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Third Ole Lando Memorial Lecture: European Contract Law in the Post-Brexit and (Post?)-Pandemic United Kingdom

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Abstract: The subject-matter of this lecture is the fate of ideas about or from European contract law in a United Kingdom (UK) which ceased to be a Member State of the European Union (EU) on 31 January 2020 and then shortly afterwards shared the common European and indeed global experience of the coronavirus pandemic. Its main thrust is that, while in the UK Brexit has been a major setback to the idea of European contract law – indeed, European private law – the continuing pandemic provides an opportunity for Scots and English law to re-engage with the subject to find answers – or better answers – to the problems which they now face. The main substantive topics addressed are frustration of contract, equitable adjustment upon change of circumstances, and the requirements of good faith.

Résumé: Le sujet de cette conférence est le sort des idées sur ou à partir du droit européen des contrats dans un Royaume-Uni (UK) qui a cessé d'être un État membre de l'Union européenne (UE) le 31 janvier 2020 et a ensuite partagé peu de temps après l'expérience européenne commune et même mondiale de la pandémie de coronavirus. Son objectif principal est que, alors qu'au Royaume-Uni, le Brexit a été un revers majeur pour l'idée du droit européen des contrats – en fait, le droit privé européen – la pandémie continue offre aux Écossais et au droit anglais l'occasion de se réengager sur le sujet pour trouver des réponses – ou de meilleures réponses – aux problèmes auxquels ils sont maintenant confrontés. Les principaux sujets de fond abordés sont la frustration liée au contrat, l'ajustement équitable en cas de changement de circonstances et les exigences de bonne foi.

Zusammenfassung: Gegenstand dieses Vortrags ist das Schicksal von Ideen über oder aus dem europäischen Vertragsrecht in einem Vereinigten Königreich (UK), das am 31. Januar 2020 aufgehört hat, ein Mitgliedstaat der Europäischen Union (EU) zu sein und kurz darauf die gemeinsame europäische und sogar globale Erfahrung der Coronavirus-Pandemie teilte.Während der Brexit im Vereinigten Königreich ein schwerer Rückschlag für die Idee des europäischen Vertragsrechts – ja des europäischen Privatrechts – war,

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bietet die anhaltende Pandemie den Schotten und engländern die Möglichkeit, sich erneut mit dem Thema zu befassen, um Antworten – oder bessere Antworten – auf die Probleme zu finden, mit denen sie jetzt konfrontiert sind. Die wichtigsten inhaltlichen Themen, die angesprochen werden, sind die Frustration des Vertrags, die gerechte Anpassung bei Änderung der Umstände und die Anforderungen an Treu und Glauben.

1. Introduction

1. It is a very great honour to be invited to follow in the footsteps of Hugh Beale and Christian von Bar and give the third lecture in memory of Ole Lando. Let me start with Ole, to whom I have already paid tribute in the *American Journal of Comparative Law.*[1] I will add now that working under Ole's inspiring leadership enabled me to satisfy most completely the two ambitions I had back in the mid-1970s when I took up the study of law. They were to contribute what I could to two, possibly contradictory causes, namely, the good of my country (which was, and is, Scotland) and the pursuit of greater political, economic and social unity in Europe (which for me of course included (and includes), not only Scotland, but also the United Kingdom (UK)). I will not try here to elaborate on how I have reconciled these two causes in my own mind; but for now, let me simply say that being a member of the Lando Commission on Contract Law enabled me to combine them with total conviction. For that I will always be grateful to Ole Lando.

2. The same reconciliation of possibly conflicting causes held good in the Study Group on a European Civil Code except that this time the inspirational leadership came from Christian von Bar. As a friend and colleague from those days said to me recently, 'Nowhere else have I been so inspired and learned so much'.[2] I was reminded of all Christian's many qualities by his brilliant Lando lecture last year on contract law and human dignity.[3] I am sorry indeed that illness prevents him being with us this evening. Hugh Beale was deeply and vitally involved in both the Lando and the Von Bar groups, of course, but my gratitude and debt to him in this regard starts from his being instrumental in getting me engaged in the first place back in 1995. Without him and his continuing interest and support, I doubt whether I would be speaking here today or, indeed, about my subject-matter at all. I share too the view expressed by Hugh Beale in his Lando lecture that the way

1 Hector L. MacQueen, 'Ole Lando (September 2, 1922-April 2019)', 68. *American Journal of Comparative Law* 2020(3), p i.

2 Christina Ramberg (Stockholm), by email dated 30 August 2021. She will give the next (centenary) Lando lecture in 2022.

3 Christian von Bar, '*Ole Lando Memorial Lecture*: Contract Law and Human Dignity', 28. *ERPL* 2020, p 1195.

forward in developing transnational contract law is to focus most on the position of small and medium-sized enterprises (SMEs) and will touch on that aspect later in this lecture.[4]

3. The subject-matter of this lecture is the fate of ideas about or from European contract law in a United Kingdom (UK) which ceased to be a Member State of the European Union (EU) on 31 January 2020 and then shortly afterwards shared the common European and indeed global experience of the coronavirus pandemic. The main thrust of what I want to say is that, while in the UK Brexit has been a major setback to the idea of European contract law – indeed, European private law – the pandemic, which continues as I speak (hence the question-mark in my title), provides an opportunity for Scots and English law to re-engage with the subject to find answers – or better answers – to the problems which they now face.

2. Responding to the Pandemic in Contract Law

4. The pandemic had the unexpected effect for me of re-engaging with many friends from Lando and Study Group days by way of a project to provide some account of the law's response to the pandemic in Europe – a project that was the brilliant idea of Ewoud Hondius initially. The resultant volume, over 1100 pages long, with more than 80 contributors, appeared in print in August 2021, having enjoyed an earlier life as an online, open access publication for about 12 months.[5] It expressly aims to provide an overview of the national and international measures developed in response to the pandemic and to serve as a 'toolbox' for judges and practitioners across Europe. That is a concept which goes back to the Lando Commission's *Principles of European Contract Law* (the PECL). That project sought to assist legislators reforming contract at domestic as well as EU levels and to help domestic and European courts to go beyond their traditional approaches in developing answers to issues not adequately treated in the existing law. *Coronavirus and the Law in Europe* is of course unlike the PECL in that it does not offer a system of possible rules and is primarily an overview of the existing laws (incidentally covering a great deal more than contract law). But the contributions make it possible to identify common themes and problems in the responses of the various national laws to the pandemic, while it is indeed feasible to pick up new ideas that might make for better solutions within domestic systems.

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4 Hugh Beale, 'Transnational Contract Law: Lando's Contribution and the Way Forward', 28. *ERPL* 2020, p 465; *infra*, §§ 18 and 40.

5 Ewoud Hondius, Marta Santos Silva, Andrea Nicolussi, Pablo Salvador Coderch, Christiane Wendehorst & Fryderyk Zoll (eds), *Coronavirus and the Law in Europe* (Antwerpen: Intersentia 2021).

3. Change of Circumstances in Scots Law

5. My own contribution to the project is mainly on change of circumstances in the Scots law of contract.[6] I argue that although Scots law received the doctrine of frustration from English law, the reception was not entire, and it can respond to frustrating events more flexibly than the English rule of absolute discharge of the contract. Thus Scots law did not need statute for it to order restitution of advance payments made under later frustrated contracts; the common law of unjustified enrichment achieved the result instead.[7] The authorities also show the possibility of partial frustration,[8] temporary suspension of the contract,[9] price adjustment,[10] or payment of the value of work done or goods supplied under an uncompleted contract.[11] These could provide more suitable ways than discharge or literal continuation with which to address the individual problems caused by the pandemic and the consequent 'lockdown' of much economic activity by government.

6. The article also responds to an apparently authoritative Supreme Court ruling in 2013, *Lloyds* Trustee Savings Bank *(TSB) Foundation* v. *Lloyds Banking Group.*[12] That case arose from a dispute triggered by the financial crisis in 2007-8, and it was held there that the Scottish courts have no power to effect equitable

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6 Hector L. MacQueen, '"Coronavirus Contract Law" in Scotland', in Ewoud Hondius, Marta Santos Silva, Andrea Nicolussi, Pablo Salvador Coderch, Christiane Wendehorst & Fryderyk Zoll (eds), *Coronavirus and the Law in Europe* (Antwerpen: Intersentia 2021), p 491.

7 *Cantiere San Rocco SA* v. *Clyde Shipbuilding & Engineering Co* 1923 SC (HL) 105.

8 See *James B Fraser* v. *Denny Mott & Dickson* 1944 SC (HL) 35, 39 (Viscount Simon), 48 (Lord Wright), both citing as an example the English case of *Leiston Gas Co* v. *Leiston-cum-Sizewell Urban District Council* [1916] 2 KB 428 (CA; never over-ruled). Lords Macmillan and Porter appear to be against their colleagues' view pp 41-2 and 51-2 respectively.

9 See John Erskine, *Institute of the Law of Scotland* (first published 1773, Edinburgh Legal Education Trust 2014), pp III, iii, 86: 'No party in a mutual contract, where the obligations on the parties are the causes of one another, can demand performance from the other, if he himself either *cannot* or will not perform the counterpart; for the mutual obligations are considered as conditional' (emphasis supplied). Note too James Dalrymple Viscount Stair, *Institutions of the Law of Scotland* (first published 1681, Edinburgh University Press 1981), pp I, x, 16; also Andrew McDouall Lord Bankton, *Institute of the Laws of Scotland* (first published 1751–3, Stair Society 1993–5), pp I, xi, 13. George Joseph Bell, *Principles of the Law of Scotland* (4th edn, first published 1839, Avizandum 2010), §71, moves the doctrine more in the direction of breach of contract.

10 See especially the authorities on abatement of rent where lease subjects are rendered partially rather than totally unavailable to the tenant by external forces. Hector L. MacQueen & Ronald Mackay Lord Eassie (eds), *Gloag & Henderson Law of Scotland* (14th edn, 2017), paras 11.08, 13.06, 35.08, gives the leading authorities, to which add the very recent case of *Fern Trustee 1 Ltd* v. *Scott Wilson Railways Ltd* 2021 SLT (Sh Ct) 7. See *also* for possible operations of the principle in other contexts *Ogilvy* v. *Hume* (1683) 2 Brown's Supplement 34; *Cutler* v. *Littlejohn* (1711) Mor 583 (although cf. *Shepherd* v. *Innes* (1760) Mor 589; *Rule* v. *Reid* (1707) Mor 6364).

11 *Head Wrightson Aluminium Ltd* v. *Aberdeen Harbour Commissioners* 1958 SLT (Notes) 12.

12 [2013] UKSC 3, 2013 SC (UKSC) 13.

adjustment of a contract affected by significant change of circumstances but not discharged under the doctrine of frustration. Inspired by knowledge gained through the Lando Commission and the Study Group that a different position could be found in Continental European jurisdictions, as well as in the PECL and the Draft Common Frame of Reference (the DCFR),[13] I attempted to show that the Supreme Court ruling was not decisive of the question in Scotland by way of a more detailed analysis of earlier cases and authoritative juristic writings on the subject. A small point I would add now is that a doctrine of change of circumstances is accepted in the Scots law of public trusts.[14]

4. Making 'Breathing Space'

7. In writing in this manner, I was also conscious of the injunctions of the UK Cabinet Office, issued in May 2020, about responsible contractual behaviour in the performance and enforcement of contracts impacted by the pandemic and resultant emergency legislation.[15] That encouraged contracting parties to be 'reasonable and proportionate in responding to performance issues and enforcing contracts (including dealing with any disputes), acting in a spirit of cooperation and aiming to achieve practical, just and equitable contractual outcomes having regard to the impact on the other party (or parties) ... '.[16] While the document was clear that it was not intended to over-ride the law or specific contractual provisions, and accordingly met with considerable scepticism from City of London practitioners,[17] it also supported the use of any 'equitable relief' available in the law and in that sense was also a message to the courts.

8. The same message was also articulated in 'concept notes' by the British Institute of International and Comparative Law (BIICL), using an over-arching title phrase evocative of contemporary contexts other than the pandemic, namely 'breathing space'.[18] The BIICL paper drew attention to the distinctive rules of

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13 PECL, Art. 6:111; DCFR III.-1:110.

14 See in particular *R. S. Macdonald Charitable Trust Trustees, Petitioners* [2008] CSOH 116, 2009 SC 6, and, in general, George L. Gretton & Andrew J. M. Steven, *Property, Trusts and Succession* (4th edn 2021), Chs 25.17–25.18.

15 UK Cabinet Office, *Guidance on Responsible Contractual Behaviour in the Performance and Enforcement of Contracts Impacted by the Covid-19 Emergency* (7 May 2020, updated 30 June 2020), https://www.gov.uk/government/publications/guidance-on-responsible-contractual-behaviour-in-the-performance-and-enforcement-of-contracts-impacted-by-the-covid-19-emergency.

16 *Ibid.*, para. 14.

17 See Hugh Beale & Christian Twigg-Flesner, 'Covid-19 and English Contract Law', in Ewoud Hondius, Marta Santos Silva, Andrea Nicolussi, Pablo Salvador Coderch, Christiane Wendehorst & Fryderyk Zoll (eds), *Coronavirus and the Law in Europe* (Antwerpen: Intersentia 2021), pp (461–489) at 483.

18 See the BIICL website, https://www.biicl.org/projects/breathing-space-concept-notes-on-the-effect-of-the-pandemic-on-commercial-contracts. The phrase 'I can't breathe' gained renewed currency for the Black Lives Matter movement following the murder of George Floyd on 25 May 2020.

Continental European systems allowing courts to adapt contracts and noted that these 'could be more readily invoked in the Covid-19 context' than the Common Law rules on frustration.[19] The article also referenced what I will call the 'soft law instruments', i.e., the PECL, and the similar provisions of the Unidroit Principles of International Commercial Contracts (UPICC),[20] as well as Principle 13(2) of the European Law Institute's Principles for the COVID-19 Crisis:

> Where as a consequence of the COVID-19 crisis and the measures taken during the pandemic, performance has become excessively difficult (hardship principle), including where the cost of performance has risen significantly, States should ensure that, in accordance with the principle of good faith, parties enter into renegotiations even if this has not been provided for in a contract or in existing legislation.[21]

5. Comparative Law and Change of Circumstances

9. Reading the contract chapters in *Coronavirus and the Law in Europe* enables one amongst other things to see in detail how the law on change of circumstances was developed significantly in many countries pre-pandemic, and how that development may now react to the issues created by Covid-19 and the governmental restrictions imposed on much economic and social activity in consequence. Speaking very broadly, the nineteenth-century codifications gave no space to the earlier *jus commune* doctrine of *clausula rebus sic stantibus*, but it re-entered the law of various jurisdictions under the pressure of world-changing events in the twentieth century, the courts making use of the general clauses of their codes in order to achieve this result.[22] The pandemic seems set to be seen as another such event. In Spain the Audiencia Provincial de Valencia has used the *clausula* principle to reduce the contractual rent payable by a tenant of a hotel in response to the coronavirus crisis which, it said, was materially different from events like the financial crash of 2007–8, as the economy is known to go in cycles.[23] There is

19 BIICL Concept Note 2, para. 54.

20 See *supra* n. 13; UPICC, Arts 6.2.2 and 6.2.3.

21 European Law Institute, *Principles for the Covid-19 Crisis* (May 2020), https://rm.coe.int/eli-principles-for-the-covid-19-crisis-1-/1680a2383e, Principle 13(2).

22 On the history see Reinhard Zimmermann, *The Law of Obligations: Roman Foundations of the Civilian Tradition* (Cape Town: Juta 1990), pp 579–582.

23 Auto Audiencia Provincial (AP) Valencia, 43/2021, 10 Febuary 2021 (ECLI:ES:APV:2021:66A). I am grateful to Professor Guillermo Palao Moreno for sending me a copy of the judgment. It is summarized and commented upon (in Spanish) at, https://cms.law/es/esp/publication/primera-resolucion-en-segunda-instancia-que-aplica-la-doctrina-rebus-sic-stantibus-por-los-efectos-derivados-de-la-pandemia, a reference for which I am grateful to Charles Garland of the Scottish Law Commission.

too a Swiss domestic arbitral award in which it was said that, unless there was already specific contractual provision on the matter, *clausula rebus sic stantibus* would apply to the lease of a restaurant that could no longer operate thanks to the Swiss government's Covid measures.[24] Moreover, the law has been given legislative form in various jurisdictions during the twentieth and this century,[25] although I am not aware of any examples of such legislation being used in response to the pandemic thus far.

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24 Andreas Furrer, Angelika Layr & Jeremias Wartmann, 'Impossibility, Force Majeure and Covid-19 under Swiss and Austrian Contract Laws', in Ewoud Hondius, Marta Santos Silva, Andrea Nicolussi, Pablo Salvador Coderch, Christiane Wendehorst & Fryderyk Zoll (eds), *Coronavirus and the Law in Europe* (Antwerpen: Intersentia 2021), pp 719, 739.

25 Polish Code of Obligations, Art. 269 (1933), Civil Code, Art. 357(1) (introduced in 1990s revision of Civil Code 1965) (references for which I am indebted to Jan Halberda); Italian Civil Code, Art. 1467 (1942), Greek Civil Code, Art. 388 (1946), Portuguese Civil Code, Arts 437–439 (1966), Dutch Civil Code, Art. 6:258 (1992), and the reforms of the law of obligations in the BGB in 2002 and in the *Code Civil* in 2016. Further on Poland, see Z. Nagórski, 'Codification of Civil Law in Poland (1918-39)', in W. Komarnicki and others (eds), *Studies in Polish and Comparative Law: A Symposium of Twelve Articles* (1945), pp 44, 63–64 (a reference which I also owe to Jan Halberda); Adam Brzozowski, 'Wplyw zmiany okoliczności na zobowiązania w świetle art. 357^1 KC Oraz Zasad Europejskiego Prawa Kontaktów (wybrane zagadnienia) (Change of Circumstances and its Impact on Obligations in Light of Art. 357 of the Polish Civil Code and PECL)', in [no editors named], *W Kierunku Europeizacji Prawa Prywatnego: Księga Pamiątkowa Dedykowana Profesorowi Jerzemu Rajskiemu* (*Towards Europeanization of Private Law: Essays in Honour of Professor Jerzy Rajski*) (Warszawa: Wydawnictwo C. H. Beck 2007), p 67. Note also two articles by Aleksander Grebieniow, drawn to my attention by Pascal Pichonnaz: 'Remedies for Inequality in Exchange: Comparative Perspectives for the Evolution of the Law in the 21st Century', 27. *ERPL* 2019, p 3; and 'Römisches Recht als Vergleichsfaktor: Ignacy Koschembahr-Lyskowski (1864–1945) und die Methodenfrage', in Tommaso Beggio & Aleksander Grebieniow (eds), *Methodenfragen der Romanistik im Wandel: Paul Koschakers Vermächtnis 80 Jahre nach seiner Krisenschrift* (2020), p 165. On Greece and Portugal see Eugenia Dacoronia, 'Coronavirus and its Impact on Contracts in Greece', in Ewoud Hondius, Marta Santos Silva, Andrea Nicolussi, Pablo Salvador Coderch, Christiane Wendehorst & Fryderyk Zoll (eds), *Coronavirus and the Law in Europe* (Antwerpen: Intersentia 2021), pp 743, 750–753, and Henrique Sousa Antunes, 'Portugal's Covid-19 Legislation and the Challenges Raised for the Change of Circumstances Regime', in Ewoud Hondius, Marta Santos Silva, Andrea Nicolussi, Pablo Salvador Coderch, Christiane Wendehorst & Fryderyk Zoll (eds), *Coronavirus and the Law in Europe* (Antwerpen: Intersentia 2021), p 677. The new civil codes of Eastern Europe frequently include similar provisions: the example studied in *Coronavirus and the Law* is Hungary (Attila Menyhárd, 'The Impacts of Covid-19 in Hungarian Contract Law', in Ewoud Hondius, Marta Santos Silva, Andrea Nicolussi, Pablo Salvador Coderch, Christiane Wendehorst & Fryderyk Zoll (eds), *Coronavirus and the Law in Europe* (Antwerpen: Intersentia 2021), pp 759, 770–774). The *Restatement of Nordic Contract Law* (2016), of which Ole Lando was a contributing editor, contains no express provisions on change of circumstances but its §§1-6 (Reasonable consideration of the other party's interests) allows a court to modify, amend or set aside a contract if it would be unreasonable to enforce it. This is not however supported by any general provision in the Nordic Contract Act.

10. Even more interesting from a Scottish point of view, however, given that it is unlikely in the extreme that Scots law will ever be codified, are continuing judicial developments in jurisdictions which have yet to adjust their codes to accommodate unforeseeably changing circumstances affecting a contract. Such developments are not necessarily achieved through the general clauses of the codes. In particular Denis Philippe draws attention to the activities of the Belgian Supreme Court which in 2009 held that a long-term international steel sales contract where the price of the steel had increased by an unforeseeable 70% during the performance of the contract could be adjusted by the court in line with the UPICC Article 6.2. The Article could be brought into consideration, the Court ruled, because the contract was governed by the Vienna Convention on the International Sale of Goods (CISG); Article 7.2 CISG allows the judge, in the case of a gap in the Convention, to deal with the question in line with its underlying general principles; and UPICC in this case provided the relevant principles.[26] Such an approach to incorporating or referencing UPICC rules – or indeed ones from the PECL or the DCFR – could not be followed in Scotland since the UK remains, as it has always been, outside the CISG; but, as I will explain later, there are perhaps some other ways in which the Scottish courts might make use of these instruments in the development of the law.

6. Developing Scots Law?

11. My contribution to *Coronavirus and the Law in Europe* is an illustration of how my participation in European contract law projects enables me to pursue what I think would be the betterment of my country's laws. The experience showed me different ways of thinking about law and the problems to which it fell to be applied and suggested that what looked radical by way of possible change and development of Scots law was perhaps not quite so impracticable after all. I have taken that into my writing about Scots contract law and was also lucky enough to be given the opportunity to use the DCFR and its forerunners as a toolbox towards possible legislative reform when I was a Scottish Law Commissioner from 2009 to 2018.[27]

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26 *Scafom International BV* v. *Lorraine Tubes SAS*, Cour de Cassation (Belgium), 19 June 2009; see *further* Denis Philippe, 'The Impact of the Coronavirus on the Analysis and Drafting of Contract Clauses: Force Majeure, Hardship and Deferral of Obligations', in Ewoud Hondius, Marta Santos Silva, Andrea Nicolussi, Pablo Salvador Coderch, Christiane Wendehorst & Fryderyk Zoll (eds), *Coronavirus and the Law in Europe* (Antwerpen: Intersentia 2021), pp 527, 548; also Carmen Jerez Delgado, María Kubica & Albert Ruda, 'Force Majeure and Hardship in the Corona Crisis: Some Contract Law Reflections on ELI Principle no 13', in Ewoud Hondius, Marta Santos Silva, Andrea Nicolussi, Pablo Salvador Coderch, Christiane Wendehorst & Fryderyk Zoll (eds), *Coronavirus and the Law in Europe* (Antwerpen: Intersentia 2021), pp 603, 611 n. 32.

27 See Scottish Law Commission Discussion Papers on Interpretation (2011), Formation of Contract (2012), Third Party Rights in Contract (2014), Penalty Clauses (2016) and Remedies for Breach of Contract (2017), and Reports on Execution in Counterpart (2014), Third Party Rights in Contract (2016), Penalty Clauses (2018) and Formation, Interpretation, Remedies for Breach of Contract

12. The Scottish Law Commission's work is aimed primarily at reform of the law by way of legislation, which does make it somewhat easier to draw upon the soft law instruments as texts themselves cast in legislative or quasi-legislative form. But that form also makes it more difficult for courts to base findings upon them directly. In a Common law system, as Scotland is in many ways in contract law, judges are called upon primarily to decide the cases before them in accordance with the existing law, not to create new systems or schemes within the law. At most they can develop the law incrementally, always working within and from the law as they find it in the relevant authorities. It is not the judicial task to frame the law as a series of legislative propositions, although, as has happened at least once in the Scottish courts, it may be possible to find in the soft law instruments an articulation of a principle which can be used to explain the existing domestic authorities on the point.[28]

13. But, when the *Lloyds TSB Foundation* case was in the Court of Session and the DCFR was cited to it in support of the proposition that Scots law recognized the possibility of a court equitably adjusting a contract in changed circumstances, the court responded thus:

> While it appears that certain European jurisdictions do have some form of equitable adjustment of contracts, there is as yet no foundation for it, as a generality, in Scots law. It would be beyond the proper scope of judicial power to develop it in any way which would assist the respondent in this case.[29]

On the other hand, the 'as yet' in this dictum does leave the door to future change ajar, as does Lord Hope in the Supreme Court when he says that '[a]daptability has a part to play in any civilised system of law', before concluding that the case before him was 'not the occasion to cast doubt on the ability of Scots law to find equitable solutions to unforeseen problems'.[30] My contribution in *Coronavirus and the Law in Europe* is designed to show that there *is* some foundation in past Scottish authority as well as in the soft law instruments upon which a doctrine of equitable adjustment could be built in traditional Common law fashion in Scotland.

(2018), all available on the Commission website, https://www.scotlawcom.gov.uk/law-reform/law-reform-projects/completed-projects/contract-law-light-draft-common-frame-reference-dcf/. The review has so far led to the Legal Writings (Counterparts and Delivery) (Scotland) Act 2015 and the Contract (Third Party Rights) (Scotland) Act 2017.

28 *Wills* v. *Strategic Procurement (UK) Ltd* [2013] CSOH 26, 2016 SC 367, para. 10.

29 *Lloyds TSB Foundation* v. *Lloyds Banking Group* [2011] CSIH 87, 2012 SC 259, para. 29.

30 [2013] UKSC 3, 2013 SC (UKSC) 169, para. 43.

14. An objection to the argument might however be that the basis in authority is rather slight; over a period of some centuries there are very few cases and practically no juristic comment on this subject. My answer to this objection is that equitable adjustment is an exceptional event, not a rule for all contracts, and again I find reinforcement for this in the experience of other jurisdictions as revealed in *Coronavirus and the Law in Europe.* So, for example, Ewoud Hondius says that the Dutch courts have only rarely if ever made use of the powers conferred upon them by paragraph 6:258 of a Civil Code that is now nearly thirty years old.[31] In fact, in all the jurisdictions discussed in the book, freedom of contract seems to be the governing principle along with the idea that a contract generally allocates risks one way or another between its parties and losses from unexpected circumstances will normally lie where they happen to fall. Both the PECL and the DCFR state as the starting point that contractual obligations must be performed even if performance has become more onerous; it is only where an exceptional change of circumstances makes it manifestly unjust to hold the debtor to the obligation that a court may intervene. UPICC's rules can be brought into play only when the occurrence of events 'fundamentally alters the equilibrium of the contract'.[32] Recognizing the possibility of equitable adjustment is evidently not in any system giving the courts licence to wreak havoc with contracts. And looking at the Scottish case law we do not see courts rewriting contracts or compelling unwilling parties to renegotiate their terms (one of the things I found unattractive in the original PECL approach and was relieved to see abandoned in the DCFR).[33] Instead the Scottish case law is about the provision in exceptional circumstances of fair and equitable solutions which do not throw all the attendant risks on one or other of the parties.

7. Tacit Conditions and Frustration

15. Does Scots law require more if it is to develop its contract law in the manner suggested? It is worth noting that a Scottish court will not order specific implement (i.e., specific performance) of a contract where that will impose undue hardship for the party against whom the order is sought.[34] Two further ideas shown to be

31 Ewoud Hondius, 'Coronavirus, the Millennium and the Financial Crisis', in Ewoud Hondius, Marta Santos Silva, Andrea Nicolussi, Pablo Salvador Coderch, Christiane Wendehorst & Fryderyk Zoll (eds), *Coronavirus and the Law in Europe* (Antwerpen: Intersentia 2021), pp 820–821.

32 UPICC, Art. 6.2.2.

33 UPICC, Art. 6.2.3, entitles the disadvantaged party to request renegotiation, with failure to agree within a reasonable time a basis for resort to the court which may then terminate the contract on terms or adapt it with a view to restoring its equilibrium.

34 Hector L. MacQueen, *MacQueen and Thomson on Contract Law in Scotland* (5th edn 2020), paras 7.6, 7.11. There has however been little consideration by the courts of what sort of prospective hardship would have this effect in contracts: see W.M. Gloag, *The Law of Contract: A Treatise on*

important by the comparative and historical evidence are those of the tacit condition and good faith in contract.[35] The latter has been explicitly recognized in Scots law in recent times, even if its scope remains uncertain and contested.[36] The idea of the tacit condition – specifically a resolutive condition implied by law to the effect that a contract will not stand where some vital but unspoken assumption of the parties at the time of contracting is falsified by subsequent events – can be found in early texts of Scots law.[37] The idea of the tacit condition was also used by the authoritative early twentieth-century Scottish jurist William Murray Gloag to explain, not only the doctrine of what he called 'mutual' (i.e., shared) error, but also, more tentatively, the doctrine of frustration.[38] With the latter he was tentative because at the time he wrote (in the 1920s), the English courts had become committed to the idea that frustration arose from an implied *term* in the contract. But Gloag was evidently not completely convinced that this was the right approach, citing a famous dictum in a Scottish case in making his point:

> A tiger has escaped from a travelling menagerie. The milkgirl fails to deliver the milk. Possibly the milkman may be exonerated from any breach of contract, but, even so, it would seem hardly reasonable to base that exoneration on the ground that 'tiger days excepted' must be held as if written into the milk contract.[39]

Gloag expressed his preferred approach as follows, very much in the idiom of the *clausula rebus sic stantibus:*

> If it can be shewn that performance, if given, would in substance be the fulfilment of a new and not the original contract neither party can be bound to

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the Principles of Contract in the Law of Scotland (2nd edn 1929), pp 251–252, 399 n. 6, 660–661, 672 n. 6; Laura J. Macgregor, 'Specific Implement in Scots Law', in Jan Smits, Daniel Haas & Geerte Hesen (eds), *Specific Performance in Contract Law: National and Other Perspectives* (2008), pp 67, 75–76.

35 See *in particular* Reinhard Zimmermann, '"Heard melodies are sweet, but those unheard are sweeter ... ": Conditio tacita, implied condition und die Fortbildung des europäischen Vertragsrechts', 193. *Archiv für die civilistische Praxis* 1993, p 121; Wim Decock, *Theologians and Contract Law: The Moral Transformation of the Ius Commune (ca. 1500-1650)* (Leiden/Boston: Martinus Nijhoff/Brill 2013), pp 203–208, 211–212.

36 See Hector L MacQueen, *MacQueen and Thomson*, paras 5.22–5.26.

37 James Dalrymple Viscount Stair, *Institutions*, pp I, 3, 8; William Forbes, *Institutes of the Law of Scotland* (first published 1722-30, Edinburgh Legal Education Trust 2012), Pt II, Bk III, Ch. 1, tit. 1; Andrew McDouall Lord Bankton, *Institute*, pp I, iv, 22; John Erskine, *Institutes*, pp III, 1, 7; George Joseph Bell, *Principles*, s. 47; George Joseph Bell, *Commentaries on the Law of Scotland* (7th edn 1870), i, pp. 463–464 (dealing with implied conditions in sale which modern law would treat as implied terms).

38 W.M. Gloag, *Contract*, pp 343 (frustration), 453–456 (mutual error).

39 *Scott & Sons Del Sel* 1922 SC 592 per Lord Sands at 597.

perform, because contractual obligation depends on agreement, and neither has agreed to anything but the original contract.[40]

With the exception of a change in general economic conditions a contract may be avoided ... by any events which so transform the obligations undertaken as to justify the argument that performance, if given, would be performance of a different contract to that to which the parties agreed.[41]

16. When the English House of Lords gave up the implied term approach to frustration in *Davis Contractors* v. *Fareham* Urban District Council *(UDC)* in 1956, the 'tiger days excepted' example was cited by Lord Reid[42] and the replacement formula was very much cast in the kind of language favoured by Gloag, i.e., in the words of Lord Radcliffe:

> [F]rustration occurs whenever the law recognises that without default of either party a contractual obligation has become incapable of being performed because the circumstances in which performance is called for would render it a thing radically different from that which was undertaken by the contract. *Non haec in foedera veni.* It was not this that I promised to do.[43]

17. This test is thus well established in the existing law of frustration. In more recent times the late Joe Thomson and I have followed in Gloag's footsteps in adopting the notion of the implied or tacit condition to explain why frustration (and shared error) discharge or avoid contracts where they apply.[44] There accordingly seems no reason in principle why it might not also provide a way of identifying those changes of circumstance which, while not necessarily discharging contracts, give rise to a power for courts to provide equitable adjustment instead. Indeed it may actually have been unconsciously applied in the *Lloyds TSB* case, where Lord Mance identified the issue as being 'how a covenant should be construed and understood as applying in a novel legal and accounting context, which was not foreseen or foreseeable – or was, according to uncontradicted expert evidence, "unthinkable" – when the covenant was entered into ... something which the [parties] would not have accepted, had they foreseen it'.[45] The right

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40 W.M. Gloag, *Contract*, p 343.

41 W.M. Gloag, *Contract*, p 354.

42 *Davis Contractors* v. *Fareham UDC* [1956] AC 696 at 720.

43 *Davis Contractors* v. *Fareham UDC* [1956] AC 696 at 729.

44 Hector L MacQueen, *MacQueen and Thomson*, paras 5.40–5.43, 5.51, 5.67, 5.71–5.73. See also J. M. Thomson, 'Suspensive and Resolutive Conditions in the Scots Law of Contract', in A.J. Gamble (ed.), *Obligations in Context: Essays in Honour of Professor D. M. Walker* (1990), p 126.

45 *Lloyds TSB Foundation* v. *Lloyds Banking Group* [2013] UKSC 3, 2013 SC (UKSC) 169, paras 1 and 22.

interpretive approach in such circumstances was 'mechanical', 'but the value of machinery depends upon its being correctly directed towards the right end'[46]:

> [T]he question is [, *Lord Mance continued*,] how [the] language [of the covenant] best operates in the fundamentally changed and entirely unforeseen circumstances in the light of the parties' original intentions and purposes ... [I]t excludes a wholly novel element which was included ... by a change which was neither foreseen nor foreseeable and which, had it been foreseen when the Deeds were executed, would not have been accepted as part of the computation of profit or loss.[47]

8. Force Majeure and Materially Adverse Circumstances Clauses

18. Another, more policy-oriented reason for favouring the development of equitable adjustment is that business people themselves tend to follow such an approach to supervening events. My anecdotal understanding is that in Scotland (and no doubt elsewhere) many longer-term contracts, such as commercial leases, were continued through lockdown by dint of renegotiation by the parties for the duration of the crisis. Further, very often such contracts contain clauses to deal with events of *force majeure* and 'materially adverse circumstances', and these may impose upon the parties an obligation to make adjustments to their contract, generally on a negotiated basis, as well as providing for suspension rather than immediate discharge and termination. There are valuable studies of such contract terms in different jurisdictions in *Coronavirus and the Law in Europe*.[48] They show that business people do not necessarily want the blunt instrument of termination as the only possible response to fundamental changes of circumstance affecting their contracts. One gathers too that legal practitioners are now busy revising their boilerplate clauses to ensure that they cover global pandemics and lockdowns alongside all the other risks typically covered in them. But this will not necessarily benefit those SMEs who typically do not seek legal advice in forming their contracts, of which there are many in Scotland. It will therefore be helpful to such businesses if the law itself provides in some way for renegotiation and equitable

46 Ibid., para. 21.

47 Ibid., paras 23, 25.

48 See articles cited in nn. 17, 24 and 26 above; *also* Angel Carrasco, 'Parameters for Applying the Rules on Force Majeure to Covid-19 in Spain', in Ewoud Hondius, Marta Santos Silva, Andrea Nicolussi, Pablo Salvador Coderch, Christiane Wendehorst & Fryderyk Zoll (eds), *Coronavirus and the Law in Europe* (Antwerpen: Intersentia 2021), p 659. In Scotland the principal cases arising from the pandemic have involved the interpretation of what were in effect *force majeure* clauses: see *Dumfries & Galloway Council* v. *NST Travel Group Ltd*, Glasgow Sheriff Court, 7 April 2021, 2021 GWD 13-186; *Billy Graham Evangelistic Association* v. *Scottish Events Centre*, Glasgow Sheriff Court, 16 Feburary 2021, 2021 SLT (Sh Ct) 185.

adjustment as well as simple discharge: precisely the sort of policy reasoning which underlies the thinking outlined in Hugh Beale's Lando lecture two years ago.

9. English Law and Frustration

19. My focus so far has been almost entirely on Scots law, and if I am to fulfil the promise of my title I must begin to turn my attention to English law. As a Scots lawyer I do so with diffidence. Here I will concentrate more on post-Brexit than on post-pandemic questions, as I think there is little chance that the English courts will even contemplate the kind of equitable adjustment that I have been talking about so far as a response to the effects of Covid-19. In their contribution to *Coronavirus and the Law in Europe*, Hugh Beale and Christian Twigg-Flesner emphasize the strictness with which the English courts apply the doctrine of frustration:

> [T]he doctrine of frustration is quite narrow. It will not apply to many cases in which the impossibility is only temporary or partial; and it will not apply when the contract no longer serves one party's purpose, or has become very much more burdensome to perform. Lastly, it is an "all-or-nothing" doctrine: if it applies, the parties are automatically discharged, but if it does not apply, a party who does not perform will be liable for breach of contract unless there is a force majeure or similar clause in the contract that covers the events that have taken place.[49]

20. A nice illustration of this strictness is one that arose directly from Brexit. In *Canary Wharf (BP4) T1 Ltd* v. *European Medicines Agency*[50] the defendants, an agency of the EU, argued that their 25-year lease of premises at Canary Wharf in London as their headquarters, begun in 2011, was frustrated by Brexit. It would be incongruous for such an agency to have its headquarters outside the EU. The judge took the approach that a finding of commercial frustration required a multi-factorial approach to determine the assumptions or common purpose of the parties in entering the contract and from that process (not to be equated with interpretation of the contract alone), whether or not performance in the new circumstances would be something radically different from that which the parties had originally undertaken. He found that Brexit was only 'relevantly' foreseeable sometime after the lease was entered in 2011, but the question of the agency's relocation in other premises (wherever that might be) was recognized and provided for in general in the contract:

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49 Hugh Beale & Christian Twigg-Flesner, in *Coronavirus and the Law*, p 471.

50 [2019] EWHC 335 (Ch).

> The parties agreed exactly what would happen in such a case: the EMA would assign the lease – pursuant to the terms of the lease – or sub-let the whole – again, pursuant to the terms of the lease. If it could neither assign nor sub-let the whole according to the terms of the lease, it would retain the premises, whether it wanted to or not, and would be obliged to pay the rent.[51]

21. The parties had no common purpose outside the terms of the lease; rather they had divergent purposes, one being the landlord's interest in long-term cash-flow and its self-protection in the event of the agency's premature departure, for whatever reason, while the agency was focussed on bespoke premises with flexibility as to term and the lowest rent. Brexit did not make this contract radically different from that which the parties had originally contemplated. Despite this adverse judgment, the European Medicines Agency has succeeded in relocating to Amsterdam, presumably having found a new tenant or sub-tenant for that awkward lease in London.

22. The same strictness is apparent in English cases so far on frustration by the pandemic.[52] Relaxation of this strictness by either the courts or the legislature does not seem at all likely, although perhaps only because the discharging effect of frustration is so drastic.[53] Beale and Twigg-Flesner point also to technical difficulties with the doctrine of consideration that would have to be overcome if English law were ever to introduce a regime of equitable adjustment of contract such as the ones I have been discussing earlier in this lecture.[54] While they do not dismiss altogether the possibility that the Supreme Court may yet rework and develop the doctrine of consideration in a helpful way, they do note that the opportunity to do so which arose with the renegotiated contract in *MWB Business Exchange Centres* v. *Rock Advertising Ltd* in 2018 was not taken.[55]

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51 *Ibid.*, para. 239(3).

52 *Salam Air SAOC* v. *Latam Airlines Group SA* [2020] EWHC 2414 (Comm) (six-year lease of three aircraft grounded as a result of pandemic legislation in Oman found to remain in full force and effect; referred to with approval in the non-Covid frustration case of *Iris Helicopter Leasing Ltd* v. *Elitaliana SRL, Point Holding SPA* [2021] EWHC 2459 (Comm), para. 26 (Jacobs J.)); *Bank of New York Mellon (International) Ltd* v. *Cine-UK Ltd* [2021] EWHC 1013 (QB) (landlord of leases of three commercial properties held entitled to full payment of overdue rent). *Salam* and *Cine-UK* are commented upon approvingly in Jonathan Morgan, 'Frustration and the Pandemic', 137. *LQR* 2021, p 563. See also *Commerz Real Investmentgesellschaft MBH* v. *TFS Stores Ltd* [2021] EWHC 863 (Ch) and the business interruption insurance case of *TKC London Ltd* v. *Allianz Insurance PLC* [2020] EWHC 2710 (Comm).

53 Michael Bridge, 'Frustration and Excused Non-Performance', 137. *LQR* 2021, p 580, argues that, understood alongside other aspects of excused non-performance in English law, frustration is not limited to automatic discharge of the contract.

54 Hugh Beale & Christian Twigg-Flesner, in *Coronavirus and the Law*, pp 486–487.

55 [2018] UKSC 24, [2019] AC 119.

But '[p]erhaps', Beale and Twigg-Flesner drily comment, thinking about the possible impact of the pandemic, 'it [i.e., the Supreme Court] will get another opportunity ... sooner than anyone thought'.[56]

10. Influences on English from European Contract Law?

23. Pre-Brexit, there were occasional signs of the influence of European contract law in English contract law. The most significant in practice were of course the implementation of EU Directives, in which process a significant role was taken by the Law Commission of England and Wales, generally in conjunction with the Scottish Law Commission, since the measures were to take effect across the UK. I worked on several of these myself, including the translation of the Consumer Sales, Unfair Terms and Unfair Commercial Practices Directives into UK legislation (where, Brexit notwithstanding, they all remain in force).[57] There was also the Commissions' advice to the UK Government on the optional instrument of the Common European Sales Law, critical, but constructively so rather than implacably hostile.[58]

24. Back in the 1990s, before my time and working by itself, the work of the English Commission led to the Contracts (Rights of Third Parties) Act 1999. One of the reasons supporting the case for reform back then was the inconsistency of English law with the laws of most other Member States of the EU, and the Commission added this in reinforcement of the point:

> With the growing recognition of the need for harmonisation of the commercial law of the states of the European Union – illustrated most importantly by the work being carried out by the Commission on European Contract Law under the chairmanship of Professor Ole Lando – it seems likely that there will be ever increasing pressure on the UK to bring its law on privity of contract into line with that predominantly adopted in Europe.[59]

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56 Hugh Beale & Christian Twigg-Flesner, in *Coronavirus and the Law*, p 487.

57 See the Consumer Rights Act 2015, Parts 1 and 2; Consumer Protection from Unfair Trading Regulations 2008, Part 4A (added by Consumer Protection (Amendment) Regulations 2014 (SI 2014/870)). Other important instruments still in force include the Commercial Agents (Council Directive) Regulations 1993 (SI 1993/3053) and the Rome Regulations I and II (for which see Law Applicable to Contractual Obligations and Non-Contractual Obligations (Amendment etc.) (EU Exit) Regulations 2019 (SI 2019/834)).

58 Law Commission and Scottish Law Commission, *An Optional Common European Sales Law: Advantages and Problems; Advice to the UK Government* (10 November 2011), https://www.scotlawcom.gov.uk/files/6413/2205/8433/Common_European_Sales_Law_Advice.pdf and https://www.lawcom.gov.uk/project/common-european-sales-law/#common-european-sales-law.

59 Law Commission, *Report No. 242 on Privity of Contract: Contracts for the Benefit of Third Parties* (1996), para. 3.8.

25. Also in the 1990s, the English Commission began a lengthy project on illegality, not only in contract law but in trusts and tort law as well. The initial Consultation Paper, published in 1999, made very little reference to comparative law generally apart from the New Zealand Illegal Contracts Act 1970, and none at all to European private law projects.[60] This is not surprising: there were then no published proposals for model rules on the subject. By 2009, when the Commission's next Consultation Paper was published, that had changed; and the Consultation Paper offered an overview of the PECL.[61] But although the PECL articles had been strongly influenced by the 'structured judicial discretion' approach put forward in the Law Commission's 1999 Consultation Paper, they were not endorsed by the Commission, which had by now changed its position to recommend no statutory reform of the law of illegality in contract. This was reaffirmed in the Commission's final Report published in March 2010,[62] which made no reference at all to international soft law instruments and decided that the matter could now be left to the judiciary and the incremental processes of change in the Common Law. That expectation has since been fulfilled by the Supreme Court decision in *Patel* v. *Mirza* in 2016,[63] to which I will return in a moment.

26. Since 2010 the Commission has neither made nor had any opportunity to consider in a detailed way the provisions of the soft law instruments as a basis for reform of English contract law.[64] At least part of the reason for this lack of interest has been the lack of calls for reform from either government or what the Law Commissions tend now (following the example of the European Commission) to call stakeholders. Indeed, there has been hostility to the idea that English contract law needs reform, least of all to make it more akin than absolutely necessary to the laws of other Member States or EU law. Resistance was great to any perceived pressure to bring English law 'in line with that predominantly adopted in Europe', as the Law Commission had put it in 1996. As Paul MacMahon has pointed out in an unpublished paper entitled 'The Englishness of English Contract Law', the resistance was based on fear of loss of control of the law to the EU, a concern that this would inevitably entail replacement of the robustly commercial certainty

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60 Law Commission, *Consultation Paper No. 154 on Illegal Transactions: The Effect of Illegality on Contracts and Trusts* (1999). The Commission later published *Consultation Paper No. 160, The Illegality Defence in Tort* (2001).

61 Law Commission, *Consultation Paper No. 189, The Illegality Defence: A Consultative Report* (Jan. 2009), paras 3.69–3.72. The laws of France and Germany are briefly described paras 3.63–3.68, and those of the USA and New Zealand paras 3.73–3.81.

62 Law Commission, *Report No. 320 on the Illegality Defence* (2010).

63 *Patel* v. *Mirza* [2016] UKSC 42, [2017] AC 467.

64 The Commissions' work on insurance which led to the Consumer Insurance (Disclosure and Representations) Act 2012 and the Insurance Act 2015 (note also Part 5 of the Enterprise Act 2016) did from time to time refer to the Principles of European Insurance Law, but not in a systematic and comprehensive fashion.

of English law by the morality-based interventionism of the Civil Law systems, and a desire to preserve the global market won for English law by its emphasis on serving certainty and the needs of commerce.[65]

27. But all that said, the soft law instruments have enjoyed at least some influence in significant recent developments of English contract law. For example, the fact that a rule against contractual penalties could be found in a wide variety of soft law instruments was significant in the Supreme Court's decision to reject a call to abolish the English rules on the subject.[66] Another example can be found in *MWB Business Exchange Centres* v. *Rock Advertising Ltd* where, in dealing with No Oral Modification terms, Lord Sumption took support for their general enforceability from the CISG and the UPICC (described, incidentally, as 'widely used codes').[67] It would be going too far to suggest that the Supreme Court's reformulation of the law on penalties in *Cavendish* was directly influenced by the soft law models but equally it cannot be denied that the English law now looks much more like its Civil Law and soft law counterparts than it did before.

11. *Patel* v. *Mirza*

28. *Patel* v. *Mirza*, already mentioned,[68] is a further instance of the Supreme Court reforming English contract law, this time in relation to illegality and its consequences. The previous approach was replaced by one the starting point of which is public policy, informed by consideration of a 'range of factors', including the principles that no-one should profit from their wrongdoing and that the law should be coherent and not self-defeating to this end. The court should then consider questions of public interest, including (1) the underlying purpose of the prohibition transgressed and whether that purpose will be enhanced by denial of the claim; (2) any other relevant public policy on which the denial of the claim may have an impact; and (3) whether denial of the claim would be a proportionate response to the illegality, bearing in mind that punishment is a matter for the criminal courts. The direct source for the reformulation of the law by the majority in that case is clearly the Law Commission Consultation Paper 2009 and its following Report of 2010, and there is no reference at all to the soft law

65 I am grateful to Paul MacMahon for allowing me to refer to his so far unpublished paper.

66 *Cavendish Square Holding BV* v. *El Makdessi; ParkingEye Ltd* v. *Beavis* [2015] UKSC 67, [2016] AC 1172, paras 37 (Lords Neuberger and Sumption), 164 (Lord Mance), and 265 (Lord Hodge), referring to the Council of Europe's Resolution (78) 3 on Penal Clauses in Civil Law (1978) (Art. 7), UNCITRAL Uniform Rules on Contract Clauses for an Agreed Sum Due upon Failure of Performance (1983) (Art. 8), PECL (Art. 9.509), UPICC (Art. 7.4.13), and the DCFR (III.-3:712).

67 [2018] UKSC 24, [2019] AC 119, para. 13.

68 See *supra* n. 63.

instruments in the judgments of the Supreme Court.[69] But an important factor supporting the reworking of the illegality doctrine in English law was the decision of the European Court of Justice in *Courage Ltd* v. *Crehan*,[70] in which it was held that an absolute rule of domestic law barring recovery in damages or unjust enrichment for infringement of the EU's competition rules would be incompatible with giving these rules full effectiveness. The Law Commission had pointed up the wider significance of this decision in its 2009 Consultation Paper:

> [T]he European Court of Justice was clearly unhappy with the idea that national courts may deprive citizens of their rights under European Union law through the application of formalistic tests that bear little relationship to considerations of fairness or public policy. ... The Court ... spelled out that the test must take account of the economic and legal context in which the parties find themselves and their respective bargaining power and conduct.[71]

29. Although no mention of *Courage* was made in the Commission's 2010 Report, in *Patel* v. *Mirza* Lord Toulson discussed the case and noted the Commission's doubt in 2009 'whether the Court of Justice would be content with a system of domestic illegality rules which were formalistic and did not allow room for a proportionate balancing exercise to be carried out on the basis of clear principles of public policy'.[72] In other words, both the Commission and Lord Toulson recognized pressure from the European institutions as a reason – not the only one, of course – to reform English contract law. But, as Birke Häcker has observed, the result of the interaction between the Commission's earlier work on illegality and the provisions in the PECL and the DCFR is that the latter are 'very similar to the "range of factors" approach ... in *Patel* v. *Mirza*'.[73] Writing in 2018, she continued: '[O]n the eve of "Brexit", the closest national comparator in Europe to the revolutionary approach towards illegal contracts advocated by the DCFR may now in fact be English law(!)'.[74]

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69 See James Lee, 'Illegality, Familiarity and the Law Commission', in Sarah Green & Alan Bogg (eds), *Illegality After* Patel v. Mirza (Oxford: Hart 2018), Ch. 7.

70 Case C-453/99, [2001] ECR I-6297.

71 *Consultation Paper No. 189*, para. 3.85.

72 At para. 39, citing *Consultation Paper No. 189*, para. 3.89.

73 Birke Häcker, 'The Impact of Illegality and Immorality on Contract and Restitution from a Civilian Angle', in Sarah Green & Alan Bogg (eds), *Illegality After* Patel v. Mirza (Oxford: Hart 2018), p 331, at 367.

74 Ibid., at 368.

12. Good Faith in English Contract Law

30. Perhaps the most striking instance of influence from European contract law on its English counterpart is the debate about good faith in contract triggered by the judgment of Mr Justice Leggatt in *Yam Seng Pte Ltd* v. *International Trade Corporation Ltd* in 2013.[75] Leggatt argued against the traditional blanket rejection of good faith in English contract law, saying that in this English law was 'swimming against the tide',[76] even in other Common law jurisdictions. Further:

> [R]eferences to good faith have already entered into English law via EU legislation. ... Attempts to harmonise the contract law of EU member states, such as the Principles of European Contract Law proposed by the Lando Commission and the European Commission's proposed Regulation for a Common European Sales Law on which consultation is currently taking place, also embody a general duty to act in accordance with good faith and fair dealing. There can be little doubt that the penetration of this principle into English law and the pressures towards a more unified European law of contract in which the principle plays a significant role will continue to increase.[77]

31. The way in which good faith could be brought into English contract law was not as a general rule or principle, however, but rather by the tried and trusted Common law technique of the implied term, founded on tests of 'obviousness', 'necessity' and 'business efficacy' in each individual case. There are nonetheless echoes of the idea of the tacit condition in Leggatt's analysis of the basis for implying a good faith term: 'contracts, like all human communications, are made against a background of unstated shared understandings which inform their meaning'.[78] Such background includes shared values and norms of behaviour, of which important examples are expectations of honesty and fidelity to the contract, the latter being especially important where the contract makes no express provision for a situation. The typical case is the longer-term, or 'relational', contract:

> [that] may require a high degree of communication, cooperation and predictable performance based on mutual trust and confidence and involve expectations of loyalty which are not legislated for in the express terms of the contract but are

75 *Yam Seng Pte Ltd* v. *International Trade Corporation Ltd* [2013] EWHC 111 (QB), [2013] 1 All ER (Comm) 1321, paras 119–154.

76 Ibid., para. 124.

77 Ibid.

78 Ibid., para. 133.

> implicit in the parties' understanding and necessary to give business efficacy to the arrangements.[79]

32. Leggatt, however, does not shy away from one consequence of his implied term analysis being the possibility that parties could exclude any good faith duty by express or implicit provision to that effect in their contract.[80] Lastly (for present purposes), he said:

> I see no objection, and some advantage, in describing the duty as one of good faith "and fair dealing". I see no objection, as the duty does not involve the court in imposing its view of what is substantively fair on the parties. What constitutes fair dealing is defined by the contract and by those standards of conduct to which, objectively, the parties must reasonably have assumed compliance without the need to state them. The advantage of including reference to fair dealing is that it draws attention to the fact that the standard is objective and distinguishes the relevant concept of good faith from other senses in which the expression "good faith" is used.[81]

32. The Leggatt implied term has had mixed fortunes amongst first instance judges since *Yam Seng*, and it has not received the blessing of any appellate court.[82] On the other hand, Leggatt himself has risen through the judicial hierarchy and is now a Justice of the Supreme Court. It seems inevitable that at some point an argument based on an implied term of good faith and fair dealing will be pressed before him in that capacity; whereupon the interesting question will be how far he can persuade his colleagues on the court, or, alternatively, whether he will modify his views in the light of theirs.

33. Leggatt J referred in *Yam Seng* to the 'pressure' to bring English law on good faith into line with its Continental counterparts; a perception we have also seen at

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79 *Ibid.*, para. 142. In *Al Nehayan* v. *Kent* [2018] EWHC 333 (Comm) Leggatt LJ sees the relational contract as a category where the good faith term can be implied in law and not just in fact (i.e., the circumstances of the particular case). Extra-judicially he also has discussed good faith as supporting the enforceability of express obligations to renegotiate in the face of adverse changes of circumstance: Sir George Leggatt, 'Negotiation in Good Faith: Adapting to Changing Circumstances in Contracts and English Contract Law', *Journal of Business Law* 2019, p 104.

80 *Yam Seng*, para. 149.

81 Ibid., para. 150.

82 An accessible short account is Ewan McKendrick, *Contract Law* (14th edn 2021), Ch. 12.10.3–4. For thoughtful critical academic commentary see e.g., the contributions of Magda Raczynska & Paul S. Davies to their jointly edited collection, *Contents of Commercial Contracts Affecting Freedoms* (Oxford: Hart 2020), Chs 5 ('Good Faiths and Contract Terms') and 6 ('Excluding Good Faith and Restricting Discretion').

work in the reforms of third-party rights and the illegality defence as well as, perhaps, the law on penalties. But insofar as that pressure stemmed from the UK's membership of the EU, it has of course been removed by Brexit. And there can be no doubt that the UK Government intends to take advantage of its new-found freedom of action, by reviewing and repealing or replacing all EU-derived legislation still retained in the UK.[83] Whether or not the English courts also intend to take advantage within the limits of their powers is probably more open to doubt. Nonetheless, a very recent decision of the Supreme Court does create at least a suspicion in this regard, with reference specifically to the good faith debate just discussed.

13. *Pakistan International Airlines Corporation* v. *Times Travel*

34. In *Pakistan International Airlines Corporation* v. *Times Travel*,[84] the Supreme Court had to consider the question of so-called 'lawful act economic duress' as a ground for the invalidation of a contract. The nature of the problem is best seen by starting with the case facts. Times Travel (TT) was a travel agent whose main business was selling tickets for Pakistan International Airlines Corporation (PIAC) flights between the UK and Pakistan. The airline allocated 300 tickets per fortnight to TT and paid commission on sales made, as well as having a right under the contract to terminate it on a month's notice. PIAC fell into dispute about allegedly unpaid commission with other agents (not including TT). Nevertheless, PIAC cut TT's fortnightly allocation to 60 tickets, as it was entitled to do, and also gave the proper notice to terminate the contract. Termination would have had a disastrous effect on TT's business, and so it accepted a new and different contract from PIAC which included a waiver of any claims to commission that TT might have had. It was this new contract that TT challenged as procured by lawful act economic duress. While PIAC had been strictly entitled to act as they did, the pressure that put on TT to agree a new contract was illegitimate, leaving them no alternative course of action, and the new contract was accordingly voidable.

35. The Supreme Court upheld the contract, however. Although finding that English law has developed a doctrine of lawful act economic duress, the court held unanimously that PIAC's actions were not the *illegitimate* use of their contractual rights required to bring the doctrine into play. In what was clearly drafted as the lead judgment, Lord Burrows argued that in the commercial context what made a party's use of its rights illegitimate was twofold: (1) deliberate creation of the victim's vulnerability to economic pressure; and (2) the party's subjective bad faith in demanding what it did not genuinely believe it was owed or in seeking

83 See the UK Government announcement on 16 September 2021, https://www.gov.uk/government/news/government-launches-plans-to-capitalise-on-new-brexit-freedoms.

84 *Pakistan International Airlines Corporation* v. *Times Travel* [2021] UKSC 40, [2021] 3 WLR 727.

waiver from a party's claim when it did not genuinely believe it had a valid defence to that claim. In what became the lead judgment, agreed with by the three other judges, Lord Hodge rejected this argument. He did not think it was supported by previous authority. Instead, lawful act economic duress was constituted by either (1) threats based on knowledge of criminal activity by the victim or a closely associated person, or (2) use of reprehensible means to manoeuvre the victim into a position of vulnerability forcing the latter to waive a civil claim against the perpetrator.

36. There is much more that might be said about this case, but for present purposes, the important point is the majority rejection of an approach to this subject based on bad faith. While Lord Burrows was careful to make clear that he did not think that English law should recognize a general doctrine of contractual good faith,[85] the other judges clearly did not want to open even a chink in the door barring the doctrine's entry into the law. Lord Hodge states categorically that in contrast to Civil law (and some Common law) jurisdictions, English law has no general principle of good faith in contract and, echoing a famous dictum of Lord Bingham, that it deals with demonstrated problems of unfairness by way of piecemeal solutions (a number of which are discussed in the Hodge judgment).[86] The concern in a commercial context is said repeatedly to be the threat good faith (as well as an unduly wide doctrine of lawful act economic duress) poses to certainty by subjecting transactions to subjective judicial views on the social and moral criteria to be applied.

37. Does this signal that Lord Leggatt's approach to good faith is doomed should it ever be ventilated in the Supreme Court? Well, in the words of George Gershwin, 'it ain't necessarily so' (with the emphasis, however, on the 'necessarily'). The Leggatt approach is based, not on the introduction of a general doctrine or principle of good faith, but on a technique attuned to the system of 'piecemeal solutions' to 'demonstrated problems of unfairness', i.e., the term implied on the facts of the particular case or in particular types of contract. Moreover, it provides for an objective rather than a subjective judicial approach, based on the contract

85 Ibid., para. 95 ('I do not think that this is an appropriate case in which to rely on a general principle of good faith dealing in so far as that would require a court to try to apply a standard of what is commercially unacceptable or unreasonable behaviour. That would be a radical move forward for the English law of contract and the uncertainty caused by it seems unlikely to be a price worth paying'.).

86 Ibid., para. 27 ('in contrast to many civil law jurisdictions and some common law jurisdictions, English law has never recognised a general principle of good faith in contracting. Instead, English law has relied on piecemeal solutions in response to demonstrated problems of unfairness: *Interfoto Picture Library Ltd* v. *Stiletto Visual Programmes Ltd* [1989] QB 433, 439 per Bingham LJ; *MSC Mediterranean Shipping Co SA* v. *Cottonex Anstalt* [2016] EWCA Civ 789; [2017] 1 All ER (Comm) 483, para. 45 per Moore-Bick LJ'.).

itself. In that it should not be a general threat to certainty but rather a way to solve problems for which the parties' contract has made no express provision. If there is express provision, it will prevail.

14. Conclusions

38. It thus remains to be seen what will happen here. I cannot even pretend that European contract law is likely to be called in aid in the process. Brexit has removed any direct pressure that the English courts may have previously perceived from EU sources, and possible solutions to new problems will have to stake their claim to consideration on their substantive merits rather than any external political position. There is perhaps a greater chance of success in Scotland, where a small legal system generating only a limited number of new cases necessarily relies on external sources for much of its ongoing development and has a historical tradition of looking to Europe for solutions. But even here pressure remains, from legal practitioners, courts and perhaps business, not to depart too far from English law in the context of the UK's internal single market.

39. On the other hand, where the European solutions can be shown to chime with Scottish sources, as I have attempted to do in my discussions of change of circumstances and frustration, they may have more chance of influencing the approach, not only of the courts, but also of bodies like the Scottish Law Commission if called upon to consider reform of the law. Indeed, what I might be arguing for in a Scottish context is an overall more flexible approach to frustration than English law allows, akin perhaps not only to the soft law instruments' provisions on change of circumstances but also to the same documents' approach to excused non-performance of a contract.[87] These enable a response to a wider range of circumstances than frustration, while also letting the courts respond in a much more variable way than the present stark alternatives of discharge with restitution or continuation of the contract.[88] And if English law does give house room to good faith by way of implied terms, I would expect Scots law to follow suit.[89]

40. What other sources of pressure exist for English law, however? Relevant developments in other Common law countries (jurisdictions explored in Lord

87 PECL, Art. 8:108; UPICC, Art. 7.1.7; DCFR, III.-3:10.

88 Such an approach for Scots law has been advocated previously: see e.g., Angelo D. M. Forte, 'Economic Frustration of Commercial Contracts: A Comparative Analysis with Particular Reference to the United Kingdom', *Juridical Review* 1986, p 1, and Laura J. Macgregor, 'The Effect of Unexpected Circumstances on Contracts in Scots and Louisiana Law', in Vernon Valentine Palmer & Elspeth Christie Reid (eds), *Mixed Jurisdictions Compared: Private Law in Louisiana and Scotland* (Edinburgh: Edinburgh University Press 2009), p 244.

89 See *Unicorn Tower Ltd* v. *HSBC Bank plc* [2018] CSOH 30, paras 38–43, 69–72 (noted by P.C. Corcoran, '*Unicorn* v. *HSBC*: Good Faith Returns to Scotland?', 22. *Edinburgh LR* 2018, p 380.

Hodge's judgment in *Times Travel*[90]) may have some effect. There is also internal political pressure in the UK, apparent from the intervention in the *Times Travel* case by the All Party Parliamentary Group on Fair Business Banking, arguing that the law should do more to protect SMEs like TT from their lack of bargaining power when dealing with larger ones, especially banks.[91] The models provided by the soft law instruments, providing for avoidance not only for coercion or threats, but also for unfair exploitation, may be of some interest in that context.[92] And finally the pandemic may yet call into question the strict approach to such matters as frustration, or even to the doctrines of consideration and lawful act economic duress, especially where the survival of an SME is at stake.[93] I am conscious that the story I have told is more of a glass half-empty (or worse) than of one half-full; but the glass has not, I think, been drained quite yet.

90 *Pakistan International Airlines Corporation* v. *Times Travel*, paras 31–39.

91 See the Group's website at, https://www.appgbanking.org.uk/parliament-2020-onwards/vulture-funds-regulation-and-dispute-resolution/; also a comment on *PIAC* v. *Times Travel* published by the firm of solicitors which acted in the Group's intervention in the case, https://www.hausfeld.com/en-gb/what-we-think/perspectives-blogs/supreme-court-curtails-the-scope-of-economic-duress/. I am indebted to Hugh Beale for the latter reference.

92 PECL, Arts 4:108, 4:109; UPICC, Arts 3.2.6, 3.2.7; DCFR, II.-7:206, II.-7:207.

93 But in response to a question from Hugh Beale after the lecture, I tend to think that the debtor being subject to a formal insolvency process should not be able as a result to plead change of circumstances and equitable adjustment, mainly because of the difficulties it might cause for the principle of parity of creditors in insolvency. I note however that under the Bankruptcy (Scotland) Act 2016, s. 209, an individual's trustee in bankruptcy is empowered to challenge 'extortionate credit transactions' entered into by the bankrupt up to three years before the bankruptcy. There is a similar, UK-wide, provision for insolvent companies in liquidation: Insolvency Act 1986, s. 244. Also under the 2016 Act, ss 101–7, the trustee may seek recovery of the bankrupt's 'excessive pension contributions'.