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Contract Law in Common Law Countries: A Study in Divergence

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This special issue is the result of the 2021 co-operation between the London Centre for Commercial and Financial Law (LCF) and Jindal Global Law School (JGLS) in India. It has been a huge pleasure to work together on this three-part conference series in 2021 and to co-edit this special issue with the Liverpool Law Review. Both of us had been fascinated with the evolution of the common law of contract across jurisdictions for some years, which is perhaps natural as we are situated within common law jurisdictions. The journey that the original English common law took from its highly integrated life in an English jurisdiction held together by the Privy Council into a more and more loosely connected network of Commonwealth countries and their independent court systems and legislatures, resulted in a variety of emanations of contract law issues. Some countries have codified their contract law. Some countries practice an active reference to the traditional body of English case law. Other countries have civil law influence as well and operate a layered or mixed system of laws where concepts of both traditions come into play. Thus, our idea was to have an exploration into the diversity of approaches to contract law within common law jurisdictions.

Our conference series provided an opportunity for all those with an interest in contract law issues to delve into a comparative analysis. We invited participants to pick a topic along three broad themes—the formation of the contract, its substance and terms, and termination and remedies. Each participant contrasted the approach of two or more common law jurisdictions, with the UK necessarily being one of the chosen jurisdictions. What had initially been envisioned as a physical conference was pushed online due to the pandemic and spread out thematically across three separate virtual conferences. Although a decision taken amidst a great tragedy

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unfolding across the globe, this changed format turned out to be somewhat fortuitous as we were able to bring together many more people than we had initially believed possible, with the participation of eminent scholars and a large network of academics across countries on four continents. Some of our participants joined at 'ungodly' hours of the day or night and rescheduled classes in order to join our live online conferences. For this and the splendid work of our presenters, commentators and keynote speakers we are tremendously grateful!

Mindy Chen-Wishart started off the conference series by giving a keynote address to the first conference (on the formation of the agreement) in June 2021. Stefan Vogenauer held the keynote speech at the second conference (on the substance of the agreement) in September 2021, and Roger Brownsword was the keynote speaker at the concluding conference (on disputes arising out of the agreement) in December 2021. All the keynote addresses, along with other materials and clips, can be viewed for free on the dedicated LCF website.[1] At each conference, we had the pleasure of inviting eminent academics and scholars to serve as discussants to the papers presented—Nigam Nuggehalli, Hector MacQueen, May Fong Cheong, Nilima Bhadbhade, Stefan Vogenauer, David Cabrelli, Martin Hogg, Jan Halberda, Stelios Tofaris, Alexander Loke, Geraint Howells, Franco Ferrari and Sonal Kumar Singh. Their comments were insightful and of great value not only to the authors, but to all participants. Once again, we are indebted to all our keynote speakers and discussants for providing for lively debates at these events and for adding to the quality of the resulting papers as they are published here. We also thank co-founder and director at the LCF, Mads Andenas QC, who expertly opened and chaired many of our sessions and has been an invaluable supporter of this project.

We now turn to summarizing the key points made by the authors, and discussants, through the conference. Before we do so, though, we found it useful to organize this editorial not upon the conference themes, but instead based upon the kind of legal challenge that the papers were discussing. The inspiration for such approach came from Roger Brownsword, who, in his very thoughtful keynote address for the final conference, identified two competing mindsets in the English common law towards contract law, which led us to adopt a broader lens through which to view our project. The first mindset Brownsword identified, which he referred to as a 'coherentist' approach, is concerned with maintaining the integrity of doctrine in a historically consistent manner. The other, Brownsword referred to as the 'regulatory' approach. This mindset is more concerned with the functionality of the law and whether it is fit for the purpose for which it is devised. This was a very intriguing duality set up by Brownsword, especially as he noted that neither option appears particularly inviting.

The coherentist would be correct in stating that no legal tradition is capable of sustaining itself without a healthy regard for its inheritance and accepting some theoretical and doctrinal limits, even as it innovates to meet new challenges. The regulatory approach is also quite reasonable, as it regards the law not as a vaunted end

[1] Our free content can be viewed here: https://lcf-academic.org/lcfjindal-gls-conference-series-2021. Full event recordings are available for a fee here: https://www.eventbrite.com/e/357425237507.

in-of-itself, but as a means to accomplish certain societal goals. If the law is unable to provide answers to a new generation of questions and challenges, its continuation in the existing form is likely unjustified. Yet, both modes of thinking have substantial drawbacks in the midst of a dynamic and fluid commercial environment. The coherentist approach is perhaps a bit too wedded to the *idea* of coherence, which may result in the law becoming insensitive to changing realities or even being an entirely fictitious exercise, running the risk of a 'doctrinal disintegration' (Gilmore 1995, p. 110). A similar outcome is likely to occur with a zealous regulatory approach that may have little regard for doctrine, fragmenting the law into myriad strands with no way to convincingly interact with each other.

Perhaps, however, instead of seeing these as two opposing perspectives, battling for dominance, it may be useful to see them instead as in conversation with each other. Doctrine is created to lend some sense to the law, in order to chart its progress and guide it through choppy waters. However, where the doctrine is straining to account for and accommodate commercial realities, its utility must be questioned—purity of doctrine must not be permitted to strain common sense. As Lord Wilberforce remarked within the context of contract formation: '…English law, having committed itself to a rather technical and schematic doctrine of contract, in application takes a practical approach, often at the cost of forcing the facts to fit uneasily into the marked slots of offer, acceptance and consideration.'[2] It is here that the legal academic has a valuable role to play. When doctrine is fraying at the edges in courts, a doctrinal restatement can help evolve a more just and sustainable jurisprudence. Occasionally, the academic is able to delve deeper into underlying legal principles, identifying similarities between seemingly disparate areas of doctrine and thereby recasting the law within a new framework. Such exercises benefit the jurisprudence by providing courts with a thoughtful means to revisit their commitment to 'technical and schematic doctrine'.

With this in mind, for the purposes of this editorial, we have organized the papers and conference proceedings in relation to the specific challenges they address. We asked ourselves, what doctrines are these papers challenging as being ill-suited to the modern world, and what are the proposed frameworks being suggested to revitalize doctrine in the face of these challenges? We found that, across common law jurisdictions, courts are struggling to fashion appropriate responses to the changes in the manner in which parties contract today, with the advent of the internet and the increasing contracting by minors in the digital space. There has also been a more open recognition of different contractual relationships, invoking the need for different doctrine; most notably within the context of the debates around 'relational' contracts and good faith in the UK. There also remain a few longer-standing critiques of doctrine resulting in some interesting divergences, such as the penalty rule, the treatment of unfair terms, the nature of pre-contractual representations and warranties, and frustration. We will take each of these in turn.

[2] *The Eurymedon*, [1975] AC 154, 167.

The Changing Manner of Contracting—Minors and the Digital Age

Concern about how parties contract is not new to the common law. In the twentieth century, it led to the rise of consumer protection laws, the advent of the unconscionability doctrine in the US, and the Unfair Contract Terms Act, 1977 (UCTA) in the UK. Brownsword described the UCTA as the result of a 'crisis' in common law, where most judges were unwilling to develop the common law of contracts to protect consumers in the face of adhesion contracts and, so, the legislature had to step in. In their paper, Dharmita Prasad and Pallavi Mishra demonstrate that, if anything, the 'adhesiveness' of the consumer e-contract is even more pronounced today, with the common law duty to read being made a mockery of with every click of an 'I Agree' button. Their paper lays out the travails of three jurisdictions in the face of this new millennial reality. US courts are putting their doctrine of unconscionability into the service of regulating onerous terms, while the UK courts seem relatively more hesitant to do so outside of the context of the UCTA. In India, the Indian Contract Act, 1872 being the product of the nineteenth century classical common law of contract, is largely silent on the issue of unfair terms. While the legislature has recently passed consumer protection legislation regulating 'unfair contracts' in consumer contracts, the Indian Supreme Court is trying to develop a broader contract doctrine of unconscionability, modelled upon the US jurisprudence. Although the Indian unconscionability jurisprudence is somewhat hesitant and inartful, Prasad and Mishra opine that a broader unconscionability doctrine may provide a necessary framework within which the Indian courts may develop a more meaningful jurisprudence regarding what constitutes unfairness within the digital sphere. Their approach was analysed by Stelios Tofaris who provided the wider context of legislative history of the Indian Contract Act where the struggle to achieve substantive fairness already played out in the nineteenth century debates. Tofaris pointed out that, while both the UK and Indian legislature have now opted for statutory solutions outside the traditional contract doctrines in modern times, the US concept of unconscionability as practiced there should not be advocated overly uncritically without giving due consideration of its limitations and failings.

The difficulties of e-contracting are exacerbated when paired with a kind of contractual relationship where one of the parties is objectively vulnerable. Minors are a classic example of a category of people that are deemed vulnerable by society, and the English common law has proceeded from that paternalism. As Shivangi Gangwar highlights in her paper, perhaps one of the most ignored modern sociological trends is the rapid, technology-fuelled expansion in the frequency and nature of minors' contracting. Drawing lessons from South Africa, Gangwar argues for a broader flexibility, adopting a graded approach with limited contractual capacity permitted. Shaun Star and Divyangana Dhankar's paper, meanwhile, demonstrates that, in comparison with the legal frameworks in Australia and the UK, the Indian law governing minors' contracts is unduly harsh and outmoded, with Indian courts seemingly compelled to declare as void almost all contracts that minors enter. The Indian courts' paralysis in the face of the relevant

statutory provision has been met with some other legislative reliefs being provided. However, similar to Prasad and Mishra, Star and Dhankar are also not convinced that legislative action provides any panacea. Instead, they persuasively argue that piece-meal legislative enactments in India have actually created a larger incoherence within the area of the sports and entertainment industries, with entire swathes of contracts unregulated (e.g. with the rise of e-sports). Despite the increase in minors' activities in the sports and entertainment industries, such minors will remain highly vulnerable in India, with only a limited right to redress found in constitutional protections, unless the Indian judiciary is willing to engage in a careful and principled re-evaluation of the general law of minors' capacity to contract.

These papers demonstrate an interesting tension in the jurisdictions being scrutinized—especially in India. While legislative enactments are useful in providing redress, they tend to be targeted to specific problems. This may be useful as some classes like consumers, may be deserving of heightened protection. However, common law courts can benefit from a broader, and more flexible, general contract doctrine as they implement such legislative protections. In the worst case, the courts may end up implementing legislation that is scattershot in an unthinking manner, becoming party to a legal environment that does more harm to those it is meant to protect.

These papers, especially Gangwar's, also throw up a question about whether the model of the beneficial/necessaries contract is even a satisfactory model in the face of e-contracting. The difficult questions of the best interest of the minor are often connected with acquisitions, such as in inheritance or marital cases, and services. Could such a framework also apply to a 16-year-old social influencer's services and profit-sharing agreement with YouTube? Can that contract be adequately described as 'beneficial' for the minor or one for 'necessaries'? Additionally, in common law countries, these matters generally seem to arise once there is a contractual dispute, and one or both parties have already invested time and resources into the contractual relationship. One wonders if a different framework, such as in Germany where such questions can be laid before the family courts in a non-contentious and *ex ante* setting, may be useful. In her comments to Star and Dhankar's paper, May Feong Chong, mentioning the well-publicised US case of Brook Shields, reminded us of the potential long lasting impact of parental prerogative in relation to minors which is the default position in the above-mentioned German (civil) law, too. We cannot help but conclude that minors' contracting capacity is a topic deserving of urgent and careful study to account for the recent shifts in behaviours.

Good Faith and Its Place Within Common Law

Contemporary debates in the UK about whether English common law recognizes a duty of good faith and what such good faith involves, invited quite a bit of attention by our participants. In her paper, Paula Giliker examines the developments in the duty of good faith in England and Wales, and Canada. She argues that the underlying principles accepted by the English and Canadian courts to promote good faith in

performance could be extended to the negotiation phase, especially in Canada where the Supreme Court has been much more enthusiastic in its embrace of good faith as an obligation in the performance of contracts. However, Giliker demonstrates that any duty to negotiate in good faith not only cuts against the grain of the arm's length bargaining posture, but will, more significantly, be difficult to measure and remedy. How much effort demonstrates good faith? And what is the measure of damages if such a duty has been breached? She suggests that perhaps the farthest the common law will go with regard to pre-contractual dealings is to prohibit the wilful stringing-along of another person and provide reliance damages. However, this too is not without its complexities in determining whether the intention of the person was to wilfully string the other along.

A further difficulty Giliker points to is that negotiations can either occur prior to a contract or be part of the contractual bargain in relation to some future moments in the contractual relationship. In the latter scenario, there may be some means for the courts to evaluate a party's actions in relation to the transaction and their past dealings. This may particularly be so in the case of a 'relational contract', although such a term requires careful consideration of what are the defining features of such an agreement. However, it is more difficult to ascertain at what point a person's self-interested negotiation tactics and strategies would be such as to deserve the sanction of courts in pre-contractual negotiations. Indeed, in more complicated contracting environments, there is frequently extensive pre-contractual documentation, which may even have been agreed to be 'subject to contract'. There is an interplay between two questions here—at what point is the contract actually formed? And how much good faith may legitimately be demanded of a party seeking to protect and advance its interests?

In their paper on good faith within the construction industry, Saintier et al. propose using a 'project-centric' approach to lend more meaningful definition to the good faith doctrine. By taking the construction industry in the UK and Australia as case studies, they demonstrate that the common law's failure to address the unique transactional arrangement at play has resulted in the construction industry having to self-regulate by way of suites of contracts. Of course, such an approach has its limitations, as ultimately parties rely upon the courts to resolve disagreements by deciding what the parties truly intended. Within the context of good faith clauses, UK and Australian courts are sympathetic to the cooperative nature of the endeavour but remain a bit wary of how to appropriately account for it within the ambit of the law. The authors argue that by adding the project into the list of considerations of what would constitute good faith, a certain objectivity would be achieved, which would help courts develop a more meaningful jurisprudence regarding what good faith means within the construction context. While Martin Hogg welcomed the use of express contractual terms in industry standard forms setting out good faith related duties in detail and agreed that the courts must do more to meaningfully implement duties of good faith, he wondered whether the project could have a separate existence, apart from the parties' intention, or whether such an approach would subsume parties' intent entirely.

What is most intriguing to us about Saintier et al.'s proposal is that they are persuaded that the doctrine of good faith has to be sensitive to the context of the

specific contractual relationships at issue. They are not alone in this insight. Indeed, in a compelling keynote address for the first conference, Mindy Chen-Wishart had presented her and co-author, Victoria Dixon's, argument that good faith is not alien to the English common law. According to them, there are three possible approaches which English courts could take regarding good faith moving forward, and four scenarios in which good faith has already found resonance in English decisions, although not explicitly recognized. They call this their '3×4 approach'. While they prefer the recognition of good faith in its 'humble' form as a credible and persuasive organizing principle, which explains various strands of English decisions, what is perhaps most intriguing is the underlying taxonomy of contractual relationships that the authors lay out—the '4' in their '3×4 approach'. The authors identify four contractual relationships: (1) arm's length; (2) symbiotic; (3) recognized vulnerability of one party; and (4) fiduciary relationships, with (1) and (4) on two ends of a continuum. (Chen-Wishart and Dixon 2020, p. 212). They demonstrate that English decisions apply gradually escalating obligations of honesty, fair dealing, and respect for the contractual purpose, such that by the time a fiduciary relationship is in front of the courts, the parties are held to very high standards of care and regard for the other. The keynote was a good reminder that as the explorations of good faith doctrine continue, such inquiries can only be successfully conducted when situated within the appropriate context of real-life interactions. In other words, it is just as important to identify the relevant characteristics of the contractual relationships, as it is to identify the doctrinal features.

Returning to Saintier et al.'s 'project-centric' approach, then, we believe that their article also throws up questions not just for the 'relational' contract, but also the network—an area of scholarship pioneered by Gunther Teubner. A network may be broadly defined as 'a combination of relational contracts close to the hybrid end of the spectrum [between market and organization] together with co-operative elements found in multilateral associations linked through bilateral contracts' (Collins 2011, p. 10). Such an arrangement throws up a contradictory mess of assessments where individual actors are engaged in self-interested commercial behaviour, but their self-interest is intricately tied to the success of the cooperation of the entire network. In order to bring any manner of harmony to this, it may be argued that the network is to be regarded as an entity outside any single bilateral contract, which is owed a separate duty of loyalty or good faith (Collins 2011, pp. 14–15). We would add that this really nips at the heels of the judicial system for a more robust jurisprudential shift regarding networks, which throws up many questions for careful consideration. For example, Saintier et al. only raise the spectre of the 'project' for analysis of the meaning of good faith within the construction context. However, could one argue that the other parties to the construction project should be allowed to sue each other in spite of a lack of privity (Collins 2011, pp. 15–16)? Although the privity rule has been much criticised, could the common law countenance such an abandonment? We would suggest that if cast as an exception to the rule within the context of a specific contractual relationship, i.e. the network, common law courts may be more willing to consider such arguments. But just as with the current debates surround the 'relational contract', the 'network' will first require a broader legal engagement and scholarship on its defining features.

The Penalty Rule

Although the common law appears to be in need of a serious engagement with the underlying taxonomy of contractual interactions and relationships, not all rests on such an inquiry. There remain several meaningful criticisms of prevailing doctrine even within the context of a simple, one-shot, arm's length transaction. In such a context, the common law presumption is that parties should have the autonomy to arrange their own commercial affairs. However, this presumption has been undercut by the common law at times. One of the more contentious areas of this subordination of parties' intention to other considerations can be found in the somewhat dissatisfying development of the jurisprudence around penalties. In 2015, the UK Supreme Court contended with this difficult history in the *Cavendish-ParkingEye*[3] judgment and expanded the application to protect the parties' 'legitimate interest'. In his fiery critique of the penalty rule, Larry DiMatteo demonstrates that there is an incoherence in the penalty rule when one surveys common law countries, indicating perhaps that the rule itself is one that belies reason. He notes that the cases also demonstrate a 'commercial-consumer dichotomy', with some common law jurisdictions adopting the 'legitimate interest' test only for commercial arrangements which do not involve consumers because, arguably, consumers' reasonable expectations should not be subordinated to business interests as they fall into a different category of cases (a recognized vulnerability of a party as Chen-Wishart and Dixon would suggest). He urges the alternative framework of unconscionability, i.e. all liquidated damages should be enforceable unless they are found unconscionable. This framework would permit courts to evaluate factors such as relative bargaining strength to determine whether a clause constitutes an unenforceable penalty. However, just as Tofaris did with Prasad and Mishra's paper, Geraint Howells questioned the workability of the unconscionability doctrine as a standard of the test for enforceability of a liquidated damages clause—a concern shared by Alexander Loke.

Joshua Teng and Kailash Kalaiarasu similarly engage with the penalty rule and the impact that the *Cavendish-ParkingEye* judgment has had in Singapore and Malaysia. They demonstrate that Singapore has resoundingly rejected the 'legitimate interest' test on the grounds that it departs from the compensatory principle, which takes as a starting point that there has been some damage to the non-breaching party for which it needs to be compensated. On the other hand, Malaysia is embracing the test. Teng and Kalaiarasu suggest that this may provide a way to avoid the judicial interpretation of the 'reasonable compensation' test contained in the Malaysian Contracts Act, 1950, which, much like its progenitor in India, has been struggling under the weight of judicial decisions that require proof of damages to assess whether the stipulated sum in the clause constitutes 'reasonable compensation'. They further argue that, although not fully appreciated by the judiciary, the Malaysian statutory language actually contains a truncated process whereby a judge may reduce the

[3] These were two cases decided together: *Cavendish Square Holding BV v Makdessi* and *ParkingEye Ltd v Beavis*, [2015] UKSC 67.

contractually stipulated amount to a reasonable sum, as opposed to declaring the clause void *in toto*.

Teng and Kalaiarasu's paper lends some additional force to DiMatteo's main thesis that there is a fundamental incoherence in the English common law penalty rule—even as far back as the nineteenth century, English jurists had attempted to forcibly break ties with the home jurisprudence in the Indian Contract Act. The question is whether the common law can today find a satisfactory resolution to the tensions within the penalty rule. However, this is an area that does not necessarily permit easy answers. The unconscionability framework pressed by DiMatteo may need further engagement, the impact of the 'legitimate interest' test upon consumers requires attention, and the desirability of permitting a judge to reduce the penalty to a reasonable sum is deserving of consideration. This may be an area where we see more divergence in the common law world yet.

Unfair Terms

Several papers through the conferences were predominantly concerned with unfair terms. Although more concerned with assessing the manner in which jurisdictions are grappling with the lack of any negotiation in digital consumer contracts, Prasad and Mishra's paper was concerned with the broader issue of consumers entering into unfair bargains. In his paper on the duty of good faith in standard form consumer contracts, Nicholas Mouttotos carries this discussion forward in another jurisdiction whose contract law follows the Indian Contract Act template—Cyprus. Mouttotos presents the reader with an interesting case study of a jurisdiction that is more wedded to the classical framework where procedural unfairness is an area of concern, as seen in the regulation of vitiating factors like fraud and coercion, but maintains an aloofness with respect to substantive unfairness. In fact, as Mouttotos points out, although Cypriot courts eagerly call upon English jurisprudence in contractual matters, they have steadfastly ignored the English courts' advancement in the area of consumer protection. Thus, in Cyprus, the EU Unfair Terms in Consumer Contracts Directive is interpreted through a rigid, and somewhat archaic, English common law lens of requiring merely an absence of dishonesty. Although Mouttotos provides some hopeful examples of a shift in the Cypriot judicial approach towards increased consumer protection, his paper is an intriguing case study of the limitations of legal harmonization projects.

Mouttotos' paper also reminds us that although other jurisdictions may be tied to the English jurisprudence through historic circumstance, it is no guarantee that modern English law will be accepted, closely followed or even properly understood. We can put Saloni Khanderia's exploration of the Indian jurisprudence of fundamental breach in the latter category. In her paper, Khanderia shows that mid-twentieth century English jurisprudence that struck down unfair exclusionary clauses on the pretext of fundamental breach, and which was subsequently overruled in England, continues to be enforced by Indian courts. English courts gladly accepted the legislative intervention of the Unfair Contract Terms Act, closing the door upon their previous decisions now that they were provided with a new framework, which

allowed them to deal with exclusionary clauses on their own terms without invoking the ill-fitting glove of fundamental breach. However, Khanderia demonstrates that the Indian courts appear to have completely misunderstood the current status of English law and the overreach committed by that earlier line of cases. Intriguingly, Khanderia concludes that Indian courts should call upon the UNIDROIT Principles of International Commercial Contracts as providing a set of indicia by which to ascertain whether a breach is fundamental, excluding recourse to English jurisprudence, which she characterizes as fragmented across statutory realms.

It is notable that both authors favoured the utilisation of supra-national rules to advance the national doctrine. And here, we must mention of Stefan Vogenauer's excellent keynote address in the second conference, where he summarized some of the findings of an ambitious comparative study with which he is engaged, along with Mindy Chen-Wishart and others—the Oxford University Press project, *Studies in the Contract Laws of Asia*. The project has six planned volumes of which three have been published, and looks at thirteen Asian jurisdictions, which have inherited a western legal tradition through the process of colonization. The project evaluates how such laws have been received and in what form they have sustained themselves, if at all. In his keynote, Vogenauer summarized his categorization of the types of legal transfers that he found in the case studies of the various countries (Vogenauer 2021), which were written by experts in the domestic laws (Chen-Wishart and Vogenauer 2021). At times jurisdictions have rejected a legal principle ('rejected transfers'), while at other times the principles have been reshaped to fit the local culture of the host jurisdiction ('localised transfers'). Not all transfers are uneasy fits, however. Some concepts that have not been imposed upon the host jurisdiction nonetheless find their way in through caselaw ('irrepressible transfers'), and in other places, despite the originator jurisdiction subsequently reviewing its own approach, the host jurisdiction remains wedded to the transfer ('sticky transfer'). He noted that, by and large, the contemporary contract law jurisprudence in these jurisdictions is heavily influenced by the inherited western jurisprudence. For example, Asian jurisdictions with a civil law influence are freer with their use of good faith in their decisions, while the jurisdictions with a common law influence steer clear of such language, constraining themselves to inquiries into reasonableness. However, this path dependency is nonetheless tempered by the presence of 'rejected transfers' and 'localised transfers', which demonstrate a somewhat uneasy assimilation of legal traditions.

Within this context, then, Mouttotos and Khanderia's papers appear to be illustrations of a kind of 'sticky transfer' as in both papers the jurisdictions (Cyprus and India) remain faithful to an English approach which has been subsequently discarded by the UK. As already noted, the reasons and motivations for such judicial hesitancy is not always apparent. Both jurisdictions have a statutory text with which they must contend, although some of this hesitancy may be the result of not closely following UK developments. We do not wish to suggest that these jurisdictions should follow the UK approach. It is merely interesting that both jurisdictions appear to espouse an affinity with English law, yet nonetheless diverge quite markedly in application. With such a conservative judicial impulse on display, we wonder if the use of EU directives or UNIDROIT principles can be expected to be successful. Indeed, in

commenting on Mouttotos' paper, Jan Halberda pointed out that even the UK had limited the scope of application of the EU Unfair Terms Directive in the context of banking practices,[4] by limiting the duty to include terms in good faith only to ancillary terms. This might be an exercise in 'defending against' what could be seen as a 'legal irritant'. In light of these discussions, we were struck by the thought that the potential success of legal transfers is an area that is deserving of further attention and review. What are the circumstances that would make it more or less likely that a particular legal transfer would be successful? We believe that projects like *Studies in the Contract Laws of Asia* could hold interesting implications for such questions and, consequently, the design and implementation of future harmonization projects.

Precontractual Representations and Warranties

The division between tort and contract, and whether such division even exists, is perhaps one of the trickier modern legal quandaries. This is a matter of sufficient import as it surfaces in various contexts—such as whether all breaches of contract can be deemed negligent (Furmston 2017, pp. 32–33), or whether a claim properly sounds in contract or tort. In their paper, Gautam Mohanty and Gaurav Rai grapple with this distinction within the context of pre-contractual statements and the appropriate measure of damages. They explore the distinctions between a contractual measure of damages and the tortious measure, and then compare the developments in the UK with Indian law, which they show is developing a different strand of thought. They argue that in India the statutory language for any claim arising out of pre-contractual misrepresentations, whether fraudulent or not, actually contains the contractual measure of damages, but one that is not constrained by foreseeability nor subject to liquidated damages clauses. As we understand their argument, the Indian Contract Act would justify treating material pre-contractual representations as both contractual—an indemnity of sorts, unhindered by arguments of remoteness of damages—and tortious insofar as the parties would not be permitted to negotiate the extent of their liability contractually. This is certainly an intriguing and novel argument. Although Mohanty and Rai's paper was limited to the treatment of precontractual statements, Sonal Kumar Singh mentioned that there is perhaps some further exploration that is also desirable for conditions and warranties that are expressly incorporated into a sale agreement, and how they interact with the Indian Sale of Goods Act, 1932 and the measure of damages therein.

Coming to the written warranty then, Manasi Kumar and Nishtha Pant explore the contract-tort dichotomy in relation to express, written warranties by contrasting the developments within the US and the UK. Kumar and Pant demonstrate that US jurisdictions continue to grapple the long shadow cast by Samuel Williston, who characterized the warranty as a 'quasi tort' (Williston 1909, § 197), in deciding whether reliance is a necessary element to prove a breach of warranty. However, in

[4] *Director General of Fair Trading v First National Bank plc* [2001] UKHL 52; *Office of Fair Trading v Abbey National plc and Others* [2009] UKSC 6.

recent years, the issue of reliance is surfacing within the context of express warranties that are incorporated in the written agreement, which were understood even by Williston as being contractual in nature. As some US jurisdictions struggle with the dividing line between contract and tort, Kumar and Pant argue that the UK is creating an artificially stark divide between the two. UK courts have treated the warranty as a creature of contract for over a century, distinguishing it from a misrepresentation by putting the focus upon whether the speaker intended to undertake contractual liability. This has served the UK well so far in protecting the written warranty as a contractual term. However, today the divide is becoming almost impenetrable with the UK High Court contesting whether a written, incorporate warranty could ever even contain within itself the seeds of a representation, such that the UK Misrepresentation Act, 1967 could apply. It has been observed that there is nothing within the 'law of nature' that makes the warranty inherently a creature of tort or contract (Atiyah 1971, p. 350), and this paper demonstrates that this inherent uncertainty continues to throw up challenges despite the approach taken.

On a related note, not only is the nature of the warranty at issue in a contract, but, as pointed out by Franco Ferrari, the nature of a dispute resolution clause is also one that is garnering attention and controversy. Speaking of choice-of-court and arbitration agreements, Ferrari raised another distinction within contractual clauses—procedural or substantive—and the impact that could have upon remedies.[5] If such a contract is classified as a procedural agreement, jurisdictions are unlikely to permit any damages for breach of contract. However, in jurisdictions that conceptualize the failure to abide by such a contract as breach of a substantive agreement, the logical conclusion is that contractual damages should be permitted, which opens up a host of interesting and related questions about the measure of damages.

Force Majeure

With the devastating and far-reaching impact of a force majeure event like Covid 19, it is no surprise that there is interest in the law of impossibility. In their paper on the law of impossibility in the UK and Australia, Sagi Peari and Zam Golestani—picking up on the ubiquitous and infamous question of timing in contract—argue that the proper understanding of the conceptual underpinning of the law of impossibility is that it is more akin to the doctrine of mistake, insofar as the parties did not reasonably foresee the dramatic supervening events at the time of entering into the contract. If the parties did not reasonably foresee the events—a high threshold according to the authors—then any interference discharges the contract, no matter how slight. We understand them as finding the 'foundation of the contract' to be the

[5] A prominent example remains Case C-185/07, Allianz SpA, formerly Riunione Adriatica di Sicurtà SpA and Generali Assicurazioni Generali SpA v West Tankers Inc. (Court of Justice of the EU, Judgment of 10 February 2009), where a breach of the contractual arbitration agreement occurred by filing proceedings in an Italian court—which in the instance was arguably the *forum conveniens*—and which could not be remedied by way of an anti-suit injunction issued by a UK court.

more appropriate juristic basis for the law of impossibility, rather than the currently favoured 'radical change in the obligation', which looks more at how the parties' performance is being affected rather than whether the parties ever understood themselves to have undertaken to perform in these circumstances.

Peari and Golestani then critique the common law's failure to permit the parties' to return to the *status quo ante*. They argue that the law of unjust enrichment is called upon to assist but it is an uneasy fit, at best, as it depends on the absence of contract whereas in such situations there was most assuredly a contract at the time of contract formation. They argue that technically under contract law principles the loss should lie where it falls as the contract existed up until the point of discharge. But, according to them, where contract law is not useful, property law can step in by recognizing the parties' proprietary interests in goods and money, necessitating a return of all property to the other party. The role and influence of the Law Reform (Frustrated Contracts) Act 1943 (the 1943 Act) was discussed in this context. Would legislative intervention be a favoured route to take? Our discussant David Cabrelli pointed out that not only is there little case law on the application of the 1943 Act to date, but commercial parties have resorted to extensive contract drafting so as not to leave anything to chance if it can be avoided and to place their own chosen solutions to unforeseen events in place of those in the 1943 Act.

The Role of Other Disciplines

As seen above, contract law is not a self-contained space and several of the papers demonstrate its interaction with different legal fields—whether tort (Kumar and Pant; Mohanty and Rai) or property (Peari and Golestani). But there is also a limit to what the judges can do. Ordinarily, where the answers to specific legal questions are dependent upon larger policy considerations that must be carefully weighed and considered, the courts defer to the legislative arm of the state. However, even in the absence of such legislative action, cross-disciplinary engagements like law and economics have proven themselves valuable and are worthy of consideration. For example, in his paper, Mitja Kovac argues that a law and economics approach actually provides a defence to the now-disfavoured mailbox rule of acceptance. Where doctrine has been commonly understood to have become anachronistic on account of the changed contracting behaviours of parties, Kovac argues that the orthodox mailbox rule contains the best allocation of risk between market players in order to promote efficient early reliance. And in a very interesting part of his paper, Kovac makes suggestions for future scholarship considering newer developments in the field of behavioural economics. He points to a study where the authors conclude that contracting parties seem to find real intention (a commitment to the deal) in specific, formal moments in the contract life cycle (e.g. signing, payment, possession), which has implications for how courts should understand consent, both in formation and performance of the contract. For example, with regard to debates about the proper role for contextualism and what weight should be given to the formal text, it has been suggested that the question is not whether to have a formalist or a contextualist approach, but rather 'what degree of formalism?' (Mitchell 2019, p. 123). Perhaps

as we look to answers to such a question, the field of behavioural economics may assist in identifying the contexts in which a higher degree of formalism more accurately reflects the parties' intention.

Of course, none of this is to suggest that such approaches would necessarily be correct or persuasive, but that they are worthy of careful consideration. In fact, Kovac's own thesis was distinctly challenged by our discussant Nigam Nuggehali who fondly recalled seminars on the subject during his time at Oxford which had centred on the morality of promises as the essence of the legal relationship initiated by contract, as outlined also in Chen-Wishart's keynote speech, as opposed to its economic success or wealth maximisation. Nuggehali preferred to use the principle of estoppel to counteract any moral hazard issues. Hector MacQueen agreed, recalling his deliberations on the mailbox rule in his role as Scottish Law Commissioner. In addition to Mads Andenas observing the role of legislatures to decide the issue, Nilima Badhbade pointed out the further implications of courts' jurisdiction depending upon the location of the acceptance, which in turn affects the practical procedural factors for a claim's prospects of success.

Conclusion

If we had to summarize the essence of our project, it would be that this was an exercise in evaluating what, if anything, was a 'common law' approach to contract law in the new millennium. We are constrained to conclude that we are unsure. Our participants have deftly illustrated the different approaches taken to various issues around the common law world. Jurisdictions are not closely mirroring the English jurisprudence. Some prefer a more traditional English approach, while others eagerly innovate. English jurisprudence has itself undergone vast shifts and is in the midst of a few more. The gulf between these jurisdictions appears to, therefore, be widening. And we are left with even more questions and open avenues of investigation. But this development also brings with it an excellent opportunity. As the commercial realities shift and strain against legal doctrine, we have for ourselves an intriguing laboratory of related jurisdictions which we can monitor to observe which ones appear to have the most success in dealing with specific challenges. We, therefore, hope that further studies may continue and refashion a new question—what *should* a 'common law' approach to contract law look like in the new millennium?

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