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Frustration v Imprévision, Why Frustration is so 'Frustrating': The Lack of Flexibility in the English Doctrine's Legal Consequence

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Abstract
The COVID-19 pandemic and subsequent economic restrictions have placed many contractual parties under great strain to honour their agreements as contracts have become commercially impracticable and excessively onerous. This article explores the legal position in England, France and the Middle East under the doctrine of impossibility, impracticability and unforeseen circumstances. Strongly rooted in contractual autonomy and commercial certainty, this article argues that frustration in English common law is not sufficiently broad because the consequence (automatic discharge) is too rigid and does not allow a renegotiation of obligations. French civil law is more accommodating but only formally adopted *imprévision* in civil law in 2016, meaning it lacks traction. However, Middle Eastern civil law countries accept the doctrine as an integral part of their law and theory of justice, allowing obligations to be rebalanced in a more flexible manner. The English legal system should consider the advantages of a similar reform.

Keywords Frustration · Unforeseen circumstances · England · France · Middle East · History

Introduction

Following the global commercial restrictions resulting from the COVID-19 pandemic, and with many contracts now impossible or quasi-impossible to perform, there has been surprisingly little academic focus on the doctrines of frustration and *imprévision* which apply to contracts that have become impracticable or excessively onerous due to unforeseen circumstances. Moreover, no research to date has used a

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historical lens to attempt to untangle the theoretical and cultural threads that explain the doctrines' differing developments.

To fill this lacuna, this article explores how the legal systems in English, French and Middle Eastern jurisdictions interpret and apply these principles. The author contends that, despite certain tentative steps forward, English common law does not, and cannot, readily accept impracticable contracts under its doctrine of frustration. Firstly, contractual autonomy and commercial certainty are prized above all else. More importantly, frustration has an 'all-or-nothing' legal consequence, the automatic discharge of the contract. This paper argues that this rigidity of remedy or consequence, and the court's lack of ability to renegotiate terms, fundamentally undermines the doctrine.[1] Despite certain restitutionary powers under Law Reform (Frustrated Contracts) Act 1943, English courts fundamentally prefer to 'let the loss lie where it falls', rather than attempting any ongoing compromise between obligor and obligee, which is outside of English judicial scope. France traditionally only accepted the power of *imprévision* to revise a contract in the public domain, that is, under administrative law. Despite recently codifying the doctrine into civil law, the lack of historical basis provides a rather fragile base. The fact that the principle is still not mandatory also shows the country's reluctance to embrace it fully.

This article contends that, in contrast, it is the Middle East that is the forerunner and leading proponent of the doctrine. The civil codes, from 1948 onwards,[2] all include a clear and categoric clause covering *imprévision* (or *nazariyah al-hawadith al-tari'ah*). This begs the question as to how and why the civil law Middle Eastern countries readily accepted a principle that was not in the Napoleonic Code, nor directly in the Shari'a or the Majalla.[3]

The answer lies in the strong customary and cultural influences in Islamic countries' legal systems. The need for harmony and to 'correct the balance' (Al-Sanhuri, 1966) in apportioning burden is at the heart of the Middle Eastern 'unforeseen circumstances' doctrine. In this belief system, justice is not individualistic but sociological as social justice and contractual justice are inextricably intertwined (Bechor 2007). The compatibility of the doctrine with Shari'a law also made it easily incorporated and gave it longevity (Ballantyne 2013).

By reviewing the three systems, this article serves as a comparative study but also acknowledges the importance of a wider perspective because no country exists in isolation. Civil law and common law are 'no longer separate and self-contained entities', as acknowledged over 100 years ago, (Lee 1915) and the assimilation process is only gathering speed. As such, English courts may be under increased pressure to be more accommodating towards contractual claims of frustration due to unforeseen circumstances. With the lack of flexibility in the remedy, however, this article

[1] This is partly due to the lack of a general doctrine of *force majeure* is English common law. As both *force majeure* and *imprévision* are grouped under the one heading of 'frustration', there is no distinction between an impossible contract, which by definition must be discharged, and an overly onerous one where it would be more logical to rebalance the obligations.

[2] Egyptian Civil Code (1948) No 131.

[3] The Majalla is the civil code used in the Ottoman Empire at the end of the 19th and early twentieth century.

contends that the Law Commission needs to review possible statutory change, to allow a rebalancing of obligations.

Part 1 Frustration in English Contract Law and How the Consequence of Automatic Discharge Undermines the Doctrine's Application

It is a truth universally acknowledged, that completely unexpected events occur in life. The outbreak of COVID-19 and the subsequent lockdowns of the vast part of many countries' economic activity is just one example. Despite the best planning, contracts often fail to foresee and protect against the vagaries and unpredictability of human existence.

A Respect for Personal Autonomy

The essence of English law has traditionally been one of personal autonomy, the ability of individuals to make their own rules and independent decisions, without interference from the court. Many jurisprudential theorists see this as a positive principle, not an abrogation of judicial responsibility (Austin, 2018). Indeed, according to Raz, the purpose of law is not so much to enforce the contract itself but 'to protect both the practice of undertaking voluntary obligations and the individuals who rely on that practice.' (Raz, 1982). As such, contractual autonomy and individualism are essential parts of a free market, the foundation of the vast majority of countries' economic structures. To act otherwise may be seen as 'paternalistic and patronising' (*Radmacher v Granatino*, 2010), and will also undermine commercial success.

Furthermore, from a moral point of view, in English common law a contract is a voluntary arrangement, creating a special bond between the parties, not dissimilar to family ties, which should be respected and upheld by the law to support the 'practice of promising, … rooted in moral precepts and in social conventions' (Raz, 1982).

Despite certain scholars such as Atiyah favouring a more interventionist system (Atiyah 1981) from both a moral and a practical point of view, this belief in the importance of the contract itself has an additional crucial benefit, namely reinforcing the reliability of the system. (Raz, 1982).

As such, Raz's theory is what Dagan calls 'structurally monist', although not substantively so, focused entirely on the need to protect the system of enforceable voluntary promises (Dagan 2013).

The Historical Development of Frustration and the Importance of Civil Law

Despite the law's commitment to contractual autonomy, various contractual principles allow for it to be disregarded, including mistake, duress, misrepresentation and fraud. However, these are largely human-driven problems—they reflect faults in the parties themselves which, by their very nature, undermine the contention that personal autonomy must be respected. The crisis that the world faces now,

however, is not the fault of the contractual parties but outside their control. The question, therefore, is whether contracts concluded before the crisis should be respected as agreed or whether they can be 'frustrated'.

> Not surprisingly, given the arguments above, the general premise is that the terms of the contract are binding as: 'in English law the sanctity of contract means that the promise endures despite the normal vicissitudes of fortune' (Coulson 1984). According to Coulson, this is because English culture values tenacity of purpose as a means to influence and determine future events, rather than be buffeted about at their mercy. As reviewed below, this contrasts sharply with the Islamic approach which honours a supreme power as the controlling force. As such, English courts are historically reluctant to intervene in contracts where the original understanding has changed, due to unforeseen circumstances *(Paradine v Jane, 1947*).

Moreover, it is for the parties to impose themselves on the possibility of unforeseen events, not to allow themselves to be subject to them, or use them as an excuse to breach their contractual duty. (Coulson 1984). Indeed, if a party had wished the contract to be void, in the case of unforeseen circumstances, he/she should have included that as an express clause in the contract (effectively a *force majeure* clause) as the 'law would not protect him beyond his own agreement' *(Paradine v Jane, 1947*).

A slight shift in judicial sympathy is seen in the mid-nineteenth century, accepting an implied term in the contract that a 'particular specified thing' was in existence and would continue to be so (*Taylor v Caldwell*, 1863). However, this was not a common law phenomenon. Indeed, Blackburn J was directly influenced by the Roman civil code, where the existence referred to the life in being of a slave, citing 'Digest, lib. XLV., tit. 1, de verborum obligationibus', 1.33 and 1.23, and the eminent French jurist, Pothier's 'Traité des Obligations', part 3, chap. 6, art. 3, § 668' (*Taylor v Caldwell*, 1863). Following the 'great assistance' of these civil code principles, the judge accepted a doctrine of impossibility to be implied into English contract law, providing what Treitel refers to as a 'turning point' as the law 'moved away from the doctrine of absolute contracts to the modern doctrine of discharge by supervening events' (Treitel 2014).

However, Blackburn's civil law expertise is dubious: Professor Ibbetson rightfully highlights that in 'purporting' to follow Roman legal texts showing no liability arose in a property transfer if said property was unexpectedly destroyed beforehand, Blackburn implied a condition to the same effect into English law, based on what the parties must have meant, thereby meaning that 'where Roman law had applied a rule, English law construed—or imposed—an intention'. (Ibbetson, 2010).

Despite this, the seeds of change were sown and at the start of the twentieth century frustration was finally accepted as a *bona fide* exception to absolute contract theory, (Macmillan, 2008) as shown in the famous 'coronation cases'(*Krell v Henry,* 1903). Again, though, the basis was Blackburn's misinterpretation of Roman Law

and implied intention, rather than the general public good of not forcing people to respect contracts that are fundamentally altered (as per Middle Eastern law below).[4]

Frustration in Modern Times and the Shortcomings of the Law Reform (Frustrated Contracts) Act 1943

The move away from the existence of the contractual 'thing' can finally be seen in Lord Radcliffe's seminal judgment in the House of Lords in 1956 (*Davis Contractors Limited V. Fareham Urban District Council*, 1956):

> Frustration occurs whenever … the circumstance in which performance is called for would render it a thing radically different from that which was undertaken by the contract. *Non haec in foedera veni*. It was not this that I promised to do.

The key question became whether the obligation is now 'radically different' from that foreseen at the time of agreement and whether, without fault, it is impossible to perform. If so, the contract can be automatically discharged, and all further obligations cancelled.

The parties' contractual intentions, 'interests and circumstances' are irrelevant to the court, (*Hirji Mulji* v. *Cheong Yue Steamship Co.*, 1926) because the event, by definition, was outside of their intentions, their foresight. Rather, the doctrine now encompasses 'the figure of the fair and reasonable man' who, himself, is the 'anthropomorphic conception of justice' (*Davis Contractors Limited V. Fareham Urban District Council*, 1956), who can only be embodied by the court.[5]

However, and unlike civil law countries, although justice is thereby explicitly accepted as the divining rod of judicial intervention, this is not based on general equitable principles or hardship, but rather on how a fair and reasonable man would interpret the possibility of performance.

> 'But, even so, *it is not hardship or inconvenience or material loss itself which calls the principle of frustration into play*.' [author's italics] (*Davis Contractors Limited V. Fareham Urban District Council*, 1956)

It must be 'impossible' (or quasi-impossible) to perform[6]: economic hardship due to a sharp rise in costs, for instance, is irrelevant (Treitel 2014). Although some attach importance to the term 'commercial impracticability' being the new norm, (Triantis,1992) the word 'impractical' is too soft (as in simply 'not sensible') and

[4] Moreover, the cancellation was not completely unforeseen – certain other contracts at the time had contingency measure clauses to cover exactly that eventuality and insurance companies were also offering insurance coverage, see Goldberg, (2010).

[5] Lord Radcliffe's test was approved by the High Court of Australia in *Codelfa Construction Pty Ltd v State Rail Authority of NSW*, 1982.

[6] This interpretation is also seen in India, with Ram Mohan et al. writing that 'burdensomeness is not the necessary consideration; the impossibility of performance is the true criterion' Mohan et al. (2020).

'impracticable' means nothing more than impossible (Collins 2020), so it does not advance the argument.

As such, English common law now sets the bar very high in deciding which circumstances qualify as serious enough to defeat agreed obligations. Supervening illegality is readily accepted,[7] as public policy considerations obviously mean that parties cannot be forced to perform an illegal obligation. However, impossibility is more difficult. Many obligations *could* be achieved, although at inordinate expense and difficulty but the courts are seemingly not concerned with such potential problems with reference to the shortage of workers, due to war, Lord Radcliffe said:

> … if that sort of consideration were to be sufficient to establish a case of frustration, there would be an untold range of contractual obligations rendered uncertain and, possibly, unenforceable. (*Davis Contractors Limited V. Fareham Urban District Council*, 1956)

Equally, 'impracticability or frustration of purpose will only rarely' be successful (Morgan 2015), as the difference in the obligation must be 'radical' (Laithier 2005). This paper contends that the reason for this stance lies in the rigid consequence of the doctrine. If a contract is frustrated, it is automatically discharged. As such, all obligations cease. The fact that the courts cannot renegotiate the contract to reflect the change in circumstances but only have an 'all or nothing' power means there is an obvious reluctance for courts to intervene and completely reverse the burden of the obligations—when faced with two similarly unfair alternatives, the least harm would seem to come from respecting the original agreement.

The English common law stance is confirmed by statute: unlike certain other common law countries, Britain's Parliament tackled the doctrine of frustration (UK Law Reform (Frustrated Contracts) Act 1943) but chose primarily to address only pre-payments, (UK Law Reform (Frustrated Contracts) Act 1943) deliberately avoiding broader issues of the doctrine itself or its remedy. Though s.1(3) does provide authority to recover any 'valuable benefit', this is not really what most people would understand by Lord Brandon's 'elaborate code by which the *rights of the parties could be readjusted in an equitable manner*' [author's italics] (*Bank of Boston Connecticut v European Grain and Shipping Ltd* (The Dominique), 1989). Rather, the fundamental principle, as per Lord Goff in *BP v Hunt*, is simply to reverse unjust enrichment and safeguard the restitution principle (*BP Exploration v Hunt* (No 2), 1979). Allowing a *quantum meruit* approach negates the unfairness of cases such as *Fibrosa (Fibrosa Spolka Akcyjna v Fairbairn Lawson Combe Barbour Ltd*, 1942), but does not alter the fundamental fact that the contract itself is discharged. Or, indeed, that the bar to achieve that discharge is set so high. The court's discretion to restore any amount up to the value of the benefit obtained does not equate to a rebalancing of the contract, as per the Middle East or France, see below, but simply a way to tidy up the ends, taking a balance sheet approach, after that contract is discharged under common law. Furthermore, even with this tallying of benefits, Lord Goff's interpretation of 'just sum' has fundamental problems as he himself admits: whether

[7] Illegality at the time of the contract obviously renders the contract unenforceable from the start.

benefit should be the services themselves or the end product of those services is not obvious and leads to counterintuitive results that can run against the justice of the situation *(Fibrosa Spolka Akcyjna v Fairbairn Lawson Combe Barbour Ltd*, 1942), and his interpretation has led to criticism by other scholars (Treitel 2014). Moreover, although the statute goes some way to apportioning unjust benefit, it does not address the other side of the same coin, a sharing of loss. Overall, England is rather out on a limb without any legal avenue, statutory or caselaw, whereby it can provide a 'fair adjustment' to the actual ongoing contract.[8]

Will the Covid-19 Pandemic and Subsequent Economic Lockdown Frustrate Contracts Governed by English Law?

This article's analysis indicates that contractual parties under English law will be hard put to argue that their obligation should be nullified because of the global health crisis and its subsequent effect on commerce. Not only would this flout general legal principles of contractual autonomy but it flies in the face of the need for economic and commercial certainty,[9] as it is 'of the utmost importance to a commercial nation that vendors should be held to their business contracts' (*Blackburn Bobbin v Allen*, 1918). Furthermore, it is a question of risk-apportionment: following 'caveat emptor', business people are expected to foresee risk and take action to protect against it; indeed, it is the role of the insurance industry, not the court, to provide this protection.[10]

It is true that events in 2020 have not been 'normal'. Yet were they really outside the contemplation of all parties? Treitel draws a distinction between events that are 'no more than a possibility' and those that have 'a real likelihood' (Treitel 2014). Although the world has seen many pandemics before, it is difficult to contend that this one was 'likely'. However, many insurable risks are not likely, indeed that is the purpose of insurance. The fact that pandemic and commercial disruption insurance is offered, and was so before the outbreak, demonstrates that, at a minimum, these circumstances were considered.[11] *Force majeure* clauses are also well-known, commonly used and designed specifically for this sort of situation. There is, therefore, a good argument to keep frustration within its 'very narrow limits' (*Davis Contractors Limited V. Fareham Urban District Council*, 1956).[12] The sheer volume of possible cases also may stand in the way of potential claimants. Although there is a certain

[8] This can be contrasted with state law in Australia, see *Frustrated Contracts Act 1978 (NSW), Australian Consumer Law and Fair-Trading Act 2012 (Vic) and Frustrated Contracts Act 1988 (SA).*

[9] This can also be seen in the traditional absence of any implied term of good faith in English contract law.

[10] The doctrine of frustration 'is not lightly to be invoked to relieve contracting parties of the normal consequences of imprudent commercial bargains', as per *Pioneer Shipping Ltd v BTP Tioxide Ltd (The Nema)*, 1982.

[11] The All England Lawn Tennis Club after the SARS pandemic, took out annual pandemic insurance from 2003. Following the cancellation of Wimbledon 2020, due to Coivd-19, they will reportedly receive £114 m (Ruel 2020).

[12] As per Lord Simonds.

merit in the argument that a 'wave of sympathy following the pandemic' may make courts more willing to be accommodating (Valentin 2020), it may conversely be easier and commercially more tenable for English courts, effectively, to wholesale reject the COVID-19 pandemic and subsequent lockdown as a reason to discharge contracts.

This, however, poses a problem. Not only might it be politically difficult to dismiss all 'hardship' claims, but English courts risk setting themselves apart from many other countries in the world. The civil law approach of countries such as France, therefore, is important to consider.

Part 2 *Imprévision* in French Civil Law

In contrast to frustration under English common law, the majority of civil law countries accept a similar but rather different principle, the theory of *imprévision*, or 'unforeseeable circumstances'. In a complete paradigm shift from contractual autonomy, this allows the judge to intervene and 'rebalance' any contract which has, due to unforeseen events, become too onerous and burdensome on an innocent party.

However, the doctrine's pathway under French law has been anything but smooth.

Imprévision in French Civil Law—'a Long Time a-Coming'

Linguistically, the term *imprévision* simply means unforeseeability or unpredictability, referring to events that make the contract significantly more onerous on one party than was originally intended. Despite being an incorrect translation, the term is often referred to in English as the 'hardship' principle because it reflects the key aspect, namely the extra hardship to which a blameless contractual party is now unexpectedly subject.[13]

In France, the theory of *imprévision* was readily accepted by the Conseil d'Etat as part of public administrative law. In private contract law, however, the French Supreme Court steadfastly rejected it. Indeed, in contrast to nearly all other civil law countries, French law is famous, or perhaps infamous, for the rigidity of its insistence on absolute contractual integrity, as shown in the seminal Canal de Craponne case (Civ 6.3 1876, D.P. 1876.1.197), enshrining the canal in French legal history (Fauvarque-Cosson 2004) where a fixed-price contract from the sixteenth century was enforced 300 years later, despite costs of maintaining the canal having risen dramatically.

However, contracts within the French public sphere are viewed differently, endorsing the importance of the public interest. Importantly, it is the interest of society, not the state that counts as 'public' interest: in the *Compagnie Générale d'Éclairage de Bordeaux* case (Conseil d'Etat, 1916), the Conseil d'État granted the appeal, allowing the private supplier to amend upwards the price of gas to reflect the

[13] The term 'hardship principle' has also been more widely adopted following the increased use of hardship clauses in international commercial contracts, see UNIDRIOT, (2016), 6.2.2.

huge increase in coal prices due to wartime; this went against the public authority but was justified as protecting the public order and social interest of allowing public contracts (and therefore public services) to run smoothly and efficiently.[14]

Professor Ballantyne rightfully highlights this aspect of the doctrine's acceptance in administrative law, namely that the basis of *imprévision* is one of public good, based on 'the public interest in ensuring the discharge of contracts which are essential to the orderly conduct of public affairs' (Ballantyne 2013). 'Public affairs', orderly or not, are irrelevant in private agreements.

Private French law also rejected *imprévision* because of jurisprudential adherence to the sanctity of a contract. This does not have the same basis as in England. French law honours the sanctity of the contract not only because of a respect for personal autonomy but also out of recognition that the contract itself has a lifeforce, that it should be respected in and of itself. As Laithier writes (Laithier 2005), the substance of a contract is not so much the exchange that the two parties have agreed, as under English law, but that a new legal entity has been created, a perfect 'ideal' contract, and thus, under the Napoleonic Code and as inspired by Domat (Domat 1689), has the full force of law upon its parties (French Civil Code, 1804, Article 1134), as 'a principle of natural law' (Sériaux, Alain. 1998). Accordingly, insofar as the court can intervene at all, there is no choice: the court must 'save the contract' (Ripert 1949). (This makes the contract immutable, neither modifiable unilaterally nor by the court which would be 'insulting for the parties' will' and endanger the obligatory force of the contract (Laithier 2005). In short, there is no room for judicial intervention, only strict adherence.

The 'public good' roots of *imprévision* made it difficult for the doctrine to transfer over to the private law domain (Perillo 1997). The French contractual doctrine of *force majeure* made the possibility even more remote. Moreover, a final difficulty was that express hardship clauses are quite common in French contracts. As with the English common law, judicial respect for free will tends towards the assumption that if the parties had wished to cover unforeseen contingencies, they would have specifically have done so.

Over time, however, there has been pressure on French law to evolve from its ultra-strict stance. Firstly, certain scholars claim there had developed a 'somewhat inchoate feeling of dissatisfaction' with the empty 'formalist rhetoric' of the sanctity of contract argument (Legrand Jr. 1989). More tangibly, the legal systems in other civil law countries have been influential, as well as international initiatives, such as the major European Contract Law project, the 'Principles of European Contract Law' (Commission on European Contract Law. 2002), and its widespread acceptance in international commercial transactions, as shown by the UNIDROIT principles (UNIDRIOT, 2016). The Explanatory Notes regarding Article 1195 of Ordonnance no. 2016-131 of 10 February 2016 (Du Régime Général Et De La Preuve Des Obligations 2016), emphasise that both comparative law and European projects to harmonise law throughout the region underpin France's desire to align itself with its European brethren and international norms, stating that France is one of the last

[14] A similar approach was taken in Conseil d'Etat, 1932.

countries in Europe to fail to recognise the theory of imprévision as a reason to modify the binding force of a contract,'(Du Régime Général Et De La Preuve Des Obligations. 2016)[15] and was essential to 'allow France to tackle serious contractual imbalances which arise during the contract's life. (Du Régime Général Et De La Preuve Des Obligations. 2016).[16]

Furthermore, from a jurisprudential point of view, it could also be argued that the integrity of the contract is actually *reinforced* by the modification purpose, not reduced. A contract that cannot be performed, either due to impossibility or significant impracticability, will end up being breached. As such, it will fail. A remedy order of specific performance will obviously also fail. Enabling a negotiation phase, on the other hand, gives a chance to reviving the contract, albeit in a slightly different form. Indeed, allowing judicial intervention will actually *encourage* such negotiation, a point specifically recognised in the new 2016 legal reforms.

The New Way Forward: The 2016 Reforms of the French Civil Code

In 2016 (French Civil Code, 2016, Law 131 of 10 February 2016), France implemented a substantial reform of its Civil Code provisions regarding contract Law and the general regime of obligations. Under these new reforms, the principle of *imprévision* has now been officially codified into French contract (French Civil Code, 2016).

This change was not without considerable controversy. Traditional antipathy to the notion ran deep. It is reported that there was 'considerable, and at times heated, debate as to whether the notion of *imprévision* should be allowed into the new civil code and, if so, in what form' (Tetley 2016). Right up until the last minute, the push was for the principle to allow the contract to be terminated but not modified. However, the final draft was amended, authorising judicial amendment of the contract, thus pulling France more towards its mainland European counterparts (and indeed its Middle Eastern neighbours) and away from the English law approach.

Under the new Article 1195 (French Civil Code, 2016),[17] *imprévision* applies when the contract has been rendered 'excessively onerous' to one party, by a change in circumstances which was not possible to foresee at the time the contract was agreed, and where that risk had not been assumed. The contract can then be renegotiated, to take into account the new hardship, either bilaterally or via the judge thereby 'rebalancing' the contract along more equitable lines. Reinforcing the

[15] **Ch IV, ss** 1: Force Obligatoire.

[16] *ibid.*

[17] , Article 1195: 'Si un changement de circonstances imprévisible lors de la conclusion du contrat rend 1′ exécution excessivement onéreuse pour une partie qui n'avait pas accepté d'en assumer le risque, celle-ci peut demander une renégociation du contrat à son cocontractant. Elle continue à exécuter ses obligations durant la renégociation. En cas de refus ou d'échec de la renégociation, les parties peuvent convenir de la résolution du contrat, à la date et aux conditions qu'elles déterminent, ou demander d'un commun accord au juge de procéder à son adaptation. A défaut d'accord dans un délai raisonnable, le juge peut, à la demande d'une partie, réviser le contrat ou y mettre fin, à la date et aux conditions qu'il fixe'.

concept of contractual continuity, the debtor must continue his/her obligations during the renegotiation phase.

It is important to note that, in keeping with the traditions of free will theory, the *imprévision* provisions in the new French Civil Code are not mandatory but can be excluded.

The aim of incentivising parties to find a mutually agreeable solution is specifically acknowledged as an important reason for the reform (see the Explanatory Memorandum). Given the less adversarial approach of the civil law inquisitorial system, this seems appropriate. In addition, there is a clear 'utilitarian dimension in trying to keep the contract alive', especially 'where it still has an economic and perhaps social role to play' (Pédamon 2017), as well as more philosophical ethos of providing 'a means to protect the continuity of the contractual link'(Kloepfer Pelese, 2010). As such, the doctrine's new inclusion typifies the French contractual approach, not to promote justice, or prevent hardship, as such, but to save the commercial bargain, as well as essence of the contract as a legal entity (Du Régime Général Et De La Preuve Des Obligations. 2016).[18]

The French Doctrine of Imprévision in Light of the COVID-19 Pandemic

This fundamental change in French contract law is very new. It is only four years since the doctrine was included, making it difficult to have any real body of caselaw to indicate how the new law will be interpreted. Moreover, the nature of the legal profession is not an overly flexible one. The traditional strict legal approach was ingrained during the training of the current cohort of both lawyers and judges. It is true that the law has now changed, but 2016 is very recent, not necessarily long enough to change ingrained cultural habits and expectations.

Moreover, cases with a specific, express hardship clause show that French courts are not open to accept unforeseeable circumstances to justify contractual modification or cancellation. For instance, an official declaration of an 'agricultural disaster' (a rare late frost which devastated vinegrowers' grape yields) did not qualify as an unpredictable or unforeseeable event (Cour de Cassation, 1995).

In addition, the question of unforeseeability is problematic. Timing is an issue: the contract may have been concluded after the outbreak in China but before infections reached France. However, as a global community, digitally interconnected, foreign events cannot be ignored by domestic parties (CA Besançon, 2014). Equally, the mere fact of the pandemic being declared a national emergency by the government does not mean that said pandemic will be considered an 'unforeseeable' event, sufficient to engage the doctrine of *imprévision* (Cass. Civ, 1993).

It will therefore be interesting to see whether the traditional jurisprudential arguments of contractual integrity will defeat the new arguments in favour of safeguarding the social and economic value of a private contract by changing its different

[18] Ch IV, ss 1: Force obligatoire: 'The unforeseen hardship rule has a preventive role – the risk of the contract being discharged or modified by the judge should strongly encourage the parties to negotiate'.

terms. France may have moved towards solidarity with its civil law neighbours but its traditional aversion to contractual intervention will be difficult to overcome.

Part 3 The Doctrine of 'Unforeseen Circumstances' in Civil Law Countries in the Middle East

Unlike the English and French legal systems, the countries in the Middle East have a far more long-standing acceptance of the principle of *imprévision* (or *nazariyah al-hawadith al-tari'ah*). This seems strange, given that the great jurist, Al-Sanhuri, used the French legal system as the main legislative foundation for his civil codes for Arab countries in the mid-twenty-ninth century.[19] However, it shows Al-Sanhuri as a man ahead of his time, seeing the trend in other European countries, even if not France. It also shows the importance of Islamic law. Contrary to the desire for certainty enshrined in English common law, Shari'a law and Islamic cultural and customary traditions favour a more flexible approach, readily accepting that things change, life is not always under our control. Although 'no general principle of Islamic Law' covers *imprévision*, (Amkhan, Adnan, 1994). Professor Ballantyne writes that 'it has proved easy to adopt into the modern Arab Codes the *imprévision* theory without offending against the principles of the Shari'a' (Ballantyne 2013).

A Virtuous Cycle of Contractual and Social Justice

Although the belief system of Al-Sanhuri, a jurist formed in French law, reflected the intrinsically French adherence to the sanctity of the contract, in a broader sense, the whole essence of his legal reforms was founded in justice, balance and equilibrium. This did not mean strict equality but that the law should 'correct the balance by striking the hand of the strong party in the contract' or by 'seizing the hand of the weak party' (Al-Sanhuri, 1966). Sociological justice was not based on individual rights—on the contrary, 'sociological means that at least two individuals must be involved to define what it justice—namely the desired proportion between them' (Bechor 2007). Accordingly, the aim in his codes was to combat *ghabn*, which although often translated as discrimination, is defined in the Explanatory Notes to the New Code as a lack of balance between what a contractual party gives and receives (Al-Sanhuri 1966). Justice is an equilibrium, promoting public good because social welfare leads us to contractual justice which, in turn, strengthens that same social good (Bechor 2007).

Al-Sanhuri, therefore, did not copy over the French code but selected rules that had an 'existence independent from their sources' (Farhat 1968), forming what Hill calls a mix 'eclectically chosen' based on his European comparative law studies and Shari'a heritage (Hill 1998). Indeed, despite Al-Sanhuri's insistence

[19] Al-Sanhuri, the founding father of the civil code of the majority of the Arab countries, received his PhD in France and drafted the original Egyptian code with Edouard Lambert, his Law professor from the University of Lyon, see Hill (1998).

on the Western foundation of the codes (Al Sanhuri 1962), Bechor correctly endorses Hill's view, that Islamic principles engrained his thinking, making the final code reflect his vision of contract law having a 'moral and altruistic function', and that contractual autonomy could be intervened in certain ways to extend the scope of justice and ethics, so that the Code offered 'a supportive and protective hand to weaker members of society' (Bechor 2007).

The Role of Shari'a Law and Islamic Tradition

Islam has a fundamental belief in *al qada* and *al qadar*. Although often used interchangeably, the general understanding is that *al qada* means the decrees regarding past events, whereas *al qadar* refers to the events willed now and in the future: fate is not entirely in people's own hands but is part of a dynamic understanding of time (Zakaria 2015).

This concept of predestination is seen in the Qur'an (57:22): 'No misfortune can happen on earth or in your souls but is recorded in a decree before We bring it into existence'. Leaving aside religious studies, in contract law, as Judge Abd elwahab El-Hassan contends, as far as Qada and Qadar are concerned, people cannot influence events, and so Muslims must accept them and satisfy the law that it is outside the purview of both themselves and the other contracting party (El-Hassan 1985).

Furthermore, Islam specifically wishes to protect people from unnecessary hardship (Saleh 1984). Although the Qur'anic text can be is difficult to apply directly to contractual duties, given the religious context, the general acceptance of a governing power, a means to smooth out difficulties (Al Eid and Arnout 2020), makes Islam more readily accepting of unforeseen circumstances: indeed, such events, outside one's control, are part of the overall plan and the law accepts and reflects this.

This underpins a significant cultural difference to English common law. Unlike in English culture whereby 'the promise must dominate the circumstances', out of respect for the tenacity of human purpose and free will, in Islamic tradition, the reverse is true, with circumstances being the unpredictable but controlling force.

> In the face of the predetermined march of events, human activity assumes a relative insignificance and the contractual promise becomes a relatively ephemeral thing …… If the tide of affairs turns then the promise naturally floats out with it. (Coulson 1984).

Although the gossamer-like nature of a contractual promise in the Shari'a is rather over-emphasised in Coulson's analysis, the inherent point seems correct.

Moreover, Shari'a law actually incorporates the so-called 'pandemic theory' (Al Essa, 2020; Abuwasel 2020). The Hanafi school use the concept of *al-Udhr*, or 'excuse', originally for hire contracts (Amkhan 1994), whereas the Malaki and Hanbali schools rely more on *al-Ja-iha* (disastrous natural events) (Al Essa 2020). Thus, the principle that a catastrophe may 'have a modifying effect' on a contract, (Sahleh 1984) or allow dissolution, (Islam 1998) is accepted in Shari'a.

Codification in the Majalla

The hardship principle due to unforeseen circumstances not only sits easily alongside the Shari'a but is also compatible with the Majalla. Although not a comprehensive code 'in the strict European sense', it provided a 'nonexclusive digest of existing rules of Islamic Law' (Onar 1956) 'The Majalla', Chapter 12 in *Origin and Development of Islamic Law* (Eds. Majid Khadduri, Herbert J Liebesny), (William Byrd Press, Inc., Virginia, USA), thus forming a body of legal rules for a vast trading area. Despite being based solely on the Hanafi school (Onar 1956), the Majalla laws were well understood and integrated into Middle Eastern business practice, being based on religious and cultural understanding.

In the Majalla's general Maxims of Islamic Jurisprudence, Article 18 states that, in the Hanafi translation, 'Latitude should be afforded in the case of difficulty' (Qubbaj 2008, Article 443). Also, in Article 17, 'Difficulty begets facility…. in time of hardship consideration must be shown' (Qubbaj 2008, Article 443), or 'hardship is solved by tolerance' (Saleh, 1048; Amkhan 1994).

However, the Majalla covers primarily the impracticability of contracts, rather than the hardship principle of Al-Sanhuri's civil codes. Article 443 states that if something happens which cancels the purpose of the contract, the contract is terminated. (Qubbaj 2008, Article 443) Indeed, the example given in the Majalla, of the chef's contract for a wedding feast that is automatically terminated when one of the spousal parties unexpectedly dies, is akin to the English coronation cases (Qubbaj 2008, Article 443).

In this way, it is even more surprising how modern the 'hardship' principle of Al-Sanhuri was, taking a civil law principle that most definitely was not French, nor—in the strict sense—represented in the Hanafi school of Shari'a, but rather one that was generally accepted in Islamic culture, as part of the need for equity, justice, good faith between parties and flexibility (Egyptian Civil Code Explanatory Memorandum 1949).[20]

Imprévision in Modern Civil Law in the Middle East

Middle Eastern countries integrated the principle into their private law frameworks significantly in advance of France, as well as into administrative law. Egypt led the way, in 1948, with the rest of the civil code countries in the Middle East following on rapidly after.

The clause is now found either as an exception to the general clause giving contracts the force of law or as a standalone clause, for example, in s.147(2) of the Egyptian Civil Code, 1949), as well as in the civil codes of Syria, (Syria Civil Code, 1949, Art 148(2),UAE (UAE Civil Code, 1985, Art 249), Kuwait (Kuwait civil code, 1981, Art 198), Iraq (Iraq civil code, 1951, Art 146(2)) Algeria (Algeria civil code, 1975, Art 107(1)), Jordan (Jordan civil code, 1977, Art 205), Libya (Libya

[20] As per the notes regarding *imprévision* (Vol 2, 370).

civil code, 1954, Art 147(2)), Qatar, (Qatar civil code, 2004, Art 171(2)), Yemen (Yemen civil code, 2002, Art 214) and more. The general tenor can be seen in Article 249 of the UAE Civil Transactions Law (the Civil Code), where:

> If public exceptional unpredictable circumstances shall arise, and their happening has resulted in making the execution of the contracted obligation, if not impossible, but burdensome to the debtor in such a manner as to threatening him with heavy loss, the judge may, according to circumstances and by comparing the interests of both parties, reduce the burdensome obligation to reasonable limits, if justice so requires. Any agreement to the contrary is void (UAE Civil Code, 1985, Art 249).

The judge, therefore, may intervene to counteract oppressive hardship imposed on one party where events of an exceptional nature occur after the contract has been agreed which make the contract oppressive or impossible to perform. From caselaw, the legal requirements are that the event has to be exceptional, unforeseeable, of a general character, and cause an excessive burden (International Bar Association. 2014, citing Egypt Civil Challenge 980/JY 52, hearing of 7 December 1987). The judge's power is discretionary, and broad, requiring the factual basis of hardship or oppression to be proven, based on his/her perception of the benefits to the two parties and the imbalance caused by the change in circumstances, with 'reasonable limits' being a question of interpretation.

Unlike frustration, or *force majeure*, if *imprévision* applies, the contract remains valid, the obligations must be honoured, but the benefit and the burden are reallocated in different proportions between the two parties, with the judge having to 'compare the interests of both parties'(UAE Civil Code, 1985, Art 249). It is this reapportionment of the burden, to restore the equilibrium, that is so 'unthinkable' in England (Ballantyne 2013).

Unlike France, this is mandatory provision and cannot be excluded. As such, contractual autonomy is overridden, and commercial certainty sidelined. Contractual equilibrium in the Middle East is a matter of public order (*nitham al-'am*) and therefore cannot be unilaterally or bilaterally changed, excluded or redefined. Morality and ethics will, in general, trump economics and commerce.

It should also be noted that the UAE version specifically includes a general requirement of respect for justice and the rules of equity. This is also true in the civil codes of Jordan and Iraq but not, for instance, in Kuwait. Whether this actually adds a broader scope, however, is debatable: it may well be that justice and equity are implied into the countries that do not specifically include it. Alternatively, it could be argued that this clause is restrictive because, based on the circumstances of the party, the burden may well now be excessively onerous but, for other reasons, justice does not require intervention. Back in 1957, the Syrian Supreme Court explicitly held that considerations of justice override the sanctity of the contract when unforeseen events create hardship (Syrian Court of Cassation, Case no 79, 14/12/1957; Tu'mah 1992), and this comprehensive approach would seem a more likely interpretation for all countries.

Interestingly, given the present climate, there is no actual definition of what would constitute such an event, nor examples given, in the Code. However, Al-Sanhuri

suggests that it would cover such things as earthquake, war, sudden strike, official price fixing, exceptional locust infestations and also—importantly—epidemics (Ballantyne 2013; Egyptian Civil Code, Explanatory Memorandum,1949 vol. 2, 282; Jordanian Civil Code, 1985, Explanatory Memorandum, vol. 1, 233).

Contractual Claims for Imprévision in Times of COVID-19

The question that remains is how, in practical terms, will the doctrine of '*imprévision*' be applied by courts in the Middle East.

Analysing the civil law requirements listed above, it is clear that a pandemic and countrywide lockdown is of a general character, affecting a number of people, and not specific to the parties (Kuwaiti Court of Cassation, no. 1265/1970 (Commercial) 10/12/1970). Unforeseeability is judged on an objective basis, depending on what a reasonable person would have realised when the contract was concluded (UAE Federal Court Judgment, no. 1, 23/11/1986). This is a question of timing. For contracts pre the announcement of the outbreak in Wuhan, this seems easy to satisfy. For those after the WHO announcement of a pandemic, there is far less chance of success: government restrictions, travel constraints, supply chain ruptures etc.were not 'unforeseeable' by that time. The contracts concluded in the intervening months, however, will be more difficult to gauge. The same timing issue relates to the performance of the contract.[21] Many will also argue that a distinction has to be drawn between the pandemic and the economic lockdown—most contracts have been badly affected by the lockdown, not by the pandemic directly. Previous pandemics did not result in such a commercial shutdown. Again, however, given the events in China, the lockdown cannot be claimed to be a complete surprise reaction to the health crisis and parties are expected to be abreast of global events.

The events must also have been 'exceptional', as in rare and unusual (International Bar Association. 2014, citing Egypt Civil Challenge 980/JY 52, hearing of 7 December 1987). War is often given as an example of an example of an unforeseen exceptional event, (Egyptian Civil Code (1949), Explanatory Memorandum, 2, 282) yet in cases regarding war with Israel, courts in the Middle East have often, although not always, held that this does not qualify as an exceptional or unforeseen event because said war has, effectively, been ongoing since 1948. As such, a pandemic is not, in and of itself, exceptional: there have been several in the past decades. However, the fact that the others did not warrant travel bans and economic lockdown reinforce the argument that the measures entailed by this one qualify it as exceptional.

Moreover, as a cultural concept, in Middle Eastern courts, a global infection crisis may be easier to claim as a qualifying event precisely because of its historical antecedents. The importance of plagues, and epidemics, is noted throughout Islamic history, with hadiths from as far back as the seventh century citing how they should

[21] The Kuwait Civil Code is one of the few that stipulates that the event must occur while the contract is in the course of being performed; however, it is generally accepted as an 'inherent logical factor' of the other countries' codes too, see Amkhan (1994).

be treated and behaviour modified.[22] The importance of quarantine is also directly acknowledged, with a hadith regarding plague saying: 'He who heard of its presence in a land should not go towards it, and he who happened to be in a land where it had broken out should not fly from it'(Hadith, Sahih Muslim 2218f, 39:129). In keeping with this historical provenance and given the Explanatory Memorandum of the New Egyptian Civil Code directly highlighting epidemics, the concept may well sit happily with Middle Eastern judges.

The claimant must show that they were unable to perform the contract as it stands. It is not a question of completely impossibility (*force majeure*) but exorbitantly expense. Saleh contends that the assessment of 'exorbitantly expensive' is based on actual loss, not loss of profits, but does not require a fixed percentage overrun (Saleh 1984). Factually, 'hardship' will also need to be proven. In theory, this is objectively decided, regardless of personal circumstances, with rich and poor treated alike (Saleh 1984). However, as the overall interests of justice must also be considered, it is possible that smaller or less solvent claimants will be favoured, in keeping with traditional Islamic efforts to protect the weak and poor. Policy factors, however, also may come into play. There will be, therefore, significant judicial discretion in what is allowed or not.

Moreover, under strict Shari'a, there is argument that the fundamental maxim of 'hardship begets facility' (as in the Majalla) is increasingly recognised as a tool 'used as a legal concession in the Shari'a for any recognised hardship' and thus serving the 'purpose of Islamic Law to alleviate or remove burdens that people may face'. (Onar 1956, Zakariyah, Luqman, 2015). This argument may well provide support under Islamic law of judicial intervention in unexpectedly onerous contracts which, in turn, will also support Muslim countries' civil law acceptance of the same. The Islamic premise that, in general, 'moral principles are placed above economic needs' (Onar 1956) also reinforces the judicial mindset in the Middle East that the judge is there to provide justice, to balance out hardship and provide an equitable solution.

In this way, judges in the Middle East can find support in religious laws for judicial interpretations under civil law which take a generous and flexible approach to arguments of unforeseen hardship.[23] Adding this to the relatively long historical acceptance of the principle, and the subsequently sizeable body of caselaw, parties in the Middle East may well receive a more favourable audience than under French civil law or, indeed, English common law. All sources lead to the same point—that, in the Middle East, the civil code is a social construct, to prevent *ghabn*, Al-Sanhuri's 'absence of balance', in a contractual relationship (Al-Sanhuri, 1966). The exceptional circumstances hardship principle is a perfect example of this theory in action.

[22] For a detailed analysis and presentation of how plague and outbreaks of disease have been an integral part of the history of the Middle East, and incorporated into Islamic law and custom, see: Conrad (1982).

[23] Modern writers in Kuwait state that Art. 198 should be fully applicable to contracts significantly impacted by the recent Covid-19 pandemic, see (Asban Legal Firm 2020).

Part 4 Imprévision and Frustration—the Theoretical Justifications

Despite the sharp contrast in legal approach between civil law and common law countries, the two legal systems do not operate in a vacuum, rather there is 'a common morality in civil law and common law systems based on the principle of human dignity', on ethics, justice and morality (BarBoza and KozicKi 2019). Indeed, 'although the Civil law is not of itself authority in an English Court, it affords great assistance in investigating the principles on which the law is grounded.' *(Taylor v Caldwell*, 1863, 313). Conversely, common law has also had an 'enormous' influence on civil law (Lee 1915). As such, it is only by understanding the juridical roots of the principle under different scopes that the force, or not, of the doctrine can be appreciated and any attempt made to calculate its impact in the practical domain.

Jurisprudential Justifications

From a jurisprudential view, however, the crucial question is under what justification does such a principle exist in general? In global terms, is this a doctrine that legal systems *should* endorse or not? This is important as judicial reasoning will be dictated not only by law but by ethics and logic. The two primary arguments that are generally put forward are those of justice and of risk allocation.

Justice

Law and justice are inextricably intertwined: as D'Amato writes, 'justice is an inherent component of the law and not separate or distinct from it' (D'Amato 1993). As above, this is the essence of Middle Eastern civil law, summed up, perhaps, in the hadith that 'there shall be no unfair loss nor the causing of such loss' (*la darar wa la dirar*) (Islam 1998). On a less individualistic focus, justice to Al-Sanhuri by necessity involved two parties, an equilibrium between, creating social harmony (Bechor 2007).

It also has been surprisingly often used as justification for court intervention in common law systems,[24] where the notion of justice 'provides the ultimate rationale of the doctrine' (*The Sea Angel* [2007] 2 Lloyd's Rep, 517). The 'surprising' part, however, is not that justice is used as a justification but that it is only used in a sparing sense. Firstly, the justification seemingly only applies when there are exceptional losses. As Trianitis correctly argues, on a philosophical basis of justice, why should it not equally apply to exceptional gains? (Triantis 1992) There is obviously an injustice in someone receiving an undeserved windfall profit, not only because it is undeserved but because one person's gain is another person's loss. Yet the law ignores this. Secondly, that the justification only applies to the doctrine of frustration and is conveniently forgotten in many other doctrines. If contract law were

[24] See for example, (*Hirji Mulji v. Cheong Yue Steamship Co*., 1926), as per Lord Sumner.

concerned overall with justice in a moral sense, English law, for instance, would incorporate a doctrine of good faith.

However, justice is not an absolute: how can it show justice to allow a rational adult, of free will, to renege on their deal, simply because circumstances have changed for the worse? Lord Diplock put it succinctly: '… parties who have bargained on equal terms in a free market should stick to their agreements. Justice is done by seeing that they do so' (*Federal Commerce and Navigation Co. Ltd. V. Tradax Export S.A.,* 1977).

The problem of justice in these situations is not an abstract one. The majority of litigation following the pandemic will be professional in nature. The question of insurance, therefore, is not only relevant in terms of risk allocation (see below) but at the heart of the justice contention too. This paper propounds that insurance is a key part of any claim based on justice and is not 'doctrinally irrelevant' Cto obligations. After all, it surely cannot be just for a judge to renegotiate the terms of the contract to make it less onerous for the disadvantaged party if that party's insurance policy will also pay out in any event. This would provide a win–win situation. Equally, if one party is careless, blasé or trying to save money and fails to take out insurance, that party should not be favoured over the prudent party who paid out in full for the premium. Indeed, this adds to the criticisms of the UK's 1943 Act which expressly states that insurance benefits must not be included when considering benefits accrued before discharge (unless there was an express clause making insurance obligatory) (Law Reform (Frustrated Contracts) Act 1943).

Apportionment of Risk: Who Should Bear the Loss?

The second justification, the question of loss allocation, is at the heart of the question of frustration and *imprévision*. Who, in the words of Posner and Rosenfeld, is the 'superior risk bearer' (Posner Richard A and Andrew M Rosenfield 1977).

English law's marked reluctance to intervene in private contracts demonstrates the commercial approach of 'letting the loss lie where it falls'. *Paradine v Jane*, almost 500 years ago, shows the English belief that he who has 'the advantage of casual profits, so he must run the hazard of casual losses'(*Paradine v Jane, 1947*). This has a simplicity and a certainty that is appealing. It accepts the haphazard nature of life. On a global scale, it also is 'fair'. Mathematically, using the principle of the law of large numbers, the distribution of the losses will revert to the mean, with low variance. As such, the average loss will even out throughout the population.

However, legal claims proceed on a case by case basis, not a general basis. And judicial discretion is an art, not a mathematical process. Social, moral and economic factors will rank high in the judge's consciousness, as well as legal principles. Or so it is hoped. In this sense, the concept of relieving a party from an unduly exorbitant burden, due to entirely unforeseen circumstances, can be easily justified—the harshness of the law's 'dry and barren shell' must be mitigated where possible to reflect the 'truth and substance of the matter' (*British Movietone News Ltd v London and District Cinemas Ltd*, 1951). The Islamic principle of rebalancing the burden of the contract reflects not only the justice of the situation but also a commercial

appreciation by the judge of the more efficient loss allocation as part of the social good.

Insurance is directly relevant here too. The apportionment of risk debate does not only concern the contractual parties themselves but also the insurances companies. Indeed, 'insurance operates not at the periphery, but at the core of the law of obligations, in both practical and conceptual terms' (Merkin and Steele 2013). This raises the classic 'deep pockets' argument more commonly seen in tort. Rightly or wrongly, many judicial decisions, in all spheres of obligations, take the insurance standing of the parties into account.[25]

This paper rejects the 'deep pockets' argument as it imposes the critical problem of circularity, namely that 'insurance follows liability, which follows insurance' (Merkin and Steele 2013). Furthermore, the allocation of risk to the insurance company is only a short-term answer, the financial burden will always return to the premium holder. The fact that the '[insurance] fund is better able to bear' the loss than the claimant is not a basis for good law (*Nettleship v Weston*, 1971) rather simply a statement of commercial reality—an insurance company, by definition, bears risk and pays financial compensation, that is its expertise, its *raison d'etre*. However, this assumption of risk must be paid for. Accordingly, both legally and economically, 'deep pocket jurisprudence is law without principle' (Iowa 2014).

In terms of economic efficiency, there is strong sense in the argument that, rather than allowing the loss to lie where it falls, the burden should be shifted to whichever party (directly or indirectly, via the third-party insurance company) is most able to support such a burden. This, Posner and Rosenfeld, argue, is based not only on the economic good of the country but on the assumption that both parties would wish to do so, as it will maximise the value of the contract between them (Posner & Rosenfeld, 1977), their 'joint surplus' of mutual profits over mutual losse (Dagan and Somech 1915).

This, however, ignores the fact that parties in dispute are not always logical or view their affairs through the lens of mutual good. As a concept, it also is unworkable in practice. It is not obvious how to determine who is better placed to be able to prevent the risk or who has the better capacity to insure against it, the two deciding factors of this theory (Posner & Rosenfeld 1977). In Prosner and Rosenfeld's example (Iowa 2014), the dilemma of one party being better placed to predict a fire but the other party better placed to calculate the size of the loss if fire occurred exposes simply the tip of the iceberg in terms of trying to lay down some workable rules for judges to use, let alone underlying ethical principles. And this ignores which party had better access to insurance. As the authors themselves admit, the 'empirical methods used …are casual and crude' (Iowa, 2014). However, they do correctly identify that a fundamental problem with the risk allocation approach is that of the

[25] Lord Denning's decision in *Nettleship v Weston*, 1971 to extend liability to learner drivers in the same way as qualified drivers, a decision with profound ramifications in English common law and the standard of duty of care owed, was heavily influenced by the insurance status of the defendant and the fact that to hold otherwise would leave the claimant with no compensation.

all or nothing consequence of its application. Indeed, it is a shame that in their analysis of alternative systems the Middle Eastern approach was not considered.

The Consequence of the Doctrines: The Heart of the Issue

The two arguments above, therefore, fail to be fit for purpose when confronted with the English common law approach. The problem here is that civil law countries have doctrines of both *imprévision* and *force majeure*, English law only has frustration to cover both. Accordingly, it only has one, consequence, not two, as needed. The fact that, as covered above, after this consequence, a rebalancing of the books can be achieved to some extent via statute does not get around the fundamental problem because there is no rebalancing of the contract itself going forward, simply a settling of accounts owing after the contract is voided.

The civil code hardship principle, however, is fundamentally different, allowing negotiation and re-drafting of the actual contract: it is this that is lacking in English com77mon law. With no flexibility to rebalance the contract or reallocate the risk *between* the parties, English law has to choose *which* single party should shoulder the whole burden of the unexpected change. The contract can stand, which burdens the unfortunate obligor. Or can be terminated which disadvantages the innocent obligee. This is not satisfactory: as scholars admit, although the doctrine of frustration 'engenders a certain feeling of contentment……by contrast, no one has ever been satisfied with the *consequences* of frustration' (Stewart, Andrew and JW Carter 1992).

Although outside the scope of this work, it is worth noting that attempts in other common law jurisdictions to counter this with statutory provisions have had some success. However, English common law has not followed suit to update its very narrow 1943 Act (UK Law Reform (Frustrated Contracts) Act 1943). Nor can common law evolve in such a fundamental way as to rewrite precedent and do the 'unthinkable' of allowing such judicial intervention (Ballantyne 2013). Without statutory reform, judges' hands are tied. It is for this reason that this article proposes that the Law Commission should review the doctrine of frustration with an eye to reform. Currently, no matter what fine distinctions are drawn by scholars and practitioners between impossible, quasi impossible and impracticable contracts, as long as the consequence of the doctrine's application remains a 'one-size-fits-all' discharge of the contract in its entirety, English courts are unable take a broader, more inclusive approach.

Conclusion

The COVID-19 pandemic has caused loss and heartache around the globe. With severe economic restrictions, and the consequent negative impact on contractual performance, litigation is set to rise significantly. Taking a new perspective, this paper contends that, compared with French and English jurisdictions, parties in civil law countries in Middle East will be best placed to bring successful claims under the

doctrine of *imprévision* to renegotiate their contractual obligations. English common law prizes commercial certainty and party autonomy, which strongly discourages judicial intervention. The system suffers from only having a single doctrine (frustration) to cover both *force majeure* and *imprévision*. The 'all-or-nothing' consequence of frustration leaves very little room for judicial discretion: discharging a contract may be as unjust to one party as enforcing it would be unjust to the other. Statutory powers of restitution to prevent unjust enrichment fail to address the core problem. In French civil law, the newness of the principle will cause difficulties as it requires a cultural shift for the spirit of reform to be truly accepted, does not incorporate its public law roots (being optional) and runs counter to engrained belief in the sanctity of the contract. In the Middle East, however, a commitment to sociological justice, requiring a balancing act between two parties, as codified and implemented for over 70 years, gives the doctrine a strong juridical base. The cultural acceptance of predestined events outside of one's control, the need for social harmony and Islamic law compatibility further bolster this contention. Given the sharp contrast in judicial approach between the three legal regimes, and the global nature of the problem, English law may need to find a more flexible solution. Frustration's all-or-nothing remedy is not appropriate; statutory reform to provide for a fair adjustment to such contracts, in the manner of the Middle East, is one possible pathway for the future.

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Declarations

Conflict of interest On behalf of all authors, the corresponding author states that there is no conflict of interest. The authors have no conflicts of interest to declare that are relevant to the content of this article.

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