<td><strong>Grand Total</strong></td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

**The Contractual Arrangements between [redacted] and [redacted]**

5. By the [redacted] MSA, [redacted] agreed to provide IT services and support to [redacted] from 1 July 2004.

6. By the [redacted] Service Agreement, [redacted] agreed to provide IT services and support to [redacted] for services agreed by [redacted] to be provided to [redacted] pursuant to the [redacted] MSA from 1 March 2007.

7. By the [redacted] Novation Agreement, the [redacted] MSA and all associated SoWs were novated by [redacted] to [redacted] effective from 1 July 2008.

8. By the [redacted] Novation Agreement, [redacted] commenced to provide IT support services for [redacted] in discharge or partial discharge of the obligations to [redacted] which [redacted] acquired under the [redacted] Novation Agreement.

10 By the [REDACTED] MSA, [REDACTED] agreed to provide IT services and support to [REDACTED] on behalf of [REDACTED] in discharge or partial discharge of the obligations which [REDACTED] had to provide IT systems and support to [REDACTED] from June 2009 until June 2010.

11 On 18 December, 2009 [REDACTED] was awarded the [REDACTED] SoW previously performed by [REDACTED] commencing 1 January 2010, following the refusal of [REDACTED] to negotiate an extension of its existing contract with [REDACTED]. The [REDACTED] MSA was varied to add the [REDACTED] SoW.

12 By the [REDACTED] MSA, which was signed in March 2010, [REDACTED] agreed to provide IT services and support to [REDACTED] on behalf of [REDACTED] in discharge or partial discharge of the obligations which [REDACTED] had to provide IT services and support to [REDACTED] from 1 January 2010 until 3 years after the [REDACTED] MSA was signed.

13 By email dated 7 May 2010, [REDACTED] gave notice to [REDACTED] that [REDACTED] was the preferred bidder for the entire [REDACTED] maintenance SoW. The remaining [REDACTED] scope SoW was to be supported by [REDACTED] from 1 July 2010.

14 In May 2010, [REDACTED] and [REDACTED] on behalf of [REDACTED] and [REDACTED] [REDACTED] and [REDACTED] on behalf of [REDACTED] commenced the Negotiations.

The First Interim Agreement for [REDACTED]

15 In July 2010, the [REDACTED] MSA was to expire and be replaced by the Amended MSA. The Negotiations had not concluded and the terms of the Amended MSA had not been agreed between [REDACTED] and [REDACTED].

16 By reason of the terms of the Amended MSA, not being agreed upon by [REDACTED] and [REDACTED], the First Interim Agreement was negotiated for three months pending completion of the Negotiations.

17 On 23 June, 2010 a series of meetings was conducted between [REDACTED], [REDACTED] and representatives of [REDACTED] in Malaysia, the USA and the Netherlands to mark the start of [REDACTED] supporting the whole [REDACTED] SoW. [REDACTED] committed to support the full service
of the SoW without an MSA and without a PO being provided. As of July 2010, it was supporting the entire SoW per the proposed Schedule 1 in the Amended MSA.

18 The First Interim Agreement for [redacted] was signed 9 September 2010. [redacted] agreed to provide IT services and support to [redacted] on behalf of [redacted] in discharge or partial discharge of the obligations which [redacted] had to [redacted] from 1 July 2010 to 30 September 2010.

19 By Clause 1.2 of the First Interim Agreement for [redacted] the terms and conditions of the [redacted] MSA applied to the First, Second and Third Interim Agreement for [redacted].

20 By Clauses 4.2, 6.1 and 7 of the First Interim Agreement for [redacted]:

19.1 the uplift; and

19.2 the uplift;

would be paid by [redacted] to [redacted] in the event that [redacted] did not sign the Amended MSA by 31 December 2010.

21 By Clause 7 of the First Interim Agreement for [redacted], in the event that prior to 31 December 2010, [redacted] and [redacted] agreed to a final version of an MSA for the provision by [redacted] of services to [redacted] for [redacted], [redacted] would refund to [redacted] the full amounts of the uplift and the uplift, from 1 January 2010 until the time the MSA came into effect.

22 By Clause 28.7 of the [redacted] MSA, [redacted] could terminate the [redacted] MSA for convenience by giving six months’ written notice to [redacted] of its intention to do so.

23 By Clause 28.12 of the [redacted] MSA:

23.1 Notice of termination for convenience could be given by [redacted] to [redacted] without six months’ prior notice due to substantial reason, subject to the payment by [redacted] to [redacted] of a compensation charge set out in Schedule 6 of the [redacted] MSA;

23.2 Schedule 6 of the [redacted] MSA does not set out the compensation charge;
23.3 Accordingly, [redacted] is liable to pay [redacted] an amount equal to 6 months Net profit based on the Total Services Delivered Average less the one months notice provided as set out in Schedule 3 to this Statement of Claim.

The Second Interim Agreement for [redacted]

24 While the Negotiations were continuing, by the Second Interim Agreement for [redacted], [redacted] and [redacted] agreed to extend the operation of the First Interim Agreement for [redacted] from 1 October 2010 to 31 December 2010, upon the same terms as set out in the First Interim Agreement for [redacted].

The Third Interim Agreement for [redacted]

25 While the Negotiations were continuing, by the Third Interim Agreement for [redacted], and [redacted] agreed to extend the operation of the First Interim Agreement for [redacted] from 1 January 2011 to 31 March 2011, subject to certain terms and conditions.

Particulars of the Terms of the Third Interim Agreement for [redacted]

The following terms applied to the Third Interim Agreement for [redacted];

25.1 [redacted] was to pay to [redacted] the [redacted] Uplift for the period July to December 2010;

25.2 The Parties agreed to a 3 months’ extension of the First Interim Agreement under the existing terms from 1 January 2011 to 31 March 2011;

25.3 [redacted] would submit invoices, as defined in the [redacted] MSA, during the 3 month period from 1 January 2011 and 31 March 2011 inclusive of the [redacted] Uplift and the [redacted] Uplift and [redacted] would pay those invoices according to the terms of the [redacted] MSA;

25.4 Should the Amended MSA be signed by 31 March 2011 with both parties acting reasonably [redacted] would repay the 15% [redacted] uplift.
charged by it for the services provided by it from 1 January 2010 to 31 March 2011.

26 The Amended MSA was not signed by [REDACTED] by 31 March 2011 and [REDACTED] is entitled to retain the [REDACTED] uplift and the [REDACTED] uplift charged for the period 1 January 2010 to 31 March 2011.

**The Invoices Claim**

27 By the [REDACTED] MSA, [REDACTED] agreed to provide IT services and support to [REDACTED] in discharge or partial discharge of the obligations of [REDACTED] to provide services to [REDACTED].

28 By the [REDACTED] MSA, [REDACTED] agreed to pay [REDACTED] for services rendered by it pursuant to the [REDACTED] MSA, by electronic transfer 30 days after the receipt by [REDACTED] of an invoice from [REDACTED].

29 By Clause 17 of the [REDACTED] MSA, [REDACTED] agreed to pay [REDACTED] for services rendered in accordance with Schedule 6 of the [REDACTED] MSA, by electronic transfer 45 days after receipt by [REDACTED] of a valid invoice.

30 By Clause 5 of the First Interim Agreement for [REDACTED], the terms of the [REDACTED] MSA applied to services rendered by [REDACTED] for [REDACTED] except that a new annexure Schedule 6 applied for charges for [REDACTED].

31 Pursuant to:

31.1 The [REDACTED] MSA;

31.2 The [REDACTED] MSA;

31.3 The First Interim Agreement for [REDACTED];

31.4 The Second Interim Agreement for [REDACTED];

31.5 The Third Interim Agreement for [REDACTED];

as it was obliged to do, between March 2009 and April 2011, [REDACTED] delivered services and supplied materials to [REDACTED] and [REDACTED], on behalf of [REDACTED].
32 As it was entitled to do, between March 2009 and April 2011, ___ rendered invoices to ___ for services which ___ provided and supplied materials to ___ and ___ on behalf of ___, totalling $34,105,958.10.

33 ___ has paid certain invoices but disputed its obligation, and has refused, to pay other invoices and is indebted to ___ for the sum of $4,000,243.41.

34 ___ says that ___ has wrongfully disputed its obligation to pay to ___ the sum of $4,000,243.41 for invoices rendered by ___ to ___ from October 2009 to April 2011, and is liable to pay that sum to ___.

**Particulars of Unpaid Invoices**

Schedule 1 to this Statement of Claim sets out the invoices which ___ disputes it has an obligation to pay, and ___ says it is liable to pay.

**The Interest Claimed:**

35 By Clause 17.3 of the ___ MSA, ___ agreed to pay interest on unpaid invoices from the due date to the date of actual payment at the rate of 2% pa above the base rate for the time being of the European Central Bank.

36 ___ is entitled to interest on the unpaid invoices in accordance with Clause 17.3 of the ___ MSA.

**Particulars of Interest**

Interest calculated as set forth in Schedule 1 of this Statement of Claim.

**The Damages Claim for failure to pay for work and labour done and material supplied and for services provided**

37 Further and in the alternative, ___ repeats the allegations contained in paragraphs 27 to 36, inclusive above.

38 In breach of Clause 17 of the ___ MSA, ___ has neglected and refused to pay ___ the amounts due to it set out in Schedule 1 to this Statement of Claim.

39 In the premises, ___ is entitled to damages from ___ for the value of the work and labour done and materials supplied by ___ to ___.
Particulars

The damages suffered by [redacted] comprise the value of the unpaid invoices set forth in Schedule 1 to this Statement of Claim and interest on the unpaid invoices.

Culpa in Contrahendo Claim/Variation of Contracts Claim

40 Further and in the alternative, [redacted] repeats the allegations in paragraphs 5 to 25 above.

41 Between October 2009 to April 2011, [redacted] and [redacted] engaged in a course of conduct, which included:

41.1 Representatives of [redacted], [redacted] or [redacted] requested [redacted] to perform work, which was outside of the Hardware Break/Fix scope of work (the work);

41.2 As a consequence of the request in 41.1, [redacted] notified the representative of either [redacted], [redacted] or [redacted], who requested the work to be performed, in writing, to confirm that the work would be charged outside that part of the contractual agreements defined as “Hardware Break/Fix” and on the IMAC Schedule; and

41.3 Representatives of [redacted], [redacted] or [redacted] confirmed in writing that the work was outside the Hardware Break/Fix scope, and if [redacted] performed the work and supplied material it could charge for the work as an IMAC.

42 Acting on the faith of the representation made by [redacted], [redacted] or [redacted], that if the work was performed and the materials were supplied, [redacted] could charge [redacted] for the performance of the work and the materials supplied as an IMAC, [redacted] performed the work, supplied materials and rendered invoices to [redacted] for the work performed and materials supplied.
Particulars of Invoices Rendered

Schedule 2 to this Statement of Claim sets out the invoices for work performed by [redacted] that were outside that part of the contractual arrangement defined as “Hardware Break/Fix” and based on the IMAC Schedule.

43 [redacted] has neglected and refused to pay the invoices in Schedule 2 to this Statement of Claim.

44 In the premises, [redacted] is estopped from denying its liability to pay the invoices in Schedule 2 to this Statement of Claim.

45 Further and in the alternative, by refusing to pay the invoices in Schedule 2 to this Statement of Claim, [redacted] has acted cupla in contrahendo and is in breach of the German Civil Code Articles 241 and/or 280 and/or 281 and/or 282 and/or 283 and/or 311.

46 In the premises, [redacted] is liable to pay to [redacted] by way of damages to the equivalent of the amount claimed by [redacted] for work and labour done and materials supplied contained in the invoices in Schedule 2 to this Statement of Claim.

The Variation of the Contractual Agreements claim

47 Further and in the alternative, [redacted] repeats paragraphs 5 to 26 and 41 inclusive, above.

48 In the premises, the Contractual Agreements between [redacted] and [redacted] have been varied in writing at the requests of [redacted] and/or [redacted] and/or [redacted] to acknowledge that the work, if carried out, was to be paid on the IMAC Schedule in the Contractual Agreements between the parties and not as part of the Hardware Break/Fix payment.

49 Further and in the alternative, by a course of conduct between the parties, [redacted] and [redacted] varied the Contractual Agreements (the Varied Contractual Agreements) between them to oblige [redacted] to perform work outside of the Hardware Break/Fix scope and with the consent of [redacted] and/or [redacted] and/or [redacted] to charge that work on the IMAC Schedule.
Particulars of Conduct

The conduct relied upon is set forth at paragraph 41 of this Statement of Claim.

50 As it was obliged to do, [Redacted] provided services and supplied materials at the request of [Redacted]; and/or [Redacted] and/or [Redacted], and, as it was entitled to do, [Redacted] rendered invoices for performing the work and supplying the material charged on the IMAC Schedule.

51 [Redacted] has neglected and refused to pay [Redacted] for the work performed and materials supplied pursuant to the Varied Contractual Agreements.

52 Pursuant to the Varied Contractual Arrangements, [Redacted] was obliged to pay [Redacted] for the work performed and materials supplied.

53 In breach of the Varied Contractual Arrangements, [Redacted] has neglected and refused to pay [Redacted] for the work performed and the materials supplied as set forth in the invoices in Schedule 2 to this Statement of Claim.

54 Alternatively, [Redacted] has breached the Varied Contractual Arrangements between [Redacted] and [Redacted], and is liable to pay damages to [Redacted] for the work performed and materials supplied by it as set forth in Schedule 2 of this Statement of Claim.

Misrepresentation Claim

55 [Redacted] repeats the allegations contained in paragraphs 5 to 26 of this Statement of Claim.

56 During the Negotiations, [Redacted] and [Redacted] on behalf of [Redacted] made certain representations, expressions of opinion and forecasts on behalf of [Redacted] to [Redacted] and [Redacted] of [Redacted] ("the Representations").

Particulars

56.1 The Representations were:

56.1.1 Express;

56.1.2 Partly written; and
56.1.3 Partly oral;

56.2 As to the written parts, were contained in:

56.2.1 emails between [redacted] and [redacted]; and

56.2.2 in clause 1 of the First Interim Agreement for [redacted].

56.3 As to the oral parts, were contained in:

56.3.1 conversations in mid-2010, between each of [redacted]

[redacted] on behalf of [redacted]

and [redacted] on behalf of [redacted];

56.3.2 conversations in late 2010, between each of [redacted]

[redacted] on behalf of [redacted]

and [redacted] on behalf of [redacted].

57 The Representations were or were to the following effect:

57.1 as to the written Representations contained in the emails between

[redacted] and [redacted];

57.1.1 the Amended MSA would be signed;

57.1.2 the Amended MSA would be for a period of three years;

57.1.3 the Amended MSA would be signed by 31 March 2011.

57.2 as the written Representations contained in Clause 1 of the First

Interim Agreement for [redacted]:

57.2.1 both parties expected to reach agreement on the terms of

the Amended MSA following completion of the “good

faith” negotiations;
57.2.2 when agreement was reached on the Amended MSA, [REDACTED] would engage [REDACTED] for the customer [REDACTED], for a period of not less than three years until June 2013;

57.3 as to the oral Representations made in mid-2010:

57.3.1 that the Amended MSA would be signed; and/or

57.3.2 the Amended MSA would be signed shortly.

57.4 as to the oral Representation in late 2010, that the Amended MSA would be signed by [REDACTED] before March 2011.

58 Acting on the faith of the Representations and induced, deceived and mislead by the Representations, [REDACTED]:

58.1 acquired, worldwide, sufficient spare parts to enable it to carry out its obligations under the Contractual Agreements and the Amended MSA between July 2010 and March 2011;

58.2 engaged contractors and employees worldwide to facilitate the performance by [REDACTED] of its obligations of the Contractual Agreements and the Amended MSA;

58.3 established corporations, offices and storage facilities in order to facilitate the necessary infrastructure required by [REDACTED] to meet the obligations of the Contractual Agreements and the Amended MSA; and

59. [REDACTED] made the Representations, it had the information upon which it relied to terminate the Contractual Agreements between the parties on 28 February 2011 for breach of the Integrity and Co-operation Clause.

60 The Representations were untrue in that:

60.1 at the time of making the Representations, [REDACTED] did not intend to enter the Amended MSA with [REDACTED]; and
60.2 [Redacted] intended to engage [Redacted] instead of [Redacted].

Particulars

From July 2010, [Redacted] was negotiating with [Redacted] to perform the IT services, which were, until 28 February 2011, being performed by [Redacted], and, after 28 February 2011, engaged [Redacted] to perform the IT services performed by [Redacted].

61 In the premises, the Representations were misleading and deceptive and [Redacted] was misled and deceived by the Representations.

62 Alternatively, by reason of:

62.1 The Representations and the failure of [Redacted] to enter into the Amended MSA, as it represented it would do, before March 2011 and/or;

62.2 [Redacted] having the information available to it upon which it relied to terminate the Contractual Agreements between the parties on 28 February 2011, at the time it made the representations,

[Redacted] has acted contra in contrahendo, and breached the German Civil Code Articles 241 and/or 280 and/or 281 and/or 282 and/or 283 and/or 311.

63 [Redacted] is liable for damages to [Redacted] caused by the Representations, and/or its acting culpa in contrahendo.

Particulars of Damage

The damages are set forth in Schedule 3 and 4 to this Statement of Claim.

Wrongful Termination Claim

64 By notice dated 28 February 2011, [Redacted] wrongfully terminated the Third Interim Agreement for [Redacted], the [Redacted] MSA and “all other agreements between [Redacted] and [Redacted]” upon the following grounds:

64.1 That [Redacted] had allegedly committed a material breach of the [Redacted] and [Redacted] Customer’s Business Integrity Regulations as specified under Schedule 16 of the MSA;
64.2 Alternatively, and as a subsidiary, pursuant to paragraph 1.2 of annexure A to Schedule 1 of the [redacted] MSA, 90 days from 28 February 2011;

64.3 Alternatively, termination for convenience on 31 March 2011.

65 The termination by [redacted] of the Third Interim Agreement for [redacted], the [redacted] MSA and all other agreements between [redacted] and [redacted] was a repudiation by [redacted] of its contractual obligations to [redacted].

66 As it was entitled to do, [redacted] accepted the repudiation by [redacted] of its contractual obligation and elected to claim damages from [redacted] for breach of contract.

67 Alternatively, [redacted] breached its obligations under the Third Interim Agreement for [redacted], the [redacted] MSA and all other agreements between [redacted] and [redacted] by wrongfully terminating the Contractual Agreements between the parties and is liable to pay damages to [redacted].

Particulars of Loss and Damage Caused by the Wrongful Termination by [redacted] of the Third Extension of the Interim Agreement [redacted], the [redacted] MSA and all other agreements between [redacted] and [redacted].

The damages are set forth in Schedules 3 and 4 to this Statement of Claim.

Breaches by [redacted] of Clause 44.1 of the [redacted] MSA Claim

68 Further and in the alternative, by Clause 44.1 of the [redacted] MSA, during the term of the [redacted] MSA, and for a period of one year following the expiration or termination of the Statement of Work, [redacted] was precluded from soliciting or awarding the SoW or part of the SoW provided by [redacted] under the SoW, to a contractor or third party service provider who performed services under the [redacted] MSA, without the prior written consent of [redacted].

69 For the term of the [redacted] MSA and the [redacted] MSA, [redacted] provided services to [redacted] as a sub-contractor to [redacted].

70 [redacted] was, during the term of the Contractual Agreements, a service provider for [redacted].
71 By reason of the conduct of [Redacted] in negotiating with and agreeing to contract with [Redacted] to perform the services to [Redacted] and [Redacted] which [Redacted] had been performing for [Redacted] and [Redacted], without the consent of [Redacted], solicited and/or awarded a SoW and/or part of a SoW provided by [Redacted], and breached Clause 44.1 of the [Redacted] MSA.

72 By reason of the breach of Clause 44.1 of the [Redacted] MSA by [Redacted], [Redacted] suffered loss and damages.

Particulars

Particulars of damage are contained in Schedule 3, 4 and 5 of this Statement of Claim.

Breaches by [Redacted] of Schedule 16 of the [Redacted] MSA Claim

73 Further and in the alternative, the DTAG Integrity and Co-operation Clause in Schedule 16 of the [Redacted] MSA with specific reference to the [Redacted] Integrity and Co-operation Clause S(2), provided that in the event of a breach by a party to the [Redacted] MSA the party committing the breach is liable to pay a penalty calculated by reference to 10% of the gross order value of the [Redacted] MSA.

74 [Redacted] breached its obligations under Schedule 16 with specific reference to the [Redacted] Integrity and Co-operation Clause and Clause 44.1 of the [Redacted] MSA by:

74.1 Failing to provide [Redacted] with an opportunity to accept or deny the material breach alleged by [Redacted] of its [Redacted] customers business integrity regulations as specified under Schedule 16 of the [Redacted] MSA; and/or

74.2 Prior to 28 February, 2011, solicited [Redacted] and/or contracted with [Redacted] to perform services to [Redacted] and [Redacted] which [Redacted] had performed as a subcontractor to [Redacted] without the consent of [Redacted].

75 By reason of the breach by [Redacted] of its obligations under Schedule 16 of the [Redacted] MSA, with specific reference to the [Redacted] Integrity and Co-operation Clause S(2), T-Systems is liable to pay a penalty calculated by reference to 10% of the gross order value of the [Redacted] MSA.
76 [REDACTED] claims the sum of $4,738,415.80, representing 10% of the gross order value of the [REDACTED] MSA calculated as set out in Schedule 5 to this Statement of Claim.

**Dispute resolution provisions of the [REDACTED] MSA**

77 At Schedule 6 to this Statement of Claim is a copy of Clause 42 of the [REDACTED] MSA.

78 By clause 42 of the [REDACTED] MSA, if any dispute arose or occurred between the parties about any matter under the [REDACTED] MSA it was to be resolved by the dispute resolution procedure set out in clause 42.

79 By a Notice of Dispute dated 6 March 2012, [REDACTED] gave notice to [REDACTED] of the existence and extent of the dispute between it and [REDACTED].

80 At Schedule 7 to this Statement of Claim is a copy of the Notice of Dispute.

81 The parties have been unable to resolve the disputes set forth in the Notice of Dispute in accordance with Clause 42 of the [REDACTED] MSA.

82 All of the disputes between [REDACTED] and [REDACTED] set forth above arise from contracts which are governed by the provisions of the [REDACTED] MSA and the resolution of those disputes are governed by Clauses 42 and 48 of the [REDACTED] MSA.

83 By Clause 48 of the [REDACTED] MSA, in the event that disputes between [REDACTED] and [REDACTED] could not be resolved by the dispute resolution procedure set out in Clause 42 to the [REDACTED] MSA, the dispute is to be submitted to arbitration.

84 At Schedule 8 to this Statement of Claim is a copy of Clause 48 of the [REDACTED] MSA.

85 [REDACTED] and [REDACTED] have carried out all escalation procedures required by clause 42 of the [REDACTED] MSA, including mediation of the dispute, which occurred on 29-30 July 2013.

**Nomination of Arbitrator**

86 [REDACTED] nominates:

[REDACTED]