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Determining Determinability: the Good & the Commercially Reasonable

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Determining Determinability: the Good & the Commercially Reasonable

This article addresses the contested interpretation of 'determinable in nature' under Section 14(d) of the Specific Relief Act, 1963 of India, as amended in 2018 to prioritise specific performance over damages. It critiques the approach of the Delhi High Court, which broadly excludes all private commercial contracts from specific enforcement, by erroneously expanding the scope of 'determinable in nature'. This reading, as held in Rajasthan Breweries, is argued to misinterpret precedent and ignore the statutory shift towards specific performance. In contrast, the Kerala and Madras High Courts have adopted a narrower interpretation, limiting determinability to contracts terminable without cause. Defending this, the article argues that Section 14(d) must be interpreted in light of both legislative purpose and commercial realities, proposing a two-stage framework. First, examining contractual intention through termination clauses; second, applying principles of good faith and commercial reasonableness. This aligns with the Amendment's purpose, while restoring doctrinal coherence.

Keywords: contracts; termination; good faith; determinability; specific relief

Introduction

Before 2018, a breach of contract under Indian law would almost always translate to damages. The Expert Committee Report on the Specific Relief Act 1963 ('Expert Committee Report') intended to change this and make specific performance the norm rather than the exception.[1] The Specific Relief (Amendment) Act, 2018 ('Amendment Act') manifested this by adding the word 'shall' under Section 10 of the Specific Relief Act, 1963 ('the Act'). It was passed with the intention of changing the damages paradigm – of improving contract enforcement, with the particular focus on making specific relief

[1] Government of India, 'Report of the Expert Committee on Specific Relief Act, 1963' (Ministry of Law and Justice, 2016).

the norm.[2] It continues to gain prominence as a highly desirable remedy for contractual breaches, particularly in commercial contracts as a commercially desirable and viable remedy.

Section 14(d) of the Act specifies that contracts that are '*determinable in nature*' are not specifically enforceable. In simple terms, 'determinable' means terminable or something that can be ended. Depending on how widely the phrase 'determinable in nature' is constructed, several contracts can fall outside the scope of specific performance. When it comes to working towards the legislative intent of the Amendment Act,[3] interpreting this phrase becomes crucial. Indeed, if the purpose of the Amendment Act is to promote specific performance, 'determinable in nature' should not include contracts which were never intended by the parties to be so. The very fact that almost all contracts have termination clauses evinces that parties intend the termination of their contract to operate in a certain manner. This makes deciphering the intention of the contract without blankly labelling them as 'determinable' imperative. The flip side of the coin must also be remembered – the existence of a concept of determinability of contracts shows that not all contracts are to be performed through court-enforced specific performance. While the Amendment Act made specific performance the rule, determinability acts as an exception. Therefore, the scope of 'determinability' has to be carefully calibrated to not only reflect the intention of the parties on how the termination is to operate, but also the purpose of the Amendment Act.

Courts have differed on the exact contours of 'determinable in nature'. One line

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[2] Rajya Sabha Debates, The Specific Relief (Amendment) Bill 2018, Session Number 246, 23 July 2018, Comments by Shri Ravi Shankar Prasad available at <https://rsdebate.nic.in/bitstream/123456789/683985/2/PD_246_23072018_p402_p416_15.pdf >; Expert Committee Report (n 1).

[3] The Statement of Objects and Reasons to the Specific Relief (Amendment) Act 2018, para 3.

of judgements, primarily by the Delhi High Court, has considered all terminable private commercial contracts to be determinable. This line of judgements is led by the Delhi High Court division bench decision in *Rajasthan Breweries v Stroh Brewery* ('Rajasthan Breweries').[4] We will call this the 'Delhi position'. Per contra, another set of judgments, led by the Kerala and Madras High Courts, have limited the scope of the phrase to contracts which can be terminated unilaterally, without cause.[5] We will call this the 'Kerala position'. The Supreme Court is yet to lay down the law of the land with a reasoned judgement. This poses two questions. *First,* which of the two provisions is correct as per the purpose of the Amendment Act? The *second* question follows from the first — how should parties draft their contracts, especially the termination clauses, to reflect their intentions towards making the contract determinable?

This paper takes a principled relook at the question of determinability. It argues that the Delhi position is erroneous on three primary grounds. *First, Rajasthan Breweries* proceeds on a wrong interpretation of the Supreme Court judgement in *Indian Oil*. *Second,* adopting the position goes against the explicit purpose of the Amendment Act, that aims towards specific performance. *Third,* it defies commercial logic. In doing so, it traces the jurisprudence on determinability across the two ruling positions and concludes that the Kerala position is correct in law as per the intention of the Amendment Act. Furthermore, it proposes a framework to adjudicate whether a contract is 'determinable in nature', based on the factors already applied by courts and principally built on the building blocks of contract law, *i.e.*, good faith and commercial reasonableness.

To that effect, it is divided into six parts. PART II explains the meaning and

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[4] Rajasthan Breweries Ltd. v. Stroh Brewery Co (2000) SCC OnLine Del 481.
[5] TO Abraham v. Jose Thomas (2017) SCC OnLine Ker 19872 [18]-[22]; A Murugan v. Rainbow Foundation Ltd (2019) SCC OnLine Mad 37961 [17].

implications of 'determinability'. PART III critically analyses the two sets of precedents governing this field: the Delhi position and the Kerala position. It argues that the Delhi High Court has proceeded on an erroneous understanding of a Supreme Court precedent, and has subsequently failed to correct itself. PART IV embarks on a normative claim in support of the Kerala position. It argues against a Delhi High Court judgement criticising the same, showing the faulty textural reasoning of it. It posits that the Kerala position is not only commercially sound, but also the correct textual interpretation of Section 14(d) of the Act. PART V proposes a two-pronged framework to answering questions of determinability that holistically assesses the contract, the parties' intention and industry practices. It adopts a lens of good faith and commercial reasonableness with an orientation that aligns with the legislative intent of the Amendment Act. It goes on to apply the test to a factual matrix to demonstrate its application. PART VI concludes the paper.

Determinability In Brief

As per the dictionary, 'determinable' means 'able to be terminated'.[6] If a contract is termed as determinable, it means that the contract can be terminated by either party even before the purpose is achieved. While seemingly simple, courts have adopted various interpretations of the term. Before explaining the doctrine, we expound on the significance of holding a contract as determinable.

Two remedies most commonly offered by courts for contractual breaches are damages and specific relief.[7] While damages provide monetary compensation for the breach, specific relief goes a step further by directing the breaching party to *specifically*

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[6] *Cambridge Dictionary*, 'Determinable' (Cambridge University Press) <https://dictionary.cambridge.org/dictionary/english/determinable?q=determinable> accessed 7 June 2025.

[7] Alan Schwartz, 'The Case for Specific Performance' (1979) 89 Yale Law Journal 271.

perform its obligations under the contract.[8] Some contracts, however, are incapable of being specifically enforced. Section 14(d) of the Act bars the specific performance of contracts which are 'determinable in nature'. Given that mutual consent underlies a contract, it is natural that a contract is similarly capable of being brought to an end. As much is embodied in the principle of freedom of contract, which is a fundamental principle driving the development of contract law.[9] Adopting the dictionary definition would imply that every contract is determinable, rendering all literature and debate on determinability pointless.

However, the *legal consequence* of a contract being determinable adds nuance to the understanding of the term. Theoretically, even if courts were to direct specific performance of a determinable contract, the parties can still terminate it, robbing the order of any practical effect. Now iff a contract is held to be determinable, the Act bars specific performance. However, the phrasing of this exception to specific performance has changed over the years. The reciprocal provision in the Original Act of 1877 was Section 21(d). It used the word 'revocable' instead of 'determinable'.[10] The 9th Law Commission Report suggested a change as the term 'revocable' was not seen as accurate.[11] Subsequently, the 1963 Act used the phrase 'determinable in nature'. The phrase remained the same even after the Amendment Act, with only the clause number being changed from 14(1)(c) to 14(d).

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[8] See generally Yonathan A Arbel, 'Contract Remedies in Action: Specific Performance' (2015) 118 West Virginia Law Review 369.
[9] PS Atiyah, *The Rise and Fall of Freedom of Contract* (Oxford University Publication, 1985).
[10] The Specific Relief Act 1877, § 21.
[11] The Law Commission of India, *Specific Relief Act, 1877 (Report No 9, 1958)* para 42 ('Law Commission Report').

Let us consider a practical example to understand this. Consider a construction contract. Midway into the project, the contractor decides to renege on their obligations because they receive a more lucrative contract. For the party that hired the contractor, compensation will neither be suitable nor adequate as a remedy. The work is half done, and they need someone to finish it in the shortest possible time. Finding contractors to complete the latter half of a project will not only be more expensive, but will also delay the process substantially. In such a case, damages are not only inadequate, but also not the commercially appropriate remedy from the party's perspective. Rather, specific performance would be the equitable and appropriate remedy.

Indeed, parties to a contract might intend to make their contract determinable by providing for termination clauses. However, the next Part will demonstrate that the legal definition of the term is not settled. Intuitively, a wide definition will effectually preclude specific performance of a wide variety of contracts.

'Determinable in Nature': A Tale of Two Interpretations

This Part highlights the contrary opinions on determinability by different jurisdictions, mainly the Delhi and the Kerela High Courts. It *first* explains the interpretations taken by the Supreme Court on this issue and demonstrates the uncertainty of the position, which is capable of multiple interpretations at best. *Second*, it proceeds to explain the Delhi position, highlighting how the error in the reasoning of *Rajasthan Breweries* was overlooked by subsequent judgements. *Lastly*, it considers the contrary opinion of the Kerela and Madras High Courts.

A. The Supreme Court's Uncertainty

One of the earliest cases decided by the Supreme Court on determinable contracts is *Indian Oil v Amritsar Gas Services* ('Indian Oil'). Here, two clauses of the distributor

agreement – Clauses 27 and 28 – are relevant. Clause 27 provided for termination by Indian Oil on the happening of certain specific events. Clause 28, however, permitted either party to terminate without any cause or reason.[12] On breach of the contract, the respondent prayed for restoration of the distributorship. *Inter alia*, the Court had to consider whether the contract was determinable for it to be specifically enforced under the Act. The Court did not delve into any discussion on the scope of 'determinable in nature'; it simply restated the arbitrator's findings that the contract was determinable in nature as Clauses 27 and 28 allowed its termination at will.[13] However, the scanty reasoning and lack of specificity as to which particular clause made the contract determinable in nature makes constructing a ratio difficult.

Certain courts have assumed that *Indian Oil* restricted the scope of determinable contracts to only those that can be terminated at will (here, Clause 28). In fact, a Madras High Court judgement went further to state that the decision in *Indian Oil* turned on Clause 28 itself.[14] Although formative, these conclusions or assumptions do not have any sound textual basis. Further, the Court also evaded any discussion on the interpretation of specific provision of the Act. In essence, *Indian Oil* failed to set any specific precedent on the scope of 'determinable in nature', making room for both a wide[15] and a narrow[16] construction of its ambit. Therefore, while the above interpretations could certainly be plausible, they are definitely not the only possible ones. Notably, once the clause was held to be determinable, the only relief left to the Court was compensation for the notice

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[12] Indian Oil Corpn. Ltd. v. Amritsar Gas Service (1991) 1 SCC 533 [2].
[13] ibid [12].
[14] Indian Oil Corporation Ltd. v. Bhagawan Balasai Enterprises (2017) SCC OnLine Mad 37266 [4].
[15] Rajasthan Breweries (n 4).
[16] TO Abraham (n 5) [18]-[22]; A Murugan (n 5) [17].

period. Therefore, the Court modified the award to grant compensation without specific relief.[17]

Orissa Manganese v Adhunik Steel ('Orissa Manganese') followed. Here, Clause 8.2 allowed for termination of the contract in the event of a breach.[18] Similar to *Indian Oil,* the Court sidestepped any discussion on Section 14 of the Act. It simply restated the High Court's observations that since an occasion for invoking the said clause had not arisen and no other clause provides for termination, Section 14(1)(c) (Section 14(d) of the present Act) does not apply.[19] While it might be argued that the Court did not consider termination on happening of some event or cause as determinable, the lack of *any* deliberation makes this a weak interpretation. Even in this case, the Court did not allow specific relief. However, it can be asserted that principles specific to injunctions in arbitration, and the requirement of the arbitral tribunal to decide the issue, limited the power of the Court in granting specific performance.[20]

In *Best Sellers v Aditya Birla* ('Aditya Birla'), the Apex Court considered the issue of determinability, but did not hinge its decision on the same. Here, the respondent company had appointed Best Sellers as their agent. On breach by the appellants, specific relief was prayed for, along with a plea for a temporary injunction against creating third-party interests on the suit property.[21] A clause in the agreement allowed for its termination by the respondent company after six years. Based on this, the appellants argued that the contract is determinable in nature, therefore no specific relief or injunction can be

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[17] Indian Oil (n 12) [14].
[18] Adhunik Steels Ltd. v. Orissa Manganese and Minerals (P) Ltd (2007) 7 SCC 125 [7].
[19] ibid [7]- [9].
[20] ibid [23].
[21] Best Sellers Retail (India) (P) Ltd v. Aditya Birla Nuvo Ltd (2012) 6 SCC 792 [7].

granted.[22] The respondent, however, submitted that since the clause allowed for termination only by the respondent company and not by both, it could not be determinable.[23] The Court evaded these arguments by holding that since injunctions are governed under the Civil Procedure Code, one need not go into arguments on the Act.[24] Regrettably, the Court missed a good opportunity for the Court to settle the interpretation of determinability.

The Apex Court judgement in *Rattan Lal v Bhalla* ('Rattan Lal'), delivered a few months after *Aditya Birla,* made some headway into the issue. Clause 8 of the contract here allowed for termination by the appellant if the respondent failed to get a sale certificate within 15 days of the effectuation of the contract. Clause 9 permitted the respondent to terminate if it applies for the certificate but fails to get it within 6 months.[25] Therefore, both the clauses provided for termination on the occurrence of some event. The Court negatived the contention of the contract being determinable. It held that clause 9 was "*never meant to be an escape route"*. The intention of the clause was to incentivise the respondent to take positive efforts towards getting the sale certificate before terminating the contract.[26] However, similar to the earlier cases, *Rattan Lal* evaded the interpretation of the phrase 'determinable in nature'. In fact, its refusal of specific relief was based on an entirely different reason. The Court held that the appellant had not suffered any monetary loss, as the property value had increased substantially. Therefore, rather than decreeing specific performance, it ordered for compensation to be paid.[27] While the correctness of such a reasoning can be critiqued, it is clear that the Court did

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[22] ibid [15].
[23] ibid [20]- [21].
[24] ibid [25].
[25] Rattan Lal v. SN Bhalla (2012) 8 SCC 659 [6]- [8].
[26] ibid [27].
[27] ibid [31].

not deny specific performance based on its interpretation of determinability of the contract. However, the fact that the Court looked at the intention behind a clause is important as it acknowledges the importance of intention when probing the issue of determinability.

The Apex Court found another opportunity to clarify the matter in *Narendra Hirawat v Sholay Media* ('Narendra Hirawat III'). The *Narendra Hirawat* trilogy consists of two Bombay High Court judgements; one by a single bench,[28] which was reversed by the division bench.[29] These two cases shall be analysed in the subsequent sub-parts. On appeal from the decision of the division bench, the Supreme Court restored the single-judge bench order, thereby overruling the division bench's judgement.[30] However, the it analysed the impugned division bench judgement from a different angle altogether, without even touching on the issue of determinability.[31] Therefore, no conclusions on determinable contracts can be drawn from this case.

The above cases clearly show that the Apex Court has not deliberated on what the proper construction of Section 14(d) would be. In fact, the cases of *Aditya Birla* and *Rattan Lal* did not refer to important High Court cases which could have lent some headway.[32] However, it is plausible to argue that both *Indian Oil* and *Orissa Manganese* lean towards the Kerala position. Based on the respective clauses and their holdings, they can be interpreted to have held that only contracts which allow for termination by either

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[28] Narendra Hirawat and Co. v. Sholay Media Entertainment Pvt. Ltd (2020) SCC OnLine Bom 391 ('Narendra Hirawat I').
[29] Sholay Media Entertainment (P) Ltd. v. Narendra Hirawat & Co (2021) SCC OnLine Bom 13971 ('Narendra Hirawat II').
[30] Narendra Hirawat & Co. v. Sholay Media Entertainment (P) Ltd (2022) SCC OnLine SC 1878 21 [22] ('Narendra Hirawat III').
[31] ibid.
[32] For example Rajasthan Breweries (n 4).

side without cause are determinable in nature. However, we concede that this interpretation is not a strong one, owing to the lack of specific averments in the judgements.

B. The Delhi Position: Rajasthan Breweries and Beyond

Lack of sufficient clarity on the issue by the Supreme Court implies that High Court judgements hold considerable value. The Delhi High Court in particular has produced a catena of judgements that have had serious implications on the interpretation of Section 14(d). Overall, its stance has been to throw open the scope of the definition, making all terminable commercial contracts without the involvement of a public body fall within the definition of 'determinable in nature'.[33] However, as will be argued below, the High Court started its journey from *Rajasthan Breweries* on an incorrect interpretation of *Indian Oil*, leading to this restrictive stance. It will also be seen how subsequent judgements have continued to pay 'ritual obeisance'[34] to *Rajasthan Breweries,* failing to correct course. While there are maverick judgements by the Delhi High Court which adopt a contrary position, Rajasthan Breweries and its succeeding cases being authoritative still hold ground.[35]

In *Rajasthan Breweries*, the parties had entered into two agreements, which were terminated on alleged failure to meet required standards.[36] A single judge bench of the High Court had refused the grant of injunction on the basis that the contract was determinable and therefore no specific relief could be granted under Section 14(1)(c) of

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[33] Rajasthan Breweries (n 4); Ksheeraabd Construction (P) Ltd v. National Highways & Infrastructure Development Corpn Ltd (2023) SCC OnLine Del 3156 [49]-[51].
[34] See Oliver, LJ's observations in Furniss v. Dawson (1984) AC 474, 483 in relation to IRC v. Duke of Westminster (1935) All ER Rep 259 (HL).
[35] See Part C.
[36] Rajasthan Breweries (n 4).

the Act (Section 14(d) of the present Act). Clause 8 of both the agreements allowed for termination on the happening of specified events. The division bench of the High Court relied on *Indian Oil*, which in their reasoning was governed by similar facts. This basis itself is problematic – in *Indian Oil,* the Court dealt with two different clauses. Clause 27 of the agreement allowed for termination only on specified events. Clause 28 allowed for termination without cause. The clause in *Rajasthan Breweries* allowed termination only on the happening of certain events, thereby analogous to only Clause 27 in *Indian Oil.* The following portion of *Indian Oil* is reproduced for better understanding:

> *Having said so in the award itself, it is obvious that the arbitrator held the distributorship to be revok-able in accordance with clauses 27 and 28 of the agreement. It is in this sense that the award describes the Distributorship Agreement as one for an indefinite period that is, till terminated in accordance with clauses 27 and 28. The finding in the award being that the Distributorship Agreement was revokable and the same being admittedly for rendering personal service, the relevant provisions of the Specific Relief Act were automatically attracted. Sub-Section (1) of Section 14 of the Specific Relief Act specifies the contracts which cannot be specifically enforced, one of which is a contract which is in its nature determinable, In the present case, it is not necessary to refer-to the other clauses of sub-Section (1) of Section 14, which also may be attracted in the present case since clause (c) clearly applies on the finding read with reasons given in the award itself that the contract by its nature is determinable. This being so granting the relief of restoration of the distributorship even on the finding that the breach was committed by the appellant-Corporation is contrary to the mandate in Section 14(1) of the Specific Relief Act and there is not error of law apparent on the face of the award which is stated to be made according to 'the*

law governing such cases'. The grant of this relief in the award cannot, therefore, be sustained.[37]

As argued in the previous sub-Part, *Indian Oil* does not make it clear which of the two clauses rendered the contract determinable. Whether mere termination, even if cause-based, makes a contract determinable in nature, or termination without cause was required, was not clarified. Hence, in any case, it cannot be concluded that *Indian Oil* was based on 'identical'[38] facts as in *Rajasthan Breweries.* The division bench, however, did not stop there. It went on to extend the reasoning of *Indian Oil* to a dangerous degree by holding as follows:

Even in the absence of specific clause authorising and enabling either party to terminate the agreement in the event of happening of the events specified therein, from the very nature of the agreement, which is private commercial transaction, the same could be terminated even without assigning any reason by serving a reasonable notice.[39]

It concluded that *any* private commercial agreement, irrespective of the presence of a termination clause, is determinable in nature. This conclusion is not logically based on *Indian Oil.* Hence, the Court's interpretation of *Indian Oil* itself was incorrect. While *Indian Oil* based itself on two very specific clauses, *Rajasthan Breweries* threw open the scope of 'determinable in nature' to all private commercial contracts. No justification was provided by the Court for extending, which we argue to be erroneous under PART IV, the reasoning in *Indian Oil*. One must note that the only prayer in *Rajasthan Breweries* was

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[37] Indian Oil (n 12) [12].
[38] Rajasthan Breweries (n 4).
[39] ibid.

for specific relief. Once that was denied, after holding the contract to be determinable, no compensation was granted either.

The conclusion has very wide implications. It made all private commercial contracts determinable in nature. Effectively, no private commercial contracts can be specifically enforced. While this purportedly promotes the freedom to exit a contract, it makes specific performance impossible. The Expert Committee Report intended to make specific performance the norm rather than the exception.[40] The addition of the word 'shall' under Section 10 of the act manifests this.[41] The holding in *Rajasthan Breweries,* restricting specific performance, goes directly against this intention. It is conceded that at the time of the judgement, the Committee Report did not exist. However, as will be demonstrated in the following sub-Part, subsequent judgements have failed to correct the position of *Rajasthan Breweries*.

C. From Tarun Sawhney to Golden Tobacco

After *Rajasthan Breweries,* a similar issue cropped up before a division bench of the Delhi High Court in *Upma Khanna v Tarun Sawhney* ('Tarun Sawhney').[42] The agreement in question provided for automatic termination *if* not implemented within twelve months.[43] It did not provide for termination without cause. The Court concluded that since the termination was possible only on the 'fault' of non-implementation, the contract is not determinable.[44] Hence, specific performance was allowed.[45] This is in stark contrast to *Rajasthan Breweries,* which made all private commercial contracts

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[40] Expert Committee Report (n 1).
[41] The Specific Relief (Amendment) Act 2018, § 3.
[42] Upma Khanna v. Tarun Sawhney (2012) SCC OnLine Del 2716.
[43] ibid [8].
[44] ibid [18].
[45] ibid [19]-[22].

determinable, irrespective of there being a termination clause. However, *Tarun Sawhney* cannot be cited as a strong precedent in favour of this liberal interpretation for two reasons. *First,* it did not deliberate on the holding of *Rajasthan Breweries,* which was a coordinate bench judgement. *Second,* the Court did not provide any proper interpretation of the 'determinable in nature', while also relying on equitable considerations.[46] No proper construction of the provision itself was provided. This makes it plausible to argue that the holding was limited to the facts.

Tarun Sawhney was delivered by a division bench. It had the opportunity to reason with *Rajasthan Breweries* or at least refer the matter to a larger bench. The failure to do so, coupled with it not even mentioning *Rajasthan Breweries,* made the latter continue as the holding precedent for the High Court. In *KSL Industries v National Textile Corporation* ('KSL'),[47] the Court continued the liberal stance taken by *Tarun Sawhney* without even referencing it. It held that the ratio of *Indian Oil* cannot be extended to all contracts which can be terminated only on certain specified events.[48] While it rejected the bar of Section 14, it appears that the decision was affected by the fact that a public entity was one of the parties.[49] Thus, no negative light was cast on the restrictive interpretation of *Rajasthan Breweries.*

The implications of *Rajasthan Breweries* are apparent in the case of *Altus v Darrameks* ('Altus'). Here, the agreement had two termination clauses. While one provided for termination only in the event of breach, the other allowed for termination

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[46] ibid [19].
[47] KSL & Industries Ltd v. National Textiles Corpn Ltd (2012) SCC OnLine Del 4189.
[48] ibid [79].
[49] ibid [78].

without cause, identical to those in *Indian Oil*.[50] While it correctly held the contract to be determinable, it stated that all commercial contracts are by their very nature determinable.[51] Therefore, rather than relying on *Indian Oil*, a Supreme Court decision binding on the present Court, and holding the contract to be determinable based on the second clause, the Court proceeded on the premise that all commercial contracts are determinable. This is the exact conclusion in *Rajasthan Breweries*. Hence, *Rajasthan Breweries* established the erreneous premise of all such contracts being determinable. This reduced the effect of *Indian Oil* to a nullity as no matter what, the courts would assume all private commercial contracts to be determinable. Incidentally, the Court in *Altus* overturned the arbitrator's award granting damages as well, as it found that the respondent was not in breach of the contract.[52]

The repercussions were also felt in *Overnite Express v Delhi Metro* ('Overnite Express').[53] Here, the Licensing Agreement allowed for termination only after the lock-in period.[54] It did not allow for termination without cause. Overlooking this, the judgement paid obeisance to *Rajasthan Breweries* and held the contract to be determinable in nature.[55] While it can be argued that the single judge was mandated to follow *Rajasthan Breweries*, it did not seek to question the stance taken, whether it was simple obiter or not. While *Overnite Express* cited *Indian Oil,* no attempt was made to reason that the latter was decided only based on a clause allowing termination without

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[50] Altus Group India Private Limited v. Darrameks Hotels & Developers Private Limited (2018) SCC OnLine Del 8263 [2].
[51] ibid [17].
[52] ibid [19].
[53] Overnite Express Ltd. v. DMRC (2020) SCC OnLine Del 2093.
[54] ibid [35].
[55] ibid [39].

cause. It simply paid ritual obeisance to *Rajasthan Breweries,* continuing the restrictive position.

A recent case of *Golden Tobacco v Golden Tobie* ('Golden Tobacco') made a valiant attempt to shred the restrictive position by reducing the scope of 'determinable in nature'.[56] Here, the contract had a lock-in period of one year. However, the contract could be terminated by either party in the event of a breach.[57] Therefore, the contract could not be terminated unilaterally. The single judge bench explicitly stated that the contract cannot be held as determinable. The Court also dismissed the argument that all commercial contracts are determinable in nature.[58] In support, it cited the Kerala position, which will be discussed in the subsequent part. Interestingly, the Court also cited *Tarun Sawhney* to defend its stance. Regardless of the progressive nature of the judgement, the Court failed to appreciate *Rajasthan Breweries,* which is a division bench judgement. Hence, the judgement is liable to be held *per incuriam*.

D. The Kerala Position

While *Rajasthan Breweries* more or less cemented its position in the Delhi High Court, the Kerala, Madras and Bombay High Courts attempted to take a different approach altogether. In essence, their position was that not all commercial contracts can be called determinable. Only the ones which allowed for no cause termination, *i.e.*, termination without the requirement of any cause, can be called 'determinable in nature' under Section 14(d) of the Act.

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[56] Golden Tobacco Limited v. Golden Tobie (P) Ltd (2021) SCC OnLine Del 4506.
[57] ibid [30].
[58] ibid [33] – [35].

The position was established by the Kerala High Court in *TO Abraham v Jose Thomas* ('TO Abraham').[59] Here, the appellants prayed for specific performance of a share transfer agreement. Clause 13 of the agreement dealt with termination.[60] It stated that the contract could be terminated only if not implemented due to breach or default; no right of unilateral termination was given.[61] The High Court stated that for a contract to be 'inherently determinable', the termination clause has to allow termination without assigning any reasons.[62] In essence, if termination is allowed only on the happening of an event, it cannot be determinable.[63] While the merits of this conclusion will be discussed in PART IV, the judgement suffers from a technical error. The Court clearly states that Section 14(1)(c) of the Act (Section 14(d) of the present Act) says 'inherently determinable'. However, the Act even before its amendment stated 'determinable in nature'. This error has been relied on by a recent Delhi High Court judgement to criticize *TO Abraham*.[64] PART IV will dispel the criticism, thereby arguing in favour of the latter.

A similar stance was taken by the Madras High Court in *A Murugan v Rainbow Foundation* ('A Murugan').[65] It considered two categories of contracts as determinable. *First*, 'contracts that are unilaterally and inherently revocable or capable of being dissolved such as licences and partnerships at will'; *second*, 'contracts that are terminable unilaterally on 'without cause' or 'no fault' basis.'[66] The Court also noted that the decision in *Indian Oil* had actually turned on Clause 28 in the case, which provided for

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[59] TO Abraham (n 5).
[60] ibid [2].
[61] ibid [13].
[62] ibid [18].
[63] ibid [18].
[64] Ksheeraabd Construction (n 33) [37].
[65] A Murugan (n 5).
[66] ibid [17].

termination without cause.[67] It cited *Rajasthan Breweries* but disagreed with it.[68] It argued that if all commercial contracts are held to be determinable, none would be specifically enforceable.[69] While the Court did not refer to *TO Abraham*, it came to the same conclusion: limiting the scope of the phrase 'determinable in nature' to contracts which can be terminated only on the occurrence of some event as decided by the parties.[70]

The position in Bombay has not remained free of ambiguity either. *Spice Digital v Vistaas* ('Spice Digital'), decided to follow *Rajasthan Breweries*.[71] It held a clause allowing for termination only on a specific event, as determinable. *Spice Digital* was referred to and followed by the Court in *Gujarat Chemical Port v Indian Oil* ('Gujarat Chemical').[72] There, Article 25 of the contract provided for termination on two events: breach and non-compliance of certain provisions in the contract.[73] No unilateral right of termination was provided. However, the Court followed *Rajasthan Breweries* and *Spice Digital*, to hold the contract as determinable.[74]

Subsequent to *Spice Digital* and *Gujarat Chemical,* came the *Narendra Hirawat* trilogy. The single-judge decision was aligned with the Kerala position.[75] However, it was reversed by the division bench.[76] On appeal to the Supreme Court, the division bench judgement was quashed.[77] Notably, the Supreme Court did not comment on the portion

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[67] ibid.
[68] ibid [16].
[69] ibid [17].
[70] ibid.
[71] Spice Digital Ltd. v. Vistaas Digital Media (P) Ltd (2012) SCC OnLine Bom 1536 [21].
[72] Gujarat Chemical Port Terminal Co Ltd v. Indian Oil Corpn of India (2016) SCC OnLine Bom 2605 [125].
[73] ibid [95].
[74] ibid [124] – [125].
[75] Narendra Hirawat I (n 28) [10].
[76] Narendra Hirawat II (n 29).
[77] Narendra Hirawat III (n 30) [21].

on determinability of the contract but quashed the division bench judgement on other grounds. All that the Supreme Court stated was this:

> *The Single Judge's order was founded on sound reasoning and we find no fault in exercise of discretion by the Single Judge in granting the order of injunction. We, thus, set aside the order passed by the Division Bench of the High Court and restore the order of the learned Single Judge*.[78]

Therefore, while it restored the first order, it cannot be forcefully argued that it affirmed the single-judge's reasoning on determinability. Still, the single-bench judgement stands as of today, while the division ruling is overruled.

The Delhi High Court attempted to correct its course, with *Golden Tobacco* referring to *TO Abraham* and holding contrary to *Rajasthan Breweries.*[79] As mentioned above, however, *Golden Tobacco* did not refer to *Rajasthan Breweries,* thereby arguably *per incuriam.* Subsequently, the Delhi High Court went back to its original stance through the judgement in *Ksheeraabd Construction v National Highway* ('Ksheeraabd Construction').[80] The Court completely relied on *Rajasthan Breweries* and criticised the Kerala position as held in *TO Abraham*.[81] The above analysis revealed that in most cases before the Delhi High Court, only specific performance was prayed.[82] Given the standard of determinability set in *Rajasthan Breweries,* the relief of specific performance is difficult to secure before the Delhi High Court. Therefore, an additional prayer for damages or a particular clause in the contract, allowing the same like in *Rattan Lal*,[83]

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[78] ibid.
[79] Golden Tobacco (n 57) [30] – [35].
[80] Ksheeraabd Construction (n 33).
[81] ibid [55].
[82] For example, Golden Tobacco (n 57) [10].
[83] Rattan Lal (n 25) [2].

might prove to be beneficial. This assumes further importance since judgements post *Rajasthan Breweries,* as highlighted above, have been denying specific performance without directing for any alternate relief as well.

The next part will attempt to defend the Kerala position by dispelling the criticisms inflicted on it by *Ksheeraabd Construction*.

Defending The Kerala Position

A. Ksheeraabd Construction: Turning the Clock Back

The single-judge bench in *Ksheeraabd Construction* took the course of Delhi High Court back to *Rajasthan Breweries.* The Court must be commended for effectively reasoning with almost all the important judgements that hold the field. However, from the very beginning, it aligned itself with *Rajasthan Breweries.* For the single-judge bench, the use of the phrase 'inherently determinable' by the Kerala High Court (which held the opposing position) was wrong. It held that in no stage of the development of the Act did the legislature use the phrase 'inherently determinable'.[84] Further, it chose to distinguish judgements that were contrary to *Rajasthan Breweries* merely because of certain specific facts. However, the Court did not reason with the principles of those judgements. For example, it distinguished *DLF Home Developers v Shipra Estate* ('DLF') simply based on the specific clause in the judgement.[85] However, *DLF* had provided a particular interpretation of determinability,[86] which was ignored by the Court in *Ksheeraabd Construction.* In *DLF,* the Court stated that for adjudicating on determinability, one must

[84] Ksheeraabd Construction (n 33) [35] - [37].
[85] ibid [42].
[86] DLF Home Developers Limited v. Shipra Estate Limited (2021) SCC OnLine Del 4902 [94] – [96].

look at the intention of the parties[87] apart from ascertaining the nature of the contract.[88] Therefore, it cannot be stated that the case turned only on a specific clause, without advancing any principles. It finally concluded that no precedence or dictionary meaning can 'lend credence' to the use of the phrase 'inherently determinable' by *TO Abraham* and *Narendra Hirawat*,[89] thereby taking the position of law back to that in *Rajasthan Breweries.*

B. The Proper Construction of Section 14 (d)

We argue that the criticism of the Kerala position in *Ksheeraabd Construction* is, with respect, wrong. In furtherance of the same, we will defend the position in *TO Abraham* and argue that the Kerala position is not only the correct textual interpretation, but also the more commercially efficacious one.

For the same, the legislative history of 'determinable' must be explored. Although PART I has highlighted the same, a re-iteration is necessary. Under the Original Act of 1877, Section 21(d) contained the reciprocal provision. The language used was 'revocable' and not 'determinable'.[90] The 9th Law Commission Report suggested a change. It opined that the term 'revocable' was not accurate for the purpose.[91] Consequently, the new Act of 1963 used the phrase 'determinable in nature'. The wording remained the same even after the 2018 amendment, reflecting continued legislative acceptance.

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[87] ibid [95].
[88] ibid [94].
[89] ibid [55].
[90] The Specific Relief Act 1877, § 21.
[91] Law Commission Report (n 11) para 42.

A question arises as to whether the change from 'revocable' to 'determinable' holds any significance in interpreting the provision. *A Murugan* ponders over this question but does not answer it.[92] In the absence of any guidance even from the drafting history of the provision, the most viable interpretation is a textual one, for which we turn to the dictionary meanings of the terms. The Oxford Dictionary defines 'determinable' as something liable to be terminated. To 'revoke' is to cancel or annul. Therefore, on a practical basis, the two words seem to convey the same meaning. A contract which can be terminated on an event can, grammatically, be called both revocable and determinable. The same goes for a contract with no cause termination clause. *Ksheeraabd Construction's* reading of the legislative history led it to the conclusion that the use of the phrase 'inherently determinable' is wrong.[93] It is conceded that *TO Abraham* erred in stating that the Section uses the said phrase. However, the word 'inherently' is of the same meaning as 'nature'.[94] While *Ksheeraabd Construction* noticed this error, it conveniently evaded the fact that no substantive damage was done by this wrong use. In fact, it appears that the Delhi position ignores the words 'in nature' subsequent to 'determinable'.

The clause is specifically for contracts which are in their very 'nature' determinable. The contract must be intended to be determinable under all circumstances and not just under certain conditions. In this view, if the intention of the termination clause was to allow for termination only under breach or other objective causes, the contract cannot be called 'determinable' in its very nature. Therefore, the proper construction of the Section ought to support the Kerala position. The assertion finds

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[92] A Murugan (n 5) [15] – [16].
[93] Ksheeraabd Construction (n 33) [37].
[94] *Cambridge Dictionary*, 'Inherently' (Cambridge University Press) <https://dictionary.cambridge.org/dictionary/english/inherently> accessed 7 June 2025.

support in the Amendment Act as well – it sought to make specific relief the norm instead of the exception.[95] Following the Delhi position would severely deter this aim. As per that position, all private commercial contracts, irrespective of their nature, will fall under Section 14(d) and escape specific performance. *Ksheeraabd Construction*, decided after the Amendment Act, failed to consider this. Therefore, not only the text but also the purpose of the amendment leans in favour of the Kerala position.

Further, a reading of Supreme Court judgements might support the argument as well. Several Supreme Court judgements have stressed on the importance of intention. In *Rattan Lal,* the court held that the clause in question was intended to be an escape route.[96] The Delhi High Court noted this point in *DLF*.[97] *Rajasthan Breweries* and *Ksheeraabd Construction* does not account for intention. If *Rajasthan Breweries* is followed, all commercial contracts, irrespective of their intention, will be held as determinable. This extreme position is against the principle of party autonomy in contract law.[98]

On the other hand, the Kerala position provides for more flexibility to assess the intention of the parties. It does not put a blanket label of 'determinable' on all commercial contracts. Ergo, intention can be looked at. This makes the Kerala position not only legally sound, but also commercially preferable. Every commercial contract will be phrased in a manner suited to that particular transaction. The phrasing captures the intention of the parties with respect to the transaction. Any blanket position of holding all commercial contracts as determinable will lead to a formalistic understanding of the transaction without considering the intention of the parties, and such blanket

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[95] The Specific Relief (Amendment) Act 2018, § 3.
[96] Rattan Lal (n 25) [95].
[97] DLF (n 88) [95].
[98] Gregory Klass, 'Intent to Contract' (2009) 95 Virginia Law Review 1437, 1443-1445.

classifications are illogical to say the least. If the essence of contract law is to resolve the disputes surrounding transactions, then the Delhi position certainly does not adhere to it.

5. Determinability: The Legal Method

The current position of law, especially the Delhi position, is not only inconsistent with the purpose of the Amendment Act, but also with commercial logic – it effectively leaves damages as the only remedy in private commercial disputes. This Part posits a nuanced framework to navigate the practical realities that affect an adjudication of determinability. It fills this vacuum by bringing the test of determinability in line with the intention of the Amendment Act, grounded in commercial logic.

In doing so, it postulates a two-pronged test. *First,* the presence of a termination clause must be examined. Where a clear and specific no-cause termination clause exists, the contract is in nature determinable. In the absence of such a clause however, the "nature" of the contract must be examined, taking us to the *second* prong. It looks at the *breadth* and *intention* of the termination clause, if present, and the kind of termination powers envisaged by the parties at the time of contracting. It asks whether a holistic reading of the contract evinces the intention of the parties to make the contract determinable in nature. Did the parties envisage a termination power *so broad* that it renders the agreement functionally at-will?

This Part is divided into three sub-parts. *First*, it details the first prong of the test. *Second*, it delves into the second prong and provides a justification for invoking the application of good faith and commercial reasonableness. *Third*, a test suite explores its application with a practical example.

It must be kept in mind that with the change from "may" to "shall" brought about by the Amendment Act, the nature of specific performance as a remedy has changed – it

is now a mandate. Naturally therefore, as an exception to what is now a rule, determinability must be read narrowly – a presumption must operate against determinability unless demonstrable under the following test.

A. The First Prong: Cause or No-Cause?

The first prong to our proposed test entails a simple examination of the termination clause in the contract. The purpose of this examination is to ascertain whether the contract provides for a clear and specific no-cause termination clause, rendering the contract capable of being terminated without the need to assign any reason.

If such a no-cause termination clause were to exist, then, as held by the Kerala HC, the contract would, in its nature, be determinable.[99] The no-cause basis for termination must be clearly established in the contract or directly inferable from its wording. For instance, a clear establishment of no-cause termination would read as follows:

> '*If the parties were so to choose, at any point in time during the subsistence of the contract, to terminate it and discharge obligations thereunder, the contract shall stand terminated without need for assignment of any cause to that effect.'*

As evidenced above, it is clear that the clause intends for the contract to be terminable by the parties without the requirement of providing a reason for the same. Such a power to terminate renders the contract determinable by its very nature, since the parties contemplated such an eventuality and gave themselves this power to terminate.

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[99] TO Abraham (n 5) [18].

In the absence of such a no-cause termination clause, the test proceeds into murkier waters in the next sub-part. Two possibilities emerge. *First,* in the absence of a clear no-cause termination clause, the court holds the contract as not determinable. *Second*, the Court enquires whether the parties intended the contract to be determinable? This finds support in the doctrine,[100] which checks for the subjective intention of the parties to inquire whether the contract was intended to be determinable 'in nature'. Therefore, the next prong proceeds to suggest a framework for this determination.

B. The Second Prong – Measuring Breadth with Good Faith & Commercial Reasonableness

Without a clear no-cause termination clause, the answer lies in the 'nature' of the clause and the intention of the parties. The termination clause may have myriad trigger events upon the happening of which the parties are empowered to terminate. The determination of whether the trigger event for termination has taken place may be left entirely to a party's discretion, making it a subjective decision.[101] In the absence of clear terms limiting this subjective discretion, the contract may in form be terminable on a cause-basis, but in substance be terminable at will.

The second prong examines the termination clause and the parties' intention to ascertain whether the contract is functionally one at will, *i.e*., determinable. It examines this using good faith, commercial reasonableness, and industry practices that may guide the intention and purpose of the contract. The factors enumerated are strictly interpretive tools to aid the Court in determining what the parties intended *vis a vis* termination, on the date of contracting. It provides a principled and structured framework to assess factual

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[100] TO Abraham (n 5) [22]; Rattan Lal (n 25) [27]; DLF (n 88) [94]-[95].
[101] ibid.

circumstances that courts already rely on, and reorients it towards the goal of the Amendment Act.

Understanding good faith

Good faith involves honesty in fact in the concerned transaction or conduct, requiring the observance of reasonable standards of fair dealing in trade.[102] It emphasises on the agreed common purposes of the contract and consistency with the reasonable expectations of the other party.[103] In one of the most authoritative works on understanding the duty of good faith in contractual jurisprudence, Chen-Wishart and Dixon regarded good faith at its core as an attitude of respect for the counterparty's legitimate interests (manifesting as a duty of honest and fair dealing), and for the contract itself, manifesting in fidelity to its contractual purpose.[104]

Despite being one of the most fundamental commitments of contract law, it is also one of the most casually invoked concepts. It is frequently used as a throwaway adjective; scarcely is it used as anything more. This is attributable to our common law heritage. Common law has historically been averse to recognizing a general duty of good faith in contracts. Naysayers of good faith deem it vague, amorphous, and uncertain. They criticise it as a "disease of alien origin", [105] or the proverbial "bull in the china shop",

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[102] Manasi Kumar and Poorna Mysoor, 'The Duty of Good Faith' in KV Krishnaprasad, Niranjan Venkatesan et al (eds), *Foundations of Indian Contract Law* (OUP 2024) 316; Uniform Commercial Code 1952, art 2. The definition is adopted from American jurisprudence because good faith in common law is comparatively under-theorized, with one of the leading jurisprudences in terms of pragmatism being the USA.

[103] ibid.

[104] Mindy Chen-Wishart and Victoria Dixon, 'Good-Faith in English Contract Law: A Humble "3x4" Approach' in Paul B Miller and John Oberdiek (eds), *Oxford Studies in Private Law Theory: Volume 1* (OUP 2020) 188, 204-5; Kumar and Mysoor (n 105) 316.

[105] Gunther Teubner, 'Legal Irritants: Good Faith in British Law or How Unifying Law Ends up in New Divergences' (1998) 61 Modern Law Review 11, 11.

marauding unrestrained through the carefully curated china shop of English contract law.[106] It continues to draw fire all on the assumption that it is an *independent cause of action*, but that is not the case.[107] However, we do not seek to import the charging bull.

Our proposed use of good faith is as an *interpretive tool*, similar to the Convention for the International Sale of Goods ('CISG').[108] In this form, it categorically deviates from the "charging bull" version that grazes in civil law systems. It is limited to being deployed, in the case of grey areas and subjectivity, as a guiding rule of interpretation. Even the harshest critics of good faith as a stand-alone doctrine find no bone to pick with its limited use in this manner.[109]

With the Amendment Act's move towards specific relief as a primary remedy found in the UNIDROIT Principles[110] and the CISG,[111] it has all but used the label of good faith performance. It is then only in consonance with legislative intent to use good faith in the interpretation of determinability under the Act. In sticking to the common law position of ardently refusing to recognize good faith in any form would be, in the words of Justice Leggatt, "swimming against the tide".[112]

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[106] Michael Bridge, 'Doubting Good Faith'(2005) 11 NZ Business Law Quarterly 426, 448.
[107] Mindy Chen-Wishart and Victoria Dixon (n 107) 250.
[108] Article 7 of the CISG says "In the interpretation of this Convention, regard is to be had to… the observance of good faith in international trade".
[109] Michael Bridge, 'Good Faith, Common Law and the CISG' (2017) 22 Uniform Law Review 1, 109. In a discussion of authorities treating good faith as an independent standard of its own, the author opined "It is all very well to turn to good faith to clarify an ambiguous text."
[110] UNIDROIT Principles of International Commercial Contracts 2016.
[111] Ajar Rab, 'Can the Adoption of the CISG Save the Commercial Relationship of the Parties in India?' (Oxford Business Law Blog, May 2020) <https://blogs.law.ox.ac.uk/business-law-blog/blog/2020/05/can-adoption-cisg-save-commercial-relationship-parties-india> last accessed 1st June 2025.
[112] Yam Seng Pte v. International Trade Corporation (2013) EWHC 111 (QB) [125] (Leggatt J).

A case for the import of good faith

The primary argument for applying a good faith interpretive standard here is simple. If businesspeople do value, and act as if they value, their relationship with the other side and assume trust, decency or basic reasonableness from the parties with whom they contract, the construction of the contract must reflect this.[113] The nature of the business relationship influences practice, which must in turn shape the interpretation of the relationship. Specifically in the context of this test, subjectivity in termination clauses conferred by phrases like "dissatisfied" and "in their sole and absolute discretion" must be circumscribed. It is not enough to simply say that it must be read narrowly – it must be read narrowly because this is an exception to the norm of specific performance established by the Amendment Act.

Simple economics also provides a strong justification the import of good faith in answering questions of determinability.[114] Where a contract confers a broad power for termination, the termination effectuates an imbalance. It is an imbalance because the party who is liable to be terminated cannot know in advance of the likelihood of it being exercised, or at what stage of the contract it will be exercised.[115] Because the decision to terminate and the reasons thereof are within the subjective control and knowledge of the terminating party, the imbalance is effectuated upon termination. This decision is one with the inherent likelihood of being used arbitrarily in reality, regardless of the degree to which the contract itself circumscribes this power. Contracts are very often terminated

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[113] Patrick Devlin, 'The Relation Between Commercial Law and Commercial Practice' (1951) 14 Modern Law Review 249, 266.
[114] Thomas Schoenbaum 'The Duty of Utmost Good Faith in Marine Insurance Law: A Comparative Analysis of American and English Law' (1998) 29 Journal of Maritime Law and Commerce' 1,3; Arlen Duke 'A Universal Duty of Good Faith: An Economic Perspective' (2007) 33 Monash University Law Review 182, 194
[115] Anthony Gray, 'Termination for Convenience Clauses and Good Faith' (2012) 7 Journal of International Commercial Law & Technology 260, 267.

by parties for their convenience. In such a case, the party who has been terminated could not have possibly computed their losses in the event of termination, given the uncertainty surrounding it. As a result of these unknowns, they are unable to account for the *price of the risk* of such a clause being included in the contract.[116] This risk-return analysis was undertaken by Lord Mansfield in the landmark ruling of *Carter v. Boehm* ('*Carter*'),[117] who used this resultant imbalance to justify the invocation of good faith. It derives from the general assumptions that contracting parties are well-informed to make rational decisions as to what is in their best interest.[118] Where this assumption of information symmetry is negated, it becomes necessary to invoke a principle like good faith to rectify the imbalance.

Good faith as a Rule of Interpretation in India

Reliance on good faith in contractual interpretation is not foreign to Indian contractual jurisprudence. The Contract Act is punctuated with examples that are premised on a duty of good faith.[119] Further, courts have extensively relied on good faith principles, if not its explicit language, to imply duties under a contract. This has particularly been the case in contract enforcement litigation such as claims for specific performance.[120] In the jurisprudence on contractual discretion on termination in particular, courts have consistently read in restrictions on the discretionary exercise of the power to terminate.

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[116] ibid 267.
[117] Carter v. Boehm (1766) 3 Burr 1905.
[118] Gray (n 118) 266.
[119] Kumar and Mysoor (n 105) 318. See Indian Contract Act 1872, §§14-20. Substantive unfairness is addressed outside the Contract Act and only in relation to consumer contracts under the Consumer Protection Act 2019, which explicitly prohibits any 'unfair contract', defined under §2(46) as a contract 'having such terms which cause significant change in the rights of such consumer'.
[120] ibid 319.

An early case employing good faith was *Chunilal Dayabhai & Co. v. The Ahmedabad Fine Spinning & Weaving Co. Ltd*,[121] where the Bombay High Court was faced with a contract vesting in the defendant the power of no-fault termination, for which the plaintiff was contractually restricted from seeking damages.[122] The Court's ultimate holding of requiring reasonable cause for such a termination was couched in the reasoning that the counterparty's expectations must be respected. They also evaluated the exercise of the right to terminate *vis a vis* the contractual purpose, and whether it was put at risk.[123] This line of reasoning is particularly important.

While courts post-independence started on a different note, the Supreme Court reverted back to the trend of reading in good faith obligations in *General Assurance Society Ltd. v. Chandumul Jain*.[124] Although the Court purported to do no more than apply the plain language of the contract, it made one rather significant amendment. It carved out an exception within the insurance contract — the insurer cannot cancel the policy if the loss has already occurred 'or has become so imminent that it must inevitably take place'.[125] It demonstrates that it is possible, even when there are equal rights of termination, that the clause is exercised in a manner that disrespects the counterparty's legitimate interests. While it may be contended that insurance contracts are a distinct category warranting different treatment, it is relevant as an important precedent for court intervention on grounds of good faith for termination. Hence, the Supreme Court has

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[121] Chunilal Dayabhai & Co. v. The Ahmedabad Fine Spinning & Weaving Co Ltd (1921) 46 ILR 806 (Bombay High Court).
[122] ibid.
[123] ibid; Kumar and Mysoor (n 105) 320.
[124] General Assurance Society Ltd v. Chandumul Jain (1966) AIR SC 1644.
[125] ibid.

rightly interpreted contract terms in light of good faith, even though it may not have used explicit language to that effect.

While *General Assurance* is a precedent specific to termination clause jurisprudence, Indian contract law is otherwise replete with cases where courts have, directly or indirectly, used good faith to impute duties and evaluate actions.[126] The Supreme Court has been particularly receptive to a rule of law that prevails over any contract language, no matter how unambiguous.[127] In the *MSED* case for example, the state entity remained unresponsive to the contractor's efforts to fulfil the contract by not providing the basic requirements.[128] Such situations inevitably require an examination of the parties' actions to determine which party is in the wrong, *i.e.*, who has not taken good faith efforts to fulfil the contract's purpose while ensuring respect for their counterparty's basic agreed expectations. In the face of bad faith conduct, therefore, it is only natural for a court to want to provide the innocent party a remedy.[129] Hence, there is a clear discernible tendency of courts to evaluate parties' actions in light of good faith where disputes arise *vis a vis* termination and enforcement.

Commercial reasonableness

What does assessing something through a good faith lens even mean? What exactly does 'good faith' entail? This is where reasonableness comes into the picture. As discussed above, good faith is widely considered to have at its core a duty of honesty, fair dealing,

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[126] KV Krishnaprasad, Niranjan Venkatesan et al (eds), *Foundations of Indian Contract law* (OUP 2024) ch 15; See Mardia Chemicals v. Union of India (2004) 4 SCC 311; DLF Home Developers Ltd. v. Martin George (2021) SCC Online Ker 2867.
[127] Kumar and Mysoor (n 105) 330.
[128] Maharashtra State Electricity Distribution Co (MSED) v. Datar Switchgear (2018) 3 SCC 173, 168-169.
[129] Kumar and Mysoor (n 105) 330.

and fidelity to the contractual purpose.[130] Fair dealing requires an element of reasonableness.[131] Even though courts have generally refrained from identifying or defining good faith, they have related it to the concept of reasonableness, contrasting it with the exercise of discretionary power under a contract in a capricious way, or contrary to the agreed object. While Indian Courts have dealt with the principle of business efficacy, it has done so for general interpretation of contracts and not specifically for termination clauses. In *Adani Power v Gujarat ERC* ('Adani'),[132] the Supreme Court held that the principle can be invoked if a literal construction of the recitals does not lead to a result that commercially reasonable parties would intend.[133] Notably, the Court hedged such implication by holding that it should be capable of clear expression and must not contradict an express clause in the contract.[134] The recent decision in *Maharashtra State v Ratnagiri* ('Ratnagiri') also states that the Court can deviate from the literal recitals only when it serves business efficacy better.[135]

While common law has applied a general reasonableness standard to various contractual issues, jurisdictions like the USA and Australia offer a more pragmatic and commercially efficient approach to reasonableness – one grounded in business efficacy, *i.e.*, commercial reasonableness. In a catena of decisions, Australian courts have held that there is an overriding obligation of reasonableness on the power to terminate.[136] Termination rights here must be exercised reasonably so they could not be used to achieve a purpose foreign

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[130] Chen-Wishart and Dixon (n 107) 188, 204-205.
[131] Kumar and Mysoor (n 105) 318.
[132] Adani Power (Mundra) Ltd. v. Gujarat ERC, (2019) 19 SCC 9.
[133] ibid [24].
[134] ibid.
[135] Maharashtra State Electricity Distribution Co. Ltd. v Ratnagiri Gas & Power (P) Ltd, (2024) 1 SCC 333 [36].
[136] Godfrey Constructions Pty Limited v. Kanangra Park Pty Ltd (1972) 128 CLR 529, 543; Pierce Bell Sales Pty Limited v. Frazer and Another (1972) 130 CLR 575; Selkirk v. Romar Investments Ltd [1963] 1 WLR 1415; Legione v. Hateley (1983).

to the purpose for which they were granted.[137] This looks at the intention of parties in granting each other the right to terminate. Naturally, the primary rationale behind granting it is that the party may terminate it if they feel they may not be able to fulfil the contract's purpose. This may be for a plethora of reasons – lack of timely payments, external constraints, or even just a desire to end business relations (bad faith as it may seem). When a party stands to lose as a result of such a termination and needs a remedy, the court inevitably needs to evaluate the legitimacy of the *reason* for termination. The court looks at actions and inactions from both side to determine culpability, *i.e.*, whether the termination was for a legitimate reason. In doing so, the court must be pragmatic, assessing the actions from the viewpoint of commercial efficacy – whether the parties' actions were directed towards efficaciously achieving the agreed objective.

The Uniform Commercial Code ('**the Code**') in the USA also relied on an element of commercial reasonableness in its initial drafts, which was excluded later.[138] However, this exclusion has drawn significant scholarly ire. The Code, in the initial draft of its standard for good faith performance, required observance of 'the reasonable commercial standards of any business or trade in which he is engaged'. This was one of the major casualties in the drafting of the Code, and was removed because the drafters intended to limit good faith to just honesty.[139] Good faith was only understood to the limited extent of purchase, not to performance. Scholars believe that this enfeebled the general obligation of good faith to a great degree, robbing it of its pragmatism and its grounding in commercial logic. In fact, Farnsworth has gone as far as to say "*Like Humpty Dumpty,*

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[137] Burger King Corporation v. Hungry Jack's Pty Ltd [2001] NSWCA 187, 573-574.
[138] Edward Allan Farnsworth, 'Good Faith Performance and Commercial Reasonableness under the Uniform Commercial Code' (1963) 30 University of Chicago Law Review 666, 673.
[139] ibid.

the general obligation of good faith had a fall".[140] Without grounding the good faith lens of assessing parties' actions in commercial reasonableness, the effective role of commercial practice would be negated.[141]

It can be argued that the test, by considering factors like commercial reasonableness, is re-introducing a discretionary power of the Court, which was explicitly removed by omitting the erstwhile Section 20 of the 1963 Act. Two counters can be advanced against this argument. First, the primary purpose of second prong is to determine the intention of the parties. The Court is required to employ general principles of construction of contracts. The use of commercial reasonableness is simply an interpretive tool. In any case, the Indian Court doctrine allows for the use of commercial efficacy to construct the intention of parties.[142] Second, the specific intention of the 2018 amendment must be enquired into. The amendment was intended to limit refusal of specific performance only to the exceptions under Section 14.[143] The intention was to remove uncertainty.[144] Section 20 allowed for refusal of specific performance even when the contract did not fall within the scope of any of the exceptions. Nothing limits use of principles of interpreting contracts, that might involve certain discretion, to check whether a contract falls into an exception.

A commercially reasonable, good faith test of determinability

In assessing whether a contract is '*in its nature determinable*', we argue that the true test is whether the breadth of the termination powers under the contract render it functionally

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[140] ibid 674.
[141] ibid 677.
[142] Adani (n 135) [26]; Ratnagiri (n 138) [36].
[143] Expert Committee Report (n 1) 11.6.
[144] ibid 11.4.1.

at-will. The nature of the contract can only be truly construed upon understanding the true scope of the clause. The primary focus of this prong is to determine whether an objective standard binds the power to terminate. If it is not an explicit and clear no-cause termination clause, what trigger events does the clause define for termination? Are there any objective metrics that limit the discretion for termination? The nature of a contract must be construed, like all human communications, in the background of shared understandings, values, norms of behaviour, and expectations of honesty which inform their meaning.[145] This examination of the nature of the contract seeks to look at the intention of the parties where the terms are not clear enough. Therefore, the terms of the contract must be considered holistically through the lens of good faith performance and commercial reasonableness, keeping in mind shared understandings and industry standards

Termination dependent on objective conditions would render a contract non-determinable.[146] If the clause hinges termination, either expressly or impliedly, on certain events or conduct which can be objectively determined, it is cause-based termination. For instance, "*Either party may terminate in case of breach if not cured within 30 days", or "may terminate if genuinely dissatisfied with quality*". The termination trigger in cases like these are linked to objective standards – breach is defined by law, and dissatisfaction with quality is construed from the perspective of a commercially reasonable man and against objective metrics or product quality.

Now, it may very well be that the clause does not explicitly enumerate an objective constraint in the termination clause. It may simply allow either party to

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[145] Yam Seng Pte (n 115) [133]-[135] (Leggatt J).
[146] TO Abraham (n 5) [18].

terminate by giving a notice and assigning a reason, without any other clarity on what kind of reasons or who decides the validity of those reasons. This is a fairly common termination clause. In such a case, going strictly by the terms of the contract would allow termination for virtually reason, effectively rendering at will. However, it must be construed in light of good faith and commercial reasonableness, with regard for the above enumerated factors. The court must examine the intention of the parties – did they intend, as commercially reasonable persons, the assignment of cause under such a reason to be absolutely anything? If such was the intention, the contract is not determinable.[147] This is not an examination of the validity of the reason for termination. It is simply a question of what the parties, at the time of allocating power under the termination clause, would intend as commercially reasonable persons in light of the agreed contractual purpose.

Test Suite

Consider a contract as follows. Company A, a pharmaceutical giant, enters into a ten-year contract with a small research firm, B. The contract is for conducting research and development for a new drug. This was the first big project for B and the majority of its revenue was generated through this contract. Clause 7 provides for termination of the contract as follows: “This agreement may be terminated by either party if the said party fails to provide the necessary approvals from regulatory authorities within a period of 6 months from the date of application." In the course of time, A, facing internal issues, finds a more established research partner. It subsequently terminated the contract, invoking clause 7. It argued that despite its efforts, the relevant approvals were not received from the regulatory authorities. Therefore, clause 9 allows for termination. B seeks specific

[147] ibid.

performance, as the majority of its business is structured around this single, long-term project.

The first prong of the proposed test asks whether the contract contains a clear and specific no-cause termination clause. Clause 7 was specifically linked to a condition, thereby disallowing termination without cause. The test then proceeds to the second prong. Under it, the court checks whether the parties, as commercially reasonable persons, would have intended the contract to be determinable 'in nature' in light of the agreed purpose and industry standards. A holistic reading of the contract reveals that the intention was for a long term contract. The six-month regulatory approval time limit was not intended to give either party a simple mechanism to exit. It was intended to trigger only if a genuine and significant regulatory hurdle arose that would make the entire R&D project commercially unviable. This is similar to clause 9 in *Rattan Lal*, which the Court interpreted to not be a simple "escape route". Given that the clause itself is not very clear, the court must look at it as a commercially reasonable person would.[148]

Again, it is plausible to contend that a long term R&D deal would not have a termination clause intending to allow either party to terminate the contract at any point of time. Considering that a majority of B's business was dependent on this project, B would not have intended the same. Therefore, through these interpretive tools, the court can conclude that the contract was never intended to be 'determinable in nature'.

6. Conclusion

This paper has excavated two positions of law on the interpretation of determinability of contracts: the Delhi position and the Kerala position. We have argued that the former, by

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[148] Adani (n 135) [24]; Ratnagiri (n 138) [36].

holding all private commercial contracts as determinable, militates against the intention of the Amendment Act which made specific performance the rule. We have demonstrated how the Kerala position as highlighted in *TO Abraham* represents the correct position of law, by holding only those contracts which can be terminated without any cause, to be determinable.

The current position of law is in a state of conflict, presenting two problems. *First,* the Delhi position is at odds with the legislative purpose of the Amending Act. *Second,* the conflicting position, without any Supreme Court decision on point, creates ambiguity in drafting termination clauses. Indeed, even if the intention of the parties while drafting the contract was to allow for specific performance, the Delhi position negates the possibility for the simple reason that it is a private commercial contract. A few solutions can be thought of. One is an intervention by the Supreme Court to settle the law on this point. Another one can be an amendment to Section 14(d) of the Act to clarify the scope of the phrase 'determinable in nature'.

This paper identifies, in questions of determinability, the core interpretive clash between two principles – the right to terminate and the obligation to perform. In keeping with legislative intent, this paper has proposed a test for determining determinability – grounded in good faith and commercial reasonableness. However, good faith, typically assumed to be an independent cause of action, faces immense scepticism. This reluctance is inherited from our common law parentage. However, India has, in mandating specific relief as the norm, departed from common law and moved towards international standards of good faith performance. This requires interpreting the scope of exceptions to this new rule of specific performance narrowly, relying on good faith and commercial reasonableness as an interpretive tool. This limited import of good faith allays the concerns of even the strongest opponents of good faith standards.

The proposed test has two prongs. The first prong simply checks whether the contract provides for a clear no-cause termination clause. If so, the contract is determinable. In the alternative, the test proceeds to the second prong. This prong checks the breadth of the termination powers accorded under the contract – whether termination is bound by objective metrics (explicit or implied), or purely subjective discretion that renders it functionally at will. Courts must look at the contract as a commercially reasonable person would, holistically, in light of the agreed purpose and industry practices. Unless it can be conclusively demonstrated that the decision to terminate rests purely within the realm of subjective discretion without any objective limitations, the threshold for determinability is not met.

It is imperative, going forward, for both courts and scholarship to understand that the new mandate of specific performance is a fundamental shift in contract law. It requires a relook at our inherited apprehensions and a more pragmatic approach to contract construction. This paper simply proposes a solution that structures that which courts already do, reoriented to the new purpose of specific relief in Indian law.

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