Overcoming Divergence in English and French Contract Law: A Common Taxonomy of Commercial Contracts

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Overcoming Divergence in English and French Contract Law: A Common Taxonomy of Commercial Contracts

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Abstract

The works presented for the PhD by publication are all connected in the way they engage in a functionally comparative study of the English and French law responses to common problems pertaining to contractual performance and contractual interpretation. My comparative inquiry demonstrates that both France and England have stayed true to their historic responses in times of peace and crisis confirming different *mentalités juridiques*. As neither England nor France offers ideal solution, parties may be better off finding a resolution to their disputes beyond the legal realm and respond to calls for collaboration. This nevertheless shows persisting differences in Anglo-French approaches.

This thesis however argues that these divergences may nevertheless lead to common results through the lens of a taxonomy of commercial contracts – professionally drafted contracts may lead to converging results given the common application and interpretation of frequently used clauses beyond a domestic legal culture; by contrast, rudimentary contracts produce diverging results as the interpretation of these agreements is marked by a distinctive domestic socio-legal culture. This taxonomy has the potential to improve the predictability of outcomes in commercial disputes in England and France.

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List of Publications as part of PhD by Published Work in order of publication

1. Judicial Interpretation of Commercial Contracts in English and French law: A Comparative Perspective (***Comparative Contractual Interpretation***), European Business Law Review 2021, Volume 32, Issue 6, pp. 1093-1124

2. Contractual Performance in COVID-19 Times: Does Anglo-French Legal History repeat Itself? (***Contractual Performance in Covid-19 Times***), with Radosveta Vassileva, European Review of Private Law 2021, Volume 29, Issue 1, pp. 3-38

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4. The "Duty to Cooperate" in English and French Contract Law: One Channel, Two Distinct Views (***The Duty to Cooperate***), with Radosveta Vassileva, Journal of Comparative Law 2019, Volume 14, Issue 1, pp. 1-25

5. The New French Contract Law and its Impact on Commercial Law: Good Faith, Unfair Contract Terms and Hardship (***The Commercial Impact of the New French Contract Law***), in M. Heidemann and J. Lee, The *Future of the Commercial Contract in Scholarship and Law Reform: European and Comparative Perspectives,* Springer Nature 2018, pp. 99-126

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Hirji Mulji v Cheong Yue SS Co [1926] AC 497

Interfoto Picture Library Ltd v stiletto Visual Programmes Ltd [1988] QB 433

Investors Compensation Board v West Bromwich Building Society [1998] 1 WLR 896

J Lauritzen AS v Wijsmuller BV [1990] 1 Lloyd's Rep 1

Jiangsu Guoxin Corporation Ltd (formerly known as *Sainty Marine Corporation Ltd*) *v Previous Shipping Public Co Ltd* [2020] EWHC 1030 (Comm)

Krell v Henry [1903] 2 KB 740

Mackay v Dick [1881] 6 App Cas 251

Marks & Spencer plc v BNP Paribas Securities Services Trust Co (Jersey) Ltd [2015] UKSC 72

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Metropolitan Water Board v Dick Kerr [1918] AC 119

Mid Essex Hospital Service NHS Trust v Compass Group UK and Ireland Ltd [2013] EWCA Civ 200

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Pakistan International Airline Corp v Times Travel (UK) Ltd [2021] UKSC 40

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Contracts (Rights of Third Parties) Act 1999

Coronavirus Act 2020

Health Protection (Coronavirus Restrictions) Regulations 2020 (SI 2020/350)

Health Protection (Coronavirus) Regulations 2020 (SI 2020/129)

Law Reform (Frustrated Contracts) Act 1943

Misrepresentation Act 1967

Unfair Contract Terms Act 1977

France

Code civil as amended by *ordonnance* no. 2016-131 du 10 février 2016 portant réforme du droit des contrats, du régime général et de la preuve des obligations

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Rapport no 352 (2017-2018) au nom de la Commission mixte paritaire chargée de proposer un texte, sur les dispositions restant en discussion du projet de loi ratifiant l'ordonnance no. 2016-131 du 10 février 2016 portant réforme du droit des contrats, du régime général et de la preuve des obligations, écrit par François Pillet rapporteur

International Treaties

UN Convention on Contracts for the International Sale of Goods

International Soft Law Instruments

Common European Sales Law

European Draft Common Frame of Reference

Principles of European Contract Law

UNIDROIT Principles of International Commercial Contracts

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Declaration

I, Catherine Pédamon, declare that all the material contained in this thesis is my own work.

Chapter 1. Introduction

1.1. Statement of Purpose

My thesis is grounded in six comparative studies on how English and French contract laws respond to common problems in contractual performance and contractual interpretation and how they balance the tension between the principles of contractual freedom, sanctity of contract and good faith.[1] For instance, in the case of unforeseeable changed circumstances (or hardship), which I analyse in my publications, each legal system is expected to resolve the conflict between the principle of *pacta sunt servanda* and the need to provide relief to a contracting party trapped in an unprofitable contract or, in other words, to square the circle of binding contracts and commercial reality. The aim of my inquiry is to compare and evaluate the solutions that English and French contract law offer to common problems with the ultimate goal of improving the predictability of outcomes, which is vital to business practices and economic efficiency. I argue that whilst the English and French doctrinal solutions to the difficulties pertaining to performance in response to supervening events may not appear functionally equivalent, the results may be similar when viewed through a lens of a common taxonomy of commercial contracts, which I explain below.[2]

My comparative studies concern contracts, whether national or transnational, in a business setting. In the absence of a definition of 'commercial contract' in English law, by contrast with French law,[3] I use a *loose* definition characterised by two features – the transaction involved is

[1] In English law, the principles of freedom of contract and sanctity of contract develop through a series of cases – e.g., *Printing and Numerical Registering Co v Sampson* [1874-75] LR 19 Eq 462, 465 (as per Sir George Jessel, MR) – but there is no general principle of good faith as held in *Pakistan International Airline Corp* (n 18), [27]. There is, however, an emerging duty of good faith in relational contracts, as acknowledged in *Yam Seng Pte v International Trade Corp Ltd* [2013] EWHC 111 (QB), [2013] 1 Lloyd's Rep 526, at [123]-[153]. For a general discussion of Freedom of Contract and the Binding Force of Contract in English law, see Hugh Beale (gen ed), *Chitty on Contracts* (34th edn, Sweet & Maxwell 2021) para 2-003 – 2-010, and para 2-020 – 2-023. By contrast, these three principles (or provisions) – freedom of contract, sanctity of contract and good faith - are now codified in the revised *Code civil* as per Articles 1102, 1103 and 1104 CC. Although the *ordonnance* No 2016-131 does not name these provisions as '(governing) principles', they are treated as such in the *Rapport au Président de la République relatif à l'ordonnance No 2016-131 du 10 février 2016 portant réforme du droit des contrats, du régime général et de la preuve des obligations*, 3 and 4. For a discussion of these principles, see below Section 2.1.1.

[2] For an explanation of this taxonomy, see below Section 1.3.

[3] In French law, 'commercial contract' is a legal category governed by 'commercial law' (*droit commercial*) which distinguishes between transactions (*actes*) which are by their nature commercial and transactions which are commercial on the basis of the status of the party as merchant (*commerçant*). By contrast, in English law, there is no general definition of 'commercial contract.'

one for profit or a business advantage, and the participants pursue self-interest and/or profit.[4] The focus of my inquiry is on the analysis of general contract law in England and France as it applies to these commercial arrangements.[5] Despite European efforts of harmonisation of contract law,[6] particularly in the sphere of consumer law, which I do not cover, or at the international level,[7] English and French contract laws have preserved their unique features;[8] Brexit may even accentuate "English exceptionalism."[9] I nevertheless acknowledge the influence of soft law instruments, such as the Principles of European Contract Law (PECL), the UNIDROIT Principles of International Commercial Contracts (Unidroit Principles) and the Draft Common Frame of Reference (DCFR), which may in a way – albeit limited – blunt this drifting away.[10]

1.2. Selection of Jurisdictions for Comparison

The reasons why I chose to compare English law with French law are threefold. First, as an academic trained in the French legal system and operating in the English jurisdiction, I am well placed to explore the two systems, which fall under the traditional classification of civil and common law legal families.[11] I am aware that this divide has been the object of a plethora of comparative studies;[12] my inquiry however challenges the relevance of this classification for commercial contracts. For instance, in *Hardship in Transnational Commercial Contracts*, I show how the French law treatment of changed circumstances before the 2016 reform used to

[4] See *Hardship in Transnational Commercial Contracts*, 14-15.
[5] In English law, in absence of any legal definition of 'commercial law', the common law of contract applies to all contracts, including commercial contracts, and there are only a few laws governing special contracts. By contrast, in French law, commercial contracts are governed by the general law of contract found in the *Code civil* (*droit commun des contrats*), except so far as it is qualified by 'commercial law' (*droit commercial*) or the law governing special contracts (*droit des contrats spéciaux*).
[6] In the area of contract law, the influence of EU law is important given the adoption of numerous EU directives relating to specific types or aspects of contracts and the imposition of certain supra-national rules, but its influence has been particularly successful in the sphere of consumer law.
[7] In terms of international conventions, see the UN Convention on Contracts for the International Sale of Goods (CISG). Although the CISG forms part of French law, parties seldom adopt it deliberately.
[8] See also Hugh Beale, 'The Impact of Decisions of the European Courts on English Contract Law: The Limits of Voluntary Harmonization' (2010) 18 European Review of Private Law 501, 513-14.
[9] Pierre Legrand, 'Against a European Civil Code' (1997) 60 Modern Law Review 53, 54.
[10] The influence of these instruments depends on the sitting judge, for instance Leggatt J (as he was then) in *Yam Seng International Trade Corporation* [2013] EWHC 111 (QB), [124]-[125]. In terms of influential instruments, see also the Common European Sales Law.
[11] For an overview of the distinctive features of legal families – their legal styles, see Konrad Zweigert and Hein Kötz, *An Introduction to Comparative Law* (Tony Weir tr, 3rd edn, OUP 1998) 67-73.
[12] For general comparative studies pertaining to force majeure or hardship, see Alfons Puelinckx, 'Frustration, Hardship, Force Majeure, Imprévision, Wegfall der Geschäftsgrundlage, Unmöglichkeit, Changed Circumstances' (1986) 3 Journal of International Arbitration 47; Elena Zaccaria, 'The Effects of Changed Circumstances in International Commercial Trade' (2004) 9 International Trade and Business Law Review 135.

converge towards the English common law approach, as opposed to German law, and how commercial parties across jurisdictions prefer to rely on private contractual solutions when faced with a situation of hardship. Secondly, the recent overhaul of contract law via the *ordonnance* No 2016-131 of 10 February 2016 has put French contract law in the spotlight.[13] Similarly, a series of seminal cases in English law, for instance those laying out the principles of contractual interpretation, such as *Investors Compensation Scheme v West Bromwich Building Society*,[14] *Arnold v Britton*[15] and *Wood v Capita Insurance Services Ltd*,[16] and those discussing a duty of good faith in contracts, including *Yam Seng Pte Ltd v International Trade Corp*[17] and recently *Pakistan International Airlines Corp v Times Travel (UK),*[18] justifies a comparative analysis. Thirdly, the COVID-19 pandemic has thrust to the fore disparate national legal responses in England and France displaying differences in contract law and legal cultures.

1.3. Contribution

I seek to contribute to a deepened meaningful understanding of doctrinal solutions to common problems pertaining to contractual performance and contractual interpretation in England and France. I focus on problems of contemporary relevance brought about by significant legal changes, for instance the French *ordonnance* No 2016-131 and the COVID-19 pandemic in both legal systems. As I compare the responses to supervening events, the principles of contractual interpretation or the duties to cooperate or renegotiate, I find diverging results, which I classify into a taxonomy of commercial contracts,[19] common to both jurisdictions from

[13] *Ordonnance no 2016-131 du 10 février 2016 portant réforme du droit des contrats, du régime général et de la preuve des obligations*, *Journal Officiel* of 11 February 2016, as amended by *loi* No 2018-287 of 20 April 2018, which ratified the *ordonnance no 2016-13, JO* of 21 April 2018. Most provisions of *ordonnance no 2016-131* entered into force on 1st October 2016 except for a few amended by *loi* No 2018-287 of 20 April 2018 (*loi de ratification*) that came into force on 1st October 2018. Depending on the relevant provisions, French courts are expected to apply three laws of contract: the law before the reform, the law from the reform to the ratification and the law resulting from the ratification.
The translation of the articles of the *Code civil* is partly mine partly the one available at <www.textes.justice.gouv.fr/art_pix/THE-LAW-OF-CONTRACT-2-5-16.pdf>.
In this text, I will refer to the *ordonnance no 2016-131* and the 2016 reform as including the 'new' provisions of the *Code civil*.
[14] *Investors Compensation Board v West Bromwich Building Society* [1998] 1 WLR 896.
[15] *Arnold v Britton* [2015] UKSC 36.
[16] *Wood v Capita Insurance Services Ltd* [2017] UKSC 24, [2017] AC 1173.
[17] *Yam Seng Pte v International Trade Corp Ltd* [2013] EWHC 111 (QB).
[18] *Pakistan International Airlines Corp v Times Travel (UK)* [2021] UKSC 40.
[19] For a taxonomy of good faith by reference to four broad types of contractual relationship, see Mindy Chen-Wishart and Victoria Dixon, 'Good Faith in English Contract Law: A Humble "3 by 4" Approach' in Paul B Miller and John Oberdiek (eds), *Oxford Studies in Private Law: Volume I* (Oxford University Press 2020) 187, 189. For a general discussion on *Classification of Contracts*, see Hugh Beale (gen ed), *Chitty on Contracts* (34th edn, Sweet & Maxwell 2021) Section 3 – Classification of contracts.

a functional and cultural perspective. This taxonomy allows for a distinction between two types of contracts "depending on the nature, formality and quality of (their) drafting (…)."[20] In *Wood v Capita*, Lord Hodge differentiates between "contracts negotiated and prepared with the assistance of skilled professionals" – 'professionally drafted contracts' - and informal, brief ones or drawn in "the absence of skilled professional assistance" – 'rudimentary contracts' - for the purpose of contractual interpretation.[21] I expand this classification to show that:

(1) professionally drafted contracts which contain detailed express terms opt out of general contract law for the sake of designing a contract fit for business purpose and providing their own rules incidental to their agreement;[22] these contracts are usually between parties of relatively equal bargaining power for a longer term; they call for an objective textual interpretation, unless the clauses are badly drafted and/or parties ill-advised;[23] and

(2) rudimentary contracts which are shorter rely on general contract law to fill the gaps in their agreement; they are more likely to be subject to a distinctive socio-legal interpretation with a focus on the subjective intentions of the parties in France or with the help of the factual matrix and surrounding circumstances in England.[24]

I argue that despite the divergence of doctrinal solutions to supervening events, the first type – professionally drafted contracts – may lead to converging results given the common application and interpretation of frequently used clauses, beyond a domestic legal culture, as they reflect a specialised sector with a culture of its own. By contrast, the second type – rudimentary contracts – produces diverging results as the interpretation of these contracts is marked by a distinctive domestic socio-legal culture. Through the lens of this taxonomy, a common degree of predictability of outcomes in commercial disputes in England and France emerges.

[20] *Wood* (n 16), [10].
[21] ibid, [13].
[22] My assumption is that most of the English law of contract consists of default rules and that sophisticated commercial contract out of undesirable rules. See *Marks & Spencer plc v BNP Paribas Securities Services Trust Co (Jersey) Ltd* [2015] UKSC 72 [28]. For an elaboration on contract law as a system of default rules except for a few relatively narrow exceptions, see Jonathan Morgan, *Contract Law Minimalism* (Cambridge University Press 2013) Chapter 6 on defining contract law minimalism, or the 'new formalism'.
[23] *Wood* (n 16), [13].
[24] For a socio-legal interpretation of good faith, see Jane Stapleton, 'Good Faith in Private Law' (1991) 52 Current Legal Problems 1, 13.

1.4. Legal Methods

I adopt a functionalist comparative law approach as a lens through which to analyse the differences and similarities between the English and French law responses to common problems relating to contractual performance and contractual interpretation.[25] I posit that the functionalist approach does not fully explain the underlying reasons for diverging results,[26] hence I add a cultural lens, beyond the traditional dichotomy of functionalism and culturalism, to provide a more comprehensive picture.[27] These two approaches may be combined to bring a "holistic view" of my comparison,[28] which corresponds to the modern view of functionalism as described by Ralf Michaels.[29]

In this comparative exercise, legal sources are primordial "as [they are] inextricably linked with questions of legal method."[30] As advocated by Vogenauer, "comparative lawyers have to understand the term 'source of law' in its broadest conceivable meaning."[31] I rely on all sources which "shape or help to shape the law,"[32] which include statutory law, case law, doctrinal writing, standard form contracts, trade usage, customs and soft international contract law instruments, such as the PECL and the Unidroit Principles.

1.4.1. Functional Comparative Law

Zweigert and Kötz argue that "the basic methodological principle of all comparative law is that of functionality."[33] They suggest that "the legal system of every society faces essentially the same problems and solves these problems by quite different means though very often with

[25] For a definition of legal method, see Stefan Vogenauer, 'Sources of Law and Legal Method in Comparative Law' (2020) Max Planck Institute for European Legal History Research Paper Series No. 2020-04, 16.
[26] See Ralf Michaels, 'The Functional Method of Comparative Law' in Mathias Reimann and Reinhard Zimmermann (eds), *The Oxford Handbook of Comparative Law* (2nd edn, OUP 2019) 345, 362-363; Jaakko Husa, 'Functional Method in Comparative Law – Much Ado about Nothing?' (2013) 2(1) European Property Law Journal 4, 16.
[27] For a discussion of a hermeneutical method om different schemes of intelligibility in comparative law, see Geoffrey Samuel, *An Introduction to Comparative Law Theory and Method* (Hart Publishing 2014) 108-120.
[28] Balázs Fekete, 'Inconsistencies in the use of legal culture in comparative legal studies' (2018) 25(5) Maastricht Journal of European and Comparative Law 551, 554.
[29] Ralf Michaels, 'The Functional Method of Comparative Law' in Mathias Reimann and Reinhard Zimmermann (eds), *The Oxford Handbook of Comparative Law* (2nd edn, OUP 2019) 345, 369-370.
[30] Stefan Vogenauer, 'Sources of Law and Legal Method in Comparative Law' (2020) Max Planck Institute for European Legal History Research Paper Series No. 2020-04, 2.
[31] ibid, 10.
[32] Konrad Zweigert 'Zur Methode des Rechtsvergleichung' (1960) 13 Studium Generale 193, 196. See also Konrad Zweigert and Hein Kötz, *An Introduction to Comparative Law*, (Tony Weir tr, 3rd edn, OUP 1998) 35-36.
[33] Konrad Zweigert and Hein Kötz, *An Introduction to Comparative Law* (Tony Weir tr, 3rd edn, OUP 1998) 34.

similar results."[34] As England and France are largely confronted with the same problems relating to supervening events, such as the COVID-19 pandemic, I inquire whether the solutions in response to these problems in both legal systems are functionally equivalent, whether they emanate from the state or specific national doctrines. This inquiry leads me to functionally compare the principles of contractual interpretation in both jurisdictions as courts are called to construe the contracts in question; I also consider possible alternative remedies to litigation in cases of non-performance or imperfect performance in the two legal systems. In my comparison, I follow a so-called 'moderate' version of functionalism, as designed by Husa, which sets aside the presumption of similarity.[35]

My research questions are:

(1) How does the State in England and France deal with changes in the area of general contract law in times of peace and crisis?
(2) How does general contract law in England and France respond to supervening events, such as the COVID-19 pandemic and related measures imposed by either government?
(3) How do English and French courts construe a commercial contract?
(4) How does each legal system address duties of collaboration as alternative remedies to litigation in cases of non-performance or imperfect performance?

1.4.2. Comparative Legal Culture

Law is embedded in a unique domestic culture, a context which I consider in my comparative studies whilst evaluating the national responses to common problems.[36] I understand legal culture as background of law, pursuant to Fekete's patterns of the interpretations of legal cultures in comparative law.[37] This approach allows me to examine "extra-legal factors as forming the cultural background of law or a legal provision."[38]

[34] ibid.
[35] Jaakko Husa, 'Farewell to Functionalism or Methodological Tolerance?' (2003) 67 The Rabel Journal of Comparative and International Private Law 419, 443-447.
[36] For a discussion of a European legal culture from a historical perspective, see Helge Dedek, 'When Law Became Cultivated: 'European Legal Culture' between *Kultur* and Civilization' in Geneviève Helleringer and Kai Purnhagen (eds), *Towards a European Legal Culture* (Hart 2014) 351. See also Lawrence Friedman, 'Is There a Modern Legal Culture?' (1994) 7(2) Ratio Juris 117, 120-130.
[37] Fekete (n 28), 554-556.
[38] ibid, 555.

I ground my work in Legrand's 'culturalist' perspective which highlights the diversity of legal cultures and stresses that "European legal systems are not converging."[39] According to Legrand, each legal system is unique given its distinctive "*mentalité juridique*," as a "collective mental programme, which includes the 'assumptions, attitudes, aspirations and antipathies' which provide the deep structures of legal rationality.*"*[40] This cultural uniqueness explains fundamental differences between legal systems, including the "primordial cleavage between civil and common laws in their distinctive ways of understanding law."[41] This uniqueness is exacerbated by globalisation leading to a "double-fragmentation of world-society into functionally differentiated global sectors and a multiplicity of global cultures."[42] Although there is a growing fragmentation across different sectors, there is a standardisation of commercial practices within each specialised sector and the development of common phenomena. An illustration of this, which I examine below, is the use of standard contract terms in international commercial agreements, such as *force majeure* or hardship clauses, or even express terms referring to good faith, to address common problems. In my publications, I highlight the business expectations that these international commercial contracts be enforced with certainty and consistency across borders.

As I identify the differences and similarities of the national solutions, I am confronted with three challenges. The first one derives from the near absence of French cases applying the new provisions given the novelty of the French reform, the second is difficulty in finding comparable facts as the basis of legal disputes in both jurisdictions and the third relates to the idiosyncrasy of contractual practices in specialised sectors and their related distinct bodies of law, which could be the subject of further comparative study.

1.5. Structure of Commentary

First, I compare historically how the state in England and France deals with changes in the area of general contract law in times of peace and crisis (Chapter 2). Second, I evaluate the doctrinal

[39] For a detailed summary of his approach, see Pierre Legrand, 'The Same and the Different' in P. Legrand and R. Munday (eds), *Comparative Legal Studies, Traditions and Transitions* (CUP 2003), 240-311. See Pierre Legrand, 'European Legal Systems Are Not Converging' (1996) 45 The International and Comparative Law Quarterly 52.
[40] Pierre Legrand, 'European Legal Systems are Not Converging' (1996) 45(1) The International and Comparative Law Quarterly 52, 60-61.
[41] Pierre Legrand, *Fragments on Law-as-Culture* (W.E.J. Tjenk Willink 1999), 63.
[42] Gunther Teubner, 'Legal Irritants: Good Faith in British Law or How Unifying Law Ends Up in New Divergences' (1998) 61 Modern Law Review 1, 14-15, 13.

solutions to supervening events and contractual interpretation in both legal systems (Chapter 3). Third, I compare how each legal system encourages – or forces - parties to cooperate or renegotiate pre-empting judicial proceedings for the sake of finding a negotiated solution (Chapter 4).

Chapter 2. Comparative Approach to English and French State Intervention in Contract Law in Times of Peace and Crisis

My focus here is on comparing state intervention in general contract law in England and France in times of peace and crisis.[43] Naturally it depends on the distinct role of the state in designing contract law in England and France, and more generally in civil and common law systems. In France, the state enacts a body of rules, which is to be found in the *Code civil* (and other specialised codes) and in legislation supplementary to the codes.[44] By contrast, England has a limited level of tolerance toward legislative intervention given that it relies on "law of the case, created by the courts…"[45] in contractual matters. This distinction between codified and court made law holds in times of peace but may blur in times of crisis. Global leaders, including the French President Macron, have compared the economic turmoil caused by the COVID-19 health emergency to the reverberations of World War II.[46] In *Contractual Performance in Covid-19 Times*, I compare how England and France have dealt with the difficulties of contractual performance caused by the pandemic. In line with the traditional common/civil law divide, France favours intervention through special legislation for the sake of fairness while England leaves the difficult choices to the discretion of the parties under the banner of freedom of contract, with the exception of the area of commercial rents, where the State has temporarily withheld enforcement through legislation, as discussed below. As I compare the national responses to the COVID-19 emergency with respect to contractual performance, I reach the conclusion that Anglo-French legal history in terms of state interventionism repeats itself even in exceptional times.

2.1. Legislative Intervention in France

I study two instances of legislative intervention in France – one in the context of the long overdue reform of the law of obligations in times of peace, which I discuss in *The Commercial Impact of the New French Contract Law*, and the other in the exceptional COVID-19 times, which I analyse in *Contractual Performance in Covid-19 Times*. A historical analysis confirms

[43] For a discussion on the factors which need to be considered in the creation of law, see Stefan Vogenauer, 'Sources of Law and Legal Method in Comparative Law' (2020) Max Planck Institute for European Legal History Research Paper Series No. 2020-04, 10.
[44] Barry Nicholas, *The French Law of Contract* (2nd edn, Clarendon Press 1992), 5.
[45] ibid, 4.
[46] French President Macron publicly declared from the onset of the pandemic that France was 'at war'.

the French cultural bias in favour of legislative interventionism to support economic exchanges and provide a helping hand – some *breathing space* - to the commercial parties in distress.

2.1.1. The *ordonnance* No 2016-131 of 10 February 2016 - A Long Overdue Reform

In *The Commercial Impact of the New French Contract Law*, I explain how the reform was a necessity since the original *Code civil*, particularly the law of contract, had remained nearly untouched since its enactment in 1804.[47] Contract law had progressively developed outside the *Code civil* in a country which prided itself on its codified law as a source of *sécurité juridique*. This was a reform in the making for many years, which was finally led by the *Chancellerie* acting via *ordonnance* with the authorisation of Parliament.[48] It aimed to modernise and simplify the law of contract whilst enhancing its legibility and accessibility, with a view to reinforcing the *sécurité juridique* and its attractiveness.[49] It sets the 'contract'[50] at the core of the law of obligations with a focus on the contractual relationship.[51] As I highlight in *The Commercial Impact of the New French Contract Law*, the reform vests parties with powers to pre-empt judicial proceedings either through consensus[52] or unilateralism.[53]

In *The Commercial Impact of the New French Contract Law*, I discuss how the *ordonnance* No 2016-131 aims at reconciling contractual fairness and the autonomy of the will,[54] or in other

[47] *Rapport au Président de la République relatif à l'ordonnance No 2016-131 du 10 février 2016 portant réforme du droit des contrats, du régime général et de la preuve des obligations*, Journal Officiel de la République française du 11 février 2016 (*Rapport au Président*), 2.
[48] The *Chancellerie* was authorised to reform the law of contract by *ordonnance* in Article 8 of *Loi No 2015-177 du 16 février 2015 relative à la modernisation et à la simplification du droit et des procédures dans les domaines de la justice et des affaires intérieures*, within a one-year timeframe. It must be said that it followed an extensive prior amount of work. The *ordonnance* No 2016-131 was ratified by *Loi No 2018-287 du 20 avril 2018 ratifiant l'ordonnance No 2016-131 du 10 février 2016*. I will refer to the 2016 reform as including the 2018 *loi*.
[49] *Rapport au Président* (n 47), 2-4. The objective of *sécurité juridique* also contributes to contractual justice.
[50] See the new definition of contract in Art 1101 CC.
[51] Laurent Aynès, 'The Content of Contracts: *Prestation*, *Objet* but No Longer *la Cause*?' in John Cartwright and Simon Whittaker (eds), *The Code Napoléon Rewritten, French Contract Law after the 2016 Reforms* (Bloomsbury Publishing 2017) 137, 138 : in the words of Aynès, "the law has moved from debt to contract" – from an instrument for the creation of debts under the *Code Napoléon* to a contract as the creator of a 'contractual bond' (*lien contractuel*).
[52] For instance, the incentive for parties to renegotiate under the new doctrine of *imprévision* (Art 1195 CC).
[53] See below for a discussion of these unilateral prerogatives in the context of COVID-19, such as the ability for one party to refuse to perform its obligation if the non-performance by the other party is sufficiently serious (*exception d'inexécution*) (Art 1219 CC), or to unilaterally reduce the price in the case of failing performance (*réduction du prix*) (Art 1223 CC) or even to unilaterally terminate the contract by notice (*faculté de résolution unilatérale par voie de notification* (Art 1226 CC). See also *The Commercial Impact of the New French Contract Law*, 103-106.
[54] *Rapport au Président* (n 47), 4. See also Catherine Pédamon, 'Freedom of Contract and Contractual Justice: The Foundations of the French Reform of Contract Law' (2016) 37(2) Company Lawyer 53-54.

words, at finding balanced solutions which are economically efficient and adjusted to the needs of the market economy while protecting the parties.[55] As confirmed in the *Rapport au Président*, the legal provisions must "(…) at once (be) favourable to a consensualism conducive to economic exchanges and protective of the weakest."[56] It is in the spirit of the reform which seeks to reconcile the principles of freedom of contract, binding force of contract and good faith enshrined in the new Preliminary Provisions (*Dispositions liminaires*) of the Sub-title on Contract in the *Code civil*.[57] This is a delicate balance to strike which leaves much discretion to the court when applying these provisions.[58]

Among the innovations brought by the *ordonnance* No 2016-131,[59] I discuss in *The Commercial Impact of the New French Contract Law*, the *summa divisio*, which formally enshrines the distinction between freely negotiated contracts (*contrats de gré à gré*) and standard form contracts (*contrats d'adhésion*).[60] Significant ramifications stem from this classification, which include the control of unfair terms in standard form contracts,[61] the interpretation *contra proferentem;*[62] and remedies in changed circumstances vis-a -vis the party "who did not agree to bear the risk of such a change."[63] I discuss these provisions below. This distinction enshrines a doctrine of unequal contracts (*droit des contrats inégalitaires*), which

[55] *Rapport au Président* (n 47), 3. Examples of provisions protecting the weaker parties include those relating to economic violence (duress) (Art 1143 CC), obligation to disclose information (Art 1112-1 CC) and unfair contract terms in standard form contracts (Art 1171 CC).
[56] *Rapport au Président* (n 47), 2.
[57] Art 1102, 1103 and 1104 CC. See *Rapport au Président* (n 47), 3 and 4.
[58] There is always a risk that the application of the legal rules by the courts "*sometimes bore only a distant relationship with the law set out by the Code civil*" - Simon Whittaker, 'Contracts, Contract Law and Contractual Principle' in John Cartwright and Simon Whittaker (eds), *The Code Napoléon Rewritten, French Contract Law after the 2016 Reforms* (Bloomsbury Publishing 2017), 32.
[59] For the deletion of the *cause*, see Laurent Aynès, 'The Content of Contracts: *Prestation, Objet* but No Longer *la Cause*?' in John Cartwright and Simon Whittaker (eds), *The Code Napoléon Rewritten, French Contract Law after the 2016 Reforms* (Bloomsbury Publishing 2017), 137. For the deletion of the traditional classification of obligations, see Geneviève Helleringer, 'The Proprietary Effects of Contracts' in John Cartwright and Simon Whittaker (eds), *The Code Napoléon Rewritten, French Contract Law after the 2016 Reforms* (Bloomsbury Publishing 2017), 207.
[60] Art 1110 CC – "A bespoke contract is one whose stipulations are negotiable by the parties. A standard form contract is one which includes a collection of non-negotiable terms which are determined in advance by one of the parties." See also Thierry Revet, 'Une philosophie générale?' (2016) 112 Revue des Contracts hors-série 5. The standard form contract was brought to the fore by René Saleilles, *De la Déclaration de volonté : contribution à l'étude de l'acte juridique dans le Code civil allemand (articles 116 à 144)* (Pichon 1901), 229-230.
[61] Art 1171 CC – "In a standard form contract, any term which is non-negotiable and pre-determined by one of the parties and which creates a significant imbalance in the rights and obligations of the parties to the contract is deemed non written *(…)."* For a discussion of overlapping, or even contradictory, provisions on unfair contract terms in civil and commercial law, see *The Commercial Impact of the New French Contract Law*, p. 112-118.
[62] Art 1190 CC - "In case of ambiguity, (…) a standard form contract is interpreted against the person who put it forward*."* For a discussion of the principles of contractual interpretation, see Chapter 3.
[63] (My translation) Art 1195 CC. For a discussion of the new doctrine of *imprévision*, see Chapter 3 *below*.

arranges contracts between those with terms freely negotiated between parties of (nearly) equal bargaining power and those with terms unilaterally drafted by one party and imposed upon the other.[64] In the former type of contract, the will of the parties must be respected pursuant to the principle of freedom of contract; by contrast, in the latter, the weaker party has been deprived of its freedom to negotiate, which justifies an external review of the terms.[65] By introducing this distinction into the *Code civil*, [66] the legislator plays a regulatory function by setting a framework within which parties may exercise their contractual freedom. Whilst acknowledging the standardisation of modern contracting, it anchors the contract in a socio-economic reality which seeks to protect the weaker party.[67] This is in contrast with the pragmatic approach of English contract law "seeing contracts primarily as market transactions and the main role of contract law therefore, as being the facilitation of these transactions"[68] where there is no control of the validity of the terms, even in standard form contracts, with the exception of exemption clauses pursuant to the Unfair Contract Terms Act 1977 and penalty clauses.[69] English courts are not troubled by unequal bargaining power in business exchanges as "it is for Parliament and not the judiciary to regulate (such) inequality of bargaining power (…)."[70]

Linked to the different types of contracts is the question of primordial importance as to whether, and in which circumstances, the new provisions can constrain contractual freedom and impinge on the binding force of contract.[71] The *Rapport au Président* provides that the contract law rules are default ones, unless they are expressed as mandatory or considered as such by the

[64] See Thierry Revet, 'Une philosophie générale?' (2016) 112 Revue des Contracts hors-série 5, 16. This distinction demarks itself from the traditional understanding of contract that all contracts were negotiated.
[65] ibid.
[66] The sanction of unfair contract terms was originally introduced in the *Code de la consommation*. For further comparison with the corresponding provisions in the *Code de commerce*, see *The Commercial Impact of the New French Contract Law*.
[67] For further comparison with the corresponding provisions in the *Code de commerce*, such as the former Article L. 442-6 I 2 (new Article L. 442-I 2) as part of a wider law of unfair competition in the context of unequal large retailers/suppliers relationship, see *The Commercial Impact of the New French Contract Law*.
[68] Simon Whittaker and Karl Riesenhuber 'Conceptions of Contract' in Gerhard Dannemann and Stefan Vogenauer (eds), *The Common European Sales Law in Context: Interactions with English and German Law* (Oxford University Press 2013), 123.
[69] Unfair Contract Terms Act 1977 S.3 which relates to exemption clauses and certain related clauses where one person acting in the course of business acts on the other's 'written standard terms of business'. See also Simon Whittaker, 'Contracts, Contract Law and Contractual Principle' in John Cartwright and Simon Whittaker (eds), *The Code Napoléon Rewritten, French Contract Law after the 2016 Reforms* (Bloomsbury Publishing 2017).
[70] *Pakistan International Airlines Corp* (n 18), [26], and also [23] – Equity can be used in contexts which calls for judicial intervention to protect the weaker party. For a discussion of equitable remedies, see section 2.2.2. below.
[71] These two principles are now enshrined in Art 1102 and 1103 CC. For a general discussion, see Cécile Pérès, 'Règles impératives et supplétives dans le nouveau droit des contrats' (2016) Semaine Juridique Edition Générale, 454. See also Art 1: 102 PECL, Art 1.5 Unidroit Principles, Art II.-1:102 DCFR and Art 1.2 CESL.

courts.[72] In terms of mandatory rules, they include good faith,[73] pre-contractual obligation of information,[74] or control of unfair terms in standard form contracts,[75] etc. Courts may also decide that a specific provision excludes any contrary term.[76] As Pérès explains, the delineation between mandatory and default rules is so blurry that it is a source of legal uncertainty for the parties, especially since all the doctrinal attempts to systematise this distinction have failed.[77] This uncertainty should not be exaggerated since in most cases, rules are defaults. It nevertheless goes without saying that mandatory provisions impose social norms upon the contract – a cultural view of the contract which corresponds with the values of promoting fairness and consensus. Likewise default rules embody "a normality perceived as ideal by the legal order."[78] These default rules, for instance those relating to *imprévision*, may nevertheless be undesirable to the parties as they are not adjusted to their business needs, thus encouraging these parties to contract them out and provide for an express allocation of risk, which I discuss in the next chapter. Any express term to that effect however runs the risk of being deemed unwritten if it is a non-negotiable pre-determined term in a standard form contract which creates a significant imbalance in the rights and obligations of parties pursuant to Article 1171 CC (or other equivalent provisions in the *Code de commerce*).[79] Overall, the nature of these provisions plays a crucial role since, according to Carbonnier, "it (is) in the default rules that the practice largely observed by the contracting parties slip in (…),"[80] leaving room for private contracting.

In conclusion, I argue in *The Commercial Impact of the New French Contract Law* that the general – sometimes uncertain - nature of the rules and their unpredictable application by the court combined with the absence of *stare decisis* put the onus on the contracting parties to spell out their obligations in detail and pre-emptively allocate the risks associated with their

[72] *Rapport au Président* (n 47), 5.
[73] Art 1104 and 1112 CC.
[74] Art 1112-1 CC.
[75] Art 1171 CC. There are other provisions, such as Art 1231-5 CC (judicial review of penalty clause) or Art 1343-5 CC (judicial prerogative to defer payment or allow payment by instalment).
[76] This refers to a virtual public order found by the court, for instance Cass. Civ., 4 Dec. 1929: S. 1931, 1, 49. See also Art 1162, which justifies the judicial control over the contract.
[77] Cécile Pérès, 'Règles impératives et supplétives dans le nouveau droit des contrats' (2016) Semaine Juridique Edition Générale, 454, 457.
[78] ibid, 458.
[79] It is the case where the term in a standard form contract "*non-negotiable and pre-determined by one of the parties*" causing "*a significant imbalance in the rights and obligations of the parties to the contract*." Other provisions in the *Code de commerce* may apply, such as the new Article L. 442-I 2 (former Article L. 442-6 I 2) of the *Code de commerce*.
[80] Jean Carbonnier, *L'évolution contemporaine du droit des contrats*, *Journée René Savatier* (PUF 1985), 25.

activities. It corresponds to what the professionals seek to achieve in my taxonomy of commercial contracts as professionally drafted agreements contract out of default rules and lay out the terms of the bargain precisely.[81] By contrast, rudimentary contracts rely on the default contract law rules to fill the gaps in their agreement; interestingly, these are the parties, usually small and medium sized businesses (SMEs), which the legislator has in mind in this reform. This leads me to consider whether the French state also intervenes in times of crisis.

2.1.2. Legislative Intervention during the Two World Wars and in Covid-19 Times: How French legal history repeats itself

In *Contractual Performance in Covid-19 Times,* I show that France has a long cultural tradition of targeted legislative intervention in times of crisis, in other words, emergency legislation. It is partially due to a reluctance of French judges to intervene in the parties' bargain even in instances of supervening events.[82] By contrast, French legislators have not shied away from providing courts with tools to ease contract performance in difficult times, such as with the *loi Failliot* of 21 January 1918,[83] which applied to commercial contract entered into before the start of WWI, and other legislation in the aftermath of WWII.[84]

With this background in mind, I explain how the intervention by the Macron Government through a series of *ordonnances* has a historical underpinning.[85] On 25 March 2020, it issued 27 *ordonnances* to deal with some effects of the Covid-19 public health emergency. Among these, the *ordonnance* No 2020-306 of 25 March 2020 adopted measures aimed at alleviating some of the drastic consequences of the crisis on contractual performance. In *Contractual Performance in Covid-19 Times,* I argue that even if at first glance, the French legislator seems wed to the tradition of interventionism, there are important differences between these *ordonnances* and past war-time legislation. The first one relates to the time these measures were introduced, which was at the outset of the Covid-19 pandemic rather than at the time its effects are felt. The second distinction relates to the *ordonnances* themselves, whose scope of

[81] See also Mustapha Mekki, 'La réforme du droit des contrats et le monde des affaires : Une nouvelle version du principe comply or explain!' (5 Jan 2016) 1 Gazette du Palais 18.
[82] For a discussion about the way French courts have strictly applied the doctrine of *force majeure*, see below.
[83] *Loi* of 21 January 1918, called *loi Failliot,* which in Article 2 provided for termination or suspension of contract upon the request of either party in certain circumstances.
[84] *Loi* No 49-547 of 22 April 1949 which bears a striking similarity to the *loi Failliot,* albeit with a wider reach and a narrower time frame, and a series of legislative texts.
[85] For reasons of expediency, most measures which were adopted were through regulation rather than legislation.

application is (1) limited since they mainly deal with enforcement proceedings and (2) *patchy* as they only concern specific contracts or contract terms; this contrasts with the broader legislative interventions during WWI and WWII. This may be due to either the pre-emptive nature of the legislative response forcing the French legislators to engage in crystal ball gazing to predict the likely effects of the pandemic on contract, or to a much more complex and specialised economic world in comparison with WWI and WWII.[86] I therefore show how intervening, particularly at the outset, has become an intricate endeavour despite the political will to provide quick-fix solutions for commercial parties. It is however based on assumptions firmly rooted in a legal – and social - culture that the state must intervene to alleviate the drastic effects of any crisis on contractual performance.[87]

However, I reach the conclusion that paradoxically the limited and patchy scope of application of these *ordonnances* leave the parties to their own fate and ultimately subject them to the discretion of the court applying them. The French state interventionism in its paternalistic quest relies on French courts, which will decide any qualification to the contract term, and as such, does not provide the predictability intended. In any case, these *ordonnances* come in addition, or as an exception, to the general law of contract, particularly the well-established doctrine of *force majeure* and the newly introduced doctrine of *imprévision*, and other contract law tools to deal with non-performance.[88] I will now contrast the French interventionist approach with the limited – even exceptional – UK intervention in contract law.

2.2. Limited Legislative Intervention and Reliance on Courts in English law

As I note in *Contractual Performance in Covid-19 Times*, by contrast with French law, only in exceptional cases, has the UK Parliament enacted legislation pertaining to contract: either when legal precedent leads to manifestly unjust results, which needs to be addressed, for example, in the case of the Law Reform (Frustrated Contracts) Act 1943, or when existing legislation needs an update for better clarity, for example the Consumer Rights Act 2015.[89] This can be explained by the particularities of the English common law system, which is firmly committed to freedom

[86] See Catherine Pédamon and Radosveta Vassileva, 'Contractual Performance in COVID-19 Times: Does Anglo-French Legal History Repeat Itself? (20210 29(1) European Review of Private Law 3, 19.
[87] See above Section 1.5.2.
[88] For a discussion of these new unilateral tools, see below Section 3.1.1.
[89] There are other important pieces of legislation dealing with contracts, for example the Misrepresentation Act 1967, the Unfair Contract Terms Act 1977 and the Contracts (Rights of Third Parties) Act 1999.

of contract enforced through its judges.[90] In the near absence of legislative intervention, the fate of contracts lies at the mercy of judges unless parties find solutions themselves.[91]

2.2.1. A Limited Legislative Intervention during the Two World Wars and in Covid-19 Times

In *Contractual Performance in Covid-19 Times*, I show how even if the UK Parliament enacted emergency legislation in response to WWI and WWII, such as the Courts (Emergency Powers) Acts, 1914, 1917 or 1939, the main focus was on vesting courts with powers to accommodate the parties in case of non-payment of money and, in limited circumstances, non-performance of certain obligations due to 'serious hardship' attributable to war. Interestingly I highlight how English courts expressed their dismay as to the lack of principles guiding them in the choice of remedies whilst applying this emergency legislation, for instance in *Metropolitan Properties v. Purdy.*[92]

In keeping with this cultural tradition, the UK Parliament has mostly remained silent in the area of general contract law in response to the pandemic.[93] It has nevertheless legislated in the specific contractual area of business tenancies. With the aim of protecting tenants, S.82 of the Coronavirus Act 2020 provides for a moratorium on forfeiture for non-payment of rent during the relevant period.[94] Whilst this measure is not a silver bullet for tenants since it does not prevent an action for the recovery of rent, it gives them some breathing space. This legislative intervention may appear surprising as it interferes with the terms of the business tenancy agreements, unlike the traditional *laissez faire* approach. It is in the spirit of mitigating the drastic effects of the pandemic on contractual parties and giving them a helping hand, which is, as I said above, unusual in English law. The similarity with French governmental measures

[90] On the role of the common law judge, see Patrick Glenn, *Legal traditions of the World* (3rd ed, Oxford University Press 2007), 245.
[91] As Sir William Anson notes in *Principles of the English Law of Contract and Agency in Relation to Contract* (1st ed, Clarendon Press 1879) in the Preface: "The law of contract so far as its general principles are concerned has been happily free from legislative interference: it is the product of the vigorous common sense of English judges."
[92] *Metropolitan Properties v Purdy* [1940] 1 All ER 188, [191].
[93] Whereas the UK Parliament has enacted the Coronavirus Act 2020, the UK Government has taken general measures, such as the Health Protection (Coronavirus) Regulations 2020 (SI 2020/129) and the Health Protection (Coronavirus, Restrictions) (England) Regulations 2020 (SI 2020/350), measures which naturally have impacted parties in the performance of their contracts, but in a limited and specific way. For a list of new legislation or other forms of regulations impacting on contracts in the UK as a response to COVID-19, see Hugh Beale and Christian Twigg-Flesner, 'COVID-19 and English Contract Law' in Ewoud Hondius et al. (eds.), *Coronavirus and the Law in Europe* (Intersentia 2020) 461, 476-484.
[94] S.82 Coronavirus Act 2020 – this provision prevents a landlord from evicting a tenant for non-payment of rent during that period. The period has been extended and now runs from 26 March 2020 to March 2022.

is striking. In that same spirit, the current Commercial Rent (Coronavirus) Bill sets an arbitral process for resolving disputes relating to the recovery of unpaid rent away from the court.[95] The recourse to arbitration, as an alternative to litigation, reinforces its legitimacy for commercial matters.

Beyond these measures, parties must fend for themselves. Making use of their contractual freedom, parties are expected to foresee future events, which by essence are difficult (or even impossible) to anticipate through detailed clauses, such as *force majeure*, hardship, Material Adverse Change (MAC), etc. Recent case law shows that some *force majeure* clauses explicitly listed epidemic and quarantine as grounds to excuse delay.[96] Such clauses usually seal the fate of the parties in what is considered as *fair* given that "(f)or (the Common law lawyers), free dealing (is) fair dealing."[97] Yet, if these clauses are ambiguous or silent, parties are left to rely on traditional equitable remedies, for instance the equitable doctrine of promissory estoppel, to settle disputes relating to difficulties of performance.

2.2.2. Reliance on Traditional Equitable Remedies and Common Law Doctrines

In *Contractual Performance in Covid-19 Times*, I demonstrate how English courts have historically addressed difficulties pertaining to performance in response to war by either reasoning in equity[98] or developing existing common law doctrines, such as the doctrine of frustration.[99] Given that these doctrines curtail contractual freedom, courts are wary of using them.[100] Through a line of cases, I show how the theoretical basis of the doctrine of frustration

[95] See the Commercial Rent (Coronavirus) Bill, Bill No 189, published on 9 November 2021. Part 1 – Introductory Provisions – 1(1). Disputes relating to rent arrears accrued as a result of the pandemic will be settled by arbitration.
[96] See Art. VIII of the contract discussed in *Jiangsu Guoxin Corporation Ltd* (formerly known as *Sainty Marine Corporation Ltd*) v *Previous Shipping Public Co Ltd* [2020] EWHC 1030 (Comm), 2020 WL 0208922.
[97] Lord Devlin, *The Enforcement of Morals* (Oxford University Press 1965) 47, quoted by PS Atiyah, *The Rise and Fall of Freedom of Contract* (Clarendon Press 1979), 403 and generally 402-05, 544-61. See also *The Impact of COVID-19 on Contractual Performance*, 32.
[98] See *Central London Property Trust Ltd v High Trees House Ltd* [1947] KB 130 for the use of promissory estoppel.
[99] *Davis Contractors Ltd v Fareham UDC* [1956] AC 696. See below for a further discussion of these doctrines.
[100] *Blackburn Bobbin v TW Allen* [1918] 1 KB 540, [551] where an 'unforeseen event' which had rendered performance 'practically impossible' was not recognized as a frustrating event.

has evolved over time from implied condition[101] to illegality or public policy[102] or justice[103] and more recently to the leading case on frustration *Davis Contractors Ltd v Fareham UDC*.[104] This case sets the current 'radically different' test, which restricts further the scope of application of the doctrine of frustration, as it requires that performance of the contract be "*radically different*" from that which was undertaken by the contract.[105] It is important to note the drastic effect of frustration which cause the contract to end automatically. I argue that even if this test appears stringent, it is consistent with the principle of freedom of contract as parties should not be expected to do something which has little to do with what they promised. The proper basis of the doctrine of frustration is therefore the construction of the contract.[106]

In conclusion, my comparative inquiry demonstrates that both France and England have stayed true to their historic responses to the COVID-19 pandemic confirming different *mentalités juridiques* – whereas France has a long tradition of legislative intervention in the name of fairness, England tends to leave the difficult choices to the parties themselves pursuant to freedom of contract, even if the UK legislator chooses to intervene in limited areas. However, in these trying times, these divergences may not be as stark as they appear since the French state intervention is limited and patchy, akin to English law, leaving general contract law in both countries unchanged, which I will further compare in the following Chapter.

[101] *Taylor v Caldwell* (1863) 3 B&S 826, which held that in contracts whose performance depends on the continued existence of a person or a thing, there is an implied condition that the impossibility of performance resulting from the disappearance of the person or the thing releases the debtor.
[102] *Blackburn Bobbin* (n 100), [551].
[103] Bingham LJ in *J Lauritzen AS v. Wijsmuller BV (The Super Servant Two)* [1990] 1 Lloyd's Rep 1 about the frustration doctrine whose object "was to give effect to the demands of justice, to achieve a just and reasonable result, to do what is reasonable and fair, as an expedient to escape from injustice where such would result from enforcement of a contract in its literal terms after a significant change in circumstances." See also *British Movietonews Ltd v London and District Cinemas Ltd* [1951] 1K.B. 190, [202] (reversed [1952] A.C. 166).
[104] *Davis Contractors Ltd* (n 99).
[105] ibid, [729].
[106] ibid, [720-721]. See also *British Movietonews Ltd v London and District Cinemas Ltd* [1952] AC 166 – "if a consideration of the terms of the contract in the light of the circumstances existing when it was made shows that the parties never agreed to be bound in a fundamentally different situation which has unexpectedly emerged, the contract ceases to bind at that point because on its true construction it does not apply to the situation." For other scholars, the basis for the frustration doctrine is 'no consent' which is any case consistent with the construction approach, see Mindy Chen-Wishart, *Contract Law* (6th edn, Oxford Uuniversity Press 2018) 292-293.

Chapter 3. Comparative Solutions to Supervening Events and Contractual Interpretation in England and France

In this Chapter, I look first at the doctrinal solutions to supervening events in England and France, and then at the principles of contractual interpretation in both jurisdictions. While inquiring whether these doctrines or principles are functionally equivalent, I evaluate how each system balances the principles of contract law and their underpinning values, such as legal certainty and flexibility, economic efficiency and fairness.

3.1. Supervening Events in English and French law: The Doctrines of *Force Majeure, Imprévision* and Frustration to the Test

The binding force of contract is a foundational principle in both legal systems, in other words, parties must perform their obligations pursuant to the contract terms.[107] However, whereas in English law it is an absolute duty, in French law it is a duty which admits a traditional defence of *force majeure* and a new judicial power to adjust or terminate the contract on the ground of changed circumstances. In this context, I inquire whether the doctrines of frustration in England and *force majeure* and *imprévision* in France are functional equivalents through four publications - *Hardship in Transnational Commercial Contracts*, written before the French reform, *The Doctrine of Imprévision* and *The Commercial Impact of the New French Contract Law* and *Contractual Performance in Covid-19 Times*. The pandemic put these doctrines to the test, which I will evaluate by comparing their scope, criteria of application and effects successively.

Commercial contracts, particularly those professionally drafted, commonly include *force majeure* or hardship clauses, which define the triggering events and their effects on the agreement. Even in that case, however, the national doctrines may still apply if the clauses are ambiguous or silent, thus justifying the need for a comparative analysis. I will consider these terms when I discuss the principles of contractual interpretation in England and France as it is a matter of construction.

3.1.1. The Doctrines of *Force Majeure* and *Imprévision* in French law

[107] See in French Law Art 1103 CC and in English law, *Printing and Numerical Registering Co v Sampson* (1874-75) LR 19 Eq 462, [465] (as per Sir George Jessel, MR)

These doctrines – Article 1218 (*force majeure*) and Article 1195 (*imprévision*) of the *Code civil* – as well as other provisions, such as Article 1219 (ability for one party to refuse to perform its obligation if the non-performance by the other party is sufficiently serious) or Article 1226 (ability of the creditor to unilaterally terminate the contract by notice), form part of the contractual toolbox (*boîte à outils contractuels*) available to the parties following the 2016 reform. These legal instruments are applicable to contracts in response to the Covid-19 pandemic and the measures put forward by the French government as they render the performance of the contract impossible or much more onerous.

3.1.1.1. The Doctrine of Force Majeure

In *Contractual Performance in Covid-19 Times*, I show how the conditions of application of *force majeure* (Article 1218 (1)) are assessed on a case by case basis.[108] Three conditions must be met for *force majeure* to apply: (1) impediment beyond the debtor's control (no fault in causing the event); (2) impediment which could not *reasonably* have been foreseen when the contract was concluded (unforeseeability);[109] and (3) impediment's effects which could not be avoided or overcome by appropriate measures (unavoidability). I note in *Contractual Performance in Covid-19 Times* that the qualification of *force majeure* is difficult to meet, even in cases of health emergencies, for purely factual reasons.[110] In the context of the Covid-19 pandemic and the governmental measures, apart from the externality requirement (beyond the party's control), which is easily met, the conditions of unforeseeability and unavoidability may give rise to challenges in their application – (a) the unforeseeability criteria will depend on the date of the contract and the date fixed for the pandemic, and (b) unavoidability on the absence of alternative solutions and the degree of impossibility to perform.[111] In addition, a link of causation must be established between the pandemic or the governmental measures and the impossibility of performance. Overall, there may be a few contracts, which will meet these

[108] Article 1218 (1) - In contractual matters, there is force majeure where an event beyond the control of the debtor, which could not reasonably have been foreseen at the time of the conclusion of the contract and whose effects could not be avoided by appropriate measures, prevents performance of his obligation by the debtor. For an application on a case-by-case approach, see CA Basse-Terre, 17 Dec. 2018, No 17/00739- the chikungunya virus was not considered to have an unforeseeable and unavoidable nature insofar that this disease could be relieved with painkillers; see also CA Saint-Denis de la Réunion, 29 Dec. 2009, No 08/02114.
[109] See also Cass. Ass. Plen., 14 April 2006, No 02-11168, which held that the impediment should not be *reasonably* foreseeable at the time of the conclusion of the contract.
[110] ibid; CA Nancy 22 November 2010, No 09/0000 - the dengue fever was deemed foreseeable and avoidable given that it was a recurrent phenomenon and not lethal in most cases; similarly see CA Besancon 8 Jan 2014, No 12/02291- the H1N1 flu which was deemed foreseeable because it was widely announced and expected.
[111] Cass. Civ. 12 July 2001, No 99-18.231 - the failure of one supplier was not deemed unavoidable since another supplier could deliver the goods.

criteria, but it will be decided on a case-by-case basis, and as of now, French courts have applied these conditions strictly.[112]

In terms of effects, they are defined in the second paragraph of Article 1218 – either suspension of the obligation if the impossibility to perform is temporary, or termination as of right if such impossibility is permanent, discharging the parties from their obligations under the conditions provided by Articles 1351 and 1351-1.[113] It is important to note that monetary obligations cannot be subject to *force majeure*;[114] other legal mechanisms may be used, such as the ability to refuse to perform (Article 1219) or suspend the performance of their obligations (Article 1220) in certain circumstances.[115] I conclude that the *force majeure* doctrine may not be well placed to address the challenges of performance caused by the pandemic.

3.1.1.2. The New Doctrine of *Imprévision*

The *ordonnance* nº 2016-131 has ushered in a radical change from the well-anchored rejection of hardship. Until this reform, as I show in *Hardship in Transnational Commercial Contracts*,[116] French courts were prohibited from discharging a contract or substituting new terms to those which had been freely agreed upon by the parties in light of changed circumstances in the name of sanctity of contracts.[117] Without any doubt this consistent case

[112] See cases cited above. See also Cass. Com. 11 Dec. 2019, No 18-11.195 - a fire was deemed foreseeable at the time of conclusion of the contract; Cass. Com. 3 March 2015, No 13-22.573 - the closure of a site for which a cleaning service contract had been concluded did not meet the conditions for *force majeure*; see also Cass. Com. 8 March 2011, No 10-12.807.

[113] Article 1218 (2) - If the prevention is temporary, performance of the obligation is suspended unless the delay which results justifies termination of the contract. If the prevention is permanent, the contract is terminated by operation of law and the parties are discharged from their obligations under the conditions provided by articles 1351 and 1351-1. Pursuant to Art. 1351 CC, the impossibility to perform the obligation discharges the party when it derives from a case of *force majeure* and that it is permanent. Any liability due to the termination of commercial relationships may also be set aside pursuant to Art. L.442–1 II of the *Code de commerce* in a case of *force majeure*.

[114] Cass. Com. 16 Sept 2014, No 13-20.306.

[115] See also with respect to the suspension of certain contracts, such as lease agreements, Article 1724 CC, or insurance contracts, Article L. 113-3 of the *Code des assurances*, in certain circumstances.

[116] In *Hardship in Transnational Commercial Contracts*, I discuss the decision, *Scafom International BV v Lorraine Tubes SAS*, 19 June 2009, C.07.0289.N, which attracted a great deal of controversy and disquiet from commercial lawyers, since the Belgian Cour de cassation confirmed the application of Article 79 CISG to changed circumstances and the obligation of the buyer to renegotiate the contract (in good faith).

[117] See the seminal case, *De Gallifet v Commune de Pelisanne* (*Canal de Craponne*), Cass. Civ., 6 March 1876, DP 1876.1.193, note Giboulot; S. 1876.1.161; Yves Lequette, François Terré and Henri Capitant, *Grands Arrêts de la Jurisprudence civile* (12th edn. Tome 2, Dalloz 2008), No 165.

law contributed to legal certainty under the governing principle of intangibility of contracts (former Article 1134).[118]

After more than a century of debate and in a radical move, the reform of contract law has now enshrined the doctrine of *imprévision* in Article 1195 of the *Code civil*.[119] The *Rapport au Président* explains that France was "one of the last countries not to recognise it as a factor moderating the binding force of contract"[120] and that this formal recognition would align it with most European private laws, especially Germany and Italy,[121] and European and international harmonisation projects.[122] As such, the French law of contract moves away from a rigid theory of party autonomy towards the pursuit of a balanced (*just*) solution, in accordance with the objective of contractual justice set by the *ordonnance* nº 2016-131. It stipulates that the rule is applicable to unforeseeable events, which have not been assumed as risk by the party whose contractual performance has become excessively onerous. In *Paradoxes of the Doctrine of Imprévision*, I argue that this new doctrine raises three contradictions, which limit its relevance. The first one is linked to its nature as default rule, encouraging professionals to exclude it and provide their own hardship clause.[123] The second one concerns the uncertainties attached to the renegotiation proceeding since the *aggrieved* party must continue to perform until the parties reach an agreement and that the *innocent* party may refuse to renegotiate or

[118] Only rare exceptions can be recorded involving distributorship agreements and commercial agencies for which there are higher standards of loyalty and cooperation - in two cases, *Huard* and *Chevassus*, the *Cour de cassation* imposed a duty to renegotiate on the legal ground of good faith, which can be explained by the fact that the affected parties were in a position of economic dependency. See *Huard*, Cass. Com., 3 November 1992, JCP ed G 1993. II.22614, note G. Virassamy; *Chevassus*, Cass. Com., 24 November 1988, JCP ed G.I. 143, note Christophe Jamin. See also *Vilot*, Cass. Civ. 15 Jan 1950, D. 1950.227, and more recently, Cass. Civ. 18 March 2009, No 07-21.260, RDC 2009.1358, obs. D. Mazeaud; D. 2010. Pan 224, obs. B. Fauvarque-Cosson. It is also interesting to note how French judges did not develop a jurisprudential solution for private contracts in contrast to their approach to administrative contracts.

[119] Article 1195 CC - If a change of circumstances that was unforeseeable at the time of conclusion of the contract renders performance excessively onerous for a party who had not agreed to bear the risk of such a change, that party may ask the other contracting party to renegotiate the contract. This party must continue to perform her obligations during the renegotiation. In the case of refusal or failure of renegotiation, the parties may agree to terminate the contract from the date and on the conditions which they determine, or ask the court, by a common agreement, to set about its adjustment. In the absence of agreement within a reasonable time, the court may, upon request of one party, adjust the contract or put an end to it, from a date and subject to such conditions as it shall determine (Translation my own).

[120] *Rapport au Président* (n 47), 3.

[121] See *Störung der Geschäftsgrundlage* (Sect 313 BGB) in Germany and *eccessiva onerosità sopravvenuta* (Article 1467) in Italy.

[122] See Article 6:111(Change of Circumstances) PECL, Articles 6.2.2 (Definition of hardship) and 6.2.3 (Effects of hardship) Unidroit Principles, Article III.1:110 DCFR and Article 89 (Change of circumstances) CESL.

[123] These exclusion clauses must comply with Article 1171 CC if they are included in a *contrat d'adhésion* and are pre-determined non-negotiable clauses. For a discussion of the legal force of these provisions, see above Chapter 2.

even agree upon a compromised solution. The third one relates to the new judicial powers, which given their unpredictability may act as a deterrent in favour of a compromised response. I conclude that most commercial parties are unlikely to avail themselves of Article 1195.[124] Instead it is designed for SMEs which in the absence of a hardship clause in their contracts may use this default legal framework.[125] By contrast, more sophisticated – or prudent – parties wary of judicial interference in their contracts are likely to contract out of this rule and provide for the allocation of risk pre-emptively. Yet the contract term must not deprive the debtor's main obligation of its substance (Article 1170) or create a significant imbalance in the rights and obligations of the parties to the *contrat d'adhésion* if it is a non-negotiable pre-determined term (Article 1171). I also highlight additional exceptions to the scope of application of Article 1195 since it only applies to contracts concluded *on or after 1 October 2016*, with contracts concluded before that date still subject to the well-anchored rejection of *imprévision*.[126] To this, statutory exclusions must be added, such as the one applying to securities and financial contracts,[127] and others deriving from specific provisions found in the *droit des contrats spéciaux*.[128] The focus of my inquiry is on the new Article 1195.

In *The Commercial Impact of the New French Contract Law* and *Contractual Performance in Covid-19 Times*, I evaluate the three conditions of application of Article 1195 against the pandemic: (1) the first condition on the unforeseeability of the changed circumstance at the time of conclusion of the contract is assessed in the same objective manner as *force majeure* and is contingent on the declaration of the pandemic; (2) the second condition on the risk of change which has not been assumed by the aggrieved party may be satisfied unless the contract allocates this risk to that party;[129] and (3) the third condition appertains to the excessive

[124] See also Jean-Sébastien Borghetti, 'Non-performance and the Change of Circumstances under French law' in Ewoud Hondius et al. (eds.), *Coronavirus and the Law in Europe* (Intersentia 2020) 509, 519.
[125] See the *chambre de commerce et d'industrie* (CCI) Paris Ile de France, which remarked that not all businesses have the benefit of legal services for drafting suitable clauses, in Bénédicte Fauvarque-Cosson, 'Does Review on the Ground of *Imprévision* Breach the Principle of the Binding Force of Contracts?' in John Cartwright and Simon Whittaker (eds), *The Code Napoléon Rewritten, French Contract Law after the 2016 Reforms* (Bloomsbury Publishing 2017) 194.
[126] CA Paris 9 May 2019, No 17/04789, Gaz. Pal. 2019, No 31, 21, obs. D. Houtcieff.
[127] See Article L. 211-40-1 of the *Code monétaire et financier* (Monetary and Financial code) regarding promises arising from securities transactions and financial contracts. This exclusion was introduced by the 2018 ratification.
[128] CA Versailles 12 Dec 2019, No 18/07183, Gaz. Pal. 2020, No 14, 36 obs D. Houtcieff – special provisions for commercial leases; CA Bordeaux 27 April 2021, No 20/04054 and CA Paris, 4 June 2021, No 19/10047, Gaz. Pal. 2021, No 31, obs. D. Houtcieff and CA Douai 23 January 2020, No 19/0718, Gaz. Pal. 2020, No 14, 36, obs. D. Houtcieff – special provisions for real estate fixed price contract (*marché à forfait*) which prevents the application of Article 1195.
[129] The risks may be allocated expressly or implicitly depending on the nature of the contract itself, such as a speculative agreement.

financial burden (*onerosity*) of the performance, which in the absence of a clear test to measure this is left to judicial discretion.[130] The French courts may decide to use the PECL to define *onerosity* as either an increase in the cost of performance or a diminution of the value of performance.[131] Debtors of monetary obligations are unlikely to find relief anyway. Finally, I argue that as these application criteria will be assessed on a case-by-case basis, they may be difficult to satisfy, reducing the chance that the debtor will be successful in their claim.

In *The Commercial Impact of the New French Contract Law* and *Contractual Performance in Covid-19 Times*, I discuss the effects of the application of Article 1195, in other words, what I call the three-stage remedies – a lengthy and uncertain process, which acts as a deterrent in favour of a compromise. These remedies stand in stark contrast to the sole remedy of automatic termination available in English law, which I mention below. The first stage-remedy is the right for a party to call for a renegotiation of the contract, which is narrowly interpreted by the courts, whilst the aggrieved party must continue to perform its obligation.[132] The second-stage remedy is the ability for the parties to jointly agree to terminate the contract or ask the court to adjust the terms of the contract, which is quite unlikely given the failed or even refused renegotiations; this contradicts the legislator's aim that the parties find a common solution. The third-stage remedy is the one of last resort, which relies on the court's ability to adjust the contract or terminate it upon the request of one party, in the absence of agreement within a reasonable period. Considering the traditional rejection of any judicial revision on the basis of equity,[133] the fear of an interventionist judicial attitude appears exaggerated to me, confirming the words of the *rapporteur* to the Senate that "(t)he hypothesis where the judge will be asked by a party to review the contract will remain theoretical."[134] This solution may nevertheless be relevant to SMEs as parties to rudimentary contracts, as opposed to professionally drafted contracts,

[130] In Cass. Com. 17 February 2015, No 12-29.550, 13-18.956, 13-20.230, the *Cour de cassation* held that the seller did not provide evidence of an increase in the cost of performance of its obligations under the contract of 12 February 2001, nor of a circumstance which had fundamentally altered the balance of benefits and constituted a case of hardship. See also for a discussion on onerosity, Bertrand Fages, *Droit des obligations* (9th edn, LGDJ 2019), No. 351; Jean-Sébastien Borghetti, 'Non-performance and the Change of Circumstances under French law' in Ewoud Hondius et al. (eds.), *Coronavirus and the Law in Europe* (Intersentia 2020).
[131] See Article 6:111 (Change of Circumstances) PECL.
[132] Denis Mazeaud, *'Renégocier ne rime pas avec réviser!*', in Cass. Com. 3 Oct 2006, Dalloz 2007, 765-777, 766. See also *Hardhip in Transnational Commercial Contracts*, 75 and Chapter 3.
[133] See *Canal de Craponne* Cass. Civ., 6 March 1876, DP 1876.1.193.
[134] Francois Pillet in the report prepared by the *Commission mixte paritaire* – Report nº 352 (2017-2018). For an unexpected – even incorrect - application of the law of *imprévision* to the sale of an ongoing concern, see Trib Com., Evry, 17 Jan. 2018, No 2017 F00641, *La Boulangerie Dourdan v. La Marquise Mes Cohen et Voye* – this decision by the lower court of Evry is surprising since it related to a case of non-performance rather than a changed circumstance.

which seek flexibility and adaptability – even judicial adaptation - in response to changed circumstances. Alternatively, I discuss other tools available in the contractual toolbox in the *Code civil*, which circumvent the judge and aim to let the parties decide their own contractual fate for the sake of economic efficiency and expediency.[135] Interestingly, these self-help tools may be better suited to address the challenges of contractual performance in Covid-19 times.[136]

Overall, as I demonstrate in *Paradoxes of the Doctrine of Imprévision* and *Contractual Performance in Covid-19 Times*, the doctrines discussed above may be of limited effect in the Covid-19 context since they lack immediacy and involve unpredictability and litigation costs. They, nevertheless, set a new tone in the face of the traditional intangibility of contracts and may act as Damocles' sword forcing the parties to renegotiate and save the contract, as acknowledged in the *Rapport au Président*.[137] "Conciliatory – or negotiated – solutions outside a judicial setting are promoted."[138] In other words, it contributes to what I call a 'culture of consensus.'[139] These solutions are left to the parties to design; as such, they instil flexibility in the contractual relationship, which is the focus of the 2016 reform, and even solidarity between the commercial parties.[140] This is in contrast with the doctrine of frustration, which upholds freedom of contract consistently with a liberal individualistic view of contract in English law.[141]

3.1.2. The Doctrine of Frustration in English Law

As discussed in *Contractual Performance in Covid-19 Times*, to this day, even if English courts have stretched the doctrine of frustration to address extreme circumstances, its scope of application remains narrow. It is commonly portrayed as covering three broad sets of

[135] For instance, Articles 1219, 1220, 1221, 1223, 1224 and 1226, together with Articles 1186 and 1187 CC, which I discuss in *Contractual Performance in Covid-19 Times*, 29-31.
[136] Articles 1186 and 1187 CC appear to refer to cases of frustration of purpose, as laid out in *Krell v Henry* [1903] 2 KB 740 in English law.
[137] *Rapport au Président* (n 47), 14 – Article 1195 CC should "…play a preventive role: the risk of destruction or review of the contract by the court should encourage the parties to negotiate."
[138] Catherine Pédamon, 'The New French Contract Law and its Impact on Commercial Law: Good Faith, Unfair Contract Terms and Hardship' in Maren Heidemann and Joseph Lee, *The Future of the Commercial Contract in Scholarship and Law Reform: European and Comparative Perspectives* (Springer Nature 2018) 99, 105.
[139] ibid.
[140] For a discussion of "solidarism," as a rectification of individualism, see Célestin Bouglé, *Le Solidarisme*, (Giard et Brière 1907). See also below Chapter 4.
[141] See Roger Brownsword, *Contract Law: Themes for the Twenty-First Century* (2 edn, OUP 2006), 137-138

supervening events – physical impossibility, illegality, and frustration of purpose – which may overlap with each other.[142] Yet de facto there is no limited class of frustrating events.[143]

In contemporary cases where frustration was argued,[144] and for the purpose of my functionalist comparison, I identify three conditions of application which courts consider: (1) the unforeseeability of the supervening event, or possibly unforeseen event, which relates to the allocation of the risk in light of the contract;[145] (2) the absence of fault of either party as frustration should not be self-induced;[146] and (3) a radical change of obligation, as held by Lord Radcliffe in *Davis Contractors*.[147] In the recent case *Spicejet* relating to aircraft 'dry' leases, the English court confirmed that the doctrine is "not to be lightly invoked; that mere incidence of expense or delay or onerousness is not sufficient; and there has to be as it were a break in identity between the contract as provided for and contemplated and its performance in the new circumstance."[148] These conditions must be read against the contract in its context and in light of the circumstances when the contract was made, pursuant to a 'multi-factorial approach.'[149] It is conceivable that certain contracts may fulfil this requirement in view of government restrictions, which may make certain types of contracts impossible or illegal to perform or radically altered due to the market disturbances caused by the Covid-19 pandemic and its related measures.[150] For example, conditions may be met in cases where suppliers were unable to work during the pandemic.[151] It is, however, unlikely that the condition relating to the allocation of risk be met. In *Spicejet*, which included a "hell-or-high water clause,"[152] the judge

[142] See, for instance, *Appleby v Myers* (1867) LR 2 CP 651: *Pioneer Shipping Ltd v BTP Tioxide Ltd* (*The Nema)* [1982] AC 724, *Fibrosa Spolka Ackcyjna v Fairbairn, Lawson Combe Barbour Ltd* [1943] AC 32.
[143] *Canary Wharf v European Medicines Agency* [2019] EWHC 335 (Ch), [41].
[144] *National Carriers v Panalpina* [1981] 1 All ER 161, [175].
[145] See *Salam Air SAOC v Latam Airlines Group SA* [2020] EWHC 2414 (Comm); *Edwinton Commercial Corporation, Global Tradeways v Tsavliris Russ (Worldwide Salvage & Towage) Ltd (The Sea Angel)* [2007] EWCA Civ 547, [111]. See also *Canary Wharf v European Medicines Agency* [2019] EWHC 335 (Ch), [213] and [243] and *Wilmington Trust SP Services (Dublin) Ltd v Spicejet Ltd* [2021] EWHC 1117 (Comm), at [58].
[146] *J Lauritzen AS v. Wijsmuller BV (The Super Servant Two)* [1990] 1 Lloyd's Rep 1.
[147] See for instance *Appleby v Myers* (1867) LR2 CP 651, *The Nema* [1982] AC 724, *Fibrosa Spolka Ackcyjna* [1943] AC 32, *Acetylene Corp of Great Britain v Canada Carbide* (1921) 8 LLR 456.
[148] *Wilmington Trust SP Services (Dublin) Ltd v Spicejet Ltd* [2021] EWHC 1117 (Comm), [58]. See also *Tsakiroglou & Co Ltd v Noblee Thorl GmbH* [1962] AC 93.
[149] *Edwinton Commercial Corporation v Tsavliris Russ (WorldwideSalvage & Towage) Ltd (The Sea Angel)* [2007] EWCA Civ 547, [111].
[150] For a discussion of the different types of impossibility, see Hugh Beale and Christian Twigg-Flesner, 'COVID-19 and English Contract Law' in Ewoud Hondius et al. (eds.), *Coronavirus and the Law in Europe* (Intersentia 2020), 463-468.
[151] Hugh Beale and Christian Twigg-Flesner, 'COVID-19 and English Contract Law' in Ewoud Hondius et al. (eds.), *Coronavirus and the Law in Europe* (Intersentia 2020) 461, 466.
[152] "Hell-or-high water clauses" describe an obligation as absolute and unconditional in order to compel a party to perform its contractual obligations irrespective of any reasons for non-performance. These clauses are generally enforced according to their terms and are a defence to a claim of impossibility or frustration.

held that "the general risk of the aircraft being grounded due to any prohibition on use or defect in airworthiness was foreseen by the parties and allocated to the (lessees)."[153] I note that 'frustration of purpose', as held by Foxton J in *Salam Air SAOC* "has seldom been applied since it first emerged in the Coronation cases," so it is unlikely to apply in the context of the pandemic.[154] If the three part-test is met, performance is discharged and the contract is brought to an end automatically at the time the frustration occurs, irrespective of the parties' wishes; it is an 'all or nothing outcome'[155] The Law Reform (Frustrated Contracts) Act 1943 applies to the issue of loss distribution.[156] As a result, the doctrine of frustration is likely to continue to be narrowly construed as it should not be perceived as an escape route to an imprudent or more onerous bargain. There is no sign that the pandemic will have much of an effect on general English contract law.[157] I therefore argue that the law of frustration does not seem best suited to address the Covid-19 challenge, leaving the parties to their own destiny.

As I compare the scope, criteria of application and effects of each doctrine invoked in response to the Covid-19 pandemic and the measures imposed by the governments in England and France, I conclude that (1) the doctrine of frustration is only partially the functional equivalent of the doctrine of *force majeure* whereas (2) the doctrine of frustration is not the functional equivalent of the doctrine of *imprévision.* I explain this conclusion in light of a distinction between instances which render performance of the contract either impossible or more onerous in the new circumstances.

First, in instances of supervening events, causing impossibility to perform, the doctrine of frustration and *force majeure* may be functionally equivalent but only partially with respect to (1) their scope of application, (2) the conditions of application and (3) the effects for the following reasons. First, with respect to the scope of application, a distinction must be drawn: (1) in the circumstances where performance becomes wholly or permanently impossible, either legally or physically,[158] the doctrines in both legal systems may apply and lead to the same results, as discussed below; (2) in other circumstances where the impossibility to perform is

[153] *Wilmington Trust* (n 148), [62]. Neither the threat of the COVID-19 pandemic nor the grounding of the B737-MAX 8 by international regulators could be used as exception to the obligation to pay rent.
[154] *Salam Air SAOC v Latam Airlines Group SA* [2020] EWHC 2414 (Comm), 49.
[155] See *National Carriers v Panalpina* [1980] AC 675, 712. See also *Hirji Mulji v Cheong Yue SS Co* [1926] AC 497.
[156] The Law Reform (Frustrated Contracts) Act 1943 distributes the loss incurred in a case of frustration.
[157] Beale and Twigg-Flesner (n 151), 488.
[158] See Mindy Chen-Wishart, *Contract Law* (6th edn, OUP 2018), 294-302.

only partial or temporary, divergences may exist - in English law, there is no partial frustration (except in the case of severable obligations under the contract)[159] and temporary frustration is "no excuse unless it lasts so long that performance or the contract becomes impossible (…) or performance in the new circumstances would be 'radically different' to what the contract called for;"[160] by contrast, it is a defence in French law. Second, in terms of the conditions of application, both jurisdictions narrowly construe them and impose a high threshold for impossibility to perform.[161] Even when these conditions carry the same name, i.e., no fault in producing the supervening event or unforeseeability, they do not have the same meaning.[162] 'Self-induced' frustration, which prevents the application of frustration, covers "deliberate or negligent conduct (which) has brought about the alleged frustrating event" [163] whereas the doctrine of *force majeure* rather focuses on the nature of the impediment, which is beyond the debtor's control.[164] With respect to unforeseeability, it is a matter of degree in both jurisdictions.[165] However, whereas in English law, it is primarily assessed from the perspective of the allocation of the risk of the inability to perform in the contract, either expressly or impliedly,[166] in French law it relates to the foreseeability of the impediment assessed objectively, which leaves some discretion to the court.[167] In both jurisdictions, courts must assess foreseeability at the time of conclusion of the contract, which is a difficult task.[168] Third, in terms of effects, in the case of wholly or permanent impossibility, the results may be the same in both jurisdictions since the contract may be automatically discharged, and the parties

[159] This is the case where performance on a date set in the contract is essential. For temporary closure, see *National Carriers Ltd v Panalpina (Northern) Ltd* [1981] AC 675.
[160] Beale and Twigg-Flesner (n 151), 464.
[161] In English law, it must be literally impossible. See *Davis Contractors Ltd v Fareham UDC* [1956] AC 696.
[162] Radosveta Vassileva, 'Change of Economic Circumstances in Bulgarian and English Law. What Lessons for the Harmonization of Contract Law in the European Union?' (2016) PhD, 143.
[163] Mindy Chen-Wishart, *Contract Law* (6th edn, OUP 2018), 307. For an example of a choice not to perform a certain contract, which bars the frustration of that contract, see *The Super Servant Two*.
[164] It used to refer to the condition of externality in the sense of 'external (outside) to the debtor's control', see P.-H. Antomattéi, *Contribution à l'étude de la force majeure*, pref. B. Teyssié, (LGDJ 1992).
[165] See Mindy Chen-Wishart, *Contract Law* (6th edn, OUP 2018), 306. In *The Eugenia*, Lord Denning states: "it has frequently been said that the doctrine of frustration only applies when the new situation is 'unforeseen' or 'unexpected' or 'uncontemplated', as if that were an essential feature. But it is not so. The only thing that is essential is that the parties should have made no provision for it in their contract." In French law, it is a reasonable standard assessed relatively, see Julia Heinich, 'L'incidence de l'épidémie de coronavirus sur les contrats d'affaires: de la force majeure à l'imprévision' (2020) Recueil Dalloz 2020, 611.
[166] In *Salam Air SAOC*, the risk of "any …occurrence of whatever kind which shall deprive [Salam Air] of the use, possession and enjoyment" of the aircraft was placed on the lessee who could not claim that the contract was frustrated by flight bans due to the pandemic imposed in Oman.
[167] See Cass. Com. 11 Dec. 2019, No 18-11.195 for a case of a fire, which did not meet the condition of unforeseeability.
[168] Philippe Stoffel-Munck, 'L'imprévision et la réforme des effets du contrat' (2016) 112 Revue des Contrats hors-série 30.

released from their obligation to perform in the future.[169] By contrast, in other cases of impossibility, this may lead to temporary suspension of performance during the period of impossibility, without incurring any liability, in French law, while it is not an outcome available in English law, the parties remaining liable to perform.

Second, in instances of changed circumstances, making performance more onerous, where the doctrine of frustration and *imprévision* apply, there is no functional equivalence given the differences to (1) the scope of application, (2) the conditions of application and (3) the effects of these doctrines, which I consider successively. First, with respect to the scope of application, these doctrines are invoked in distinct ways. The law of frustration has a restrictive scope of application, which only applies when the supervening event radically or fundamentally changes the nature of performance.[170] This contrasts with the law of *imprévision*, which cover any changed circumstances, whether economic, legal or political.[171] Second, concerning the conditions of application, the same remarks apply with respect to unforeseeability, as discussed above. For instance, French courts expect parties to be familiar with risks in their sectors of activities.[172] In addition, Article 1195 requires that the party has not agreed to bear the risk of the change, which is similar to the allocation of risk in English law, which may be express or implied. The last condition relates to the effects of the impediment on the contract performance, which differ drastically – in English law, the event must cause a radical change of obligation and cannot be invoked simply because performance has become more onerous, even dramatically more expensive.[173] By contrast, in French law, it is required that the changed circumstance render the performance excessively onerous. There is no clear test to determine excessive onerosity, so it is left to the French courts to decide its meaning with the unpredictability it entails.[174] In sum, what matters in English law are the effects of the event on the promise – is it what I promised to do? – whereas French law is concerned about the effects

[169] Each party must make restitution for what they have received. I will discuss the rules on restitution in both legal systems in a forthcoming paper.
[170] *Blackburn Bobbin* (n 100), [551]. In *Spicejet*, where incidence of expense or delay or onerousness is not sufficient.
[171] Bertrand Fages, *Droit des obligations* (9th edn, LGDJ 2019) No. 351.
[172] In a case governed by the CISG, *Société Romay AG v SARL Behr France*, Cass. Civ. 30 June 2004 CISG–online Case No. 870, the *Cour de cassation*, applying the CISG, decided that the events leading to a change in value of commodities were part of the risk assumed by the buyer, thus failing to meet the condition of unforeseeability in article 79 CISG.
[173] *Davis Contractors Ltd* (n 99). For a discussion of the unusual case, *Metropolitan Water Board v Dick Kerr* [1918] AC 119, see Guenter Treitel, *Frustration and Force Majeure* (3rd edn, Sweet & Maxwell 2014), para 6-031. See also *Thames Valley Power Limited v Total Gas & Power Limited* [2005] EWHC 2208.
[174] See above for a discussion on excessive onerosity.

on the performance itself – has the performance become excessively onerous?[175] Third, in terms of the remedies, the differences are striking since frustration results in automatic termination at the time it arises whereas *imprévision* offers an ambivalent three-stage remedy led by the parties themselves, which may lead to judicial adjustment or termination as a last resort. The progression in the choice of remedies in French law is emblematic of a legal culture, which seeks to find a negotiated solution, which accommodates the interests of all parties for the benefit of society, by contrast with the radical remedy of automatic discharge in English law for the sake of legal certainty.

I explain these differences between English and French law in the competing contractual principles and values of these two jurisdictions – English courts are primarily committed to freedom of contract and *pacta sunt servanda*, and the needs of commercial parties as expressed in legal certainty.[176] They are concerned about the alteration of the promise rather than the unjust outcome resulting from the supervening event - the agreement becomes *unfair* when parties have to perform something that they did not promise to perform. This is consistent with the ideology of market individualism, as advanced by Brownsword.[177] By contrast, in Article 1195, the French legislator designs a judicial mechanism to redress the economic imbalance as it vests the court with broad discretion to adjust or terminate the contract, with the help of objective parameters and expert determination. In any case, is a court well placed to exercise these discretionary powers in specialised sectors?[178] It seems too early to say how French courts will apply Article 1195, but it is unlikely that they would enthusiastically embrace a mechanism that would contribute to the congestion of their courts by forcing them to exercise an economic function that they are not qualified for or are generally reluctant to perform, and challenge the principle of *pacta sunt servanda*.[179] A recent decision by a first instance commercial court however contradicts this prediction as it incorrectly applies Article 1195 to a case of non-

[175] For English law, see *Davis Contractors Ltd* (n 99). See also Radosveta Vassileva, 'Change of Economic Circumstances in Bulgarian and English Law. What Lessons for the Harmonization of Contract Law in the European Union?' (2016) PhD, 144.
[176] See Iain MacNeil, 'Uncertainty in Commercial Law' (2009) 13 Edinburgh Law Review 68, 69. Legal certainty is associated with the idea that law should be predictable and treat similar cases consistently. McCardie J in *Blackburn Bobbin v TW Allen* [1918] 1 KB 540, [552] - "the utmost importance to a commercial nation that vendors should be held to their business contracts."
[177] See Roger Brownsword, *Contract Law: Themes for the Twenty-First Century* (2 edn, OUP 2006) 137-138.
[178] By analogy, see Gunther Teubner, 'Legal Irritants: Good Faith in British Law or How Unifying Law Ends Up in New Divergences' (1998) 61 MLR 1, 11-32. As a legal transplant, I am doubtful that the doctrine of *imprévision* will "irritate" the French contract law, as it is consistent with the pursuit of *just* outcomes under the principle of good faith. I nevertheless acknowledge that it may cause irritation in relation to the traditional legal and social functions of the court – *l'office du juge.*
[179] Dimitri Houtcieff, *Droit des contrats* (4th edn, Bruylant 2018) 842.

performance.[180] This questionable application is hopefully one of a kind,[181] but it shows that lower courts may be willing to apply this provision. I nevertheless acknowledge the French legislator's clear preference for negotiated solutions in the spirit of the 2016 reform[182] – the intervention of the court is very much a last recourse.[183] Considering this, Article 1195 may not reflect the state of French contract law as the *ordonnance No 2016-131* vests parties with self-help tools as a way to expedite the resolution of a dispute away from the courts, which I discuss in *The Commercial Impact of the New French Contract Law* and *Contractual Performance in Covid-19 Times*. French courts nevertheless remain the ultimate arbiter in case of a dispute. These provisions seek to reconcile two views of the contract – a liberal one as a tool of economic exchange and a social one which needs to be saved for the sake of justice – by contrast English libertarian understanding.

However, I argue that despite the absence of functional equivalence, the results to imperfect or non-performance caused by supervening events may be similar in England and France for three reasons. The first one is that both jurisdictions are wary of the doctrines I have just discussed narrowly construing them to preserve the binding force of contract in the name of contractual freedom. The second one, which I demonstrate in *Contractual Performance in Covid-19 Times*, is that as contract law in England and France may not offer ideal solutions, both legal systems appear to encourage the parties to be proactive, albeit by different means, and design the outcome which suits them. Whereas the British Institute of International and Comparative Law (BIICL) exhorts parties to be creative in finding solutions to their disputes in England, the French legislator provides the contractual parties with a range of legal instruments to address imperfect or non-performance. In addition, in English law, parties may rely on traditional equitable remedies to address difficulties pertaining to performance. The third one is to be found in the contract itself – in both jurisdictions, as a reaction to the narrowly confined judicial solutions, courts encourage parties to fend for themselves and foresee future events in their agreement.[184] Both Beale and Campbell suggest that the current English rule, not recognising force majeure, is a penalty default, meaning a rule that is calculated to encourage parties to

[180] See Trib Com., Evry, 17 Jan. 2018, No 2017F00641, *La Boulangerie Dourdan v. La Marquise Mes Cohen et Voye*.
[181] Dimitri Houtcieff, 'Une imprévisible application de l'imprévision' (18 Sept 2018) 31 Gazette du Palais 28.
[182] See above Section 2.1.1 - The *ordonnance* No 2016-131 aims at finding solutions, which are economically efficient while protecting the parties.
[183] See Gaël Chantepie and Mathias Latina, *La réforme du droit des obligation* (Dalloz 2016), 449.
[184] Ewan McKendrick, '*Force Majeure* Clauses: The Gap between Doctrine and Practice' in Andrew Burrows and Edwin Peel (eds), *Contract Terms* (2nd ed, OUP 2007) 239. See Gaël Chantepie and Mathias Latina, *La réforme du droit des obligation* (Dalloz, 2016), 442.

insert a clause of their own because the default rule produces absurd results. In *Hardship in Transnational Commercial Contracts*, I discuss how the contract appears to be the solution against the uncertainties thrown up by the law in a situation of supervening events.[185] Pursuant to the taxonomy of commercial contracts I suggest to use, professionally drawn contracts address these uncertainties by anticipating these events via *force majeure* or hardship clauses, or MAC or material adverse effect (MAE) clauses,[186] with varying degrees of complexities depending on the relevant sector.[187] Recent decisions in France have confirmed the application of force majeure clauses in the context of the pandemic and the distribution of the pandemic risk in insurance contracts.[188] By contrast, rudimentary contracts may be silent or rely on the other party's limited standard terms against the general contract law in England and France.[189] In all these situations, courts in both jurisdictions have to construe these clauses or the contract itself applying their principles of contractual interpretation in England and France, which I will now discuss.

3.2. Contractual Interpretation in England and France

In *Comparative Contractual Interpretation*, I consider how the principles applicable to the interpretation of commercial contracts by English and French courts compare following the 2016 reform of French contract law and in light of a series of recent English decisions.[190] I

[185] For a discussion of the different types of contract terms, see Chapter 5, The Contractual Solution, in *Hardship in Transnational Commercial Contracts*.
[186] See ICC Force Majeure and Harship clauses, available at <https://iccwbo.org/content/uploads/sites/3/2020/03/icc-forcemajeure-hardship-clauses-march2020.pdf>. MAC or MAE clauses describe clauses which permit parties to declare an event of default, refuse draw-down of financing, or exit from a transaction entirely upon the occurrence of a fundamental change in one party's ability to perform its obligations, or representations made in connection with a party's financial position. They are commonly found in banking transactions, such as in the case *BNP Paribas v Yukos Oil Company* [2005] EWHC 1321 (Ch), and in the Mergers and Acquisitions sector with respect to share purchase agreements for instance, as found in *Travelport Limited v Wex Inc* [2020] EWHC 2670 (Comm), [172], they can be heavily negotiated.
[187] See for instance, M.J. Denison, 'Force majeure clauses in LNG sales and purchase agreements' (2021) 14(2) Journal of World Energy Law and Business 88-99. A recent case, *Travelport Ltd v Wex Inc* [2020] EWHC 2670 (Comm), shows the level of intricacy of a MAE clause, together with the other clauses relating to carve-out exceptions, contained in a share purchase agreement as the court seeks to understand their meaning. See also Julia Heinich, 'L'incidence de l'épidémie de coronavirus sur les contrats d'affaires de la force majeure à l'imprévision' (2020) Recueil Dalloz 611.
[188] CA Paris 28 July 2020, No 20/06689; CA Colmar 12 March 2020 No 20/01098; Trib Com Paris 22 May 2020, No 2020017022.
[189] In the case of a standard form contract under French law, these terms may be subject to Article 1171 CC. For a discussion of Article 1171 C, see above Chapter 2. See also *The Commercial Impact of the New French Contract Law*, 112.
[190] It used to be relatively ignored, except for a few seminal papers, such as Stefan Vogenauer, 'Interpretation of Contracts: Concluding Comparative Observations' in Andrew Burrows and Edwin Peel (eds), *Contract Terms* (Oxford University Press 2007) 123-150. Since the 2016 reform, it has given rise to interesting studies in book

focus on the following aspects of interpretation in England and France: (1) the nature of the interpretative question, (2) the purpose of contractual interpretation and (3) its scope.

As I compare each aspect, I note a (broad) functional equivalence between some principles of contractual interpretation in England and France, which is not surprising, since in any system of law any court interpreting a commercial contract must be bound by the ordinary meaning of the words used whilst having some understanding of its business purpose and context. More precisely, despite divergences as to the nature of the interpretative question, I notice a *rapprochement* pertaining to the purpose of contractual interpretation – the formal recognition of an objective approach to construction in the *Code civil* (Article 1188 para 2) aligns French law with the English position. It applies when no subjective intention can be discerned, which is the case with respect to professionally drafted contracts. I adopt Lord Hodge's distinction in *Wood v Capita* who held that:

> the court must consider the contract as a whole and, depending on the nature, formality and quality of drafting of the contract, give more or less weight to elements of the wider context in reaching its view as to that objective meaning.[191]

(1) Professionally drawn contracts, as they contain detailed express terms, call for an objective textual analysis.[192] In *Wood v Capita*, Lord Hodge acknowledged that the provisions which lack clarity may be interpretated "by considering the factual matrix and the purpose of similar provisions of the same type." [193] I however argue that even if clauses are badly drafted and/or parties ill-advised, the clearer the natural meaning the more difficult it is for courts to justify departing from it in both jurisdictions. In that case, the court found the circumstances triggering the indemnity in the language that the parties had used.[194] (2) By contrast, rudimentary contracts are more likely to be subject to a contextualist approach allowing the courts to seek the common intention in the context with the help of the factual matrix. This distinction, I argue, also applies in French law as French courts are likely to follow an objective textualist

chapters – e.g., see Hugh Beale, Bénédicte Fauvarque-Cosson, Jacobien Rutgers, Stefan Vogenauer, *Cases, Materials and Text on Contract Law: Ius Commune Casebooks for the Common Law of Europe* (3rd edn, Hart Publishing 2019), and Francois Ancel and Bénédicte Fauvarque-Cosson, *Le nouveau droit des contrats, Guide bilingue à l'usage des praticiens* (Librairie Générale de Droit et de Jurisprudence 2019).

[191] *Wood* (n 16), [10].

[192] ibid, [13].

[193] ibid.

[194] ibid, [42].

approach when interpreting a professionally drawn contract in a sophisticated business setting, as opposed to a focus on the parties' subjective intentions with respect to rudimentary contracts. For instance, I consider that even if a French court may be tempted to read a *force majeure* or hardship clause against the doctrine of the same name, it runs the risk of having its decision quashed by the *Cour de cassation* on the basis that courts may not distort clear and precise terms.[195] Similarly, in English law, Beale and Twigg-Flesner note that each clause is to "be interpreted individually (…), and without the help of any general doctrine that might inform the discussion, for example by providing an established meaning to the phrase 'force majeure'."[196] As such, the results may be similar in the two jurisdictions. This confirms Vogenauer's conclusion even before the 2016 reform that in practice the results reached in comparative situations in France and England are similar; for this author, the distinctive objective/subjective approach relates to differences in values and ideologies rather than substance.[197] In my example, however, I consider that the results are the same because French courts follow an objective approach to interpretation; there are more risks of divergences if these courts focus on the parties' subjective intentions using a subjective evidential basis. In parallel, the complexification of contracts accentuates the complexity of interpretation, which naturally calls for an objective literal approach. In any event, any uncertainties as to the scope of evidence or the mode of interpretation may be addressed through express terms, such as entire agreement or interpretation clauses, which are usually held to be valid in both jurisdictions in the name of contractual freedom. I therefore argue that contractual terms dealing with supervening events in professionally drafted contracts in both jurisdictions are likely to be construed the same way in an objective textualist manner, thus reaching similar results.

Nevertheless, in *Comparative Contractual Interpretation*, I show that differences between England and France persist which relate to the normativity of the principles of contractual interpretation and the extent to which courts may consider subjective evidence relating to the background, the context and the genesis of the transaction.[198] These differences matter when interpreting rudimentary contracts as their shorter – more succinct – form naturally leaves room

[195] Article 1192 CC.
[196] Beale and Twigg-Flesner (n 151), 474.
[197] Stefan Vogenauer, 'Interpretation of Contracts: Concluding Comparative Observations' in Andrew Burrows and Edwin Peel (eds), *Contract Terms* (2nd edn, OUP 2007) 123, 139-140 and 150.
[198] Blurring the line between interpretation and rectification seems unavoidable when one applies a contextual approach. So many exceptions to the parol evidence rule means that extrinsic evidence are for the most part admissible to prove the existence of a term.

for judicial discretion. With respect to these contracts, courts in both jurisdictions may reach diverging results as French courts are likely to search for the subjective intention of the parties with the help of a wide subjective evidentiary basis, as opposed to the English objective interpretation, even if this approach is contextualist. One element, which French courts take into consideration, unlike English courts, is the nature of the relationship between the parties, whether the parties have equal bargaining power. This is consistent with the doctrine of unequal contracts introduced by the 2016 reform discussed above.[199]

I draw a link between the interpretative method and the theory of contract in England and France in *Comparative Contractual Interpretation*.[200] As the *Code civil* officially enshrines an objective approach, I consider that the French conventional understanding of contract is shifting towards an objective theory of contract in line with the utilitarian view of English contract law. The traditional French view of contract which relies on the subjective common intention of the parties anchoring the agreement in its commercial realities now co-exists with an objective approach which extracts itself from this reality and gives an abstract understanding of the contract.[201]

In conclusion, my comparative inquiry shows that despite the lack of functional equivalence of the doctrines applicable to difficulties pertaining to performance, the results may be similar with respect to professionally drafted contracts as their terms may be interpreted pursuant to a similar approach in both jurisdictions. I argue that using the lens of this taxonomy of commercial contracts contributes to the predictability of outcomes in both jurisdictions, beyond the traditional common law/civil law divide. I also demonstrate in *Contractual Performance in Covid-19 Times*, that as neither England nor France offers ideal solution, parties may be better off finding a resolution to their disputes beyond the legal realm and respond to calls for collaboration. Could this be the emergence of a culture of dialogue?

[199] See above Chapter 2.
[200] It is important to note that there is no general theory for commercial contracts, distinct from the *Code civil*.
[201] For Definitions of Contract, see Hugh Beale (gen ed), *Chitty on Contracts*, (34th edn, Sweet & Maxwell 2021) Section 2.

Chapter 4. A Collaborative Approach in Commercial Contracts in England and France: A Culture of Dialogue?

In this Chapter, I consider how each legal system enforces calls of collaboration in case of non-performance or imperfect performance. My functional comparison focuses on two duties - the duty to cooperate and the duty to renegotiate – as alternatives to litigation for the sake of finding an amicable – even fair - solution to the dispute.

My inquiry into these duties considers the extent to which each legal system is committed to a culture of dialogue between the parties to the contract as cooperation may be used as an instrument to foster the performance of the contract and renegotiation as a device to remedy *unjust* outcomes caused by changed circumstances. As I show in *The Duty to Cooperate* and *Hardship in Transnational Commercial Contracts*, these duties tend to live in the shadow of good faith, which give rise to substantial doctrinal differences between England and France. In English law, good faith as a legal concept anchored in a legal doctrine is traditionally rejected.[202] The traditional hostility of English law towards good faith is rooted in the pursuit of self-interest as a feature of commercial transactions in a market economy,[203] and a resistance to such an overriding principle as opposed to piecemeal solutions to problems of unfairness.[204] Good faith is viewed as limiting or qualifying the parties' contractual freedom and binding force of contract.[205] By contrast, in French law, I argue that good faith is an intrinsic part of freedom of contract albeit with a life of its own in contract law.[206] Broadly speaking, it may be used to "facilitate the interpretation of the rules applicable to contracts and if need be to fill in the gaps."[207] As noted in the *Rapport au Président*, the principle of good faith should not be

[202] For a distinction between good faith as legal or contractual concepts, see Hugh Beale (gen ed), *Chitty on Contracts*, (34th edn, Sweet & Maxwell 2021) para 2-027 - "legal or contractual concepts, that is, ones which are used by the law itself or by contractual practice rather than with broader justifications for legal doctrines or rules expressed in other terms." It is also interesting to note the differences between good faith as legal value and legal concepts.
[203] *Pakistan International Airline Corp* (n 18), [95] and also [133].
[204] *Interfoto Picture Library Ltd v stiletto Visual Programmes Ltd* [1988] QB 433, 439 (Bingham LJ).
[205] See Simon Whittaker 'Contracts, Contract Law and Contractual Principle' in John Cartwright and Simon Whittaker (eds), *The Code Napoléon Rewritten, French Contract Law after the 2016 Reforms* (Bloomsbury Publishing 2017) 33. See also Lord Devlin in *The Enforcement of Morals* (Oxford University Press, 1965) 47 - "Free dealing is fair dealing" as quoted by PS Atiyah, *The Rise and Fall of Freedom of Contract* (Clarendon Press, 1979) 403 and generally 402-05, 544-61. See also *MSC Mediterranean Shipping Co SA v Cottonex Anstalt* [2016] EWCA Civ 789, [2016] 2 Lloyd's Rep. 494, [45].
[206] See Article 1104 CC as the third principle in the trilogy. For a general discussion, see Gaël Chantepie and Mathias Latina, *La réforme du droit des obligation* (Dalloz 2016), 92-101. Freedom of contract, as other freedoms, cannot be absolute.
[207] *Rapport au Président* (n 47), 4.

used for an "*increased judicial interventionism*."[208] It is not a tool to rewrite the contract and "*undermine the very substance of the rights and obligations legally agreed upon by the parties* (…)."[209] Similarly, it is not an instrument for altruism or solidarity as advocated by the solidarist movement.[210] It nevertheless fulfils different functions – first, a corrective function as it vests the French judge with the power to punish bad faith and limit the excesses of self-interested or opportunistic behaviour, such as improper bargaining tactics, disloyal conduct or 'abusive' refusal to renegotiate;[211] second, a purposive function as it sets a standard of conduct, which allows the court to check that parties perform their obligations in the spirit of the contract in accordance with its purpose, as I discuss in *The Commercial Impact of the New French Contract Law*; and third, as a source of positive obligations deriving from the standard of conduct, such as duties of loyalty, cooperation or renegotiation, which I compare in *The Duty to Cooperate* and *Hardship in Transnational Commercial Contracts*. Overall, French courts use good faith with caution.

As I consider the calls for collaborating, I note in *Contractual Performance in Covid-19 Times* the *surprising* exhortations from the BIICL and the UK Cabinet office. On the other hand, the BIICL calls for " ... creative, graded, but nevertheless rigorous approach without prejudicing the underlying need for legal certainty" – a "breathing space."[212] On the other, the Cabinet office's note advises parties to contracts impacted by the COVID-19 emergency "to act responsibly and fairly,"[213] or in other words to be "(...) reasonable and proportionate in responding to performance issues and enforcing contracts, acting in a spirit of co-operation and aiming to achieve practical, just and equitable contractual outcomes having regard to the impact on the other party (or parties) (…)."[214] These exhortations are in stark contrast with the

[208] ibid.
[209] See for example Cass. Com. 10 July 2007, No 06-14.768. In that case, the court held that "if the principle that agreements must be performance in good faith (former Article 1134 CC) enables the court to punish the disloyal use of a contractual prerogative, it does not authorise it to undermine the very substance of the rights and obligations legally agreed upon by the parties (…)." See als Cass. Civ. 3, 9 December 2009, No 04-19.923.
[210] See Francois Gény, Léon Duguit and Emmanuel Gounot from the late 19th century to modern times through the works of Christophe Jamin and Denis Mazeaud. See Denis Mazeaud, 'Imaginer la réforme' (2016) Revue des Contrats 610.
[211] Cass. Civ. 3, 21 March 2012, No 11-14.174; Cass. Com. 10 July 2007, No 06-14.768.
[212] BIICL'S "Breathing Space" Concept Notes 1, 2 and 3 (7 April 2020) <Breathing Space- Concept Notes on the effect of the pandemic on commercial contracts (biicl.org)> accessed 12 March 2022.
[213] Cabinet Office, Guidance on responsible contractual behaviour in the performance and enforcement of contracts impacted by the COVID-19 emergency (7 May 2020) (para 3) <Microsoft Word - *Covid-19 and Responsible Contractual Behaviour (web final) (7 May).docx (publishing.service.gov.uk)> accessed 12 March 2022, para 3.
[214] ibid, para 14.

adversarial nature of a bargain in English law.[215] Their influence is questionable as commercial parties commonly make their decisions in light of business considerations, e.g. whether they wish to pursue or not their commercial relationship, whether there is any prospect of a future relationship, most obviously where one party is insolvent, or whether the insurance policy covers the loss. Nevertheless, could these injunctions be symptomatic of a change of values in favour of dialogue in the business sphere in response to the pandemic, as I suggest in *Contractual Performance in Covid-19 Times*? Could they rather be directed to the courts to factor in all the circumstances surrounding the contract rather than applying the strict letter of contract in the interpretative process? In a recent case, an English court stayed the payment of the sums due by the lessee to the lessor inviting the parties to mediate to find a common solution[216] – mediation appears to give the *breathing space* needed by the parties. This alternative mode of dispute resolution has also become a mode of dispute resolution of choice in French law.[217] Beale and Twigg-Flesner consider that the parties' willingness to find a common solution will depend on the way each party perceives their legal position – if it is unclear, "they may readily settle for a sum representing part of the claim;" if not, they will go to court.[218] Yet, commercial actors may not act rationally, and be ready to go to court as a tactic to extract a compromise from the other party or redress what is perceived as an injustice. Whatever the motivations, I inquire into the extent to which each legal system may encourage parties to engage in a dialogue to pre-empt judicial proceedings.

4.1. The Duty to Cooperate in English and French Contract Law: One Channel, Two Distinct Views

In *The Duty to Cooperate*, I inquire whether *cooperation* in its legal dimension is functionally equivalent in England and France.[219] I argue that the duty to cooperate has different doctrinal foundations and scope in each legal system and that the relationship between *cooperation* and good faith is uncertain in both jurisdictions.

[215] See Lord Sumption, 'A Question of Taste: The Supreme Court and the Interpretation of Contracts' (2017) Oxford University Commonwealth Law Journal 301, 310. See also *Walford v Miles* [1992] 2 AC 128, 138, where good faith was held "*unworkable in practice*".
[216] See Miss Julia Dias QC sitting as Deputy High Court Judge deciding to stay the execution of the judgments to allow the parties to undertake meditation or some other form of alternative dispute resolution in *Wilmington Trust SP Services (Dublin) Ltd v Spicejet Ltd* [2021] EWHC 1117 (Comm).
[217] Olivier Buisine, 'L'imprévision, outil de restructuration en temps de crise' (3 May 2022) Gaz. Pal, No 15. Conciliation or mediation is mandatory in certain cases, in particular for small claims of a value oof less than 5,000 euros, see Article 750-1 of the *Code de procédure civil*.
[218] Beale and Twigg-Flesner (n 151), 484.
[219] This goes beyond the colloquial meaning of cooperation as a casual expectation from the parties.

In the English tradition, the duty to cooperate is an autonomous duty with a limited scope, which only applies to the extent that it is *necessary* to make the contract *work.*[220] This duty is consistent with the well-established value of commercial common sense. Nowadays, as it emerges from recent English cases, such as *Yam Seng* and *Sheikh Tahnoon Bin Saeed Bin Shakhboot Al Nehayan v Kent*,[221] cooperation appears to live under the shadow of good faith.[222] In *Yam Seng*, Leggatt J, following in the footsteps of Lord Steyn,[223] argues that good faith may be *implied in fact* in "any commercial contract based on the presumed intention of the parties;"[224] it would have to be necessary to make the contract work, which is quite a severe limit. He contends that a number of duties could be derived from good faith, among which are "duties of cooperation" in the performance of contracts.[225] Despite the association of good faith and cooperation, many English judges remain committed to the traditional restrictive conception of the duty to cooperate and are not ready to expand its meaning. By comparison, in *The Duty to Cooperate*, I show how cooperation in French law is a complex duty, which is still coloured by the doctrinal movement of 'contractual solidarity' (*solidarisme contractuel*) albeit with limited influence in case law, and has an uncertain relationship with the duty of loyalty and good faith.[226] I explain that there is no clear definition and scope of cooperation – opinions of scholars vary but in light of case law, it takes many forms and applies to a range of contracts, which usually have a strong *affectio contractus* between the parties as they pursue a common purpose, such as concession agreements, franchise agreements and supply contracts and tend to be in the longer term. It is traditionally established by virtue of the applicable legislation, such as the one pertaining to commercial agency agreement when referring to a duty of loyalty, an express term imposing an obligation to cooperate or good faith. It is

[220] *Mackay v Dick* [1881] 6 App Cas 251. See also *Mona Oil Equipment v Rhodesia Railways* [1949] 2 All ER 1014, p. 1018.
[221] *Yam Seng* (n 17). In *Sheikh Tahnoon Bin Saeed Bin Shakhboot Al Nehayan v Kent*, [2018] EWHC 333 (Comm), [167] - Relational contracts involve "trust that the other party will act with integrity and in a spirit of cooperation. The legitimate expectations which the law should protect relationships of this kind are embodied in the normative standard of good faith." These contracts are of a different kind from that involved in fiduciary relationships.
[222] See *Yam Seng* (n 17) on the two main aspects of good faith in English law, [138] - the observance of "standards of commercial dealing which are so generally accepted that the contracting parties would reasonably be understood to take them as read" and [139] "fidelity to the parties' bargain*"*.
[223] Johan Steyn, 'Contract Law: Fulfilling the Reasonable Expectations of Honest Men' (1997) 113 LQR 433 - The English law of contract seeks to protect the reasonable expectations of honest people when they enter into contracts.
[224] *Yam Seng* (n 17), [131]. Also, in [131], Leggatt J held that he follows the established methodology of English law for the implication of terms in fact.
[225] *Yam Seng* (n 17), [145].
[226] See Jean Cédras, 'Le solidarisme contractuel en doctrine et devant la Cour de cassation' in *Rapport de la Cour de cassation 2003* (La Documentation française 2004) 186-204.

interesting to note that the 2016 reform makes no reference to a duty to cooperate.[227] I argue further that Leggatt J's view of an implied duty of good faith, and by consequence, a duty to cooperate, in relational contracts in *Yam Seng* appears to be the equivalent to the French duty of loyalty as it applies to long-term agreements with a strong feature of relationship requiring the highest degree of care, and in that sense, could lead to similar results;[228] this is by contrast to the polymorph French duty to cooperate, which is established in a range of contracts, which are not necessarily long-term or relational, pursuant to the applicable legislation or the contract terms.

However, it is important to note that most English judges continue to show their reluctance to apply a duty to cooperate, narrowly construing express clauses requiring parties to 'cooperate with each other in good faith'[229] or implying these duties only within strict confines.[230] In addition, recent cases have confirmed the natural resistance to good faith in English law,[231] and reasserted the piecemeal approach to demonstrated problems of unfairness. [232] Even if there was a duty of good faith, English judges would be reluctant to draw positive obligations from it as they often equate it with the absence of bad faith or intentionally harming the other party. In *Mid Essex Hospital*, the Court of Appeal held that "it is clear from the authorities that the content of a duty of good faith is conditioned by its context."[233] I argue in *The Duty to*

[227] Mustapha Mekki, 'The General Principles of Contract Law in the Ordonnance on the reform of contract law' (2016) 76(4) Louisiana law Review 1193, 1209. This silence also breaks away from the expansive vision of good faith of the solidarists, see Dominique Fenouillet, 'Les valeurs morales' (2016) 3 Revue des Contrats 589.
[228] Leggatt LJ is careful to draw this distinction with fiduciary contracts in *Sheikh Tahnoon* [2018] EWHC 333 (Comm), [167]. For a discussion on fiduciary principles, see Martin Gelter and Geneviève Helleringer, 'Fiduciary Principles in European Civil Law Systems' in Evan Cridle, Paul Miller and Robert Sitkoff (eds), *Oxford Handbook of Fiduciary Law* (Oxford University Press 2018). In both instances, the breach of the term leads to termination.
[229] Contractual devices, which would require the parties to cooperate, may be likened to "agreement to agree" clauses, which have no legal effect under English law. See *Walford v Miles* [1992] 2 AC 128. However, a clause referring to an obligation to meet and discuss may be enforceable but will be construed narrowly by English courts. See also *Mid Essex Hospital Service NHS Trust v Compass Group UK and Ireland Ltd* [2013] EWCA Civ 200; *Portsmouth City Council v Ensign Highways* [2015] EWHC 1969 (TCC). See also express provisions such as "all reasonable endeavours" clause which was held enforceable in *Astor Management AG v Atalaya Mining plc* [2017] EWHC 425 (Comm).
[230] *Globe Motors* v *TRW Lucas Varity Electric Steering* [2016] EWCA 396, [67].
[231] *Pakistan International Airline Corp* (n 18), [3] and also [95], which rejects the existence of a general principle of good faith as it would be a cause of uncertainty.
[232] ibid, [27]. *Interfoto Picture Library Ltd* (n 204), [439] (Bingham LJ). See also P S Atiyah, *The Rise and Fall of Freedom of Contract* (Clarendon Press 1979), 724; See also Hugh Beale (gen ed), *Chitty on Contracts,* (34th edn, Sweet & Maxwell 2021) para 2-024 – 2-032.
[233] *Mid Essex Hospital Service NHS Trust v Compass Group UK and Ireland Ltd* [2013] EWCA Civ 200 [109] and also [151]. At [112], the Court of Appeal held that the term referring to good faith in its context means that "the parties will work together honestly endeavouring to achieve the two stated purposes." For a distinction between contractual discretions and absolute contractual rights, see *Braganza v BP Shipping Ltd* [2015] UKSC 17, [18].

Cooperate that in the footsteps of Beatson LJ in *Globe Motors*, the duty of good faith in English law could be understood as an "extended duty to cooperate" implied in long-term contracts.[234] By contrast, even if French law is hesitant about the types of agreements to which cooperation applies, concerns of enforcement are less palpable because of the overarching duty of good faith over the life of the contract which implies certain cooperative behaviours. It is salient where there is an express clause of cooperation in the contract, which French courts, by contrast with English courts, will have no issue in enforcing.

As a result, I conclude that there is no functional equivalence and that divergences regarding the duty to cooperate are likely to persist given the cultural differences in the two jurisdictions – in English law, any (higher) duty of cooperation relies on the parties themselves to decide how business should get done; there is a cultural assumption that arm's length – in essence adversarial – dealing is what drives the commercial relationship.[235] There are nevertheless critiques of this assumption which consider that in practice parties rely much more on implicit relations of trust and cooperation,[236] but this does not challenge the orthodox meaning of contract. By contrast, in French law, the duty of cooperation under the shadow of good faith emphasises these relations and the co-operative nature of contracts, which is more in line with Demogue's doctrine of *solidarity* between the parties in the name of common social interests.[237] Whether a duty to renegotiate in changed circumstances carries the same differences remains to be seen.

4.2. The Duty to Renegotiate in Good Faith

The calls for collaboration, which I mention in *Contractual Performance in Times of Covid-19*, may be expressed as a duty to renegotiate the contract terms, particularly the price, in changed circumstances. This duty, which I discuss in *Hardship in Transnational Commercial Contracts*, may come into play in English and French law by virtue of general contract law, pursuant to an express provision in the contract, or where such a duty is implied in the

[234] *Globe Motors* (n 230), [67] – "in certain categories of long-term contract, the court may be more willing to imply a duty to cooperate or, in the language used by Leggatt J in Yam Seng (n 17), [131], [142] and [145], a duty of good faith."
[235] *Walford v Miles* [1992] 2 AC 128.
[236] Catherine Mitchell, *Contract Law and Contract Practice: Bridging the Gap between Legal Reasoning and Commercial Expectation* (Hart Publishing 2013).
[237] René Demogue, 'Traité des obligations en général' (Rousseau 1931) VI, 9 – "les contractants forment une sorte de microcosme. C'est une petite société ou chacun doit travailler pour un but commun qui est la somme des avantages des buts individuels par chacun. "

commercial contract – three grounds, which I consider successively. My functional inquiry raises similar elements of comparison as the ones discussed for the duty to cooperate. The relevance of this comparison is set against the Unidroit Principles[238] or the PECL[239] which provide that the parties enter into (re)negotiations with a view to adapting the contract or terminating it in a case of changed circumstances.

First, I consider if both general contract laws impose a duty to renegotiate, which would amount to "involuntary renegotiation" further to changed circumstances.[240] In *Hardship in Transnational Commercial Contracts*, I explain how English law has a natural aversion against this type of duty due to its uncertainty and as it upsets the binding force of contract.[241] Similarly, French contract law does not impose such a duty, despite the ability for the aggrieved party to '*request that the other contracting party renegotiate the contract*' under Article 1195.[242] This is not a duty, only an ability, which the other party may even reject.[243] During the phase of renegotiation, the parties must nevertheless act in good faith, but there is no positive obligation to renegotiate and agree upon revised terms. As a way to avoid opportunistic behaviours, the legislator requires the aggrieved party to continue performing its obligations during that phase; this may lead to a stalemate. I therefore argue in *Hardship in Transnational Commercial Contracts* that neither England nor France imposes a general duty to renegotiate in their respective contract law, even in times of changed circumstances, as it would go against the freedom of commercial parties to manage their own business.[244]

Second, as discussed above, some professionally drafted contracts in England and France include hardship clauses, price review or price reopener clauses, MAC clauses – one such clause may request the parties "to enter into good faith (re)negotiations to seek agreement on a fair and equitable revision of the prevailing price provisions of this Agreement"[245] in response

[238] Article 6.2.2 (Effects of hardship) Unidroit Principles.
[239] Article 6:111 (Change of circumstances) PECL.
[240] *Hardship in Transnational Commercial Contracts*, 86.
[241] *Walford* (n 235).
[242] Article 1195 CC is applicable to contracts entered into in or after 1 October 2016. There is still hardly any case law on its application.
[243] In *Hardship in Transnational Commercial Contracts*, 37 - 48 I already discussed the emergence of an obligation to renegotiate in French law in light of case law.
[244] There is however a provision in the *Code de commerce* which requires that the parties insert in their supply contract a duty to renegotiate, but this is limited to supply contract of raw vegetables.
[245] Paul Griffin, 'Natural gas price reopeners and English law' in Paul Griffin (ed), *Liquified Natural Gas: The Law and Business of LNG* (Globe Law and Business 2012), 132 and 148-149 as to the components of a contract term of renegotiation of the parties' bargain. See also Russell Weintraub, 'A Survey of Contract Practice and

to changing circumstances. This so called "anticipated renegotiation'[246] is intended to preserve the contract and maintain the financial equilibrium of the bargain, as for instance in the case of liquefied natural gas sale and purchase agreements, which are typically for the long term (in the order of 25 years) for a value of several billion dollars and rely on objective mechanisms, such as a panel of arbitrators or an appointed expert, to achieve this.[247] English courts may be reluctant to enforce these clauses if they lack the necessary certainty,[248] although they will also look to enforce the bargain made by the parties according to their contract terms.[249] Determination by an expert, arbitrator or other third party militates against claims of unenforceability for vagueness or incompleteness.[250] As I discuss in *Hardship in Transnational Commercial Contracts*, French courts may enforce a duty to renegotiate clause as it naturally draws on the principle of good faith, which contributes to the pursuit of the purpose of the contract.[251] French judges also prefer to resort to experts appointed by the parties themselves.[252] Overall, I argue that both jurisdictions are likely to enforce these clauses commonly found in long term agreements for the sake of contractual freedom even though they may construct them narrowly, referring to an objective literal interpretation, as discussed above. Yet these clauses in a standard form contract may run the risk of being deemed not written pursuant to Article 1171 CC although it is unlikely since the assessment of significant imbalance does not relate to the main subject-matter of the contract or to the adequacy of the price for the performance.[253]

Policy' (1992) Wis. L. Rev. 1, 17 – Weintraub found that 41,9% of long-term contracts reviewed had renegotiation clauses, together with provisions to protect against price changes. See for instance the ICC Hardship Clause.

[246] See *Hardship in Transnational Commercial Contracts*, p. 86.

[247] Griffin (n 245), 133.

[248] MAE clauses typically do not define what is 'material' as "parties find it efficient to leave the term undefined because the resulting uncertainty generates productive opportunities for renegotiation…" in *Travelport*, [179], citing *Akorn Inc v Fresenius Kabi AG*, N 2018-0300-JTL, 2018 WL 4719347 (Del. Ch. October 1, 2018). See also *Walford v Miles* [1992] 2 AC 128, 138 – "The reason why an agreement to negotiate, like an agreement to agree, is unenforceable, is simply because it lacks the necessary certainty."

[249] See *Barbudev v Eurocom Cable Management Bulgaria*, [2011] EWHC 1560 (Comm), for a conservative position, by contrast with *Petromec v Petroleo Brasileiro SA Petrobas* [2005] EWCA Civ 891 where Longmore LJ held that "(i)t is not irrelevant that it is an express obligation, which is part of a complex agreement drafted by City of London solicitors. It would be a strong thing to declare unenforceable a clause into which the parties have deliberately and expressly entered."

[250] Griffin (n 245), 145.

[251] Cass. Com 3 Oct 2006, No 04-13.214, D. 2007, at 765-770, for a restrictive interpretation of a hardship clause, holding that there is no contractual obligation to reach an agreement so long as the parties do not act in bad faith.

[252] See *EDF v Shell France*, CA Paris, 28 Sept 1976, JCP G 1978. II. 18810, note J. Robert - In this case, there was a hardship clause which the Court of Appeal used to force the parties to renegotiate a new pricing formula under the supervision of a third party.

[253] Art 1171 al 2 CC.

I conclude that the results may be the same in both jurisdictions when these clauses are found in professionally drafted contracts.[254]

Thirdly, a duty to renegotiate may be implied in certain commercial contracts, particularly long-term agreements, in both jurisdictions albeit on different bases. In English law, a duty to renegotiate may be implied in fact if it is necessary to make the contract work or it goes without saying, pursuant to the legal methodology held in *Marks & Spencer*.[255] Parallels may be drawn with the implication of good faith in relational contracts in *Yam Seng*. However English courts may be reluctant to imply terms to the effect of forcing parties to renegotiate and as such, providing any form of relief. Yet, in *The Duty to Cooperate*, I refer to Lord Denning in *Staffordshire Area Health Authority* who held that an agreement of indefinite duration between an hospital and the water authority, was terminable on reasonable notice, as such forcing the parties to renegotiate a new agreement.[256] In any case, as contracts become more complex and interdependent, parties may naturally imply that they will act cooperatively to save their contractual relationships. By contrast, such a duty may be implied on the basis of good faith, as I discuss in *Hardship in Transnational Commercial Contracts*. It usually relates to long-term agreements where the aggrieved party is in a situation of economic dependency, e.g., a distribution contract[257] or a commercial agency agreement.[258] The party's economic interests or even its continuing presence in the market were threatened by the intangibility of the seriously imbalanced contracts. In a recent case, which I discuss in *Contractual performance in Covid-19 Times*, the *Cour d'appel de Paris* acknowledged that "the obligation to perform the contract in good faith must encourage the parties to renegotiate the (imbalanced) contract."[259] Underpinning this implied duty in French law is "contractual solidarity,"[260]

[254] See *Petromec v Petroleo Brasileiro SA Petrobas* [2005] EWCA Civ 891. See also for an analysis of the LNG market, M.J. Denison, 'Force majeure clauses in LNG sales and purchase agreements' (2021) Journal of World Energy Law and Business 14, 88-99.
[255] *Marks & Spencer plc v BNP Paribas Securities Services Trust Co (Jersey) Ltd* [2015] UKSC 72.
[256] *Staffordshire Area Health Authority v South Staffordshire Waterworks Company* [1978] 1 WLR 1387.The cost of supplying water was approximately twenty times higher than the price agreed on in the contract, and the contract was entered into more than fifty years before the case was brought to the court.
[257] Cass. Com. 3 Nov 1992, *Huard*, No 90-18.547, Bull. civ. IV, No 338
[258] Cass. Com. 24 Nov 1998, *Chevassus-Marche*, No 96-18.357, Bull. civ. IV, No 277.
[259] CA Paris, Pole 5 – Ch. 11 17 janvier 2020, No 18/01078.
[260] On contractual solidarity in French law, see for instance Christophe Jamin, 'Plaidoyer pour le solidarisme Contractuel' in Yves Guyon, Christophe Jamin and Gilles Goubeaux (eds) *Le contrat au début du XXIème siècle: Etudes offertes à J. Ghestin* (LGDJ 2001) 441; Denis Mazeaud, 'Loyauté, solidarité, fraternité: la nouvelle devise contractuelle?' in *Mélanges en l'honneur de François Terré, L'Avenir du droit* (PUF Juris-Classeur 1999) 603.

considerations foreign to English law in this context.[261] Differences between jurisdictions therefore persist.

I conclude from my inquiry that solutions reached with respect to cooperation and renegotiation under general contract law in England and France tend to diverge, but that the results may however be similar using the taxonomy of commercial contracts.[262] In the case where a professionally drafted contract includes an express duty of cooperation or renegotiation (in good faith), which is common in long-term agreements, parties are willing to subordinate their own interests to the overall purpose of the contractual relationship.[263] Both jurisdictions are likely to enforce these clauses, but their approaches may differ. In the spirit of freedom of contract, English courts are slow to strike down even broadly drafted clauses referring to good faith given that English contract law "does not normally obstruct the legitimate intentions of businessmen, except for overriding reasons of public policy."[264] As such, there is no policy reason why effect should not be given to the mutual bargain made in cooperation or renegotiation clauses; a party's conduct may be held as a breach of an express term requiring good faith.[265] Often however English courts will construe these clauses narrowly.[266] By contrast, French courts do not view these clauses as problematic; naturally their interpretation may be wider given the flexibility of the principle of good faith. I doubt whether business communities are prepared to change their values, but this remains to be seen in the light of a new wave of litigation relating to the Covid-19 pandemic.

[261] See *Pakistan International Airlines Corp* (n 18); *National Westminster Bank Plc v Morgan* [1985] 1 A.C. 686.
[262] For a discussion of hardship or force majeure clauses, see above Chapter 3.
[263] As opposed to rudimentary contracts, which rely on default contract law rules.
[264] *MWB Business Exchange Centres Ltd v Rock Advertising Ltd* [2018] UKSC 24, [2019] A.C. 119, [12]. Lord Sumption JSC held that there is no policy reason why effect should not be given to the mutual bargain made in No Oral Modification clauses.
[265] *Health and Case Management Ltd v Physiotherapy Network Ltd* [2018] EWHC 869 (QB).
[266] *Mid Essex Hospital* (n 233).

Chapter 5. Conclusion

I used a functionalist comparative law approach as a lens through which to analyse the similarities and differences between English and French law in their responses to common problems relating to contractual performance and contractual interpretation. By adding a cultural perspective, I was able to explain the nuances in my Anglo-French comparison in answer to the research questions.

In sum, I argued that Anglo-French legal history in terms of state interventionism repeats itself even in exceptional times. This confirms their distinctive *mentalité juridique* – whereas France has a long tradition of state intervention in the name of fairness, England tends to leave the difficult choices to the parties themselves and ultimately to the courts. Despite culturally rooted differences, divergences in results may not be as stark as they appear since French state intervention is limited and patchy, while the UK legislator chooses to intervene in particular areas, such as commercial leases. This convergence is likely to be the result of similar socio-economic pressures exercised across borders calling for state support in specialised sectors.

Similarly, the near absence of functional equivalence between frustration in English law and force majeure and *imprévision* in French law reveals diverging values – whereas English courts are primarily committed to freedom of contract and the needs of commercial parties as expressed in legal certainty, French law seeks to find balanced solutions reconciling party autonomy with contractual justice. I argued that the results may nevertheless be the same when considered through the lens of professionally drafted commercial contracts pursuant to the common taxonomy of contracts I used *as per* Lord Hodge in *Wood v Capita.*[267] Although globalisation has led to a "*fragmentation of world society*,"[268] there is a standardisation of commercial practices within each specialised sector with a culture of its own. Yet, these common trade practices which disregard national borders, are still dependent on a domestic legal system to produce legal effects beyond *de facto* compliance by the concerned business community.[269] This tension is resolved in the contract itself as similar clauses are commonly found in professional agreements in response to the same problems, such as *force majeure* or hardship clauses. Whereas professionally drafted contracts rely primarily on detailed contract

[267] *Wood* (n 16).
[268] Teubner (n 41), 13-15.
[269] For a discussion about *lex mercatoria*, see Roy Goode, 'Rules, Practice and Pragmatism in Transnational Commercial Law' (2005) 54 ICLQ 539.

terms to regulate the contractual relationship, in other words on private ordering, rudimentary agreements depend on the domestic default contract law rules to fill in the gaps.

With regards to the principles of contractual interpretation in both jurisdictions, I showed that despite persisting divergences a coalescence around an objective textual interpretation is emerging, particularly since the formal introduction of an objective approach in the *Code civil*. It is not surprising, since in any system of law any court interpreting a commercial contract must be bound by the ordinary meaning of the words used whilst having some understanding of its business purpose and context. I concluded that this common approach may lead to similar results in both jurisdictions with respect to the interpretation of professionally drafted contracts.

I argued further that divergences persist with respect to doctrinal solutions to *cooperation* and *renegotiation* under general contract law in England and France. Even when professionally drafted contracts include express terms of cooperation or renegotiation in good faith, I demonstrated continuing differences as English courts tend to construe these clauses narrowly whereas French courts view them as consistent with the principle of good faith. This reflects a diverging *mentalité juridique* – on the one hand an adversarial individualist culture in England which values contract as an instrument to facilitate economic exchanges, on the other hand a culture of balanced solutions in France which focuses on the contractual relationship as part of a wider socio-economic web.

The distinct cultures in both legal systems are nevertheless challenged in the face of global economic pressures and practices which embed the contract in a specialised business reality with a culture of its own. The result is a system of private law making and private governance by professionals, which applies across borders and co-exists with domestic legal rules. From a contract theory point of view, privately ordered transactions such as the ones I refer to as professionally drafted contracts are generally in line with the importance given to party autonomy in liberal market economies.[270] They value freedom of contract in their commercial arrangements for the sake of designing a contract fit for purpose. This contrasts with rudimentary contracts, which rely on domestic contract law rules and associated cultural values

[270] For key works on liberal contract theory, see Charles Fried, *Contract as Promise: A Theory of Contractual Obligation* (2nd edn, OUP 2015).

to fill in the gaps. This private/public ordering dichotomy, together with my taxonomy of commercial contracts, merit further comparative research.

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Appendix 1: Translation of the Articles used in the Text

THE LAW OF CONTRACT, THE GENERAL REGIME OF OBLIGATIONS, AND PROOF OF OBLIGATIONS

The new provisions of the Code civil created by Ordonnance n° 2016-131 of 10 February 2016 and including revisions made to the text by Loi no 2018-287 of 20 April 2018 translated into English by

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The translation of the text is supplemented by notes written by the translators.

Sub-title I CONTRACT

Chapter I Introductory provisions

Art. 1101. - A contract is a concordance of wills of two or more persons intended to create, modify, transfer or extinguish obligations.

Art. 1102. - Everyone is free to contract or not to contract, to choose the person with whom to contract, and to determine the content and form of the contract, within the limits imposed by legislation. Contractual freedom does not allow derogation from rules which are an expression of public policy.

Art. 1103. - Contracts which are lawfully formed have the force of legislation for those who have made them.

Art. 1104. - Contracts must be negotiated, formed and performed in good faith.

Art. 1110. - A bespoke contract4 is one whose stipulations are negotiable by the parties. A standard-form contract5 is one which comprises a collection of non-negotiable terms which are determined in advance by one of the parties without negotiation.

Chapter II Formation of contracts

Section I Conclusion of contracts

Sub-section 1 Negotiations

Art. 1112. - The commencement, continuation and breaking-off of precontractual negotiations are free from control. They must mandatorily satisfy the requirements of good faith. In case of fault committed during the negotiations, the reparation of the resulting loss is calculated so as to compensate neither the loss of benefits which were expected from the contract that was not concluded nor the loss of the chance of obtaining these benefits.

Art. 1112-1. -The party who knows information which is of decisive importance for the consent of the other, must inform him of it where, legitimately, the latter does not know the information or relies on the contracting party. However, this duty to inform does not apply to an assessment of the value of the act of performance. Information is of decisive importance if it has a direct and necessary relationship with the content of the contract or the status of the parties. A person who claims that information was due to him has the burden of proving that the other party had the duty to provide it, and that other party has the burden of proving that he has provided it. The parties may neither limit nor exclude this duty. In addition to imposing liability on the party who had the duty to inform, his failure to fulfil the duty may lead to annulment of the contract under the conditions provided by articles 1130 and following.

Section 2 Validity of the contract

Sub-section 1 Consent

Paragraph 2 Defects in consent

Art. 1143. - There is also duress where one contracting party exploits the other's state of dependence on him and obtains an undertaking to which the latter would not have agreed in the absence of such constraint, and gains from it a manifestly excessive advantage.

Sub-section 3 The content of a contract

Art. 1162. - A contract cannot derogate from public policy either by its stipulations or by its purpose, whether or not this was known by all the parties.

Art. 1170. - Any contract term which deprives a debtor's essential obligation of its substance is deemed not written.

Art. 1171. - In a standard-form contract, any term which is non-negotiable and determined in advance by one of the parties and which creates a significant imbalance in the rights and obligations of the parties to the contract is deemed not written. The assessment of significant imbalance must not relate either to the main subject-matter of the contract nor to the adequacy of the price in relation to the act of performance.

Section 3 The form of contracts

Sub-section 1 General provisions

Art. 1173. - Formal requirements imposed for the purposes of proof of a contract or setting up a contract against another person have no effect on the validity of the contract.

Section 4 Sanctions

Sub-section 2 Lapse

Art. 1186. - A contract which has been validly formed lapses if one of its essential elements disappears. Where the performance of several contracts is necessary for the putting into effect of one and the same operation and one of them disappears, those contracts whose performance is rendered impossible by this disappearance lapse, as do those for which the performance of the contract which has disappeared was a decisive condition of the consent of one of its parties. However, lapse occurs only if the contracting party against whom it is invoked knew of the existence of the group operation when he gave his consent.

Art. 1187. - Lapse puts an end to the contract. It may give rise to restitution under the conditions provided by articles 1352 to 1352-9.

Chapter III Contractual interpretation

Art. 1188. - A contract is to be interpreted according to the common intention of the parties rather than stopping at the literal meaning of its terms.

Art. 1189. - All the terms of a contract are to be interpreted in relation to each other, giving to each the meaning which respects the consistency of the contract as a whole. Where, according to the common intention of the parties, several contracts contribute to one and the same operation, they are to be interpreted by reference to this operation.

Art. 1190. - In case of ambiguity, a bespoke contract is interpreted against the creditor and in favour of the debtor, and a standard-form contract is interpreted against the person who put it forward.

Art. 1191. - Where a contract term is capable of bearing two meanings, the one which gives it some effect is to be preferred to the one which makes it produce no effect.

Art. 1192. - Clear and unambiguous terms are not subject to interpretation as doing so risks their distortion.

Chapter IV The Effects of contracts

Section 1 The effects of contracts between the parties

Sub-section 1 Binding force

Art. 1193. Contracts can be modified or revoked only by the parties' mutual consent or on grounds which legislation authorises.

Art. 1194. - Contracts create obligations not merely in relation to what they expressly provide, but also to all the consequences which are given to them by equity, usage or legislation.

Art. 1195. - If a change of circumstances that was unforeseeable at the time of the conclusion of the contract renders performance excessively onerous for a party who had not accepted the risk of such a change, that party may ask the other contracting party to renegotiate the contract. The first party must continue to perform his obligations during renegotiation. In the case of refusal or the failure of renegotiations, the parties may agree to terminate the contract from the date and on the conditions which they determine, or by a common agreement ask the court to set about its adaptation. In the absence of an agreement within a reasonable time, the court may, on the request of a party, revise the contract or put an end to it, from a date and subject to such conditions as it shall determine.

Section 5 Contractual non-performance

Art. 1218. - In contractual matters, there is force majeure where an event beyond the control of the debtor, which could not reasonably have been foreseen at the time of the conclusion of the contract and whose effects could not be avoided by appropriate measures, prevents performance of his obligation by the debtor.
If the prevention is temporary, performance of the obligation is suspended unless the delay which results justifies termination of the contract. If the prevention is permanent, the contract is terminated by operation of law and the parties are discharged from their obligations under the conditions provided by articles 1351 and 1351-1.

Sub-section 1 Defence of non-performance

Art. 1219. - A party may refuse to perform his obligation, even where it is enforceable, if the other party does not perform his own and if this non-performance is sufficiently serious.

Art. 1220. - A party may suspend the performance of his obligation as soon as it becomes evident that his contracting partner will not perform his obligation when it becomes due and that the consequences of this non-performance are sufficiently serious for him. Notice of this suspension must be given as quickly as possible.

Sub-section 3 Price reduction

Art. 1223. - In the case of imperfect performance of the act of performance, the creditor, having given notice to perform and where he has not yet paid for all or part of the act of performance, may notify the debtor as quickly as possible of his decision to reduce its price proportionally. Acceptance by the debtor of the creditor's decision to reduce the price must be made in writing. Where he has already paid, and in the absence of an agreement between the parties, the creditor may claim a reduction in price in court.

Sub-section 4 Termination

Art. 1224. - Termination results either from the application of a termination clause, or, where the non-performance is sufficiently serious, from notice by the creditor to the debtor or from a judicial decision.

Art. 1225. - A termination clause must specify the undertakings whose non-performance will lead to the termination of the contract. Termination may take place only after service of a notice to perform which has not been complied with, unless it was agreed that termination may arise from the mere act of nonperformance. The notice to perform takes effect only if it refers expressly to the termination clause.

Art. 1226. - A creditor may, at his own risk, terminate the contract by notice. Unless there is urgency, he must previously have put the debtor in default on notice to perform his undertaking within a reasonable time. The notice to perform must state expressly that if the debtor fails to fulfil his obligation, the creditor will have a right to terminate the contract. Where the non-performance persists, the creditor notifies the debtor of the termination of the contract and the reasons on which it is based. The debtor may at any time bring proceedings to challenge such a termination. The creditor must then establish the seriousness of the non-performance.

Sub-section 5 Reparation of loss resulting from non-performance of the contract

Art. 1231-5. - Where a contract stipulates that the person who fails to perform shall pay a certain sum of money by way of damages, the other party may be awarded neither a higher nor a lower sum. Nevertheless, a court may, even of its own initiative, moderate or increase the penalty so agreed if it is manifestly excessive or derisory. Where an undertaking has been performed in part, the agreed penalty may be reduced by a court, even of its own initiative, in proportion to the advantage which partial performance has procured for the creditor, without prejudice to the application of the preceding paragraph. Any stipulation contrary to the preceding two paragraphs is deemed not written. Except where non-performance is permanent, a penalty is not incurred unless the debtor was put on notice to perform.

Sub-title II EXTRA-CONTRACTUAL LIABILITY

Chapter IV Extinction of obligations

Section 1 Satisfaction

Sub-section 2 Particular provisions relating to monetary obligations

Art. 1343-5. - Taking into account the situation of the debtor and the needs of the creditor, a court may defer payment of sums that are due, or allow it to be made in instalments, for a period no greater than two years. By a special, reasoned decision, a court may order that sums corresponding to deferred instalments shall bear interest at a reduced rate (not lower than the

legal rate of interest) or that any payments made will first be allocated to repayment of capital. The court may make these measures subject to the debtor effecting acts appropriate to facilitate or to secure payment of the debt. A court order suspends any enforcement procedures which might have been initiated by the creditor. Any interest payable or penalties provided for in case of delay are not incurred during the period fixed by the court. Any contractual provision to the contrary is deemed not written. The provisions of this article do not apply to debts in relation to maintenance payments.

Section 5 Impossibility of performance

Art. 1351. - Impossibility of performing the act of performance discharges the debtor to the extent of that impossibility where it results from an event of force majeure and is permanent unless he had agreed to bear the risk of the event or had previously been given notice to perform.

Art. 1351-1. - Where the impossibility of performance is a result of the loss of the thing that is owed, the debtor who has been given notice to perform is still discharged if he proves that the loss would equally have occurred if his obligation had been performed. He must, however, assign to the creditor his rights and claims attached to the thing.

Appendix 2: List of published pieces of work as part of my PhD by Published Work

1. Judicial Interpretation of Commercial Contracts in English and French law: A Comparative Perspective (*Comparative Contractual Interpretation*), European Business Law Review 2021, Volume 32, Issue 6, pp. 1093-1124

2. Contractual Performance in COVID-19 Times: Does Anglo-French Legal History repeat Itself? (*Contractual Performance in Covid-19 Times*), with Radosveta Vassileva, European Review of Private Law 2021, Volume 29, Issue 1, pp. 3-38

3. The Paradoxes of the Doctrine of *Imprévision* in the new French law of Contract: A Judicial Deterrent? (*Paradoxes of the Doctrine of Imprévision*) *Amicus Curiae*, 2019 Volume 112, pp. 10-17

4. The "Duty to Cooperate" in English and French Contract Law: One Channel, Two Distinct Views (*The Duty to Cooperate*), with Radosveta Vassileva, Journal of Comparative Law 2019 Volume 14, Issue 1, pp. 1-25

5. The New French Contract Law and its Impact on Commercial Law: Good Faith, Unfair Contract Terms and Hardship (*The Commercial Impact of the New French Contract Law*), in M. Heidemann and J. Lee, The *Future of the Commercial Contract in Scholarship and Law Reform: European and Comparative Perspectives*, Springer Nature, 2018, pp. 99-126

6. Hardship in Transnational Commercial Contracts – A Critique of Legal, Judicial and Contractual Remedies (*Hardship in Transnational Commercial Contracts*), with Jason Chuah, Paris Legal Publishers, 2013, pp. 1-109