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DIVERSITY AMONG CONTRACT LAWS: WHAT ARE THE MEASURES, AND WHAT ARE THE DRIVERS?

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TITLE: Diversidad entre legislaciones contractuales: ¿cuáles son las medidas y cuáles los impulsores?

RESUMEN: Con la perspectiva de un jurista inglés con intensa formación comparada, el autor reflexiona en este trabajo sobre las analogías y diferencias que pueden encontrarse en el Derecho de contratos común o general de los sistemas jurídicos más cercanos, sobre todo entre los del common law, por un lado, y los continentales, en su bifurcación franco-alemana, por otro.

Llama la atención sobre los falsos amigos que pueden originar los trasplantes jurídicos, sobre las diferentes maneras de afrontar la solución de conflictos surgidos de las relaciones contractuales, o de abordar las situaciones de crisis que afectan directamente a los contratos y de las que tenemos reciente experiencia, como la guerra o la pandemia. También trata sobre los diferentes modos de actuar que muestra la práctica, las diferencias económicas o de actitudes sociales, el menor o mayor intervencionismo judicial en el contrato o, finalmente, los diferentes tipos de casos que suelen llegar a unos y otros tribunales.

ABSTRACT: *From the perspective of an English jurist with extensive comparative training, the author addresses in this paper the analogies and differences that exist in the common or general contract law across various legal systems, focusing particularly on the contrast between common law systems and continental ones, specifically in their Franco-German bifurcation.*

The author highlights the potential pitfalls of legal transplants, such as "false friends," and examines the diverse approaches to resolving conflicts arising from contractual relationships or handling crisis situations that directly impact contracts, like those recently experienced with the war or the pandemic. Additionally, he discusses the differing practices observed, variations in economic or social attitudes, the extent of judicial intervention in contracts, and the types of cases that typically reach the courts in different countries.

PALABRAS CLAVE: Derecho contractual, diversidad, similitud, trasplantes jurídicos, falsos amigos, diferencias en la práctica contractual.

KEY WORDS: *Contract law, diversity, similarity, legal transplants, false friends, differences in contractual practice*

I am very honoured to be invited to contribute to this special issue to mark the tenth anniversary of the Revista de Derecho Civil. The RDC has met with great success and its reputation is firmly established.

The readership of the RDC is international, so I hope it is appropriate to address a question that necessarily involves looking across our various laws of contract: how similar, or conversely, how diverse, are they? And I hope I will not be thought to be abusing the invitation if I do not present a set of polished piece of comparative legal analysis. My paper raises many more questions than it gives answers. This is not only because my knowledge of contract law outside England and Wales is limited. It is also because some of the questions involve looking at legal systems «from the inside», which is difficult for an «outsider» brought up in another system; and because I am not confident that as yet I have even identified all the relevant questions, let alone the answers. I hope, however, that the paper will stimulate discussion and perhaps inspire future work.

I had planned to point to a number of apparent differences between laws of contract across Europe, Asia, Australasia and North America and to ask what is driving these differences. But when working on the paper I realised that there is another question that we have to ask first: how do we measure diversity? And the more I have thought about that, the more complicated it seems to be.

1. MEASURES OF DIVERSITY

1.1. *Scope of the comparison*

The first question is which parts of the law of contracts to try to compare. In this paper, I will concentrate on the law governing business to business contracts, which in most jurisdictions is left either to what I will call «general contract law», or a slightly modified set of general principles applicable to commercial contracts.[1] I will refer to consumer contracts, employment contracts and residential tenancies only occasionally. For these types of contract, basic contract law has often been supplemented or replaced by such elaborate sets of rules that they form almost separate laws.

This is not to say that the law governing these types of contract is irrelevant - on the contrary. To get an accurate picture of a general law of contract, we need to consider

[1] For example, in German law the provisions of the civil code (the BGB) are supplemented or partly replaced by the Commercial Code (HGB).

the «exceptions», because they differ in scope (for example, in some systems small businesses are treated as consumers), because the exceptions may tell us something about what «insiders» think about their general law - why were the exceptional rules seen to be necessary? - and because they may reflect social values in the relevant country more clearly than does its general law of contract. The only reasons for not considering them in detail are space and that that the number of special rules makes comparisons too difficult.

1.2. *Patent differences: key doctrines of general contract law*

Looking then at general contract law, it is obvious that our various laws have a great deal in common. This is true not only of laws that are members of the same legal family – for example, common law systems, broadly «Napoleonic» systems, those heavily influenced by the German Civil Code («the BGB») and Scandinavian systems. If we apply the functional approach of stripping away differences in concepts and terminology, and concentrating on the outcomes in particular cases,[2] we find that the laws of contract from each of these families often reach similar results. This not only in the European laws but also across many of the Asian legal systems.[3] It is what has made it possible to draft «restatements» of the law of contract such as the Principles of European Contract Law (PECL)[4] or the UNIDROIT Principles of International Commercial Contracts (UPICC).[5] To give a single example, though they use different mechanisms, all the systems that I have studied reach the result that if an event makes the contract factually impossible or legally impermissible to perform, the event occurs after the contract was made that was unforeseen, was not the result of anything done by either party and was outside the normal risks, a party who is unable to perform will neither be required to do so nor be liable to pay damages for breach of contract for failing to perform; and that the counter-party may be released from its obligations also.[6]

However, on a number of key issues, patently outcomes differ markedly between the domestic laws of contract, in particular between the more traditional common law

[2] See ZWEIGERT K. and KÖTZ, H., *An Introduction to Comparative Law* (transl. Tony Weir), 3rd edn., OUP, Oxford, 1998, 33–47. The method is critiqued by R. MICHAELS, «The Functional Method of Comparative Law» in M. Reimann and R. Zimmermann (eds), *The Oxford Handbook of Comparative Law*, 2nd edn., OUP, Oxford, 2019, ch. 13.

[3] See the various volumes of the *Studies in the Contract Laws of Asia* series, M. Chen-Wishart, *et al* (ed.), OUP.

[4] *Principles of European Contract Law, Parts I and II*, O. Lando and H. Beale (eds.), Kluwer, 2000; *Part III*, O. Lando, E. Clive, A. Prüm and R. Zimmermann (eds.), Kluwer, 2003.

[5] UNIDROIT (2016).

[6] For a brief summary see the Notes to PECL Art 8:108.

systems of England and Wales, Hong Kong and Singapore and the systems that have been heavily influenced by either Napoleonic law or German law.

By way of illustration, compare a number of issues in English and German contract law. In brief,

(1) Under the rubric of *culpa in contrahendo*, German law imposes liability for breaking off negotiations contrary to good faith. English law imposes liability for breaking off negotiations only if one party fraudulently or (possibly) negligently gave the other party incorrect factual information about their intentions or whether the contract negotiations were likely to succeed.[7]

(2) On the same basis, German law has developed a duty of disclosure and, when there is such a duty, recognises fraud by silence.[8] It also allows a contract to be avoided by a party who was mistaken about the essential nature of the subject-matter.[9] English law not only has no duty of disclosure and does not recognise «fraud by silence»; it also does not allow a contract to be avoided because one party was mistaken as to the substance or essential qualities of the subject-matter of the contract, unless that mistake was caused by an incorrect statement («misrepresentation») by the other party.[10]

(3) As to the terms of the contract, German law provides that «surprising clauses» do not form part of the contract[11] and imposes controls over the substantive fairness of terms that were not negotiated;[12] in English law, if the contract has been signed there are only the very limited controls described earlier.

(4) In the cases of fundamental change of circumstances, German law allows the court to adjust the contract to restore the original balance;[13] English law gives no relief unless the contract or the «contractual venture» turns out to be substantially and permanently impossible.[14]

[7] See H. BEALE, B. FAUVARQUE-COSSON, J. RUTGERS and S. VOGENAUER, *Ius Commune Casebooks for the Common Law of Europe: Cases, materials and text on Contract Law,* Hart, 3rd edn. 2019, (*Ius Commune Casebook*), ch. 13.
[8] See B. MARKESINIS, H. UNBERATH and A. JOHNSTON, *The German Law of Contract*, 2nd edn., Hart, 2006, (Markesinis), 305-310.
[9] § 119 II BGB.
[10] For a more detailed comparison see *Ius Commune Casebook*, ch. 14.
[11] §305c BGB.
[12] §§303-310 BGB.
[13] §313 BGB; see Markesinis ch 7.
[14] For a comparison see *Ius Commune Casebook*, ch. 29.

(5) In German law, specific performance is seen as the primary remedy for both monetary and non-monetary obligations. In general English contract law, specific performance of non-monetary obligations is seen as an exceptional remedy, available only when damages would not be an adequate remedy, when it would not involve the court in supervising performance and subject to the court's discretion.[15]

(6) German law requires all parties to perform in accordance with the requirements of good faith.[16] English law has no general doctrine of good faith. I will come back to this point later.

So one measure of diversity is the patent stance taken by a law of contract on these key issues. Other issues could be added to the list: what is regarded as «key» is a matter of taste.

1.3. *False friends*

It is not surprising that even common law and the continental laws have a good deal in common. There are many examples of the importation of continental concepts into the common law during the nineteenth century, often via text book writers.[17] This was a period of great development of English contract law. Sometimes it had to deal with new issues that had not confronted it before, such as contracts being made by correspondence rather than face-to-face. Judges frequently reacted by wholesale borrowing from continental systems. The doctrine of offer and acceptance[18] was largely taken from the writings of POTHIER; the famous rule in *Hadley v Baxendale*,[19] limiting damages in contract to the losses that were in the contemplation of the parties, came to England from the same source but via America and the writing of SEDGWICK.[20] The development of the doctrines of common mistake[21] and of frustration[22] also seem to

[15] For a comparison see *Ius Commune Casebook*, ch. 23.
[16] § 242 BGB.
[17] See SIMPSON, «Innovation in Nineteenth Century Contract Law», *LQR* (1975), 91, 247.
[18] The first case to adopt this theory was *Adams v Lindsell* (1818) 1 B & Ald 681, 106 ER 250.
[19] (1854) 9 Exch 341, 23 LJ Exch 179.
[20] SEDGWICK, T., *A treatise on the measure of damages,* J Voorhies, New York, 1852. On other possible sources see SWAIN, W., *The Law of Contract 1670-1870*, Cambridge Studies in English Legal History, CUP, 2015, 198.
[21] See *Kennedy v Panama, New Zealand and Australian Royal Mail Co* (1867) L.R. 2 Q.B. 580, though it is questionable whether the judge was really deciding the case on the basis of mistake: see BEALE, H. (Gen ed) *Chitty on Contracts* 35th edn, (2023) (*Chitty on Contracts*), paras 9-021 – 9-022.
[22] *Taylor v Caldwell* (1863) 3 B & S 826, 32 LJQB 164.

have come about through the influence of Roman law; in each of the leading cases the judge was Blackburn J, who had an extensive knowledge of Roman law and cited it in his judgment.

However, apparent similarities may be misleading. While English law took the offer and acceptance analysis from French law, and relies as heavily on offer and acceptance to resolve issues of contract formation,[23] it decides whether there is an offer that is capable of being accepted by applying an objective test of how the other party reasonably understood what had taken place.[24] Thus a party may be held to have made an offer when they did not in fact intend to do so, or to be bound by an acceptance which took place only after the offeror's intention to make an offer must have ended because they had sold the property to someone else.[25] In English law, if the offeree does not know that the offer has been revoked they may still accept it and a binding contract will result. In contrast, in French law the courts would say that there is no contract in that case, though the offeror may incur delictual liability;[26] and in principle French law requires a subjective meeting of the minds for there to be a contract.

Likewise, the rule in *Hadley v Baxendale* is similar to Art 1231-3 Code civil but there is no equivalent of the last phrase, «except where the non-performance was due to a gross or dishonest fault». In English law the remoteness rule applies even to intentional breaches.

A more recent example of an ostensible transplant that may be deceptive is good faith. As a general principle, good faith seems to have been accepted to some extent in both Canada and England and Wales, but in rather different ways. In Canada the Supreme Court treats it not as a directly applicable rule only as an organising principle from which more particular rules may be derived; and from it the court derived a rule requiring honesty in performance, though not an obligation to have regard to the other party's legitimate interests.[27] In England and Wales a duty of good faith has been accepted, at

[23] In *Gibson v Manchester City Council* [1979] 1 WLR 294 the House of Lords was at pains to stress that normally these issues should be solved by a traditional analysis into offer and acceptance, rather than the more broad-brush approach advocated by Lord Denning MR in the Court of Appeal, [1978] 1 WLR 520.
[24] *Paal Wilson & Co A/S v Partenreederi Hannah Blumenthal (The Hannah Blumenthal)* [1983] 1 AC 854, HL.
[25] As in *Stevenson, Jacques & Co v McLean* (1879-80) LR 5 QBD 346.
[26] E.g. *Cass. civ., 17 December 1958,* D. 1959.1.33.
[27] *Bhasin v Hrynew* 2014 SCC 71. See McCAMUS. J., «The New General "Principle" of Good Faith Performance and the New "Rule" of Honesty in Performance in Canadian Contract Law», *JCL LEXIS* (2007), 216 and further McCAMUS. J., «The Canadian Doctrine of Good Faith Contractual Performance: Further Clarification», *JCL* (2022) 38, 1.

least in High Court decisions, as a term implied by law in relational contracts[28] - a phrase that seems to mean that at least one party is going to have trust the other to act fairly because the contract either did not contain provisions to deal with events that were likely to occur,[29] or gave considerable power to one party and very little protection to the other.[30] In one respect the English implied term seems to go further than the Canadian rule, as it is said that it may require not only honesty but refraining from commercially unreasonable behaviour.[31] In another respect it may be much weaker; being an implied term of certain types of contract, it is presumably subject to the parties agreeing to exclude it, while the Canadian requirement of honest performance cannot be excluded.[32] Both are much weaker than the civilian notion of good faith from which they are derived, as in civilian systems good faith or the rules derived from it are usually mandatory[33] and, as we will see later, they are often more demanding, requiring parties to have reasonable regard to the other party's interests.

In other words, variations between laws may be hidden. We must always remember to check whether a doctrine that has been «transplanted» has developed along the same lines in the original and the «host» jurisdictions. It may look the same on the surface but in fact be markedly different, a «false friend».

1.4. *Bright-line rules versus broad standards*

I mentioned earlier that while German law requires all parties to perform in accordance with the requirements of good faith, English law has no general doctrine of good faith.

[28] See *Al Nehayan v Kent* [2018] EWHC 333 (Comm) at [174] and *Bates v Post Office Ltd (No.3: Common Issues)* [2019] EWHC 606 (QB) at [725].
[29] As in the case which started this development, *Yam Seng Pte Ltd v International Trade Corp Ltd* [2013] EWHC 111 (QB).
[30] As in *Bates v The Post Office (No.3: Common Issues)* [2019] EWHC 606 (QB).
[31] *Bates v The Post Office* at [711]; *Astor Management AG v Atalaya Mining Plc* [2017] EWHC 425 (Comm), [2017] 1 Lloyd's Rep. 476 at [98]. Though when an express term requires good faith, the Court of Appeal has said that «the core meaning of an obligation of good faith is an obligation to act honestly», «[d]epending on the contractual context, a duty of good faith may be breached by conduct taken in bad faith. This could include conduct which would be regarded as commercially unacceptable to reasonable and honest people, albeit that they would not necessarily regard it as dishonest»: *Re Compound Photonics Group Ltd, Faulkner v Vollin Holdings Ltd* [2022] EWCA Civ 1371 at [148] and [243].
[32] 2014 SCC 71 at [74]. However, as MCCAMUS points out, in English law liability for at least personal fraud cannot be excluded (*S Pearson & Son Ltd v Dublin Corporation* [1907] AC 351), though liability for the fraud of an agent can be: *HIH Casualty and General Insurance Ltd v Chase Manhattan Bank* [2003] 2 Lloyd's Rep 61; [2003] UKHL 6.
[33] An interesting exception is Article 1166 of the 2016 French Code civil on *imprévision*; though the doctrine of change of circumstances that the Article introduces was derived from good faith, Art 1166 is not mandatory.

In many legal systems, and perhaps most famously in Germany, the article on good faith has been used as the basis on which the courts may develop new principles to deal with situations that were not foreseen by the drafters or cases which were omitted from the Code. An example of the first are the developments of controls over standard form contracts which led ultimately to the German Act on Standard Terms (AGBG) of 1976, now incorporated into §§ 305 ff BGB. An example of the second was the notion of positive breach of contract, again now codified.[34]

In a Code system, developments of this kind must be based in a provision of the Code. §242 BGB operates in part as a kind of «expansion joint». Courts in common law jurisdictions do not need to base developments in the law on a statutory provision; they have an inherent power to develop new doctrines to deal with new situations.

It is true that the rather strict doctrine of precedent can make it hard for the English courts to develop new doctrine: even if equity is said not to be past the age of child-bearing,[35] seventy-odd years ago Lord Denning pointed out that its then latest off-spring was of a considerable age.[36] Sometimes the courts feel that legislation is the only answer, for example to control unfair exclusion and limitation clauses, where the doctrine of fundamental breach developed by the Court of Appeal turned out to be unworkable.[37] Moreover, frequently judges argue that radical change is the job of Parliament, not of the courts, because of the issue of democratic deficits or because Parliament (or Government or the Law Commission) can make a more thorough investigation of what is needed.[38] But from time to time the courts do develop the law in surprisingly innovative ways. A good example is the development of the notion of constructive notice to protect wives and other non-commercial sureties who have given guarantees to a lender for the debts of the husband or other third party, possibly as the result of misrepresentation, duress or undue influence by the third party debtor.[39] This has resulted in something close to a code of conduct which banks must follow if they wish to avoid the guarantee being avoided.

[34] § 241(2) BGB.
[35] HARMAN, *LQR* (1951), 67, 506.
[36] DENNING, A., «The Need for a New Equity», *Current Legal Problems*, 5, (1952), 1, 2.
[37] See *Suisse Atlantique Société d'Armement Maritime SA v N.V. Rotterdamsche Kolen Centrale* [1967] 1 AC 361, HL.
[38] E.g. Lord Scarman in *National Westminster Bank plc v Morgan* [1985] AC 686, 708; Brooke LJ in *Leach v Chief Constable of Gloucestershire* [1999] 1 WLR 1421, 1438; Lord Hodge in *Pakistan International Airline Corp v Times Travel (UK) Ltd* [2021] UKSC 40 at [26].
[39] See *Barclay's Bank Plc v O'Brien* [1994] 1 A.C. 180, HL and *Royal Bank of Scotland v Etridge (No.2)* [2001] UKHL 44, [2002] 2 A.C. 773. See generally *Chitty* paras 11-148 ff. For a (now somewhat dated but fascinating) study of the background see FEHLBERG, B., *Sexually Transmitted Debt* (1997).

In functional terms, I do not see the German courts' use of good faith as an expansion joint as fundamentally different from what common law courts can do. What is different is that English courts, at least, tend to develop the law incrementally, by adopting what Bingham LJ famously described as «piecemeal solutions in response to demonstrated problems of unfairness».[40]

This preference for particular rules reflects a more general fear on the part of English judges and many English practitioners, that to adopt a broad standard like good faith would lead to uncertainty. In *MSC Mediterranean Shipping Co SA v Cottonex Anstalt* the trial judge, Leggatt J (as he then was), had held that a party could not continue to claim the contract price after the commercial purpose of the contract had become impossible because that would be contrary to good faith, but the Court of Appeal refused to base its decision on that ground, preferring to base its decision on technical rules about when it is no longer open to the party to keep the contract going. Moore-Bick LJ said:

> «[…] the better course is for the law to develop along established lines rather than to encourage judges to look for what the judge in this case called some "general organising principle" drawn from cases of disparate kinds […] There is […] a real danger that if a general principle of good faith were established it would be invoked as often to undermine as to support the terms in which the parties have reached agreement.»[41]

I am not convinced that using good faith in the way that German courts do would actually run this risk: good faith merely gave rise to distinct doctrines that are now seen as free-standing and that, as we saw earlier, have been incorporated into specific and relatively confined provisions of the BGB. So, for example, a contract term that was negotiated between the parties, and therefore falls outside §§305 ff BGB, would not be struck down as contrary to good faith. In that sense there is an interesting parallel between the German and Canadian approaches, However, I am told that in other continental jurisdictions, such as the Netherlands and Belgium, the courts make much more use of the doctrine as a general standard to police contractual behaviour that they see as improper. Another example is that in Belgian law, before enactment of the new Civil Code, which incorporates an express provision on change of circumstance,[42] good faith, and specifically the prohibition of abuse of rights, was used to prevent landlords claiming

[40] *Interfoto Picture Library Ltd v Stilletto Visual Programmes Ltd* [1989] Q.B. 433, 439.
[41] *MSC Mediterranean Shipping Co SA v Cottonex Anstalt* [2016] EWCA Civ 789 at [45].
[42] Art 5.74 of the New Belgian Civil Code.

the full rent when a change of circumstances led to rented premises being closed.[43] The Italian Supreme Court, in detailed guidance on how courts should treat cases that were expected to arise after the Pandemic, said that courts should not use the specific hardship provision of the Civil Code, Art 1467, because it only gives rise to a right to terminate. Rather they should rely on the doctrine of good faith, which looks to preservation of the relationship and may require the parties to negotiate; should the parties fail to agree, the court can make adjustments.[44]

Thus a third variable is in the degree to which each law employs general standards.

1.5. *Differences in standards*

In German law, §242 BGB, in addition to acting as an expansion joint, performs a second function. When the doctrines based on good faith fall to be applied, good faith provides the standard by which to judge the behaviour of the parties or the content of the contract, and it is a demanding standard. The parties are required to have a reasonable «consideration for the interests of the other party».[45] In contrast, in English law even when the contract expressly requires good faith, the Court of Appeal has recently said that good faith will normally merely preclude behaviour that is dishonest; it may preclude commercially unreasonable behaviour, but only where that is evident from the context.[46] As I understand it, the decisions in Canada have refused to adopt a rule that each party must take the other part's interests into account.[47]

[43] See DE POTTER DE TEN BROECK, M., «The Covid-19-Pandemic and the Forced Closure of a Rented Premises: A Belgian Perspective on the Judgment of the Bundesgerichtshof of 12 January 2022», *European Review of Private Law* (2023), 31, 587, 597-599.

[44] Supreme Court of Cassation, Office of The Supreme Court, Thematic report: *Substantive regulatory novelties of the anti-Covid 19 «emergency» law in contract and insolvency*, Rel. no. 56 Rome, July 8, 2020. I am most grateful to my colleague Federico PISTELLI (Trento) for bringing this to my attention. DACORONIA, E., «Coronavirus and its Impact on Contracts in Greece», in E. Hondius, M. Santos Silva, A. Nicolussi, P. Salvador Coderch, C. Wendehorst and F. Zoll (eds.), *Coronavirus and the Law In Europe*, Intersentia, 2021 (C&LE), 743, 751 argues that if the conditions for application of Art 388 CC (change of circumstances) are not met, a Greek court can fall back on good faith (art 288 CC) «as an ultimum refugium». In France, in contrast, the Cour de cassation has held that good faith does not require aa party to renegotiate the contract when there has been a change of circumstances: Pédamon and Vassileva, (n 00), 31, citing *Cour de cassation com. 19 juin 2019, n°17-29.000.*

[45] This is taken from the definition of «good faith» in the proposed Regulation on a Common European Sales Law, art 2(b), but seems to reflect German law. See also the formulation by the CJEU in *Aziz v Caixa d'Estalvis de Catalunya, Tarragona i Manresa* (Case C-415) at [69] («whether the seller or supplier, dealing fairly and equitably with the consumer, could reasonably assume that the consumer would have agreed to such a term in individual contract negotiations»).

[46] *Re Compound Photonics Group Ltd, Faulkner v Vollin Holdings Ltd* [2022] EWCA Civ 1371 at [243].

[47] *Wastech Services Limited v Greater Vancouver Sewerage and Drainage District* 2021 SCC 7; MCCAMUS, *JCL* (2022), 1, 20.

To what extent German law demands more of the parties than does English law is not so easy to decide, however, when we look at some of English laws «particular doctrines». There are a number of doctrines that may be said to reflect a requirement of good faith:

- The rule that standard terms will be incorporated into an unsigned contract only if the user gave reasonable notice of them;[48]
- That a public authority that asks for tenders (offers) from bidders must abide by the rules of the process that it has set out;[49]
- The objective approach to interpretation;[50]
- Interpretation of contracts according to the meaning that reasonable persons in the same situation would give to the words;[51]
- The duty to mitigate damages;[52]
- The rule that a party who has been told that the services it was to supply are no longer required cannot continue to perform and then claim the price unless it has a legitimate interest in doing so; [53]
- Rectification.[54]

At least some of them -the red hand rule, for example- in effect require a party to have some regard to the other party's interests. However, others are less demanding: for example, it has been held that a party has a «legitimate interest» in performing under *White & Carter* unless to continue to perform would be «wholly unreasonable». Moreover, each rule is usually thought to have some other basis, such as the protection of reasonable reliance or economic efficiency. It is clear that not only has English law developed fewer controls over parties' behaviour than has German law, but that the controls imposed by the «particular rules» are generally less demanding. To take a single example, the «red hand» rule, which says that an onerous and unusual term will be incorporated into the contract only if it was specifically drawn to the other party's attention (for example by being marked by a finger in red ink pointing to it),[55] applies only to notices and similar documents that are unsigned; if the document has been

[48] E.g. *Interfoto Picture Library Ltd v Stilletto Visual Programmes Ltd* [1989] Q.B. 433.
[49] *Blackpool and Fylde Aero Club Ltd v Blackpool BC* [1990] 1 W.L.R. 1195.
[50] The many cases are discussed in *Chitty on Contracts*, paras 4-003 ff.
[51] See especially *Investors Compensation Scheme Ltd v West Bromwich Building Society* [1998] 1 W.L.R. 896.
[52] See Chitty on Contracts, paras 30-098 ff.
[53] *White and Carter (Councils) Ltd v McGregor* [1962] A.C. 413.
[54] Leggatt LJ in *FSHC Group Holdings Ltd v GLAS Trust Corp Ltd* [2019] EWCA Civ 1361, [2020] Ch. 365 at [122].
[55] *Interfoto Picture Library Ltd v Stilletto Visual Programmes Ltd* [1989] Q.B. 433.

signed, at least by a manual signature, the terms in it will form party of the contract however unexpected they are. Contrast the rule developed by the German courts on the basis of good faith and now enacted as §305c BGB, first paragraph:

> Provisions in standard business terms which in the circumstances, in particular with regard to the outward appearance of the contract, are so unusual that the party contracting with the user need not expect to encounter them, do not form part of the contract.

1.6. *Differences in application*

Even as between systems that have doctrines of good faith there may also be differences in the standard of behaviour that is required. This is much harder to judge, as I will necessarily be an «outsider» to at least one of the systems being compared, but there do seem to be differences in particular fields. Take the doctrine of change of circumstances. This was developed by the courts in Germany, largely in response to the economic turmoil in the German economy between the two World Wars; and even before it was incorporated into the BGB it had been adopted in many other civilian jurisdictions, either in legislation[56] or by doctrine and caselaw.[57]

In Germany the doctrine is presented as coming into play only in exceptional cases. «The doctrine of *pacta sunt servanda* requires that a subsequent change of the terms of a contract must be restricted to extreme cases»[58]; «what is really required is such a fundamental and radical change in the relevant circumstances that it would be an intolerable result, quite inconsistent with law and justice, to hold the party to the contract.»[59] In the Netherlands the doctrine is so rarely applied that HONDIUS & GRIGOLEIT felt Dutch law should be classified as a «closed» system, in the same category as English

[56] E.g. Lithuania, Art 6.204 CC; The Netherlands, Art 6:258 BW; Hungary Art 6.192 HCC; Italy, Art 1467 CC; Greece, Art 388; CC Art Poland, Art 357 CC, see WIEWIÓROWSKA-DOMAGALASKA, A., «Corona Contract Law: When Pandemic meets Politics» in *C&LE*, n. 00, 219, 233; Portugal CC Art 437. Art 112 of the Slovenian Code of Obligations provides for rescission of the contract but not its amendment.

[57] E.g. Spain, see JEREZ, C., KUBICA M. and RUDA, A., «Force Majeure and Hardship in the Corona Crisis: Some Contract Law Reflections on ELI Principle no 13» in *C&LE*, n 00, 603, 606-607 and RUBI-PUIG, A., «Coronavirus' Impact on Broadcasting Rights for the Spanish Professional Football League», in *C&LE*, n 00, 627, 642-643 (describing the Supreme Court's decisions as «pendulant»), HONDIUS & GRIGOLEIT, n 00, 126-133; Switzerland (seemingly referred to as rebus sic stantibus but the substance seems the same) and Austria, see FURRER, A., LAYR, A. and WARTMANN, J., «Impossibility, Force Majeure and COVID-19 under Swiss and Austrian Contract Laws» in *C&LE*, n 00, 719, 737-739. Unusually for a civil law jurisdiction, Czech law does not recognise change of circumstances, though it does allow for termination if the purpose expressed in the contract is frustrated: HONDIUS & GRIGOLEIT 92-95. The Scandinavian systems do not recognise change of circumstance but have a «doctrine of assumptions» that may perform a similar function.

[58] MARKESINIS 325.

[59] *Ibid*, quoting BGH NJW 1959, 2203-4.

law.[60] Cases from Taiwan seem to present a marked contrast. Taiwanese law in this area was heavily influenced by German law (via Japanese law) and introduced a provision on change of circumstance in 1941[61] to deal with disputes arising out of the extreme fluctuation of commodity prices and inflation.[62] Although in principle a «tremendous change» is required for the doctrine to be triggered,[63] the Taiwanese Supreme Court has applied change of circumstance to a construction contract when the government issued a ban on the collection of sand and rocks from rivers, which brought about a 50% increase in the price of sand and rocks. The Supreme Court has also indicated that the doctrine might apply when a construction contract unexpectedly delayed by «the changed design of a bridge, the delay of acquiring the land for work, the delay of removing things and electronic poles on the site, and inhabitants' opposition to use the land» and took twice the expected time;[64] and similarly when a contractor was delayed for over 1,000 days by another contractor unexpectedly suspending work.[65] It seems unlikely that a German court would consider such changes to be sufficiently serious to trigger §313 BGB.

1.7. *Alternative mechanisms: arbitration*

A possible difference that is even harder to evaluate is what use is made of arbitration in each system and happens there. First, we would need to collect comparative information on the percentage of B2B contracts that contain arbitration clauses and of disputes in which the parties later agree to arbitration. Secondly, we would need to know whether the arbitrator is to decide the case according to the governing law of the contract (in which case the reason for choosing arbitration may be speed, cost or (most probably) confidentiality), or according to some other non-national law rules, which may be more or less «flexible» or «protective» than a national law. Thirdly, we would need to know how the arbitrators actually apply the rules – which at least in the UK we will see only if they make a sufficiently egregious mistake that a court will consider the case.[66]

[60] HONDIUS & GRIGOLEIT, n 00, 644.
[61] Article 20(2) of the Supplemental Rules of Civil Procedure 1941. See now Art 227 TCC, which provides:
[62] CHEN, T-f., «The Doctrine of Change of Circumstances in Taiwan Law», in M Chen-Wishart *et al* (eds), *Studies in the Contract Laws of Asia*, Vol V, forthcoming, OUP, 1.
[63] *Ibid*, 5.
[64] Supreme Court 103 Tai-shang No. 1363 Civil Judgment (2014).
[65] Supreme Court 96 Tai-shang No. 482 Civil Judgment (2007).
[66] In his 2019 BAILLI Lecture, our former LCJ Lord Thomas has expressed concerns that the prevalence and confidential nature of arbitration is hampering proper development of the law: see https://www.judiciary.uk/wp-content/uploads/2016/03/lcj-speech-bailli-lecture-20160309.pdf]

1.8. *Alternative mechanisms: regulation*

Even in B2B contracts, contract law may be supplemented or even superseded by rules applied by regulators. For very small businesses in the UK, regulation is likely to have as much effect on their contracts as general contract law. Take as an example the Financial Conduct Authority (FCA), which now has responsibility for consumer credit - which includes credit given to sole traders and partnerships of no more than three persons.[67] In regulating consumer credit, the FCA relies on both detailed rules, which are contained in the Consumer Credit Sourcebook referred to as «CONC», and on high level «Principles»,[68] such as Principle 6:

> A firm must pay due regard to the interests of its customers and treat them fairly.

If a regulated firm fails to comply with a rule, a private person who suffers harm as a result will have a claim for breach of statutory duty.[69] Breach of a Principle does not give rise to the same right, but the offending firm may be disciplined and the FCA may require it to pay compensation to parties who have been harmed. Equally importantly, complaints about the behaviour of firms may be referred to the Financial Ombudsman Service, which will ask whether the firm complied with the Principles, and if it did not do so may order it to pay compensation to the consumer. The result is that a firm that, for example, does not «treat its customers fairly» may be both disciplined and made to pay compensation. The FCA or the Ombudsman may decide that it was not treating the customer fairly even if as a matter of strict law the firm was only doing what it was entitled to. The practical effect is that the law is reformed by regulation. A graphic example was provided by consumer insurance. The Financial Standards Authority (the relevant authority at the time) decided that a firm that sought to avoid an insurance policy on the ground of non-disclosure of a material fact by the insured – a basic right under English insurance law - was not treating the customer fairly if the insurer had not

[67] CCA 1974 s 8 («an agreement between an individual ("the debtor") and any other person ("the creditor") […]»).

[68] The FCA has recently added a new «consumer duty», which interestingly imposes, inter alia, «cross cutting obligations», including:

2A.2.1 A firm must act in good faith towards retail customers.

2A.2.2 Acting in good faith is a standard of conduct characterised by honesty, fair and open dealing and acting consistently with the reasonable expectations of retail customers.

This reads like pure civil law…

[69] Financial Services and Markets Act 2000, s 138D(2).

asked the consumer about the matter; and in such cases the Ombudsman would require the insurer to pay the claim.[70]

So it is impossible to get a true picture of the operation of contract law in a given jurisdiction without knowing whether some cases are being dealt with by regulators rather than the courts, and if so whether the law is in effect disapplied.

1.9. *The nature of contracts*

The practical operation of a contract law must also depend on the nature of the contracts that are routinely used in the jurisdiction.

Very detailed contracts leave less room for judges to do more than simply enforce the terms – indeed, one of the alleged motivations of American lawyers' use of standard form contracts was to make the contract «judge-proof» (or «jury-proof»).[71] My continental colleagues have often told me that in their countries, contracts were traditionally much shorter than in common law jurisdictions; the parties would leave what should happen in unlikely contingencies to be decided at the time, if necessary by the court. (They normally go on to lament that contracts are now getting longer and longer, (no) thanks to *les Anglo-Saxons*.) Likewise in the 1970s a Japanese scholar wrote that Japanese contracting was characterised by oral or shortly worded agreements that were not readily enforced, let alone litigated, even when problems arose.[72] Subsequent scholarship has cast doubt on some of this, suggesting that Japanese attitudes to law are so different to those in the UK or the US,[73] but I have been by a Japanese colleague that Japanese contracts are often much less detailed than in the West.

A second aspect of contract practice relates to long-term relationships between businesses, when it is not practical to fix detailed obligations for the future («presentiation» being prevented by «bounded rationality»). In some jurisdictions, including Japan and New Zealand, these seem to be governed by short, framework agreements.[74] In the US and the UK, despite the parties' anticipation of an on-going

[70] See Law Commissions, Joint Consultation Paper *Insurance Contract Law: Misrepresentation, Non-disclosure and Breach of Warranty by the Insured* (LCCP 182 /SLCDP 134, Law Commission, 2007), Part 3.
[71] See KESSLER, F., «Contracts of Adhesion- Some Thoughts about Freedom of Contract», *Columbia Law Rev* (1943), 629, 631.
[72] KAWASHIMA, T., «The Legal Consciousness of Contract Law in Japan» (1967), translation in *Law in Japan* (1974), 7, 1.
[73] See the discussion in SONO, H., NOTTAGE, L., PARDIECK A., and SAIGUSA, K., *Contract Law in Japan,* Kluwer, 2019, 34-37.
[74] *Ibid*.

relationship, it seems not uncommon for there to be just a series of short-term (almost «spot») contracts and no long-term contract – or at least no arrangement that the English Court of Appeal was prepared to recognise as a contract.[75]

1.10. *Special measures*

From time to time countries introduce temporary measures to deal with the effects of a crisis such as a war[76] or a pandemic.[77] These special measures may also tell us something about the jurisdiction's law of contract and, as they are generated internally, about how the system is viewed «from the inside».

The restrictions imposed in order to combat COVID-19 caused major disruption to contracts. Some contracts were rendered factually or legally impossible to perform; at a guess, many more were rendered much more burdensome to one party or much less useful to the other. Jurisdictions that recognise that contracts may be adjusted when there has been a change of circumstance would seem to have a ready-made tool to deal with the problems. In fact, special measures were adopted in the various countries including both those that those that recognise change of circumstances and those that do not.

The special measures varied in many respects. One variable was the extent to which they adjusted either contract law or the terms of contract rather than employing other mechanisms to achieve possibly similar results. In England and Wales,[78] for example, a major part of the Government's effort went into prevention rather than cure – for example, the «furlough» scheme for employees and agency workers and a similar scheme for the self-employed. But when contracts were impacted there was relatively little direct interference with the terms of contracts, the main ones being to extend the

[75] Baird Textile Holdings Ltd *v* Marks & Spencer plc [2001] EWCA Civ 274.

[76] See e.g. LORENZ, W., «Contract Modification as a Result of Change of Circumstances» in J. Beatson and D. Friedmann, *Good faith and Fault in Contract Law*, OUP, Oxford, 1995, 357, 359 and PÉDAMON C., and VASSILEVA, R., «Contractual Performance in Covid-19 Times: Does Anglo-French Legal History Repeat Itself?», *European Review of Private Law* (2021) 29(1), 3, 9-11, referring to French legislation after each of the two World Wars. For special legislation in Italy see the references given by ALPA, G., «Remarks on the Effects of the Pandemic on Long-term Contracts», *C&LE,* n 00, 553, 554.

[77] See E. Hondius, M. Santos Silva, A. Nicolussi, P. Salvador Coderch, C. Wendehorst and F. Zoll (eds.), *Coronavirus and the Law In Europe*, Intersentia, 2021, C&LE.

[78] See BEALE, H. and TWIGG-FLESNER, C., «COVID-19 and English Contract Law», *C&LE*, n 00, 461. For an account of the position in Scotland see MACQUEEN, H., «Coronavirus Contract Law' in Scotland», in *C&LE*, n 00, 491.

minimum notice periods (set by statute) for terminating residential tenancies.[79] Rather, changes were made to protect debtors in two principal ways. One was via civil procedure – the possession proceedings that have to be taken before a tenant can be evicted were suspended save in exceptional cases, and bailiffs were forbidden to execute debts.[80] The other was by regulation. The Financial Conduct Authority relied on its power to require financial institutions to «treat customers fairly» to insist, for example, that consumers whose ability to pay had been affected by the restrictions be given «payment holidays» of up to three (and later six) months, unless the firm [reasonably] determined that it was obviously not in the customers' interests to do so. Applications for or grants of payment holidays were not to affect the consumer's credit record.

However in nearly all cases, the result in England and Wales was that interest would continue to mount during the payment holiday. So on a second variable, the degree of relief afforded, the landlord's or creditor's rights were not reduced, they were merely postponed.

It is interesting that in France, which had adopted change of circumstance in 2016,[81] special measures were adopted which did affect the terms of contracts directly, but the in effect they not go much further than in England and Wales. Rights of termination and penalties for non-performance that would have arisen in certain periods of time were not enforceable, but payment obligations were not reduced.[82]

Other schemes, even in common law jurisdictions, involved potentially greater interference with contractual rights, especially under business-to-business (B2B) contracts. Singapore's (Temporary Measures) Act 2020 (No 14 of 2020), which applied to a wide range of B2B contracts[83] made before 1 February 2020, prevented not only the commencement of court or arbitral proceedings and execution of distress, etc, in relation to the contract but also the repossession of any hired goods or the termination or forfeiture of leases or licences of immoveable property for a prescribed period.[84] There were special provisions for, e.g., inability to perform construction contracts or supply contracts, giving relief against the forfeiture of performance bonds and liquidated

[79] See Coronavirus Act 2020, Sch 29. The periods were changed several times during the course of the Pandemic.
[80] Initially under Practice Direction 51Z. For further details see BEALE and TWIGG-FLESNER (n 00), 478
[81] Art 1195 Cciv.
[82] PÉDAMON and VASSILEVA, (n 00), 19-21.
[83] See Sch 1, para 1. The list includes, for example, construction and supply contracts.
[84] Section 5, esp s 5(3)(k), (l) and (m)

damages clauses;[85] and interest charges were limited to the legal rate. To some extent, contract prices could be adjusted, for example the contractor could require the employer to pay additional «foreign manpower salary» costs.[86]

A feature of relief of this kind, and also of the English and French measures mentioned earlier, is that it is essentially one-sided: the affected party gets relief irrespective of the other's interests.[87] Where the affected party is a consumer and the other is a financial institution, that is understandable. But this brings us to a third variable: the extent to which they attempted to provide «balanced» relief, so that the interests of both parties had to be considered. In the Singapore Act, there was some attempt to balance the interests of the parties. Where a construction contract could not be completed within the extended time permitted, and as a result the contractor incurred «prolongation costs», such as having to rent equipment or maintain insurance cover for longer,[88] the cost of so doing should be shared with the employer.[89]

It was by no means just the common law jurisdictions that introduced special measures: so too did many jurisdictions that already recognise change of circumstance.[90] Many of these measures were also «one-sided», for example giving tenants extra time to pay the rent[91] or suspending their repairing obligations. Commentators frequently noted this, arguing that the one-sided measures were justified by simplicity and the need to provide certainty as quickly as possible.[92] But some measures appeared to replicate in a rough-and-ready fashion the kind of balancing that might be necessary under the change of circumstance doctrine. In Germany[93] an Act of 27 March 2020 (Article 240 Introductory

[85] S 6.
[86] Ss 79A-79K.
[87] The French measures did not even require a causal connection between the debtor's difficulties and the Covid-19 restrictions, which PÉDAMON and VASSILEVA, n 00, 21 argue is inconsistent with good faith.
[88] For «qualifying costs» see s 39D(9). Interestingly, any costs incurred in trying to accelerate the work are not included: s 39D(9)(g).
[89] See s 39D.
[90] MAK, V., «Covid-19 and Long-Term Contracts», *European Review of Private Law* (2022), 30, 419, 424 argues that government intervention in long-term contracts in England with its common law system was more extensive than in the Netherlands with its civil law.
[91] E.g. Portugal: see ANTUNES, H., n 00, and AFONSO, A., «Obligation to Pay Rent for Commercial Premises During the Covid-19 Lockdown: The Portuguese Juridical System Solution», *European Review of Private Law* (2023), 31, 643.
[92] E.g. ANTUNES, H., «Portugal's COVID-19 Legislation and the Challenges Raised for the Change of Circumstances Regime», in *C&LE*, n 00, 677 at 683 and 690.
[93] SCHMIDT-KESSEL, M. and MÖLLNITZ, C., «Particular Corona Contract Law in Germany: Why Does General Contract Law not Suffice?», in *C&LE*, n 00, 699, at 699-718.

Act (Art 240)[94]) introduced a number of measures. Some sections of Art 240 adopted a kind of balancing approach. With long-term contracts under which a business had undertaken to supply a consumer or a micro-business (MB)[95] with essential services such as compulsory insurance, gas, electricity and telecommunications, if due to Covid-19 restrictions a consumer could not pay without endangering their own or their relatives' reasonable maintenance,[96] or a MB would face an existential threat, a moratorium was imposed: the consumer or MB could refuse to perform while the other must continue. However, the supplier could object to the consumer's or MB's refusal if non-performance was unacceptable to it also. In that case the consumer or MB's only right was to terminate the contract. Similarly, for loan agreements and mortgages, Art 240 §3 provided that if the debtor's loss of income due to Covid-19 made it unreasonable for the debtor to have to pay, interest was deferred and termination was excluded, and the creditor had to offer to negotiate an arrangement to help the debtor. If the creditor did not do so, or the parties failed to reach an agreement, the payment period would be extended by 3 months and the obligations under the agreement would be deferred by the same period. However, none of this applied if «if it is unreasonable to expect the lender to accept the deferral of payment or the preclusion of termination of the agreement after giving due consideration to all the circumstances of the individual case, including the changes to the general circumstances of life brought about by the COVID-19 pandemic.»[97]

1.11. *Consistency within systems: special measures*

The commentators who felt that the «one-sided» nature of some of the special measures had to be justified in terms of expediency presumably felt that this kind of relief was at odds with the values of their laws of contract. At a guess, it is not uncommon for politicians, under pressure to «do something» about a crisis, to impose measures that lawyers in the system may feel do not fit. We found this in England and Wales, though the objections there were presumably made from a different viewpoint.

Given the narrowness of the doctrine of frustration in English law and the complete absence of any notion of change of circumstance, it was surprising to find the Government trying to encourage negotiation. In early May 2020 the Cabinet Office

[94] A translation is available at https://www.gesetze-im-internet.de/englisch_bgbeg/englisch_bgbeg.html#p0237

[95] As defined in European Commission Recommendation 2003/361/EC, i.e. fewer than 10 employees, annual turnover not exceeding €2m.

[96] By reference to the basic needs set out in the Social Security Code.

[97] Art 240 §3(6).

issued *Guidance on responsible contractual behaviour in the performance and enforcement of contracts impacted by the COVID-19 emergency*.[98] In this document the government exhorted all individuals and businesses «to act responsibly and fairly in the national interest in performing and enforcing their contracts»[99] where these are affected by the Covid-19 pandemic. In particular, contracting parties should be «reasonable and proportionate in responding to performance issues and enforcing contracts», which entails «acting in a spirit of cooperation and aiming to achieve practical, just and equitable contractual outcomes having regard to the impact on the other party».[100] This guidance has no legal force, nor indeed any basis in law, and it is in obvious conflict with the general philosophy of English contract law. This may explain the rather dismissive reactions to the document in blogs from law firms and barristers' chambers.[101]

Even more surprising was the passage of the Commercial Rent (Coronavirus) Act 2022. This aimed to provide relief to business tenants who because of the restrictions had accumulated rent arrears in the period 21 March 2020 – 18 July 2021. A temporary moratorium was imposed on enforcement proceedings[102] and each party should make a proposal as to how to deal with the arrears. Ultimately an arbitrator could make an award as to how much the tenant should pay, in order to preserve (or where the tenant's business will only be viable if relief is granted, to restore and preserve) the viability of the business of the tenant, so far as that is consistent with preserving the landlord's solvency.[103] For a common law jurisdiction this seems extraordinary. It is reported,

[98] Cabinet Office, «Guidance on responsible contractual behaviour in the performance and enforcement of contracts impacted by the Covid-19 emergency» https://www.gov.uk/government/publications/guidance-on-responsible-contractual-behaviour-in-the-performance-and-enforcement-of-contracts-impacted-by-the-covid-19-emergency . In similar vein see the Code of Practice for Commercial Property Relationships During the COVID-19 Pandemic *https://www.gov.uk/government/publications/code-of-practice-for-the-commercial-property-sector/code-of-practice-for-commercial-property-relationships-during-the-covid-19-pandemic* (both accessed 25 June 2024).

[99] Para 3.

[100] Para 14.

[101] See, for example, SAMEK, C., «Freedom of contract: Does it still exist?» https://littletonchambers.com/articles-webinars/freedom-of-contract-does-it-still-exist/; CALDER K. and RICHARD, M., «Play fair children! - UK Cabinet Office publishes contract management guidance entreating all parties to act "reasonably" in managing Covid-19 issues», https://www.jdsupra.com/legalnews/play-fair-children-uk-cabinet-office-30763/; SCHOFIELD, F., «Play nicely, children»: Cabinet Office guidance on responsible contractual behaviour during the pandemic, https://www.falcon-chambers.com/publications/articles/play-nicely-children-cabinet-office-guidance-on-responsible-contractual-beh; Norton ROSE FULBRIGHT, «UK Government publishes guidance on "responsible contractual behaviour" applicable to all contracts impacted by COVID-19» https://www.nortonrosefulbright.com/de-de/wissen/publications/0a264bcc/uk-government-publishes-guidance-on-responsible-contractual-behaviour-applicable#2 (all accessed 25 June 2024).

[102] S 23; likewise on insolvency proceedings, s 25.

[103] S 15.

however, that there has been very little take up of the scheme: the Act operated within very narrow limits because of the limited period of time for which it applied (it only operated between 24 March 2022 and 23 September 2022) and because its requirements were not easy for a tenant to satisfy.[104]

1.12. *Consistency within systems: permanent rules*

Of course, even in the permanent law of contract there may also be a variety of approaches. Rules that were developed in years past may survive even though they no longer seem to fit readily with the rest of the law. In English law, examples are the rule against penalty clauses, even after its liberalisation by the Supreme Court in *Cavendish Square Holding BV v Makdessi and ParkingEye Ltd v Beavis*[105]; and ss 6 and 7 of the Unfair Contract Terms Act 1977, which subject clauses that exclude or restrict liability for breaches of contract relating to the quality, etc of goods supplied to a reasonableness test, even if the clause had been negotiated between the parties.[106] And there can be marked differences of view between judges, as witness the debates over interpretation[107] or implied terms requiring good faith.

1.13. *Insolvency*

A further difference between the laws that may well be interrelated with contract law – particularly with the treatment of change of circumstance, but potentially with other issues also, such as termination - is in the law of insolvency. It must sometimes be the case that a party who is still bound by an unprofitable contract will become insolvent as a result. This takes me out of my field, so I will simply point out that English insolvency law seems forgiving. Provided that there has been no wrongdoing, an individual bankrupt can often be discharged and free to start trading again after just twelve months, and directors of companies that have become insolvent can start up new businesses very quickly. My impression is that continental systems are less liberal.

[104] MCKENDRICK, E., in *Chitty on Contracts*, para 27-017.
[105] [2015] UKSC 67, [2016] A.C. 1172 (held that a clause that requires payments that do not represent a genuine pre-estimate of the likely loss may be valid if the payee has a legitimate interest in obtaining performance rather than damages, and the sum payable is not disproportionate to that interest).
[106] The Law Commissions recommended that these sections be repealed: Law Commission and Scottish Law Commission, *Unfair Terms in Contracts* (LAW COM No 292, SCOT LAW COM no 199 (2005), para 4.29.
[107] See Lord SUMPTION «A Question of Taste: The UK Supreme Court and the Interpretation of Contracts» in D. Clarry (ed.), *The UK Supreme Court Yearbook* (2016–2017), Vol.8 p.74 at pp.75 and 87, and in reply Lord HOFFMANN'S «Language and Lawyers» (2018) 134 L.Q.R. 553.

1.14. *Contract practice*

My last variable is perhaps the most difficult of all to pin down. It is the way that contract law operates in practice. Do parties actually seek to enforce their contractual rights? Do they rely on those rights as a means of securing performance by the other party? We have a certain amount of evidence that, at least in certain sectors, English business people do not normally look to the law, or even to the contract itself, to govern their relationship.[108] Rather they look to commercial trust, and rely on the fact that the other party will behave well in the hope of getting more business in the future. One study suggested that while German contracting parties go through the contract together as a way of developing trust,[109] English businessmen think that to refer to the contract shows that you do not trust the other party – and so they are reluctant to mention it.

It is difficult to pin down contract practice even within a single jurisdiction. First, practice may vary from sector to sector. Reading Lloyd's Law Reports makes it evident that parties in the commodity and charter markets are quite ready to litigate with each other without this stopping dealing them with each other. Secondly, practice may vary over time. In the 1970s I used to give courses on contract law for civil engineers. I was frequently told that whereas disputes over building contracts were rife, litigation and even arbitration over civil engineering contracts were almost unheard of. The difference was said to be that the real protagonists in building disputes -the architect representing the employer and the contractor– came from very different backgrounds and had little mutual understanding or respect, whereas in civil engineering contracts the key person on each side was an engineer. This enabled everything to be settled informally. But this all changed under Mrs Thatcher, who sent in the accountants to ensure that the Government (at the time most engineering work was still «public») was getting value for money. The accountants would not sanction payments without a clear legal basis - and contractual disputes became as common as in the building industry.

Despite these difficulties, I think we have to take some account of the extent to which parties rely on the law. I suspect there are considerable variations from one jurisdiction to another. Some of this will be affected by the cost of litigation or arbitration, but some

[108] BEALE, H. and DUGDALE, A. M., «Contracts between Businessmen: Planning and the Use of Contractual Remedies», *British Journal of Law & Society* (1975), 2, 45. This study essentially replicated MACAULAY'S, S., «Non-contractural Relations in Business», *Am. Sociological Rev.* (1963) 28, 45.

[109] See DEAKIN, S., LANE C. and WILKINSON, F., «Contract Law, Trust Relations and Incentives for Co-operation: a Comparative Study» in S. Deakin and J. Michie (eds), *Contracts, Co-operation and Competition*, 1997, 105, esp. at 125-130.

may reflect differing social attitudes among business people - and possibly among their legal advisers.

2. DRIVERS OF DIVERSITY

If identifying and assessing variations between the laws of contract is difficult, accounting for the diversity seems to be even harder.

2.1. *Entrenched legal or philosophical ideas*

Some of the differences between the laws of contract seem to be directly related to legal ideas that are entrenched in one legal system but not in another. An obvious example is the Will Theory, which was influential in both the Napoleonic and German civil codes, and which remains quite important in modern civil law. In French law, for example, relief is given because the claimant's consent was not wholly free or fully informed, for instance because the claimant was mistaken as to an essential characteristic of the subject matter; similarly §119 BGB permits avoidance by a party who has made a mistake «about such characteristics of a person or a thing as are regarded as essential in business». In English law, in contrast, with the exception of common mistake as to the facts, which was an (unhappy) 19th century importation, the claimant will not get relief unless the defendant has «behaved badly» in some way – e.g., inducing the contract by fraud, misrepresentation or duress. The will theory had little or no lasting influence on the 'pure' common law. Even in India and the other jurisdictions that have adopted versions of the Indian Contracts Act, early drafts of which showed clear civilian influence, adherence to the will theory seems to be no more than superficial; texts which seem to embody civilian ideas such as «free consent» turn out to have the common law model in mind. So the definition of free consent in s 14 of the Act includes mistake as a ground of avoidance, but subject to section 22, which provides that a contract is not voidable merely because it was caused by one of the parties to it being under a mistake as to a matter of fact. One or two provisions based on the will theory have survived, such as that a contract may be avoided on the ground of duress even when the threat to the avoiding party emanated from a third person and was not known to the other party to the contract,[110] but they are very much the exception.

[110] Indian Contracts Act 1872, s 19. For an overview of this aspect of the Indian Contracts Act see BEALE, «Conclusions», in KV. Krishnaprasad and S. Swaminathan (eds), *Foundations of Indian Contract Law*, forthcoming, OUP.

2.2. *Path dependency*

It is possible that the systems stick with legal ideas and so produce different results simply because each has developed in its own way and no one has thought about doing things differently – in other words, the differences might be the result of «path dependency», «we've just always done it this way». There are two reasons, however, for doubting whether path dependency offers an adequate explanation of continued differences. First, very few legal systems are static, and indeed there have been developments in the very fields we are discussing. Take for example the questions of mistake and non-disclosure. In French law and German law, the law of mistake may not have changed much in the last 100 years, but fraud by silence and duties of disclosure are relatively new developments – and they do not seem to have been directly related to the will theory. Secondly, in many if not most countries there has been active discussion of law reform, and very frequently there have been committees charged with reform of the civil code or permanent bodies, such as law reform agencies, whose task it is to ensure that the country's law is kept up to date. If these bodies have not recommended changes, we can presume that in these countries the courts and law reformers consider their law to be broadly satisfactory.

We can find examples of courts and reform agencies feeling that they cannot change one rule because of the presence or absence of another, which they cannot change. An example of this in the courts is that the UK Supreme Court felt that the rule against penalties should be retained, at least in modified form, because businesses, and in particular small businesses, which are not protected by legislation against unfair terms generally, might need the protection offered by the doctrine.[111] An example from law reform is that the Law Commission felt unable to recommend that quasi-security devices such as hire-purchase agreements should have to be registered in order to be effective against third parties without a review of the nemo dat exceptions generally, which would require another project.[112]

However, if lawyers in a particular jurisdiction found a particular rule to be inappropriate, I would expect to see at least some pressure for change, and certainly to find it being contested when wider law reform was being discussed, as it was before the reforms of 2022 in Germany and those of 2016-18 in France. In Germany, on the key differences in

[111] Lord MANCE [2015] UKSC 67 at [167]; Lord HODGE at [263].
[112] *Company Security Interests* (LAW COM No 296), 2005, pars 1-65-1.66. Such a project was included in the Ninth Programme of Law Reform but it was never taken forward.

doctrine that I identified earlier, there was little change in substance; rather the doctrines were reinforced by being brought into the BGB. In France, there was little substantive change on mistake, while the adoption of generally-applicable controls over unfair non-negotiated terms and of the doctrine of *imprévision* moved French law closer to German law and further away from the results reached in most common law jurisdictions.

2.3. *Differences between economies*

Diversity might be explained by differences between the economies of the countries in question. I have certainly encountered an example of this. When reform of the Hungarian Civil Code was under discussion, I asked whether the new code would include a rule against laesio enormis (ie that a contract may be set aside simply because the price was too high or too low). I assumed that the old code contained this rule, which is now very uncommon,[113] simply because of its Austro-Hungarian origins[114] and that it was just a relic of the old notion of just price. I was told, however, that it was considered necessary to retain it because Hungarians lacked experience of a market economy and might not realise that they should «shop around» for good prices.

Generally, however, it is not easy to identify economic differences that lead directly to differences in contract laws. Even the laws of China and Vietnam, the two countries within the Asian contract law study that seem to differ the most from the market economies prevalent elsewhere, do not seem to be particularly different for this reason.

2.4. *Social differences*

CHEN-WISHART has demonstrated how a doctrine that has been transplanted, like the English doctrine of undue influence, may be interpreted very differently in the host country because social conditions there, such as respect for parental authority, are very different.[115] There may well be broader differences. French contract law seems imbued with a sense of social solidarity that must be part of a wider social phenomenon (though,

[113] The French Code civil has a provision that applies only to land sold at an under-value. In the Asian jurisdictions I have studied, only the Philippines adopts the doctrine: DIZON & DISINI, «Invalidity of Contracts in the Philippines», *Studies in the Contract Laws of Asia IV, Invalidity*, 325, citing TOLENTINO, AM., *Commentaries and Jurisprudence of the Civil Code of the Philippines*, vol 4 (Central Lawbook Publishing Co 1987) 574 (lesion is defined as «the injury which one of the parties suffers by virtue of a contract which is disadvantageous for him»).

[114] Austrian CC s 936.

[115] CHEN-WISHART, M., «Legal Transplant and Undue Influence: Lost in Translation or a Working Misunderstanding», *International and Comparative Law Quarterly*, (2013), 62, 000

to judge by the reactions of some of our French colleagues to the new reforms, this sense is not universally shared). The philosophy behind German contract law does not seem to be something German academics discuss much, but I am sure that I am not the only one to wonder whether there is not a link between German contract law and the philosophy that lay behind Bismarck's desire to provide social security in one form or another.

Conversely, the English law of contract seems to reflect a philosophy of individualism, of every person for themselves. And some of the Brexiteers seemed to think that Singapore is even more individualistic, as for a while they talked of turning the UK into «Singapore on Thames».

Within the traditional common law systems, I hesitate to put too much down to differing social attitudes. Certainly some specific social factors have led to variations – for example, Australia's doctrine of unconscionability is wider than the English doctrine, and this has been justified by the number of immigrants for whom English is not their first language[116] – though this must also be a problem in England and Wales. Some differences may simply to reflect different ideas of what is the «best» rule in a particular situation, for example what may be the most «workable» approach. Take for example, the differences between the UK Supreme Court and the Australian courts over whether the penalty rules can apply to sums payable when there has been no breach of contract but one party has exercised an option under the contract.[117] I hesitate to ascribe either to wider factors.

When we consider the issues on which the traditional common laws and the civilian laws tend to diverge, the variations are so great that they do seem to reflect deeper differences.

2.5. *The roles of judge and contract law*

The content of the law of contract must in part be determined by the perception, among lawyers in each system, of the proper role of the judge and of the law. To put it in very crude terms, but terms that I think most English lawyers will recocognise, English judges see their primary role in contract cases as being to enforce what the parties have agreed, with only minimal and essential supplementation; and to interfere only when one party's

[116] For a discussion of the differences between England and Wales and Australia see ELLINGHAUS, «An Australian Contract Law», *JCL*, (1989) 1, 13.
[117] See *Andrews v Australia and New Zealand Banking Group Ltd* [2012] HCA 30; 247 CLR 205; *Cavendish Square Holding BV v Makdessi and ParkingEye Ltd v Beavis* [2015] UKSC 67 at [41]-[42].

behaviour has been egregious. True, «holding the parties to their bargain» normally means only providing compensation to the victims of breach of contract, and the law makes it relatively easy for a party who is dissatisfied with the other's performance to walk away and find a better counter-party with who to deal.

In contrast, in both French and German law, not only do judges exercise much more control over both the making, the content and the performance of the contract, but there is much more concern about keeping contracts alive – whether by encouraging performance and restricting rights of termination (the readier use of specific performance, and in French law the mise-en-demeure[118] and the delai de grace[119]), or by adjusting them when there is an unexpected change of circumstances. I have read that the Code Napoleon was intended as a guide to citizens as to how to conduct themselves. If that is true, it presents quite a contrast to English law 's refusal to interfere unless there has been misrepresentation, duress or a narrowly-defined form of unconscionability.[120] English law seems merely to set outer limits on what will be tolerated.

2.6. *The nature of the disputes coming before the courts*

Lastly, there is what I think may be the most important reason for the diversity between the systems: the types of case, the nature of the disputes and the parties coming before the courts. In England and Wales, at least in the only courts whose decisions are reported – in practice, in civil and commercial cases, the High Court and the appellate courts; county court judgments are reported only very sporadically - the overwhelming bulk of cases are «commercial» cases, usually involving high value contracts between parties who are sophisticated or at least well-advised.[121] Between such parties, the old notions of freedom and sanctity of contract, and of self-reliance - «*qui dit contractuel dit juste*»[122] - are quite plausible. This must affect the law made by the courts, and may well explain the largely individualistic, «hard-nosed» nature of general English contract law.[123]

[118] E.g. Arts 1221, 1223 , 1225(2) and 1231 Cciv.
[119] Art 1228 Cciv.
[120] On the English doctrine of unconscionability, see *Chitty on Contracts* paras 11-170 ff.
[121] See also ELLINGHAUS, «An Australian Contract Law», *JCL* (1989) 1, 13, 19-20.
[122] FOUILLEE, A., *La science sociale contemporaine*, 2nd ed., 1885, 410: see ROLLAND, L., 2006, 51, MCGILL L. J., 765, 771.
[123] See BEALE, H., «The Impact of the decisions of the European courts on English contract law: the limits of voluntary harmonization», *European Review of Private Law* (2010), 18, 501, 520-521. There is an interesting contrast with UK consumer law, which has frequently given consumers more protection than was required by EU Directives at the time, e.g. Consumer Rights Act 2015.

To this should be added two further points about English contract law. The first is that often the contracts being litigated –for example, commodity contracts or charterparties- were made in a market that fluctuates dramatically and the real question is whether a party who has ended up «out of the money» can find a way escape from the contract so as to throw the loss back onto the other party. In such cases, any uncertainty as to how the law will be applied is likely to encourage litigation, and the English courts have frequently preferred «bright line» rules that they consider will give more predictable outcomes to rules that may seem to produce «just» results on the facts of the particular case.[124]

The second point is that English law is an «export product». The English legal profession goes to great lengths to sell its services to businesses around the world, and to encourage the use of English law as the «law of choice» for international transactions.[125] And rightly or wrongly, it has been assumed that international businesses are capable of looking after their own interests and that the English courts should not try to control the fairness of the terms of their contracts. When the Unfair Contract Terms Act 1977 was adopted, there was a deliberate decision that it should not apply to either international supply contracts or contracts that are subject to English law only because the parties have chosen that law to govern the contract.[126]

> «The effect of imposing our proposed controls in relation to those contracts might well be to discourage foreign businessmen from agreeing to arbitrate their disputes in England […]»[127]

Despite the change in the nature of parties making transnational contracts, I do not see any likelihood of this attitude changing. Even if smaller businesses and consumers are now making transnational contracts, the amounts involved will almost never justify the expense of litigation in London.

So English contract law is «law for big business». This drives not only English case law but also law reform. For example, when the Law Commissions provisionally proposed controls over unfair terms in B2B contracts generally, the profession objected very strongly, and the Law Commissions' eventual report recommended a much more limited

[124] E.g. *Bunge Corp v Tradax SA* [1981] 1 WLR 711 (HL).
[125] See KÖTZ, H., «The Jurisdiction of Choice: England and Wales, or Germany?», *European Review of Private Law* (2010), 6, 1243.
[126] See ss 26 and 27.
[127] Law Commissions, *Exemption Clauses Second Report* (Law Com No 69, Scot Law Com No 39, 1975), para 232.

measure that would have helped only small businesses. Even that was never implemented. In my view, English contract law is simply inadequate for B2B contracts where one or both parties are SMEs. It would be very interesting to know to what extent the English attitude to contract law is shared in, say, Hong Kong and Singapore.

What I do not have any reliable information on is how the caseload of the English courts compares to that of courts in most other systems. I suspect that in many countries it is very different, more often involving small businesses and lower value contracts. It is certainly my impression that in France, for example, «smaller business» cases are heard by the Cour de cassation on a regular basis.

3. CONCLUSIONS?

In the end, I am afraid, I cannot present a set of conclusions, only a list of questions. I would really like to know whether these are the right ones to be asking, and whether there are others that also need to be addressed.

If I am asking the right questions, however, that would be a step forward in trying to understand how and why our laws differ. And that would not be a purely descriptive exercise. Law reform and even case law sometimes seems to copy developments elsewhere, or conversely to ignore them, without too much thought being given to their suitability for the system, and if they were to be imported how they might work in the host jurisdiction. I think that if we understood better how and why our laws differ, «foreign» models might be put to better use.