Contractual Justice under English and Shariah Law of Contract: The Case of Consumer Protection

A thesis submitted for the degree of Doctor of Philosophy

By

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Abstract

The modern role of the law of contract imposes a duty on the state to regulate the way individuals treat each other in the marketplace as part of fulfilling its social role. This thesis investigates the situation of contractual justice under shariah and English law. It tests the extent to which contractual justice is protected under Shariah and English laws of contract. It indicates that the English law of contract is focused on the absolute sanctity of contract (in its classical form) and economic efficiency (in its modern form). On the other hand, the shariah law of contract is governed by the general principle that gain comes only from labour and stresses the importance of the equivalence of counter-values. It reveals that while contractual justice under the English law of contract is procedurally oriented, it is substantively oriented under the Shariah law of contract. Additionally, the thesis also discusses the role of the law of consumer protection in pursuing contractual justice. While the consumer is protected under the English law by legislative control, the Shariah law of contract, which was the product of the seventh and eighth centuries, does not recognise the concept of the consumer. One would accordingly question the legitimacy of the action of protecting consumers in those states (take for example Saudi Arabia) that adopt Shariah as the law of the state. Most of the states, which adopt shariah either alongside other normative systems or as the entire code, grant some kind of consumer protection measures within the law of contract. The thesis attempts to fill this gap by testing the viability of consumer protection derived from the Shariah law of contract. In doing so, attention is paid to the theoretical and practical aspects of the law. It is revealed that the Shariah law of contract is fit both from a theoretical and a practical perspective to serve the aims of consumer protection. The outcomes of the research should guide and enhance the legitimacy of consumer protection measures in Shariah-ruled countries.

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Chapter One: Introduction

Making contracts is part of everyday activity, people contract everyday for buying goods and services (food, accommodation, employment etc.). The law of contract expresses individuals' freedom by enforcing power on parties to create binding agreements. The most fundamental rules of the marketplace are stated by contract law. It serves the enforceability of transactions and imposes restraints on the conduct of obligations created by parties and limits its enforceability by means of self-help or coercion from legal institutions.

Furthermore, the law of contract has the potential to enhance community welfare. The marketplace forms a key mechanism for the production and distribution of wealth in most societies. The modern role of contract law requires the balancing of the contractual relationship rather than mere protection of individually acquired positions.[1] This imposes a duty on the state to regulate the way individuals treat each other in the marketplace. It is always for the benefit of contractor to receive the maximum benefit from a contract. Yet, contracting is a social activity, the gain of one contractor could be earned at the expense of harm to the other party. It is for the law of contract to preserve justice between parties. To be able to have a fair and equitable deal has far reaching consequences for the level of welfare in a society. It has the force to determine the direction of people lives.[2] Good morals require contractors to act fairly, honestly and to respect the legitimate rights of others. Exploiting vulnerability or weakness of position of the counter-party to yield self interest runs counter to accepted moral standards. This research is concerned with determining when this changes from being a mere moral obligation to become one that is enforced by law.

Governmental intervention into the marketplace is a modern phenomenon. The development of a mass consumer market is a major cause of the evolution of the modern law of contract.[3] The law of consumer protection is taken to be an avenue for the redistribution of wealth in a

[1] Nagla Nassar, *Sanctity of Contracts Revisited: A Study in the Theory and Practice of Long-term International Commercial Transactions* (Martinus Nijhoff 1995) 24
[2] Mindy Wishart, *Contract Law* (5th edn, OUP 2015) 1
[3] Roger Brownsword, *Contract Law: Themes for the Twenty-first Century* (2nd edn, OUP 2006) 69

society.[4] This is supported by legal rules which ensure a fair, equitable and balanced deal for the consumer. Distributional motives of consumer regulation accord more control to the law of contract rather than relying only on the tax and welfare system.[5]

1.1 Aims, objectives and scope of the study

The research is conducted with two primary aims in mind. The first aim of the thesis is to investigate the situation of contractual justice under Shariah[6] and English law. The first aim is achieved by testing the extent to which contractual justice is protected under Shariah and English law of contract and in doing so the following sub-objectives are addressed: (1) to test the extent to which parties' autonomy is limited for the purpose of protecting fairness; (2) to investigate the extent to which the law of contract contributes towards achieving community welfare and the redistribution of wealth in society; (3) to bring light to the meaning of the concepts of justice under the two jurisdictions; (4) to investigate the extent to which consumer protection contributes to achieving contractual justice, community welfare and the redistribution of wealth; (5) to compare and contrast the situation of the two relevant jurisdictions taking into account the effect of different ideologies and principles on the practice of the two legal systems; (6) to evaluate the efficiency of the systems of protecting contractual fairness in each jurisdiction .

A second aim of this research is to investigate the possibility of a consumer protection regime driven by Shariah law in the field of contract. Shariah law of contract was the product of the seventh and eighth centuries and does not recognise the concept of the consumer. One would accordingly question the legitimacy of the action of protecting consumers in those states (take for example Saudi Arabia) that adopt Shariah as the law of the state. Most of the states which adopt it, either along-side other normative systems or as the entire code, grant some kind of consumer protection measures within the law of contract. There is no evidence that those roles have been tested for their compatibility with Shariah principles. Protecting the consumer in the absence of analysis of the conformity of such rules with durational Shariah principles would put the legitimacy of such measures under question. The second aim is

[4] Ian Ramsay, *Consumer Law and Policy: Text and Materials on Regulation of Consumer Market* (3rd edn, Hart Publishing 2012) 70
[5] Geraint Howells and Stephen Weatherill, *Consumer Protection Law* (2nd edn, Ashgate 2005) 11-4
[6] In this thesis the term Shariah law refers to Shariah principles that are extracted from the primary sources (Quran and *Sunna*) and the secondary sources (*ijma*, *qias*, the public interest and *urf*) as outlined in section 3.3.

achieved by addressing the following objectives: (1) to invoke the theoretical grounds of consumer protection as well as the English experience of consumer protection to illuminate the main characteristics and values of consumer protection; (2) to test the theoretical ground of consumer protection under the contract theory of the Shariah law; (3) to propose a formula for the protection of consumer protection that derives from the spirit of Shariah law of contract.

1.2 Theoretical framework

Conducting the two aims of the research requires invoking many theories and legal concepts of contract and social justice. These are particularly related to the role of the law of contract in achieving fairness and social welfare as well as the function and theoretical basis of consumer protection. These are addressed below along with justification for choosing the two jurisdictions.

1.2.1 Fairness as relevant to autonomy

Fairness or justice is an open concept that is difficult to define or measure. Nonetheless, within the law of contract it might be useful to view fairness as relevant to autonomy. When we refer to parties' autonomy in the context of contract we refer to 'control' or 'influence' over action in relation to the formation, content and performance of the contract. The law decides on the degree of control or influence that an individual possesses before it can be established that the parties have exercised autonomy. It is said that autonomy in the context of contract is of two types: one is in line with freedom of contract thinking and the other is in line with fairness-oriented thinking. From a freedom-oriented perspective, autonomy is concerned with maximizing self-reliant freedom. From this perspective, in order to respect the parties' autonomy and expectations a strong adherence to their intention is required (obligations and liabilities are based on their intention). By contrast, from a fairness-oriented perspective autonomy is concerned with the distinctive interests and expectations that a party is likely to have when entering the relationship. The pursuit of self reliance and the parties' intention are given less importance in this approach. As a result, obligations and liabilities are

determined more by reference to those distinctive interests and expectations rather than self-reliance and intention.[7]

Addressing the first aim of the thesis necessitates invoking contractual theories related to freedom of contract and parties' autonomy. More precisely it requires the investigation of the extent to which the law of contract allow public interference into parties' autonomy for the purpose of ensuring contractual balance. This is done for the purpose of discovering which perspective of contractual autonomy is reflected by the regulation of the relevant jurisdictions. The research reviews the two legal systems (Shariah and English law) from classical to contemporary times. Emphasis is given to fairness norms under the law of contract and the extent those norms form limitations to parties' autonomy. Because different types of autonomy underlie differences in the philosophies of contract, the thesis refers to the underlying ideas which have affected the development and direction of the law.

Although this thesis supports the meaning of contractual justice as presented above, it acknowledges that there are other aspects of fairness. In contrary to the above mentioned meaning of fairness, there is a fairness aspect which flows from 'utilitarian premises'.[8] Under this latter aspect, justice is said to be achieved when people are left to do the best they can according to circumstances. Thus, in contrast to the former position, which requires intervention into private contracts by limiting contractual autonomy to achieve fairness, the latter indicates that the role of the state is limited to ensuring that the contractual relation is made by consent and voluntary will. In other words, fairness as 'utilitarian premises' is focused on procedural fairness rather than substantive fairness. The thesis acknowledges this concept by investigating the extent to which substantive and procedural justice are reflected by the legal principles of both legal systems.

1.2.2 Fairness norms

The thesis is concerned with the role of the law of contract in promoting social welfare as well as the distributive function of the law of contract. This requires the invocation of justice

[7] See Chris Willett 'Autonomy and Fairness: The Case of Public Statements' in Geraint Howells, Andre Janssen and Reiner Schulze (eds), *Information Rights and Obligations: A Challenge for Party Autonomy and Transactional Fairness* (2nd edn, Routledge, 2016) 1-16

[8] Alan Schwartz 'Justice and the Law of Contracts: A Case for the Traditional Approach' (1986) 9 Harvard Journal of Law & Public Policy 107

norms; most modern debates on the normative justice of contract theories uphold either corrective justice (based on right) or distributive justice (welfare distribution). The two Aristotelian norms (corrective and distributive) are defined and measured against the regulation of the two legal systems. Special attention is given to the distributive function of the law of contract. This includes analysis of distributive norms and the way they function. In this regard, the thesis proposed by Hassan that the Shariah law of contract is bound by corrective (or commutative justice) is contested. He argues that distributive concerns are served under Shariah legal traditions only by social institutions and not the law of contract.[9] On the contrary, this thesis argues that the Shariah law of contract promotes the distributive function of the law of contract.

1.2.3 The consumer case

Consumer protection is fulfilled when theories of fairness, consumer welfarism and fair distribution are implemented. Modern laws of consumer protection intervene into the marketplace in order to fix the balance of the consumer/supplier relationship. Protecting the consumer is a form of social responsibility that aims at achieving fairness. In other words, consumer protection is bound by fairness-oriented autonomy rather than freedom-oriented autonomy. The English experience of consumer protection is introduced to this research in order to demonstrate the role of the law of contract in bringing fairness and equity to society. Without introducing the consumer experience the discussion of the level of contractual justice of English law is not complete. Consumer transactions currently constitute a large proportion of contractual relations. Consumer contracting is closely regulated by the English law for the purpose of ensuring a balanced contractual scheme. The research outlines the rationales behind the regulation of consumer contracts and illustrates the extent to which intervention is made into parties' autonomy by exploring the major regulation techniques of consumer protection. While the English law of consumer protection is regulated closely by multiple acts, Shariah law of contract does not recognise the concept of the consumer. Thus, the thesis attempts to examine this lacunae by testing the viability of consumer protection driven from the Shariah law of contract.

[9] Hussein Hassan 'Contracts in Islamic Law: The Principles of Commutative Justice and Liberality' (2002) 13 Journal of Islamic Studies 257

1.2.4 The viability of consumer protection under Shariah law of contract

In order to pursue the second aim of the thesis, theoretical grounds of consumer protection as well as the English experience of consumer protection is invoked to bring to light the characteristics of consumer protection. The established characteristics are subsequently (chapter six) tested for their compatibility with Shariah law of contract. Any legal system must be consistent in theory and technical rules. Thus, to introduce a suitable legal solution requires ensuring that is compatible with both theory and rules of law. This thesis therefore tests the capability of the Shariah law of contract for protecting the consumer from theoretical and practical points of view.

In terms of theory, three factors constitute the theoretical ground of consumer protection. The first requires intervention into private contracts by public authority. Thus, a law system that promotes consumer protection necessarily allows public intervention into private contracts (government paternalism). Second, the legal rules of consumer protection are of special nature that are set to balance the contractual relation for the benefit of the consumer rather than for the benefit of both contracting parties. This is because it derives from the idea that consumer contracts[10] tend to be imbalanced (the distributive function of contract). Third, consumer protection involves the promotion and enforcement of ideas of cooperation and fairness in society by the law of contract (community values and social responsibility). These three factors are tested for their compatibility with the general theory of Shariah law of contract.

From a practical perspective, there are certain values that need to be protected by the law of consumer protection to offer satisfactory protection to consumers. These are: (1) consumers' expectations; (2) informed consent; (3) voluntary will and; (4) fair and balanced contract terms. The thesis proposes a formula for the protection of these values through rules that are taken from the Shariah contract traditions which reflect the spirit of Shariah law.

1.2.5 Justification for choosing the jurisdictions

[10] For the purposes of this thesis the term 'consumer contract' is used as defined by the Consumer Rights Act 2015, as explained in section 5.5 below.

The thesis compares two jurisdictions that generally stand on distinct ideologies and come from very distinct law sources. Such comparison produces interesting results that indicate that difference in contract ideologies does not necessarily mean that a certain issue is treated differently. Many comparative studies between the relevant jurisdictions have been conducted before.[11]

The English law of consumer protection, along with being a classical example of a legal system of strict contractual liberty, reflects the modern needs of consumer protection and has the ability to change the notation of contract. Indeed, it is interesting to follow how the English law has changed from being entirely based on the ideologies of *laissez faire* and *caveat emptor* to become a system that promote values of fairness and cooperation.

It needs to be kept in mind that the English experience is invoked for guidance; it is by no mean an attempt to enforce the English rules blindly onto the Shariah legal system. It rather serves the comparison aim and offers guidance in terms of the basic requirements of consumer protection in the contemporary era. Applying rules that do not reflect the general theory of the legal system is exactly what this research rejects. It was mentioned earlier that consumer protection is somehow granted to consumers in Shariah-ruled countries. However, there is no evidence that these rules have been carefully tested by Shariah principles. It rather seems like a blind application of the Western experience. Applying an experience of one legal system uncritically to another that is bound by different ideologies and background, is likely to produce issues of inconsistency, illegitimacy, fragmentation and conflict. For this exact reason, a state that follows Shariah as the formal law needs to protect consumers by

[11] See for example: Khalad Abou el Fadl 'The Common and Islamic Law of Duress' (1991) 6 Arab Law Quarterly 121; M.A.H. Baharum 'Misrepresentation: A Study of English and Islamic Contract Law' (PhD thesis, The University of Essex 2008); Ibrahim Alhowaimil 'Frustration of Performance of Contracts: a Comparative and Analytic Study in Islamic Law and English Law' (PhD thesis, Brunel University 2013); Shafaai Musa Mahmor 'The Conditions of the Countervalues of the Contract of Sale under Islamic Law with Occasional Comparison with English Law'(PhD thesis, Glasgow Caledonian University 2000); Hussein Hassan 'Contract Theory: Views from the Islamic Legal System' (PhD thesis, University of Oxford 2001); Mahfuz Mahfuz 'A Research to Develop English Insurance Law to Accommodate Islamic Principles' (University of Manchester 2013); Mohammad Sadeghi 'Impossibility of Performance of Contracts in Islamic Law: a Comparative Analysis with Particular Reference to Iranian and English Law' (PhD thesis, University of Liverpool 1994); Nehad Khanfar 'A Comparative Critical Analysis of the Concepts of Error and Misrepresentation in English, Scottish, Islamic, International Contract Law, and Palestinian Draft Civil Law (PhD thesis, University of Abertay Dundee 2010); Hamid Elfatih 'The Role of Consent in the Formation of Contracts : a Comparative Study in English and Islamic law' (PhD thesis, SOAS, University of London 1971); Rakan Alrdaan 'The Contractual Obligations, Subsequent Impossibility and Commercial Hardship: A Study of aspects of the English Doctrine of Frustration and the Use of Force Majeure Clauses with some Comparison to the Law of Saudi Arabia' (PhD thesis, University of Leeds 2016)

means that are driven by the overall spirit of Shariah. The outcomes of the research should guide and enhance the legitimacy of consumer protection measures in Shariah-ruled countries.

1.3 Methodology

This study is undertaken by multiple methods, but is mainly conducted through doctrinal and comparative research methods. Interpretation is the core aspect of any legal study and this is why doctrinal research forms the basis of most legal research projects.[12] A comparative method is employed in order to offer a critical perspective on the two jurisdictions as well as to support the legal reform suggested by this research. Following this two legal methods are addressed.

1.3.1 A doctrinal research

A legal researcher is usually required to identify, analyse, and synthesise the content of the law. Furthermore, the researcher is required to verify the authority and status of the legal doctrine being examined. The way to accomplish this is by using a doctrinal legal research method. A researcher would not be able to embark on critiques of the law or empirical study of the law in operation unless she is familiar with the status of the legal doctrine at hand.[13]The essence of doctrinal research is explained by Van Gestel and Micklitz, in three points:

First, the arguments of doctrinal work are 'derived from authoritative sources, such as existing rules, principles, precedent and scholarly publications'. Second since 'the law somehow represents a system. Through the production general and defendable theories, legal doctrines aims to present the law as a coherent net of principles, rules, meta-rules and exceptions at different level of abstraction'. Third 'decisions in individual cases are supposed to exceed arbitrariness because they have to (be) fit into the system. Deciding in hard cases

[12] Mark Van Hoecke, *Methodologies of Legal Research: Which Kind of Method for What Kind of Discipline?* (Bloomsbury Publishing 2011) 1-17

[13] Terry Hutchinson 'Doctrinal Research Method: Researching the Jury' in Dawn Watkins and Mandy Burton(eds), *Research Methods in Law* (Routledge 2013) 9

impels that existing rules will be stretched or even replaced but always in such a way that in the end the system is coherent again.'[14]

The process of doctrinal research typically consists of two parts. The first step involves locating the sources of the law and then in a second step analysing the texts.[15] In the first stage of legal doctrine research the relevant materials need to be collected. These could be normative sources such as statuary texts, general principles of the law or binding precedents or authoritative sources such as non-binding case law and scholarly legal writing. The discussion of legal sources is one of relevance: a binding precedent is more relevant than non-binding one. A publication of a scholar who is considered an authority in his field is more accepted than the publication of a young academic. In relation to normative sources the relevance is based on validity. The relevance of an authoritative source is always a matter of degree, given that the writing of even an established figure in the field might have weak moments.[16]

In a further step of doctrinal research, the located sources need to be interpreted and synthesised. This thesis employs deductive logic, inductive reasoning and analogy where appropriate. Deductive logic is used when the research is examining the situation of law in order to decide if the situation comes within the given rules.[17] This thesis invokes deductive reasoning for the investigation of the situation of contractual justice under the relevant jurisdictions. The situation of contractual justice in the two legal systems is compared to the given rules and principles of the law and tested for its agreement with the general theory of the law. Inductive reasoning uses a process of arguing from specific cases to a more general rule.[18] Such reasoning is used in this thesis extensively. For example, in relation to generalising the doctrine of unfair exploitation of Shariah law of contract to create theoretical grounds for consumer protection. Analogical reasoning involves locating similar situations, and then arguing that similar cases should be governed by the same principle and have similar outcomes.[19] Such reasoning is employed in relation to the purposed formula of

[14] Rob Van Gestel and Hans-Wolfgan Micklitz 'Revitalizing Doctrinal Legal Research in Europe: What About Methodology?' (2011) EUI Working Paper, Law 2011/5 <http://cadmus.eui.eu/bitstream/handle/1814/16825/LAW_2011_05.pdf> accessed 24/07/2017
[15] Dawn Watkins and Mandy Burton, *Research Methods in Law* (Routledge 2013) 1-8
[16] Hoecke (n 12) 1-17
[17] John Farrar, *Legal Reasoning* (Thomson Reuters 2010) 92
[18] Sharon Hanson, *Legal Method and Reasoning* (2nd dedn, Cavendish Publishing 2003) 217
[19] Farrar (n 17) 102

consumer protection under Shariah law of contract. Many existing rules of Shariah are suggested in the research for the regulation of consumer issues.

1.3.2 A comparative research

In addition to the doctrinal method the research adopts a comparative approach. The purpose of comparative study goes beyond the listing of differences and similarities and critical analysis of their causes. It is rather a way to show a superior mastery of legal material and deeper insight into the law in order to contribute to its development. Legal comparative study is invoked for many purposes including guidance for legislation, law reform, a tool of construction and a means of understanding legal rules.[20]

Comparative law has the intrinsic purpose of developing legal research and education. Comparing ones' national law with a foreign legal system aids reflection and offers a deeper and more critical perspective on this national law. It also broadens the understanding of the roots and context of legal rules. This comes as a natural result to comparative studies; when a researcher is faced with differences or similarities she would want to refer to their historical development, recent globalising trends, and political, cultural or economic reasons in order to explain the similarities or differences.[21] Furthermore, comparative research gives more weight to legal research; it offer a way for the law to become international and therefore, suitable for international exchange.[22]

Comparative study is not limited to comparing the advantages and disadvantages of the two legal systems, but it also acknowledges the background by which these are sustained, along with the values and origins of the legal institutions. It gives special attention to the causes of defects and suggests solutions through critical evaluation and legal reasoning. It is held that the comparison between legal systems of different traditions can be made either on a large scale or a small scale. The small scale is invoked when the study is aimed at the legal rules and institutions used to solve the relevant issue (referred to as microcomparison).[23] The large scale is used in studies that compare the spirit and style of the relevant legal systems, the method of thought and procedures used (referred to as macrocomparison). In this thesis, the

[20] Peter De Cruz, *Comparative Law in a Changing World* (3rdedn, Taylor & Francis Group 2007) 18
[21] Mathias Siems, *Comparitive Law* (CUP 2014) 2-3
[22] Konrad Zweigert and Hein Kötz, *Introduction to Comparative Law* (3rdedn, Clarendon Press 1998) 15
[23] Ibid 4-5

comparative study of the selected legal systems is made through a macrocomparison approach; it exceeds the comparison of relevant rules and institutions by comparing the spirit and style of the relevant legal systems, the method of thought and procedures used.

Comparative law is an important tool for the development of the law. Foreign law can provide model of how different sets of legal rules can work in addressing a given legal issue or promoting particular policy. It is particularly important for the purpose of law reform, which this research proposes in relation to consumer protection in Shariah-ruled countries. This thesis compares the proposed consumer protection model of Shariah to the established English model. Yet, any reform project must consider the limitation of transplanting a foreign model.[24] Particularly, two points must be considered when the adoption of a foreign solution, which is said to be superior, is proposed: first, whether it has proved satisfactory in its country of origin; second, whether it will work in the country where its adoption is proposed.[25] The English model of consumer protection is chosen for its good reputation as a successful model of consumer protection which reflects the European experience. The question of whether the borrowed rules have the potential to be successful under the Shariah legal system is considered by invoking two points. First, testing the computability of the proposed measure with the underlying principles of Shariah. Second, modification to the proposed measures is suggested where needed, in order that they can be passed under Shariah traditions.[26] This step is highly important to avoid the proposal of misguided or superficial legal reform.

The understanding of the two legal systems is a key factor leading to a successful comparative study. Particularly one needs to understand the relevant piece of the law to be borrowed. A comprehensive understanding of a legal rule requires the understanding of its meaning, underlying principles, values, implementation and extension within their relevant circumstances.[27] A basic principle for a successful comparative methodology is the functionality principle, which seeks to avoid all limitations and restraints. According to this principle, 'only things which are comparable are those which fulfil the same function'. The principle of functionality rests on the assumption that 'every legal system of every society

[24] Siems (n 21) 4
[25] Zweigert and Kötz (n 22) 17
[26] This process is made from theoretical and practical perspective under Chapter six
[27] Alan Watson, *Legal Transplants: An Approach to Comparative Law* (2nd edn, University of Georgia Press 1993) 10-16

faces essentially the same problems, and solves these problems by quite different means though very often with similar results'. Therefore, any comparative study must rest entirely on functional terms; the problem must be stated without any reference to the concepts of one's legal system.[28] Thus, instead of questioning 'the extent to which the law reflects good faith and reasonableness in contracting' this thesis investigates the 'extent the law observes contractual fairness' and asks 'how does the law response to perceived unfairness'.

The principle of functionality applies to the sources of the law. The researcher 'must treat as a source of law whatever moulds or affect the living law in the chosen system, whatever the lawyers in there would treat as a source of law, and must accord those sources the same relative weight and value as they do'.[29] This thesis considers two different legal traditions; each tradition adopts a different approach in resolving legal questions. Thus, the results may not always be inconsistent but the way the two laws came into existence and the strength of the legal sources will be different. In relation to English law, the sources of data for this research include legislation, case law and commentaries made by public bodies or individuals in the form of books, reports or articles. Common law was predominantly founded on a system of case law or judicial precedent. Thus, as derived from the common law tradition, precedent case law counts as an authoritative source of English law. On the other hand, the law under the Shariah tradition of Shariah law is based on sources of *lex diva* and comes from the sacred sources of the Quran and *Sunna*, rather than legislation or litigation or by discovery through a specific judicial methodology.[30] Unlike common law, case law under the Shariah tradition is not responsible for the creation of the law or law reform. Case law used in the study comes from the Saudi Arabian judicial system and it is merely invoked for the purpose of explaining the application of the law rather than stating the law.

Furthermore, the principles of Shariah are believed to be based on revelation and therefore, are immutable. Once the main principles of law become settled, the role of the subsequent scholars is limited to developing the rules that flow from the settled principles. This brings about an important consequence that the researcher can discuss a legal thought from the eighth or tenth century without needing to acknowledge a historical development. This is true to what is referred to as the classical period of Shariah law in this research. By contrast, when

[28] Zweigert and Kötz (n 22) 34-6
[29] Ibid
[30] The distinct nature of the sources of the law under the Shariah law of contract is explained in section 3.3

referring to the classical period of the English law of contract of the nineteenth century one needs to acknowledge the historical development and the transformation of the law.

1.4 Chapter outlines

In order to satisfy the aims and objectives of the study, the research is articulated in the following manner:

Chapter Two: Contractual justice under the English law of contract

This chapter is concerned with the general law of English contract. It tests the extent to which the general law of contract serves contractual justice. It investigates the extent to which it allows for public intervention into parties' autonomy for the purpose of setting contractual balance. In the first part of the chapter, the study goes back to the roots of the English law of contract in the nineteenth century. The concept and meanings of contractual justice under such classical law is illustrated. The notions of sanctity and freedom of contract are explored as being dominant in that period. The second part of the chapter explores the modern transformation of the law of contract. The transformation is presented by the introduction of some elements of fairness and cooperation to the law of contract. This includes the notions of inequality of bargaining power, reasonableness, unconscionability and good faith into the law of contract. The discussion is focused on the evolution, meaning, effect and scope of these doctrines.

Chapter Three: Contractual justice under Shariah law of contract

This chapter is devoted to distinguishing the situation of contractual justice under the general theory of Shariah law of contract. Given the distinct nature of the Shariah law of contract the first part of this chapter provides an overview of the law. It explores the evolution of the law in the seventh and eighth centuries, the sources of the law and the nature of the law. It further illustrates the general theory of contract. It then addresses the ongoing debate over the existence of a general theory that binds the Shariah law of contract. The major limitations to contractual autonomy are presented by invoking the doctrine of *shurut* (ancillary condition). The second part of the chapter deals with the doctrines of contractual fairness of Shariah. It explores the meaning, affect and scope of the doctrines of duress, *riba*, *gharar*, unfair

exploitation and just price. The discussion is focused on the scope, meaning, function and effect of these doctrines.

Chapter Four: Theoretical grounds for consumer protection

This chapter reviews the theoretical basis of consumer protection. It explores the rationales of consumer protection from economic and social perspectives. The two major grounds for consumer protection, economic grounds (market failure) and social grounds (distributive justice, paternalism and community values), are discussed. Furthermore, it offers a critical perspective on the necessity, efficiency and chosen level of consumer protection. This is done with the overall aim of the research in mind, that is, with respect to the viability of consumer protection under the Shariah law of contract.

Chapter Five: Consumer protection under English law

The chapter begins by presenting the evolution of consumer protection in the late nineteenth century. It illustrates that consumer law departs from the general theory of contract by making substantive fairness a relevant consideration to contract validation. The major legal techniques of consumer regulations are mentioned, including the test of fairness, the imposed conditions, information remedies and the cooling-off period. It finally summarises the lessons that could be learned to guide the evolution of Shariah law of consumer protection.

Chapter Six: The viability of consumer protection under Shariah law of contract

This chapter investigates the viability of consumer protection driven by Shariah law of contract. The question is approached by testing both the theoretical and practical aspects of the law. From a theoretical perspective, it analyses the three grounds of distributive justice, paternalism and community values in Shariah legal thought. In the second section some general rules of Shariah contract law are introduced for employment in the consumer protection field. These rules have the ability to protect consumer expectations, informed will, voluntary consent and fairness of the contract.

Chapter Seven: Contractual justice and consumer protection: a critical approach to English and Shariah law

This chapter offers final remarks as to where the two relevant legal systems stand in relation to contractual justice. A comparative method is invoked in the light of all that has been discussed throughout the research in relation to the general law of contract and consumer theory in both Shariah and English law. It outlines the extent to which the legal doctrines of both legal systems reflect the concepts of either substantive or procedural justice. Some issues that are related to contractual justice and consumer protection under the relevant jurisdictions that call for explanation are addressed in this chapter. These issues include: the requirement of good faith under the Shariah law of contract; commercial and consumer separation under the Shariah law of contract; the effect of the rejection of a general doctrine of substantive fairness under English law; the European influence on English law and the regulation of just price under English law. Finally, justice norms reflected by the Shariah and English law are outlined.

Chapter Eight: Conclusion

In this conclusion chapter, a summary of the whole research is presented. The major issues that have been discussed throughout the thesis are outlined. The outcomes of the research are illustrated along with recommendations for development and reform. Finally, several avenues for future research are suggested.

Chapter Two: Contractual justice under the English law of contract

2. Introduction

This chapter is concerned with the general English law of contract. It investigates the extent to which the law promotes public intervention into parties' autonomy for the purpose of setting contractual balance. In the first part of the chapter, the study goes back to the roots of the English law of contract in the classical period of the nineteenth century. The concept and meanings of contractual justice under classical law is illustrated. The notions of sanctity and freedom of contract are explored as being dominant in that period. The second part of the chapter explores the modern transformation of the law of contract. The transformation involves the introduction of elements of fairness and cooperation to the law of contract. This includes the notions of inequality of bargaining power, reasonableness, unconscionability and good faith into the law of contract. Additionally, the modern development of the traditional doctrines of equity of duress and undue influence is outlined. The discussion is focused on the evolution, meaning, effect and scope of these doctrines. The main purpose of the discussion is to explore the extent to which these notions influenced the law of contract particularly in relation to the promotion of contractual fairness by the contemporary law of English contract.

2.1 Classical law of contact

The English law of contract extends back to the middle ages.[31] Nevertheless, it is difficult to be certain about the law of that time given the controversy that surrounded the sixteenth and seventeenth century laws of contract. Furthermore, most legal doctrines and principles of the modern law of English contract were developed in the eighteenth and nineteenth centuries. The period from 1770 to 1870 is the most important time in the history of English law. At this time theories of natural law and the philosophy of *laissez-faire* flourished.[32] Understanding the situation of the classical period is essential for understanding the current

[31] See M.P.Furmston, Geoffrey Cheshire and Cecil Fifoot, *Law of Contract* (16th edn, OUP 2012) 2
[32] P.S.Atiyah, *The Rise and Fall of Freedom of Contract* (Clarendon 1979) 359-88; See section 2.1.1.5.1 on the development of the English law of contract in the classical period from 1770-1870

laws. The idea of freedom of contract lies at the heart of the classical law of contract, which gives a particular importance to the study of the classical law.[33]

The period before the classical is surrounded with controversy; no one is really certain about the law of contract of the sixteenth and seventeenth century laws of contract. Nevertheless, it is interesting to mention the point made by Horwitz that pre-industrial contract law was based on fairness which was later replaced by a law of contract that is based on the meeting of the wills of the parties. He puts forwards an argument based on the doctrinal shifts that occurred at that time. He explains that executory contracts and the requirement of consideration (which used to be of equivalent value to the performance received in exchange) were widely recognised in pre-industrial contract law. Additionally, the expectation of interest and the award of expectation damages were protected. However, the law was shifted by the effort of judges who attempted to transform the law to favour commercial interests. Their effort was to succeed by about 1850.[34]

The argument of Horwitz, along with its evidence, was tested by Simpson. Simpson explains that the doctrines Horwitz identified to indicate the transformation of the new law are traced back to the seventeenth century and even earlier. Thus Simpson notes that the argument that contract law was based on fairness lacks evidence. According to him, what actually happened in late eighteenth and early nineteenth century is that new doctrines were created that had not existed before.[35]

Atiyah on the other hand, accepts to some extent that a general theory of fairness existed. His argument is based on the fact that courts did on many occasions refuse to enforce grossly unfair contracts.[36] Other scholars disagree with Atiyah's argument; they claim that courts in the eighteenth century were not concerned with the fairness of exchange.[37] In any case, the pre-industrial law of contract does not have a substantial effect on the current law of contract. By contrast, most of the current principles of the English law of contract do have their roots

[33] Brownsword, *Contract Law* (n 3) 46-7
[34] Morton Horwitz 'The Historical Foundations of Modern Contract Law' (1974) 87 Harvard Law Review 917
[35] A.W.B.Simpson 'The Horwitz Thesis and the History of Contracts' (1979) 46 The University of Chicago Law Review 533
[36] Atiyah, The Rise and Fall (n 32) 154-66; P.S.Atiyah and Stephen Smith, *Introduction to the Law of Contract* (6th edn, Clarendon 2005) 9-20
[37] See J.L.Barton 'The Enforcement of Hard Bargains'(1987) 103 Law Quarterly Review 188; Philip Hamburger 'The Development of the Nineteenth-Century Consensus Theory of Contract' (1989) 7 Law and History Review 241

in the classical period of the eighteenth and nineteenth century. The following analysis is conducted with the classical law of contract as a theoretical construct.

2.1.1 The theoretical construct of the classical law

Under the classical conception, the existence of contract relies on the mutual intention of its parties to enter into an agreement. An important implication is that the interpretation, construction and implication of a contract are isolated from external standards of fairness, justice or reasonableness. It is rather governed by the parties' common intention. This means that the parties are completely free to set every aspect related to the contract (its terms, content, price and subject matter). The dominant assumption of the classical law is that parties are more aware of their own interests. Parties are expected to calculate all the relevant risks and future contingencies before entering into an agreement. However, once an agreement has been made, it is then binding and it becomes entirely irrelevant if it turns out to be unfair or of a gross inequality.[38]

Atiyah points out that there are underlying presuppositions of the classical law of contract that are usually not made explicit but are of great significance. First, there is the assumption that the law of contract is based on the intention of the parties rather than their actions. Second, the court role is assumed to be limited to encouraging parties to perform their contracts rather than settling disputes. Third, contract law is conceived as a general law of contract rather than a fragmented law of contracts; all sorts of transactions are governed by the same set of rules.[39]

Overall, contracts in the nineteenth century were used as a vehicle to jointly promote autonomy and rational planning. This is done by respecting the parties' free choices and by channelling the parties towards performance (parties in breach are held responsible for letting down their fellow contractors). To put this in place, classical contract law serves autonomy by adapting the principle of the freedom of contract and promotes rational planning by adapting the principle of sanctity of contract.[40]

[38] Brownsword, *Contract Law* (n 3) 48
[39] P.S.Atiyah 'Contracts, Promises and the Law of Obligations' in *Essays on Contract* (Clarendon 1990) 10-56
[40] Brownsword, *Contract Law* (n 3)

2.1.1.1 Freedom of contract

The slogan of freedom of contract was attached with significance importance in the nineteenth century law of contract. This is illustrated by the famous quote of Sir George Jessel in *Printing and Numerical Registering Co v Sampson*:

'If there is one thing which more than another public policy requires it is that men of full age and competent understanding shall have the utmost liberty of contracting, and that their contracts when entered into freely and voluntarily shall be held sacred and shall be enforced by Courts of justice. Therefore, you have this paramount public policy to consider that you are not lightly to interfere with this freedom of contract.'[41]

The concept of freedom of contract is said to have a double meaning. It contains a positive element in the sense that contractors have the right to act as private legislators. They possess the power to make contracts binding upon themselves and to choose the terms and conditions of their agreement.[42] Consequently, compulsory contract and other imposed duties are ruled out.[43] It also contains a negative element in that parties are free from any obligation unless they have consented to it. The idea of consent was often extended to mean no liability without contract.[44] As a result, state interference in market transactions is rejected.[45]

The concept of freedom of contract is said to rest on two key ideologies. The first is the economic model of the free market ideology. The intellectual setting of this idea is associated with Adam Smith and David Ricardo and other market economists.[46] Certainly, the evolution of the classical model of contract was significantly influenced by classical economists and philosophical radicals.[47] The market individualism ideology facilitates competitive exchange rather than simple exchange. As a result, restraints on the market are kept to the minimal level. Bargains on the market are only subject to practices such as fraud, mistakes and coercion. As a result of the market being a competitive place, parties are not expected to

[41] (1875) L.R. 19 Eq. 462, 466
[42] Jack Beatson and Daniel Friedman 'Introduction: From 'Classical' to Modern Contract Law' in Jack Beatson and Daniel Friedman (eds), *Good Faith and Fault in Contract* Law (Clarendon 1997) 3-24
[43] Hugh Collins, *The Law of Contract* (4thedn, LexisNexis 2003) 25
[44] Beatson and Friedman (n 42) 3-24
[45] Collins, *The Law of Contract* (n 43) 25
[46] Atiyah, *The Rise and Fall* (n 32) 292-345
[47] Atiyah 'Contracts, Promises and the Law of Obligations' (n 39) 10-56; J.H.Baker 'From Sanctity of Contract to Reasonable Expectation?'(1979) 32 Current Legal Problems 17

disclose all information for the sake of making a prudent bargain, yet, practices like misrepresentation are rejected.[48]

The second ideology is liberalism, which is thought to be closely related to the freedom of contract. The freedom of contract is part of a reform movement that was linked to the political movement towards democracy. The reforms of the 1830s proclaimed a belief that people could be trusted to look after their own interests.[49] Parties are held to be the best judges of their own interests, thus, they must be left free to choose contract terms that suit them best, and any intervention to restrain their freedom is held to harm their interest.[50]

In a libertarian state the law is meant to maximise the liberty of individual citizens and encourage self-reliance. Contract law is an effective way to ensure these aims through facilitating legal agreements without intervening with regard to terms that have been freely chosen by individuals.[51] Parties who agree on a contact are in fact exercising the lawmaking power delegated to them by parliament to make a private legislation that binds them. Therefore, the only reason parties become bound by a contract is that they consented to it, which makes it sacrosanct in the eyes of the law.[52] In addition, by limiting the power of the state under the banner of freedom of contract, the law of contract represents the theory of the legitimacy of state power. Generally, the classical conceptual framework of the law of contract is focused on individuals' voluntary choices. Accordingly, the law of contract is primarily limited to the facilitation of such choices by giving them legal effect.[53]

2.1.1.2 Sanctity of contract

The principle of sanctity of contract is highly related to the freedom of contract. The two principles complement each other, where the core idea of freedom of contract is there to assert not imposing any unnecessary restraints on trade, sanctity of contact asserts that parties are held to their bargains. The application of the principle of sanctity of contract in a legal

[48] John Adams and Roger Brownsword 'The Ideologies of Contract' (1987) 7 Legal Studies 205; However, a thesis offered by Gordley questions the links made between liberal philosophy and classical law of contract see James Gordley, *The Philosophical Origins of Modern Contract Doctrine* (Clarendon 1993) 214-29
[49] Atiyah and Smith (n 35) 9-20
[50] Baker (n 47)
[51] Collins, *The Law of Contract* (n 43) 6
[52] Baker (n 47)
[53] Collins, *The Law of Contract* (n 43) 6

system stands against paternalistic relief of contract by the court when the party is trying to avoid the consequences of his bargain. Relief from performance is highly restrained by the doctrine of sanctity of contract.[54]

Regarding contracts as sacred was a normal consequence of the special attention placed on them by the classical philosophers and jurists' manifestation and extension of an individual's freedom through contract. Contract in the classical period gained a prominent place due to its role in promoting individual freedom with which the nineteenth-century jurists and political philosophers were deeply concerned.[55]

2.1.1.3 The classical concept of contractual justice

Judges in the classical period were only concerned with the individualist nature of contracts. The role of the law was limited to protecting and enforcing bargains that have been freely agreed upon. Therefore, the fairness of a bargain that has been freely made would not be questioned by courts. As long as an agreement is represented by an agreed exchange judges will have no interest in its substance.[56] Consent is the only way to create contractual obligation, thus, it is not for the courts to impose terms in a contract that parties never agreed upon.[57] Thus, in classical theory contractual fairness is procedurally oriented rather than substantively oriented.[58] As a result, intervention into parties' autonomy is strict and limited to procedural doctrines of duress and undue influence.[59] Such intervention is justified as correcting a lack of contractual freedom. Traditional equity doctrines of duress and undue influence are designed for the purpose of correcting lack of contractual freedom rather than imposing standards of fairness onto the contractual relation.[60]

As a result, plain foolishness or a remarkably low or high price would not be a basis for judicial intervention, yet deception would be. Parties are trusted according to the classical view to take care of their own interests and they are expected to know what is best for them.

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[54] Jack Beatson, *Ansons's Law of Contract* (28th edn, OUP 2002) 22
[55] David Parry, *The Sanctity of Contract in English Law* (Stevens & Sons Limited 1959)
[56] Howells and Weatherill (n 5) 15
[57] Baker (n 47)
[58] P.S.Atiyah 'Contract and Fair Exchange' (1985) 35 The University of Toronto Law Journal 1
[59] The scope, meaning and development of the doctrines of duress and undue influence will be expanded on in sections 2.3.1 and 2.3.2
[60] Jill Poole, *Textbook on Contract law* (11th edn, OUP 2012) 574

This is known as *Caveat emptor* - let the buyer beware, which asserts individual responsibility.[61] This approach has resulted in keeping supervision over contract terms to a minimal level. Grounds of unreasonableness and unfairness would never be invoked to claim the invalidation of a contract.[62]

Being governed by liberal ideas does not necessarily mean that contractual fairness is irrelevant to the classical conception of contract. The classical law of the nineteenth century proclaimed its fairness. It is rather that it follows a special kind of thinking.[63] Classical law of contract is, according to Lord Devlin, based on the assumption that free dealing is fair dealing.[64] This must not be taken to mean that judges in the classical period were indifferent to public interest. But rather they simply thought that, in nearly all cases, it was in the public interest to enforce private contracts. Their assumption was based on the economic thinking that prevailed in the nineteenth century.[65] Nineteenth-century economists saw in classical contract model what they felt was both admirable and applicable far beyond the commercial sphere. They believed this model to be desirable in that it encourages individuals to take control over their lives. People are encouraged to make definite plans and aim for particular goals. It is a natural right for mankind to develop their skill and ambitions and an accepted corollary is that some will rise and others sink.[66]

Furthermore, contracts are regarded to be a fundamental social regulator rather than being merely a tool to arrange short-term relations.[67] Freedom of contract is an element that is embedded in the Victorian interpretation of market order. It is a result of a deep faith in the justice of an order of wealth and power established through exchange relations. This stems from the belief that the market order establishes equality in place of social hierarchy and reciprocity instead of exploitation. The idea of equality is respected by the market order. The same opportunity is granted to every individual to enter into any kind of transaction.[68]

[61] Howells and Weatherill (n 5) 15
[62] Beatson and Friedman (n 42) 3-24
[63] Collins, *The Law of Contract* (n 43) 23
[64] Patrick Devlin, *The Enforcement of Morals* (Liberty Fund Edition 1965) 47
[65] Atiyah and Smith (n 35) 9-20
[66] Atiyah 'Contracts, Promises and the Law of Obligations' (n 39) 10-56
[67] Atiyah, *The Rise and Fall* (n 32) 292-304
[68] Baker (n 47)

This is different from social orders that distribute wealth and power by reference to social status, political power, physical force or moral wealth. Being dependent on the success in trading, the regime of contract law that is based on market order imposes a great social levelling. Equality within the conception of market order is concerned with formal equality and a narrow view of equality of opportunity rather than equal distribution of wealth. According to the narrow view of equality each individual is permitted the same set of rights to enter an agreement and to own property. Apart from some exceptions related to children, the insane, and more controversially married women, the equality within the ideology insists that each person in principle should be permitted to enter into any transaction without limit.[69]

Concerns in relation to monopoly or superior technical knowledge were not addressed within the classical ideology. The common belief was that, so long as the terms of an agreement have been freely agreed upon there is no danger that unjust positions of power would arise. Similarly, questions about the effects of equality of bargaining powers upon the terms of contracts and consequently, the nature of social relations created by them are ignored by the ideology. The position taken was that unjust power cannot arise within the framework of freely chosen agreement. Distribution of wealth, poverty and hardship were never a concern and hence the ultimate distributive consequence of the market is not addressed by classical contract law.[70]

2.1.1.4 Classical intervention into parties' autonomy

While the general rule of the classical conception is that people must be bound by their free agreement, classical thinkers acknowledge this could occasionally result in unfairness and harshness. However, direct interference into parties' autonomy is against the conceptual ideas of classical law. In their search for a solution courts developed very interesting techniques. The most common technique was 'implied terms' whereby courts in very extreme cases would imply terms that were not expressed by the parties.[71] Contractors could enter into a contract and fail to expressly state their terms. They could be relying on a background of previous dealings between the party in question, or common trade usage, local custom, or conveyancing practice. When a dispute arose between them regarding rights and duties,

[69] Collins, *The Law of Contract* (n 43) 22-4
[70] Ibid
[71] Implied terms were later codified in the Sale of Goods Act 1979

courts were willing to consider implied terms by giving effect to the understood, but unexpressed, intention of the parties.[72]

It is significant that the terms were not understood to be implied in the contract to promote standards of justice or fairness. It was rather meant to reflect the parties' consent. Thus, in situation such as when terms are implied based on trade customs, this had to be strictly proved. The custom must be consistent and had to be more than a course of conduct or habit. Furthermore, it had to be shown that it was recognised as binding and intended to affect the legal rights and duties of the parties involved.[73]

Another technique used was the doctrine of 'public policy', which was restrictively applied.[74] Being harsh or grossly unfair was not sufficient to rule out a contract based on public policy.[75] In addition, the doctrine of consideration was occasionally invoked to invalidate unfair contracts. An agreement is not enforced unless it has involved exchange; an exchange of counter-values must happen. The doctrine of consideration distinguishes between enforceable market transactions (resulting from bargain or exchange) and instances of expropriation, domination and exploitation. Nevertheless, the doctrine of consideration does not ensure an exact equivalent in the value of the exchanged. This comes from the idea that value depends on subjective appreciation. Thus, setting the value of consideration is considered as interference into parties' autonomy, which undermines the reliability of bargains.[76]

In some situations a very limited intervention was allowed in order to ensure a competitive market. Legislations against combinations cartels and allied with the development of the doctrine of restraint of trade by the courts aimed to ensure a competitive market.[77] However, the effectiveness of these techniques was very limited as they were highly restricted.[78] Therefore, instances of injustice resulting from foolishness and carelessness were tolerated, in

[72] Parry (n 54) 40
[73] Beatson and Friedman (n 42) 3-24
[74] Baker (n 47)
[75] Beatson and Friedman (n 42) 3-24
[76] Collins, *The Law of Contract* (n 43) 23-4
[77] Ibid
[78] Beatson and Friedman (n 42) 3-24

the common belief that individuals who accept unfair bargains should bear the blame for this.[79]

2.1.1.5 The process of transformation

Before moving on to the modern period of the English law of contract it is necessary to look at the process of transformation. The transformation of the law is mainly effected by the level of commitment to the liberal approach presented by the principles of freedom and sanctity of contract. Atiyah devoted one of his major works *The Rise and Fall of Freedom of Contract* to describe the fluctuations in the belief in the freedom of contract that controlled the development of the English law of contract.[80] The transformation of the law is linked to the social and economic developments as well as political movements that have underpinned the changes in legal thought. This section attempts to provide an overview of the social, political and economic changes that have affected the transformation of the law of contract, particularly in relation to the statue of freedom of contract. Understanding the factors that influenced the transformation of the law is essential to an understanding of how the current law of contract is shaped.

2.1.1.5.1 Classical Period (1770-1870)

This period is commonly described as the time when the classical law of contract and freedom of contract flourished.[81] The spirit of individualism and of *laissez faire* were dominant in matters of contract.[82] It is regarded as the classical period because it witnessed extensive development of legal doctrines and in the structure of contract law, which still underpin the modern law of contract. It involved change in the attitude of lawyers, and voluntary social cooperation was encouraged through the institution of contract law. The freedom of contract was particularly seen to an avenue for social improvement and human happiness.[83]

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[79] Collins, *The Law of Contract* (n 43) 24
[80] See generally Atiyah, *The Rise and Fall* (n 31)
[81] Grant Gilmore, *The Death of Contract* (1974) 35; Atiyah, *The Rise and Fall* (n 32) 219
[82] Friedrich Kessler 'The Contracts of Adhesion: Some Thoughts about Freedom of Contract Role of Compulsion in Economic Transactions' (1943) 43 Columbia Law Review 629
[83] See Furmston, Cheshire and Fifoot (n 31) 12; Kessler (n 82)

Additionally, most judges who were responsible for the creation of law during the classical period were influenced by contemporary thought more broadly.[84] Theories of natural law were interpreted to mean that individuals possess unconditional rights to own property and consequently to make arrangements to deal with that property. The *laissez-faire* philosophy was interpreted to limit state interference in an individual's activities as much as possible. The function of private law was limited to enforcing private arrangements upon which contracting parties had agreed.[85] One of the most important features of the classical period is that contract law was governed by a general body of rules applicable to all contract types.[86] This era in the law of contract tended to be highly stable and predictable because parties were able to rely upon the binding effect of the contract.[87]

2.1.1.5.2 The period from 1870 to 1980

In this period the freedom of contract started to decline gradually. The decline was associated with a reversion to paternalist thought led by parliament. The level of legislative interference into contracts by parliament grew in the second half of the nineteenth century. The intellectual changes that occurred in this period of time can be summarised into three changes. The first change is the decline of the idea that economic prosperity is brought about through free and voluntary exchange. The recognition of the issue of externalities in the market affected the way contract law was perceived,[88] where externalities refers to the cost of exchange imposed on third parties.[89] The problem of externalities was particularly relevant in relation to issues arising from England's industrial revolution in the nineteenth century. Issues such as pollution, disease and dirty urban environments were commonly seen as external costs imposed on third parties in private contracts.[90]

The second change is a challenge to the idea that free and voluntary exchange brings about just results. In other words the perception of what constitutes justice of exchange changed. Particularly, an argument started to be made that having the choice to enter or not enter a contract does not provide any guarantee that contracts are free and voluntary in any

[84] See Atiyah, The Rise and Fall (n 32) 398-448
[85] Atiyah, *The Rise and Fall* (n 32) 292-304; Atiyah and Smith (n 35) 9-20
[86] See M Furmston, Cheshire and Fifoot (n 31) 12
[87] Beatson and Friedman (n 42) 3-24
[88] Atiyah, *The Rise and Fall* (n 32) 571-96; Atiyah and Smith (n 35) 9-20
[89] See Michael Trebilcock, *The Limits of Freedom of Contract* (2nd edn, Harvard University Press 1997) 58-77
[90] Atiyah and Smith (n 35) 11

meaningful sense. This was associated with the emergence of the magnitude of consumer as a contracting party. Freedom of contract would become meaningless for an individual who lacks the skills to make basic contracts for food, clothing and employment. Furthermore, it began to be recognised that even if a contract was made freely and voluntarily this does not necessarily mean it is fair and just. The increased need for services which started to be regarded as essential, such as railways and public utilities, limited peoples' freedom in choosing their contracting party. As a result, on many occasions, individuals as well as businesses had no real choice with respect to choosing their parties. In fact it has been suggested that in the period from 1870 to 1950 the British economy was characterised by restricted practices dominated by monopolies and cartels.[91]

The introduction of the standard-form contract had a significant role in the transformation of the law in the twentieth century. Businesses started to formulate contracts that could be used in every bargain dealing with the same product or service.[92] The extensive use of standard-form contracts raised concern over lack of choice due to the lack of consent within individually negotiated or custom-made terms.[93] The lack of choice was not because people were forced to enter into an agreement but because if they wanted to do so they had no choice but to accept the standard-form terms that were often made on a take-it-or-leave it basis. For example, passengers were not forced to buy a train ticket, but if they wanted to do so they had no choice but to accept the terms and conditions imposed by the railways.[94] This was applicable in many situations even if the sector was not controlled by a monopoly because terms and conditions offered by suppliers were in most cases identical. The situation in commercial relations was no different; standard contracts were used in most transactions, for example in contracts for carriage of goods by sea and insurance contracts.[95]

In addition to this lack of choice, the problem of lack of understanding was recognised. Many individuals would have had a degree of choice that they could not benefit from due to their lack of understanding of the legal implications related to their choice. Standard-form contracts tended to impose exemptions and limitations clauses that aimed to protect suppliers

[91] Atiyah, *The Rise and Fall* (n 32) 571-96; Atiyah and Smith (n 35) 9-20
[92] Kessler (n 82)
[93] Atiyah, *The Rise and Fall* (n 32) 571-96
[94] Kessler (n 82)
[95] Atiyah, *The Rise and Fall* (n 32) 571-96; Atiyah and Smith (n 35) 9-20

from any responsibilities that might arise.[96] These clauses tended to be sophisticated and typed in small print, which made it difficult for the average unskilled person to understand their implications.[97]

The above described changes of market operation have resulted in the creation of new legal doctrines and the introduction of new statutory rules within the law of contract. As a consequence of courts and tribunals being active in striking out anti-competitive practices such as cartels and exclusive trading arrangements, the doctrine of the restraint of trade was created. In response to the unfairness created by exclusion clauses courts developed the dual doctrines of fundamental term and fundamental breach.[98] The intention of these two doctrines is to make a non-excludable liability for essential contractual obligations, not merely as a rule of construction but as a sustainable rule of law.[99] Additionally, statutory competition laws were introduced in the long-term. In many situations public policy concerns were prioritised over freedom of contract. For instance, the House of Lords in *Johnson v Moreton* held, based on public policy, that agriculture tenants should remain bound by the protections conferred on them by the Agriculture Holding Act 1948.[100]

More generally from an ideological prospective, outside the private law the most important change to occur in this period with regard to the decline in the freedom of contract was the rise of various institutions associated with the welfare state (e.g. government-funded education and medical care). This represented an obvious rejection of the idea that social relation should be governed by the market, as in classical contractual principles.[101]

The tendency towards protecting fairness and justice of contract resulted in three main developments. Firstly, on many occasions legislation interfered in order to specify the substance of parties 'obligations. This legislation was primarily intended to protect the perceived weaker party. Hire-purchase legislation, for instance, passed rules to protect hirers from unfair treatments. Legislation was mainly passed to protect employees against

[96] See generally Richard Lawson, *Exclusion Clauses and Unfair Contract Terms* (10thedn, Sweet & Maxwell 2011)
[97] Atiyah, *The Rise and Fall* (n 32) 571-96; Atiyah and Smith (n 35) 9-20
[98] The rule of fundamental breach was later on dismissed by the House of Lords in the *Photo Production Ltd v Securicor Transport Ltd* [1980] AC 827; See Richard Stone and James Devenney, *The Modern Law of Contract* (11thedn, Routledge 2015) 7.1-7.3-4
[99] Brownsword, *Contract Law* (n 3) 60
[100] [1980] AC 37
[101] Atiyah, *The Rise and Fall* (n 32) 571-96; Atiyah and Smith (n 35) 9-20

employers[102], tenant against landlords[103]and consumers against suppliers[104]. These rules focused on one party in the agreement and resulted in the creation of specific laws rather than general rules applicable to all contracts.

Secondly, rules that aimed to protect contracting parties' in general regardless of their positions were developed. This helped the creation of general rules, which in itself shaped the nature of contract law.[105] This movement was spearheaded by the Unfair Contract Terms Act of 1977. Although the Act mainly targeted consumer interests, it also gives judges the general authority to strike down unreasonable exemption clauses regardless of the category of contract. It contains a wide range of exclusory provisions and considers others under a reasonableness test.[106] In so doing it has been regarded as highly paternalistic.[107]

Additionally, in this period the use of defences such as duress, undue influence and mistake were expanded. (e.g the concept of 'economic duress' was created along with the defence of 'mistake at equality').[108] However, despite the significant changes that occurred in this period they did not manage to satisfy all hopes. A duty to act in good faith and a general defence of unconscionability, for instance, were never created.[109] It was even held that what distinguishes the twentieth century law of contract is the tendency to reject the nineteenth century confidence in the freedom of contract without the adoption of any new clear alternative norm.[110]

The third change is related to the way the law is undertaken. Many rules that in the eighteenth and nineteenth centuries were explained as resting on the implied intention of the parties have subsequently been understood to be based on public policy that aims to reflect the interests of all parties. For example, the quality guarantee as set in the Sale of Goods Act 1979 that was held to rest on the implied intention of the parties in the eighteenth century, is believed in the twentieth century to ensure the fairness of the parties' bargain. This is applicable to other

[102] For instance the Employment Rights Act 1996 set rules in relation to salary and basic job description.
[103] The Landlord and Tenant Act 1954 set rules that protect the rights of the tenant.
[104] The Unfair Contract Terms Act 1977 and the Mispresentation Act 1967 preclude attempts by business parties to exclude or limit liabilities to consumers.
[105] Brownsword, *Contract Law* (n 3) 64; Furmston, Cheshire and Fifoot (n 31) 18
[106] See Lawson (n 96)193
[107] Brownsword, *Contract Law* (n 3) 61-3
[108] Ewan McKendrick 'English Contract Law: A Rich Past, an Uncertain Future?' (1997) 50 Current Legal Problems 25
[109] Brownsword, *Contract Law* (n 3) 69
[110] See Furmston, Cheshire and Fifoot (n 31) 18

rules such as relief for frustration or mistake. The change in the way such rules are understood has consequently affected the way the rules are perceived by judges; they have become more comfortable with applying the rules to give direct effect on notions of fairness and justice.[111]

2.1.1.5.3 The Contemporary period

Two opposing trends characterise the period from 1980 onwards. The first to arise was a revival of the freedom of contract as known in the nineteenth century.[112] This trend was part of a wider move in most Western democratic countries towards the resurgence of support for classical ideas of freedom of contract. The dissolution of the Soviet empire was one factor to contribute to this shift. More importantly, at the level of contract law, the new generation of pro-market economists and economist-lawyers were highly influential in driving this trend.[113] The ideas of this group were focused on the relationship between rules and their economic effects. They held the idea that the limited freedom of contract is the major cause of market associated problems.[114]

The widespread appearance of anti-competitive practices in the period around 1900-50 is specifically seen to be a major concern. The monopoly power enjoyed by the advantaged party was thought to be the underlying source of unfairness. Standard-form contracts on the other hand, were intended to avoid costly negotiated individualised terms. However, a problem arises when potential parties are forced to accept these terms because there is no other provider for the service or goods contracted for due to monopolistic power. Similarly, exemption clauses were taken to serve economic purpose of allocating risks.[115]

Competition is held to be the answer to the issue of lack of understanding of the exemption clauses and the issue of complexity of contractual terms. The logic followed is that profit margins in a competitive market are narrow, therefore, vendors are encouraged to not lose even small percentage of their customers, which makes them more worried about their

[111] Atiyah and Smith (n 35) 9-20
[112] See P.S.Atiyah 'Freedom of Contract and the New Right' in *Essays on Contract* (Clarendon Press 1990) 355-86
[113] Atiyah and Smith (n 35) 9-20
[114] See Ramsay, *Consumer Law* (n 4) 41-56
[115] See Michael Meyerson 'Efficient Consumer Form Contract: Law and Economics Meets the Real World' (1989) 24 Georgia Law Review 583

reputation. The concern about their reputation makes traders reluctant to impose unfair terms, and even if such terms are imposed traders will be held hostage by them for the sake of protecting their reputation.[116]

Nevertheless, supporters of the liberal approach to the law of contract ignore the fact that many opportunities in the market are only available to a wealthy minority.[117] Even those who acknowledge the problem share the belief that the best way to deal with it is away from the law of contracts through taxes or subsidy programmes. The general belief is that 'contract law should focus on increasing the size of pie available for redistribution, and that is done by enforcing agreement on the terms it was made.'[118]

The second trend in the contemporary period is a continuation of the late nineteenth-century departure from the freedom of contract. Yet, new arguments were introduced to explain this position, which differ from those previously introduced. For example, the argument that consumers and small businesses usually suffer from inequality of bargaining powers when contracting with large commercial entities especially if the deal is done on the basis of standard-form contract, is replaced by new ideas. These new ideas offer a defence of market intervention derived from economic analysis.[119]

Economic justification of market intervention based on the idea of market failure has gained popularity in recent years. Economists have argued that the idea of the perfect market is unrealistic as a phenomenon rather than a theoretical or abstract ideal. The government thus should intervene into the market only to the extent of rectifying the failure.[120] This stands against classical economic ideas that a free market is the perfect market.

Furthermore, market intervention is linked to contract facilitation. The idea is that regulation can be used to increase the size of the market rather than protecting weaker parties. Law is

[116] Atiyah and Smith (n 35) 9-20; Richard Craswell 'Freedom of Contract' (1995) Chicago Working Paper in Law & Economic <http://www.law.uchicago.edu/files/files/33.Craswell.FrdmCntrct_0.pdf> accessed 12 October 2015

[117] See Peter Cartwright 'Understanding and Protecting Vulnerable Financial Consumers' (2015) 38 Journal of Consumer Policy 119; Ramil Burden 'Vulnerable Consumer Groups: Quantification and Analysis'(1998) Office of Fair Trading Research Paper 15

[118] Atiyah and Smith (n 35) 9-20

[119] See Ramsay, *Consumer Law* (n 4) 41-56; Craswell (n 116)

[120] The economic idea of market failure as a rationale for modern intervention into the marketplace is expanded on further under section 4.1.1

used as a tool to make contracts easier for people to conclude. For example, based on this logic, terms implied into contracts by legislation[121] are explained on the grounds that it is more time and cost efficient then writing lengthy contracts. The same logic is true for other rules that intervene in the market. The ultimate aim of prohibiting unfair terms in modern contracts is to facilitate contracting rather than protecting weaker parties.[122]

A point of significant importance to the transformation of the law is related to the effect of European contract law. Since 1980 the most important regulatory legislation to be introduced has originated not from England but from the European Union (EU), most of which deals with consumer contracts. Consequently, English judges are forced to deal with principles novel to the English law and in contradiction to classical ideas of freedom of contract. Together all these trends have resulted in complex changes to the law of contract.[123] The effect of opposing trends on the development of modern law will become clearer when the controversy surrounding the introduction of the notion of fairness into the law of contract is discussed, as it is below.

2.1.1.6 The classical roots of modern law

The Modern approach to contract is commonly defined as a counter point to the so-called 'classical law' of contract. The classical law of contract is a body of doctrines, presuppositions and ideologies. Modern law of contract is different from classical law in its motivating ideals, its methods of legal reasoning and its sources of law. Nevertheless, the evolution in contract law was not driven by the invention of new principles of law but rather through reinterpretation and differentiation. Reinterpretation served to change the law either by redefining some of the basic concepts or by giving more value to classical principles. For instance, consideration, which is known as a classical concept, is given a new meaning. Also, legal doctrines such as estoppels or undue influence are given much more significant strength in order to override classical rules.[124] Differentiation is done by excluding innovations from the canon of contract law, for example hiving off development in consumer law or employment contracts. The change in the law of contract can only be understood when the

[121] For example terms implied by the Sale of Goods Act 1979
[122] Atiyah and Smith (n 35) 9-20
[123] Ibid
[124] Brownsword, *Contract Law* (n 3) 46-7

formal continuity of principles is examined in its particular application and the process of differentiation is resisted.[125]

2.2 Summary

The first part of this chapter was devoted to the classical law of contract. The classical English law of contract is bound by two primary principles; the freedom of contract and the sanctity of contract. The classical law of contract is of an individualist nature; the role of the law is limited to protecting and enforcing bargains that have been freely agreed upon. Contractual fairness under the classical conception is procedurally oriented. Classical law of contract is based on the assumption that free dealing is fair dealing. The court had no incentive to evaluate the substantive fairness of a contractual relation that had been freely concluded. The process of the transformation of the law of contract from its classical to the contemporary form was mainly affected effected by the level of commitment to the liberal approach. At one historical moment, the idea that the liberal approach is the best way to facilitates contract was dominant over legal thinking. The decline of this idea was the start of the transformation of the law in the nineteenth century when the efficiency of the liberal theory of contract started to be questioned. The acknowledgment of the classical period of the English law is essential for the understanding of the law of the modern law of contract as it represents its cornerstone. The modern law of contract is not driven by novel principles but rather through reinterpretation and differentiation of classical principles. Modern development of the law of contract is distinguished by the introduction of some elements of fairness and cooperation to the law of contract. The following discussion will be devoted to the analysis of the innovative notions of inequality of bargaining power, reasonableness, unconscionability and good faith into the law of contract. The discussion is focused on the evolution, meaning, effect and scope of these doctrines. This is done for the purpose of testing the extent to which the modern law of contract serves contractual justice.

2.3 Modern law of contract

The untraditional concepts of fairness and cooperation are understood to be a central theme for the changes in the modern law of contract.[126] Novel notions of reasonableness and

[125] Collins, *The Law of Contract* (n 43) 20-1

fairness have been introduced to the law, and have brought about changes within it. However, the transformation of the law of contract is a matter of controversy both in relation to its occurrence and to its detail. Many legal texts deny changes in contract law. Their denial is supported by the methodology of economic analysis of law, which provides a new rationale for traditional principles of law in relation to efficiency and supplies reasoning for modern qualifications in terms of market failure.[127]

The transformation of the law is also a matter of controversy between those who acknowledge it, in relation to themes that underlay this evolution. Some scholars attribute the changes merely to increased concerns for consumer protection.[128] Others see it in the differentiation between private agreements and commercial transactions.[129] A third group claim that the transformation is presented by the shift in the values expressed by the law; the law moved from emphasising rights and freedom to a concern with needs and economic dependence.[130]

In tracing the transformation of the law of contract the focus will here be paid to fairness of exchange and control of contracting powers. Particularly, the extent to which the modern law of contract intervenes into parties' autonomy will be emphasised. In doing so, the modern development of the traditional doctrines of duress and undue influence, including the establishment of the doctrine of economic duress, will be discussed. Furthermore, the introduction of fairness into the law of contract (inequality of bargaining power, unconscionability, reasonableness and good faith) will be reviewed. The discussion is focused on the evolution, meaning, effect and scope of these doctrines. The overall purpose is to evaluate the extent to which the English law of contract has succeeded in regulating contractual justice.

2.3.1 Duress

Historically duress was recognised by the common law as involving actual or threatened violence to the person. It was closely associated with the legal control of criminal and

[126] Collins, *The Law of Contract* (n 43) 25
[127] Ibid 21; Economic analysis of market failure is addressed under section 4.1.1
[128] John Adams and Roger Brownsword, *Understanding Contract Law* (5th edn, Sweet & Maxwell 2007) 115-8
[129] John Wightman, *Contract: A Critical Commentary* (Pluto Press 1996) 48-62
[130] Thomas Wilhelmsson, *Critical Studies in Private Law: A Treatise on Need-Rational Principles in Modern Law* (Springer Science & Business Media 2013) 51-79

tortuous conduct. The operation of the doctrine was later restricted by the pressure requirement. Accordingly, the focus of the doctrine turned to the wrongfulness of the threatened conduct from the consequences to the coerced party.[131] The essential elements of duress were established as early as the mid-thirteenth century.[132] Early analysis of duress centred on the act of coercion itself and its effect on the victim in inducing fear. Common law required a 'wrongful' or an 'unlawful' act before it would provide redress for duress, but the presence of fear in the victim was relatively less important.[133] The concept of duress in common law used to be a very narrow one that was restricted to actual or threatened physical violence to the person.[134] English courts have had little difficulty in setting aside a contract on the ground of duress to person. Yet, they have had more difficulty in recognising the existence of more subtle forms of duress (such as goods duress or economic duress).[135]

In the context of economic pressure, the doctrine of consideration was historically employed to regulate duress-type situations. In the sense that if somebody forces somebody else to pay him an amount of money, the promise is then unenforceable due to the absence of consideration. However, the role played by the doctrine of consideration in such situations is limited because of the rule that consideration must be sufficient but need not be adequate.[136] Thus, the role of consideration in regulating duress-type has diminished.[137] Duress in the common law of contract has the power of rendering the contract voidable.[138] Coercion in the making of contract results in the victim of coercion being offered the remedy of setting the agreement aside and recovering any money paid.[139]

2.3.1.1Types of duress in common law

Today, common law acknowledges three types of duress. The first type of duress is duress to person, which is fairly settled and of little controversy. It consists of actual violence or threat

[131] Roger Halson 'Opportunism, Economic Duress and Contractual Modifications' (1991) 107 Law Quarterly Review 649
[132] M.H.Ogilvie 'Economic Duress, Inequality of Bargaining Power and Threatened Breach of Contract' (1980) 26 The McGill Law Journal 289
[133] Jack Beatson 'Duress by Threatened Breach of Contract' (1976) 92 Law Quarterly Review 496
[134] Edwin Peel, *Treitel: the Law of Contract* (30thedn, Sweet and Maxwell 2011) 441-7
[135] Ewan Mckendrick, *Contract Law* (10thedn, Palgrave 2010) 293-9
[136] Ibid
[137] See the decision of Court of Appeal in *Williams v Roffey Bros & Nicholls (Contractors) Ltd* [1991] 1 QB 1
[138] Peel (n 135) 441-7
[139] Poole (n 60) 548-56

to the claimant or to members of his family.[140] It also includes creating threading environment, [141] or threat of imprisonment.[142] To set an agreement aside on the basis of duress to person it only needs to be proved that threat was one reason why the contract was entered into.[143] The number of cases of duress to person in English courts has been very small, thus, the doctrine is of relatively little significance.[144]

The second type of duress is duress to goods (or duress to property). It consists of a threat to seize another's property or to damage it.[145] The development of duress to goods was hampered in 1840 by the case of *Skeate v Beale,*[146] when it was held that an unlawful takeover of another's property does not amount to duress. This decision was heavily criticised in the literature.[147] *Occidental Worldwide Investment v Skibs* also refused to follow it.[148] Mckendrick confidently predicts that *Skeate v Beale* will not be followed today and that duress to goods can, in an appropriate situation, form the basis of claim for relief.[149] The development of economic duress (discussed below) and in the statement of Lord Goff in *Dimskal Shipping Co SA v International Transport Workers' Federation, the Evia Luck*[150], when he explained that the limitation in *Steate v Beale* was that only coercion to the person amounts to relief under duress had been 'discarded' and as such there is 'evidence that duress to goods still form a basis for claim to relief.[151] Treitel suggests that duress of goods is now seen as a particular instance of the border concept of economic duress so the test is the same in both (considered below).[152]

The third type of duress is economic duress; it consists of using superior power in an 'illegitimate' way in order to coerce the other contracting party to agree to a particular set of terms.[153] The doctrine was formally applied for the first time in England in the case of

[140] Ibid
[141] See *Antonio v Antonio* [2010] EWHC 1199 (QB)
[142] See *Williams v Bayley* (1886) LR 1 HL 200
[143] See *Barton v Armstrong* [1976] AC 104
[144] Poole (n 60) 548-56; Peel (n 135)441-7
[145] Ibid
[146] (1840) 11 Ad & E 983
[147] See Jack Beatson 'Duress as a Vitiating Factor in Contract' (1974) 33 The Cambridge Law Journal 97
[148] [1976] 1 Loayd's Rep 293
[149] Mckendrick, *Contract Law* (n 135) 293-9
[150] [1991] 4 All ER 871, 878
[151] Mckendrick, *Contract Law* (n 135) 293-9
[152] Peel (n 135) 441-7
[153] Mckendrick, *Contract Law* (n 135) 293-9

Occidental Worldwide Investment v Skibs.[154] In relation to this case, Kerr J canvassed the idea that mere economic duress might render a contract voidable, and this has consequently been affirmed in many cases.[155] The most common instance of economic duress is the threat by one party to break a contract unless the other party agrees to its variation, or compromise.[156] In the following section the doctrine of economic duress will be examined on account of its significance in the modern law of contract, and in acknowledgement of the fact that the doctrine is a late development in common law, which makes it subject to change.

2.3.1.2 Economic duress establishment

Lord Scarman attempted to establish the essential requirements of economic duress in *Pao On v Lau Yiu Lon*g. He identified two essential conditions for the operation of the doctrine. There needs to be (1) 'coercion of the will that vitiates consent' and; (2) 'illegitimate' pressure or threat. [157] These requirements have subsequently been developed by case-law; in the *Evia Luck* case Lord Goff pointed out that the claimant needs to prove that the pressure applied was a 'significant cause' inducing him to enter into the contract.[158] The three requirements of economic duress (compulsion, pressure and causation) will be discussed below.

2.3.1.2.1 The requirement of compulsion

Typically the first point to be established by the court in an economic duress claim is whether or not the agreement was compelled. In doing so courts rely on the absence of consent by the victim of duress. In *Pao On* v *Lau Yiu Long* Lord Scarman stated that economic duress rendered a contract voidable provided that the duress amounted to a coercion of the will which vitiated consent.[159]

[154] [1976] 1 Loayd's Rep 293
[155] For example *Pao On v Lau Yiu Long* [1979] 3 WLR 435; and *R v A-G for England and Wales* [2003] UKPC 22
[156] Peel (n 135)441-7
[157] [1979] 3 WLR 435,451
[158] [1992] 2 AC 152, 165; See similar decision: *Huyton SA v Peter Cremer Gmb H & Co Inc* [1999] 1 Lloyd's Rep 620
[159] [1979] 3 WLR 435

However, the traditional formula that there must have been 'coercion to the will of the victim' has long been recognized as being technically incorrect. Atiyah explains that the main difficulty in the 'coercion of the will' theory is that duress does not deprive a person of all choice. A victim of duress is rather left with a choice between evils.[160] It is even held that in some sense the more extreme the threatened wrong and the concomitant desire of the victim to avoid it, the more real the consent obtained.[161]

Lord Goff in *Evia Luck* expressed similar doubts, pointing out that victims of duress know exactly what they are doing and submit intentionally. [162] Furthermore, in criminal law, the House of Lords has clearly indicated that the defence of duress does not depend on the absence of a voluntary act, but rather upon an intentional action in the face of no other practical alternative.[163] It is suggested that the same must be true in contract; and thus release on the grounds of duress must not be made on the absence of consent but rather on the fact that victim had no other realistic option available other than to agree. This line of reasoning is borne out by the fact that duress in common law renders a contract voidable not void.[164]

Lords Diplock and Scrman submitted in *Universe Tankships Inc. of Monrovia v International Transport Workers' Federation,* that duress in contract law does not involve the destruction of will but intentional submission of the inventible.[165] In the light of this debate Poole observes that the first requirement of duress has been reformulated to be 'no realistic choice' rather than 'coercion of the will vitiating consent'.[166]

This is evident in case law. For example in *Carillion Construction Ltd v Felix (UK) Ltd* it was held that threats to withhold deliveries when under a contractual obligation to use best endeavours to prevent delay, amounted to illegitimate threats and that it was unrealistic to expect the other party to seek a mandatory injunction.[167] Thus, it seems the focus of duress

[160] P.S.Atiyah 'Economic Duress and the Overborne Will' (1982) 98 Law Quarterly Review 197
[161] Halson (n 131)
[162] [1991] 4 All ER 871, 878
[163] See *Lynch v DPP for Northern Island* [1975] AC 653
[164] Poole (n 60) 548-56
[165] [1983] 1 AC 366
[166] Poole (n 60) 548-56
[167] [2001] ELR 1; See similar decisions in: *Adam Opel GmbH v Mitras Automotive Ltd* [2007] EWHC 3205 (QB), [2008] Bus LR Digest D55; *Atlas Express Ltd v Kafco (Importers & Distributors)Ltd* [1989] QB 833

has turned to the nature of the threat imposed (considered below) rather than the absence of consent.[168]

2.3.1.2.2 The legitimacy of pressure

In a claim of economic duress it is necessary to prove the existence of pressure or threat. However, there could be some sense in saying that all contracts have been entered into under pressure. A party to a contract could threaten to withhold the contracted goods unless the contract price is paid. The right to withhold from another the goods he desires until she pays the price demanded is usually described as 'freedom of contract' but yet nevertheless amounts to pressure. It is submitted that pressure in contract has always existed, especially in commercial relations. Thus, the question is not simply whether the agreement was entered into as a result of pressure, but rather the nature of the pressure exercised.[169]

Therefore, the role of the court is not to search for pressure but to distinguish between agreements that are the result of mere 'commercial pressure' and those which are the consequence of unfair exploitation.[170] In *DSND Subsea Ltd v Petroleum Geo Services ASA* Dyson J stated that 'illegitimate pressure must be distinguished from the rough and tumble of the pressures of normal commercial bargaining'.[171] It is of great significance to the doctrine of economic duress to distinguish the line between legitimate and illegitimate pressure.[172]

Nevertheless, in the context of economic duress, there seems to be no definitive test of legitimacy of the pressure produced by the court. Generally, courts tend to consider unlawful act threats as being illegitimate.[173] *In R v A-G for England and Wales* Lard Hoffman stated that:

'Generally speaking, the threat of any form of unlawful action will be regarded as illegitimate. On the other hand, the fact that the threat is lawful does not necessarily make the

[168] Mckendrick, *Contract Law* (n 135) 293-9
[169] Halson (n 131)
[170] Peel (n 135) 441-7
[171] [2000] All ER (D) 1101, 131
[172] Poole (n 60) 548-56
[173] Donal Nolan 'Economic Duress and the Availability of A Reasonable Alternative' (2000) Restitution Law Review 105

pressure legitimate. As Lord Atkin said in *Thorne v Motor Trade Association* [1937] AC 797, 806:

The ordinary blackmailer normally threatens to do what he has a perfect right to do-namely, communicate some compromising conduct to a person whose knowledge is likely to affect the person threatened [...] what he has to justify is not the threat, but the demand of money.'[174]

Accordingly, there seems to be two approaches to illegitimate pressure. First, unlawful threats, which generally amount to duress, such as the threat to commit a crime, a tort or a breach of contract. Second, there could be duress in cases where lawful threat is used to support unlawful demands.[175] So, the general rule is that a person who threatens to do what he is entitled to do will not be held to have applied illegitimate pressure.

Thus, in *Alec Lobb (Garages) Ltd v Total Oil (GB) Ltd* the refusal to waive existing contractual obligations was not taken to constitute duress because of the absence of wrongful threat.[176] Also, in *Alf Vaughan & Co Ltd v Royscot Trust plc* the demand for payment by the owner of goods (who has validly terminated a hire-purchase contract) as the price for not exercising his right to repossess the goods has also been held not to constitute duress.[177] Hence, in the same sense a threat to refuse to contract should not accordingly constitute duress, because the absence of obligation to enter into contract means that no wrongful threat is made in refusing to contract.[178] Yet, Lord Hoffmann observes that it is necessary to extend the category of illegitimacy to include the case of blackmail (as an exception), where the threat is lawful but used to attain unlawful goals.[179] However, although there are cases where the pressure is said to take the form of a threatened breach of contract, not all cases amount to the application of illegitimate pressure. It is concluded that only breaches of contract in bad faith will be classified as illegitimate for this purpose.[180]

An important point to be made here is that English courts in the context of economic duress are shifting away from the consent test (explained above), and are putting more emphasis on

[174] [2003] UKPC 22, 16
[175] Mckendrick, *Contract Law* (n 135) 293-99
[176] [1983] 1 WLR 87, 94
[177] [1999] 1 All ER (Comm) 865
[178] Poole (n 60) 548-56
[179] *R v A-G for England and Wales* [2003] UKPC 22, 16
[180] Mckendrick, *Contract Law* (n 135) 293-99

the nature of the pressure. This has led to the conclusion that a threat to break a contract can constitute duress, whereas a refusal to waive an existing contractual obligation cannot. Although this sounds conceptually perfect it could on occasion be difficult to apply in practice. One of the most difficult examples identified is related to the question of whether or not the party applying the pressure is threatening to break the contract, or whether he is entitled to make the demand he is making.[181]

Burrows suggests that bad faith must be taken into consideration when deciding on the legitimacy of a threat.[182] A 'threatened breach of contract should be regarded as illegitimate if concerned to exploit the claimant's weakness rather than solving financial or other problems of the deferent' threat must not be considered illegitimate (made in bad faith) if the threat is a reaction to circumstances that almost constitute frustration or if it merely correct what was always clearly a bad bargain.[183]

2.3.1.2.3 Causation

In the *Evia Luck* case Lord Goff pointed out that in claims of economic duress the claimant needs to prove that the pressure applied was a 'significant cause' inducing him to enter into the contract.[184] So, in economic duress the test applied is a restricted one; it needs to be proved that the agreement would not have been made at all on the terms it was in fact made.[185] By contrast, in duress to person, it only needs to be proved that the threat was one reason why the contract was entered into.[186] The test applied by the court for the purpose of ensuring that there is a sufficient causal link between the pressure applied by the defendant and the entry into the contract, is said to lack some certainty.[187]

A claimant must overcome a serious hurdle to prove a claim of economic duress, however, it is held that the significance of this hurdle is not entirely clear. A point that it is likely to be considered by the court in distinguishing the causation is whether or not there was an

[181] Ibid
[182] Andrew Burrows, *The Law of Restitution* (3rdedn, OUP 2011) 267-79; The same point was mentioned by Mance J in *Huyton SA v Peter Cremer GmbH & Co Inc* [1999] 1 Lloyd's Rep 620, 637
[183] Burrows (n 181) 267-79
[184] [1992] 2 AC 152, 165; See similar decision: *Huyton SA v Peter Cremer Gmb H & Co Inc* [1999] 1 Lloyd's Rep 620
[185] Peel (n 135) 441-7
[186] See *Barton v Armstrong* [1976] AC 104
[187] Mckendrick, *Contract Law* (n 135) 293-99

alternative open to the claimant.[188] In *Huyton SA v Peter Cremer Gmb H & Co Inc*, Mance J stated that while it was 'not necessary to go so far to say that it is an inflexible third essential ingredient of economic duress that there should be no practical alternative course open to the innocent party', it seems…'self-evident that relief may not be appropriate, if the innocent party decides, as a matter of choice not to peruse an alternative remedy which any and possibly some other reasonable persons in his circumstances would have pursued'.[189] It is for the claimant to prove the existence of a sufficient causal link.[190]

2.3.2 Undue influence

The doctrine of undue influence is said be an equitable doctrine that emerged separately from common law duress. It functions to release parties from a contract that they have entered into as a result of being influenced by the other party. The difficulty of identifying the limits of legitimate persuasion has always been associated with the doctrine of undue influence. For instance, saying that persuading, cajoling or encouraging people to enter into an agreement is impermissible would result in the job of sale representative jobs' being unlawful. Thus, influence is perfectly acceptable in contract law; it becomes unlawful only when it becomes undue.[191]

2.3.2.1 The nature of undue influence

The word undue has two potential meanings. It can be used to indicate some impropriety on the part of the influencer or as an indication of the level of influence, in the sense that influence has reached a level where the influenced party has lost his contractual autonomy.[192] There are two main approaches to this matter. The first approach views the doctrine as being claimant-sided. So, the focus is placed upon the claimant's position. The court will give release based on undue influence if the claimant's decision was made by excessive reliance or dependence on the defendant.[193] By contrast, the defendant-sided approach requires wrongful conduct on the part of the defendant. A court that follows this approach will base its decision

[188] Nolan (n 173)
[189] [1999] 1 Lloyd's Rep 620, 638
[190] See *Huyton SA v Peter Cremer Gmb H & Co Inc* [1999] 1 Lloyd's Rep 620, 638
[191] Stone and Devenney (n 98) 11.2
[192] Ibid
[193] Peter Birks and Chin Nyuk Yin 'On the Nature of Undue Influence' in Jack Beatson and Daniel Friedman (eds), *Good Faith and Fault in Contract Law* (Clarendon 1995) 57-98

on the existence of 'abuse' of a position of confidence, the 'exploitation' of the weaker party or any other form of 'advantage taking'.[194]

Courts do not seem, yet, to be committed to one approach over the other. Generally, it is observed that most cases of undue influence contain an element of 'wrongful' conduct on the part of the defendant, which takes the form of an act of exploitation or taking advantage of the claimant's vulnerability. In the House of Lord's decision on *Royal Bank of Scotland v Etridge*, a defendant-focused approach was adopted, with emphasis placed on the abuse of position of influence.[195] In *R v A-G for England and Wales* Lord Hoffmann has given the analysis of undue influence a strong defendant-focus by drawing an analogy with duress and emphasising the need for 'unacceptable means' and 'unfair exploitation'.[196] Similarly, Lord Millett in *National Commercial Bank (Jamaica) Ltd v Hew* stated that:

'Undue influence is one of the grounds on which equity intervenes to give redress where there has been some unconscionable conduct on the part of the defendant … the doctrine involves two elements. First, there must be a relationship capable of giving rise to the necessary influence. And secondly the influence generated by the relationship must have been abused.'[197]

Furthermore, in *Davies v AIB Group (UK) plc* Norris J stated that undue influence 'does not protect against folly, but against victimisation' and that it has a 'connection of impropriety'.[198] Thus, Stone and Devenney have taken the position that the dominant approach is defendant-focused.[199]

However, the courts' position is not consistent and in some instances a mixed approach that gives rise to both positions (defendant and claimant-sided) has been adopted.[200] More importantly, according to Briks the fact that courts, in most cases of undue influence, have established an element of wrongful doing on the part of the defendant does not rule out the

[194] Mckendrick, *Contract Law* (n 135) 293-99
[195] [2001] UKHL 44; [2001] 4 All 449
[196] [2003] UKPC 22, 21
[197] [2003] UKPC 51, 29-31
[198] [2012] EWHC 2178 (Ch), 8-10
[199] Stone and Devenney (n 98) 11.2
[200] This includes *Randall v Randall* [2004] EWHC 2258 and *Turkey v Ahwad* [2005] EWCA Civ 507

possibility of establishing undue influence without having to establish such conduct.[201] He cites the Court of Appeal decision in *Hammond v Osborn*, where it was enough to render the gift voidable as not being 'the product of full, free and independent violation.'[202] This falls in line with the statement of Mummery LJ in *Pesticcio v Huet:*

'Although undue influence is sometimes described as "equitable wrong" or even as species of equitable fraud, the basis of the court's intervention is not the commission of a dishonest or wrongful act by the defendant, but that, as a matter of public policy, the presumed influence arising from the relationship of trust and confidence should not operate to the disadvantage of the victim, if the transaction is not satisfactorily explained by ordinary motive: *Allcard v Skinner (1887) 36 Ch D 145 at 171*. The court scrutinises the circumstances in which the transaction, under which benefits where conferred on the recipients, took place and the nature of the continuing relationship between the parties, rather than any specific act or conduct on the part of the recipient. A transaction may be set aside by the court, even though the action and the conduct of the person who benefits from it could not be criticised as wrongful.'[203]

2.3.2.2 Undue influence classification

The essential classifications of undue influence were distinguished by Lord Browne-Wilkinson in *Barclays Bank Plc v O'Brien*. He explained that the doctrine of undue influence consist of two classes. Class 1 (actual undue influence) includes cases where the claimant must prove the exercise of actual undue influence by the defendant, which resulted in him (the claimant) entering into the transaction. In class 2 (presumed undue influence) a relationship of trust and confidence is required. Class 2 is subdivided into class 2A cases, where it has been authoritatively decided that a certain relationship raises the presumption of confidence (such as solicitor/client, trustee/beneficiary, and doctor/patient). Class 2B involves other relationships where the claimant must prove on the facts that the necessary trust and confidence was present.[204]

[201] Peter Briks 'Undue Influence as Wrongful Explanation'(2004) 120 Law Quarterly Review 34
[202] [2002] EWCA Civ 885; [2002] WTLR 1125
[203] [2004] EWCA Civ 372, 20
[204] [1993] UKHL 6

2.3.2.2.1 Actual undue influence

This consists of cases where one party has induced the other to enter into a contract by actual pressure that equity regards as improper but which did not involve an element of violence to person, and was formally thought not to amount for duress at common law. For example, a party could agree to pay money because he was threatened by the other party to be or by one of his close relatives, or his spouse prosecuted for a criminal offence. Today such case would now constitute duress. Thus, there is an overlap between cases of undue influence and common law duress.[205] Lord Nicholls in *Etridge*[206] illustrated that actual undue influence cases 'comprise overt acts of improper pressure or coercion such as unlawful threats' which results in 'much overlap with the principle of duress as this principle has subsequently developed.'

To make a claim of actual undue influence the existence and exercise of such influence needs to be proved, along with evidence that the transaction was a consequence of that influence. Yet, it need not to be proved that the transaction is of obvious disadvantage to the claimant[207] or be one which 'calls for explanation' by the other party.[208] In distinguishing the causation link the Court of Appeal in *Bank of Credit and Commerce International SA v Aboody* applied a 'but-for' test, which means it is not sufficient to prove the existence of undue influence to set a transaction aside but rather it needs to be proved that the victim of influence 'on balance of probabilities' would not have entered into the transaction in normal circumstances.[209]

The 'but-for' test was subsequently rejected by the Court of Appeal in *UCB Coaprate Services v Williams*[210] as being inconsistent with Lord Browne-Wilkinson's statement of principle in the *CIBC Mortgages v Pitt* case that the victim of the influence is entitled to have the transaction set aside 'as of right'.[211] So, it needs to be proved only that the undue influence was a factor. In other word, it is sufficient to prove only that the victim consent was vitiated.[212]

[205] Peel (n 135) 447-64
[206] [2001] UKHL 44; [2001] 4 All 449
[207] *CIBC Mortgages v Pitt* [1994] 1 AC200
[208] Peel (n 135)447-64
[209] [1990] 1 QB 923
[210] [2002] EWCA Civ 555
[211] [1994] 1 AC 200, 209
[212] Mckendrick, *Contract Law* (n 135) 293-99

In *CIBC Mortgages v Pitt* it was held that it is not a requirement in cases of actual undue influence that the transaction is disadvantageous to the victim; a person is entitled to have a contract set aside if they have been bullied into making it, even if the contract was in somehow beneficial for him.[213] This brings the causation test of actual undue influence in line with duress to person. As a result, the burden of proof is on the stronger party to show that any undue influence played no part at all.[214]

2.3.2.2.2 Presumed undue influence

There are three stages within a case of presumed undue influence.[215] First, it needs to be proved that trust and confidence were placed by the plaintiff in the defendant in relation to the management of the affair. In the case of some relationships the law presumes the existence of a relationship of trust and confidence (class 2A), and the relationships that give raise to influence were identified by the House of Lords in *Royal Bank of Scotland v Etridge.* It takes the form of a relationship 'where one party is legally presumed to repose trust and confidence in the other'. As Lord Nicholls put it:

'the law has adopted a sternly protective attitude towards certain types of relationship in which one party acquires influence over who is vulnerable and dependent […] In these cases the law presumes, irrebuttably, that one party had influence over the other. The complainant need not prove he actually reposed trust and confidence in the other party. It is sufficient for him to prove the existent of the type of relationship'[216].

This category of relationship includes parent/child, guardian/ward, trustee/beneficiary, doctor/patient, solicitor/client and religious adviser/disciple. Yet, the relationship of husband/wife is not included. These relationships are ones in which the party has placed confidence and trust in the other party, to the level that he/she acts on the other's suggestions without thinking that they should seek independent advice. It is said that other relationships (except for that of husband/wife), which have these characteristics could be added to the list

[213] [1994] 1 AC 200, 209
[214] Peel (n 135) 447-64
[215] Ibid
[216] [2001] 4 All ER 449, 460-1

in the future.[217] In cases of relationships outside this category (class 2B), the claimant must prove that she placed trust and confidence in the defendant. If this was proven than any disadvantageous transaction entered into through the influence of the dominant party will constitute *prima facie* evidence of abuse to the claimant's trust and confidence. This shifts the burden of proof to the defendant.[218]

In the second stage, the claimant must prove that the contract 'calls for explanation'. This concept was formerly referred to as 'manifest disadvantage'[219] but Lord Nicholls in *Etridge* illustrated that 'experience […] has shown that this expression [i.e manifest disadvantage] can give raise to misunderstanding' and has been 'causing difficulty'. [220] He returned to the original test adopted by Lindley LJ in *Allcard v Skinner* to point out that a small gift made for a person falling within one of the presumed category of influence would not be enough in itself to set the contract aside:

It 'would be absurd for the law to presume that every gift by a child to a parent, or every transaction between a client and his solicitor or between a patient and his doctor, was brought about by undue influence unless the contrary is affirmatively proved. Such a presumption would be too far-reaching. The law would be out of touch with everyday life if the presumption were to apply to every Christmas or birthday gift by a child to a parent, or to an agreement whereby a client or a patient agrees to be responsible for the reasonable fees or his legal or medical adviser. The law would be rightly open to ridicule, for transactions such as these are unexceptionable. They do not suggest that something may be amiss. So something more is needed […]' [221]

Accordingly, transactions that amount to undue influence are the sort of transaction that the claimant would not have entered into in normal circumstances. One indication would be when the transaction provides no benefit to the victim of undue influence. Therefore, when there is a relationship that falls within the categories of presumed undue influence and the transaction happened to be not one that falls within the range of normal incident of such a

[217] Stone and Devenney (n 98) 11.4
[218] Ibid 11.5
[219] The concept of 'manifest disadvantage' appeared for the first time in the speech of Lord Scarman in *National Westminster Bank plc v Morgen* [1985] AC 686
[220] [2001] 4 All ER 449, 450
[221] (1887) 36 Ch D 145, 185

relationship, there will be held to be an interference of undue influence. It will be then up to the defendant to show otherwise.[222]

In the third stage of presumed undue influence the defendant usually attempt to disapprove the assumption of undue influence that has arisen on the grounds of proof by the claimant of the existence of a relationship of trust and confidence and a transaction which requires explanation.[223] There is no specific way to prove that the claimant entered the transaction independently. But this is usually done by showing that the claimant received independent legal advice before entering into the transaction.[224] Yet, this may not be sufficient to dismiss the assumption of undue influence, as explained by the Privy Council in *Attorney General v R*,[225] which established that the adequacy of the advice needs to be considered. It is not sufficient for the defendant to show that there had been no wrongdoing on her part[226] nor to show that there happened to be a reasonable explanation for the transaction.[227]

2.3.3 Inequality of bargaining power

The concept of inequality of bargaining power as a legal doctrine is a relatively new invention. The disparities of bargaining power were first noticed in the late nineteenth century in relation to the perceived abuses of *laissez faire* economic regulation and *Lochner-era* freedom of contract doctrine. The notion of inequality of bargaining power was first invoked in relation to labour disputes; it was not until the 1930s that it was recognised as a legal doctrine applicable to contract in general.[228] Modern law of contract, unlike classical law, recognises that dealers in the marketplace do not always enjoy the same bargaining strength.[229] Thus, the relative bargaining strength of the contracting parties is made relevant in many situations by modern law of contract. However, no general doctrine of inequality of bargaining power is recognised.[230]

[222] Stone and Devenney (n 98) 11.4
[223] Mckendrick, *Contract Law* (n 135) 293-9
[224] Stone and Devenney (n 98) 11.4
[225] [2003] UKPC 22; [2003] EMLR 24,23
[226] See *Hammond v Osborn* [2002] EWCA Civ 885; [2002] WTLR 1125
[227] See *Smith v Cooper* [2010] EWCA Civ 722; [2010] 2 FLR 1521
[228] Daniel Barnhizer 'Inequality of Bargaining Power' (2005) 76 The University of Colorado Law Review 143
[229] Brownsword, *Contract Law* (n 3) 71
[230] Ibid 72; See Barry Reiter 'The Control of Contract Power' (1981) Oxford Journal of Legal Studies 347

2.3.3.1 The rise of concerns

In the 1960s concerns rose about the increased use of standard form contract especially in consumer relations.[231] Particularly, the validity of exemption clauses was questioned by courts. The main concern about the exemption clause was related to its effect on the freedom of contract and the lack of choice imposed by it.[232] The effect of the recognition of the idea of inequality of bargaining power on the doctrinal development of contract law can be summarised under three headings: (1) the differentiation between rules regulating consumer contracts and those regulating commercial relations; (2) the regulation of exclusion clauses; (3) other employments of the idea.

2.3.3.1.1 Commercial and consumer contract separation

In modern England as well as across Europe,[233] contract law is typically classified into commercial and consumer contracts. Although distinct ideas have been introduced recently to explain such a classification,[234] it is traditionally made on the basis of the relative bargaining strength of the parties.[235] The disparity of contractors' bargaining strength is widely accepted as justification for the separation of the two types of contracts.[236] Parties to commercial contracts[237] tend to be of an equal bargaining position. By contrast, parties to consumer relations negotiate from unequal bargaining positions. This disparity in power between the producer and consumer is due to the disparity of bargaining power, knowledge and resources between the two sides.[238]

This differentiation between rules applicable to commercial and consumer relations is evidential in adjudication as well as in legislation.[239] Regarding judicial recognition it is useful to consider the different positions taken by be the Court of Appeal regarding the

[231] See John Livermore, *Exemption Clauses and Implied Obligations in Contracts* (Law Book Co. 1986) 1
[232] The essence of these concerns were illustrated in Lord Reid's speech in the *Suisse Atlantique* see *Suisse Atlantique Societe d'Armament SA v NV Rotterdamsche Kolen Centrale* [1967] 1 AC 361
[233] See Hugh Beale 'The Inequality of Bargaining power' (1986) 6 Oxford Journal of Legal Studies 123
[234] See section 4.1 on consumer protection rationales
[235] Brownsword, *Contract Law* (n 3) 72-3
[236] Brian Harvey and Deborah Parry, *The Law of Consumer Protection and Fair Trading* (6thedn, Butterworths 2000)13; Howells and Weatherill (n 5) 6; Iain Ramsay, *Rationales for Intervention in the Consumer Marketplac*e (Office of Fair Trading 1984) 50
[237] For the purposes of this thesis the term 'commercial contracts' refers to 'business-to-business contracts'.
[238] Ramsay, *Rationales for Intervention in the Consumer Marketplac*e (n 235) 50
[239] Ibid

incorporation of standard form contracts in the commercial case of *British Carne Hire Corpn v Ipswish Plant Hire Ltd*[240] and in the consumer case of *Hollier v Rambler Motors (AMC) Ltd.*[241] Lord Denning stated in the former case that 'The plaintiff [in *Hollier*] was not of equal bargaining power with the garage company which repaired the car. The conditions were not incorporated. But here the parties were both in the trade and were of equal bargaining power.'[242]

In subsequent years, such a distinction gained legislative recognition through the Unfair Contract Terms Act 1977 (UCTA 1977) and the Sale and Supply of Goods Act 1994. These legislations have two streams: one deals with consumer relations and the other deals with commercial relations (the consumer part is now regulated by the Consumer Rights Act 2015). Moreover, there is legislation that is completely dedicated to the regulation of consumer relations such as the Unfair Terms in Consumer Contracts Regulations 1999 [243](now replaced by the Consumer Rights Act 2015).

2.3.3.1.2 Exclusion clauses regulation

In addition to differentiation between commercial and consumer relations, the idea of relative bargaining power is employed in the statutory regimes, especially in relation to the regulation of exclusion clauses.[244] Exclusion clauses started to appear in the nineteenth century, in association with concerns about its effect on the freedom of contract and the lack of choice imposed by it.[245] Such clauses are usually included in standard form contracts that are made on a take-it-or-leave it basis, leaving the other party with very little choice. Parties who rely on exclusion clauses are typically given exemption from liabilities (in contract or tort) that could arise from the contracts.[246]

[240] [1974] 1 All ER 1059
[241] [1972] 2 QB 71
[242] [1974] 1 All ER 1059, 1061-2
[243] SI 1999/2083, implementing Directive 93/13/ EEC
[244] Brownsword, *Contract Law* (n 3) 72-3
[245] *Suisse Atlantique Societe d'Armament SA v NV Rotterdamsche Kolen Centrale* [1967] 1 AC 361
[246] Stone and Devenney (n 98) 7.22; See generally on exclusion clauses: Lawson (n 96); David Yates, *Exclusion Clauses in Contracts* (Sweet & Maxwell 1982)

The first reaction of the contract law to improve the common law rules to address imbalance in bargaining power was taken by courts.[247] When the use of exclusion and limitation clauses started to become widespread courts decided to deal with the lack of consent they imposed. However, to avoid clashes with the freedom of contract, courts adopted techniques that consisted mostly of 'heightened' application of those used for constructing and interpreting contracts.[248] Formal rules related to the determination of the content of the contract and the scope of the clauses contained in it were used directly to police exclusion and limitation clauses. The main rules used are those of 'incorporation' and 'construction'.[249]

The issue of exclusion clauses was subsequently acknowledged by legislations in the twentieth century. This was primarily done through the Reasonableness test of the UCTA 1977.[250] The relative bargaining strength of the parties was made a relative consideration when reviewing the validity of exclusion clauses. A in Schedule 2 of the UCTA 1977 makes the bargaining positions of the parties a relative consideration: 'the strength of the bargaining positions of the parties relative to each other, taking into account (among other things) alternative means by which the customer's requirements could have been met.'

However, the purpose of the legislator requires explanation in relation to perceived inequality under the UCTA 1977. In *Photo Production Ltd v Securicor Transport Lt* Lord Wilberforce's comments on the UCTA 1977 pointed out that 'After this Act [ie UCTA], in commercial matters generally, when the parties are not of unequal bargaining power, and when risks are normally borne by insurance, not only is the case for judicial intervention undemonstrated, but there is everything to be said, and this seems to have been Parliament's intention, for leaving the parties free to apportion the risk as they think fit and for respecting their decisions.'[251] This statement could be understood, according to Brownsword, to uphold the

[247] See generally about common law policing of exclusion clauses: Robert Bradgate 'Unreasonable Standard Terms' (1997) 60 The Modern Law Review 582; Lawson (n 96)
[248] Stone and Devenney (n 98) 7.1-7.3
[249] The rule of fundamental breach was later dismissed by the House of Lords in the *Photo Production Ltd v Securicor Transport Ltd* [1980] UKHL; See Stone and Devenney (n 98) 7.1-7.3-4
[250] On statutory regulation see John Adams and Roger Brownsword 'Unfair Contract Terms Act: A Decade Decision' (1988) 32 Law Quarterly Review 94; Elizabeth Macdonald 'Unifying Unfair Terms Legislation' (2004) 67 The Modern Law Review 69; Norman Palmer and David Yates 'The Future of the Unfair Contract Terms Act 1977' (1981) 40 The Cambridge Law Journal 108; Brian Coote 'Unfair Contract Terms Act 1977' (1978) 41 The Modern Law Review 312
[251] [1980] AC 827, 843

statement in the UCTA 1977 guidelines should not be taken as an invitation to discriminate 'case-by-case' based on relative bargaining strength.[252]

On the contrary, a case-by-case approach was taken by the House of Lords in *George Mitchell (Chesterhall) Ltd v Finney Lock Seeds Ltd.* It was acknowledged that commercial contractors generally negotiate from equal bargaining positions. Thus, the purpose of statutory guidance is to view the bargaining position in each particular case.[253] The reasonableness test of the UCTA 1977 supports the view that in situations where parties are faced by take-it-or-leave-it sort of contracts, the bargaining positions of the parties become a material factor (weighting against the validity of conditions). This is true even if it is a commercial relation.[254]

2.3.3.1.3 Other employments of the idea of inequality of bargaining powers

There is evidence that the notion of inequality of bargaining power has been stretched beyond consumer contracts and exclusion clauses. In *Schroeder Music Publishing Co Ltd v Macaulay*, a young songwriter contracted on a standard form contract with a music publishing house, the agreement gave the publishing house the exclusive benefit of his compositions. It was to last for five years, during which time the music publishing house would have the right to terminate or assign the contract, but the claimant could not. According to the agreement the defendant is under no obligation to publish or promote any of the claimant's songs. Macaulay claimed that the agreement was contrary to public policy. In court, the defendant argued that the provisions had stood the test of time and caused no obvious injustice.[255]

Lord Reid's response to the defendant's argument was that in the relevant case there was no evidence that the contract was made freely by parties 'bargaining on equal terms' or 'moulded under the pressure of negotiation'.[256] Lord Diplock pointed out that a distinction needs to be made between standard form contracts that have been negotiated by parties of relatively equal bargaining powers and on the other hand, standard forms that have not been

[252] Brownsword, *Contract Law* (n 3) 74
[253] [1983] 2 AC 803
[254] Brownsword, *Contract Law* (n 3) 75; See Adams and Brownsword 'Unfair Contract Terms Act' (n 250)
[255] [1974] 3 All ER 616
[256] Ibid 623

negotiated between parties but rather have been dictated by the party in superior bargaining position. The party in the strong position could be an exercised by one entity or unification with other provider of similar goods or services. In other words, when one party is able to say: 'If you want these goods or services at all, these are the only terms on which they are obtainable. Take it or leave it', such a position clearly illustrates a classic situation of unequal bargaining powers.[257] The approach of the case indicates that when a contract is an outcome of two-side negotiation, it is presumed that its terms are fair and reasonable. By contrast, when the contract is put to one side, the fairness and reasonableness of its terms are questioned.

In *Lloyds Bank Ltd v Bundy* a security was taken from a father to secure his son's indebtedness to the bank. The bank did not fully disclose the state of the son's affairs. The contract was invalidated by the court; Lord Denning took the position that the case involves an obvious abuse of bargaining power. He made his famous statement suggesting a wider basis of inequality of bargaining power as the dispositive principle. He stated that it applies when a person's 'bargaining power is grievously impaired by reason of his own needs or desires, or by his own ignorance or infirmity, coupled with undue influences or pressures brought to bear on him or for the benefit of the other.'[258]

2.3.3.2 A general doctrine of inequality of bargaining power?

In recent years there has been some controversy about the question of whether a doctrine of inequality of bargaining power exists in the English law of contract.[259] The primary source of this controversy is the statement made by Lord Denning in *Lloyds Bank v Bundy*.[260] He suggested that many of the traditional defences to contract enforcement, such as duress, undue influence, and breach of fiduciary duty are merely exemplary of a general doctrine of inequality of bargaining power. Trebilcock has also generalised the House of Lords' reasoning in *Schroeder Music Publishing Co Ltd v Macaulay* to argue for a general principle of protection for the weaker parties in unequal bargains.[261] However, scholars are now almost

[257] [1974] 3 All ER 616, 624
[258] [1975] QB 326, 339
[259] Mckendrick, *Contract Law* (n 135) 303
[260] [1975] QB 326
[261] Michael Trebilcock 'The Doctrine of Inequality of Bargaining Power: Post-Benthamite Economics in the House of Lords' (1976) 26 The University of Toronto Law Journal 359

in agreement that even if there has been a tendency towards the creation of a doctrine of inequality of bargaining power, this tendency has now shifted.[262]

Two cases have been cited to support this view: *Pao On v Lau Yiu Long*[263] and *National Westminster Bank plc v Morgan.*[264] In the former case, the parties entered into a contract under which the claimant sold a building for a share in the defendant's company (as a consideration). It was agreed that the claimant is under obligation not to sell at least 60% of the share obtained in the first year to avoid loss in share value. The parties entered into a subsidiary agreement to cover the risk of the shares falling in the period of sale bar. The subsidiary agreement requires the defendant to buy back the share at the indemnity price in case the value of the share falls down. But it also allowed the latter to buy the shares at the same price (meaning at profit) if the shares rise in value.[265]

The claimant had threatened not to complete the main contract for the purchase of shares unless the subsidiary agreement was cancelled and replaced by simple indemnity. The defendant was anxious to complete the main contract as there had been a public announcement of the acquisition of shares and he did not want to undermine public confidence in the company with the consequent effect on share prices. The claimant then sought to enforce the guarantee and the defendant sought to have the agreement set aside for economic duress. The argument was rejected, and the court concluded that 'where businessmen are negotiating at arm's length it is unnecessary for the achievement of justice, and unhelpful in the development of the law, to invoke such a rule of public policy, it would also create unacceptable anomaly'. Furthermore, 'It is unnecessary because justice requires that men, who have negotiated at arm's length, be held to their bargains unless it can be shown that their consent was vitiated by fraud, mistake or duress. If promise is induced by coercion of man's will, the doctrine of duress suffices to do justice.' Thus the doctrine would be unhelpful 'because it renders the law uncertain' and 'it would become question of fact and degree to determine in each case whether there had been, short of duress, unfair use of strong bargaining position'. The adaptation of a doctrine of inequality of barging powers would also create an unacceptable anomaly because such a doctrine would render a contract void: 'it

[262] Beatson, *Ansons's Law of Contract* (n 54) 298; Mckendrick, *Contract Law* (n 135) 303; Brownsword, *Contract Law* (n 3) 76
[263] [1980] AC 614
[264] [1985] AC 686
[265] Ibid

would be strange if conduct less than duress could render a contract void, whereas duress does no more than render a contract voidable'.[266]

The situation in *National Westminster Bank plc v Morgan* is very similar to the one in *Lloyds Bank v Bundy* mentioned before. A bank manager came to Mrs Morgan's house to get her to sign a charge, which was going to refinance Mr Morgan's business. She had no independent advice. Mrs Morgan argued that the agreement had been obtained by undue influence. Lord Scarman, rejecting a general principle, held that 'the doctrine of undue influence has been sufficiently developed not to need the support of a principle which by its formulation in the language of the law of contract is not appropriate to cover transactions of gift where there is no bargain […] and even in the field of contract I question whether there is any need in the modern law to erect a general principle of relief against inequality of bargaining power. Parliament has undertaken the task - and it is essentially a legislative task - of enacting such restrictions open freedom of contract as are in its judgement necessary to relief against the mischief: for example the hire-purchase and consumer legislation of which the Supply of Goods (Imply Terms) Act 1973, Consumer Credit Act and Companies Act 1982 are examples. I doubt whether the courts should assume the burden of formulating further restrictions.'[267]

2.3.3.3 The current approach

It has been illustrated that the ideas of relative bargaining strength and inequality are employed in many situations in modern contract law. Although its emergence in English contract law was in the context of a coalescence of concerns about standard form contracts, exemption and limitation clauses, it has subsequently moved towards creating a general doctrine of inequality of bargaining powers to cover all sorts of contractual situations, including commercial relations.

Rejecting a general doctrine of inequality of bargaining powers, Lord Scarman in *National Westminster Bank plc v Morgan* pointed out that contractual reliefs against equality of bargaining powers are best left to Parliament.[268] But the question to be raised here is whether

[266] [1980] AC 614, 634
[267] [1985] AC 686, 708
[268] Ibid

a modern stream of modern consumer protection legislation is an adequate response to the lack of balance between contractors? Here Lord Scarman is assuming that the legislation has dealt with all potential situations of inequality of bargaining power. This is based on an assumption that outside of the legislative scheme parties are negotiating at arm's length. However, the truth is that there are many situations of inequality of contractual power that are not regulated by the Parliament: for example, the situation of small companies contracting with a large and powerful company. Such situations are left without solution in the absence of a general doctrine of inequality of bargaining power.[269]

2.3.4 Unconscionability

Unconscionability as a doctrine has long been known in the common law of contract. As early as the mid-seventeenth century, the common law recognized the courts' power to refuse to enforce contracts that overstep accepted bounds of public policy. However, the call for bringing unconscionability away from public policy analysis is relatively new.[270] Unconscionability is recognised as a general legal doctrine in other jurisdictions within the common law.[271] Nevertheless, the development of such principle under English law is faced by the hurdle of traditional doctrines of freedom and sanctity of contract. The common law traditional principle that 'consideration need not to be adequate' reflects the fact that courts are not concerned about the 'comparative values of exchange.' Yet, such an attitude has changed in the contemporary law.[272] However, does the principle of unconscionability in itself constitute grounds for intervention in the English law of contract?

2.3.4.1 The recognition of the doctrine of unconscionability

The first instance where an English court recognised the principle of unconscionability was in *Fry v Lane*. The case involved setting aside a contract that was made on the basis of a considerable undervaluation and without independent advice against a 'poor and ignorant

[269] See criticism on the way the English law deals with the unequal bargaining powers outside consumer contract under section 7.1.2.2
[270] Barnhizer (n 227)
[271] Article 2-302 of the American Uniform Commercial Code allow for intervention on this ground: 'If the court as a matter of law finds that contract or any clause of the contract have been unconscionable at the time it was made the court may refuse to enforce the contract, or it may enforce the remainder of the contract without the unconscionable clause as to avoid unconscionable clause'; The High Court of Australia has recognised a general doctrine of unconscionability See: *Commercial Bank of Australia v Amadio* (1983) 151 CLR 477m 461
[272] Poole (n 60) 574

person'[273]. The principle was subsequently expanded in *Cresswell v Potter* to involve old age.[274] In *Credit Lyonnais Bank v Burch*, the principle was expanded to junior employees influenced by employers and family friends.[275]

Nevertheless, as pointed out in *Boustany v Pigott*, the key element of the unconscionability principle is not the agreement being unreasonable or unfair but rather the abuse of the position in the relationship. In other words, unconscionability is not yet in itself a ground for intervention in the English law of contract.[276] On this basis, to be able to rule out a contract on the basis of unconscionability there needs to be evidence of 'taking advantage' of a disadvantaged party.[277]

Indeed, in *Kalsep Ltd v X-Flow* it was explained that in order to set a contract aside on the basis of unconscionability, more than just improvidence needs to be proved. Pumferey J stated that 'it is necessary to prove impropriety, and that is to say not merely harshness but impropriety, both in the terms of the agreement and in the manner in which the agreement was arrived at.'[278] In *Greenwood Forest Products (UK) v Ltd v Roberts* it was held that in order to set an agreement aside on the basis of unconscionability three requirements need to be satisfied: (1) one party has to suffer from disability or serious disadvantage; (2) the agreement has to be 'overreaching or oppressive'; (3) the stronger party must have acted in an unconscionable manner.[279] Therefore, it seems that unlike in other jurisdiction it is not enough to prove that a claim is unfair or unreasonable to set an agreement aside by the doctrine of unconscionability, 'there must be procedural and substantive 'impropriety' which extend beyond mere unfairness.'[280] Unconscionability is only one factor among others required to set an agreement aside.

2.3.4.2 The link between unconscionability and inequality of bargaining power

[273] [1888] 40 D 312
[274] [1978] 1 W LR 255
[275] [1997] 1 All ER 144
[276] [1995] 69 P&CR 298, 3
[277] Poole (n 60) 574-9
[278] (2001) Times, 3 May
[279] QBD Leeds [2010] Bus LR D146, 269-82
[280] Poole (n 60) 574-9

The doctrine of unconscionability is closely linked to the inequality of bargaining power simply because bargaining power disparities are taken to be an indication of unconscionability.[281] In other words, intervention is not based on the imbalance in a relationship but on the abuse and advantage-taking of that imbalance.[282] In *Director General of Fair Trading v First National Bank plc,* under the former regulation of Unfair Terms of Consumer Contracts Regulations 1999, unfairness was assessed by reference to procedural and substantive unfairness. It was linked with the concept of inequality of bargaining power and taking advantage of a superior position.[283] However, as indicated above, unfairness or inequality of bargaining power is not sufficient to set an agreement aside, there needs also to be an element of 'abuse.'

2.3.4.3 Undue influence and unconscionability

The doctrine of undue influence has been linked with unconscionability in many cases. The heavy requirements imposed on the doctrine of unconscionability, along with the fact that courts, as explained before, tend to emphasise the 'wrongdoing' of the stronger party in cases of undue influence, has led to a linking of the two doctrines in a number of cases.[284] Various theses have been proposed in this regard. Capper argues that the two doctrines are sufficiently similar in their objectives and effects to the extent that they can be merged into one doctrine. According to him, a proper understanding of the doctrine of unconscionability leads to the conclusion that the doctrine of undue influence could be subsumed under it.[285] A similar proposal that the two doctrines could be emerged into one has been made by Phang.[286]

On the other hand, Birks and Chin have indicated that the two doctrines are very distinct. Undue influence is a claimant-sided doctrine concerned with the weakness in the claimant's consent as a result of an excessive dependence upon the defendant. Unconscionability is defendant-sided and is concerned with the defendant's exploitation of the claimant's vulnerability.[287] The difference between the two doctrines was emphasised in *Portman*

[281] Barnhizer (n 228)
[282] Poole (n 60) 574-9
[283] [2001] UKHL 52; [2002] 1 AC 481
[284] See *Credit Lyonnais Bank v Burch* [1997] 1 All ER 144; *Dunbar Bank plc v Nadeem* [1993] 3 All ER 876
[285] David Capper 'Undue Influence and Unconscionability: A Rationalisation' (1998) 114 Law Quarterly Review 479
[286] Andrew Phang 'Undue Influence Methodology, Sources and Linkages' (1995) Journal of Business Law 532
[287] Birks and Yin (n 193) 57-98

Building Society v Dusangh. It was held that the focus of the unconscionability principle is the abuse of position by the defendant, and as such no trust relationship is required. Undue influence, on the other hand, focuses on the reason why the claimant entered a contract and the relationship between parties.[288] The statement of Mason J in the High Court of Australia in *Commercial Bank of Australia v Amadio* was cited:

'Although unconscionable conduct in this narrow sense bears in resemblance to the doctrine of undue influence, there is a difference between the two. In the latter the will of the innocent party is not independent and voluntary because it is overborne. In the former, the will of the innocent party, even if independent and voluntary, is the result of the disadvantageous position in which he is placed and of the other party unconscionability taking advantage of the position,'[289]

Nonetheless, according to Poole, the doctrine of unconscionability is likely to face difficulties. This is due to the fact that the courts' requirement for unconscionability is difficult to satisfy and courts are more likely to find claims based on undue influence more conceptually certain and thus easier to satisfy.[290] In supporting her argument she cites two cases. In *Credit Lyonnais Bank v Burch*, despite the fact that there was no plea of unconscionable bargain, the court set the agreement aside on the doctrine of undue influence.[291] In *Portman v Dusangh*, there was no evidence of undue influence and the requirement of unconscionability was also missing.[292] Indeed, the doctrine of unconscionability hardly forms a doctrinal limitation to contract formation. The heavy requirements of unconscionability make the court very unlikely to accept a claim based on unconscionability. Furthermore, as a result of the development of the doctrine of undue influence with respect to establishment of wrongdoing in undue influence, judges tend to base judgment on the better established doctrine of undue influence rather than unconscionability.

2.3.5 Reasonableness

[288] [2000] 2 All ER (Comm) 221
[289] (1983) 151 CLR 447, 461
[290] Poole (n 60) 574-9
[291] [1997] 1 All ER 144
[292] [2000] 2 All ER (Comm) 221

The idea of reasonableness was first introduced to the English common law as a supplementary principle. It was employed to fill the gap where the express terms of the contract fail to indicate parties' intention: for example, when the terms of the contract are vague or ambiguous, when the implication of terms is contested, or the contract is salient in some matters. Today reasonableness exceeded its initially status as a supplementary principle to becoming employed as a limiting principle.[293]

2.3.5.1 Reasonableness in modern law

The principle of reasonableness is widely employed in the contemporary law of contract. It is imposed by legislation on several occasions and has a great effect on the rules and doctrinal formation of the modern law. A test of reasonableness is imposed by legislation through the UCTA 1977.[294] It is set out under section 11 (1) of UCTA 1977, that the test investigates in relation to exemption clauses if a certain clause is 'fair and reasonable to be included, having regard to the circumstances which were, or ought reasonably to have been, known to or in contemplation of the parties when the contract was made'. Moreover, in relation to the exercise of remedies, the innocent party's rights are qualified by considerations of reasonableness, for example reasonable steps in mitigation are required and, under section 4 of the Sale and Supply of Goods Act 1994, a commercial buyer's right to withdraw for breach of statutory implied terms is lost if 'the breach is so slight that it would be unreasonable […] to reject'.

Reasonableness is also made a relevant qualification to rule formation, for example, some terms need to be incorporated by a reasonableness notice.[295] Even in doctrine formation, reasonableness is a relevant qualification for a number of legal doctrines. It is introduced to the doctrine of restraint of trade as an avenue to soften its effect.[296] Under the doctrine of promissory estoppels, binding adjustments to contracts are required to be reasonable.[297] To plead the doctrine of economic duress, it needs to be shown that no reasonable alternative

[293] Brownsword, *Contract Law* (n 3) 93-110
[294] Coote 'Unfair Contract Terms Act 1977'(n 250)
[295] See Stone and Devenney (n 98) 7.4.2; Peel (n 135) 238
[296] See *Nordenfelt v Maxim Nordenfelt* [1894] AC 535; John Heydon, *The Restraint of Trade Doctrine* (LexisNexis Butterworths 2008); Neville Rochow 'Towards a Modern Reasoned Approach to the Doctrine of Restraint of Trade' (2014) 5 The Western Australian Jurist 25
[297] See *Central London Property Trust Ltd v High Trees House Ltd* [1947] KB 130; Stanley Henderson 'Promissory Estoppel and Traditional Contract Doctrine' (1969) 78 The Yale Law Journa 343; Jay Feinman 'Promissory Estoppel and Judicial Method' (1984) 97 Harvard Law Review 678

other than to accede to the demand made, and steps of avoidance must be taken within reasonable time.[298] Recourse to reasonable men abounds in disputes involving implied terms and frustration.[299] However, the law of contract does not impose a general duty on contractors to act in a reasonable manner.[300]

It seems that reasonableness notions have become the core of the modern law of contract. The law of contract has evolved from being intention-based, where the law endeavours to force contracts that have been freely made, to one that enforces only bargains that have been willed by reasonable contractors and those having reasonable characteristics.[301] The contract law has passed through many stages in acknowledging reasonableness. Yet, the role of reasonableness in modern law remains limited simply because it is not imposed as a general principle, meaning that parties are not expected to act reasonably towards each other and prices need not be reasonable.[302] In other words, the notion of reasonableness is by no means employed as a general limitation to the freedom of contract.

2.3.5.2 Whose standards of reasonableness?

The extensive employment of reasonableness in the modern law of contract raises a question about the sources of the standard of reasonableness. In other words, whether the notion in modern law reflects faith in the parties' expectations or the courts' standards of reasonableness. The answer to this question is that it probably differs according to the situation. In some situations, the incorporation of reasonableness is merely a reflection of the intention of the parties'. For example, the incorporation of terms by reasonable notice is a rule that is clearly articulated to make sure that the contractual rules reflect the parties' understating. Another example of reasonableness reflecting parties' expectations is found in section 3(2) (b) (i) of the UCTA 1977. It states regarding voidable terms that when a party claims to be entitled 'to render a contractual performance substantially different from that

[298] See *North Ocean Shipping Co Ltd v Hyundai Construction Co Ltd, The Atlantic Baron* [1979] QB 705; Andrews Tewart 'Economic Duress: Legal Regulation of Commercial Pressure' (1983) 14 Melbourne University Law Review 410
[299] See Wishart (n 2) 284-9
[300] Elisabeth Peden 'When Common Law Trumps Equity: The Rise of Good Faith and Reasonableness and the Demise of Unconscionability'(2005) 21 Journal of Contract Law 226
[301] Brownsword, *Contract Law* (n 3) 93-110
[302] Peden (n 300)

which was reasonably expected of him.' This approach is a merely an enforcement the contract as understood by the party.

Conversely, the role played by reasonableness in some situations is no doubt a reflection of the court's own standards of reasonableness, for example, when the court declares that a certain covenant in restraint of trade is reasonable or unreasonable. Moreover, Treitel points out in relation to the reasonableness test of the UCTA 1977, that reasonableness is not merely an exercise of judicial discretion. The process involves the application of statutory and judge-made guidelines.[303] He cites Lord Bridge's statement in the *George Mitchell* case which indicates that in such decision there 'will sometimes be room for legitimate difference of judicial opinion'.[304]

In other situations more than one interpretation is possible. For example in *Ruxley Electronics and Construction Ltd v Forsyth*, the construction company was in breach by building a swimming pool that did not meet the agreed depth specification. Damages were entitled; the House of Lords awarded Mr Forsyth £2500 for ostensibly the loss of amenity rather than the cost of cure, which was worth approximately £21560. The House of Lords emphasised the role of reasonableness in deciding the appropriate measure of damages. It was held that the cost of cure was wholly unreasonable because the shortfall in the depth of the pool did not decrease its value. The award of difference in value was not reasonable in this particular case as it will be under-compensated.[305]

More than one interpretation could be given to the court approach of reasonableness in *Ruxley.* One could be that when approaching reasonableness the court was merely reflecting the parties' expectations of damages at the time of contracting. By contrast, another would be that the court is imposing its own standards of reasonableness, and that the court applied its own concern with maintaining a degree of balance between breach and remedy.[306] Obviously, even if could be said in some situations that the reasonableness is merely a reflection of parties' standards of reasonableness, such an argument is hard to claim in other situations. In

[303] Peel (n 135) 282
[304] [1983] 2 AC 803, 810
[305] [1995] 3 All ER 268; See Brian Coote 'Contract Damages, Ruxley, and the Performance Interest' (1997) 56 The Cambridge Law Journal 537
[306] Brownsword, *Contract Law* (n 3) 93-110

most cases, in exercising reasonableness the court is likely to impose its own standards of reasonableness, which necessarily raises the question of legitimacy of such practice.

Additionally, there are certain situations where the law is imposing its own canons of reasonableness on the parties. For example, when legislation sets down certain terms as being void, irrespective of the expressed terms of the contract, a buyer is not allowed to reject goods where the breach is trivial. Here in the last case one would question the legitimacy of the imposition of standards of reasonableness other than those of the parties. The legitimacy of such an imposition could be justified if it were to protect third party interests or when it somehow supports the autonomy of the parties. Moreover, the legislative imposition of reasonableness is justified as reflecting 'a collective community judgment that certain transactional practices should not be supported because they are thought to be unreasonable.' The real legitimacy challenge is related to the imposition of reasonableness by the court; why should one regard judges' understanding of reasonableness to be superior to the understanding of the contracting parties?[307]

2.3.6 Good Faith

Good faith is relatively a new concept in the English law of contract. Until recently it was not addressed by legislation and English textbooks of contract did not cover good faith as a subject.[308] The violation of good faith was also not an issue pleaded in court. Judicial opinions, however, did make occasional references to 'bad faith.'[309] The only exception to this was in relation to insurance contracts, which was governed by the *uberrima fides* (utmost good faith) principle.[310] In the well known case of *Intterfoto Picture Library Ltd v Stiletto Visual Programmes Ltd*, Sir Thomas Bingham made his famous statement on the principle:

'In many civil law systems, and perhaps in most legal systems outside the common law world, the law of obligations recognises and enforces an overriding principle that in making and carrying out contracts parties should act in good faith. This does not simply mean that they should not deceive each other [...] its effect is perhaps most aptly conveyed by such

[307] Brownsword, *Contract Law* (n 3) 93-110
[308] The one exception is Raphael Powell's inaugural lecture in 1956 see: Raphael Powell 'Good Faith in Contracts' (1956) 9 Current Legal Problems 16
[309] Brownsword, *Contract Law* (n 3) 111-135
[310] Ibid

metaphorical colloquialism as 'playing fair,' 'coming clean' or 'putting one's cards face upwards on the table.' It is in essence a principle of fair and open dealing [...] English law has, characteristically, committed itself to no such overriding principle but has developed piecemeal solutions in response to demonstrated of unfairness'.[311]

The English common law attitude towards the principle of good faith has dramatically changed since 1989. This is mainly due to the effect of European Directives.[312] Under regulations 3(1) and 4(2) of the Commercial Agents (Council Directive) Regulations 1993[313], the principal and agent are under a duty to 'act dutifully and in good faith'. Section 62(4) of the Consumer Rights Act 2015 (CRA 2015) provides that 'A term is unfair if, contrary to the requirement of good faith, it causes a significant imbalance in the parties' rights and obligations under the contract to the detriment of the consumer.' A large body of literature has been devoted to discussion of the subject of good faith in contract.[314]

2.3.6.1 The adaptation of a general doctrine of good faith

In recent years, good faith has frequently been invoked and wide range of literature has discussed the principle of good faith. Yet, despite the fact that jurisprudence of good faith is now quite well developed,[315] English lawyers remain 'suspicious' of the idea that parties should act in good faith.[316] Thus, it is a mistake to think that there is general agreement on the adaptation of a general principle of good faith. The arguments of the supporters and opponents of adopting a general doctrine of good faith are outlined below.

2.3.6.1.1 Arguments for adopting a good faith requirement

[311] [1989] QB 433, 439
[312] Stone and Devenney (n 98) 1.11
[313] An implementation of the Commercial Agents Directive 86 /653/ EEC
[314] For the emergence of good faith in English law of contract see generally: J.F.O'Connor, *Good Faith in English Law* (Dartmouth 1990); Jack Beatson and Daniel Friedmann, *Good Faith and Fault in Contract Law* (Clarendon 1997); John Adams and Roger Brownsword, *Key Issues in Contract* (Butterworths 1995); Christopher Staughton 'Good Faith and Fairness in Commercial Contract Law' (1994) 7 Journal of Contract Law 193; Reziya Harrison, *Good Faith in Sale* (Sweet & Maxwell 1997); Roger Brownsword, Norma Hird and Geraint and Howells, *Good Faith in Contract: Concept and Context* (Ashgate 1999)
[315] See Robert Summers 'Good Faith in General Contract Law and the Sales Provisions of the Uniform Commercial Code' (1968) 54 Virginia Law Review 195
[316] Adams and Brownsword, *Understanding Contract Law* (n 128) 113

The first attempt to argue for the introduction of good faith in the law of contract was made by Powell.[317] According to him, bad faith is already regulated by the law of contract, thus, nothing in principle prevents the creation of such a principle. Telling a lie, using illegitimate pressure, exploiting the weakness of others and abusing the position of confidence are all examples of bad faith.[318]Adopting a requirement of good faith would bring clarity in dispute settlement. Judges would be saved the effort of finding indirect ways to give effect to their own sense of justice in the case. It makes more sense to address an issue directly and openly rather than indirectly and covertly. Besides, trying to achieve fairness in the absence of a general doctrine makes for incoherent outcomes, leaving judges unable in some situations to achieve justice.[319]

On the contrary, adopting a general doctrine of good faith achieves a coherent regime that enables judges to deal effectively with unfair manners.[320] Furthermore, there is an argument that the adaptation of good faith requirements moves the law towards the protection of reasonable expectations. Lord Steyn illustrates that the protection of reasonable expectation is a principal task for the modern law of contract.[321] Finally, it is arguable that the benefits of the good faith doctrine exceed dispute settlement. It contributes to a culture of trust and cooperation, which enhances the autonomy of contractors. Consequently, contractors are given great flexibility in doing business. On a larger scale, trust and cooperation are basic features of successful economics.[322]

2.3.6.1.2 Argument against adopting a good faith requirement

The first objection is particularly related to contract negotiation. Arguably, a principle of good faith is inconsistent with the position of negotiating in the common law of contract. As long as no deception or mispresintation is committed, a party is entitled to pursue his own interests. Thus, the requirements of good faith, that contractors are obligated to consider the

[317] Powell (n 315)
[318] The reconstruction of the doctrine of economic duress has improved the court regulation of economic pressure in recent years. See Ewan McKendrick 'Good faith: A Matter of Principle?' in Angelo D.M.Forte (eds), *Good Faith in Contract and Property Law* (Hart Publishing 1999) 41-2
[319] Powell (n 315)
[320] Ibid
[321] Lord Steyn 'Contract Law: Fulfilling the Reasonable Expectations of Honest Men' (1997)113 Law Quarterly Review 433
[322] See Alessandro Arrighetti, Bachmann Reinhard and Simon Deakin 'Contract law, Social Norms and Inter-Firm Cooperation' (1997) 21 Cambridge Journal of Economics 171

legitimate interests and expectations of one another, does not cohere with the 'individually based' ethics of the English law of contract.[323] This point of objection was pointed out in the *Walford v Miles* case. Where the House of Lords held that there could be no binding obligation to negotiate in good faith. Such a position was felt to be 'repugnant to the adversarial position of the parties when involved in negotiations'.[324]

A second point of objection is that a general duty of good faith would impose vagueness and uncertainty on the contractual relation. Contractors and law makers are likely to have a different understanding of good faith. Moreover, honesty and fairness are of those values that vary from one individual to another. The likelihood of disagreement over the way the contractors need to act is accordingly increased.[325] Indeed, what constitutes good faith is a matter of sophisticated and lively discussion. This reflects the fact that the meaning of good faith changes over time and according to context.[326] Different attempts have been made to formulate workable good faith standards, most famously the 'excluder analysis' by Robert Summers[327] and the 'forgone opportunities' approach by Steven Burton.[328] However, these attempts are usually made with different goals in mind.[329]

The former point leads to another point issue in relation to the legitimacy of the court in the imposition of its own conceptions of decency and fairness, namely that judges lack knowledge about market and factors that influence contractors.[330] Another closely related issue is that implementing a doctrine of good faith would require inquiry into the contractors' state of mind. This clearly raises the question of the difficulty of identifying motives behind contractors' actions.[331] Motives are generally difficult to prove and tend to be mixed (there could be more than one reason for one action). But a good faith requirement would

[323] Brownsword, *Contract Law* (n 3) 111-135
[324] [1992] 1 All ER 453,460-461
[325] Clayton Gillette 'Limitations on the Obligation of Good Faith' (1981) 1981 Duke Law Journal 619
[326] Emily Houht 'Critical Introversion: Towards an Expensive Equity Approach to the Doctrine of Good Faith in Contract Law' (2003) 88 Cornell Law Review 1025
[327] Summers (n 312)
[328] Steven Burton 'Breach of Contract and the Common Law Duty to Perform in Good Faith' (1980) 94 Harvard Law Review 369
[329] Houht (n 323)
[330] Mark Snyderman 'What's So Good about Good Faith? The Good Faith Performance Obligation in Commercial Lending' (1988) 55 The University of Chicago Law Review 1335
[331] Steven Burton 'Breach of Contract and the Common Law Duty to Act in Good faith '(1980) 54 Harvard Law Review 369

nonetheless involve regulating substantial matters within the process of contracting. This contradicts the classical idea that contracts ought to be self-regulated.[332]

A final objection is that a general doctrine of good faith does not acknowledge that different contexts need different treatment. Whereas it would seem appropriate to impose a duty of good faith in some situations, such as consumer relations, it does not seem appropriate in other situations. For instance, dealing in commodities markets is highly competitive; accordingly one would consider opportunistic behaviour perfectly accepted. These variations indicate that it is not a good idea to generalise a standard of fair dealing and good faith.[333]

Overall, it seems that concerns regarding individualism and vagueness are the major arguments against the development of good faith requirements. However, the issue of vagueness can be overestimated. The issue of vagueness as Gillette describes it is 'marginal' because it is temporally limited; it only exists because there has not been a sufficient body of case-law to verify the requirement of good faith. Yet, over time, when the familiarity with the notion of good faith grows, courts will be able to create a standard definition of it.[334] In this way the issue will dissolve on case-by-case basis when the English courts become more familiar with the good faith concept. The issue of vagueness is also likely to diminish in the light of the application of the requirement of good faith by statuary regimes especially in a consumer context. Indeed, there is a growing body of jurisprudence associated with the application of the good faith requirement in just this setting.[335] In support of this view, in *Yam Seng Pte Limited v International Trade Corporation Limited*, Leggatt J expressed his opinion that the recognition of a duty of good faith 'involves no more uncertainty than is inherent in the process of contractual interpretation'.[336] Furthermore, the court has recently shown willingness to enforce requirements of good faith by giving effect to an express term without mentioning any legal difficulty or vagueness issues.[337]

[332] S.M.Waddams 'Good faith, Unconscionability and Reasonable Expectations' (1995) 9 Journal Of Contract Law 55
[333] Michael Bridge 'Good Faith in Commercial Contracts' in Roger Brownsword, Norma Hird and Geraint and Howells (eds), *Good Faith in Contract Concept and Context* (Ashgate 1999)139-47
[334] Gillette (n 322)
[335] See section 5.6.1.2 on the requirement of the good faith in the fairness test of the CRA 2015
[336] [2013] EWHC 111 (QB), 152
[337] See *Emirates Trading Agency LLC v Prime Mineral Exports Private Ltd* [2014] EWHC 2104 (Comm); *Bristol Groundschool Ltd v Intelligent Data Capture Ltd* [2013] EWCA Civ 200

Thus, it seems that the argument of vagueness against the notion of good faith is misplaced. Over time imposing a good faith requirement would bring clarity since it will help courts to deal with substantive fairness directly, thereby enhancing judicial expectations. This was the intimated when the House of Lords was first faced with one of the provisions that introduced the concept of good faith it was taken to mean requiring fair and open dealing between parties:[338]

'Openness requires that the terms should be expressed fully, clearly and legibly, containing no concealed pitfalls or traps…Fair dealing requires that a supplier should not, whether deliberately or unconsciously, take advantageous of consumer's necessity, indigence, lack of experience, unfamiliarity with the subject matter of the contract, week bargaining position…'

However, the real obstacle facing the development of good faith requirements comes from individualistic concerns. Indeed, the critical question is whether the English court is willing to accommodate such a development even though it runs counter to the individualistic thinking of contract. The next section is concerned with the position of the English court towards the adoption of a general doctrine of good faith.

2.3.6.2 The position of the English courts of good faith

The English law of contract does not impose a general duty to act in good faith. Nevertheless, courts do occasionally uphold the good faith requirement.[339] A major decision in this context is *Walford v Miles*, in which the House of Lords appeared to exclude the duty of good faith. The House of Lords stated that there could be no binding obligation to negotiate in good faith in the law of contract. Such a position was felt to be 'repugnant to the adversarial position of the parties when involved in negotiations'.[340] The same position was taken by the Court of Appeal even where the contract in hand was of co-operative nature. In the case of *Baird Textile Holding Limited v Marks and Spencer plc*, Baird relied on the co-operative nature of

[338] *Director General of Fair Trading v First National Bank plc* [2002] UKHL52; [2002] 1 All ER 97
[339] See *Timeload ltd v British Telecommunications* plc [1995] EMLR 459; *Yam Seng Pte Limited v International Trade Corporation Limited* [2013] EWHC 111 (QB); *Emirates Trading Agency LLC v Prime Mineral Exports Private Ltd* [2014] EWHC 2104 (Comm); *Bristol Groundschool Ltd v Intelligent Data Capture Ltd* [2013] EWCA Civ 200
[340] [1992] 1 All ER453,460-1

his relationship with Marks & Spencer, but the Court of Appeal remained consistent with classical individualistic thinking and rejected his view.[341]

However, the position of the English court seems to have changed somewhat since then. Recent development of case law indicates more willingness to recognise a duty of good faith. Perhaps the most significant development in this area was the court decision in *Yam Seng Pte Limited v International Trade Corporation Limited*. *Pte Limited v International Trade Corporation Limited*. Here Leggatt J doubted 'that English law has reached the stage, however, where it is ready to recognise a requirement of good faith as a duty implied by law, even as a default rule, into all commercial contracts.' Nevertheless, he expressed the position that traditional reasons for the rejection of the doctrine of good faith under the English law of contract are 'misplaced'. He suggested that there are types of commercial contract that imply a good faith requirement, including 'relational agreements'. According to him, a duty of good faith can be enforced into a relational contract as a matter of implication. In this regard he stated that 'there seems to me to be no difficulty, following the established methodology of English law for the implication of terms in fact, in implying such a duty in any ordinary commercial contract based on the presumed intention of the parties.'[342]

The decision of Leggatt J in *Yam Seng* seems thus far to have been well received. In *Emirates Trading Agency LLC v Prime Mineral Exports Private Ltd* Teare J described Judge Leggatt's judgment as 'masterly', and approved the reasoning about the circumstances in which a term of good faith could be implied.[343] Similarly in *Bristol Groundschool Ltd v Intelligent Data Capture Ltd*, the finding of *Yam Seng* was affirmed. It was held that a duty of good faith shall be implied in a relational contract for the production and distribution of training materials for pilots. Nevertheless, Jackson J has asserted that this does not mean that the law of contract imposes a general duty of good faith. He has held the following:

'I start by reminding myself that there is no general doctrine of "good faith" in English contract law, although a duty of good faith is implied by law as an incident of certain

[341] [2001] EWCA Civ 274
[342] [2013] EWHC 111 (QB), 131-53
[343] [2014] EWHC 2104 (Comm), 59-63

categories of contract… If the parties wish to impose such a duty they must do so expressly.'[344]

In this light it is possible to say that a standard of good faith exists in English contract law. The latest court decisions suggest signs of a genuine paradigm shift. In the light of *Yam Seng* Paterson explains that the English common law is now prepared to imply a duty of good faith. He indicates that the recognition of a good faith requirement is not causing any issues of uncertainty or disruption to the law of contract. She, however, explains that it is not yet certain whether the court is willing to take the idea of good any further by enacting a general duty of good faith.[345] Zhou expresses similar concerns, explaining that although the English law has made a steady improvement towards the adoption of a general duty of good faith, it is still uncertain whether the English court will recognise such duty anytime soon.[346]

Furthermore, the English law of contract might be pressurised to adopt a general principle of good faith.[347] This pressure may come from the worlds of common law and civilian law where good faith dealing is the basis of any system of regime of contract law.[348] Also, the development of regional markets along with the growing importance of international contracts, make it difficult to maintain an incommodious doctrinal attitude. In fact, the greatest degree of pressure is likely to come from European law. As mentioned above, the good faith concept was in fact introduced to the English law by European Directives.[349]

However, all of this does not change the fact that there remains considerable scepticism about adopting a general doctrine of good faith. Market-individualists will continue resisting a general doctrine of good faith 'so long as good faith is perceived to be a blank cheque for judicial discretion'.[350] Brownsword suggests that good faith needs to be adopted as a 'requirement' in the sense that courts need to act simply 'on standards of fair dealing that already recognised in particular contracting context' rather than adopting a good faith

[344] [2013] EWCA Civ 200, 105
[345] Jeannie Paterson 'Good Faith Duties in Contract Performance' (2015) 14 Oxford University Commonwealth Law Journal 283
[346] Qi Zhou 'The Yam Seng Case: A New Development of Good Faith in English Contract Law' (2014) 17 International Trade and Business Law Review 358
[347] Adams and Brownsword, *Understanding Contract Law* (n 128) 115-18
[348] See Roger Brownsword, Norma Hird and Geraint and Howells, *Good Faith in Contract Concept and Context* (Ashgate 1999) 1
[349] Adams and Brownsword, *Understanding Contract Law* (n 128) 115-8
[350] Ibid

'regime' by attempting to prescribe 'the co-operative ground rules'.[351] Ultimately, this will make even market-individualists more willing to accept such a doctrine.

2.3.7 The effect of adverse ideologies on the development of contractual justice notions of the English law

It should have become clear by now that the English law of contract is no longer bound by a single ideology. Conflicting ideological movements have controlled the law of contract since the late nineteenth century. The European influence and other causes including the development of social values have resulted in different ideological bases of the law of contract. As mentioned earlier, two trends continue to dominate the contemporary period in England.[352] One trend is towards a revival of the freedom of contract as known in the nineteenth century. The second trend is a continuation of the late nineteenth-century departure from the freedom of contract.[353] These opposing trends have resulted in complex developments in the law of contract.[354]

Recognising this fight within the law of contract brings about a much clearer understanding of the current situation. The four ideologies controlling the English law of contract have been identified by Adams and Brownsword as:[355] These are: formalism, realism, market individualism and consumer welfarism.

2.3.7.1 Formalism

The first ideology of contract is formalism. Formalists regard the law as a closed logical system. Judicial power must be exercised within the existing concepts of contract. Conceptual purity and the integrity of the law must be maintained, which manifests in doctrinal conservatism and limited innovation. Formalist judges always base their judgments on the best established rules. Moreover, they tend to comply with rules and doctrines mechanically and 'without critical reflection to their doctrinal purpose or social context in which they are to be applied' For example, the principles of the freedom of contract and sanctity of contract

[351] Brownsword, *Contract Law* (n 3) 130-4
[352] See section 2.1.1.5.3
[353] Atiyah and Smith (n 35) 9-20
[354] Brownsword, *Contract Law* (n 3) 69
[355] Adams and Brownsword, *Understanding Contract Law* (n 128) 115-8; Adams and Brownsword 'The Ideologies of Contract' (n 48)

tend to be cited blindly by formalists. In other word, formalists avoid responsibility for major law reform and prefer to leave it to Parliament.[356]

2.3.7.2 Realism

In opposition to formalism there is realism, and against each formalist tendency there seems to be a realist tendency that pushes in the opposite direction. To realists legal rules are not always definite. Decisions are the most important fact, and legal rules are a secondary consideration. As Lord Devilin states 'the true nature of common law is to override theoretical distinctions when they stand in the way of doing practical justice'[357] The ideology of realism acknowledges that justice sometimes requires changing the rules. A judge should never be deprived of his role in creating ground for new legal doctrines. Realist judges show a tendency towards innovation and the creation of new doctrines and principles of law. From a realist perspective, for judges to succeed in their role of keeping the code, they must act as custodians of practical justice and convenience. Rules are created for the purpose of either defending a principle or supporting a policy. Thus, rules that no longer serve their intended purpose should no longer be followed. The movement towards consumer protection is the most obvious instance of a realist acknowledgment that the law must change to accommodate social developments.[358]

2.3.7.3 Market individualism

Market individualism supports individualistic standards. It promotes self-interested competitive trading rather than charity or gifts. Thus, only minimum restrictions must be placed on trade. The purpose of this ideology is to create a marketplace where contracting parties can deal securely and confidentially. As a result, the facilitation of market operation is the primary concern of the law of contract. It is the law that should accommodate commercial practice not the other way around. Therefore, predictability and calculability are major concerns for the law of contract.[359] The doctrines of 'freedom of contract' and 'sanctity of contract' lie at the heart of the individualistic ideology. Individuals are free to make

[356] Ibid
[357] *Ingram v Little* [1961] 1 QB 31,66
[358] Adams and Brownsword, *Understanding Contract Law* (n 128) 115-8
[359] Ibid ; Adams and Brownsword 'The Ideologies of Contract' (n 48)

whatever agreement they wish and by the same means once the agreement is made they are bound by their agreement.[360]

2.3.7.4 Consumer-welfarism

The ideology of consumer welfarism arose in the late nineteenth century. It supports the view that legal rules must reflect social and cultural currents. Great welfare responsibilities are assumed for the government, which inevitably shows through in contract law. The principles of fairness and reasonableness in contract are encouraged in both commercial and consumer contracting. The notions of paternalism, reasonableness, good faith and unconscionability are promoted. Under the consumer-welfarism ideology the consumer's interests are taken seriously. While consumer contracts should be closely regulated, commercial contracts are still regarded as competitive transactions but are subject to more regulations than a market-individualist would allow.[361]

The fight between these ideologies is an essential reason for the inconsistency that can be observed at times in the creation of common law by the courts. For the same reason, the issue of substantive fairness of contractual relations is not, yet, a finished business. Whenever realism or consumer-welfarism movements towards the enhancement of substantive fairness are created the supporters of formalism and market-individualism will oppose them. This clearly is the situation of the modern law of English contract since the twentieth century.

2.4 Concluding remarks

Traditionally the English law of contract was strictly regulated by liberal ideas of non-intervention and freedom of contract. The classical conception of contract assumes that a contract that has been concluded freely is necessarily fair. However, in modern times, there a tendency towards the promotion of cooperation and fairness by the law of contract has been observed. Such a tendency is evident in the development of traditional doctrines of equity (duress and undue influence) as well as the introduction of novel notions of fairness and justice (inequality of bargaining power, unconscionability, reasonableness and good faith).

[360] See section 2.1.1

[361] Adams and Brownsword, *Understanding Contract Law* (n 128) 115-8; Adams and Brownsword 'The Ideologies of Contract' (n 48)

The discussion of this chapter indicates that the English court has paid attention to enhancing and regulating procedural justice rather than substantive justice.

On the one hand, English courts have gone long way in developing common law duress and undue influence to create more limitations on contractual autonomy. There is an obvious tendency of the English courts to emphasise the 'wrongdoing' of the stronger party in duress and undue influence cases by requiring an act of exploitation and advantage taking. However, the courts' approach, according to Stone and Devenney, is inconsistent, as there are cases of undue influence which indicate that wrongdoing is not an essential element. More fundamentally, the starting point for the law in cases of undue influence and duress is 'not the substance, but rather the process by which it came about.'[362] As a result, in cases of undue influence English courts will intervene only where there is some relationship between the parties, either contracting or in relation to a particular transaction, which leads to inequality between them. By the same means, to start a case of duress there needs to be an element of compulsion.[363]

On the other hand, the novel notions that have been added to the law have not fulfilled hopes of a general limitation to the freedom of contract. The law has not gone very far in regulating the fairness of contractual relations. The novel notions of substantive fairness are best described as supplementary notions, which soften the rigidity of law rather than limit doctrines. This indicates that the sanctity freedom of contract is softened but still dominant. The liberal notions of contract seem to be still dominant, and the notion of freedom of contract particularly stands as a serious obstacle to the development of any general doctrine of substantive fairness.

It seems that whenever a general doctrine of fairness starts to be formulated, individualistic ideas are brought into service to hamper the process of formulation. As Adams and Brownsword put it, 'even in a co-operative context […] we find individualistic doctrinal thinking continuing to assert itself.'[364] This is because the idea that fairness should be a condition of the validity of contract represents a challenge to the notion of freedom of

[362] Stone and Devenney (n 98) 11.2
[363] See the decision of *Portman Building Society v Dusangh* [2000] 2 All ER (Comm) 221 citing the statement of Mason J in the High Court of Australia in *Commercial Bank of Australia v Amadio* (1983) 151 CLR 447, mentioned under section 2.3.4.3
[364] Adams and Brownsword, *Understanding Contract Law* (n 128) 115-8

contract. Howells and Weatherill observe that 'it would be misleading to assume that the connected themes of individualism, freedom of contract and judicial non-intervention in the parties' bargain have lost their relevance to twentieth-century commerce. The rationales which underpinned the nineteenth-century perspective largely hold true today in the commercial sphere.[365]

Indeed, English judges still to great extent insist that contracts are governed by freedom of contract.[366] This appears clear from the statement made by Lord Diplock in 1980 in the House of Lords: 'A basic principle of the law of contract […] is that parties are free to determine for themselves what primary obligations they will accept.'[367] The fear of clashing with the individualistic theory of contract is probably what has made the English courts avoid adopting a general doctrine of substantive fairness.[368] In this light one might conclude that the inconsistency in the English law of contract is not going to disappear until the adversarial ethics of English contract law is abandoned.

The rejection of a general doctrine of substantive fairness by the English courts could be taken as rejection of the idea that fairness is relevant to contract validity.[369] While this is the general rule, one needs to keep in mind that the fragmentation of the law makes itself a theme of the modern law of contract, meaning that a complete picture cannot be gained by looking at the general rules of contract. Fragmentation of the law of contract has resulted in distinguishing some contractual relations that have been given special consideration. The most significant departure from the general rules of contract is the consumer/supplier relationship. It represents the largest scale of contracts in the modern period. Thus, giving the issue of contractual fairness a proper acknowledgment is not complete without including the situation of consumer contracting, as will be addressed in chapter four. However, for the comparative purpose of this research, the next chapter will turn to the issue of contractual justice under the general principle of the Shariah law of contract.

[365] Howells and Weatherill (n 5) 18
[366] Beatson, *Ansons's Law of Contract* (n 54) 7
[367] *Photo Production Ltd v Securicor Transport Ltd* [1980] AC 827, 848
[368] Spencer Nathan Thal 'The Inequality of Bargaining Power Doctrine: The Problem of Defining Contractual Unfairness' (1988) 8 Oxford Journal of Legal Studies17
[369] The consequences of contractual justice as a limitation to contract conclusion is dealt with under section 7.1.2.2.1 below

Chapter Three: Contractual justice under the Shariah law of contract

3. Introduction

This chapter investigates the extent to which contractual justice is promoted by the general theory of Shariah contract law. Given the distinct nature of the Shariah law of contract, the first part of this chapter is devoted to an overview of the law. It explores the evolution of the law in the seventh and eighth centuries, and the sources and nature of the law, and it further illustrates the general theory of contract. The ongoing debate over the existence of a general theory that binds the Shariah law of contract is addressed. Major limitations to contractual autonomy are presented by invoking the doctrine of *shurut* (ancillary condition). The second part of the chapter deals with the doctrines of contractual fairness in Shariah law. It explores the meaning, effect and scope of the doctrines of duress, *riba*, *gharar*, unfair exploitation and just price. By doing so, the meaning and concepts of contractual justice under Shariah law are determined. Furthermore, the extent to which contractors are legally bound to act fairly and justly towards each others is examined.

3.1The evolution of the law

Shariah law of contract, as part of the code of behaviour known as Shariah, took its shape as early as the seventh century. The starting point of Shariah law and its doctrinal basis is linked to the Quranic revelation.[370] According to classical Shariah theory, law is a divinely orientated system which reflects the revealed will of God. Thus, being a God-given system rather than man-made one, it does not follow the idea that the law itself can evolve as a historical phenomenon closely tied with the progress of society.[371] Yet, a close look at the development of the Shariah law reveals that although the task of jurisprudence is one of discovery (to discover the precise terms of the Shariah or to reveals the precise will of God) customary practices were always made relevant to the process of discovery. The law has undergone four major stages which will be briefly discussed below.

[370] Noor Mohammed 'Principles of Contract in Islamic law' (1988) 6 Journal of Law and Religion 117
[371] Noel Coulson, *A History of Islamic Law* (4th edn, Edinburgh University Press 2011) 1-9

3.1.1 The primary stage

The first stage covers the lifetime of the Prophet and the early Caliphas. During this stage the Islamic community was small in size. The traditions of the Prophet and the decisions of the Caliphas were available to resolve all legal problems that occurred at this point in time. The mission of the Prophet was to set the general principle of the law. Regulating trade practices was a prime concern and this was done by redressing the unconscionable and abusive commercial practices of pre-Islamic Arabia.[372] In doing so all transactions were required to comply with the evolving principles of Shariah, and particularly with the two cardinal Shariah doctrines of *riba* and *gharar.*[373]

3.1.2 The classical period

The second stage is what could be called the classical period of Shariah law. It starts from the eighth century and extends to the twelfth century. Changes in this period affected all aspects of life and originated with the political shift generated by the creation of the first political dynasty of Islam (the Umayyad). The significance of this period centres on the beginning of what is called Islamic jurisprudence. This consisted of the activities of pious scholars grouped together in the loose studious fraternities known as early schools of law. The effort of the jurists at this stage resulted in the construction of a large fragmentary scheme of contractual rights and obligations which characterise this as the most significant stage in the development of Shariah law.[374]

3.1.3 The modern period

Modern times have witnessed a general decline in the Shariah law but especially in relation to the role of human reasoning in the development of the law.[375] Modern scholars generally

[372] Mohammed (n 370)
[373] See generally Wael Hallaq, *The Origins and Evolution of Islamic* Law (CUP 2005); The meaning and scope of the two doctrines is explained in depth under section below 3.6.2.1
[374] Noel Coulson, *Commercial Law in the Gulf States: The Islamic legal Traditions* (Graham & Trotman Limited 1984) 9- 17
[375] Hallaq claims that the gate of *ijtihad* was in fact never closed, either in theory or in practice see Wael Hallaq 'Was the Gate of Ijtihad Closed?'(1984) 16 International Journal of Middle East Studies 3

assume that by the 1850s the door of *ijtihad* (human reasoning) was closed. Schacht describes the situation thus:

'By the beginning of the fourth century of *hijra* (about A.D. 900), however, the point had been reached when scholars of all schools felt that the essential questions had been thoroughly discussed and finally settled, and a consensus gradually established itself to the effect that from that time onwards no one might be deemed to have the necessary qualifications for independent reasoning in law, and that all future activity would have to be confined to the explanation, application, and, at the most, interpretation of the doctrine as it has been laid down once and for all.'[376]

This concurred with the replacement of Shariah law in many Middle-Eastern Muslim countries with Western-style laws.[377] Until the 1850s Shariah law was the only basic law in Muslim countries but since then, the law has seen major reform. Two countries played a major role in spreading western law styles into other countries in the area: Egypt and the Ottoman Empire. Colonisation was a major cause that led to law reformation, and additionally, some countries were under pressure to keep up with the modern world by adopting Western style law.[378]

Shariah law however, was never completely deserted in relation to commercial and contract law, even in those countries that adopted western styles of law.[379] In fact the first attempt to codify Shariah law were made in this period through the introduction of *Majallat Alahkam Aladliyyah* in 1877 by the Ottoman Empire. Although the *Majallat* was never adopted as formal law it is considered to be a successful attempt and has been heavily referred to by judges. Kourides claims that Shariah law had an influence on the formation and binding force of contract in many countries in the Middle East. He indicates that Shariah legal principles are implemented in the civil codes of countries such as in Egypt, Iraq, Libya and Jordan.[380]

[376] Joseph Schacht, *An Introduction to Islamic Law* (Clarendon Press 1964) 70-1
[377] See generally Joseph Schacht and Clifford Bosworth, *The Legacy of Islam* (OUP 1974)
[378] Norman Anderson 'Islamic Law Today the Background to Islamic Fundamentalism' (1987) 2 Arab Law Quarterly 339
[379] Ibid
[380] Nicholas Kourides 'The Influence of Islamic Law on Contemporary Middle Eastern Legal Systems: The Formation and Binding Force of Contracts' (1970) 9 Columbia Journal of Transnational Law 384

In the twentieth century Shariah law was put under pressure to keep up with modern laws. Whereas common law was reshaped in the wake of the industrial revolution of the eighteenth century, the Muslim world generally did not experience the challenge of industrial revolution. However, the oil-based prosperity of some Islamic countries has put the law under pressure.[381] Restatement of the law to fit the contemporary needs of the market has become a necessity. The decline in Shariah law in the nineteenth century has left the law with a gap, in that it has essentially remained the same as when it was developed in medieval times. Although the jurists of the classical period produced a wealth of material that covers every aspect of the law of contract, their work represented their times.

To most Muslims Shariah is wider than any Western definition of law; it is a system of duties that covers matters of morality as well as jurisprudence.[382] Arguably, the law of contract has gone through a major development in the field of Islamic banking. The middle of the twentieth century witnessed the evolution of Islamic banking.[383] What makes Islamic banking different from conventional banking is that it is interest free and is based on profit and loss sharing. In Islamic banking profits and losses from the physical investment are shared between the creditor and the borrower according to a formula that reflects their respective levels of participation.[384] Thus, unlike conventional banks that deal with money only, trading is one of the common activities of Islamic banks.[385] This means banking is closely linked to contract law especially because many of the contracts that were discussed by classical jurists are technically employed by Islamic banking as financing modes. Still, such development is limited due to its special nature.

The role of Shariah courts in the modern development of the law is however limited due to a number of factors. The role of Shariah courts (in Saudi Arabia), unlike Common law courts, is limited to the application of rather than creation of the law. Shariah judges, when faced with a legal issue, typically search for the most reliable jurisprudence opinion on which to base the judgment. These judicial opinions are found in a range of sources of Shariah

[381] Mohammed (n 370)
[382] The concept is similar to the Jewish concept of Torah see Anderson (n 378)
[383] See Rodney Wilson, *Banking and Finance in the Arab Middle East* (Springer 1983) 42-69
[384] Abbas Mirakhor and Iqbal Zaidi 'Profit-and-loss Sharing Contracts in Islamic Finance' in Kabir Hassan and Mervyn Lewis (eds), *Handbook of Islamic Banking* (Edward Elgar 2007) 49-63
[385] Mufti Usmani, *An Introduction to Islamic Finance* (Kluwer Law International 2002) 12; Latifa Algaoud and Mervyn Lewis 'Islamic Critique of Conventional Financing' in Kabir Hassan and Mervyn Lewis (eds), *Handbook of Islamic Banking* (Edward Elgar 2007) 38-48

literature rather than one specific source. Most of the Shariah literature was, however, written in the classical period from the eighth to the twelfth century. The law of contract remained to large extent the same as it was developed in the classical period. Due to the significance of the classical period in shaping the Shariah law of contract, it will be the subject of most of the analysis of this research. Reference is made to the modern application of the Shariah law of contract by the Saudi court where applicable. The next section considers the jurisprudence method of discovering the Shariah law. This method of discovery was developed in the classical period of Shariah law and is still relevant today for all Shariah legal studies.[386]

3.2 Shariah jurisprudence method

The eighth century is the start of what we know today as Shariah jurisprudence. The need for such development appeared as a result of the Quran verses being general in nature. The Quran is indeed not a code of law; it provides in relation to contractual obligations guidelines of contractual ethics, such as a general injunction to honour agreements and observe good faith in commercial dealing. Thus, the scholar-jurists grouped together to begin to give their opinions on the standards of conduct which would represent the real fulfilment of Shariah ethics.[387]

In the early stages of the classical period, the method of the jurists was to review the local practices (legal and popular) in light of principles of behaviour enshrined in the divine revelation of the Quran. Jurists reviewed institutions and activities on a case by case basis, and then gave their decision to approve, modify or reject it according to whether it stood up to certain criteria.[388]

Legal jurisprudence has become increasingly more sophisticated and includes divergence in legal doctrine. This divergence arose as a result of the existence of four schools of Shariah law (as far as Sunni Islam is concerned). The four schools of Hanfi, Maliki, Safiai and Hanbali, did not have the same circumstances of origin, and they existed in different geographical areas and in different periods of time. Their formation was linked to the

[386] The term 'discover' is used to reflect the theory that Shariah law is a divinely orientated system; the task of jurisprudence is limited to discovering the law according to a certain method.
[387] Coulson, *Commercial Law in the Gulf States* (n 374) 9- 17
[388] Ibid

personal allegiance of a group of jurists to a founder-member from whom they derived their names.[389]

The Hanfi and the Maliki schools were the first two schools to be established, they both came into existence as the representatives of the legal tradition of particular geographical locality. In this stage, jurists dealt with cases that were not textually regulated by the Quran or a decision of the Prophet by referring to their own personal reasoning. As a result, the divergence between the two oldest schools of Hanfi and Maliki doctrine appeared as a natural reflection of the social traditions and environments of the two different localities.[390]

On the other hand, the establishment of the doctrines of the other two schools were affected by the jurisprudential controversy that arose during the ninth century in the subject of the sources of the law. The Shafi school attempted to formulate a systematic theory of law. According to this theory the law is derived from the Quran, the *Sunna* and reasoning. This was adopted later on by all school as the tri-partite sources of the law. The Hanbali school, which happened to be the last school to be established, adopted a doctrine that gives particular authority to the Prophet *Sunna* that was undermined by the forms of jurist reasoning recognised in the former schools.[391]

The legal theory according to Hallaq, which was the product of the ninth and tenth century had a changing effect on the law. The primary aim of legal theory was to rationalise the positive law of God and to discover the law of God. The legal theory was meant in the first place to ensure that Shariah law in general is based on a solid judicial methodology 'providing that the positive conclusions were sound was in fact providing that community was not in error'. As a result, the positive law formulated in the eighth and the ninth centuries (before the evolution of legal theory) was tested and then classified into two groups. The first group included the rules that were structured on a solid and systematic basis by acknowledging the four sources of the law. The second group included the rules which were considered dubious by many jurists on account of being based on loose analogy, these were subject to reformulation and rationalisation.[392]

[389] Ibid
[390] Ibid
[391] Ibid
[392] Wael Hallaq 'Considerations on the Function and Character of Sunnī Legal Theory' (1984) 104 Journal of the American Oriental Society 679

Accordingly, the divergence in doctrine between schools which had derived from the recognition of different customary practices changed with the development of legal theory and the doctrinal sources of law. At a certain point, it was generally accepted that the proper law of Shariah is derived from the divine command of God and that the basic principles through which the divine will could be ascertained (sources of the law).[393]

As a result, it became generally accepted that each rule or institution had to be tested exclusively by the accepted criteria, which are now known as the sources of Shariah. In many cases, the controversy among the schools centered on the degree to which analogical reasoning might properly be applied. The effort of the jurists has gradually resulted in building a fragmentary and fertile scheme of contractual rights and obligations. The accepted sources of the law are explained below.

3.3 Sources of Shariah law

An understanding of the nature of the law and its development is not complete without understanding the sources of the law. The sources of the law are of particular importance to any study of Shariah law. It is the sources of law that make Shariah law generally different from secular legal systems. Secular laws are mainly based on reasoning, which means that changes in social and economic conditions may result in the over-ruling of some previously rational doctrines. In England, Parliament has an absolute power to enact legal rules.[394] Furthermore, being a common law system, the law is shaped by judicial creativity. Thus, one needs to look at judicial precedent in addition to parliamentary legislation to know the law.[395]

By contrast, Shariah law is based on sources of *lex diva*, which make the law permanent in principle and not subject to overruling on the grounds of reasoning or changed socio-economic circumstances. This means that a state that adopts the Shariah law cannot override its legal principles even with the power of its Parliament. All legal rules enacted by states' authority need to be compatible with the principles of Shariah to pass the legitimacy

[393] Coulson, *Commercial Law in the Gulf States* (n 374) 9- 17
[394] Gary Slapper and David Kelly, *The English Legal System* (Taylor & Francis 2009) 65
[395] Ibid 100-28

requirements.[396] The law is discovered through a specific judicial methodology (the sources of the law).

In principle, Shariah scholars are under the common belief that Shariah and its sources cannot be abrogated or subjected to limitations of time, space or circumstances. Nevertheless, the following discussion of sources of the law of Shariah will illustrate that the rigidity of Shariah is sometimes overestimated. While it is true that the primary sources of Shariah (Quran and *Sunna*) cannot be abrogated or subjected to limitation under any circumstances, the secondary sources of Shariah are based on *ijtihad* (human reasoning), which respond to social changes.

Due to the vital importance of the sources of the law to Shariah, the study of sources of the law and judicial methodology is made a science in itself and separate from jurisprudence or the rules of law. The methods applied to the deduction of the rules from their sources are studied under the science of *usual alfiqah* (the judicial methodology).[397] The science of judicial methodology is central to any discussion of any legal issue in Shariah. It is devoted to ensuring that the law is grounded on authoritative sources; *usual alfiqah* is founded on divine ordinances and the acknowledgment of God's authority over the conduct of man.[398] At the same time it secures an avenue by which Shariah can adopt any necessary adjustment in the law to accommodate social changes. Next, the primary sources (Quran and *Sunna*) and the secondary sources (*ijma*, *qias*, the public interest and *urf*) of Shariah will be outlined.

3.3.1 Primary sources

The rules of Shariah are derived from two primary sources: Quran and *Sunna*. The rules included in the Quran and *Sunna* are of a rigid character, under no circumstances can they be abrogated or subjected to any limitation. Nevertheless, the two primary sources are not law books or statutory texts. Thus, a process of interpretation is needed in order to distinguish rules and principles of law.

[396] Article 2/7 and 2/8 of the Saudi Arabian Constitutional Law respectively provides that 'The government of Saudi Arabia drives its power from the Holy Quran and Prophet *Sunna*' and 'The ruling of the government of Saudi Arabia is based on the premise of justice, consultation and equity in accordance with Islamic Shariah'.
[397] Muhammad Abu Zahrah, *Usul Al-fiqh* (1958) 8
[398] Mohammad Kamali, *Principles of Islamic Jurisprudence* (Islamic Texts Society 1991) 2

3.3.1.1 Quran

The term Quran refers to the book embodying the revelation from God to the Prophet Mohammed.[399] There is only one book of Quran; it forms the foundation of all aspects of Islamic religion comprised in 114 *surah* (chapters), 6,666 *ayah* (verses) and 86,430 words. Over the texts of the Quran a capricious freedom of individuals in determining their ethical course is recorded along with a stress on the absolute control of God. Many Quranic verses, either directly or by implication, hold a general theoretical significance. Although the largest theoretical category included in the Quran is concerned with divine revelation, there are a total of five hundred additional injunctions.[400] The Quranic injunctions can be categorised as criminal, business, transactions, domestic relations, inheritance, and international relations.[401] Although the Quran is the cornerstone upon which Shariah law and its primary principles and some specific injunctions are based, it does not form a code of law and is not a law book.[402] This is what makes the text of the Quran not always accessible for individuals without the help of experts, and thus gives significant value to the science of Quranic interpretation (*tafsir*), which will be discussed below.

3.3.1.2 *Sunna*

The terms *Sunna* or *Hadith* are commonly used interchangeably to refer to the practice and sayings of the Prophet Mohammed.[403] The *Sunna,* like the Quran communicates a divinely revealed message, yet, unlike the Quran, the articulation of the content is made by the Prophet himself. From a theoretical perspective, the most telling texts are those that deal explicitly with a variety of attitudes and values underlying the countless rituals and other practices with which many thousands of *Hadiths* deal.[404]

[399] Muhammed Hamidullah, *Introduction to Islam* (Centre Culturel Islamique1959) 16
[400] John Rensrd, *Islamic Theoretical Themes: A Primary Sources Reader* (University of California Press 2014) 9-10
[401] Abdur Rahman Doi, *Shari'ah: The Islamic Law* (A.S.Noordeen 2007) 36-42 the author provides a list of each subject area of law cited based on the particular verses of Quran mentioned in.
[402] Alhaji Ajijola, *Introduction to Islamic Law* (2nd edn, Adam Publisher 1983) 94
[403] Warithuddin Muhammad, *Prayer and Al-Islam* (Muhammad Islamic Foundation1982) 2
[404] Rensrd (n 400) 12

The *Sunna* is the 'verbalized accounts of what Muhammad said and did as reported by his contemporary followers (companions or *sahba*) and which have been reduced to writing.'[405] While there is only one Quran, scores of scholars compiled the *Sunna* over a period of three hundred years using various methodologies. Most of the books of the *Sunna* available today were the result of the movement between 850 and 915. During that time, certain scholars devoted themselves to authenticate each *Hadith*. Six books of the *Sunna* were the result of this movement and were complied by recognised scholars of high character. Those compilers are *Al-Bukhari*, *Muslim*, *Abu Dawud*, *Al-Termidhi*, Al-Nasai and *Ibn-Majah*. The first two of the six are the most highly regarded; *Al-Bukahri's* work contains authentic 7,397 selected out of 600,00 purported *Hadiths* and *Muslim*'s work contains 12,000 *Hadiths*.[406]

Generally, *Al-bukhari*'s work is preferred over Muslim's because he would only accept a *Hadith* as authentic if there was evidence that the transmitter actually met his or her teacher of *Hadith. Muslim*, known for the enhanced arrangement of *Hadith*, would accept a *Hadith* as authentic if the transmitter and teacher were contemporaries, even if he could not find actual evidence of them having met.[407]

The relation of the *Sunna* with the Quran and whether it is a source itself or a supplement to the Quran, is treated by Al-Shafi. According to him, the *Sunna* is of three types: (1) texts of the *Sunna* that prescribe what is revealed in Quran, (2) texts of the *Sunna* that explain the general principles of Quran and clarify the will of God; (3) where, in the *Sunna*, the Messenger of God has ruled on a matter about which nothing can be found in the Book of God. The first two types are integral to the Quran, but scholars have differed with regard to the third.[408]

3.3.1.3 Interpretation of sacred sources

The sacred texts of Quran and *Sunna* are by no means law books or statutory texts. Thus, injunction and legal principles need to be distinguished. Ordinary people normally lack the relevant skills to distinguish the legal rules within the texts. Thus, *tafsir* (since of

[405] Irshad Abdal-Haqq 'Islamic Law: An Overview of Its Origin and Elements' in Hashan Ramadan (eds), *Understanding Islamic Law: From Classical to Contemporary* (Rowman Altamira 2006) 1
[406] Muhammad Abdulrauf, *Al-Hadith* (1974) 19-23
[407] Ibid
[408] Al-Shafi, *Al-Risala* (First Published 767-820, Al-Halabi 1940) 64-105

interpretation) and commentary on the Quran is of significant importance to Shariah jurisprudence.[409] Interpretation of the texts of the Quran is done by one of several methods. The interpretation of the Quran by Quran itself is the most commonly invoked method of interpretation. This is to say that the Quran expounds upon many of its own principles at different places throughout the Quran. Another method of interpretation of the Quran is by *Sunna*, which, as mentioned before, refers to the view of Al-Shafi that some texts of *Sunna* could explain the general principles in the Quran and clarify the will of God.[410]

The exercise of Quran interpretation must be practised with adherence to a complex set of rules of interpretation explained in depth by the four schools of jurisprudence.[411] The sense of exegesis evolved and Islamic scholars established standards for individuals engaged in the interpretation of the sacred sources. Any person who attempts to interpret a text of the Quran or *Sunna* must have the following characteristics: she must be '(a) an accomplished linguist familiar with Quranic (classical) Arabic; (b) have a thorough understanding of the message of Islam; (C) have the ability to perceive meanings, abstract relations and generalising principles apparent in the various passages of the Quran; and (d) take into consideration the report of tradition stemming from Muhammad and his companions; i.e., be fully familiar with *Hadith*'.[412]

The interpretation of the *Sunna* follows the same standards as the interpretation of the Quran. Nevertheless, along with the need for interpretation, the authenticity of the *Sunna* is a matter of the highest importance.[413] Before basing a legal rule on a text of the *Sunna*, the authenticity of the text needs to be checked. Out of the six well known books of the *Sunna* the book of Al-Bukhari is regarded by the Muslim community as the most reliable book of the *Sunna*.

[409] M.Th.Houtsma, T.W.Arnold, R.Basset and R.Hartmann 'Encyclopaedia of Islam', *E.J. Brill's First VII* (1913-1936) 320
[410] Al-Shafi (n 408) 64-105
[411] Abdal-Haqq (n 405) 14-5
[412] Ismail R.Al-Faruqi and Lois L.Al-Faruqi, *The Cultural Atlas of Islam* (Free Press 1986) 244-6
[413] Abdur Rahim, *The Principles of Islamic Jurisprudence: According to The Hanafi, Maliki, Shafih and Hanbali Schools* (Kitab Bhavan 2006) 67

3.3.2 Secondary sources

The primary sources of Shariah, the Quran and *Sunna,* do not always provide detailed principles for legal rules. As Rensrd puts it 'the fundamental sacred texts are not theoretical manuals or treatises, but they are in essential and too seldom and acknowledged ways the inspirational wellsprings of theological themes in works of all subsequent generations of Muslims.'[414] Since there are many issues in which no clear judgments are to be found in the Quran or *Sunna, ijtihad* (human reasoning) is needed to discover what God had ordained for each question. All secondary sources of Shariah consist of a form of *ijtihad.* The practice of *ijtihad* is regulated by *usul al-fiqah* (jurisprudence methodology), which provides the criteria for the deduction of the rules of law from the sources of Shariah. It provides a systematic methodology for the purpose of understanding the contents of sources and for discovering the *lex divina*.[415]

A central purpose of the jurisprudence methodology is to guide the jurist in his efforts to deduce the law from its sources. It arose out of the need to remove unwanted risks of error and confusion in the development of Shariah, to avoid confusion and to ensure that *ijtihad* is carried out by qualified people. *Ijtihad* is the avenue by which Shariah responds to changes in society, and to the difficulties of finding the right balance of values and finding better solutions and alternatives when needed. The development of the law by human reasoning under Shariah is encouraged by the fact that '*ijtihad* is a collective obligation of the Muslim community and its scholars to exert themselves to find solutions to new problems and to provide the necessary guidance in a matters of law and religion.'[416] The obligatory nature of *ijtihad* is reinforced by the encouragement given to *mujtahid* (a person who practice *ijtihad*) by rewarding him in the hereafter whether he arrives at the correct result or not.

Under Shariah's science of jurisprudence methodology, the *mujtahid* needs to follow specific rules and steps to reach a conclusion in any legal issue. Under the general rules of *ijtihad* one would need to first refer to the Quran for clearly articulated principles of law. This requires extensive study and the application of highly refined interpretive skill. In a further step, the *mujtahid* is required to look at the texts of the *Sunna* in the same manner. If neither texts

[414] Rensrd (n 400) 1
[415] Kamali (n 395) 2
[416] Ibid

appear not to contain explicit or implicit guidance on the issue in question, human reasoning then needs to be exercised to reach a determination. Several classes of reasoning are accepted for applying and deducing the principles of Shariah.[417] Those that are most agreed upon are: collective reasoning by consensus (*ijma*), analogical deduction (*qias*), the public interest and local custom (*urf*).

3.3.2.1 Collective reasoning by consensus (*ijma*)

A Shariah rule can be generated by the consensus of the learned scholars of Islam and/or the learned community of Muslims of a particular era.[418] The leading Quranic authority for *ijma* stems from the following verses of the Quran: 'O ye who believe, Obey Allah, and obey the messenger, and those who are charged with authority among you. If ye differ in anything among yourselves, refer it to Allah and his messenger, if ye do believe in Allah and the Last Day; that is best and most suitable for final determination.'[419] The authority of *ijma* is also found in the *Sunna* in several contexts, the most commonly cited text of the *Sunna* is the report of the prophet saying 'My community shall never agree on an error'.[420]

The practice of *ijma*, which was established by the Prophet companions, needs to go through three stages. To start with, each participant is required to resort to individual reasoning (*ijtihad*) in his own right. Second, the relevant issue needs to go through mutual consultation (*shura*) before reaching a decision on the issue.[421] A person who participates in *ijma* decision-making needs to be qualified to practice *ijtihad*.[422]

Ijma as a source of the law reflects the natural evolution and development of society. It is said to have a crucial role in developing Shariah. *Ijma* is regarded as an instrument of tolerance and evolution of ideas in a way that reflects the vision of scholars in the light of new education and cultural achievements of the community. Goldhizer describes the *ijma* as following: 'This principle (i.e. *ijma*) provides Islam with potential for freedom of movement and a capacity for evolution. It furnishes a desirable corrective against the dead letter of

[417] Abdal-Haqq (n 405) 20
[418] Doi (n 401) 64-6
[419] Quran 45/18
[420] Ibn Majah, *Sunan*, vol 2, 1303, Hadith 3950
[421] Doi (n 401) 64-6
[422] Abdur Rahim (n 413) 113

personal authority. It has proved itself, at least in part, an outstanding factor in the adaptability of Islam'[423]

Once an *ijma* is established it constitutes a strong authority; it is an independent source in the sense that it is capable of quoting the law without reference to the primary sources.[424] An existing *ijma* is binding and not open to amendment or abrogation. Only the constituents of *ijma* themselves are entitled to their own *ijma* or enact another one in their place.[425] Nevertheless, although *ijma* potentially could be of significant weight to Shariah jurisprudence, its role is displaced by the fact that *ijma* has not been used successfully for a very long time. The different political power in Muslims countries, the great distance and circumstances separating Muslims, has for a significant period generated a serious obstacle against the establishment of rules through *ijma*.[426]

3.3.2.2 Analogical deduction (*qias*)

Qias literally means 'measuring' or 'ascertaining' something. It could also mean comparison with a view to suggesting equality or similarity between two things. Under Shariah jurisprudence, it means expanding Shariah value from *asl* (original case) to f*ra* (new case), where the *asl* is regulated by a giving and *qias* seeks to extend to the *fra* the same textual ruling. In other words, it is the practice of the application of a ruling of a case on a similar case where the law is silent. *Qias* does not amount to the establishment of a new rule of law but rather extends an existing rule. It is though more than an interpretation of the primary sources. A person practicing *qias* is required to exert himself intellectually in trying to discover the effective cause in *qias*. The purpose of *qias* is to create an avenue for the development of law that conforms with the spirit of Shariah.[427]

The authority of *qias* is found in the following verse of Quran: 'should you dispute over something, refer it to God, and to the Messenger, if you believe in God.'[428] The former verse is interpreted to mean the dispute should be referred to God and the Prophet by allowing the

[423] Ignaz Goldziher, *Introduction to Islamic Theology and Law* (Andreas and Ruth Hamori 1981) 52
[424] Shah Wali Allah, *Qurrah Al-Aynayn fi Tafdil Al-Shaykhayn* (KFNL 1930) 40
[425] Muhammed Al-Ghazali, *Al-Mustafa Min Ilm Al-Usul*, vol 2 (First published 1058-111, Dar Al-Koutoub Al-Almyah 1993) 298
[426] Abdal-Haqq (n 405) 17-22
[427] Ibid
[428] Quran 4/59

signs found in the Quran and the *Sunna*. This is exactly what *qias* does; it is the method by which the rationale of an existing rule is sought and then applied to a new issue which shares the same rational.[429] Further authority for *qias* is found in the *Sunna* when the Prophet directed his compatriot Muadh bin Jabal to resort to his own *ijtihad* (*qias* is a form of *ijtihad*) where he failed to find guidance in the Quran and *Sunna.*[430]

Schacht argues that the concept and method of *qias* are derived from the Jewish exegetical term *hiqqish,* which is taken from the Aramaic root *naqsh* meaning 'to beat together'. He further infers from the similarity of technique of discussion by Al-Shafi that the doctrine of *qias* in Shariah jurisprudence has been influenced by Greek logic and Roman law.[431] He however, did not provide any evidence of actual borrowing or influence. And, ultimately, similarity of doctrines and concepts, and resemblance in discursive techniques does not amount to proof that one has necessarily been borrowed from the other.

3.3.2.3 The public interest

The concept of public interest has been referred to in different terms by the schools of Shariah jurisprudence. The Hanbali school refers to it as *istislah*, while it is called *istihsan* by the Hanfi school and al-*masalih al-mursalah* by the Maliki school. It involves the practice of 'selecting one acceptable alternative solution over another because the former appears more suitable for the situation at hand, even though the selected solution may be technically weaker than the rejected one.'[432] It certainly involves a form of *ijtihad* or independent reasoning in deciding what is best for the general public. It is an alternative recourse where analogy is deficient; but opposition to it from other schools prevented it from being fully developed and recognised.[433]

[429] Ibn-Qayyim Al-Jawziyyah, *Ilam Al-Muwaqqin an Rabb Al-Alamin*, vol 1 (First Published 1292, Dar Al-Koutoub Al-Almyah 1991) 104-23
[430] Al-Ghazali (n 422) 641-4
[431] Joseph Schacht, *The Origins of Muhammadan Jurisprudence* (OUP 1967) 99-100
[432] Doi (n 401) 81
[433] Moinuddin Ahmed, *The Urgency of Ijtihad* (Kitab Bhavan 1992) 38-9

3.3.2.4 Local custom (*urf*)

Prevailing customs may be given recognition only where they do not contravene Shariah principles.[434] A consideration of the purpose and consequences of the custom must be measured against the Quran and *Sunna.* Custom is given different values to *urf* as a source of law, but they all recognise it as legitimate method for formulating law. The authority of local custom as source of law is traced to the practice of the Prophet who was silent on many customs of the Arab people; the practice of the Prophet was taken to be an approval of their continued practice.[435]

3.4 The nature of the Shariah law of contract

The employment of the judicial method explained above has resulted in the construction of a fragmentary and fertile scheme of legal rights and obligations. Legal thought in the field of contract is bound by two characteristics, the nature of which makes them different from most contract laws. This because the Shariah law of contract was first made on the basis of nominative contract and developed away from the authority of a certain state. The two major characteristics that describe the nature of the Shariah law of contract are outlined below.

3.4.1 Based on nominative contracts

Classical jurists who built the cornerstone of the Shariah law of contract approached the law systematically, they preferred classification and tidiness. Accordingly, the contractual scheme rested upon a quartet of basic contracts. By doing so, the jurists meant to deal with the two primary issues related to the purpose of the contract; whether the contract is made for the transfer of the corpus or the usufruct and; whether it is made for a consideration.[436] The law of contract was formulated by creating specific rules for nominative contracts. The four primary contracts on which the law was mainly based are: (1) *bay* (sale) in which the ownership is transferred for consideration, it is also said to be the archetype and to cover all commutative contracts in Shariah, and to be used extensively to draw analogies by jurists; (2) *hiba* (gift) in which the ownership is transferred without consideration; (3) *ijara* (hire) in

[434] Ibid; Doi (n 401) 84
[435] Abdur Rahim (n 413) 113
[436] Coulson, *Commercial Law in the Gulf States* (n 374) 9- 17

which the position is transferred for consideration; (4) *ariya* (loan) in which the possession is transferred without consideration. These four contracts are the most commonly discussed, yet, fourteen other contracts were nominated. Each nominated contract is accorded a distinct treatment by jurists under their respective title of the texts.[437]

3.4.2 Developed away from the authority of the state

Since the two primary sources of Shariah, the Quran and *Sunna*, deal with legal matters generally, they do not provide comprehensively detailed or technical rules. The legal scheme known today as Shariah represents the effort of the jurists working through the accepted methods of discovering the law through human reasoning.[438] The legal philosophy is the result of the analysis and elaboration of Shariah law in *abstracto* rather than a science of the positive law emanating from judicial tribunals.[439]

Those jurists in the classical period were never subjected to the authority of a state. In fact, there was no state during the formative stages. The current meaning of 'state' was not introduced to the Muslim world until the nineteenth century. The only means of authority was to have control over the law by appointing and dismissing judges. Yet, there was no authority to influence the decisions as to what law should be applied. Law was, in fact, created by society; communities produced their own legal experts who were qualified to fulfil a variety of functions that, in totality, made up the Shariah legal system.[440]

Jurists, for their part, believed that rational thinking is a gift from God and thus it should be fully utilized in a wise and reasonable manner. But to them human thinking cannot understand all the secrets of the world, thus rational thinking is not in itself enough without divine guidance. Rationality as such must be predetermined by the revealed will of God through the Quran and *Sunna*. The law accordingly is a combination of reason and revelation.[441]

[437] Coulson, *A History of Islamic Law* (n 371) 1-9
[438] Wael Hallaq, *An Introduction to Islamic Law* (CUP 2009) 7-8
[439] Coulson, *A History of Islamic Law* (n 371) 1-9
[440] Hallaq, *An Introduction to Islamic Law* (n 438) 7-8
[441] Ibid 14-20

3.5 The general theory of Shariah contract law

The fact that classical jurists of Shariah law have based on nominative contractual scheme has raised the question of if it is bound by a general theory. Some jurists have treated the contract of sale as the prototype to which the contracts were expected to conform. Nevertheless, the fact that the whole contractual scheme is based upon many nominated contracts means that basing the general theory on one contract is of limited use, especially for the purpose of providing premises for analogy. On other occasions jurists have attempted to deduce general principles from the extensive commentaries and exegeses produced by their predecessors. For example, Ibn-Taimiyah included in his famous book *Majmu Fatawa* a complete chapter on principles governing contracts in general. But, these principles were merely affirmation and truisms.[442]

In the same sense jurists did not attempt to create a general concept to bind all contracts, they have never attempted to define contract in their manuals. Although the technical term 'contract' as known in Western jurisprudence is usually translated in Arabic to mean *aqd*, the two terms are not of precise equivalence. The term *aqd* literally means in Arabic to 'tie' or 'bond' whereas the technical term 'contract' brings into common law the two essentials of agreement and consideration. The term *aqd* is widely used to describe various transactions especially those that are concluded by offer and acceptance, but it is equally used to describe transactions that are concluded by the offer of one party only, such as gifts, guarantees and bequests.[443]

In fact, the term *aqd* under Shariah law is wide enough to cover the entire field of obligations including those that are spiritual, social, political, and commercial. It regulates spiritual matters by dealing with an individual's obligation to God, it also regulates social relations such as marriage, and on a political level it encompasses treaty obligations. Additionally, it covers the whole scheme of commercial obligations.[444]

[442] Hussein Hassan 'Contract Theory: Views from the Islamic Legal System' (PhD thesis, University of Oxford 2001) 67
[443] Coulson, *Commercial Law in the Gulf States* (n 374) 9- 17
[444] Mohammed (n 370)

The way the law of contract was laid out by classical jurists has led some scholars such as Schacht[445] and Coulson to say that the Shariah law of contract is not bound by a general theory. For Coulson this is attributed to the fact that Shariah law is of a primitive nature. He states in the context of the development of the Shariah law of contract the following:

'It perhaps seems natural from the experience of Western legal systems that this stage of the development of Islamic legal doctrine would be followed by a further stage in which jurists analysis would derive from various particular cases the general principles and would thus give the birth to a general theory of contract.'[446]

Coulson's reasoning is, however, undermined by the fact that jurists were able to generalise and rationalise in other areas of the law, most obviously the area of legal theory. It seems that the way the jurists treated contracts and their lack of an articulation of general theory was merely a reflection of the process of the development of the law. The Islamisation of the law in the early stages involved overriding pre-Islamic institutions by the norms of Islam. In the context of contract law, the starting point of Islamisation was subjecting the customary contract that existed in pre-Islamic Arabia to examination. Many of the nominated contracts were known in pre-Islamic times.[447]

Thus, the way the law was laid out was merely a reflection of needs at that time; the lack of generalisation was not intended. In fact the Shariah law of contract include many norms that are general in nature, such as the price and subject matter. There are general norms that are applicable to all contracts; all contracts were subjected to detailed analysis to ensure that they were free from these elements.[448]

Some contemporary scholars take the position that the Shariah law of contract is maintained by a general theory that contains general default rules applicable to all contracts. Their argument is that an innominate contract is given effect by Shariah law.[449] However, Husain explains that innominate agreements were developed in the first place because of the absence

[445] Schacht, *An Introduction to Islamic Law* (n 376) 98-112
[446] Coulson, *Commercial Law in the Gulf States* (n 374) 9- 17
[447] Hassan (n 442) 65
[448] Ibid
[449] Sayed Amin, *Islamic Law in the Contemporary World* (Royston 1985) 45-8

of a general theory.[450] Other scholars have attempted to develop some Shariah rules of a general nature, which could be made applicable to all contracts. These general rules are derived in abstract hindsight from the regulation of nominate contracts by the classical jurists. Their attempts included treatment of issues such as the classification of legal acts and their effects and impediments to consent.[451]

However, the question to ask is: if the Islamic law of contract were to be bound by a general theory what this theory would be? It would be possible to generate a general theory of contract from some verses of the Quran which present a moral injunction of extreme sanctity. For example the following verse provides that 'Ye who believe, fulfil all contracts'.[452] However, such verses were not made the basis of a legal system of binding agreements but rather, as has been explained, a series of nominate contracts supplemented by means of giving effect to innominate agreements. More significantly, the law of contract classically was based on principles that emphasise justice and equity rather than strict sanctity of contract. For the purpose of this research the next section addresses the extent to which contractual autonomy is implemented by the general principles of the Shariah law of contract. Limitation in freedom of contract is also considered.

3.6 Contractual autonomy under the Shariah law of contract

The fact that the Shariah law of contract is based upon nominate contracts has led some to assume a complete absence of freedom of contract. According to Hamid this means we have in hand a law of contract(s) rather than contract. As a result, we have to accept that the principle of freedom of contact is not recognised by Shariah law.[453] Yet, according to Hassan this can be rejected by the fact that innominate contracts made by parties are given effect under the law of contract.[454]

In fact it seems that freedom of contract is limited for other reasons that are not related to its being a law of contracts. The view taken by many contemporary scholars is that the Shariah

[450] Hassan (n 442) 65
[451] See for example: Abdalrazzaq Al-Sanhuri, *Masader Alhaqq fi Alfigh Alislami* (Alhalabi 1998); Subhi Al-Mahmasani, *Alnazariah Alamah lil-Mujibat wa AlUqud* (Dar Al-Ailm, 1983)
[452] Quran 5/2
[453] M.E.Hamid 'Islamic Law of Contract or Contracts' (1969) 3 Journal of Islamic and Comparative Law 1
[454] Hassan 'Contracts in Islamic Law' (n 9)

law of contract does not allow contracts that are repugnant to any principle of Shariah moral scheme.[455]

There is also the view that the legal effect of a contract is decided by the lawgiver not by the contracting parties. In general terms this means that whereas parties can decide to enter a certain contract or not, once they decide to do so, they are obliged to fulfil the requirements of the contract as determined by the lawgiver.[456] In other words, the role of the will of the parties is simply to start the contractual process by choosing a particular form of contract, but the effects of this contract are governed by Shariah and apply automatically.[457] Obeied upheld this view, arguing that 'it is evident, for example, that any individual is free to make a contract of sale, but this contract will have effects which are necessarily imposed on the contracting parties.'[458]

However, how does the law deal with situations where parties decide that the legal effect of a certain contract set by the law does not meet their needs? In other terms, to what extent is party autonomy is recognised? In fact, a literal interpretation of some verses of the Quran would indicate a strict sanctity of contract.[459] Nevertheless, classical jurisprudence did not base the law of contract on these verses only but rather acknowledged other principles which emphasise justice and equity. The closest treatment to the issue of parties' autonomy by the classical jurists is found under the doctrine of *shurut* (ancillary conditions), which needs to be discussed in order to approach the matter appropriately.

[455] Atikullah Abdullah 'The Doctrine of the Freedom of Contract (Ḥurriyyat al-Ta'āqud) in Islamic Mu'āmalāt: An Exposition on the Concept and Rules of the Contract of Muqāwalah in the Construction Industry'(2011) 50 Islamic Studies 365

[456] Jaffar Hussain 'Freedom and Sanctity of Contract, Common Law and Syariah'(1988) Journal of Undang-undang 53

[457] Nayla Comair-Obeid, *The Law of Business Contracts in the Arab Middle East* (Kluwer Law International 1996) 31-40; Schacht on the other hand claim that 'Islamic law does not recognize the liberty of contract, but does provide an appreciable means of freedom within certain fixed limits' See: Joseph Schacht 'Pre-Islamic Background and Early Development of Jurisprudence' (1955) 1 Law in the Middle East 28

[458] Obeid (n 457) 31-40

[459] Examples of Quranic verses that stress the sanctity of contracts include: 'You who believe, fulfil contracts' (5/1); 'You who believe, be faithful to your contracts' (4/33); 'Fulfil the covenant of God when you have entered into it, and break not your oaths after you have confirmed them' (16/91).

3.6.1 The doctrine of *shurut* (ancillary condition)

The term *shurut* is meant to describe any clause which has the consequence of adding or removing a certain effect accorded to the contract by the law.[460] The four schools have approached the issue differently. Generally, ancillary conditions are largely admitted by the Hanbali school, whereas they are heavily regulated by the other three schools. The Shafi, Hanfi and Maliki schools admit certain freedoms for individuals to arrange the effects of their contractual relation. The discussion of the opinions of the three schools will be primarily focused on the Hanfi school position as it is very much the same as that of the Shafi and Maliki schools. Reference to the opinions of the other two schools will be made when necessary.

3.6.1.1 The position of the Hanfi, Shafi and Maliki schools

The ancillary conditions are considered by the Hanfi school to be either valid or null and void. Three types of valid condition are admitted. First, a clause is valid if it conforms with the legal effect attributed by the law to a certain contract.[461] Yet, this type of clause has very limited legal effect because it merely emphasises the normal consequences of a contract. This could be, for example, a clause in a contract of sale that stipulates that the ownership of the subject matter shall be moved to the buyer, or confirming the buyer's right to return a defective item.[462] It adds nothing to the effect of the contract imposed by the law; no additional rights or obligations are imposed on the parties.

Secondly, there are those conditions that agree with the purpose of the act to which they are added. This type of condition is divided by the Hanfi school into three categories including: pledge, security on the price of sale, and power delegation. The three conditions are given effect by the Hanfi school in a very strict manner. To them the relevant conditions are given effect only if they were stated at the time of the conclusion of the contract.[463] The position taken by the Shafi and Maliki schools is more flexible. It is enough for the Shafi school to give legal effect to a pledge if it is precisely identified and to give effect to security if it was

[460] Obeid (n 457) 31-40
[461] Ala-Aldean Al-Kasani, *Bada' Alsna'a*, vol 5 (First Published 1191, Dar Al-kutub Al-almyah 1986) 153-192
[462] Abdulrahman Algziry, *Alfigh ala Almthahib Alarbah* (Dar Ihya'at Turath Alabri 1963) 227
[463] Abdalrazzaq Al-Sanhuri, *Masader Alhaqq fi Alfigh Alislami*, vol 3(Alhalabi 1998) 134-45

fixed at the time of the conclusion of the contract.[464] The Maliki school take an even more flexible position by giving effect to conditions requiring a pledge even if the article of the pledge was not determined and to give effect to security even if its size was not fixed.[465]

The third category of valid conditions consists of clauses that give force to customary practices. In order to explain this type of condition, jurists laid out many examples. It includes services which buyers require from sellers by custom.[466] Al-Kasani explained this type of condition by setting out the following examples; the purchaser of a leather sole asking the seller to cut the leather and add straps; a condition to cut boots out of a leather hide; to dye a garment or to shape woollen cloth into a bonnet.[467] This category of ancillary conditions is validated as an exception (*istihsan*) by the Hanfi school[468] and as a matter of principle by the Shafi and Maliki schools.[469]

As for null and void clauses, there are those conditions which do not suit the contractual relation to which they have been appended. This could be either because it is not admitted by practice or custom or because it gives benefit to one of the contracting parties over the other. It includes any condition that upsets the balance of the contract by imposing supplementary obligation.[470] This category includes but is not limited to the following: (1) conditions which directly infringe the law or morality principles (for example to make the article sold inalienable or donation irrevocable); (2) conditions which are irreconcilable with the legal effect of the contract imposed by the law or those which impose obligations on third parties; (3) conditions which cannot be made in practice.[471]

[464] Muhammed Al-Shirazi, *Almuhathib*,vol 2 (First Published 1003-1083,Dar Alqalam 1996) 22-3
[465] Muwahim Hattab, *Sharh Syyidi Khalil*, Cairo, 1329-18 Hegria, T. IV, pp. 375-376 (as cited in Obeid (n 457) 36)
[466] Ibn AlHiman, Fath Alqader, Sharah Alhidayat, Cairo, 1315-18 Hegira, T. V, p,215 (as cited in Obeid (n 457) 36)
[467] Muwahim Hattab, *Sharh Syyidi Khalil*, Cairo, 1329-18 Hegria, T. IV, pp. 375-376 (as cited in Obeid (n 457) 36)
[468] Al-Kasani, *Bada' Alsna'a*, vol 5 (n 461) 153-192
[469] Algziry (n 462) 218-30
[470] Obeid, *The Law of Business Contracts* (n 457) 37
[471] Algziry (n 462) 169-173

3.6.1.2 The position of the Hanbali school

The Hanbali school took a more liberal approach, and give more effect to the sovereignty of the will.[472] They admit the right of individuals to make any contractual relationship they wish, as long as it does not contradict with the general principles and the spirit of the Shariah law.[473] According to Hanbali school, only conditions which are inconsistent with morality or expressly prohibited by the texts of the law (the Quran or *Sunna*) are void. Within the morality scheme contractual limitation is centred on the doctrines of *riba* and *gharar*.[474] Other than that there are some conditions that are prohibited explicitly by the texts of Quran or *Sunna*, which tend to be limited in scope. Examples of conditions that are considered void by the Hanbali school by reference to a textual ban include: any contracts which comprise two agreements, one of which is the condition of the other; any contract of sale which has two ancillary conditions imposing supplementary obligations on the same contracting party; any condition that contradicts the purpose of the contract.[475]

3.6.1.3 The effect of nullity

In all schools of law the effect of nullity differs according to the object of the clause and nature of the contract to which it is attached.[476] Accordingly, if the clause has the effect of making imbalanced advantages, the entire contract becomes null. To the Maliki school, the entire contract is rendered void if the void clause contradicts the principle effect of the contract. But if the void clause only contradicts a secondary effect of the contract, the effect of nullity is then limited to that clause.[477]

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[472] Sawwar, at-Ta'bir an al-iradat fi l-figh al-islami, ed ash-Shaikat al-Wataniyat li-nashr Algiers, 1979, p.437 (as cited in Obeid (n 457) 37)
[473] Ibn-Taymiya, *Alfatawa* AlKubra, vol 4 (First Published 1263-1328, Dar AlKutob Alailmia 1987) 76-108; Abdalrazzaq Al-Sanhuri, *Masader Alhaqq fi Alfigh Alislami*, vol 1(Alhalabi 1998) 80-4
[474] Ibn-Taymiyah, *Alfatawa AlKubra*, vol 4 (n 473) 76-108
[475] Obeid (n 457) 38-9
[476] Abdalrazzaq Al-Sanhuri, *Masader Alhaqq fi Alfigh Alislami*, vol 4 (Alhalabi 1998) 84-8
[477] Muwahim Hattab, *Sharh Syyidi Khalil*, Cairo, 1329-18 Hegria, T. IV, p 373 (as cited in Obeid, *The Law of Business Contracts* (n 457) 40)

3.6.2 How far is the autonomy of parties recognised?

It seems that most classical jurists were under the impression that allowing individuals to freely arrange the effect of their contractual relationships (according to their whims) brings about the risk of having imbalanced economic relations. Consequently, the fundamental principles of equity and justice will be in danger of violation by falling under the prohibited scheme.[478]

Some scholars point out that classical jurists assumed that the law has established a relation between judicial act and its effect. They support their argument with reference to texts of the Quran and *Sunna* that urge contractors to fulfil their contracts, for which they are responsible before God. According to Obeid, this is a variation of the broad belief that the role of human will is limited to bringing the agreement into existence, whereas the content of the act is already decided by the law. Therefore, the effect of an agreement must be determined by the lawgiver to avoid injustice and imbalance.[479] As a result, a clause attached to the contract is only admitted if it agrees with the nature of the act in such a way that they may be harmoniously integrated.[480]

Hussain explains that the reason for the difference in opinion between the schools lies in the interpretation of two propositions. The first is that the effect of contract is determined by the law, and the second, that parties are restricted in making stipulations by the expressed law.[481]

Looking deeply into the regulation regarding the doctrine of *shurut* it seems that the four schools agree on the primary aim of regulation. This is merely to have a contractual scheme free from elements of prohibition as stated in the Quran and *Sunna.* More precisely, it is to maintain a contractual scheme free from *riba* and *gharar* (explained below). In implementing these restrictions the schools of law had different approaches, and where the three schools preferred to remain cautious by strictly regulating contracts, the Hanbali school adopted a more liberal approach. This is supported by the fact that all four schools give legal effect to innominate contracts that do not violate general principles. All the schools are then in

[478] Obeid (n 457) 32
[479] Hassan 'Contracts in Islamic Law' (n 9)
[480] Obeid (n 457) 32
[481] Hassan 'Contracts in Islamic Law' (n 9)

agreement about the effective cause of limiting the contractual freedom but disagree in their method.

It seems that the Hanbali position is the more favourable one for the present time because it serves commercial requirements.[482] Furthermore, some contemporary scholars argue that the position of the Hanbali school agrees with the modern formula of the autonomy of the will. The opinion of the Hanbali jurist Ibn-Taimiyah supports this argument since he explains that parties to a contract have the freedom to 'decide as they wish the content of their judicial acts and determine the effects on the condition that these effects are not contrary to public order and morals'.[483]

It might seem that the Hanbali school position is similar to the Western idea of autonomy of the will, in that they are limited only by the demands of the moral order. However, the will be shown not to hold because the concept of morality in Shariah law is much wider then in Western laws. This will become clearer in the following discussion of the general limitation of contractual autonomy represented by the two principles of *riba* and *gharar*. The Hanbali position remains the most liberal approach within the Shariah law of contract and therefore is the most popular and widely accepted approach in the practice of Shariah law.[484]

3.6.2.1 Limitation on profit (the doctrine of *riba*)

The term *riba* is usually translated into English to mean 'usury' or 'interest' but it has in fact a much boarder sense. The literal meaning of the term *riba* in Arabic means augmentation, increase or gain.[485] Al-Jazari defines it as an increase in one of the articles exchanged without there being any compensation for this increase.[486] Schacht studied *riba* under the category of unjust enrichment where he defines it as 'any unjustified increase in capital for which no compensation is given'.[487] The way Saleh defines *riba* is the most accepted way of defining *riba* among Shariah scholars: 'illicit profit or gain resulting from an inequivalence in the

[482] Obeid (n 457) 40
[483] Ibn-Taymiyah, *Alfatawa AlKubra*, vol 4 (n 473) 76-108
[484] The Hanabli position is adopted by the practice of Shariah law in the Saudi Arabian jurisdictions see section 3.6.3
[485] Hideyuki Shimizu 'Philosophy of the Islamic Law of Contract' (1989) The Institution of Middle Eastern Studies, The International University of Japan Working Paper Serious 15 <http://nirr.lib.niigata-u.ac.jp/bitstream/10623/38149/1/2012_1_iuj1_9.pdf > accessed 30/5/2016
[486] Abdurahman Al-Jazari, *Alfigh ala Almathahib Alarba'a*, vol 2 (2nd edn, Dar Al-Kutub Al-Almyah 2003) 202
[487] Joseph Schacht 'Riba' in *The Encyclopadea of Islam*, vol 7 (1995) 491

counter-value of the reciprocal benefits during an exchange of two or of several articles of the reciprocal benefits of the same species and genus and governed by the same efficient cause'. According to Saleh, counter-values means 'the two or more corporeal objects that the parties to a liberal contract exchange between themselves as a result of the contract'.[488] *Riba* may exist also in transactions where the handing over of the values exchanged is not simultaneous.[489]

3.6.2.1.1 Classification of *riba*

In the attempt to bring all economic activities under social and moral control, *riba* was categorised into two broad classes by jurists: *riba al-fadal* (surplus *riba*) and *riba al-nasi`a* (credit *riba*).[490] The four schools had different views regarding each of these categories, but generally it was understood that the basis for *riba al-fadal* (surplus *riba*) is found in the following text of the *Sunna*:

'Gold for gold and silver for silver, wheat for wheat, barley for barley, dates for dates and salt for salt of the same kind for the same kind and the quantity for the same quantity, from hand to hand and if they differ from each other in quality sell them as you like but from hand to hand.'[491]

Riba al-fadal is accordingly concerned with the unlawful excess of one of the counter-values in a hand-to-hand transaction. This text of the *Sunna* has acquired many different interpretations.[492] Yet, it is sufficient to understand that it is generally accepted that the main purpose of the text is to emphasise the absolute equality of the exchanged counter-values of certain fungibles.[493] This represents a principle rule of the Shariah law of contract.[494]

Riba al-nasi'a (credit *riba*) occurs when the exchange of counter-values is delayed. A deferred exchange confers the possibility of producing a gain in one of the counter-values

[488] Nabil Saleh, *Unlawful Gain and Legitimate Profit in Islamic Law* (2nd edn, Grahman & Trorman 1992) 11-42
[489] Obeid (n 457) 44
[490] Ziaul Haque 'The Nature of Riba Al-nasi'a and Riba Al-fadal'(1982) 21 Islamic Studies 19
[491] Al-Nasa'I, *Sunan*, vol 5, 44 Hadith 4565
[492] Emad Khalil 'An Overview of the Sharia'a Porhibition of Riba' in Abdulkader Thomas (eds), *Interests in Islamic Economics: Understanding Riba* (Routledge 2006) 58
[493] Saleh (n 488) 11-42; Shimizu (n 485)
[494] Shimizu (n 485)

because of delayed payment or delivery. Accordingly, it is considered unlawful whether or not it is accompanied by profit.[495] Nevertheless, the prohibition does not apply to the exchange of currency with commodity (orthodox contract of sale).[496]

3.6.2.1.2 Judicial method of regulating *riba*

The early Shariah scholars made a great effort to specify all illicit transactions that contain elements of *riba,* whether in exchange or in loans. For example Al-Bayhaqi included in his book, *Al-Sunan Al-Kubra*, more than forty chapters on different categories of forms, types and nuances of transactions containing elements of *riba* in different sectors.[497] Generally, all discussion by classical scholars was conducted with the prohibition of *riba* in mind and transactions were then categorised as being either valid or void on this basis. As a result many legal doctrines were created within the spirit of the doctrine of *riba*, such as the doctrine of just price which will be expanded upon further in this chapter.

3.6.2.2 The prohibition of uncertainty (the doctrine of *gharar*)

Under the Shariah law of contract each party has the right at the time of the conclusion of the contract to know the existence of her benefit and, *ipso facto,* of how much he stands to gain. This is done under the doctrine of *gharar*, which is a variation of the general principle that gain comes only from work. The initial prohibition of uncertainty in contract is found in the prohibition of gambling (*mysier*), which literally means in Arabic getting something too easily without working for it.[498] The doctrine of *gharar* was formulated by linking the notation of *riba* with the prohibition of gambling.[499] *Gharar* is a very sophisticated concept that is usually translated into English as risk of uncertainty or speculation, but it is more than this. Realising how difficult it is to define *gharar,* classical jurists did not attempt to define it but rather it was studied in the framework of transactions relating to the contract of sale being regarded as the typical form of contract. Contracts involving elements of uncertainty relating

[495] Ibid
[496] Khalil (n 492) 58
[497] Haque (n 490)
[498] Obeid (n 457) 55
[499] Saleh (n 488) 62-102

to the object of sale, its price or the delay allowed for delivery of the goods are prohibited under the doctrine of *gharar*.[500]

Classical jurists formulated the doctrine of *gharar* in the light of commercial reality.[501] In the early development of the doctrine many fell into the mistake of assuming that it forbids contracting on future goods. The leading jurist Ibn-Qayyim has pointed out that the notion of the doctrine is not concerned with the existence or non-existence of the subject matter at the time of contract, but rather the uncertainty of the availability of the subject matter.[502] The doctrine was then refocused onto knowledge about the existence or non-existence of the subject matter, or concerning its quality, quantity or date or performance.[503]

The definition formulated by Ibn-Rushed is a helpful formula for the application of *gharar*. According to him *gharar* can be produced by the material want of knowledge in either the subject matter or the price. However, if the subject matter can be adequately described and the price can be clearly fixed, *gharar* can be dismissed because of the elimination of speculative risk. Saleh puts the definition made by Ibn-Rushed in the following terms:

'*Gharar* in sale transactions causes the buyer to suffer damage (*ghubn*) and is the result of a want of knowledge (*jahl*) which effects either the price or the subject-matter. *Gharar* is averted if both the price and the subject-matter are known to be in existence, if their characteristics are known, if their amount is determined, if the parties have such control over them as to make sure that the exchange shall take place and, finally, if the date of future performance, if any, is defined.'[504]

The doctrine was reformed and its effect has softened with time. It is not applied in contemporary jurisprudence to business risk but to speculative or unconscionable risk. It does not also apply to minimal risk such as, for example the risk regarding if the subject matter in the contract of sale is certain to be delivered in a future date. *Gharar* was described

[500] Obeid (n 457) 57
[501] Ibn-Rushd, *Bidayat Al-Mujtahid wa Nihayat Al-Muqtasid*, vol 3 (First Published 1126-1198, Dar Almarifah 1997) 183-4; See Saleh (n 488) 62-102
[502] Ibn-Qayyim Al-Jawziyyah, *Ilam Al-Muwaqqin an Rabb Al-Alamin*, vol 2 (First Published 1292, Dar Al-Koutoub Al-Almyah 1991) 9
[503] Saleh (n 488) 62-102; See in this regard Al-Sanhuri, *Masader Alhaqq fi Alfigh Alislami*, vol 3(n 463) 7-9; Mohammed (n 370)
[504] Saleh (n 488) 62-102

as a 'possibility or risk where the equilibrium of counter-values is upset or that an unjust or inequitable gain or loss is produced'.[505] According to Noor contemporary thinking about *gharar* in contract could be summarised under the following headings:

'(1) There should be no want of knowledge (*jhal*) regarding the existence of the exchanged counter-values; (2) There should be no want of knowledge (*jahl*) regarding the characteristics of the exchanged counter-values or the identification of their speciousness? or knowledge of their quantities or the date of future performance if any; (3) Control of parties over the exchanged counter-values should be effective.'[506]

3.6.2.2.1 Judicial methods of regulating *gharar*

In the attempt to have a contractual scheme free from *gharar*, just like in *riba*, customary transactions were divided into lawful and unlawful ones. This was done according to *gharar* as well as *riba*. In doing so transactions involving a high degree of risk were prohibited. In order to avoid *gharar* as much as possible certain conditions were emphasised by Shariah jurisprudence. In doing so, the importance of the existence of the counter-values, which are to be established at a meeting in order to examine them and hand them over to the other immediately, is stressed in bilateral transactions.

In addition, emphasis is placed on the importance of examining the object of contract in a precise manner through inspections and communication.[507] Generally, the safest way to avoid *gharar* and *riba* and guarantee that parties have choices grounded on genuine intent without any exploitation is by having contracts concluded immediately.[508] It must be pointed out that the two doctrines of *riba* and *gharar* have been to some extent moderated in contemporary times under the doctrine of necessity.[509] Nevertheless, they continue to exist in the very basis of the Shariah law of contract and remain the subject of scholarly debate.

[505] Shimizu (n 485)
[506] Mohammed (n 370)
[507] Saleh (n 488) 63
[508] Shimizu (n 485)
[509] Ibid

3.6.3 Modern application of the doctrine of *shurut* by the Saudi courts

The Saudi court upholds the Hanbali school position in that it admits the right of individuals to make any contractual relationship they wish, as long as it does not contradict the general principles or the spirit of Shariah law. The court relies on the text of the *Sunna* which indicates that individuals 'will be held to their conditions, except the conditions that make the lawful unlawful, or the unlawful lawful'.[510] On many occasions a number of different kinds of condition have been accepted and enforced by the Saudi courts. Usually the court would validate the condition unless it is contradicted by a textual rule. For example, in a contract of sale where the parties agree that the price is to be paid by instrument in twelfth months. The contract contains a condition which states that if the buyer is two months late in paying the instrument the full price becomes automatically due. This condition is held to be valid and enforceable by the Saudi court.[511]

On a different occasion, the Saudi court accepted the validity of sale conditioned upon the discharge of goods. A contract sale of commercial goods between a supplier and trader contained a term which states that; if the trader did not resell the product supplied to him by the supplier within a given time, he has the right, according to the relevant condition, to return the goods to the supplier. The terms have been regarded as valid and enforceable by the Saudi court.[512]

Conversely, it is observed that the Saudi court would invalidate three types of conditions: a condition containing element of *riba*, *gharar*, or a condition that does not agree with the purpose of contract. In many instances the Saudi court has ruled in relation to contracts which included terms that would amount to *riba* as being void. In its essence the doctrine of *riba* is limited to the exchange of certain fungible goods. The majority of cases seen by the Saudi courts are related to the sale of gold. The court emphasises the absolute equality of the exchanged counter-values of the sale and that the sale must be immediate.[513]

Similarly, any ancillary condition that amounts to *gharar* or gross uncertainty is invalidated by the Saudi courts. For example, in a contract of sale where the agreement contains terms

[510] Al-Tirmithi, *Jami*, vol 3, 13 Hadith 1352
[511] Case 34328427 on 12/10/1434AH
[512] Case 826/2/ق/ on 1428 AH
[513] See Case 976/3/ق/ on 1429 AH; Case 489/3/ق/ on 1427 AH; Case 550/2/ق/ on 1424 AH

which regard the value of the contract as not final until approved by an accountings report, the price of the contract could be either decreased or increased prior to the conclusion of the contract. When brought to court, it has been held that this is case of uncertainty which amounts to *gharar* and this renders the contract void.[514] In a different case, a contract to supply contract chilled food contained a term that obliged the buyer to pay for storage expenses in addition to the price of the subject matter. The contract did not involve a mechanism for determining the storage costs. The court held that the contract involved an element of *gharar* as regard to storage costs. Thus, it ordered that the buyer is liable only for the price of the subject matter and revoked the term regarding storage cost.[515]

Furthermore, any ancillary condition that contradicts the purpose of the contract is invalidated by the Saudi courts. A case was brought to court relating to a contract of sale in which the subject matter is land that is subject to dispute. The contract of sale included a term which obliged the seller to transfer the ownership of the land to the buyer once the dispute is settled. The buyer paid part of the price of the sale at the time of the conclusion of the contract. The full amount was due upon the transfer of the ownership. The seller did not honour his obligation; he did not transfer the ownership of the land to the buyer even though the dispute over the land has been settled. When the case was brought to court it was held that this was an invalid contract of sale on account of it being subject to a condition which contradicts with the nature of the contract. The transfer of the ownership is the primary purpose of any contract of sale; thus subjecting this to a condition renders the contract void.[516] Likewise, a condition to keep the subject matter of a contract of sale in the position of the seller until all instruments are paid was held by the court to be void. The Saudi court explained that such a condition contradicts the contract of sale where the subject matter must be effectively transferred to the buyer, and that this cannot be made without taking a position.[517]

3.7 Summary

The central part of this chapter was focused on introducing the Shariah law of contract. The evolution of the law of contract took place around the seventeenth and eighteenth centuries.

[514] Case 8138/1/ق/on 1431 AH
[515] Case 2282/1/ق/on 1427 AH
[516] Case 34192240 on 20/4/1434 AH
[517] Case 33368994 on 21/8/1433 AH

The classical period from the twelfth to the eighteenth century had an enormous role in shaping the Shariah law of contract. Most of the Shariah literature written during this period by the classical jurists is still relevant to modern Shariah law. Furthermore, the sources of Shariah law along with the judicial methodology were distinguished for their special nature. Shariah law is said to be a divinely orientated system, and as a result, legal development is made a matter of discovery. Two major characteristics that describe the nature of the Shariah law of contract were mentioned, and these are the fact that it is based on nominative contract and developed away from the authority of a certain state. The ongoing debate over the existence of a general theory that binds the Shariah law of contract was addressed. The discussion has revealed that parties' autonomy under the Shariah law of contract is limited to the service of equity and morals. This has led to the conclusion that the Shariah law of contract is bound by the principle of permissibility of contract rather than freedom of contract. The major limitation on contract conclusion by the principles of *riba* and *ghrar* were introduced. In the following section notions of fairness under the Shariah law of contract will be addressed including duress, *riba, gharar,* just price, unfair exploitation and mandatory disclosure. This is aimed at characterising the situation of contractual justice under the Shariah law of contract.

3.8 Notions of contractual justice in the Shariah law of contract

The previous analysis addressed the general limitations to contractual autonomy under the Shariah law of contract. The general theory of contract is limited by the two fundamental doctrines of *riba* and *gharar*. The importance of the two doctrines, as will become clearer later on, is that all doctrines and legal rules under the Shariah law of contract have been created within their spirit. Since the general principles of the Shariah law of contract have been established we shall move on to address some detailed rules related to the research issue. This section aims to investigate the level of contractual justice offered by the Shariah law of contract. Particularly, it investigates the meaning and concepts of contractual justice. It determines how the law deals with perceived cases of injustice, and indeed, the extent to which individuals are legally bound to act fairly and justly towards each others.

In Shariah justice is a central theme in dictating the traditions of law and how they should put into practice. Justice operates in both a legal and a divine sense. Individuals are required to conduct themselves and others in a just manner. It would, therefore, seem quite natural to

apply justice to the market place. Yet justice is a relative concept, and this is presented in the Shariah law of contract through two major principles, that gain has to be earned and the emphasis on the equality of counter-values. The discussion that follows is concerned with notions of contractual justice under the Shariah law of contract.

Obligation in Shariah is created by consent, thus, the doctrine of duress, which is aimed at protecting consent will be addressed first. The general meaning of the doctrines of *riba* and *gharar* have been addressed above, here we shall determine the justice rationale behind the two doctrines. Other notions of contractual justice including the doctrines of just price, unfair exploitation and mandatory disclosure will also be addressed.

3.8.1The doctrine of duress

Primary texts of Shariah emphasise that no contract can be concluded without consent. This is mentioned in the following verse of the Quran 'Squander not your wealth among yourselves in worthless dealings, but let there be trade by mutual consent'.[518] Duress is generally regarded as a defect affecting consent in contract and therefore the validity of the consent. The doctrine is based on both objective and subjective requirements. To start with the objective inquiry needs to exist before considering the subjective feeling of the victim. It is, therefore, a matter of balance between the objective factors (types of duress and the nature of the threat) and subjective factors (the feeling of the victim).[519] Yet, it must be stressed here that a threat to purely economic interests does not amount for duress under Shariah law.

3.8.1.1 The objective test

The objective test is concerned with the nature of the threat. Five objective conditions have to be satisfied in a claim of duress:[520](1) the threat must be of serious injury to the victim of duress, including deprivation of liberty through physical confinement or serious damage to property; (2) the threat must be directed at the coerced person himself or one of his close relatives. Most jurists include spouses, children and parents in the category of close relative. The Maliki school include only the children of the contracting party, but the Hanfi school

[518] Quran 4/29
[519] Khalad Abou el Fadl 'The Common and Islamic Law of Duress' (1991) 6 Arab Law Quarterly 121
[520] Coulson, *Commercial Law in the Gulf States* (n 374) 48-9

broaden the category of close relative to include most relatives;[521] (3) the threat needs to be realistic, in the sense that it is reasonable to expect that it will be carried out; (4) the threat must be of imminent injury or damage in a way that leaves the victim without a chance to protect himself by asking for help or recourse to the law. In this regard some jurists require the threat to be immediate or the coerced act to be performed in the presence of the coerced person.[522] However, the essence of the condition is the formation of the fear in the victim's mind when she feels she is left without any choice. As a result, according to the Maliki, since the real issue is the formation of fear in the victim's mind there is no need to require that the threatened harm is immediate. It could occur in month but the victim may well be terrified by this and might not be able to ask for help;[523] (5) the threat must be unlawful.[524]

3.8.1.2 The subjective test

The objective test presented in the above listed criteria is meant to determine whether or not a reasonable ground for duress exists. When a reasonable ground for duress exists, the next step would be the subjective test. The state of mind of the party is the primary concern of the test. Therefore, it investigates whether the coerced person believed, by a preponderance of his thought, that he was faced with a necessity that left him no alternative.[525] Sarakhsi explains the test in the following terms:

'We consider the preponderance of thought [of the victim] and what he felt because the victim's belief takes precedence over the reality concerning matters that we have no way of verifying independently […] The conditions of people vary according to their ability to withstand pain therefore we have no alternative but to consider what the victim believed.'[526]

The court then will proceed to decide whether or not the coerced party acted solely on account of the fear of threat. The individual personality of the coerced party is therefore a relevant consideration. The question to be determined by the court is whether the contracting

[521] Fadl (n 519)
[522] This is predominantly the opinion of some within the Hanfi school see Fadl (n 519)
[523] Fadl (n 519)
[524] Coulson, *Commercial Law in the Gulf States* (n 374) 48-9
[525] Ala-Aldean Al-Kasani, *Bada' Alsna'a*, vol 7 (First Published 1191, Dar Al-kutub Al-almyah 1986) 176
[526] Al-Sarkasi, *Al-Mabsut*, vol 24(First Published 1090,Al-Marifah 1989) 38-46

party himself believed that his failure to consent would result in immediate, unlawful and serious injury to himself or a relative or a property.[527]

It seems that duress requirements are therefore relative according to the circumstances of the victim. Things that make an inexperienced person feel terrified do not necessarily have the same effect on a wiser person. Thus, each case has to be decided individually based on the relative circumstances.[528]

3.8.1.3 The effect of duress

With regard to its effect, duress is divided into two categories: compiling and non-compiling. All jurists agree that no person will be bound to an agreement he made under duress. Generally, compiling duress nullifies consent and vitiates free choice; it therefore, renders contracts non-binding and automatically non-existent. On the other hand, non-compiling duress nullifies consent but does not vitiate free choice. In this case the victim of duress is given the option of duress, which means that the contract is voidable for the benefit of the victim of duress.[529]

3.8.2 The fairness aspect of the doctrine of *riba*

The doctrine of *riba* is believed to be the limitation of the contract for a moral objective related to fairness. Different rationales have been linked to the prohibition of *riba*. Some regard it to be limited to the prohibition of exploitive lending by loan sharks, which makes the prohibition of *riba* limited to high interest loans only. Others take it in general terms to mean that the prohibition of *riba* is centred on the potential for exploitation in contracts.[530] However, the view that the prohibition of *riba* comes from the stress of equilibrium of counter-values seems to be the most appropriate, as the following analysis will demonstrate.[531]

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[527] Coulson, *Commercial Law in the Gulf States* (n 374) 48-9
[528] Fadl (n 519)
[529] Ibid
[530] Mahmoud Gamal 'An Attempt to Understand the Economic Wisdom in the Prohibition of Riba' in Abdulkader Thomas (eds), *Interests in Islamic Economics: Understanding Riba* (Routledge 2006)112-22
[531] Saleh (n 488) 62-102

The doctrine of *riba* is categorised by many under unjust enrichment.[532] Shimizu explains that because labour is the only source of income tolerated by Islamic law, interest, which is enrichment of currency by itself, is not accepted. In the Islamic law of contract interest is regarded as unjust consideration. It is regarded as a surplus, a gain that destroys the equilibrium of the counter-values. Although the gain itself is accepted, an unjustified gain or a gain received without giving a counter-value is forbidden.[533] Ibn-Rushed, the Maliki jurist has made a direct economic argument to explain how *riba* is concerned with inequality and injustice. This argument was presented in the context of the types of goods to which the prohibition of *riba al-fadl* applies.[534] The analysis of Ibn-Rushed was articulated by Gamal in the following terms:

'It is thus apparent from the law that what is intended by the prohibition of *riba* is what it contains of excessive injustice (*ghubn fahish*). In this regard, justice in transactions is achieved by approaching equality. Since the attainment of such equality in items of different kinds is difficult, their values are determined instead in monetary terms (with the *Dirham* and the *Dinar*). For things which are not measured by weight and volume, justice can be determined by means of proportionality. I mean, the ratio between the values of one item to its kind should be equal to the ratio of the value of the other item to its kind. For example, if a person sells a horse in exchange for clothes, justice is attained by making the ratio of the price of the horse to other horses the same as the ratio of the price of the clothes [for which it is traded, tr.] to other clothes. Thus, if the value of the horse is fifty, the value of the clothes should be fifty. [If each piece of clothing value is five], then the horse should be exchanged for 10 pieces of clothing […] As for [fungible] goods measured by volume or weight, they are relatively homogenous, and thus have similar benefits [utilities]. Since it is not necessary for a person owning one type of those goods to exchange it for the exact same type, justice in this case is achieved by equating volume or weight since the benefits [utilities] are very similar […]'[535]

Gamal, in his attempt to put Ibn-Rushed's analysis into contemporary economic terminology, explained that the statement of Ibn-Rushed indicates that justice requires equality in the ratio

[532] Shimizu (n 485)
[533] Ibid
[534] Gamal (n 530) 112-22
[535] Ibn-Rushd (n 501) 183-4

of barter trade, the ratio of prices and of marginal utilities.[536] In the first quoted paragraph Ibn-Rushed meant, according to Gamal, to say that justice is only obtained if 'the ratio at which non-fungible goods are traded for one another (e.g. clothes for a horse) is the reciprocal of the ratio of their prices.' Therefore, justice in this context means 'making to market', if a bag is worth 20 on the market it should be traded for 2 dresses that are each worth 2 in the market. As for very heterogeneous items (e.g. clothes for a horse), parties are required to comply with the ratio of market prices. Yet, because non-fungibles vary widely in prices, the ratio can only determined approximately in most cases.[537]

Gamal further explains that in the second quoted paragraph mainly focused on fungibles, Ibn-Rushed stresses the ratio of trading and the ratio of utilities (benefits) derived by the traders. According to Gamal, if this is to be put into modern terms it should be 'the ratio of marginal utilities'. The second part of Ibn-Rushed's statement is centred on the equality of ratios of barter trading and market prices and its relationship to economic efficiency, from which Gamal draws the following conclusion:

'Considering benefit/utility in the marginal sense, it would stand to reason that the ratio at which a barter trade takes place would roughly equate the two parties' ratios of marginal utilities of the traded objects (with perfect equality if the goods were perfectly divisible), provided that they have access to many other trading partners. The trade will be conducive to economic efficiency if the trading ratio was equal to the ratio of marginal utilities over the entire economy. The latter is ensured—in turn—by equating the ratio of marginal utilities to the ratio of market prices. This is the condition for Pareto efficiency[538] in the market. We can now appeal to the first and second welfare theorems of economics, and conclude that "justice" dictates that the "just" prices and trading ratios are those which maximize allocative efficiency.' [539]

In its essence the doctrine of *riba* is concerned with the exchange of fungibles and credit transactions. The effect of the doctrine acquired a considerable weight in early times when the exchange of goods for something other than money was common. Yet, in modern days the significance of the doctrine of *riba* is largely limited to financial and credit transactions.

[536] Gamal (n 530) 112-22
[537] Ibid
[538] See on the concept of Pareto efficiency: Richard Posner, *Economic Analysis of the* Law (9thedn, 2014) 1.2
[539] Ibid

However, the spirit of the law's stress on the equality of counter-values accords with the essence of the regulation of the law of contract. Indeed, *riba* has been the ground from which many legal doctrines of Shariah contract law have been evaluated. For example the doctrines of fair price and unfair exploration (explained below) were created in the light of the doctrine of *riba*.

3.8.3 The fairness aspect of the doctrine of *gharar*

The doctrine of *gharar* was formulated by linking the principle of *riba* with the prohibition of gambling.[540] Uncertainty as prohibited by the doctrine of *gharar* is aimed at avoiding the risk of inequality either in a transaction which has the potential of resulting in *riba* or unequal gain.[541] In other words, in order to judge whether or not a certain transaction is in compliance with the principle of equality of counter-values as described above in the context of *riba*, a fixed obligation will be needed as a precondition. It could be said that *gharar* is a principle that supplements the principle of *riba* by protecting the equality of counter-values in future transactions.

This is supported by the opinion of many scholars. Chehata, in light of the attempt to define *gharar* concluded that the basis of the prohibition of *gharar* is the desire to ensure equivalence in commutative transactions.[542] Furthermore, Obeid concludes her analysis of *gharar* by making a similar statement. She explains that 'the concept of the balance of benefits' is highly desired by Shariah law in the principle of *gharar*. She states that Shariah prohibits 'all transactions in which the weaker party might be exploited by reasons of his ignorance of current market prices or because hazardous or speculative transactions'.[543]

3.8.4 The doctrine of just price

The idea that contracts ought to be concluded at a just or fair price has always existed in the Shariah law of contract. The significance of the doctrine lies in pursuing justice rather than determining price. The earliest case reported was when the prophet denounced overcharging

[540] Saleh (n 488) 62-102
[541] Coulson, *Commercial Law in the Gulf States* (n 374) 44
[542] C.Chehata, *The´orie ge´ne´rale de l'obligation en droit musulman hane´fite* (1969) 82 (as cited in Hassan (n 442) 217)
[543] Obeid (n 457) 58

a trusting customer.[544] The concept was then applied by jurists in a restricted sense, mainly in relation to compensation. For example in the case of defective goods, usurpation or disposal of the property of trust. The general assumption was that the just price of something is the price which is paid for similar objects in a given time and place. For this reason, classical jurists used the term (*thaman almithel*) for the price of the equivalent.[545]

It was Ibn-Taimiyah who paid special attention to this matter. He explained the difference between *iwad almithel* (just compensation) and *thamn almithel* (just price). He used the term compensation of the equivalent to refer to the ethico-legal aspect of just price and the term just price to refer to the economic aspect.[546] In differentiating between compensation of the equivalent and the price of equivalent Ibn-Taimiyah provided the following analysis. A just compensation is the amount with which people are familiar and to which they are accustomed. The price of the equivalent is an uncommon amount which results from an increase or decrease in volition or other factors.[547] Ibn-Taimiyah further explained that just compensation does not occur in cases of exchange but rather in compensation or discharge of obligation. On the other hand, the price of the equivalent occurs in situations where there is an actual sale or exchange of counter-values.[548]

Apparently, as illustrated by Islahi, Ibn-Taimiyah viewed the compensation of the equivalent as being a relatively durable phenomenon resulting from established custom. By contrast, the price of the equivalent is variable; it is determined by the forces of supply and demand and is affected by the will and desire of the people concerned. Accordingly, one can define the compensation of the equivalent as 'the equivalent amount of that particular object in the prevailing usage' or, 'the rate and the custom.'[549] The price of equivalent is 'that rate at which people sell their goods and which is commonly accepted as equivalent for it and for similar goods at that particular time and place.'[550]

[544] Abu Bakr Al-Bayhaqi , *Al-Sunan Al-Kubra*, vol 5 (First Published 994-1066, 1353AH) 348
[545] Ibn-Najm, *Alashbah W Alnazar (*First Published 1826, Dar Alkoutub Alalmiyah 1980) 362-4
[546] Abdulazim Islahi, *Economic Concepts of Ibn Taimiyah* (The Islamic Foundation 2015) 80-5
[547] Ibn-Taimiyah, *Majmoua Fatawa,* vol 29 (First Published 1263-1328, King Fahd Publishing Centre 2004) 520-2
[548] Islahi (n 546) 80-85
[549] Ibn-Taimiyah, *Majmoua Fatawa,* vol 29 (n 547) 520-2
[550] Ibid 254

Ibn-Taimiyah explained that the best way to evaluate just compensation is by assessing the item by its equivalent in order to achieve real justice. On other occasions, he stated that 'if people are dealing with their goods in the normal way without any injustice on their part and the price rises either due to shortage of the goods (i.e. decrease in supply) or due to increase in population (i.e. increase in demand), then it is from God. In these cases, to force the seller to sell their goods at particular price is a wrongful pressure.'[551]

The second statement above identifies that it is the price established by the free play of market forces of supply and demand. The use of phrases 'in a normal way' and 'without injustice on their part' indicates that the price of the equivalent must be a comparative price and there must be no fraud. It is worth noting here that Ibn-Taimiyah encourages setting a price of the equivalent where one is not already in place. In doing so, the subjective value of the object to the buyer and to the seller is taken into consideration.[552] Closely related to the issue of the price of the equivalent is *ujrat almithel* (the wage of the equivalent) and the profit of the equivalent. Ibn-Taimiyah applied the same rules of the price of the equivalent to the wage of the equivalent.[553]

Just profit or the profit of the equivalent is a normal profit that is usually earned in a particular type of trade without harming others. Profit is generally permitted until it becomes abnormal or exploitive. This protects people who are not aware of the normal conditions of the market, as will be illustrated in the doctrine of unfair exploitation.[554] Nevertheless, the doctrine of just price in Shariah is a supplementary principle in the sense that it cannot be invoked by itself. Other than cases where the price is not specified, one needs to prove a case of exploitation or defect to invoke the doctrine of just price. Similarly, in a case of unfair exploitation and in some cases of defect the unfairness of price needs to be determined to support such claims.

3.8.5 Unfair exploitation (*ghubn)*

The above discussion of the doctrine of *riba* and just price illustrates the stress on the equivalence of counter-values in the law of contract. The doctrine of unfair exploitation is a

[551] Ibn-Taimiyah, *Al-Hisba* (First Published 1263-1328, Dar Al-Koutub Al-Almyah) 22-42
[552] Islahi (n 546) 80-85
[553] Ibn-Taimiyah, *Al-Hisba* (n 551) 22-42
[554] Islahi (n 546) 80-85

means by which the principle is enforced. It was the Hanbali school who gave the doctrine a special attention and shape. They discussed the issue of unfair exploitation in relation to three practices; (1) sale by inexperienced persons, (2) necessity sale and (3) the act of meeting Bedouin traders before reaching the city market. The prohibition in the three practices is meant to protect the weakness or vulnerability of one of the contracting parties. Exploitation renders the contract voidable for the benefit of the exploited party who has the option to rescind the contract upon learning the real value of the commodities in the market place.[555]

3.8.5.1 Sale by inexperienced persons (*bay almustarsel*)

This kind of sale is concluded by a person who is ignorant of market prices. In this type of sale the inexpert contractor would disclose his lack of knowledge to the co-contractor, putting his/her trust in the other party to conclude the deal at market price.[556] The relevant circumstances impose a duty on the seller to disclose the market price. He is under an obligation to honour the trust by ensuring a fair deal.[557] Jurists defined *almustarsel* as the following: according to Ibn-Qudamh *almustarsel* is 'a person who is unaware of market conditions and lacks […] bargaining skills'.[558] Imam Ahmad suggests a similar definition: 'he is a person who has no advantage in bargaining and places his trust on the seller'.[559] Similarly, Al-Bahouti explains that he is 'unaware of market price and lacks the barging skills'.[560]

3.8.5.1.1 The requirements of *istersal*

Hanbali scholars have generally agreed that a claim under the doctrine of *istersal* needs to satisfy two conditions. First, the victim must be unaware of real market conditions; here the lack of bargaining skills is regarded as a presumption. Second, there must be an inequality of counter values where the inequality must be a gross and obvious imbalance between the exchanged values (*ghubn fahish*). It is enough for the Hanbali scholars to prove that there was a gross inequality between the exchanged values and that the exploited party lacked the

[555] Muhammad Omar and others 'The Implications of *Ghubn* in Islamic Contracts: An Analysis Of Current Practices' (2011) 7 Journal of Applied Sciences Research 2177
[556] Ibid
[557] Ibn-Taimiyah, *Majmoua Fatawa*, vol 21 (First Published 1263-1328, King Fahd Publishing Centre 2004) 359
[558] Ibn-Qudamah Al-Maqdisi, *Al-Moughni,* vol 3 (First Published 1146-1223, Maktabat Al- Qahirah 1968) n 501
[559] Omar (n 555)
[560] Mansuer Al-Bahouti, *Kashf Alqina* , vol 3 (First Published 1591-1641, Alam Alkutoub 1983) 212

relevant market skills. The Maliki scholars, on the other hand, require that the other contractor is aware of the lack of knowledge of the part of the victim and exploited the other party's weakness for his own benefit.[561]

3.8.5.2 Necessity contracts (*bay almuztar*)

This kind of contract is concluded to satisfy a basic need of the contractor (food, clothes etc). The way jurists describe this kind of sale impels an element of urgently or necessity, meaning that the sale is concluded in abnormal circumstances. In this context Ibn-Taimiyah illustrated that a person who has something that others are in need of and which nobody else can provide is under an obligation to sell it to them at the normal price (just price or equivalent price).[562]

3.8.5.3 Meeting Bedouin traders before reaching the market (*talaqqi al-rukban)*

Talaqqi al-rukban refers to the act of meeting Bedouin traders before reaching the city market whereby a city dweller would meet those traders at the outskirts of the city and buy their merchandise for unfairly low prices as the traders are unaware of the real market prices.[563] Such a practice was prohibited by the text of the *Sunna* through the saying of the prophet: 'Do not meet incoming traders outside the market.'[564]

The essence of the prohibition of such a practice is to protect the Bedouin who are usually ignorant of market prices, which potentially leads to an unjust bargain. A similar requirement of claim under the sale by inexperienced persons is applicable to the doctrine of *talaqqi al-rukban.* No fraud is required by the Hanbali school. It is sufficient to prove that the other contractor was aware of that the exploited party was ignorant of market conditions. This was presumed from the fact that such traders were yet to reach the market. However, a minor inequality of counter-values is tolerated. There must be gross exploitation (g*hubn fahish*) to be able to initiate a claim.[565]

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[561] Bha-aldean Alalaili, *Alnazariah Alamah l'l uquad* (Dar Alashraf 2005) 419
[562] Ibn-Taimiyah, *Majmoua Fatawa* vol 21 (n 557) 360
[563] Omar (n 555)
[564] Al-Bukhari, *Sahiah,* vol 18, Hadith 267
[565] Alalaili (n 561) 415-19

3.8.5.4 Modern applications of the doctrine of unfair exploitation

From the available case law in the Saudi legal system, it seems that the fairness of the deal is the most significance aspect to be distinguished in a case of unfair exploitation. Ignorance of market price is presumed when there is a significant difference between the contract price and the just price (the price of the equivalence). In a case where the plaintiff claims that he bought a farm for more than it is worth as result of his ignorance of market price the Saudi court held that this is a case of *istrisal*, which can only be invoked if the price paid is grossly unfair. Although the court cited Ibn-Qudamh's definition of the *almustarsel*, which is a 'person who is ignorant of market price and lacks the bargaining skills',[566] it did not involve itself in a process of determining the situation of the buyer. The court did not attempt to distinguish whether or not the buyer was aware of the market price. Instead, focus was placed upon distinguishing the fairness the deal, particularly the fairness of the price, and determining the equality between the price and the subject matter.[567]

In deciding what amounts to fair price the court ordered an expert team to evaluate the price of the subject matter (farm land) at the time of the conclusion of the contract. The evaluation had to acknowledge the value of farms in the same area with similar characteristics (the price of the equivalence). The court however, explained that what amounts to exploitation is related to custom. It is a matter of deciding whether the price charged is of usual profit or not. In this regard, the court mentioned the Maliki school position which indicates that a transaction is considered unfair exploitation if the price charged was above the price of equivalence by a third or more. The court, however, did not attempt to set a specific standard in this regard. Instead it was held that in the given situation the contract price is three times more than market price, which constitutes an absolute case of unfair exploitation.[568]

In a different case the court explained that the doctrine of unfair exploitation is for the benefit of both parties. The seller can rely on this right if she can prove that she has sold the subject matter by less than the price of the equivalence due to her ignorance of the market price.[569] The right to invoke the doctrine of unfair exploitation is dismissed when the abused party acts in a way which implies that she accepted the sale and had no objection to it. The transfer of

[566] Al-Maqdisi, *Al-Moughni*, vol 3 (n 558) n 501
[567] Case 34167086 on 21/3/1434AH
[568] Case 34167086 on 21/3/1434AH
[569] Case 34258649 on 3/7/1434AH

the ownership of the subject matter to a third party is an example of this.[570] The court cited Ibn-Qudamh's statement that 'options are dismissed by the transfer of the ownership.'[571] The court has refused an obvious case of unfair exploitation in a sale of land; the land was sold for considerably less than the market price. The decision was based on the fact that the claimant did not act in a way which indicated his non-acceptance of the validity of the contract. The claimant had seen the buyer of the land building, farming and selling parts of it and remained silent for a long time.[572] A victim of unfair exploitation is given the option of *ghubn*. She can choose whether to rescind the contract or claim the difference in price between the contract price and the price of the equivalence (*irsh*).

3.8.6 Mandatory disclosure

Silence is not generally an offence in Shariah; however, in few particular situations it could amount to negligence. There is a distinction between silence as an expression of consent and silence as concealment. The first silence concerns personal liberty and is thus preserved. The second silence relates to good faith in a transaction and may amount to a liability.[573] Shariah law applies the doctrine of failure of disclosure to two situations. There are two situations of mandatory disclosure known in Shariah as defect disclosure and disclosure in trust contracts.[574] All major schools of Shariah are in agreement that sellers are under a duty to disclose any default in the object of sale. Failure of disclosure of the defect is regarded to be fraud and amounts to responsibility (*tadlis bi al-ayb).*[575]

The second situation is related to trust sales (*bay al-amana).* This type of sale is based on the relation of trust that the seller will disclose the original price of the subject matter. An example of a trust sale is *morabaha,* which is the sale of something for the price at which it was purchased by the seller and an addition of a fixed sum by way of profit. The nature of this sale requires the seller to disclose the original price of the commodity. This sale is based on the trust relation between a fiduciary and a beneficiary. The seller (agent) is under a responsibility to disclose the original price of the subject matter. Failure of disclosure is a

[570] Case 33429922 on17/10/1433AH
[571] Al-Maqdisi, *Al-Moughni*, vol 3 (n 558) n 501
[572] Case 34258649 on 3/7/1434AH
[573] The requirement of good faith under the Shariah law of contract is dealt with under section 7.1.2.1.1
[574] Alalaili (n 561) 363-5
[575] Ibid 355

betrayal of the trust relation that amounts to responsibility. Such a failure gives the buyer the option to rescind the contract.[576]

3.8.6.1 Modern applications of the doctrine of mandatory disclosure

In the Saudi judicial system the defect defence is a common one for relief from contractual obligations.[577] Such claims are not always successful. The fact that the defendant waited until the case was brought to court is taken by the Saudi court as evidence of trying to escape from contractual obligations. For a claim to succeed based on a defect claim the Saudi court has explained that the defect must have existed at the time of the conclusion of the contract. The claim is not likely to succeed if the claimant fails to prove that the defect was there at the time of the conclusion of the contract or is a consequence of a defect that was there at that time.[578] On a different occasion, the court has explained in relation to a technical error related to a laser machine that there is a difference between an old defect that existed at the time of the conclusion of the contract and occasional defects, which are covered by the guarantee. Where the former gives rise to the option of defect, the latter is resolved by repair.[579]

Once the defect has been proved the buyer is required to use the option of defect. In a case related to a manufacturing defect in a car, the Saudi court explained that the buyer of the defective subject matter has two options. She can choose whether to rescind the contract or claim the difference in price between the fit and the defective product (*irsh*).[580]

There is no certain time limit to bring the claim of defect. In fact the court has accepted a claim of defect even though the subject matter had been used up. The case was brought to court three months after the delivery. The subject matter was agricultural compost that according to the claimant did not satisfy common standards. The claimant had used up almost all of the compost which had caused him losses since it did not satisfy its purpose. The Saudi court held that since the claimant had used up most of the subject matter his right to rescind the contract was no longer possible. The court therefore ruled for (*irsh*), the decrease in price

[576] Ibid
[577] See Case 3030/2/ق/on 1420AH; Case 314/3/ق/on 1428AH
[578] Case 2030/1/ق/ on 1430AH
[579] Case 28/1/ق/ on 1429AH
[580] Case 33252287/on 17/5/1433AH

as result of the defect to be paid to the claimant. In addition the court ruled that damages should be paid for losses caused by the subject matter falling under the requisite standard.[581]

However, the option of the defect, just like the option of *ghubn*, is dismissed once the buyer has made an action that indicates that he has accepted the sale after the defect has come to his knowledge. The Saudi court refused the claim for the option of defect in a case of a defective car because the buyer of the car had transferred ownership through selling.[582] Nonetheless, the examination and acceptation of the subject matter by the buyer does not obviate the buyer's right to the option of hidden defects. In the case of a second hand car sale the court refused the defendant's argument that the buyer had the chance to examine the car and accepted the sale based on this examination.[583]

There seems to be no rule on the value of what is considered a defect. While in cases of unfair exploitation the court is unlikely to accept cases where the exploitation is by less than the third, a case of defect would be accepted for an amount less than that. In a case of defective goods that did not meet accepted standards, the court ruled for 25% of the value of contract to be refunded to the buyer.[584]

3.9 Concluding remarks

The Shariah law of contract is governed by limited contractual autonomy. The moral scheme limiting the law is wide enough to say that the law is based on the principle of promissory of contract rather than freedom of contract. The two doctrines of *riba* and *gharar* constitute a general limitation on contractual autonomy. In their essence they uphold equality and certainty. Equality is a fundamental principle of the Shariah law of contract in the sense that all counter-values must be equal. This underpins the principle that profit must be a result of the work of labour not a matter of exploitation of the needs of others. For the purpose of satisfying these principles the Shariah law of contract has become highly regulated to satisfy its own concept of justice.

[581] Case 1662/1/ق/on 1413AH
[582] Case 33477956 on 26/12/on1433AH
[583] Case 34192793 on 21/4/on1434AH
[584] Case 1210/1/ق/on 1417AH

It is well accepted that the Shariah law of contract is based on the mutual consent of the parties. The doctrine of duress protects consent from any defect. Individual circumstances and personal differences and weakness are considered by the doctrine. Other than this the law is focused on the satisfying of justice within the substance of contract. The law provides a framework in which the contract scheme is bound by the moral ethics that promote justice and fairness in society.

The principle of equivalence of counter-values appears as well as the doctrine of just price. A just price is the equivalent price: 'that rate at which people sell their goods and which is commonly accepted as equivalent for it and for similar goods at that particular time and place.'[585] The doctrine of unfair exploitation serves the same end. Under the doctrine of unfair exploitation vulnerable individuals are protected from exploitation. It ensures that they receive as much as they get in return. Certainty of contract is enhanced to serve the same end through the doctrines of *gharar* and mandatory disclosure. Individuals are provided with the important information to help them to decide on the value of the commodity.

As a result, it seems that fairness and justice are admitted and promoted aims of contract law. A fair deal in the eye of Shariah law is one where the rights and obligations of the contracting party are clearly determined and where each receives as much as she gives in return back. The stress on the equivalence of counter values aims to encourage work and to make it the only permitted cause of profit.

Shariah law of contract deals with perceived unfairness in contract either by prohibition or correction. In order to correct perceived unfairness, a unilateral legal right of recovery is given to a party of contract to make up for any loses that may occur. A party who is the victim of an unfair situation has the right to either revoke or ratify the contract and thus determine its validity. In other words, the relevant contract is in theory valid subject to the use of the option. This is done through the corrective scheme of options. Options are measures that have been regulated to deal with any fault associated with the contact regardless of its classification (such as the options of *ghubun* and defect mentioned above) The concept is that whenever something goes wrong in a contract it is dealt with by an option.

[585] Ibn-Taimiyah, *Majmoua Fatawa,* vol 29 (n 551) 254

Until now the research has addressed the issue of the general theory of contractual justice in both English and Shariah law of contract. The focus shall now be turned to consumer contracts. The following chapters move on to address the theoretical grounds for consumer protection, the practice of consumer protection under English law and the viability of consumer protection under Shariah law.

Chapter Four: Theoretical Grounds for Consumer Protection

4. Introduction

In this chapter, the theoretical basis of consumer protection will be addressed from economic and social perspectives. It investigates from a theoretical perspective why the law of contract should protect consumers over traders. Indeed, one could argue that the mere fact that the context of consumer contract is different from that of commercial contract does not in itself necessitate different regulations. Consumer law diverges from the broader law of contract governed by the individual notion of free choice, in those legal systems that promote it. Thus, any intervention into the parties' autonomy needs to be on a basis that is more than simply difference. In addition, distinguishing rationales for intervention helps to come up with the right remedies to deal with consumer problems.[586] The protection of the consumer against fraudulent and other criminal practices has been thought to be appropriate for many centuries and is hardly conventional.[587] A more difficult question to answer is why protect the consumer when there has been no fraud by the producer or the seller?[588] The following section will address the theoretical aspect of consumer protection under the heading of consumer protection rationales. Next a critical perspective on consumer protection is offered as to the necessity, efficiency and chosen level of protection. The discussion of this chapter serves the second aim of the research by distinguishing the main theoretical characteristics of consumer protection to be tested under the Shariah law of contract. This will later be examined in chapter six in relation to the Shariah law of contract in order to determine the viability of consumer protection under the Shariah law of contract.

4.1 Consumer protection rationales

Broadly speaking consumer protection is justified on two grounds: economic justifications and social justice justifications. Economic goals of regulation seek to improve efficiency and maximise welfare at a societal level. It does not, however, address how welfare is distributed

[586] Ramsay, *Rationales for Intervention in the Consumer Marketplac*e (n 238)10
[587] See James Brundage, *Medieval Canon Law* (Routledge 2013) 70-97
[588] Harvey and Parry (n 237) 14

between people or groups within society except in certain limited senses. Indeed, it is commonly accepted that distribution resulting from market processes is not always fair and just. Therefore, some regulation ought to be based on distributional and fairness goals regardless of the efficiency of its outcomes. In this context, Ogus suggests that 'regulatory measures designed to correct economic inefficiency should be subject to constraints resulting from perceptions of distributional justice.'[589] The subsequent analysis will focus on economic (market failure) and social justice (distributive justice, paternalism and community values) rationales for consumer protection.

4.1.1 Economic justification

The free market was thought to be the best possible way to deliver economic efficiency. Classical theorists were under the impression that if the market is left alone it will achieve the greatest possible level of resource allocation.[590] Although this idea of the 'perfect market' model has proved to be unrealistic in reality, it is still useful as a starting point for examining the economic justification of consumer protection. In an ideal market there is no need for Government to intervention.[591] Ramsay identifies the characteristics of the perfect market as follows:

'(i) there are numerous buyers and sellers in the market, such that the activities of any one economic actor will have only a minimal impact on the output or price of the market; (ii) there is free entry into and exit from the market; (iii) the commodity sold in the market is homogeneous; that is, essentially the same product is sold by each seller in the particular market;(iv) all economic actors in the market have perfect information about the nature and value of the commodities traded;(v) all the costs of producing the commodity are borne by the producer and all the benefits of a commodity accrue to the consumer – that is, there are no externalities.'[592]

In reality it has been proved that the idea of the 'perfect market' is unrealistic and a free market is not always the best way to allocate resources.[593] When a free market does not

[589] Anthony Ogus, *Regulation: Legal Form and Economic Theory* (Portland Oregon 2004) 46-54
[590] Stephen Munday, *Markets and Market Failure* (Heinemann 2000) 29
[591] Craswell (n 116)
[592] Ramsay, *Rationales for Intervention in the Consumer Marketplac*e (n 236) 15-6
[593] Craswell (n 116)

deliver the optimum allocation of resources it is said to fail: 'market failure exists where the free market fails to deliver economic efficiency'.[594] Market failure (neo-classical rationale) is the central economic rationale for government intervention. Market failure analysis of contract helps decision makers to identify the sources of consumer problems and take the relevant measures to correct them. The role of government is limited to rectifying the market failure.[595] It is part of a modern corrective intervention which is taken to be a restatement of the classical law of contract and the freedom of contract.[596] In the next section the most common market failures will be discussed to explain why it becomes necessary to intervene by regulating the marketplace.

4.1.1.1 Absence of competition

In a competitive market consumer choice is protected by ensuring that the consumer is able to choose freely.[597] Competition has the advantage of making the market function effectively.[598] Munday names two main reasons to explain why monopolies occur in a free market. The first is referred to as the 'economy of scale.' It describes the need for a firm to become large if they are to succeed in minimising their costs. Although, in concept there is nothing wrong with this, the market may not be able to sustain more than few such large firms. The second issue is referred to as 'profit move' where in an effort to maximise profit firms may deliberately try to destroy competition. Destroying competition is one of the most effective ways of maximising profit. It allows them to set their own prices and earn large profits without competition.[599]

The issue of competition failure is not limited to the occurrence of monopoly, but is also related to the extent to which consumers benefit from competition. Indeed, the effectiveness of competition might be reduced in a free market that is open for competition simply because consumers are not benefiting from that competition. 'Switching costs' is a major reason for this. Consumers might find it sometimes too expensive to switch from one producer to another. As a result, they prefer not look to what other competing suppliers offer. Farrell and

[594] Munday (n 590) 29
[595] Ramsay, *Rationales for Intervention in the Consumer Marketplac*e (n 236) 15-6
[596] Brownsword, *Contract Law* (n 3) 88-92
[597] Micheal Waterson 'The Role of Consumers in Competition and Compaction Policy' (2003) 21 International Journal of Industrial Organization 129
[598] Michael Porter 'The Competitive Advantage of Nations'(1990) 68 Harvard business review 68
[599] Munday (n 590) 43

Klemperer identify the concept of 'switching costs' as consisting of exit fees, the cost of learning about alternative terms, and issues such as the paperwork necessary to effect the changes.[600] All of these obstacles and expenses may lead the consumer to choose not to look at what other competing suppliers offer.

4.1.1.2 Barriers to entry

Free entry into the market is said to have a positive effect on the marketplace, yet, there are several different types of barrier to entry that can exist in markets. There is the product differentiation barrier, which reflects the difficulty that faces a trader when trying to introduce a new product to consumers. Consumers naturally need to identify a seller's brand name with the product. This means that it is a significant hurdle for a new entrant to the market to make consumers familiar with her product. Additionally, there are institutional barriers, which are erected by government. These barriers take many forms such as patents, licensing tariffs and quotas. Barriers are usually imposed to market entry in those areas of the market where the risks posed by a particular sector are seen to be great, such as pharmaceuticals. Finally there are economic barriers. One of the most likely obstacles to be faced by a new entrant to the marker is the issue of 'economies of scale'. It means that the cost advantage rises with increased output of a product. This makes it difficult for a new firm to compete with an existing one.[601]

4.1.1.3 Product homogeneity

Homogenous products exist in an industry when products of one firm cannot be distinguished from those of others. Product homogeneity is said to be a characteristic of perfect competition. If products are homogeneous it is easier for a consumer to choose between products, since the only preferential difference is the price. However, traders prefer to distinguish their products from those of others to create consumer loyalty. Product differentiation occurs when consumers can differentiate the products of one firm from the

[600] Joseph Farrell and Paul Klemperer 'Coordination and Lock-In: Competition with Switching Costs and Network Effects' (2007) 3 Handbook of industrial organization 1967
[601] Harold Demsetz 'Barriers to Entry' (1982) 72 The American Economic Review 47

other on a non-price basis. Product differentiation is said to be a feature of monopolistic competition that causes the market to fail.[602]

4.1.1.4 Information deficits

The analysis of information asymmetries is a vital aspect of consumer discussion. It has been regarded as 'the key analytical basis for early consumer protection law'.[603] Indeed, information deficits are a justificatory factor in all consumer protection measures. Information is held to empower consumers to make informed choices. By contrast, information failure is likely to significantly injure a consumer's position.[604] Three types of information have been identified, which can assist consumers in making an informed choice. These three types of information are the price of the product and other complementary and substitute products, the quality of the product and other complementary and substitute products, and the terms of trade.[605]

Consumers usually obtain information through search or experience. Sellers also, often have an incentive to provide consumers with information to distinguish their products from other products. In addition, warranties, service contracts and producers reputation provide consumers with a 'signal' of reliability.[606]

Nonetheless, the information one might expect to be supplied by the market is in all probably not perfect. Traders are not likely to provide consumers with the information they need to make an informed decision. Traders are likely to disclose information that promotes their goods but not that which might render their products unfavourable. A trader, for instance, is unlikely to provide the information that her products are outperformed in a material way by a substitute product. Traders often appear reluctant to engage in comparative advertising out of the fear of reprisals and because comparative information may lead to an overall reduction in

[602] Bruce Lindeman, *Microeconomics* (Business & Economics 2002) 86
[603] Gillian Hadfield, Robert Howse and Michael Trebilcock 'Information-Based Principles for Rethinking Consumer Protection Policy' (1998) 21 Journal of Consumer Policy 131
[604] See Alan Schwartz and Louis Wilde 'Intervening in Markets on the Basis of Imperfect Information: A Legal and Economic Analysis' (1979) 127 University of Pennsylvania Law Review 630; Howard Beales, Richard Craswell and Steven Salop 'The Efficient Regulation of Consumer Information' (1981) 24 The Journal of Law & Economics 491; Robert Reich 'Toward a New Consumer Protection'(1979) 128 University of Pennsylvania Law Review 1; Hadfield, Howse, and Trebilcock (n 735)
[605] Office of Fair Trading, *Consumer Detriment under Conditions of Imperfect Information* (1997) 38
[606] Ramsay, *Rationales for Intervention in the Consumer Marketplac*e (n 236) 26

demand for the type of product.[607]An idea developed by Akerlof suggests that traders are more willing to disclose some types of information over others. Although price is one form of information that traders are likely to disclose, they may deliberately hide some extra costs.[608] Information such as quality tends to be more costly to supply in comparison to price since it is to some extent subjective, especially in the case of technology or professional services. Consequently, traders are not likely to supply information at the cost of greater expense.[609]

The issue of information failure is not just limited to the disclosure of information; it is also linked to the extent to which consumers are able to process information.[610] Traders may take advantage of the weakness of consumers by making information complicated for them to understand.[611] This is described by Trebilcock and Elliott in the following manner: 'Information failure occurs where a transactor either lacks information about a proposed arrangement or lacks the ability to process it […] By processing information we refer both to the comprehension of complex legal and business facts and to the sorting and sifting of alternatives that people perform in an effort to decide which arrangement will best satisfy their utility functions. The lack of an ability to process information is in a sense a form of incapacity as some people lack the intellectual or experiential resources needed to synthesise and make sense of information.'[612]

4.1.1.5 Externalities

An externality exists where a third party is affected by the actions of others. When an activity imposes a cause on a third party that is not reflected in the price, it is a form of externality.[613] It is mostly invoked in relation to the polluter effect of products on the environment; the purchaser of the product does not pay for its true social cost. The concept of externalities may

[607] Office of Fair Trading (n 605) 38
[608] George Akerlof 'The Market for "Lemons": Qualitative Uncertainty and the Market Mechanism'(1970) 84 Quarterly Journal of Economics 488
[609] Ogus (n 589) 41
[610] Bettina Wendlandt 'EC Directives for Self-Employed Commercial Agents and on Time-Sharing Apples, Orange and the Core of the Information Overload Problem' in Geraint Howells, Andre Janssen and Reiner Schulze (eds), *Information Rights and Obligations: A Challenge for Party Autonomy and Transactional Fairness* (2nd edn Routledge, 2016) 34-43
[611] Marcel Cohen 'Insights into Consumer Confusion' (1999) 6 Journal of Consumer Policy 210
[612] Michael Trebilcock and Steven Elliott 'The Scope and Limits of Legal Paternalism' in Peter Benson (eds), *The Theory of Contract Law* (CUP 2001) 62
[613] Munday (n 590) 29

have a widespread effect leading to considerable complexities for policy makers that extend beyond the simple example of the polluter effect.[614]

It is sufficient to say that externalities exist where harm or benefit results from an activity that was not taken into account by the market price. However, the requirement that there are no externalities is almost impossible to achieve. In practice, third parties are sometimes affected by decisions made by others within the market framework. For example, if a person buys a cheap car, this imposes additional costs in terms of the danger that it poses to the environment (third parties).[615]

4.1.2 Consumer law and social justice

Consumer protection measures, in addition to economic rationales, are linked to social justice concerns.[616] It is a mistake to assume that consumer regulation is only a matter of counting costs and benefits. Intervention into the freedom of contract in consumer relations is, according to Howells and Weatherill, part of a wider judicial and legislative intervention directed at social justice. Intervention into contractual freedom is made for this purpose. The regulation of consumer relations is deemed to be capable of supporting social justice by emphasising general social concerns, rooted in equality and the protection of human dignity. It ignores the preeminent status of the market as an organising mechanism for society, which reflects the belief that 'there is a core clutch of rights the protection of which transcends the rhetoric of economic efficiency.'[617] There are three main elements to consider under the heading of social justice: (1) distributive justice; (2) paternalism; and (3) community values.[618]

4.1.2.1 Distributive justice

Consumer law and policy 'may be viewed as general attempt to redistribute power and resources (e.g. rights) from producers to consumers, and changing producer markets to

[614] See Ogus (n 589) 35-8
[615] Peter Cartwright, *Consumer Protection and the Criminal Law: Theory, and Policy in the UK* (CUP 2004) 25-7
[616] Mary Donnelly and Fidelma White, *Consumer Law: Rights and Regulation* (Thomson Round Hall 2014) 7
[617] Howells and Weatherill (n 5) 32-3
[618] Ogus (n 589) 46-54

consumer markets.'[619] Rules aimed at lowering prices and those that adopt policies of loss sharing and shifting risk from consumer to producer, are inspired by distribution motives.[620] Distributional motives of consumer regulation afford more control to the law of contract rather than being reliant only on the tax and welfare system.[621]

The concept of distributive justice was explained by Aristotle and his most famous commentator Aquinas. Aristotle in the fifth book of the *Nicomachean Ethics*, defines distributive justice (*dianemetikon dikaion*) as 'the distribution of honour or money or any other things divisible among those who share in the regime'.[622] More recently distributive justice has typically been invoked when looking at social approaches to regulation. It is associated with ideological movements such as socialism and liberalism.[623] Various conceptions of distributional justice have been developed by socialist thinkers.[624] Yet, they generally agree, according to Ogus, on the general theme of the pursuit of equality through the abolition of advantages conferred by power, privilege and wealth. In addition, it is concerned with ensuring individuals' access to resources that enable them to participate equally and fully in the community.[625]

Distributional concepts could influence regulatory policy either directly or indirectly. In cases where intervention is justified primarily on grounds other than fair distribution (e.g. market failure), it is achieved indirectly by predicting the distributional effect of the proposed measures and adopting a form of regulation that is consistent with fairness and justice.[626] Distribution between individuals on the basis of income and wealth (from richer to poorer) is the most direct and the most frequently encountered distributional policy.[627] Distribution is, therefore, usually, from one group to another, such as from the affluent to the poor, or the strong to the weak, mostly based on wealth and income.[628]

However, on what grounds ought we to distribute from traders to consumers? It is suggested that the transfer of power in consumer protection measures may be effected on the basis that

[619] Ramsay, *Consumer Law* (n 4) 70-80
[620] Ibid
[621] Howells and Weatherill (n 5) 14
[622] Höffe Otfried (ed) and David Fernbach (trs), *Aristotle's Nicomachean Ethics (*Brill 2010) 125-48
[623] Cartwright, *Consumer Protection* (n 615) 28
[624] See Victor George and Paul Wilding, *Idology and Social Welfare* (Harvester Wheatsheaf 1995) 44-68
[625] Ogus (n 589) 46-54
[626] Joseph Stiglitz and others, *Economic Role of the State* (Basil Blackwell 1989) 28-30
[627] Ogus (n 589) 46-54
[628] Cartwright, *Consumer Protection* (n 615) 28

there is an inequality of bargaining powers between traders and consumers.[629] Recently, many studies have focused on poverty and the vulnerability of consumers to explain why there may be a wish to distribute to them.[630]

4.1.2.1.1 The poor and disadvantaged

There is a general assumption that consumers are poorer than traders. Despite this poor consumers are rarely named as intended beneficiaries of legislation; the issue of poverty, as Ramasy observes, has always been an undercurrent in consumer protection.[631] Consumer policy might therefore be understood as part of a general policy of 'positive welfare' designed to establish minimum standards in the marketplace, provide equal access in consumption opportunities and enforce rights.[632] In addition to the poor Burden identifies seven socially vulnerable groups which are likely to be socially excluded and vulnerable. These are the elderly, the young, the unemployed, those with a limiting, long-standing illness, those in low-income households, members of ethnic minorities, and those with no formal educational qualifications.[633]

A study published by the National Consumer Council in the United Kingdom, on the issue of low-income consumers indicates that 'the poor pay more or get less', and this phenomenon is attributed to the following causes:

(1) The way the payment is made because cash payment is more expensive; (2) individuals who cannot afford to buy in bulk or weekly shop could pay more; (3) limited transportation or disability could limit the consumer choice if she cannot shop around; (4) markets in some cases, such as credit, may not be competitive for low income consumers. In other situations, such as financial advice, regularity barriers could form an obstacle in the way of innovation.[634] Arguably, limited access to the internet is a major reason why the poor consumer pays more because the internet today has become a major source of comparative shipping.

[629] Ramsay, Consumer Law (n 4) 70-80
[630] Burden (n 117); Cartwright 'Understanding and Protecting Vulnerable Financial Consumers' (n 117)
[631] Ramsay, *Consumer Law* (n 4) 70-80
[632] Ibid
[633] Burden (n 117)
[634] National Consumer Council, *Why do the poor pay more ...?* (NCC 2004)

The issue is dealt with by encouraging the private sector to supply essentials through the privatisation of national industries and the introduction of competition. However, the evidence shows that competition is not serving the needs of most of these disadvantaged groups. Although it can help bring prices down, providers use marketing techniques to choose the most profitable consumers. As a result, some socio-economic groups could benefit less from price competition than others.[635]

This is because 'disadvantaged consumers are excluded either because they lack the skills to negotiate complex markets and systems, they are too costly to serve or they lack purchasing power'.[636] In other words, they lack the skills and confidence to obtain the services they need. Furthermore, low income consumers are argued to be less rational in their market behaviour and may be less able to process market information or voice complaint about defective products, which make them even more vulnerable.[637] Thus, it is said that market-based exclusion is the main issue to be tackled in order to reduce or eliminate poverty and social exclusion.[638]

4.1.2.1.2 Procedural vulnerability

A consumer may not be considered socially vulnerable as he could be well educated and well off financially, but still be in a weak position in relation to the process leading to the conclusion of the contract[639], which we regard here as procedural vulnerability. Many recent studies have focused on the vulnerability of consumers to explain why someone wishes to distribute to them. Burden identifies two reasons why the consumer may be vulnerable: difficulty in obtaining or dealing with information, and greater loss being suffered as a result of inappropriate decisions.[640] Cartwright proposes a taxonomy of vulnerability that he claims helps to identify what makes consumers particularly vulnerable. He suggests that it is useful to consider the relation between vulnerability and the way the market operates in classical theory in order to understand vulnerability. He categories vulnerability as following: (1) informational vulnerability; (2) redress vulnerability; (3) supply vulnerability; (4) pressure

[635] Ibid
[636] Ibid
[637] Arthur Best and Alan Andreasen 'Consumer Response to Unsatisfactory Purchases: A Survey of Perceiving Defects, Voicing Complaints and Obtaining Redress' (1977) 11 Law & Society Review 701
[638] Ramsay, *Consumer Law* (n 4) 70-80
[639] Ramsay, *Rationales for Intervention in the Consumer Marketplac*e (n 236) 50
[640] Burden (n 117)

vulnerability; and (5) impact vulnerability. These categories will next be invoked to illustrate how the consumer may be procedurally vulnerable.[641]

A. Informational vulnerability

The importance of the procedural stage is its effect on the consumer's expectations of the contract and the consumer's ability to protect her interests in relation to the substance terms of the agreement. One issue which may leave the consumer vulnerable at the procedural level is ignorance of the relevant information.[642] Indeed, a consumer's consent might well not be informed by knowledge of the terms of the contract or she may be unaware of the risks inherent in the substance terms. She consequently may be ignorant of the risk she might be exposed to and unaware of the need to negotiate better terms.[643]

Information deficits do not have the same effect on every consumer. Some consumers could have a detailed background knowledge as to the terms used and how they are typically interpreted and applied. Nevertheless, in the general course of things consumers do not tend to have experience as to the types of standard terms used or in relation to their interpretation and application in practice by traders. Legal jargon such as conditions and warranties may be too complex for a normal person to understand by themselves. On the other hand, the economic value of transactions in not likely to be high enough for them to seek technical or legal advice.[644]

Consumers may be ill informed because of the low level of transparency in the market; standard form contracts are often badly structured and some important terms tend to be put in small print. Also, there might be pre-existing signals that override the contract terms; advertising, for example, could be more powerful than the formal terms in building consumer understanding. It has the ability to distract consumers from formal terms and conditions to in the belief that formal terms are not important in practice.[645] Some traders may intend to exclude some important information from marketing. Furthermore, the basic expectations of

[641] Cartwright 'Understanding and Protecting Vulnerable Financial Consumers' (n 117)
[642] Chris Willett, *Fairness in Consumer Contracts: The Case of Unfair Terms* (Ashgate 2007) 37-47
[643] Thomas Wilhelmsson 'Cooperation and Competition Regarding Standard Contract Terms in Consumer Contracts' (2006) 17 European Business Law Review 49
[644] Willett, *Fairness in Consumer Contracts* (n 642) 37-47
[645] See Ian Ramsay, *Advertising, Culture and Law* (Sweet & Maxwell 1996); Debera Ringold 'Criticisms of Target Marketing: Process or Product?' (1995) 38 American Behavioral Scientist 578

consumers may be reflected by performance in the market. Thus, a consumer may not pay attention to formal terms because he is assuming that they will have little effect in practice.[646]

In addition to a lack of informed consent the absence of information has the effect of preventing the consumer from comparing terms offered by different traders. This consequently undermines competition in the market because if the terms are not transparent and consumers cannot understand and compare the offers of different traders, there will be no incentive for traders to compete with one another. This has a direct effect on the level of choice and substantive fairness of contacts.[647]

B. Redress Vulnerability

Closely related to informational vulnerability is redress vulnerability. A lack of informed consent could prevent consumers from benefiting from terms which could be used to their advantage and because they are unaware of this they are also not able to benefit if a dispute arises. Consumers who are unaware of their legal rights are prevented from securing redress, simply because they do not know about the existence of those rights.[648] Typically, the more complicated the legal procedure is the less likely consumers are to benefit from it. This is evident from the fact that consumer cases are rarely brought to court in the UK. Consumers might think that the value of a transaction is not worth the hazard of going to court or doubt that they will benefit from taking the dispute further.

C. Supply vulnerability

Consumers might be well informed and aware of the legal consequences of the contract but still procedurally vulnerable due to lack of choice. The trader in question is likely to refuse the consumer's offer to renegotiate a standard form contact, simply because it is the purpose of having standard terms to avoid negotiations. Besides, it is not efficient to engage in negotiation with every consumer.[649] There may also be no alternative package offered anywhere else.

[646] Willett, *Fairness in Consumer Contracts* (n 642) 37-47
[647] Ibid
[648] Cartwright 'Understanding and Protecting Vulnerable Financial Consumers' (n 117)
[649] Beale 'The Inequality of Bargaining Power' (n 233)

As a result, a consumer is not well placed to refuse entering a given contract. There is one simple explanation for this; she has a need that 'must be satisfied'.[650] It does not have to be a need in the sense of absolute necessity it is enough for it to be necessary in the type of society in which she lives.[651] Supply vulnerability becomes even more problematic in relation to products essential to health and wellbeing. Nevertheless, even if a product is not essential, consumers can still suffer supply vulnerability due to lack of choice.[652]

D. Pressure vulnerability

Even if bargaining does occur, the consumer is not likely to be in good bargaining position to get what she wants. The notion of inequality of bargaining power is an impartment factor in consumer protection rationales. In fact it has been invoked frequently since the 1960s as the major rationale for consumer protection.[653] Judges have made reference to the supposed inequality of bargaining power[654] and statutory regimes make the issue relevant.[655] As explained in chapter two, the inequality of bargaining power between parties has been regarded as the separation ground between consumer and commercial contract. Parties to commercial contracts tend to be of an equal bargaining position. By contrast, parties to consumer relations negotiate from unequal bargaining positions.[656] However, the meaning of 'inequality of bargaining power' is not clearly defined.

According to Ramsay, inequality of bargaining power generally represents a disparity of power between the producer and consumer; this takes the form of a disparity of bargaining power, of knowledge and resources between the two sides.[657] It may also result from 'a feeling of inferiority or susceptibility.'[658] The discussion of bargaining power is linked to either market power or lack of bargaining sophistication.[659] Brownsword makes the point that the issue of inequality of bargaining power cannot be regarded in the abstract; it needs to be

[650] Cartwright 'Understanding and Protecting Vulnerable Financial Consumers' (n 117)
[651] Willett, *Fairness in Consumer Contracts* (n 642) 37-47
[652] Cartwright 'Understanding and Protecting Vulnerable Financial Consumers' (n 117)
[653] Harvey and Parry (n 236) 13; Howells and Weatherill (n 5) 6; Ramsay, *Rationales for Intervention in the Consumer Marketplac*e (n 236) 50
[654] See reference to relevant cases in the dissection on the doctrine of inequality of bargaining power under section 2.3.3
[655] For example the Unfair Contract Terms Act 1977 schedule 2 para (a)
[656] See the dissection on the doctrine of inequality of bargaining powers under section 2.3.3
[657] Ramsay, *Rationales for Intervention in the Consumer Marketplac*e (n 236) 50
[658] Cartwright 'Understanding and Protecting Vulnerable Financial Consumers' (n 117)
[659] Law Commission, *Unfair Terms in Contracts: A Joint Consultation* Paper (Law Com No 166, 2002) para 4.102

regarded in relation to standard form contracts or to the other party.[660] Thus, it is appropriate to evaluate the bargaining power of the consumer as relative to the trader in the following ways.

The bargaining power of consumers and traders is dependent on their relative importance or what Brownsword regards as 'the need to deal.'[661] The importance that the trader places on the custom of a particular costumer is affected by many factors. These include: the overall situation of sales; the chance that the relevant consumer is going to make another purchase; the value of the product or services in question; the proportion that the contract represents in the supplier's overall turnover. However, monopolist traders are not likely to be concerned with the custom of a consumer as he is in any event guaranteed this custom. Market power is also determined by the consumer's 'need to deal'. In other words, it is affected by the degree to which the consumer needs to obtain the offered goods and services (related to supply vulnerability) and how quickly they are needed.[662]

Furthermore, bargaining power and the consumer's ability to use it for her benefit changes according to a number of factors. To make this clear we can assume a typical situation where a consumer is in average need for a product or service and has the average time to obtain the deal; where there is a fairly large number of consumers in the market, and the cost of each product and service is a small proportion of the overall turnover of the trader; and where the consumer is relatively unimportant to the seller or supplier. As a result, the consumer has little power to negotiate terms for her benefit.[663] Consumer vulnerability usually varies from one sector to another. For instance, consumer credit is an area where consumers are particularly vulnerable to pressure especially when a consumer is indebted. In financial services, consumers can be put under pressure by providers who are frequently in a position of power. Consumers might be under pressure because of their individual characteristics, temporary individual circumstances or physical situations. In addition, they might be under pressure because of the way the seller acts or as a result of being in financial difficulties.[664]

[660] Brownsword, *Contract Law* (n 3) 79-85
[661] Ibid
[662] Willett, *Fairness in Consumer Contracts* (n 642) 37-47
[663] Ibid
[664] Cartwright 'Understanding and Protecting Vulnerable Financial Consumers' (n 117)

Additionally, the matter of bargaining sophistication is related to the knowledge of the relative bargaining powers of the parties. The expertise of the parties in understanding the terms and the value of products and negotiation skills can determine the strength of the parties during the negotiation phase. The issue here is typically the limited skills and experience of the consumer which affects his ability to bargain thoughtfully and skilfully. Assuming that the trader has the upper hand in all circumstances is not accurate because consumers happen sometimes to be very skilled. Nevertheless, in a general course of things based on the average consumer, it is difficult for them to match a supplier in expertise especially in technical knowledge, for example in relation to financial services or technology. Traders are assumed to be professionals who are trained and/or practised at negotiation, whereas a consumer is a normal person who contracts to sustain and enhance the private sphere of life.[665]

A final point that affects bargaining power is 'resources that can be called upon to support the bargaining process'. Again in the normal course of things, consumers have fewer resources to support their negotiation position. Negotiation may require an investment of time or money and traders, both of which traders tend to have more to a greater degree, which means they can negotiate from a more powerful position.[666]

E. Impact Vulnerability

An average consumer may be vulnerable because of the way they are affected by the substance of the contract. Consumers enter into contracts in order to sustain and enhance the private sphere of life rather than to make profit. The terms of these contracts therefore affect the physical safety, propriety, economic and social interests arising in, and affecting, the private sphere life. Therefore, the damaging effect of contractual terms would typically have a more serious effect on a consumer than on a commercial entity.[667] This is what Burden meant by saying that consumers suffer greater loss as a result of inappropriate decisions.[668]

A term which states that the trader is not liable when the product causes injury or death to the consumer would put the safety of the consumer in danger. By contrast a similar term simply

[665] Willett, *Fairness in Consumer Contracts* (n 642) 37-47
[666] Ibid
[667] Ibid
[668] Burden (n 117)

would not have the same impact upon a business entity since it cannot itself be physically injured. Even when the terms exclude liability for economic losses these are likely to have a more harmful effect on private consumers than a business entity. Commercial entities are generally in a better position to insure against such losses and can cope better with economic losses, for example by adjusting prices and wages. Therefore, the loss for business entities is in most cases of money or monetary value, whereas, losses affecting the economic interests of consumers may indirectly effect their social interests.[669]

4.1.2.1.3 Targeting the neediest

One would assume that in order to achieve satisfactory distribution outcomes the system needs to actively target the neediest consumers within society (the poorest or most vulnerable). But it is indeed arguable that improving the position of all consumers is not likely to distribute to the neediest consumer groups. According to Wilhelmsson, consumer laws usually focus on information regulation and individual claims that tend to benefit affluent middle-class consumers, which leads consumer law to conceal and even reproduce injustice.[670] Therefore, examining the distributive effect of consumer polices among groups of consumers and producers to assist policy makers when deciding from whom and to whom, to distribute, is thought to be preferable sometimes.[671]

Nevertheless, the efficiency of such analysis is questionable. Willett explains that there is a serious limitation on the agenda to distribute resources to those who are most in need. Firstly, this is because the law of contract can only play a supporting factor in this regard. Other factors such as taxes and social security systems serve distribution goals better. Secondly, in the context of contractual relationships, Willett doubts that the measures employed, such as regulation of unfair terms would provide systematic protection that serves the need of vulnerable parties. More importantly, distinguishing consumers who are vulnerable enough to be protected is the most difficult obstacle.[672]

Willett's argument is valid in the sense that the distribution function of the law of contract is limited for many reasons. Systematic protection targeted to the neediest is not likely to

[669] John Wightman, *Contract: A Critical Commentary* (Pluto Press1996) 98-9
[670] Thomas Wilhelmsson 'Consumer law and social justice' (1997) Consumer Law in the Global Economy 217
[671] Ramsay, *Rationales for Intervention in the Consumer Marketplac*e (n 236) 13
[672] Willett, *Fairness in Consumer Contracts* (n 642) 377-9

achieve accurate results. There is no guarantee that certain goods are going to be bought only by the neediest. Grocery shopping for example is an activity that all consumers share no matter how affluent they are. Nevertheless, the distributional function of the law of contract should not undermined just because it is not certain whether it will benefit the neediest or not. The distributive function of law relating to the consumer is surely not alone going to cure social issues such as poverty. However, it could definitely release pressure from social security systems such as taxation. A consumer regime structured around a distributive motive might not be able to ensure that distribution is optimally achieved, but it could definitely secure a friendly environment for consumers who tend to bargain from a vulnerable position. Such a policy would benefit the largest segment of consumers rather than a small group. As a result, it should increase the level of wealth and welfare in society more generally.

4.1.2.2 Paternalism

The doctrine of paternalism is assumed to be a powerful motivation of consumer regulation.[673] It constitutes an important concept in dissections of consumer policy.[674] Dworkin describes paternalism as 'the interference with a person's liberty of action justified by reasons referring exclusively to the welfare, good, happiness, needs, interests or values of the person being coerced.'[675] In general, any legal rule that prohibits an action on the ground that would be contrary to the actor's own welfare is paternalistic. It protects people from themselves by limiting their capacity to make enforceable agreements of various kinds. It includes those kinds of legal rule that 'prohibit an action on the ground that it would be contrary to the actor's own welfare.' For example, prohibitions against suicide, the requirement that motorcyclists wear helmets, laws that restrict the use of drugs or make education compulsory are all paternalistic.[676]

A state that intervenes into a party's autonomy to undertake distributive or commutative justice is not acting paternalistically. It is so rather 'when it circumscribes or influences the choice a citizen would otherwise make because it believes the citizen's choice is wrong,

[673] Ogus (n 589) 46-54
[674] Ramsay, *Consumer Law* (n 4) 81-3
[675] Gerald Dworkin, 'Paternalism' in Rolf Sartorius (eds), *Paternalism* (U of Minnesota Press1983) 20
[676] Anthony Kronman 'Paternalism and the Law of Contracts' (1983) 92 Yale Law Journal763

whether through a want of prudence or of some other virtue.'[677] A measure is taken to be paternalist rather than distributive if the individual who is supposed to benefit from it does not agree with it.[678] In other words, paternalism is based on a lack of trust in the consumers' judgment and rational decisions.

In the context of consumer relations paternalism is usually associated with areas where consumers' mistakes are likely to cause serious consequences, or if the long term interests of consumers need to be protected more than the short term ones.[679] For example the laws related to the requirement of quality in goods and product safety are examples of paternalistic rules because they deny the consumer's choice regarding the degree and kind of risk he is willing to accept.[680] Also, the 'cooling-off' period imposed in many consumer transactions is thought to be a paternalistic measure.[681]

The basis of paternalism is, however, contradicts with the notion of freedom of contract. It contradicts the basic idea of freedom of contract that people can be trusted to look after themselves, and to decide upon their own interests. It is argued that in many situations the consumer may feel that he does not need or want the protection imposed on him. This could be especially true if the protection measure is associated with extra charges carried by the consumer. It is argued that the cost of protection, whether it is a cost of insurance or any other cost, is eventually paid by the consumer. The private right of the consumer to choose how he wishes to spend his money is then violated.[682]

On the other hand, there are those who try to justify paternalism both from an individualist perspective and an anti-individualist perspective.[683] Those who base their argument on individualist grounds, refer to what we could describe as 'rational paternalism'. It is based on the assumption that individuals in some situations may want to be protected from

[677] James Gordley 'Morality and Contract: The Question of Paternalism' (2007) 48 William & Mary Law Review 1733
[678] Duncan Kennedy 'Distributive and Paternalist Motives in Contract and Tort Law, with Special Reference to Compulsory Terms and unequal Bargaining Power' (1982) 41 Maryland Law Review 563
[679] Ramsay, *Consumer Law* (n 4) 81-3
[680] Cartwright, *Consumer Protection* (n 615) 33-8
[681] Kronman 'Paternalism' (n 676)
[682] Atiyah 'Freedom of Contract and the New Right' (n 112) 355-8
[683] Ogus (n 589) 46-54

themselves.[684] Individuals in some situations, particularly where decision making is difficult, may rationally delegate choices to others.[685] This argument was developed in the area of problematic decision making where it is believed that individuals make irrational choices.[686] There is empirical evidence generated by psychological research which shows that people commonly underestimate personal risk and tend to prefer current gratification to postponed gratification.[687]

At its root this argument is based on the idea that there is a difference between real and apparent desire in individuals. Paternalistic rules give effect to the real desire over the apparent.[688] The individualist justification of paternalism is criticised as it makes truth claims about what Kleining regards as at best inferred or as giving effect to fictional desires with a different character over the actual ones.[689]

On the other hand, the justifications of paternalism on anti-individualist grounds deny the primacy of individuals' desire. They view paternalism as both compassionate and humanitarian as an attempt to overcome the alienation of individualism and to show sympathy for others.[690] It is argued that in some situations experts within society know better than individuals what serves their interests and should determine outcomes accordingly.[691] It is also assumed that people, especially when young, lack the ability to make rational decisions. Intervention is then required to protect the capacity for self development.[692]

Ogus criticises the anti-individualist perspective as being unclear and uncertain. It lacks clear guidelines as to when intervention is appropriate. He suggests that paternalist regulation should be strictly restricted to certain activities where it is assumed that many individuals are likely to make unwise decisions. In order to avoid depriving choice in those who are well

[684] Brian Barry, *Political Argument: A Reissue with New Introduction* (University of California Press 1965) 226-7
[685] John Kleining, *Paternalism* (Rowman & Allanheld 1983) 55-67
[686] Dworkin (n 675) 29
[687] See studies in Thomas Jackson 'The Fresh-Start Policy in Bankruptcy Law' (1985) 98 The Harvard Law Review Association 1393
[688] Ogus (n 589) 46-54
[689] Kleining (n 685) 59
[690] Kennedy 'Distributive and Paternalist' (n 678)
[691] Kleining (n 685) 567-73
[692] Kennedy 'Distributive and Paternalist' (n 678)

equipped in the relevant area, the decision maker needs to be precise in targeting the relevant laws.[693]

4.1.2.3 Community values

There are many other non-economic values that could be invoked to justify intervention into the market order, including the set of public interest goals described as 'community values'. People in society may not be self-concerned only but are likely also to care about society as whole. They care about improving the social, intellectual and physical environment in which they live. Here the emphasis is on providing opportunities for individuals to participate in decision making and to develop the community concept of 'good'.[694]

In the context of consumer protection 'community values' could be understood to refer to values such as honesty, fair-dealing and loss-sharing.[695] It is arguable that rational self-interested behaviour associated with the market can only flourish where mutual trust and confidence exist.[696] As Stewart and Sunstein put it, consumer policy is not simply a 'matter of counting economic costs and benefits, or of defending private entitlements, but part of a continuing process of deciding what sort of a society we shall be - how risk averse, how hospitable to entrepreneurial change, how solicitous of the vulnerable, and how willing to allocate resources through markets or public control.'[697]

Consumer measures are believed to contribute to developing social norms of trust and confidence to improve the functioning of the market and the consumers' entitlement to rights. Many consumer protection measures within financial services are justified on the basis of trust and confidence stimulation along with the promotion of public awareness and ensuring market confidence. The Commission also partly appeals to this value in promoting the harmonisation programme for consumer law in the EU.[698]

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[693] Ogus (n 589) 46-54
[694] Richard Stewart 'Regulation in a Liberal State: The Role of Non-Commodity Values' (1983) 92 The Yale Law Journal 1537
[695] Richard Stewart and Cass Sunstein 'Public Programs and Private Rights' (1982) 95 Harvard Law Review 1193
[696] Ramsay, *Consumer Law* (n 4) 81-3
[697] Stewart and Sunstein (n 695)
[698] Ramsay, *Consumer Law* (n 4) 81-3

In addition, trust and similar values are believed to be economically efficient as they act as an important lubricant in the social system. Indeed, they enable people to produce more by saving them significant effort. Arrow claims that the government is better than the private sector in realising social feelings, trust and empathy, but within limits.[699]

Care for the community good should include not only the current generation but also future generations through sustainable consumption. Indeed, sustainable consumption has been recognised in recent years as an aspect of consumer policy and included in the United Nations Guidelines on consumer protection. Moreover, individuals are expected to act as reflective consumers and consider the impact their decisions have on the environment. Ramsay notes that 'economists conceptualise environmental effects as externality (third party effect) that is not costed in the price of consumer products.'[700]

4.2 Consumer policy in perspective

Although it is almost generally agreed that the consumer needs protection, the question of *why* the consumer should be protected is far from settled. This is probably due to the fact that fairness or justice is a relative concept. What might seem fair for someone in a particular situation might not be fair for someone else in the same situation at a different time or even at the same time. One might think that contractual justice can only be achieved when individuals can rely on the legal system to ensure that they get a fair and equitable deal out of their contracts. For others justice should be achieved by giving individuals the right to freely negotiate and regulate their contracts. While the former would call for closely regulated rules that guide the consumer in all contractual aspects, the latter would call for consumer protection that enhanced the informed will of consumer. In other words, the latter would call for consumer policy that rectifies market failure and encourages efficiency rather than the substantive fairness of balance in contractual relations.

On one hand, from a social justice perspective, consumer protection contributes to achieving fair and just distribution of resources in the society. It serves general social concerns of protecting equity and human dignity. On the other hand, economic analysis supports

[699] Kenneth Arrow, *The Limits of Organization* (Northern& Company 1974) 23
[700] Ramsay, *Consumer Law* (n 4) 81-3

consumer protection because it contributes to achieving an optimal allocation of resources. The two goals are likely to produce contradictory outcomes on many occasions. Indeed a rule of economic efficiency might not be just socially, and vice versa. The challenge arises when this contradiction arises. For example, the disclosure of certain information might be regarded as a basic right of the consumer in a democratic society, but at the same time will not be efficient from an economic perspective because some information might be expensive to supply. The choice between the two is a matter of general policy, which needs to be set by the policy maker.

4.2.1 Setting out the policy

The issue of setting the level of consumer protection is related to the general policy of the legal system. Two essential values are to be acknowledged when setting consumer policy. Among these are the ideological basis of the law and the concept of justice as understood by society. The two factors should control the level of fairness encouraged and how much space is left for contractual autonomy after protecting the consumer. The policy maker's decision must therefore be guided by these two factors. The policy maker ought to decide what level of unfairness is to be tolerated for the overall sustainability of contracts and efficiency of the market and vice versa.

In this regard it is argued that the question of how to balance the aims of distribution and those of market efficiency is a matter of ideology. To libertarians efficiency is not to be sacrificed whereas to others minimum standards of justice should be achieved by regulation regardless of the economic cost.[701] According to Willett, the level of justice is closely associated with the level of welfarism that is facilitated. Justice is associated with certain values of the Welfare State in that protecting the social and economic interests of weaker parties in the context of economic exchange is important to maintain a minimum level of well being.[702]

[701] Harold Laski, *A Grammar of Polices* (Routledge 2014) 142-70; Charles Reich 'The new property' (1964) 73 The Yale Law Journal 733
[702] Willett, *Fairness in Consumer Contracts* (n 642) 377-9

There are generally two identified types of welfare in contract regulation: minimal and maximal.[703] Maximum welfarism seeks to protect weaker parties within the contractual relationship (procedurally vulnerable consumers). An approach that seeks to address this issue can be viewed as maximally welfarist. In the case of maximum welfarism, it does not matter whether the party is weaker within the overall social order or not. A consumer is then accordingly protected even if he is well educated and well-off financially. Protection is made on the grounds that these factors notwithstanding the consumer is weak in terms of protecting himself procedurally.[704]

By contrast, minimal welfarism is focused on the overall position of the parties in the social order and its agenda is to distribute to the neediest within the society. It, therefore, favours the weakest consumers within the overall social order. It consists of fewer standards of protection or fairness, that would not protect consumers who are able to protect themselves procedurally and are better able then most to bear the consequences.[705] However, whether such policy is practically viable is questionable. We discussed earlier the difficulty of distinguishing the neediest or most vulnerable consumers. Not being able to identify these groups by the consumer policy should not prevent the consumer policy. Instead it should seek to serve the largest group of people and thus aim for maximal welfarism.

The law of contract, particularly in relation to the consumer, has indeed a role to play in securing fairness and the distribution of resources in society. This role might be limited and uncertain in terms of whether or not it will directly benefit the neediest groups. Nevertheless, it definitely relieves the pressure on the tax and transfer system, and also reduces their side-effects. It creates a friendly environment for consumers to contract more confidently. Consumers who benefit from protection might not always be the neediest within the society, but studies have shown that most consumers tend to be vulnerable regardless of their level of education and status within society. This is because average consumers tend to be procedurally vulnerable compared to suppliers.[706] Furthermore, they have been shown to be irrational by social studies.[707]

[703] See Roger Brwnsword, Geraint Howells and Thomas Wilhelmsson 'Between Market and Welfare' in Chris Willett (eds), *Aspects of Fairness in Contract* (Blackstone 1996) 50-4
[704] Willett, *Fairness in Consumer Contracts* (n 642) 377-9
[705] Ibid 378-81
[706] See section 4.1.2.1.2
[707] See sections 4.1.2.2 and 4.2

Therefore, when consumer policy is set in the abstract it does not mean that it is unable to meet its distributive means. On the contrary, it might mean that a larger segment of consumers will benefit from the distribution and thus the level of welfarism will increase. It needs to be kept in mind that when the distribution function of the law of contract is suggested it is not understood to function independently. The role of distribution held by the law of contract, although very important, cannot achieve optimal distribution alone. Social security programmes are needed to complement the distribution resulting from the law of contract.

Outside of this scheme there is still the argument that consumer protection policy is not achieving its objectives. In other words, it neither achieves economic efficiency nor distribution. It is claimed that mandating consumer protection is to violate contract autonomy for a protection that the consumer might not want or cannot afford. Mandatory consumer protection comes at a price. It involves changing seller behaviour, for instance, sellers do not tend to disclose unfavourable information about their product. This changing of seller behaviour would raise their costs. The cost is likely to eventually be passed to the consumer in the form of higher prices. Here comes the issue of heterogeneity of consumers. Their priorities and preferences differ depending on their situations and indeed according to their budgets. Some may prefer to pay for a better quality of goods, better contractual terms and informed choices. Others prefer to save these additional costs, meaning that some people waive warranty programmes, buy non-refundable items, choose slower delivery options or decline to insure. The same people will likely choose not to have mandatory consumer protection for the same reason. As a result, it is suggested that consumer protection should become optional rather that mandatory.[708]

Let us assume for the sake of the argument that consumer protection is to be 'optional' rather than 'mandatory'. How this would benefit consumers as whole? Consumers will need to be rational, sophisticated, intelligent and well informed to be able to bargain for the best deal. For example, the consumer needs to assess rationally the possible risks in the contract, and thus whether or not it is worth paying extra for optional protection.

[708] Oren Bar-Gill and Omri Ben-Shahar 'Regulatory Techniques in Consumer Protection: A Critique of European Consumer Contract Law' (2012) Coase-Sandor Working Paper Series in Law and Economics < https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2061148> accessed 4 December 2016

However, in a free market system individuals do not tend to be well informed. There is certain information that unless it is supplied by the supplier it would be very difficult for the consumer to reach.[709] Furthermore, social behaviour studies have proved that consumers do not act rationally.[710] For these reasons only a small percentage of consumers will be able survive in such a *laissez-faire* environment. Only those consumers who are rational, well informed and intelligent will be capable of bargaining for good value protection. Average consumers who tend to be vulnerable for many reasons will not benefit from such a system.[711]

Thus, the mandatory role of the policy maker is indispensable. The issues surrounding consumer decision making necessitates paternalistic intervention by the law. The degree to which the law should intervene into contract (the level of protection) is affected by changing societal circumstances. This is related to the level of education and awareness that are likely to change over time. Nevertheless, the limitation of the human mind along with the increased sophistication of production makes it hard to imagine going back to a contract scheme of complete *laissez-faire*. Furthermore, consumer protection, particularly in relation to information supply, has become part of a wider protection of human dignity.[712] This is because a person entering a transaction that she knows very little about is arguably not treated with dignity. Thus it is argued that consumer rights are part of the new range of social rights and they are likely to be declared a human right in the coming years.[713] This means that

[709] See section 4.1.1.4
[710] See sections 4.1.2.2 and 4.2
[711] See section 4.1.2.1.2
[712] Stewart and Sunstein (n 695)
[713] Although it is observed that there seems to be no expressed reference to human rights in case law nor in any other formal context, there seems to be a position that consumer rights are part of the new range of social rights claimed in modern societies. See Willett, *Fairness in Consumer Contracts* (n 642) 299-301; Stewart and Sunstein (n 695)
An argument made by Deutch is that consumer rights could be considered as human right. His thesis is that consumer rights are focused on the individual to whom rights to fair trade and safe products are granted. In the same sense human rights protect the individual's prosperity, honour and development. Furthermore, consumer protection grants protection to consumers even though this kind of measures might not be for the benefit of the economy. By the same means, human rights are focused on the right of individuals as opposed to the collective. Moreover, the right to fair trade, the right to fair contract and the right of access to court are part of maintaining human dignity, which is similar to other accepted human rights. Human rights are intended to protect the individual from arbitrary infringements by governments, and in the same way the individual consumer is protected against big business organisations, monopolies, cartels and multinational corporations. These rights according to Deutch are not less important than other human rights, which makes consumer rights suitable to be declared as human rights. See Deutch on consumer rights as human rights in Sinai Deutch' Are Consumer Rights, Human Rights?' (1994) 32 Osgoode Hall Law Journal537
Whittaker makes the proposal that human rights aspects could be regarded in the good faith test of contract; see Simon Whittaker 'Judicial Review in Public Law and in Contract Law: The Example of 'Student Rules'' (2001) 21 Oxford Journal of Legal Studies 193

consumer rights are likely to flourish rather than diminish or become optional. Therefore, the policy maker needs to act paternalistically to balance the benefit of individuals and the group of consumers as a whole to protect the greatest possible proportion of consumers.

4.3 Concluding remarks

Consumer protection is supported from economic analysis as it contributes to achieving an optimal allocation of resources. More fundamentally, consumer protection involves the promotion and enforcement of ideas of cooperation and fairness in society by the law of contract. This requires intervention into the private sphere of contract by a public authority. As consequences, a law system that promotes consumer protection necessarily allows public intervention into private contracts and the legal theory needs to promote the paternalist behaviour of government. Furthermore, the legal rules of consumer protection are of a special nature in that they are set with the aim of balancing the contractual relation for the benefit of the consumer rather than being set in a standard way for the benefit of both contracting parties. It is thus based on the idea that consumer contracts tend to be imbalanced and is understood in terms of a distributive function of contract. The means that have been distinguished in this chapter will be referred to where appropriate in the following chapter on consumer protection under English law. These means will be critically tested for their combinability with the Shariah law of contract in chapter six.

It is suggested that the Convention on Human Rights, which places the obligation to respect the rights deriving from the European Convention on Human Right on 'public authorities' is applicable to contracts between a business and consumer or even between two private contractors in the sense that the court as a public authority could approach accepted law applicable to contracts in a way that respects human rights stated in the Convention. See on the 'horizontal effect' in the decision of the Court of Appeal in *Wilson v Secretary State for Trade and Industry*, sub norm *Wilson v First Country* Trust (no2) [2001]3 All ER 229, [2003] UKLHL40, [2003] 3 WLR 568; Gavin Phillipson 'The Human Rights Act, 'Horizontal Effect' and the Common Law: A Bang or a Whimper?' (1999) 62 The Modern Law Review 824; A.Lester and D.Pannick 'The Impact of the Human Rights Act on Private Law: The Knights Move' (2000) 116 Law Quarterly Review 380. See on the contrary view Richard Buxton 'Human Right Act and Private Law' (2000) 116 Law Quarterly Review 48

The tendency towards linking consumer protection with human rights is indeed going to give consumer protection even more importance. However, this discussion is excluded from the analysis of this theses because consumer protection has not yet gained formal recognition as a human right.

Chapter Five: Consumer protection under English law

5. Introduction

The discussion in the second chapter regarding contractual justice under the English law of contract was focused on how over time the English law of contract has dealt with perceived contractual unfairness. The limitations on the court's interference into contractual autonomy were emphasised. Nevertheless, the general principles presented before do not give a full picture of the situation of contractual justice under the English law of contract. This is because in modern times legislation has intervened into some aspects of private law by regulating specific types of transactions. Consumer law is a diversion from contract law where intervention into parties' autonomy is promoted by the law. This chapter investigates the extent to which contractual justice is promoted under the consumer theory of English contract law. The evolution of consumer protection in England is traced along with the concept of the consumer. Additionally, the major techniques of consumer contract regulation are outlined. Lessons are extracted from the English experience of consumer protection in order to support the law reform proposed by this thesis in relation to consumer protection under the Shariah law of contract. The main characteristics of the law of consumer protection as well as the main values protected by the law of consumer protection under the English law of contract are summarised. This will later be tested in chapter five in relation to the Shariah law of contract in order to determine the viability of consumer protection under the Shariah law of contract.

5.1 A historical perspective

Earlier in this research an account was offered of how freedom of contract formed the cornerstone of the law of contract in classical times. The *Caveat emptor* - let the buyers beware - was an assertion of individual responsibility which led as a result to a firm belief in market order.

Under the classical conception of the common law of contract, an agreement should be enforced in accordance with its terms.[714] The focus of control upon contracts was limited to procedural matters. As a result, doctrines of duress, fraud, and misrepresentation developed.[715] Attempts to tackle the fairness of the substance of contract law were highly limited. Generally, the court could not set aside a term of private agreement because it was found to be harsh, unconscionable or unfair. The reasonableness of the terms of a private contract was considered to be the business of the parties of that agreement only. There was no place for the court to impose its own view upon the parties' rights and duties. Even when the language of the contract needed a judicial interpretation, the task of the court was limited to literal interpretation. Public policy was the only tool that could be used to set aside the provisions of private agreements, and this only occurred in exceptional cases and with care.[716]

Starting from the late nineteenth century the classical view of the law of contract has been in general retreat. The *laissez-faire* doctrine has increasingly met with a cool reception. The idea that government should adopt a complete hands-off approach with respect to economic matters has been shown to be incorrect.[717] It is recognised that the thematic unity of changes in the law of contract can be presented by untraditional concepts such as fairness and cooperation.[718] Although there was a tendency towards the creation of a judicial limitation on the freedom of contract for the purpose of protecting the fairness of exchange, such a movement was resisted and hampered by the notion of freedom of contract.[719]

However, fragmentation comes to be a key theme in the modern law of contract due to the enormous intervention in it by statute. Such interventions are made in order to fix situations where there is assumed to be an imbalance between the contracting parties, as this was understood to harm the economy as whole. Presumably in this sense freedom of contract is regarded as a 'reasonable social ideal only to the extent that equality of bargaining power can be assumed'.[720]

[714] Richard Epstein 'Unconscionability: A Critical Reappraisal' (1975) 18 Journal of Law and Economics 293
[715] Cartwright, *Consumer Protection* (n 615) 11
[716] Epstein (n 582)
[717] Ibid
[718] Collins, *The Law of Contract* (n 43) 25
[719] See section 2.1.1.5.2
[720] Beatson, *Ansons's Law of Contract* (n 54) 4

Specific relationships regulated by statutes include the law of landlord and tenant, the employer and employee relationship, and the consumer and supplier relationship. The core of these relationships is based on contract law, yet, the legal techniques aimed at striking the balanced of the relationship have 'drifted far from the *laissez-faire* contract law as normally understood.'[721]

5.2 Consumer law as an exception to the freedom of contract

Although the relationship between consumers and suppliers is deemed to be contractual, the modern law of consumer contract in England operates in a way that is quite different to the classical notions of individual autonomy and legal non-interventionism. It follows a rather distinct pattern of control over the consumer/supplier relationship. A starting point would be that the consumer contract in modern times usually takes the form of a standard form contract; no real bargaining process is conducted for the purpose of concluding the contract. As a result, the notion of respect for the parties' bargain as the sole source of legal rights and obligations has declined. The notion of freedom of contract that underpins judicial non-intervention appears to be no longer realistic. The relationship between the parties in a consumer transaction has become typically economically imbalanced in favour of the supplier. Therefore, state regulation of the bargain is seen as an appropriate response to the economic imbalance between the supplier and consumer.[722]

Under English law the consumer/supplier contractual relationship has become considerably more than simply an agreement. Consumer regulation is now subject to measures that set a minimum quality level, and must adhere to certain standards of fairness that also must be met, at least in the specific context of the type of clause.[723] Statutory regimes intervene into the substance of contract. Furthermore, the court is now under a duty to consider the fairness of a term in a consumer contract whether or not a party has raised the issue.[724]

[721] Howells and Weatherill (n 5) 32
[722] Ibid 31-5
[723] Ibid
[724] Section 71 of the Consumer Rights Act 2015

5.3 The evolution of consumer protection in the UK

If we were to describe the evolution of the law of consumer protection in the United Kingdom (UK) by two characteristics these would be that it is statute-based and influenced by European law. Even though the UK is regarded as a common law country the law of consumer protection was developed by legislation rather than case law.[725] The law of consumer protection took its current shape in the 1960s and 1970s and the common law role was very limited.[726] One explanation for this is that consumer cases are rarely brought to court, which creates an obstacle in the shaping of common law because of the lack of judicial presentation. In addition, for very long period of time only few judges were willing to challenge the idea of *caveat emptor*.[727]

The movement towards the substantial development of consumer protection took place in England in the 1960s. The main concern raised at that time was the issue of addressing the natural imbalance between consumers and business providers and to stop trading abuses. The government sought to create new institutional procedures to tackle the issue effectively. Government reports published in the 1960s and 1970s presented source material that indicated the changes that were needed in the field of consumer protection.[728]

The report of the Committee on Consumer Protection (known as the Molony Committee after its chairman the late Sir Joseph Molony Q.C) published in 1962 was the first formal movement towards consumer protection. It reviewed the law relating to safety standards, labelling, advertising, civil redress and other aspects of consumer protection; and competition and market forces were taken to be the best way of protecting consumers' interests.[729] Amendments of existing laws to accommodate consumer protection were recommended by the Committee. For example it suggested that the Sale of Goods Act 1893 be amended to introduce the definition of consumer sales.

[725] Sir Gordon Borrie, *The Development of Consumer Law and Policy–Bold Spirits and Timorous Souls* (Stevens & Sons 1984) 1-7
[726] See for the role of common law ibid 7-44
[727] Christine Riefa 'Codification: The Future of English Consumer Law?' (2015) 1-2 Journal of European Consumer and Market Law 12
[728] Borrie (n 725) 1-7
[729] Her Majesty's Stationery Office, *Final Report of the Committee on Consumer Protection* (Cmnd1781, 1962)

Another government committee report, dealing with the subject of Consumer Credit was published in 1971.[730] In addition, a number of English and Scottish Law Commissions made proposals, which to a large extent were implemented by the Government and Parliament in the formation of legislation.[731] Most of the pieces of the statutory legislation which forms the development of consumer protection were produced during this period, for example: the Supply of Goods Act 1973; the Unfair Contract Terms Act 1977; the Supply of Goods and Services Act 1982. The statutory laws adopted showed 'a willingness to bring together principles and rules of law to govern particular areas, some of which were until recently the stronghold of the common law.'[732]

5.4 The European influence

At the European level, consumer law has been harmonised through the firm belief of European institutions that harmonisation raises consumer confidence that assist cross-border purchases in the internal market.[733] The meeting of heads of State of the EU in Paris in 1972 was the first movement towards harmonised consumer protection. A Committee was instituted in order to 'strengthen and coordinate measures for consumer protection.'[734] The Council Resolution of 14 April 1975 approved the principle of consumer protection and information policy. It gave a foundation to the development of consumer protection law and constructed a program aimed at improving quality of life via the protection of health and economic interests of the consumers, as stated in Article 2 of the treaty.[735]

[730] Her Majesty's Stationery Office, *Consumer Credit: Report of the Committee* (Cmnd 4596, 1971)
[731] Her Majesty's Stationery Office, *Exemption Clauses in Contracts: First Report: Amendments to the Sale of Goods Act 1893* (Law Com. No. 24 and Scot. Law Com. No.12, 1969) implemented by the Supply of Goods (Implied Terms) Act 1973; Her Majesty's Stationery Office, *Exemption Clauses: Second Report* (Law Com. No. 69 and Scot. Law Com. No. 39, 1975) implemented by the Unfair Contract Terms Act 1977; Her Majesty's Stationery Office, *Report on Implied Terms in Contracts for the Supply of Goods* (Law Com. No. 95, 1979) implemented by the Supply of Goods and Services Act 1982; Her Majesty's Stationery Office, *The Report on Liability for Defective Products* (Law Com. No. 82 and Scot. Law Com. No. 45, 1977); Her Majesty's Stationery Office, *The Report on Insurance Law: Non-Disclosure and Breach of Warranty* (Law Com. No. 104, Cmnd 8064, 1980)
[732] Riefa (n 727)
[733] Hans-w Micklitz, Julien Stuyck and Evelyne Terryn, *Cases, Materials and Text on Consumer Law* (Hart 2010) 20
[734] Commission, 'Preliminary Programme of the European Economic Community: For a Consumer Protection and Information Policy' OJ C92 (1975)
[735] Luke Nottage, Kate Tokeley and Christine Riefa 'Comparative Consumer Law Reform and Economic Integration' in Justin Malbon and Luke Nottage (eds), *Consumer Law & Policy in Australia & New Zealand* (The Federation Press 2013) 52-91

Perhaps the most significant factor affecting the evolution of European consumer law is the enactment of the Single European Act in 1986. According to this, consumer protection law was an essential part of the policy concerning the completion of the Single European Market.[736] The Council of Ministers was given the competence in cooperation with the European Parliament to enact measures that established or enhanced the functioning of the internal market subject to restrictions related to consumer protection.[737]

This was the starting point for the most significant development in the area: the adaptation of EU directives. The Directive is a legal instrument, which unlike EU Regulations, is not directly applicable but needs to be implemented by the states in their national legal order.[738] Harmonisation at the European level raises the question of the margin left to the member states to maintain the level of consumer protection; this depends on the nature of harmonisation.[739] In the early years the directives set only the minimum ground for protection (minimum harmonisation). Thus, it was considered to be appropriate to offer a higher level of protection by member states. However, as this decision has proved to be leading to fragmentation recent legislative activity has moved away from it.[740]

Directives that are adopted on the basis of minimum harmonisation provide the member states with a basis below which protection cannot fall. But member states have the option of implementing better protection by the texts introduced into their national legal systems. Fragmentation resulting from this was deemed to have a negative effect on the aim of bringing the national legal orders closer together.[741] Therefore, since the mid 2000s maximum harmonisation' directives were introduced by the EU. A directive based on maximum harmonisation sets not only a basis for protection but also a limit that cannot be exceeded by member states. No more and no less protection can be offered when implementing the directive into member states' legal systems (for example the Unfair Commercial Practices Directive[742]). Nevertheless, the EU Commission had to compromise for a dual approach that mixes maximum harmonisation and minimum harmonisation (for

[736] Ibid
[737] Article 100a of the Single European Act 1986
[738] This includes: the Unfair Terms in Consumer Contracts Directive 93/13/EEC implemented in the UK by the Unfair Terms in Consumer Contracts Regulations 1999 and the Commercial Agents Directive 86 /653/ EEC implanted in the UK by the Commercial Agents Regulations 1993
[739] Micklitz, Stuyck and Terryn (n 733) 20
[740] Nottage, Tokeley and Riefa (n 735) 52-91
[741] Ibid
[742] 2005/29/EC

example the Consumer Credit Directive[743] and the Directive on Consumer Rights[744]). The two directives have some rigid provisions and others which give the member states the option to deviate to some extent.[745]

5.5 Definition of consumer

It seems that there is no universally agreed definition of consumer thus regulations tend to define the term 'consumer' for their own purpose. Section 20(6) of the Consumer Protection Act 1987 states: 'Consumer (a) in relation to any goods, means any person who might wish to be supplied with the goods for his own private use or consumption; (b) in relation to any services or facilities, means any person who might wish to be provided with the services or facilities otherwise than for the purposes of any business of his; and (c) in relation to any accommodation, means any person who might wish to occupy the accommodation otherwise than for the purposes of any business of his.'

The CRA 2015 seems to have a more broad approach and it defines the consumer under Section 2 as 'an individual acting for purposes that are wholly or mainly outside that individual's trade, business, craft or profession.' The 'trader' is defined as 'a person acting for purposes relating to that person's trade, business, craft or profession, whether acting personally or through another person acting in the trader's name or on the trader's behalf.'

Accordingly, in general terms, that there are two main characteristics attached to a person regarded a consumer. First, he must be a private individual acting in a private capacity. Second, she is dealing with a supplier in the course of business.

5.6 Techniques of regulation

The way consumer protection is typically influenced is by specific objectives being targeted in the rationales for protection. In general the laws designed to protect consumers are focused on the following areas: '(a) unsafe products; (b) qualitatively deficient goods and services; (c) fraudulent trading practices; (d) insufficient information to exercise prudent

[743] 2008/48/EC
[744] 2011/83/EC
[745] Nottage, Tokeley and Riefa (n 735) 52-91

trading practices; (e) economic exploitation through lack of competition or excessive prices'.[746] Many legal techniques are used within regulations to control markets for the purpose of protecting the consumer. Prior approval regimes require standards to be met and broad statutory standards and improving access to justice are all part of this endeavour to protect consumers. For the purpose of this research the following discussion will be limited to the most popular regulation techniques within the law of contract. Regulations protect the consumer in his contractual relationship in multiple ways. Four major techniques are deployed by legislation for the purpose of balancing the consumer/supplier contractual relationship. These are (1) the test of fairness; (2) implied terms; (3) information remedies; and (4) the cooling-off technique (the cancelation period). These four techniques will be explained next.

5.6.1 The test of fairness

Unfair terms in consumer contacts are controlled by the CRA 2015. This replaces the overlap between the Unfair Contract Terms Act 1977 and the Unfair Terms in Consumer Contracts Regulations 1994, which were themselves superseded by the Unfair Terms in Consumer Contract Regulations 1999. These regulations were enacted in the UK in order to implement the Directive on Unfair Terms in Consumer Contracts (the Directive)[747] issued by the EU as an attempt to harmonise domestic rules relating to unfair terms in consumer contracts. Since the CRA 2015, just like the old regulations, is an implementation of the Directive, most cases relevant to the Directive remain useful when deciding how the act should be interpreted, though, it does need to be handled with caution.[748]

The fairness test under the CRA 2015 is applicable only to contracts between traders and consumers.[749] The key provision setting the test is section 62(4). This section provides that 'A term is unfair if, contrary to the requirement of good faith, it causes a significant imbalance in the parties' rights and obligations under the contract to the detriment of the consumer.' Section 62 (5) elaborates that testing the fairness of a term is determined by '(a) taking into account the nature of the subject matter of the contract, and (b) by reference to all the

[746] Harvey and Parry (n 236) 1
[747] 93/13/EEC
[748] Paul Davies, JS *Smith's: The Law of Contract* (OUP 2016) 222
[749] Section 61 of the CRA 2015

circumstances existing when the term was agreed and to all of the other terms of the contract or of any other contract on which it depends.'

The language of the Article is very similar to the language of the Directive and thus the old regulations. Yet, it is broader in the sense that the test is no longer limited to terms which have not been individually negotiated but extends to all terms. As a result, the scope of the fairness test is no longer limited to standard form contracts. Otherwise the substance of the test of fairness remains the same in the old regulation.

In addition to the requirements set out in section 62, section 68 imposes requirements that all written terms in consumer contracts should be transparent, a quality that is defined as 'in plain and intelligible language and […] legible'. Section 69 (1) adds a rule that 'if a term in a consumer contract […] could have different meanings, the meaning that is most favourable to the consumer is to prevail.'

To understand the nature of the test the three main requirements set out by the CRA 2015 need to be elaborated. These are the requirements of 'significant imbalance', 'good faith' and 'transparency'. Unfair terms will become non-binding to the consumer,[750] but, the remainder of the contract will continue to be binding. It is the court's duty to distinguish the fairness of a term.[751]

5.6.1.1 The requirement of 'significant imbalance'

There is general agreement that the requirement of significant imbalance is directed to the substantive fairness of the contract and this is supported by the wording of legislation and case law.[752] It is directed at the 'substance of the contract terms', which according to O'Sullivan and Hilliard, is obvious from the indication given by the gray listed term.[753] The gray listed term under the CRA 2015 is a defining feature of the sort of terms likely to be regarded as unfair. The gray list is laid down in schedule 2 of the CRA and is gray because

[750] Section 62 (2) of the CRA 2015
[751] Section 71 of the CRA 2015
[752] Hugh Collins 'Good Faith in European Contract Law' (1994) 14 Oxford Journal of Legal Studies 229; Janet O'Sullivan and Jonathan Hilliard, *The Law of Contract* (OUP,7th edn 2016) 219; Hans Micklitz and Norbert Reich 'The Court and Sleeping Beauty: The Revival of the Unfair Contract Terms Directive (UCTD)' (2014) 51 Common Market Law Review 771
[753] O'Sullivan and Hilliard (n 752) 219

the terms in the list are not necessarily unfair whilst at the same time there may be other unfair terms which are not included in the list. It is a guide to what potentially could be unfair terms. The gray listed terms are an illustration of the significant imbalance being considered with respect to the substance of the term. For example under schedule 2 of the CRA 2015 the gray list includes any term that gives the trader the right to terminate a contract of indeterminate duration without giving the consumer a notice with no serious grounds and a term that obliges the consumer to fulfil all of his obligations where the trader did not perform his obligations. These terms are obviously considered as part of the substantive fairness of the deal.

This position is also supported by case law; it was made clear by the House of Lords' decision in *Director General of Fair Trading v First National Bank plc* that the test of 'significant imbalance' requires assessment of the substantive terms of the contract.[754] The same approach was supported by the Court of Justice of the EU in *Aziz v Caixa d'Estalvis de Catalunya, Tarragona i Manresa* where the essence of the test was elaborated. It was stressed that the issue of 'significant imbalance' requires the court to consider whether the consumer is deprived of an advantage which he normally has under national law. In doing so, the court needed to consider the significance, purpose and practical effect of the term in question. Also, the term must be consistent with the reasonable objective that the relevant term seeks to protect.[755]

However, a mere imbalance is not enough to render the term unfair. According to O'Sullivan and Hilliard the gray list indicates that the imbalance between the parties must be 'significant'. Courts have on many occasions stressed that it is not enough for the imbalance to be 'slight' but it rather need to be 'significant'.[756]

Furthermore, it is held that the consumer will not be able to rely on legislative protection against unfair terms just because he has made a 'bad bargain'.[757] In *Banker Insurance Co Ltd v South* Mr South relied on his travel insurance to pay for damages to Mr Gardener, which were caused by him (Mr South) whilst riding a jet ski. The insurer relied on the term in the

[754] [2001] UKHL 52, 17
[755] Case C-26/13, 14 March 2013 [2013] 3 CMLR 89
[756] See *Director General of Fair Trading v First National Bank plc* [2001] UKHL 52; *Office of Fair Trading v Ashbourne Management Services Ltd* [2011] EWHC 1237 (Ch), [2011] ECC 31 [174] (Kitchin J); *West v Ian Finlay& Associates* [2014] EWCA Civ 316
[757] Davies (n 748) 226

contract which said that the insurance does not cover accident involving 'motorised waterborne craft'. The court held the term was clear and covered jet skis. The term was regarded to be fair because there were no significant imbalance to the detriment of the consumer since Mr South had paid a very low price for the insurance. Mr South got what he paid for; he paid a low sum so did not receive total protection.[758]

In short, the requirement of significant imbalance is related to the substantive fairness of any consumer contract term. This includes standard term contracts and individually negotiated contracts. According to this requirement the court has to look at the substance of the term in order to determine its fairness. It should consider whether the term deprives the consumer of an advantage that he would usually have under national law. The court should take into account the significance, purpose and practical effect of the term in question and its consistency with the reasonable objective that the relevant term seeks to protect. The imbalance needs to be significant and this excludes imbalance caused by bad bargains.

5.6.1.2 The requirement of 'good faith'

The meaning of the good faith requirement is not as clear as the meaning of significant imbalance. It is not entirely settled whether it refers to procedural or substantive consideration and what it adds to the requirement of significant imbalance. Indeed, the requirement of good faith has been one of the most controversial aspects of the Directive to be received by English law[759]; Teubner has gone so far as to call it a 'legal irritant' for English law.[760] There are potentially three answers to these questions; that good faith involves (1) procedural considerations; (2) substantive consideration (3) a mix of procedural and substantive.

One position that is held is that the good faith requirement is only meant to deal with procedural unfairness. In this sense it is meant solely to tackle unfairness related to the formation of a contract. For example, it examines whether the trader dealt with the consumer in good faith by making sure she is aware of the term in question at the time of the conclusion of the contract. In a recent decision of the Court of Appeal in *West v Ian Finlay &*

[758] [2003] EWHC 380 (QB)
[759] See section on the notation 2.3.6 of good faith under modern English law of contract
[760] Gunther Teubner 'Legal Irritants: Good Faith in British Law or How Unifying Law Ends Up in New Divergencies' (1998) 61 The Modern Law Review 11

Associations a purely procedural approach was adopted by focusing on the conduct of the parties' dealings.[761]

Beale takes the position that the good faith requirement is of both procedural and substantive consideration.[762] This approach was supported by Lord Bingham in *Director General of Fair Trading v First National Bank plc,* where he posited that that good faith is concerned with both how the contract was formed and the fairness of the deal and that it requires 'fair and open dealing'.[763]

Yet, Lord Steyn in the same case insisted that good faith is related to substantive fairness, and that this meant 'that there is a large area of overlap between the concepts of good faith and significant imbalance.'[764] The same approach was supported by Lord Millett.[765] So, if tests of both significant imbalance and good faith are related to the substance of the terms how does 'good faith' add to 'significant imbalance'?

Lord Millett pointed out that good faith requirements could be explained in the light of reasonable expectations of the consumers. He explains that it is important to decide 'whether if [the term] were drawn to his attention the consumer would be likely to be surprised by it'.[766] In other words, Lord Millett meant to refer to the idea of the 'unfair surprise' justification in the sense that consumer should not be surprised by a term.[767]

The Court of Justice of the EU also seems to be of the view that the good faith test is related to substantive fairness. It was held in *Aziz v Caixa d'Estalvis de Catalunya, Tarragona i Manresa* that whether a term is unfair and contrary to the requirement of good faith is dependent on 'whether the seller or supplier, dealing fairly and equitably with the consumer, could reasonably assume that the consumer would have agreed to such tern in individual contract negotiations'.[768] The Court of Justice relied on the opinion of the Advocate General Kokott who thought that it is essential to consider whether the contract terms are common, or

[761] [2014] EWCA Civ 316
[762] Hugh Beale 'Exclusion Clauses and Limitation Clauses in Business Contracts: Transparency' in Andrew Burrows and Ewan Peel (eds), *Contract Terms* (OUP 2007) 191-212
[763] [2001] UKHL 52 [17]
[764] Ibid [37]
[765] Ibid [54]
[766] Ibid
[767] Davies (n 748) 225
[768] Case C-26/13, 14 March 2013 [2013] 3 CMLR 89 [69]

surprising, or objectively justified. Micklitz and Reich illustrate that the wording of the Court of Justice indicates that 'good faith requires a balancing between the interests of the supplier and those of the consumer.'[769]

Collins makes the argument that the good faith requirement imposes 'social market conditions' onto the fairness test. According to him, the significant imbalance requires a condition that the goods or services supplied must be of a competitive price. And the good faith requirement adds the condition that the goods or services supplied must be of at least the minimum quality that consumers reasonably expect.[770] As a result, a contract for the sale of goods of low quality at a very low price may not amount to a 'significant imbalance' but may not pass the test of 'good faith', because consumers expect goods to be of certain quality no matter how cheap they are.[771] This view again supports the idea that the good faith requirement is closely linked to consumer expectations.

In sum, the meaning of the good faith requirement of the test of fairness is a matter of controversy. Nonetheless, from the available indications it seems that it is akin to the requirement of significant imbalance, in that it is related to the substantive fairness of the term. While the requirement of significant imbalance ensures that there is a balance between the rights and obligations of the consumer and trader, the good faith requirement ensures that the trader is acting in a fair and equitable manner. Particularly the requirement of good faith is there to protect consumer expectation. It other words, it protects consumers from being victims of unfair surprises.

5.6.1.3 The requirements of 'transparency'

A written term in a consumer contract needs, according to section 68 of the CRA 2015, to be transparent in the sense that it must be expressed in 'plain, intelligible and legible' language. The drafting of the CRA 2015, which is a mirror to the Directive, does not indicate whether the requirement of transparency is part of the test of fairness or in itself a separate consideration. One might well regard it as separate from the test of fairness as it reads as a separate requirement and arguably there is no obvious connection between unclear language

[769] Micklitz and Reich (n 752)
[770] Collins 'Good Faith in European Contract Law' (n 752)
[771] Ibid

and a significant imbalance in the parties' rights and obligations. Nonetheless, as O'Sullivan and Hilliard observe that there is no specific language in the CRA 2015 for the breach of the transparency requirement.[772] Thus, it is most likely that the requirement of transparency is meant to be part of the fairness test.

It was mentioned in the Law Commission's consultation Paper of 2013 on unfair terms in consumer contracts that 'we do not think that non-transparent terms are automatically unfair, though it is an important factor to consider.' The recommendation of the Law Commission was that the transparency requirements should be assessed under the broader question of the fairness test.[773] The same approach was taken by Davies, who takes the wording of the CRA 2015 to mean that non-transparent terms should be subject to the test of fairness. According to him 'if a consumer would be surprised by the term upon being told of it after entering into the contract, it will generally be subject to the test of fairness.'[774] To recap, a term is generally considered non-transparent if a consumer would be surprised by it once it comes to his knowledge at any time after the conclusion of the contract. A non-transparent term is not regarded as automatically unfair but it rather becomes subject to the test of fairness. Non-transparency is, however, an indication that the term might not be fair.

5.6.1.4 Terms excluded from the test of fairness

The general rule is that any term in any consumer contract can be assessed for fairness; the exception is laid down in section 64 of the CRA 2015. It provides that: (1) A term of a consumer contract may not be assessed for fairness under section 62 to the extent that—(a) it specifies the main subject matter of the contract, or (b) the assessment is of the appropriateness of the price payable under the contract by comparison with the goods, digital content or services supplied under it.'

These sorts of terms are commonly known as 'core terms'. According to section 64 (2) the core terms are excluded from the assessment of fairness only if they are 'transparent and prominent'. The meaning of prominent is elaborated under section 64 (4) 'A term is

[772] O'Sullivan and Hilliard (n 752) 217
[773] The Law Commission and The Scottish Law Commission, *Unfair Terms in Consumer Contracts: Advice to the*
Department for Business, Innovation and Skills (2013) s 34
[774] Davies (n 748) 225

prominent for the purposes of this section if it is brought to the consumer's attention in such a way that an average consumer would be aware of the term.'

Such exclusion could be criticised as undermining the consumer right of protection especially in relation to price fairness. Indeed, a consumer should have the right to prove that a particular product was too expensive and the price was accordingly 'unfair'. Howells and Wilhelmsson point out that the intention behind the exclusion of the core terms by the Directive is a result of being cautious not to intervene into 'anything resulting directly from the contractual freedom of the parties'.[775] It is said that the Directive and the CRA 2015 embody a compromise by regulating subsidiary terms but leaving the market free to regulate price and product.[776]

Bright explains that this fits with consumer behaviour since most consumers will focus on the price and the quality of goods before entering into the contract. Thus it said that, in the majority of non-monopoly cases, the core terms reflect a free choice. By contrast, consumers rarely consider other terms of the contract when making their decision and this 'explains why consumers need greater protection against unfairness in relation to non-core terms'[777]

Furthermore, one would argue that there is no 'unfair surprise justification' in relation to price and main subject matter because the consumer takes notice of these at the time of contract conclusion. Also, it is regarded as unacceptable from the standpoint of freedom of contract, for the trader or supplier to give the consumer the right to undo a bargain freely entered into on the grounds that they later regretted their original willingness to pay a given price for a given product.[778]

However, it is stressed that the exception of core terms should only be interpreted narrowly to avoid unwanted consequences.[779] Lord Bingham in *Director General of Fair Trading v First National Bank plc* held that broad interpretation of core terms would potentially lead to a limitation of protection under the fairness test. He explained that 'the object of the regulations and the directive is to protect consumers against the inclusion of unfair and prejudicial terms

[775] Geraint Howells and Thomas Wilhelmsson, *EC Consumer Law* (Aldershot 1997) 94
[776] O'Sullivan and Hilliard (n 752) 215
[777] Susan Bright 'Winning the Battle against Unfair Contract Terms' (2000) 20 Legal Studies 331
[778] O'Sullivan and Hilliard (n 752) 215
[779] Elizabeth Macdonald 'Scope and Fairness of the Unfair Terms in Consumer Contracts Regulations: Director General of Fair Trading v First National Bank' (2002) 65 The Modern Law Review 763

in standard-form contracts into which they enter, and that object would plainly be frustrated if regulation' terms excluded from the test 'were so broadly interpreted as to cover any terms other than those falling squarely within it. Thus the exemption in Regulation […] should only cover terms falling squarely within it'.[780]

In the same case Lord Steyn supported the approach that the core terms need to be interpreted narrowly 'since all terms of the contract are in some way related to the price or remuneration' and if this is not done it will 'enable the main purpose of the scheme to be frustrated by endless formalistic arguments as to whether a provision is a definitional or an exclusionary provision'.[781]

The CRA 2015 adopted the narrow interpretation of the core terms by making them subject to the requirements of 'transparency and prominence'. The requirement of 'transparency' as explained before is a general requirement for any term but, the requirement of 'prominence' was exclusively mentioned in relation to the core terms. It is submitted that the requirement of 'prominence' is similar to the common law requirement of incorporation of unusual or onerous terms.[782] It places the seller under an obligation to ensure that the consumer has read and subjectively understood the term (almost an impossible task to fulfil). It also prevents the trader from putting a 'core term' in small print.[783]

The requirement of 'prominence' was not there in the old regulation before the CRA 2015. This has led to the undesirable decision in *Office of Fair Trading v Abbey National Bank.* The case was concerned with charges that banks levied on their consumers for unauthorised overdrafts. The Supreme Court refused to assess these terms for fairness, as they concerned part of the price consumers paid for their current accounts. The fact that the charges were not essential or a core part of the price was not taken to be relevant.[784] The approach of the Supreme Court considerably reduced the scope of protection offered to consumers to a level below the protection offered elsewhere in Europe.

[780] [2001] UKHL52, 12
[781] Ibid 34
[782] O'Sullivan and Hilliard (n 752) 219
[783] Ibid
[784] [2009] UKSC 6, 116

Furthermore, the CRA 2015 requirement that core terms are only excluded from the fairness assessment if they are transparent and prominent has the ability to protect the consumer from hidden charges. This is because traders are increasingly pressurised to advertise 'low headline prices whilst earning their profit through other charges'.[785] According to the requirement of prominence unless these charges were read and subjectively understood by the consumer they would be subjected to the fairness test.

5.6.2 Implied terms

Modern regulation of consumer protection does not stop at testing the agreed terms for fairness. Favourable terms are imposed by legislation into any consumer relation. These terms share the purpose of protecting the contractual fairness by imposing conditions that protect the contractual right of the consumer as the vulnerable party and protect the essence of the contractual relation.

Implication of terms into contract is an old technique of common law (implication by custom or fact). It is a tool that works from a practical perspective, as a technique of construction or interpretation of contract. In general, implication of terms into private contracts conflicts with the fundamental principle of sanctity of contract in common law. Neither the court nor the parliament is a party of the contract. Yet, implication by the common law is a means of avoiding conflict with freedom and sanctity of contract. It is a matter of interpretation of the contract made between the parties by asserting the actual intention which might only imperfectly have been expressed in words, oral or written.[786] By contrast, terms implied by legislation intervene into freedom of contract. On some occasions the legislator intervenes into parties' freedom by implying or including certain terms which the parties cannot agree to exclude.[787]

Such implication of certain terms into contracts is meant to protect the essence of contract to reflect consumers' expectations and the quality of goods. By enforcing conditions that goods must be of certain level of quality the legislator is protecting consumer expectation. The protection of the quality of goods is a modern approach which deviates from *caveat*

[785] The Law Commission and The Scottish Law Commission (n 773) s 34
[786] Richard Austen-Baker, *Implied Terms in English Contract Law* (Edward Elgar 2011) 1-4
[787] Section 31 of the CRA 2015

emptor.[788] Lord Weight describes implied terms with regard to quality as a shift from *caveat emptor* to *caveat vendor*.[789] It indeed reflects the change in the law. Until the early nineteenth century the position was that *caveat emptor* applied to all aspects of the sale, and the only way to displace it was by obtaining a warranty or by alleging and proving fraud.[790]

Terms implied (or included) into consumer contracts are now regulated under the CRA 2015. It replaces the implied terms to consumer contracts under the Sale of Goods Act 1979. The language of the included terms under the CRA 2015 is similar to the one under the old regulation. Therefore, case law under the old regulations remains to a large extent relevant. Thus, reference to case law under the old regulation will be made in this chapter where applicable. The following discussion will be limited to implied terms in the sale of goods only.

5.6.2.1 Implied terms with regard to quality

Section 9 of the CRA 2015 implies the condition that goods must be of satisfactory quality in all consumer contracts for the supply of goods. Goods are regarded as satisfactory if 'they meet the standard that a reasonable person would consider satisfactory, taking account of— (a) any description of the goods, (b) the price or other consideration for the goods (if relevant), and (c) all the other relevant circumstances […] The quality of goods includes their state and condition; and the following aspects (among others) are in appropriate cases aspects of the quality of goods (a) fitness for all the purposes for which goods of that kind are usually supplied; (b) appearance and finish; (c) freedom from minor defects; (d) safety; (e) durability.'

Determining the question of goods being of satisfactory quality is simply a matter of application of the criteria stated by the law. Lord Dunedin in *Dunlop Pneumatic Tyre Con, Ltd v New Garage and Motor Co. Ltd* stated that in order to determine the question of whether the goods are of satisfactory quality or not judges need only to determine factual questions as stated in the regulations (fitness for purpose, appearance and finish, freedom

[788] Austen-Baker (n 786)112-3
[789] *Grant v Australian Knitting Mills Ltd* [1936] AC 85, 98 (P.C.)
[790] Austen-Baker (n 786) 112-3

from minor defects, safety and durability.[791] Failure of the goods to be satisfactory in one aspect renders the goods unsatisfactory.[792]

Section 9(4) provides for the exemption of certain matters causing the goods to be unsatisfactory if the defect was sufficiently drawn to the consumer's attention either directly by the seller or indirectly through examination of the subject matter or a sample, provided that the defect would have been apparent on a reasonable examination.

5.6.2.2 Fitness for particular purpose

If the buyer notifies the seller that the goods are needed for a particular purpose then the goods must be fit for that specific purpose, as stated in section 10 of CRA 2015. This is true even if the specified purpose is not one for which goods of that kind are usually supplied. The buyer must have relied on the seller's expertise and judgment when buying the goods in order to benefit from the Article.

The fitness for particular purpose implied by section 10 is different from fitness for purpose in section 9. The latter, unlike the former, concerns the general requirements for quality of goods. It is thus apparent that fitness for purpose is a concept playing two roles. One is related to the quality as determined by the court in considering whether the goods are of satisfactory quality or not, and the other represents a distinct implied term.[793] Accordingly the goods may satisfy the test of satisfactory quality in section 9 but breach the implied term in section 10. In *Ashington piggeries Ltd v Christopher Hill Ltd*, animal food was supplied which was fit for its normal use but not as food for mink, to which it was fatal.[794]

5.6.2.3 Conformity with description

It is assumed that the majority of sales carried out today are at least partly sales by description. The sale of any future goods including any internet sale, catalogue sale and so on is a sale of description. Even sales via supermarket racks or shelves contain an element of

[791] [1915] AC 79,86
[792] See the decision of the Court of Appeal in *S. W Tubes Ltd v Owen Stuart Ltd (t/a O.S.L Technical Services)* [2002] EWCA 854; [2002] All ER (D) 243 (May)
[793] Austen-Baker (n 786) 120
[794] [1972] AC 441

description; if someone buys a package of tomatoes marked 'organic tomatoes' where the fact of their being tomatoes is obvious and needs no description the 'organic' part is an element of description to which the goods need to conform.[795] Section 11 of the CRA 2015 implies that every contract to supply goods by description is to be treated as including a term that the goods will match the description. This includes all kind of descriptions, even descriptions provided with goods that were exposed for supply and selected by the consumer, as well as any information that is provided by the trader about the goods. Furthermore, if a description is provided in the sale in addition to a sample the bulk of the goods must match the description as well as the sample.

The application of implied terms as to the conformity with description is a straightforward procedure, if the goods sold were described as so-and-so and they were not so, then they would fail the test of conformity with description, with no complication.[796] This is confirmed by the history of the relevant case law.[797] Case law indicates that it is not relevant whether or not the buyer relied on the description.

Furthermore, it does not matter if a sample was also supplied or if the sale is of specific or unascertained goods or even if the goods were inspected or chosen by the buyer, as long as there was some description applied to the goods it is then a sale of description.[798] Lord Wright in *Grant v Australian Knitting Mills Ltd* defined sale by description as the following: 'A thing is sold by description, though it is specific. So long as it is sold not merely as the specific thing but as thing corresponding to a description, e.g., woollen under-garments, a hot water bottle, a second-hand reaping machine, to select a few obvious illustrations.'[799]

In sale by description the descriptive words need to form a part of the contract, and not be present as a mere representation. This is a matter which needs to decided through the ordinary principles of contract law.[800] Lord Wilberforce in *Reardon Smith Lines v Hansen-Tangen,*

[795] Austen-Baker (n 786) 107
[796] Ibid
[797] See for example: *Gompertz v Bartlett* (1853) 2 EL. & Bl. 849,118 ER; *Gurney v Womersley* (1854) 4 El. & Bl. 133; 119 ER 51 ; *Hamilton Finance Company, Ltd. v Coverley Westray Walbaum & Tosetti, Ltd.,* and *Portland Finance Company, Ltd.* [1969] 1 Loyd's Rep53 BD [1969] 1 Loyd's Rep. 53(QBD)
[798] See *Oscar Chess Ltd v Williams* [1957] 1 WLR 370; *Harlingdon & Leinster v Enterprises Ltd v Christopher Hull Fine Art Ltd* [1991] 1 QB 564
[799] [1936] AC 85,100
[800] Austen-Baker (n 786) 112

held that the description in the contract is relevant to the implied term only if it forms a 'substantial ingredient of the "identity' of the thing sold'.[801]

5.6.2.4 Correspondence of bulk with sample

When goods are supplied, by reference to a sample section 13 of the CRA 2015 implies a condition that the goods will match the sample. The only exception is if any differences between the sample and goods were brought to the consumer's attention before the conclusion of the contract.

It is only a sale of sample if the sample was intended to form part of the contractual basis of the sale. The mere fact that a sample was presented in the course of negotiations does not make it a sale by sample. Sir Goode observes that 'a sale is likely to be considered a sale by sample unless the sample is released by the seller to the buyer […] for the purpose of providing a means of checking whether the goods subsequently tendered corresponded with sample'.[802]

Lord Macnaghten in *James Drummond & Sons v E.H. Van Ingen & Co.* held that the bulk needs only to correspond with the sample in respect to qualities which could be disclosed through reasonable observation and testing, rather than exhaustive testing. However, the trader may still be liable for aspects of quality that would not be disclosed by reasonable examination.[803]

5.6.2.5 Implied terms with regard to the ownership of the commodity

According to section 17 of the CRA 2015 the trader must have the right to transfer the ownership of the commodity. This implies a condition that goods must be free from any 'charge or encumbrance', which is not known to the consumer prior to the conclusion of the contract. Furthermore, the goods must remain free from any 'charge or encumbrance' until the contract is concluded and the ownership is transferred to the consumer. Once the contract is concluded the consumer should enjoy quiet possession of the goods 'except so far as it may

[801] [1976] 3 All ER 570, 577
[802] Sir R.Goode, *Commercial Law* (3rd edn, Butterworths 2004) 324
[803] (1887) 12 App. Cas. 284, 297

be disturbed by the owner or other person entitled to the benefit of any charge or encumbrance so disclosed or known.'

5.6.2.6 Remedies for breach

If any of the goods fail to comply with any of the contract terms the consumer is given three means of response. The first is the right to reject under sections 20 and 21of the CRA 2015. Goods can be rejected in full or in part within 30 days of the goods being supplied, unless the expected life of the goods is shorter. The consumer is entitled to treat the contract as at an end and receive a refund, but must make the goods available for collection by the trader.

The second remedy is the right to repair or replacement under section 23 of the CRA 2015. It places the trader under a duty to provide the repair or replacement within a reasonable time, without causing significant inconvenience to the consumer and at no cost to the consumer. If the consumer requests a repair or replacement within the first thirty days of the goods being supplied then the short term right to reject is paused. On provision of the repaired or replaced goods the consumer has either the remainder of the thirty day period or seven days, whichever is the longer, in which to reject the goods if they still do not conform to the contract. The consumer only has to accept one repair or replacement. If the goods still do not meet the contract terms, either because the original issue persists or a new one has arisen, the consumer can exercise their right to a price reduction or the final right to reject.

The third remedy is the right to a price reduction or the final right to reject under section 24 of the CRA 2015. It is available where a repair or replacement is unsuccessful, impossible or not provided within a reasonable timeframe or without significant inconvenience to the consumer. Essentially, the consumer chooses either to keep the goods and claim a reduction in price or return them and claim a refund. The reduction in price must be an appropriate amount, taking into account all of the circumstances and can usually consider any use that the consumer has had from the goods. However, no deduction for use can be made where the goods are rejected within six months of supply except in the case of motor vehicles.

5.6.3 Information remedies

Information remedies are another technique implied by the English law for the protection of consumers while contracting. Information remedies are the cornerstone of modern consumer protection. Information remedies provide the consumer with all the information needed to make an informed decision. Generally, the English law does not recognise a general duty to disclose material facts known to one party but not to the other.[804] Information under the law of contract is only regulated by the law of mispresentation, which regulates deceptive and misleading statements. The growth of consumer protection in modern times as an essential regulatory concern has led to the evolution of disclosure regulations.[805] In the early stages regulation of information disclosure was limited to product labelling; it now covers most areas related to consumers such as advertisement, consumer credit and consumer contracts.[806]

Information remedies are much more than laws controlling trade description. The latter is only concerned with the accuracy of the information which businesses pass on to consumers.[807] Information remedies on the other hand regulate three aspects: (1) removing restraint on information; (2) correcting misleading information; and (3) encouraging additional information.[808] This potentially covers a wide range of information, including the quality of products and services, their price (including the cost of credit) and the actual terms of consumer transactions.[809]

The disclosure of material information in contract is regulated under the Consumer Contracts (Information, Cancellation and Additional Charges) Regulations 2013 (the Regulations).[810] It requires certain information to be supplied to the consumer prior to the conclusion of the contract (informational requirements). These requirements are extended by the Regulations to on-premises, off premises and distance contract (which can include contracts made by electronic means and contracts commenced by telephone call).

Schedule 1 of the Regulations lays down the information to be included in any on-premises contract (not applicable to a contract which involves a day-to-day transaction and is

[804] Mckendrick, *Contract Law* (n 135) 215
[805] William Whitford 'The Functions of Disclosure Regulation in Consumer Transactions' (1773) 400 Wisconsin Law Review 424
[806] Collins Scott and Julia Black, *Cranston's Consumers and the Law* (3rd edn, Butterworths 2000) 337-40
[807] Ibid
[808] Beales, Craswell and Salop (n 604)
[809] Scott and Black (n 806) 337-40
[810] SI 2013/3134

performed immediately at the time when the contract is entered into).[811] It should include: the main characteristics of goods and services, the identity of the trader, the price and any additional charges, the terms of the contract (including arrangements of the payment, delivery performance, the time of performance and the duration of the contract), where applicable any information related to the functionality and any information related to the applicable technical protection measures, of digital content and 'any relevant compatibility of digital content with hardware and software that the trader is aware of or can reasonably be expected to have been aware of.'

In addition, the regulation in schedule 2 mandates the disclosure of extra information in distance and off-premises contracts which are mostly related to cancellation. These are '(l) where a right to cancel exists, the conditions, time limit and procedures for exercising that right in accordance with regulations 28 to 31; where applicable, that the consumer will have to bear the cost of returning the goods in case of cancellation and, for distance contracts, if the goods, by their nature, cannot normally be returned by post, the cost of returning the goods […].' The effect of failure to supply the specified information is regulated under section 12 of the CRA 2015; any contract information supplied by the trader under the regulation falling within schedule 1 and 2 of the Regulations is to be treated as an implied term of the contract.

Disclosure is also encouraged by legislation in relation to defects; a trader is released from liability if she makes the consumer aware of the defect before the conclusion of the contract. Section 9(4) of the CRA 2015 excludes from the trader's liability as to the quality of goods any defect 'which is specifically drawn to the consumer's attention before the contract is made'.

5.6.3.1 Information remedies in perspective

The promotion of the informed consumer is a cornerstone of modern consumer protection.[812] Regulation remedies are a popular regulation technique in modern consumer litigation.[813] It is assumed that once a consumer has the relevant information he would be able to protect

[811] Regulation 9(2)
[812] Scott and Black (n 806) 337-40
[813] Whitford (n 805)

himself by acting accordingly.[814] Moreover, if the correct information is made available to the consumer, competition is also facilitated.[815]

Information disclosure as a technique of consumer protection is particularly supported by those who advocate minimising government interference into the market and insist that the market remains regulated by the notion of *caveat emptor*.[816] Making information available to consumers gives them the chance to make their own choices and therefore introduces 'less rigidity into the market'. Moreover, it leaves the market free to respond as consumer preferences and production technology change over time.[817]

Flexibility is another advantage of information disclosure since it provides consumers with the opportunity to protect themselves according to personal preferences. This releases the regulator from the difficult task of compromising diverse preferences with a common standard. Finally, information remedies are said to be harmless, no serious risk is likely to occur as a result of supplying consumers with information.[818]

However, disclosure regulations do not seem to meet the expectations placed on them. It is said that consumer's policies are a waste of effort since only a few consumers make use of information provided.[819] Some scholars assume that the only reason that information disclosure is promoted by governments is because it is relatively inexpensive.[820] Most consumers do not have the time and the chance to use the available information in the course of their daily lives.[821] Moreover, consumers do not deal with information in the same manner. This is a normal consequence of consumer being from different classes and different educational backgrounds.[822] The more affluent, well-educated middle-class consumers are likely to benefit from information more than any other group. Evidence from studies of

[814] Scott and Black (n 806) 337-40
[815] Sanford J.Grossman 'The Informational Role of Warranties and Private Disclosure about Product Quality' (1981) 24 Journal of Law and Economics 461
[816] Scott and Black (n 806) 337-40
[817] Beales, Craswell and Salop (n 604)
[818] Ibid
[819] See K.Viscusi 'Individual Rationality, Hazard Warnings and the Foundations Tort Law' (1996) 48 Rutgers Law Review 625
[820] Ogus (n 589) 124
[821] Geraint Howells 'The Potential and Limits of Consumer Empowerment by Information' (2005) 32 Journal of Law and Society 349
[822] Scott and Black (n 806) 337-40

consumer credit disclosure rules suggests that it is the better-off consumers who tend to make use of information disclosed in the marketplace.[823]

The assumption on which disclosure regulations are based is that consumers will make the rational decisions if they are supplied with the right information, but this has been challenged by behavioural economics. Kahneman and Tversky describe consumer action as being irrational as a result of human nature regardless of levels of education and intelligence.[824] Thus, the focus of consumer polices on average consumers has been criticised as attaching above average qualities to consumers by considering them to be 'reasonably well informed and reasonably observant and circumspect'.[825] It is argued that the model employed by the law assumes that the average consumer is capable of identifying information and processing it rationally to act in a predictable way. By the same means vulnerable consumers are regarded as atypical consumers who need special protection. Yet, it is argued that the needs of the vulnerable group should not form an obstacle to 'deregulation and liberalization to benefit the 'average consumer'. This assumption, according to behavioural economics, is unrealistic. Every consumer is to some extent vulnerable due to the limitations of the human mind.[826] Jacoby suggests that the focus needs to be shifted from whether consumers are well informed to whether the information provided contributes to creating competitive prices and terms. In his view, consumers only need to be provided with the minimum information regarding the characteristics of product in order to make informed decisions.[827]

Another point that may make information remedies non-useful is related to the impact of information presentation on consumers. The traditional economic assumption that consumers would react in a predictable way to the expected utility of the alternatives is criticised as being imprecise. It has been proved that the way information is presented could have a significant impact on how consumers perceive and react to information.[828] Consumer choices

[823] Howells (n 821)
[824] Danial Kahneman and Amos Tversky 'Prospect Theory: An Analysis of Decision Under Risk' (1979) 47 Econometrica 263
[825] Jon Hanson and Douglas Kysar 'Taking Behavioralism Seriously: The problem of Market Manipulation' (1999) 74 New York University Law Review 630
[826] Howells (n 821)
[827] Jacob Jacoby 'Perspectives on Information Overload' (1984) 10 Journal of Consumer Research 432
[828] Danial Kahneman and Amos Tversky 'Choices, Values, and Frames' in Danial Kahneman and Amos Tversky (eds), *Choices, Values, and Frames* (CUP 2000) 1-16

are likely to change if they are provided with more options, even as between the initial, choices.[829]

A major point in the debate is related to the processing of information. This is vital because information disclosure cannot provide consumers with protection unless consumers are able to make sense of information and use it.[830] This is especially critical in relation to technical information. Information must be capable of being understood by consumers, but at the same time it must be accurate, and yet accuracy sometimes necessities the use of technical knowledge.[831]

A consumer may be aware that a certain product is faulty, but he might not be aware of the technical implications for usability, which could affect the overall quality of goods on the market. This point was invoked by Twigg-Flesner in relation to the application of Article 2 (3) of the Consumer Sales Directive, which is implemented now by section 9 (4) of the CRA 2015. She argues that the importance of 'consumer's expectations' is ignored by these information polices. Consumers usually have a certain idea about the product and its use before making the purchase. At a basic level, a consumer expects that 'the goods will be suitable for his needs and, even more fundamentally, work reliably' However, according to section 9 (4) if the consumer was told about the defect he then cannot claim that the goods or services did not meet the contract description. She claims that it is not enough to correct the information failure to make sure that the consumer is aware of the defect, 'but also the extent to which the consumer is able to process that information' is crucial.[832]

Perhaps it is the high expectation attached to information polices that make them seem ineffective. Collins has rightly suggested some useful recommendations to avoid such outcomes by lowering expectations of information policies and considering other policies to complement information rules. Furthermore, the effectiveness of information rules should be enhanced by developing a more sophisticated and nuanced approach to information. The

[829] Itamar Simonson 'Choice Based on Reasons: The Case of Attraction and Compromise Effects' (1989) 16 Journal of Consumer Research 158
[830] Robert Bradgate and Christian Twigg-Flesner 'Expanding the Boundaries of Liability for Quality Defects' (2002) 25 Journal of Consumer Policy 345
[831] Scott and Black (n 806) 337-40
[832] Christian Twigg-Flesner 'Information Disclosure about the Quality of Goods– Duty or Encouragement?' in Geraint Howells, Andre Janssen and Reiner Schulze (eds), *Information Rights and Obligations: A Challenge for Party Autonomy and Transactional Fairness* (2nd edn, Routledge 2016) 59-65

rising level of consumer education could also be taken into account in the assessment of consumers' ability to benefit from information remedies.[833] Additionally, it would be worthwhile for the policy maker to consider carefully how information rules should be delivered to consumer. The best situation regarding information rules need to be established, including how information should be delivered to consumer and what sort of information consumers need.[834] Current legislation does to some extent reflect the need to deliver information in a way that assists the understanding of consumers. This is partially acknowledged by the legislator in the Regulations since it is provided that 'something is made available to a consumer only if an average consumer would be aware of how to access it'.[835] Finally, one should not ignore the fact that disclosure regulations relate to a basic right of the consumer in a democratic society to be informed about products and services on the market so that they can have control over their daily decisions.[836]

These are means that could enhance the effectiveness of information policies. However, the importance of information remedies in consumer policy should not be underestimated, especially since it could be 'the only practicable approach, given the limits on the legislative technique and a shortage of enforcement resources'.[837] Scott and Black rightly observe that 'it is misguided to adopt the attitude that because consumers at present will not use information there is no need for it.[838] One should not underestimate the rectifying effect of 'active information seeking consumers'.[839] Even if only a small percentage of consumers use the information, there is potential to benefit the consumer market considerably.[840] Furthermore, whether the consumer is benefiting from the information supplied or not it is arguably an inherited right of the consumer to have sufficient information about the contract he is entering into. Otherwise, consumer consent might not be voluntary simply because the consumer is not aware of the real condition of the transaction. Information remedies therefore are an indispensable technique of consumer protection.

[833] Scott and Black (n 806) 375
[834] Howells (n 821)
[835] Regulation 8
[836] Scott and Black (n 806) 375
[837] C.Chen 'Consumer Protection through the Regulation of Product Information' (1922) 47 Food and Drug Law Journal 185
[838] Scott and Black (n 806) 375
[839] Alan Schwartz and Louis Wilde 'Intervening in Markets on the Basis of Imperfect Information: A Legal and Economic Analysis' (1979) 127 University of Pennsylvania Law Review 630
[840] Howells (n 821)

5.6.4 The cooling-off period

The cooling-off or cancellation period is another essential regulation technique for consumer protection. It is a technique that is designed for protecting the consumer by giving him the option to reflect when the contract is concluded, in circumstances that are likely to vitiate the consumer's will. The first time the cooling-off period was introduced in the UK was to control issues surrounding doorstep selling. Considerable abuse issues were associated with doorstep selling in the UK. These were related to overcharging and inducing consumers to sign contracts committing them to substantial payments for things which, on reflection, they do not want. The cooling-off period allows the purchaser to reflect, and gives him a remedy if he feels that he was prejudiced by a transaction.[841]

The 'cooling-off' period has been extended to distance selling and off-premises contracts, under the Regulations. Consumers are given a fourteen day 'cooling off' (cancelation) period after the day on which the contract is entered into.[842] Regulation 28 gives consumers the right to cancel a distance or off-premises contract at any time during the cooling-off period. The consumer should not pay for any costs except in relation to enhanced delivery chosen by the consumer[843], if the value of goods is diminished by consumer handling,[844]or costs of service provided at the consumer's request.[845]

5.7 Consumer protection of English law in perspective

Certainly consumer protection now extends far beyond the general common law of contract in protecting the fairness of private transactions. Four main contractual values are protected under consumer legislation. The essence of contract protected by the implied terms reflects consumer's reasonable expectations; informed choice is protected by information remedies; fairness of terms are subjected to the fairness test and the consent of consumer is preserved by the cooling-off period. All of these measures violate the basic concepts of common law contract that promote the free will of the contracting parties.

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[841] Scott and Black (n 806) 427-34; See on the purpose of cooling-off period in Office of Fair Trading, *Annual report of the Director General of Fair Trading* (HMSO 1990) 4-5
[842] Regulation 29
[843] Regulation 33(3)
[844] Regulation 33(9)
[845] Regulation 35(4)

These measures set standards aimed at protecting consumers regardless of their individual circumstances. Abstract protection regimes that protect consumers regardless of their position within the overall society, according to Willet, amount to maximal welfarism. However, there are other aspects, such as price regulation, that need to be achieved by the law to reach maximal welfarism. According to Willet, a regime that aims to achieve maximal welfarism needs also to satisfy the requirement of fair price.[846] Accordingly, the one action that might reduce the level of protection offered by English law is the exclusion of the price from the test of fairness under section 64(1) of the CRA 2015. The price is indeed a significant aspect of fairness; a consumer should have the right to prove that a particular product was too expensive and the price was accordingly 'unfair'.[847]

Another factor with regard to the level of protection in the UK is the fact that it mostly derives from an implementation of EU law. This raises the question of the effect of the British exit from the EU on the level of protection. However, although it is true that the law of consumer protection comes primarily from European Directives, it is enshrined in the UK by national Acts which means that changes are not likely to be immediately imminent, especially given the recent introduction of the CRA in 2015. However, the future relationship between the UK and the EU is not yet clear. The UK certainly wants to maintain a commercial relation since it currently account for 44% of UK trade. If the UK wants to continue selling products to consumers in the EU, it definitely needs to continue to comply with the EU consumer protection level.[848]

5.8 Lessons learned

The second aim of this research is to test the viability of consumer protection derived from the Shariah law of contract. The English experience has been invoked for the purpose of distinguishing the main values and major techniques of regulations of consumer protection to be tested under the Shariah law of contract. The ongoing analysis of English consumer protection reveals that the protection of the consumer by the law of contract is a matter of theory as well as practice. Consumer protection involves the promotion and enforcement of

[846] Willett, *Fairness in Consumer Contracts* (n 642) 378-81
[847] See discussion in section 7.1.2.2.4
[848] Taylor Wessing 'UK Consumer Law in the Wake of the EU Referendum'(2016) Oxford business Law blog < https://www.law.ox.ac.uk/business-law-blog/blog/2016/07/uk-consumer-law-wake-eu-referendum> accessed 4/December 2016

ideas of cooperation and fairness in society by the law of contract. The ongoing discussion indicates that the English law has intervened into the private sphere of contract in order to balance the contractual relation for the benefit of the consumer. This has reflected the promotion of the paternalist behaviour of government and the distributive function of contract by English consumer contract theory.

The most important values within consumer policy are reflected in English law by the four major techniques of regulation discussed above: consumer expectations (reflected by the imposed terms); the balance of the contractual relation (reflected in the fairness test); the informed choice of the consumer (presented by information remedies); and the voluntary consent of the consumer (as indicated by the cooling-off period). These constitute the minimum values to be protected by a consumer protection policy. A successful body of consumer rules must ensure that deals made by consumers are free, equitable, balanced and voluntary.

5.9 Concluding remarks

Consumer contracting under the English law obviously follows a theoretical path that differs from that of general contract. On the one hand, the general theory of contract limits intervention into parties' autonomy to a minimum. Under the general conception of the English law of contract parties are under no obligation to contract in good faith or to act reasonably towards each other. By the same rationale, the power of English judges to intervene into the substantive fairness of a contractual relation is very limited.

On the other hand, in consumer transactions the law intervenes in many ways for the purpose of balancing the contractual relation. The intervention is mainly meant to rebalance the contract for the benefit of the consumer. Such intervention into the autonomy of the parties is sometimes rationalised under the neo-classical theory of market failure, which is itself a modern restatement of the classical theory of contract. It accepts the fact that failures occur in the free market and that the law ought to intervene to correct such failures. As a result, consumer policy is expected to stop at the point the market failure is rectified. The aim is to achieve efficiency in the market rather than fairness. The market failure explanation of consumer policy agrees (or at least does not contradict) with the general conception of the

law of contract. The motivation for consumer protection in this model thus focuses on the overall situation of the market rather than the position of individual consumers.

Nevertheless, evidence shows that consumer protection in England amounts to more than this. For example, the terms of consumer contracts are tested for fairness rather than efficiency. Furthermore, good faith is required on the part of the supplier under the CRA 2015 when setting contract terms. This in principle contradicts the general principles of the English law of contract, which does not impose a requirement of good faith and does not allow the intervention of testing contract terms for fairness. Such measures can only be rationalised under fairness and distributive social motives.

Accordingly, this has led to the conclusion that substantive fairness of contract is not completely irrelevant to English law of contract. The consumer contract scheme forms a large proportion of contractual relations at this point in time. Although consumer theory has a distinct theoretical basis the law of contract remains its cornerstone. Accordingly, it becomes hard to say that substantive fairness of contract is completely irrelevant to the English law of contract. [849] The next chapter will move on to examine the viability of consumer protection afforded by the Shariah law of contract. The English model of consumer protection will be employed for guidance and comparison.

[849] Further discussion in relation to how consumer protection changes the level of contractual justice under English law is presented in section 7.1.2.2.2

Chapter Six: The viability of consumer protection under Shariah contract law

6. Introduction

The overall discussion of the thesis is focused on contractual justice by examining the extent to which the two relevant legal systems promote the intervention into the autonomy of the contracting parties to fix perceived injustice in contracts. English and Shariah laws of contract have been reviewed from classical to contemporary times by focusing on contractual justice, equity and acknowledgment of vulnerability in both legal systems. It has been demonstrated that the English law of contract is focused on the absolute sanctity of contract (in its classical form) and economic efficiency (in its modern form). On the other hand, the Shariah law of contract is governed by the general principle that gain comes only from labour and stresses the importance of the equivalence of counter-values. This chapter attempts to investigate the viability of consumer protection under the Shariah law of contract. The matter is approached by testing both the theoretical and practical aspects of the law. The English model of consumer protection, as discussed in the last chapter, is invoked for guidance. The outcomes should guide and enhance the legitimacy of consumer protection measures in Shariah-ruled countries.

6.1 A Shariah consumer law?

In order to protect consumers, intervention into the autonomy of the parties is needed for the purpose of preserving the fairness and reasonableness of contracts. While honest and fair dealing is an essential consideration of the Shariah law of contract, Shariah law does not recognise the concept of the consumer. The Shariah law of contract is the product of the seventh and eighth centuries where the concept of consumer was not yet recognised. Thus an argument has been made that Shariah law cannot form a satisfactory model of consumer protection to offer solutions to contemporary issues regarding the consumer. The negligence of Muslim society with respect to Shariah law has lead to its retreat. The current practice of Shariah is not taking full advantage of the relevant provisions and this means it is unqualified

to compete with modern legislation.[850] Nevertheless, many contemporary scholars of Shariah claim that consumer protection is an admitted value of Shariah law.[851] Mancuso refers to the means of protecting individuals' rights and lives against any interference as a basis for consumer protection.[852] Riyad argues for Shariah fraud as a basis for protecting consumers against industrial and commercial fraud.[853] A number of other such arguments have been made by reference to the general acknowledgment of moral and honest dealing set by Shariah law and the prohibition of fraudulent practices.[854] But these theses do not attend sufficiently to the issue of consumer protection. None involve the determination of the major values to be protected by a consumer policy nor how Shariah rules would satisfactorily address these values. Neither fraud nor the recognition of moral and honest dealing could form a satisfactory basis for consumer protection. Fraud enables protection against dishonesty and cheating in commercial transactions. This does not support the minimum values to be protected under a consumer policy, including securing free, equitable, informed and voluntary transactions. The encouragement of fair and honest dealing is not an adequate basis for consumer protection which requires far more than an engagement with honest dealing.

A more thoughtful thesis has been proposed by Ahmed who makes reference to many technical rules of Shariah which protect fairness and cooperation. He employs examples of certain technical rules within Shariah that protect contracting parties from being victims of fraud, misrepresentation, negligence, and unfair contracts.[855] He thus invokes the right rules that can potentially protect consumer values. Yet, his thesis is mostly focussed on the practical aspect of the law. He does not test suggested Shariah rules for their computability with modern values of consumer protection. Rather he presents the relevant Shariah rules in their original form without offering a formula as to how they could be employed in consumer protection.

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[850] Abdulla AlGhafri 'The Inadequacy of Consumer Protection in the UAE: The Need for Reform' (PhD Thesis, Brunel University 2013) 168

[851] Salvatore Mancuso 'Consumer Protection in E-commerce Transactions: A First Comparison between European Law and Islamic Law'(2007) 2 Journal of International Commercial Law and Technology 1; Muhammad Akbar Khan, *Consumer Protection in Islamic Law* (Lambert Academic Publishing 2011); Muhammed Ahmed, *Hemait Al Mostahlik fi Al figh Al Eslami* (Dar Al-Kotob Al-ilmiyah 2004)

[852] Mancuso (n 851)

[853] N.Riyad, *Consumer Protection Facing the Commercial and Industrial Activities*: *Practical Analysis* (Al-Ahram Economy 1994) 1

[854] Aidh Sultan Albaqme 'Consumer Protection under Saudi Arabia Law' (2014) 80 Arab Law Quarterly 158; Obaid Sa'ad Al-Abdali, *Consumer Protection in Saudi Arabia* (Nahwa Thagfah Taswegeah 2008); David Morris and Maha Al Dabbagh 'The Development of Consumer Protection in Saudi Arabia' (2004) International Journal of Consumer Studies 2; A.A.Arafa'Consequences of Low Level Products and the Consumer Protection in the Islamic View' (1987) 2 The Arabian Management Magazine 63

[855] Muhammed Ahmed, *Hemait Al Mostahlik fi Al figh Al Eslami* (Dar Al-Kotob Al-ilmiyah 2004)

This research argues that consumer protection calls for more than just honest and fair dealing. It is matter of balancing the aims of securing the stability of contract by protecting the autonomy of the contracting parties and securing a fair and just market. It requires governmental intervention into private contracts to enforce elements of fairness and distribution in the marketplace. It fixes unbalanced contractual relations by setting minimum standards of quality, transparency and fair contractual terms.

Any legal system consists of both theoretical and practical aspects. Thus, to introduce a suitable legal solution it must be compatible with both theory and the rules of law. The discussion of consumer protection under English law has helped to shed light on the characteristics of consumer protection. From a theoretical perspective, the value of protecting the fairness and reasonableness of contractual relations is central to any consumer policy. Under consumer theory cooperation and reasonableness are values that are enforced by law. Consequently, in order to secure a satisfactory consumer regime, the law needs to provide an avenue for the government to intervene into the parties' autonomy. In other words, legal theory needs to promote paternalistic behaviour on the part of the government. Consumer protection rules are of a special character in the sense that their focus is on fixing the fairness of the deal for the benefit of consumer rather than both parties of an agreement and they, therefore, acknowledge the idea that being in a weaker position qualifies a person for special treatment. To put this in the proper terms, this means a distributional function of the law. Furthermore, consumer protection is a form of social responsibility and care for the community. These issues have been touched in the chapter on contractual justice in Shariah and will be expanded in this chapter.

From a technical perspective, the law requires proper rules to reflect its theoretical ideas. In the chapter on consumer protection under English law four major techniques of regulation were discussed to identify the major values to be protected by the law of consumer protection. Consumer rules must protect the following: consumer voluntary choice, informed will, fairness and equitability within the contractual deal. The intention here it to search for technical rules within the Shariah law of contract that could reflect these values, and propose a formula as to how it could be employed in a consumer context to ensure the maximum benefit is gained from them.

To illustrate further the issue facing the protection of the consumer under Shariah law, the experience of Saudi Arabia (one of the leading countries applying Shariah law) will be outlined below. Next, the theoretical basis of consumer protection under Shariah will be analysed by invoking three grounds: paternalism, distributive justice and community values. The technical aspect of consumer protection under the Shariah law of contract will also be expanded upon.

6.2 Shariah consumer law in application

Saudi Arabia acknowledges Shariah as the former law of the country. Shariah governs morals, duties, behaviours, and other aspects at the level of both individual and society. The legislative power of the government is restricted by the rules of Shariah. The creation of legal rules by the legislative assembly must take place within the scope and dominance of the sources of law indicated by Shariah. Any proposed or existing legislations must not contradict the rules of Shariah, otherwise it will be considered null and void.[856]

Consumer protection in Saudi Arabia is given attention particularly in sensitive areas such as health and safety. The protection of the consumer in Saudi Arabia falls mainly under the duty of three bodies: the Ministry of Commerce and Industry, the Ministry of Municipal and Rural Affairs, and the Ministry of Health.[857] These bodies are entitled to issue secondary legislation, when appropriate, to regulate the consumer market. The focus of these bodies has been mainly on rules regarding standards of safety and health, advertising and occasionally pricing.[858]

For the aim of protecting the consumer, the Ministry of Commerce has been supervising the supply of goods and service in the market by setting standards as to the quality and safety of those goods. It oversees the advertising process for the purposes of preventing exploitation and exaggeration in prices and the provision of misleading information. It does occasionally intervene in the market by putting an end to excessiveness and exaggeration in prices. It seeks

[856] Tom Sorell and John Hendry, *Business Ethics* (Butterworth-Heinemann 1994) 105
[857] Obaid Sa'ad Al-Abdali, *Consumer Protection in Saudi* Arabia (Nahwa Thagfah Taswegeah 2008) 15
[858] For example see: The Regulations for Trade in Baby Milk< http://internationallawyerenews.com/dow/s/424 > accessed 5/2/2017; Regulation of Food and Medicine Safety <http://internationallawyerenews.com/dow/s/424> accessed 5/2/2017; Anti-Fraud Regulations < http://internationallawyerenews.com/dow/s/68> accessed 5/2/2017; Competition Regulations < http://internationallawyerenews.com/dow/s/61> accessed 5/2/2017

to guarantee the availability of basic living materials in the market at equitable and reasonable prices.[859] Recently, increased attention from the Ministry of Commerce has been paid to consumer contract terms in relation to cancellation pricing and guarantees, and has come in the form of ministry decisions rather than legislative rules.

However, the Saudi consumer protection system suffers many issues on both conceptual and practical levels. The law suffers from complexity and inconsistency. This is in part because there are multiple entities involved in the process of consumer protection. More importantly, the protection of consumer is made in a random way as it not bound by a single legislative code. The system is focused on preventing fraudulent and misleading practices, more than ensuring a fair deal for consumer. The complexity and lack of clarity of the system is probably the reason why most consumer cases rarely reach courts.[860]

More fundamentally, the system is potentially suffering a legitimacy problem. There is no evidence that these rules have been tested under Shariah. This could potentially lead to these rules being challenged for inconsistency. The issuance of a single body of legislation compatible with Shariah rules is likely to be the key solution for all of these issues. Perhaps a fear of changing the nature of the Shariah law is what is currently preventing any attempt to develop and codify it. A belief common among some Shariah scholars of the last century was certainly that codifying the Shariah law has a negative impact on *ijtihad* (human reasoning). There is always a fear that if the law is codified, it will stop developing and its nature will be affected. Furthermore, if the codification was made based on wrong *ijtihad*, this would lead to the misapplication of Shariah. Nevertheless, codification is a necessity if Shariah is to survive in modern times. It would bring much needed elements of clarity and consistency to the law. The codification of consumer protection in Saudi Arabia, along with creating a stable and clear system, is likely to enhance legitimacy and moderation within the practice of consumer protection. The following analysis will test the general theory of the Shariah law of contract for its compatibility with the theoretical grounds of consumer protection;

[859] David Morris and Maha Al-Dabbagh 'The Development of Consumer Protection in Saudi Arabia' (2004) International Journal of Consumer Studies 2

[860] See R.Al-Hamad 'Saudi Citizen's Behavior after Purchasing in Case of Satisfaction'(1993) 11 King Saud Journal of Managing Science 1

6.3 The theoretical ground for consumer protection

Under the discussion of consumer protection rationales two large headings were invoked: economic and social justice rationales. Economic justifications of consumer protection are focused on the idea of rectifying market failure in a free market system. The economic rationale for consumer protection or the so called neo-classical theory of contract softens classical ideas of non-intervention into the marketplace. It provides that the law should intervene into the marketplace in order to rectify market failures to achieve efficiency. Such ideas cohere with the classical ideas of free market and trade liberalisation that are important within the historical context of English law. The situation in Shariah law is different and the discussion of the general theory of Shariah contract law has revealed that liberal ideas of contract have never formed a basis for the law of contract. Furthermore, there is no evidence that economic analysis is a primary aspect of Shariah law considerations. Additionally, in the last chapter the conclusion has been reached that the economic dimension of consumer protection cannot explain all consumer protection measures. Some consumer protection arrangements can only explained under social and distributive ideas.[861] The discussion of market failure remains useful when trying to locate the sources of consumer vulnerability. It is however, not relevant to distinguishing the theoretical ground of consumer protection under the Shariah law of contract. For the time being, therefore, the discussion will be limited to the social aspect of consumer theory and will attend to three factors: paternalism, the distribution function of the law of contract and community values.

6.3.1 The distributional function of contract

The law of contract is a tangled mass of legal rules set for the purpose of regulating the process of private exchange. Kronman identifies three legitimate functions of the law of contract; 'first, to specify which agreements are legally binding and which are not; second, to define the rights and duties created by enforceable but otherwise ambiguous agreements; and finally, to indicate the consequences of an unexcused breach.'[862]

A less settled function of the law of contract is the distributive function. It has been suggested that the law of contract is an instrument by which distributive justice can be achieved. For

[861] See section 4.1.2
[862] Anthony Kronman 'Contract Law and Distributive Justice' (1980) 89 The Yale Law Journal 472

the purpose of achieving a fair division of wealth among the members of society, law makers are required to consider the distributional effect of any legal rule.[863]

The distributive function of the law of contract is reflected in certain legal rules that promote a kind distributional end, such as usury laws limiting interest on loans, rules concerned with the quality of goods, habitability, and minimum wage laws. Generally, it includes any body of rules which promote, in accordance with the principles of distributive justice, the transfer of wealth from one group to another: from landlords to tenants, traders to consumers and employers to employees.[864]

Giving effect to the distributional function of the law of contract could pose a conceptual hazard to a liberal system of contract such as the English law. Indeed, many libertarians deny the role of the state in enforcing a system that redistributes wealth from one individual or group to others.[865] The opponents of the distribution function of contract regard any involuntary transfer of wealth as theft, regardless of the way it is done and the motive behind it. This group strongly believes that distribution must be occur outside the law of contract, which ought to be based on consent only. Distribution is better achieved through the social security system such as taxation.[866]

Kroman, who strongly believes in the distributional function of the law of contract, argues against the standard libertarian position. He argues that distributive justice should be considered under the law of contract. The distribution function of the law of contract is necessary if the law is to achieve a minimum moral acceptability. He argues that the idea of voluntary exchange within the libertarian theory of exchange cannot be achieved away from distributive means. He states that 'the notion of individual liberty, taken by itself, offers no guidance in determining which of the many forms of advantage-taking possible in exchange relations render an agreement involuntary and therefore unenforceable on libertarian grounds.'[867]

[863] Duncan Kennedy 'Form and Substance in Private Law Adjudication'(1976) 89 Harvard Law Review 1685
[864] Kronman 'Contract Law and Distributive Justice' (n 862)
[865] Friedrich Hayek, *The Constitution of Liberty* (Routledge 2014) 148-165; James Buchanan 'Political Equality and Private Property: The Distributional Paradox' in Geraldj Dworkin, Peter Brown and Gordon Bermant (eds.), *Market and Morals* (Hemisphere Publish 1977) 69-84; Epstein (n 582)
[866] John Rawls 'The Basic Structure as Subject' (1977) 14 American Philosophical Quarterly 59
[867] Kronman 'Contract Law and Distributive Justice' (n 862)

In the Shariah law of contract the situation is different, since the notion of liberty only barely forms a base for the law of contract. Yet, if we are to claim a distributive function for the Shariah law of contract we need to indicate how it functions. To give the matter a proper consideration the meaning and origin of the concept of distributive justice will be discussed below.

6.3.1.1 Distributive norms

Distributive justice is a social norm that can be traced back to Aristotle. Distributive justice aims at allocating resources in a fair and just manner. Nevertheless, Fleischacker proposes that the concept of distributive justice in modern times is different to the Aristotelian principle. He observes that 'the ancient principle has to do with distribution according to merit while the modern principle demands a distribution independent of merit.' According to him the concept of distributive justice in a modern sense is related to a state responsibility to guarantee that resources are distributed throughout society so that everyone is supplied with a certain level of material means. These material means are regarded essential in the sense that they must be guaranteed to everyone regardless of their character traits or their actions. Most debates on distributive justice are therefore related to the size of the means to be granted in terms of the extent of the governmental intervention necessary to guarantee such means. He further explains that this is different to the Aristotelian sense of justice. Distributive justice as created by Aristotle is a system that 'called for deserving people to be rewarded in accordance with their merits.'[868]

In general, the issue of the distribution of resources has been of interest to many philosophers throughout history.[869] The means by which resources are divided in a fair manner among individuals has been given great attention. However, the question of how individuals divide resources between themselves in a just manner is a matter of disagreement between theorists. Whereas some theorists insist that there is only one norm of equity[870] others regard equity as

[868] Samuel Fleischacker, *A Short History of Distributive Justice* (Harvard University Press 2004) 4-5

[869] Perhaps it was Homans who brought the attention of socialists to the concept of distributive justice as an aspect of human behaviour; See generally George Homans, *Social Behavior: Its Elementary Process* (Harcourt 174)

[870] For example Elaine Walster and William Walster 'Equity and Social Justice (1975) 31 Journal of Social Issues 21

comprising more than one norm of justice.[871] Broadly, there seems to be three independent justice norms attached to the theory of distributive justice to explain how resources should be allocated. These are equity, equality, and need.[872]

Under the equity norm the distribution of resources needs to be made based on the inputs of the individuals. The underlying assumption of this position is that, when various inputs are seen to be equal, then fairness requires their rewards to be equal. Inequality exists if two people who made the same contributions receive different outcomes.[873] This argument is similar to the primary formal Aristotelian principle of justice. Aristotle regards 'merit' as the relevant quality according to which goods are justly distributed. Because people are different in their merit, proportionate equality does not require that all individuals have an equal share.[874] The justice theory proposed by Homans draws from Aristotle in that contributions are linked to rewards. Justice is centred on what people should receive in return for their actions or contributions. Homans' idea is that it is a universal concept of justice to match rewards with 'investments and costs'.[875] The equity norm of distributive justice whereby outcomes are correlated with inputs has been widely accepted.[876]

By contrast, the equality norm distributes equally to all members of society regardless of their differences and contributions. Sampson justifies the equality norm on the basis that people are not by their nature 'equity theorists' thus sometimes resources need to be equally distributed between them.[877] Need is another justice norm that has received significant attention. In general terms, the need principle requires that resources be allocated in response to recipients' legitimate needs and to prevent suffering.[878]

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[871] Edward Sampson 'On Justice as Equality' (1975) 31 Journal of social Issues 45; Morton Deutsch 'Equity, Equality, and Need: What Determines Which Value Will be used as the Basis of Distributive Justice?' (1975) 31 Journal of Social Issues 137; Gerald Leventhal 'The Distribution of Rewards and Resources in Groups and Organizations' in Berkowitz Leonard and Elaine Walster (eds), *Advances in Experimental Social Psychology* (Academic Press1976) 91-131

[872] Jerald Greenberg and Ronald Cohen 'Why Justice? Normetive and Instrumental Interpretation' in Jerald Greenberg and Ronald Cohen (eds), *Equity and Justice in Social Behaviour* (Academic Press 1982) 441-3

[873] Elaine Walster and William Walster 'Equity and Social Justice' (1975) 31 Journal of Social Issues 21

[874] Ronald Cohen and Jerald Greenberg 'The Justice Concept in Social Psychology' in Jerald Greenberg and Ronald Cohen (eds), *Equity and Justice in Social Behaviour* (Academic Press 1982) 3

[875] George Homans, *Social Behaviour: Its Elementary Process* (Harcourt 1974) 248

[876] See Guillermina Jasso 'On the Justice of Earnings: A New Specification of the Justice Evaluation Function' (1978) 83 American Journal of Sociology 1398; Stacy Adams 'Inequity in Social Exchange' (1965) 2 Advances in Experimental Social Psychology 267; Joseph Berger, Morris Zelditch, Bo Anderson and Bernard Cohen 'Structural Aspects of Distributive Justice: A Status Value Formulation' (1972) 2 Sociological Theories in Progress 119

[877] Sampson (n 871)

[878] Leventhal (n 871) 91-131; Deutsch (n 871)

Greenberg and Cohen suggest that the choice between the three norms of justice depends on the relevant circumstances and conditions.[879] For example, as reported by Leventhal, the equity norm is likely to be appropriate in economic situations where production and efficiency are highly valued.[880] The equality concept, on the other hand, as suggested by Deutsch, is relevant when the focus is placed on group harmony and positive social relations.[881] Lerner points out that in situations where group identity is more important than that of individuals', the equality norm become appropriate.[882] Deutsch illustrates that the need principle will predominate in situations where personal welfare, development of the group interest and equality are predominant under conditions of cooperation and social harmony.[883]

Here we need to keep in mind that this research supports that the role of contract law in achieving distributive justice is limited. The contract law can only make a contribution to the aim of protecting consumers. At the same time, other institutions of the welfare state need to be invoked to achieve distributive justice successfully.[884] This is why it is preferable to use the term the 'distributive function' of contract law rather than using terms such as 'achieving distributive justice'. Now we turn to the issue of the distributive function of the Shariah law of contract. In the light of the admitted justice norms can we say that Shariah law of contract has a distributive function? If so which of the mentioned norms could describe it, if any?

6.3.1.2 Distributive norms in the Shariah law of contract

Equality is stressed by Shariah as a norm of social welfare by discouraging extreme inequalities and promoting social harmony.[885] The fulfilment of the basic needs of individuals is a matter of concern in Shariah economics.[886] *Zakah* is the mechanism by which extreme inequalities are tackled.[887] Nevertheless, this is not really reflected in the law of contract.

[879] Greenberg and Cohen (n 872) 441-2
[880] Leventhal (n 871) 91-131
[881] Deutsch (n 871)
[882] Melvin Lerner 'The Justice Motive and Social Behavior: An Introduction' (1975) 31 Journal of Social Issue120
[883] Deutsch (n 871)
[884] See argument in section 4.2.1
[885] Khaliq Ahmad and Arif Hassan 'Distributive Justice: The Islamic Perspective'(2000) 8 Intellectual Discourse 159
[886] M.N.Siddiqi 'The Guarantee of a Minimum Level of Living in an Islamic State' in Munawar Iqbal (eds), *Distributive Justice and Need Fulfilment in an Islamic Economy* (The Islamic Foundation1988) 2-51
[887] Ahmad and Hassan (n 885)

Instead, the distributive function of the Shariah law of contract could possibly be described by the other two norms of 'equity' and 'need' in the following sense.

The equity norm stresses the matching of 'inputs' with 'returns' or 'contributions' with 'rewards'. This agrees perfectly with the general principle of the Shariah contract law, which emphasises the matching of the counter-values exchanged. This stress on the equivalence of counter-values aims to encourage work and make it the only permitted cause of profit. The principle is reflected in a number of doctrines. The doctrine of *riba* (usury) prohibits the exchange of unequal quantities of similar fungibles and interest on loans (usury laws are a typical example of rules that reflect distributive motives).[888] The doctrine of just price is another means by which the equivalence of counter-values is emphasised. According to the rules of Shariah a just price is the equivalent price.[889] Informational rules of Shariah presented by the doctrine of *gharar* and mandatory disclosure also serve this end. They provide individuals with important information to help them to decide on the value of the commodity.[890] As a result, contractors are protected against unexpected and future inequalities. Under the doctrine of unfair exploitation, an exploited party is given a remedy to rebalance the contracting agreement when the price is proved not to reflect the price of the equivalence.[891] All of these rules imply the principle that each of the contracting parties should receive as much as he gives in return. This seems to agree with 'equity' in that input is matched with return.

The 'need' norm of distributive justice is also reflected in Shariah contract rules. It is present in the doctrine of unfair exploitation, which aims to protect the weakness or vulnerability of one of the contracting parties. Three practices are regulated under the doctrine of unfair exploitation: the sale to inexperienced persons, necessity sale and the act of meeting Bedouin traders before reaching the city market. In each case, one party is contracting from a weak position; this weakness is obvious and known to the other party who is prevented from exploiting this weakness for his own advantage.[892]

[888] See section 3.8.2
[889] See section 3.8.4
[890] See sections 3.8.3 and 3.8.6
[891] See section 3.8.4
[892] See section 3.8.5

When a sale is concluded by an inexpert person who is ignorant of the market price, once the seller becomes aware of the vulnerability of the buyer he is under a duty to conclude the deal at the market price.[893] Under the necessity contract a person is concluding a deal to satisfy a basic need (food, clothes etc) accompanied with an element of urgency or necessity (abnormal circumstance). The seller is under an obligation to conclude the contract at a fair price.[894] Finally, the sale of *talaqqi al-rukban* refers to the act of meeting Bedouin traders before reaching the city market whereby a city dweller would meet those traders at the outskirts of the city and buy their merchandise for unfairly low prices since the traders do not know the real market prices.[895] The essence of the prohibition of such a practice is to protect the Bedouin who are usually ignorant of the market price which can lead to unjust bargains. In these three practices the law protects an element of 'need' or 'vulnerability'. A moral obligation is placed upon the superior party who is prevented from exploiting the counter party's need for his own benefit. Underlying this is the assumption that the element of 'need' qualifies the contractor for special treatment. This reflects the fact that the 'need' norm of distribution requires resources to be allocated in response to the recipient's legitimate needs in order to prevent suffering.

6.3.2 Paternalism

Paternalist motives in the law of contract are behind any legal rules that prohibit an action on the grounds that it will be counter to the actor's own benefit. Paternalism limits the freedom of contract; it deprives the party of the right to decide whether their voluntary agreement should be legally binding. In most cases, paternalistic rules tend to protect the general interest of society at large. It has the purpose of protecting the promisor by limiting her contractual power based on what the law judges to be against her own interests.[896]

In the context of consumer contracts, the cooling-off period[897] and compulsory terms[898] represent paternalistic motives. Compulsory terms are perhaps the most obvious example of paternalism in consumer contracts. They require individuals to conclude their agreement in a particular way, when they would rather make it differently. For example, when the law

[893] Omar (n 555)
[894] Ibn-Taimiyah, *Majmoua Fatawa* vol 21 (n 557) 360
[895] Omar (n 555)
[896] Kronman 'Paternalism' (n 676)
[897] Ibid
[898] Kennedy 'Distributive and Paternalist' (n 678)

judges that it is in the buyer's best interests to pay a higher price to receive a superior product quality or a warranty, the law maker is then acting paternalistically.[899] Paternalistic motives of contract can be explained by more than one norm. It can be understood in terms of 'economic efficiency, distributive justice, the idea of personal integrity, and a third set of limitations by the familiar, though poorly understood, notion of sound judgment.'[900]

Under the English law of contract, paternalist motives for regulation have been subject to challenge under the notion of freedom of contract. Paternalism contradicts the basic idea of the freedom of contract that people can be trusted to look after themselves, to see to their own interests. It is argued that in many situations the consumer may feel that he does not need or want the protection imposed on him. This could be especially true if the protection measure is associated with extra charges that are carried by the consumer. It is argued that the cost of protection whether it is a cost of insurance or any other cost is eventually paid by the consumer. The private right of the consumer to choose how he wishes to spend his money is thus violated.[901]

In the Shariah law of contract the situation is different. The discussion of the freedom of contract under Shariah has shown that classical jurists assumed that the law has established a relation between judicial act and its effect.[902] According to Obeid, this is a variation on the broad belief that the role of human will is limited to bringing the agreement into existence, whereas the content of the act is already decided by the law. Therefore, the effect of an agreement must be determined by the lawgiver to avoid injustice and imbalance.[903] As a result, contract terms are only admitted if they agree with the nature of the act in such a way that they may be harmoniously integrated into its structure.[904]

Although Shariah schools differ in the degree to which they recognised individual autonomy, they all agree on the primary aim of regulation. This is merely to have a contractual scheme free from elements of prohibition as stated textually in the Quran and *Sunna.* More precisely, it is to maintain a contractual scheme free from *riba* and *gharar*. In implementing these

[899] Ibid
[900] Kronman 'Paternalism' (n 676)
[901] Atiyah 'Freedom of Contract and the New Right' (n 112) 355-8; See argument against paternalism in section 4.1.2.2
[902] See section 3.6.2
[903] Hussain (n 453)
[904] Obeid (n 457) 32

restrictions the schools of law had different approaches. Where the three schools preferred to remain cautious by strictly regulating contracts, the Hanbali school adopted a more liberal one. This is supported by the fact that all four schools give legal effect to innominate contracts that do not violate general principles.[905]

Therefore, we can draw the conclusion that the Shariah law of contract is based on the principle of 'permissibility' rather than 'freedom of contract'. This means that individuals are free to enter into any agreement they wish if this agreement is not prohibited by Shariah. In this light, we could argue that 'paternalism' is a central value of Shariah law of contract. The following passage by Obeid illustrates the paternalistic approach of the Shariah law of contract:

'Allowing individuals to freely arrange the effects of their juridical acts according to their whims brings the risk of their committing abuses by perpetuating aleatory contracts […] This will have the effect of an imbalance of the benefits of the contracting parties, evidently going against the principles of equity and justice that the Quran […] and the *Sunna* of the Prophet have laid down for the contract to be concluded with concern for the perfect equilibrium of the reciprocal advantages.'[906]

In the context of public intervention in the law of contract it seems appropriate to turn to the practice of the institution of '*hisbah*' under Shariah law. The *hisbah* is an institution by which public intervention into the marketplace in the early days of Islam was made for the purpose of preserving fair and just dealing.

6.3.2.1 The institution of *hisbah*

The *hisbah* is an institution of monitoring within Shariah. The institution of *hisbah,* according to Ibn-Taimiyah, is a moral as well as well as a socio-economic institution that is based on the Quranic commands of promoting good and forbidding evil.[907] Al-Mawardi defines it as the 'struggle to ensure that people do good deeds, when it is apparent that such an activity is being neglected, besides guarding against evil, when it is noticed that the

[905] See the discussion under section 3.6.1
[906] Obeid (n 457) 32-3
[907] Ibn-Taimiyah, *Al-Hisba* (n 551) 1

majority are being involved in such an activity.[908] The philosophy of *hisbah* stems from the encouragement of social responsibility, integrity and fairness for the aim of protecting social welfare and a high standard of morality.[909]

In the context of the marketplace, the process of monitoring includes all actors engaged in the market. The *hisbah*'s functional role is to maintain public law and order by the supervision of the behaviour of actors in the market. It is reported that the Prophet Muhammad himself acted as the first *hisbah* officer (the *muhtasib*). The duty of *hisbah* was subsequently carried by people who are known for their honesty and moral character. The role of the institution of *hisbah* is to preserve a high standard of morals in society, by supporting moral behaviour and combating immoral behaviour. In addition, it aims to increase the welfare of society by increasing the level of social responsibility and awareness among people. It provides society with a system of monitoring which supports and strengthens positive activities, while combating and preventing corrupt ones.[910]

The institution of *hisbah* is responsible for appointing members of society (*mutasib*) who are responsible for the maintenance of the market. The *mutasib* is concerned with preserving justice and fairness in the market. His role is to help to enforce fair play among economic actors in order to minimise possibilities for exploitation. The *muhtasib* is required to go out into the market and supervise its operation. He inspects weights, and measures, the metallic content of coins, and the quality of food products. It is part of his role to supervise prices, supplies and production, monopolistic collusions, cheating, mispresentation and fraud.[911] In doing so he is expected to prevent any illegal and unfair dealing. He thus inspects whether weights and measures are constituted properly, and oversees the terms and conditions of contract, the safety and quality of products, and the standard of the units traded in the market, along with hearing complaints from the public, attending to them on the spot.[912] In short, the *muhtasib* intervenes into the market to investigate whenever the economic balance is violated

[908] Ali Al-Mawardi, *Al-Ahkam Al-Sultaniyyah* (Dar al-Kutub Ilmiah 1999) 315
[909] Azrin Ibrahim 'Accountability (Hisbah) in Islamic Management: The Philosophy and Ethics behind its Implementation' (2015) 5 International Journal of Humanities and Social Science 184
[910] Fauzan Saleh 'The Institution of Hisbah: Its Role in Nurturing Fair and Just Economic System in Islam' (2009) Seminar Ekonomi Islam Peringkat Kebangsaan1
[911] Ssuna Salim, Syahrul Faizaz Binti Abdullah and Kamarudin bin Ahmad 'Wilayat Al-Hisba: A Means to Achieve Justice and Maintain High Ethical Standards in Societies' (2015) 6 Mediterranean Journal of Social Sciences 201
[912] Saleh (n 910)

by a powerful individual or entity for their own advantage, and rebalances the market situation.[913]

Nevertheless, the role of the *muhtasib* is limited to fixing obvious violations of Shariah. He does not have the authority to question any *prima facie* approved behaviour nor could he engage in secret probing into a doubtful affair. Furthermore, he could only intervene to fix the violation rather than punishing the violator.[914] The role of the institution of *hisbah* is therefore an executive rather than a regulatory one. It is nevertheless, an indication that the Shariah law promotes paternalistic intervention into marketplace.

6.3.3 Community values

Shariah rules, like those of all religions, encourage people to care about society as a whole and to abandon selfishness and self concern. Honesty, fair dealing and loss-sharing are stressed on many occasions by Shariah ideologies and are implemented in the law of contract. The principle of *ehsan* is a form of social responsibility, in which individuals are encouraged to enhance and strengthen their relationship with each other. In this sense market actors are encouraged to go beyond their legal agreement by being generous, forgiving and tolerant.[915]

People are not only encouraged to care about the society, it is rather an obligation.[916] The virtue of unity is a basic concept of Shariah philosophy by which cooperation and care for others are mandatory. Individuals are also recommended to maintain a sense of balance in all aspects of life and not to build their gain on the loss of others.[917]

6.4 Summary

The first part of this chapter addressed the viability of consumer protection under Shariah law of contract from a theoretical perspective. The general theory of the Shariah law of contract has been tested for its compatibility with the theoretical grounds of consumer protection; these are paternalism, the distribution function of the law of contract and community values.

[913] Salim, Abdullah and Ahmad (n 911)
[914] Abd Ar Rahman Khaldun, *The Muqaddimah* (Franz Rosenthal 2012) 29
[915] Abbas Ali, *Business Ethics in Islam* (Edward Elgar 2014) 202
[916] See Salma Taman 'The Concept of Corporate Social Responsibility in Islamic Law' (2011) 21 Indiana International & Comparative Law Review 481
[917] Rafik Issa Beekun, *Islamic Business Ethics* (International Institute of Islamic Thought 1997) 23-5

It seems that the rational grounds of consumer protection perfectly agree with the theoretical bases of Shariah law. Shariah contract law performs a distributional function based on both 'equity' and 'need' norms. Paternalist motives constitute the theoretical basis of a good deal of Shariah rules. Furthermore, public intervention into marketplace has been practiced since the early days of Islam through the institution of the *hisbah*. Finally, values of honesty, fair dealing, unity and encouragement of cooperation are promoted by the philosophy of Shariah. The following section will move on to test the practical aspect of the Shariah law of contract. The discussion will be guided by the modern regulations of English law of consumer protection and a formula of consumer protection under the Shariah law of contract will be offered. The proposed formula addresses the following values; (1) consumer expectations, (2) how well consumer's are informed, (3) fairness and balance within the contract and (4) voluntary will. The following section is to address how these values could be protected under the Shariah law of contract.

6.5 The technical aspect

By this point in the research, we have established that fairness of exchange is a promoted value of exchange under the Shariah law of contract. The research has also established that the spirit of the law in general promotes theories of distribution, paternalism and community values. This makes the theory of contract in Shariah law perfectly suitable for the accommodation of a consumer protection policy. Nevertheless, the promotion of these values, although necessary as a basis for consumer protection, is not in itself enough for satisfactory consumer protection. There are minimum values that need to be protected by the law of consumer protection in order for it to achieve its goals. Modern regulation regarding consumer contracts protects certain values including a well-informed consumer, voluntary consent, legitimate expectations, and balanced and equitable transactions. It is hard to imagine a successful consumer protection regime that does not serve these values. These values are reflected in the English law of contract mainly through four regulation techniques; implied terms, information remedies, the test of fairness and the cooling-off period.

In order to discuss the viability of consumer protection under Shariah law the technical aspect of the law ought to be examined. The following section attempts to search for technical rules within the Shariah law of contract that could possibly serve the values of consumer protection. This research argues that the rules of Shariah contract have the potential to

protect the following values: (1) consumers' legitimate expectations; (2) consumer's informed consent; (3) consumers' voluntary consent; and (4) fairness and balance of contractual. The following section will discuss these values individually in order to address the extent to which they could be protected under the Shariah law of contract. It makes extensive use of the rules and legal doctrine that protect the fairness and justice of contract. A formula to achieve the maximum benefit from the Shariah rules is proposed. The suggested rules give similar effect to consumer protection as that offered by modern legislation. More importantly they stem from the spirit of the Shariah law and reflect its values.

6.5.1 Consumers' legitimate expectations

Any contractor typically would have certain expectations in his mind that he assumes the contract will satisfy. For example, a contractor would assume that the subject matter would satisfy the contract purpose and specifications. This is particularly important in consumer transactions for many reasons related to consumer's vulnerability.[918] Imposing terms into consumer contracts is one of the common techniques used in consumer regimes to achieve this end. The essence and fairness of the contracts is protected by imposing terms that ensure the balance of the contractual relation. Four terms are imposed by the English law in any consumer contract. These are: implied terms of quality, fitness for particular purpose, conformity with description, correspondence of bulk with sample, implied terms of ownership of the commodity.[919]

The idea of enforcing terms into contractual relationships is not new for the Shariah law of contract; if we were to consider the fact that it is a law of contract(s) rather than a law of contract. The Shariah law of contract is based on a number of nominate contracts by giving each contract a separate consideration. Just like imposed terms, the detailed regulation of contracts is meant to protect the 'essence' attributed to each kind of contract.[920]

Some of the conditions imposed into the contract of sale that are relevant to the purpose of creating consumer protection compatible with Shariah will be outlined below. The focus will be limited to the contract of sale, yet with the understanding that the contract of sale under

[918] See section 4.1.2.1.2
[919] See section 5.8
[920] See section 3.4.1

Shariah is wider than the western concept. It includes barter trading and money exchange. The following discussion will be limited to the sale of goods only.

6.5.1.1 The ownership requirement

The requirement of ownership is essential for the validity of the sale of goods. In classical manuals the ownership requirement is usually expressed passively by requiring goods to be owned by the seller.[921] Al-Qurafi defines ownership as 'a permission conferred by the Shariah to a person to utilise the benefit that he or his representative may gain from a corporeal or usufruct and to take compensation over them.'[922]

The authority of this requirement is found in the *Sunna* in the following text, which clearly expresses the ownership condition: Hakim Ibn Hizam said 'I asked the Prophet, a man comes to me and asks me to sell him what is not with me. I sell him (what he wants) and then buy the goods for him in the market (and deliver them).' The Prophet said: 'Do not sell what is not with you.' The phrase 'do not sell what is not with you' is interpreted to mean do not sell what you do not own even if you are going to acquire the ownership in a later time.[923] Typically, the requirement of ownership has been stressed in Saudi cases in many instances related to the contract of sale.[924]

6.5.1.2 Capability of delivery

The majority of classical jurists of Shariah agree that in a valid contract of sale, goods must be capable of delivery at the time of the conclusion of the contract.[925] Delivery of goods according to Al-Kasani means 'handing over the goods to the buyer in such a way that the goods reach him safely, and, making them over solely to him so that no other party can make a claim over the goods.'[926] The seller is under an obligation to waive any impediments between the subject matter of the sale and the buyer, for the purpose of allowing the buyer to

[921] Shafaai Musa Mahmor 'The Conditions of the Countervalues of the Contract of Sale under Islamic Law with Occasional Comparison with English Law'(PhD thesis, Glasgow Caledonian University 2000) 108
[922] Al-Qurafi, *Al-furuq,* vol 3 (First Published 1229- 1285, Al-Ryisalah 2000) 234
[923] Al-Kasani, *Bada' Alsna'a*, vol 5 (n 461) 208; Mohammed A1-Shawkni, *Nayl al-Awtar*, vol 5 (First Published 1759-1834, Dar Al-Hadith 1992) 184
[924] See Case 2451/2/ق/ 1428AH
[925] See for example: Al-Bahouti (n 560) 162; Al-Kasani, *Bada' Alsna'a*, vol 5 (n 461) 148
[926] Al-Kasani, *Bada' Alsna'a*, vol 5 (n 461) 244

take delivery of the subject matter.[927] The method of delivery differs depending on the nature of the subject matter; it could be actual or constructive.

The delivery of goods sold by quantities for example must be actual; by physical transfer of the goods so that the buyer can take actual possession of them.[928] There are other goods that can only be delivered constructively, for example the sale of a house or building.[929] In such cases Al-Nawawi requires that the seller takes the appropriate actions to keep the subject matter free from any occupation.[930]

The law links the requirement of capability of delivery to both the goods and to the seller's ability to deliver them. The subject matter must be of a nature that makes delivery possible. Furthermore, the seller must have the relevant resources to give effect to the delivery. The two conditions have been sometimes used interchangeably by scholars.[931]

The issue of incapability of delivery has been expressed by scholars through similar examples. These are *inter alia* the sale of birds in the air, the sale of a fish in water and the sale of a runaway.[932] The incapability of delivery can be either absolute or relative.[933] For example, in the case of a runaway animal, if the seller has no idea about its location this is an absolute incapability of delivery. However, if the seller has some information about the whereabouts of the runaway it is a relative incapability. The incapability affects the validity of the sale only if it is absolute. When the incapability of delivery is relative the sale can become valid and enforced once the delivery has taken place.[934]

This requirement has been affirmed by Saudi case law. In a case of the purchase of land the buyer was surprised by the legal authority that bans him from building his home on the land

[927] Nzaam Al-Dean and Others, *Al-Fatawa Al-Hendeah*, vol 3 (Dar Al-Feaker 1893) 28-37
[928] Al-Kasani, *Bada' Alsna'a*, vol 5 (n 461) 244; Ibn-Qudamah Al-Maqdisi, *Al-Moughni*, vol 4 (First Published 1146-1223, Maktabat Al- Qahirah 1968) 86; Abulkaram Al-Rafae, *Fatah Al-Azis*, vol 8 *(*First Published 1160-1226, Dar Al-Koutoub 2015) 442
[929] Nzaam Al-Dean and Others (n 927) 28-37
[930] Yahya Al-Nawawi, *Al-Majmoua*, vol 9 (First Published 1233-1277, Dar Al-Feakr 1970) 276
[931] Al-Kasani, *Bada' Alsna'a*, vol 5 (n 461) 147; Al-Nawawi (n 930) 284; Shams Al-Dean Al-Ramli, *Nrhaiyat Al-Mouhtaj*, vol 3 (First Published 1513- 1596, Dar Al-Feakr 1984) 398; Ibn-Qudamah Al-Maqdisi, *Al-Sharah Al-Kabear*, vol 4 (First published 1146-1223, Dar Al-Ketab Al-Arabi 1928) 4-34
[932] Al-Maqdisi, *Al-Sharah Al-Kabear*, vol 4 (n 931) 4-34; Al-Kasani, *Bada' Alsna'a*, vol 5 (n 461) 243
[933] See the proposal made by Al-Sanhuri, *Masader Alhaqq fi Alfigh Alislami*, vol 3 (n 463) 79-81; The proposal made by Al-Sanhuri seems to originates from the differentiation made by Ala Aldean Al-Kasani, *Bada' Alsna'a*, vol 5 (n 461) 283; See in this regard: Mahmor (n 921) 203
[934] Al-Sanhuri, *Masader Alhaqq fi Alfigh Alislami*, vol 3(n 463) 79-81

due to it being government property. The court held that the contract is void because every contract of sale is underpinned by the requirement that the subject matter is free from charge or encumbrance that qualifies the buyer of a quiet position.[935]

6.5.1.3 Inspection of the subject matter

The inspection of the subject matter by the buyer has been given special attention by the Shariah law of contract. Immediate sale is encouraged for the purpose of certainty. While spot trade is encouraged, need sometimes requires that the contract is concluded in *absentia*. The actual inspection of the subject matter by the buyer is required as long as it possible. The requirements of inspection differ as to the type the type of sale.[936]

6.5.1.3.1 Spot sale

In spot sales the contract is made on a cash-and-carry basis. The actual appearance of the commodity in a contractual meeting (*majlis al aqd*) is required so that the buyer is capable of inspecting the subject matter for the purpose of avoiding uncertainty. The seller is under an obligation to make the subject matter available for inspection by the buyer.[937] This type of sale is encouraged by Shariah because it carries minimum risk since the buyer has the chance to inspect the subject matter just before the conclusion of the contract.

6.5.1.3.2 Sale by description

Sale by description is permitted only if the actual inspection cannot be effected without hardship. For example, if the subject matter is in a location that is distant from the contracting parties, this means that cannot be reached without hardship.[938] Most of the relevant discussion of the classical jurists was focused on the distance and how faraway the commodity is. Yet, Mahmor argues that the situation is different in present times due to the development of transportation. What used to cause a hardship may not be a cause of hardship anymore.[939] Thus, the effective cause here is the hardship rather than the distance.

[935] Case 34208897 on 7/5/1434AH
[936] Mahmor (n 921) 152
[937] Coulson, *Commercial Law in the Gulf States* (n 374) 57-67
[938] Ahmad Al-Derder, *Al-Sharah Al-Kabear*, vol 3(First Published 1715-1786, Aisa Al-Halabi 2004) 27
[939] Mahmor (n 921) 171

Once the hardship is established, the sale is validated without inspection according to certain conditions. The subject matter must be clearly and sufficiently described by which is meant that the nature of the object should be indicated by specifying its type and/or species Ibn-Qudamh adds that the description must include all factors which could affect the value of the subject matter.[940]

6.5.1.3.3 Sale based on previous sighting

In this type of sale the sale is concluded based on the buyer's knowledge of the subject matter gained from a previous viewing. The subject matter that is not present in the contractual meeting has been already viewed by the buyer prior to the contract. Sale based on previous sighting is valid as long as that the subject matter has not changed since the viewing. If there is a chance that the subject matter has changed since that time, the sale become invalid unless the seller grants the buyer the option of inspection.[941]

6.5.1.3.4 Sale by Sample

In sale by sample the subject matter of contract is inspected via a sample. In the sale of fungible goods, according to the Maliki school, it is sufficient to inspect part of the subject matter. On the other hand, partial inspection is not sufficient in the sale of non-fungible goods.[942] The Shafi on their part, necessitate that the sample be part of the subject matter. Otherwise, it will be a sale of something out of sight, which is unacceptable in Shafi legal thought.[943]

6.5.1.3.5 Remedy for the sale with neither inspection nor description

In some situations the contract of sale could be concluded with neither inspection nor description of the subject matter. Whereas some scholars disallow this kind of sale as being null and void, others render the contract voidable subject to the option of inspection (*khyar*

[940] Al-Maqdisi, *Al-Moughni*, vol 4 (n 928) 86
[941] Al-Nawawi (n 930) 296
[942] Muhammed Al-Dusouqi, *Hashiat Al-Dusouqi ala Al-Sharah Al-Kabear*, vol 3(Aisa Al-Halabi 2004) 24
[943] Al-Nawawi (n 930) 296

al-ruayah).[944] The option of sighting or inspection is granted by those who permit it to the person who buys something without inspection or description. The option of inspection is meant to achieve the fundamental aims of certainty and transparency regarding the nature and quality of the subject matter. Ideally from a Shariah point of view the subject matter should be presented in the contractual session (*majlis al-agd*) and made available for inspection by the buyer. Yet, if for commercial needs that buyer has to contract for something that she has not seen, certainty is then enhanced by the option to rescind upon sight and inspection of the goods. The buyer, accordingly, has the right to rescind the goods if it did not meet her expectations.[945] This situation is different from the non-conformity of description because no description is provided.

6.5.1.4 The existence of the subject matter

There is a general agreement among the classical jurists of Shariah that the subject matter must be in existence at the time of the contract's conclusion. It seems that the common impression was that the existence of the subject matter of sale is necessary to give effect to the essence of the contract of sale which is the transfer of the ownership.[946] The requirement that the subject matter must be, *inter alia,* in existence at the time of the conclusion of the contract was emphasised on many occasions. The requirement of the existence of the subject matter is explained by Al-Kasani in the following text:

'There are several conditions for the contract of sale to be validly concluded with special reference to its object. The first condition is that it must be in existence; the sale of the non-existent and sale of anything, which is susceptible to the hazard of non-existence, is void. Examples are as in the sale of the offspring of a future-born animal and the sale of the foetus of an animal before its birth, of which the former is the sale of non-existent whilst the latter involves in a hazard of non-existence.'[947]

There are two exceptions to the general rule of the existence of the subject matter of sale; the *salam* sale and the *istisna* sale, subject to certain conditions. The two exceptions are agreed

[944] Al-Kasani, *Bada' Alsna'a*, vol 5 (n 461) 208; Al-Derder (n 938) 21
[945] Coulson, *Commercial Law in the Gulf States* (n 374) 57-67
[946] Al-Kasani, *Bada' Alsna'a*, vol 5 (n 461) 243
[947] Ibid 138

upon by the four schools of Shariah law and subjected to certain rules and conditions.[948] The *salam* is a sale of an object that is not in existence at the time of the conclusion of the contract whereby the seller commits to deliver the subject matter at a fixed future date for price paid at the time of the conclusion of the contract.[949]

The sale of *istisna* is for the purchase of something that will be manufactured later according to certain specifications. The practice of the two types of sale is subjected to certain conditions, which are meant to enhance the certainty of the transaction. In both sales the subject matter must be specified leaving no ambiguity that could lead to a dispute. The contract must specify all possible details including the type of the commodity, quality, quantity, time of delivery and the place of delivery, which must be expressly mentioned in the contract. A subject matter that cannot be determined by description cannot be contracted upon by *salam* or *istisna*. In addition, in the sale of *istisna* contracts, the subject matter must be specified by its use, or the purpose for which it is made.[950]

In the light of these two exceptions the leading scholars of the Hanbali school, Ibn-Taimiyah and Ibn-Qayyim, diverted from the majority position. According to them the non-existence of the subject matter is not in itself a cause for nullity. According to Ibn-Taimiyah, the prohibition of dealing non-existant commodities has never been explicitly indicated in the primary sources of the Quran and *Sunna*. The effective cause of the prohibition of selling non-existent subject matter is not the state of existence itself but rather the uncertainty or *gharar* attached to it. On this, Ibn-Taimiyah notes the following:

'Some people said, the sale of non-existent is unlawful, however, their view has not been supported with any legal texts or consensus of opinion *(Ijma).* In fact, there is consensus that invalidates some sales of the non-existent as it invalidates the sale of some other articles, which actually exist. So, in what sense should they generalise that the effective cause of the prohibition is the fact of non-existence?'[951]

[948] Mohd Zulkifli Muhammad and Rosita Chong 'The Contract of Bay' *Al-salam* and *Istisna'* in Islamic Commercial Law : A Comparative Analysis' (2007) 1 Labuan Journal of Muamalat And Society 21
[949] Razali Nawawi, *Islamic Law on Commercial Transactions* (CT Publications 1999) 1
[950] Alalaili (n 561) 295
[951] Ibn-Taimiyah, *Nazariat Al-Aqd* (First Published 1263-1328, Al-Ketab L-Al-Nasher) 213

Ibn-Qayyim agrees with Ibn-Taimiyah that the prohibition of the sale of non-existent commodities is not prompted by non-existence itself but by *gharar*.[952] It seems that the classical scholars have become sometimes overprotective in their endeavours to keep the element of uncertainty or *gharar* away. The requirement of existence of the subject matter is one such occasion. This over-protectiveness has led classical jurists to the imposition of very strict rules of contract. The requirement of the existence of the object at the moment the sale is concluded is based on confusion over the requirements of the doctrine of *gharar*.

Al-Sanhuri proposes a useful guide to differentiate between non-existent subject matter that can be subject of the contract and that which cannot. He argues that a distinction should be made between 'non-existent' subject matter and that which is 'non-existent at the time being but shall necessarily occur in the future'. Whereas the first cannot be subject to sale, the second can be subject to a valid sale. Where the subject matter is potentially coming to existence, the danger of *gharar* is excluded. Yet if the future existence of the subject matter is a mere possibility the notation of *gharar* is presented.[953]

This position seem to be favourable to modern scholars as it responds better to the needs of the modern market. The modern Shariah position is then that the non-existence of the subject matter does not necessarily invalidate the contract. Thus, it is suggested that the principle of *gharar* be applied to determine whether or not the non-existent commodity can be a valid subject matter of the contract of sale or not. Accordingly, the sale of non-existent subject matter is void only if it causes unreasonable certainty regarding the qualitative and quantitative description of the subject matter. Thus, the prime concern for the validity of the contract is safe availability rather than existence at the time of the conclusion of the contract.[954]

The Saudi court seems to agree with the later position that the sale of future subject matter is valid as long as it can be determined with reasonable certainty. In a case of sale of plastic boxes, the contract contained a term that the delivery of the subject matter would be made in stages, the price being payable upon the delivery of each group. The buyer accepted the delivery and paid for the first part of the delivery, but then refused to accept the delivery of

[952] Ibn-Qayyim Al-Jawziyyah, *Ilam Al-Muwaqqin an Rabb Al-Alamin*, vol 2 (n 499) 9
[953] Al-Sanhuri, *Masader Alhaqq fi Alfigh Alislami*, vol 3 (n 463) 7-9
[954] Mahdi Zahraa and Shafaai M.Mahmor 'The Validity of Contracts When the Goods Are Not Yet in Existence in the Islamic Law of Sale of Goods' (2002) 17 Arab Law Quarterly 379

the rest of the amount specified in the contract. When the case was brought to court, the buyer argued that the contract was void from the beginning as it is a form of the sale of non-existence, which is prohibited by the opinion of the majority. The buyer rested his argument on the fact that the wording of the contract of sale was written in the past sense (e.g. A has sold a certain amount of boxes to B). The contract did not mention that the subject matter was going to be manufactured but instead was stated as being an orthodox contract of sale. Accordingly, the contract is void as it is a form of the sale of the non-existence prohibited by Shariah law. The court held that this is a valid contract of *istisna* (manufacturing), which is accepted as a valid contract by all legal schools. Although the contract did not specify that it is a contract of manufacturing this is clear from the situation of the contract. The court explained that a contract of *istisna* is valid if the following are specified: subject, type, quantity, and a description that determines its nature.[955]

Nevertheless, in a different case the court ruled against the validity of a future sale. In a contract to supply lambskin hide, the buyer refused to accept part of the supplied goods as being defective. The court held that the subject matter is of the kind that cannot be determined by description; as a result it cannot be subject to the future sale. The court therefore ruled on the invalidity of the contract.[956]

6.5.1.5 Determination of the counter-values

Both the subject matter and the price must be precisely determined by the contract of sale for the purpose of reducing uncertainty.[957] All schools of Shariah jurisprudence are in agreement that the subject matter must be determined by avoiding any form of unreasonable uncertainty. Yet, a trivial uncertainty about the characteristics of the subject matter is tolerated.[958] Goods must be determined in relation to their specific item, quantity and description.[959] The way the goods are determined is affected by the nature of the goods; some can determined by description or quantity whereas others can only be determined by rough estimation. The subject matter must be determined by one or more methods of determination including:

[955] Case 2060/ق/on 1418AH
[956] Case 317/5/ق/on 1428AH
[957] Al-Kasani, *Bada' Alsna'a*, vol 5 (n 461) 156; Al-Dusouqi (n 942) 15; Al-Nawawi (n 930) 149
[958] Al-Kasani, *Bada' Alsna'a*, vol 5 (n 461) 156
[959] Al-Nawawi (n 930) 286

description, quantity rough estimation, and quality which will be individually addressed below. Furthermore, the price of the contract must be determined.

6.5.1.5.1 Determination by description

Some goods can only be determined by description. This is normally the case in the sale of goods to be manufactured (*istisna*). In this case the subject matter must be described with reasonable certainty. It must be specified leaving no ambiguity which may lead to a dispute. The contract must specify all possible details including the type of the commodity, quality, quantity, time of delivery and the place of delivery. Furthermore, the subject matter must be specified by its use, or the purpose for which it is made.[960] When the subject matter posesses unique characteristics, its unique features must be established by precise description. Additionally, when the contract of sale is concluded for the sale of a specific item, its individuality must be reasonably determined.[961]

6.5.1.5.2 Determination by quantity

The quantity of goods must be determined in accordance with their nature. The subject matter must be determined appropriately by weight, number, length, volume, etc. The exact quantity of the goods must be clearly determined in order to effect a valid sale. Accordingly if a seller offers to sell 'some of these cereals' the sale is void on the grounds of uncertainty.[962]

6.5.1.5.3 Determination by rough estimation

The exact quantity of the subject matter of the sale of contract could, either according to certain circumstances or due to its nature. This is the case in the *juzaf* sale.[963] *juzaf* is the selling of something that has been inspected by the buyer but is not bound by description of quantity. For example, the sale of a heap of wheat inspected by the buyer but not measured.[964] The authority of the *juzaf* sale derives from the fact that it was commonly practiced during the life time of the prophet. It said that the *juzaf* sale is permitted as a matter

[960] Alalaili (n 561) 295
[961] Al-Bahouti (n 560) 163; Al-Maqdisi, *Al-Sharah Al-Kabear*, vol 4 (n 931) 4-34
[962] Al-Dusouqi (n 942) 15; Al-Bahouti (n 560) 163; Al-Nawawi (n 930) 311
[963] A1-Shawkni (n 918) 190
[964] Al-Dusouqi (n 942) 186

of necessity as an exception to the general rules in response to market needs.[965] The sale of *juzaf* is permitted subject to certain conditions. It must be inspected and approved by the buyer. The exact quantity of the subject matter must not be known to either party. If it turns out that the seller knows the exact quantity of goods and has kept this information from the buyer the sale is void.[966] Furthermore, the goods must be capable of estimation. A subject matter that is not capable of estimation cannot be sold on the basis of *juzaf*.[967]

6.5.1.5.4 Determination by quality

The subject matter must also be determined by its quality. The determination of quality is important for the purpose of avoiding any uncertainty as to the value of the subject matter.[968] The formula offered by classical jurists for such determine reflects the methods available in their historical period. For example, they stress the determination of the subject matter based on species and origin, which is somewhat different from the modern way of describing goods by maker, model, ingredients, expiry date, manufacturer guarantee, minimum quality and so on. Certainty about the value of the subject matter cannot be achieved today without invoking such criteria. Thus, the proper application of the requirement of determination of the subject matter under Shariah law requires that the current criteria be included. It is self-evident that the information as to the maker, model, specification of guarantee, etc, comes under specifications of quality required for the purpose of deciding upon the value of the subject matter.

6.5.1.5.5 Price determination

The prevailing opinion among scholars is that the price of the contract of sale must be fixed at the time of the conclusion of the contract. Failure to comply with this requirement renders the contract void.[969] Ibn-Taimiyah however, diverts from the majority consensus. He advocates that the non-determination of the price in the contract should not render the contract void. According to him the requirement of price determination might sometimes be difficult to meet. He proposes that when the contract provides nothing on the price, the

[965] Saleh (n 488) 62-102
[966] Muḥammad Ibn Juzayy, *Al-Quanin Al-Fiqhiah* (First Published 1294-1340, 1970) 164
[967] Al-Derder (n 938) 21; Al-Nawawi (n 930) 314
[968] Mahmor (n 921) 243
[969] Al-Bahouti (n 560) 173; Al-Dusouqi (n 942) 15

equivalence price (*thamn al- mithel)*[970] is payable.[971] This proposal responds to modern needs where many contracts are concluded without fixing the price.[972]

6.5.1.5.6 Remedy for non-conformity with specifications

Failure to determine the subject matter renders the contract void in the majority of juristic opinions.[973] However, if the subject matter turns out not to conform with the description specified in the contract the contract is then voidable. The buyer has the remedy of *khyar al-wasf* (the option of description). The option is mandatory, any purported agreement to exclude it is null. Although no strict time limit is required, the option must be practiced within a reasonable time from the moment at which the fault was discovered.[974]

Non-conformity with specifications is a significant topic in modern times. The Saudi court has explained that non-conformity with specifications must occur within one of two situations. First, when the non-conformity with specifications causes decrease in the value of the subject matter, this is dealt with by the option of defect. Under the option of defect the buyer can choose whether to rescind the contract or claim the difference in price between the fit and the defective product (*irsh*).[975] The second case of non-conformity with specifications is when the subject matter proves to be unfit for the purpose of contract. The Saudi court considers this situation as a case of non-effective delivery, which renders the contract void. The court has explained the importance of this differentiation with reference to duration. While in the first case the right to use the option of defect is dismissed if the subject matter has been used for a sufficient period of time; the situation is different in the second case, because an effective delivery was never made.[976]

6.5.1.6 Merchantability of the subject matter

Generally the requirements of quality have only been mentioned for the purpose of determining the value of the subject matter as explained above. Hardly ever has the

[970] See section 3.8.4
[971] Ibn-Taimiyah, *Nazariat Al-Aqd* (n 947) 161
[972] Mahmor (n 921) 252
[973] Al-Dusouqi (n 942) 15; Al-Nawawi (n 930) 149
[974] Coulson, *Commercial Law in the Gulf States* (n 374) 57-67
[975] Case 33252287/on 17/5/1433AH
[976] Case 1991/1/ق/1428AH

specification of quality been mentioned in other situations. Nonetheless, under the doctrine of defect,[977] the buyer has the right to rescind the contact upon the discovery of fault. The defect must have existed in the goods at the time of the contract. This, according to Coulson, impels a requirement that the goods must be of merchantable condition. The criterion is determined by normal commercial usage. Failure to meet with the condition gives the buyer the right to rescind the contract under the option of defect.[978]

The Saudi court seems to uphold the position that every contract of sale implies a condition that the goods must meet accepted standards. In a case of the sale of agricultural compost that did not satisfy common standards the court held that this is to be considered a defect. The buyer of defective goods has the choice whether to rescind the contract or claim the difference in price between the fit and the defective product (*irsh*)[979] Furthermore, the Saudi court has explained that the non-conformity with the purpose of contract renders the contract void.[980]

6.5.1.7 Consumers' legitimate expectations under the Shariah law of contract

Certainty is encouraged by Shariah law under the rules pertaining to the sale of goods. Certainty has the potential to narrow the gap between consumer expectations and reality. The above discussion presented conditions intended to protect the essence of the contract of sale under the Shariah law of contract. These conditions can be employed by the legislator in consumer protection in order to protect consumer expectations. The research argues for specific conditions to be implied in legal statues that regulate consumer protection in Shariah-ruled countries. The implication of these conditions serves the value of protecting consumers' expectations. Every consumer contract for the sale of goods should imply the following: (1) the goods must be owned by the supplier before the conclusion of the contract; (2) the subject matter must be free from charge or encumbrance; (3) the supplier must enable the consumer to inspect the subject matter where possible; (4) where the inspection of the subject matter is not possible, the subject matter should be determined in a way that dismisses any uncertainty; (5) where the subject matter is to be found in the future it must be of the type of good that can be determined by description; (6) the subject matter of the sale must conform with all the

[977] See section 3.8.6
[978] Coulson, *Commercial Law in the Gulf States* (n 374) 57-67
[979] Case 1662/1/ق/ on 1413AH
[980] Case 1991/1/ق/on 1428AH

specifications mentioned in the contract; (7) the subject matter must be of merchantable quality and must satisfy the purpose of the contract. The implication of these conditions into consumer relations, as well as being compatible with Shariah regulations, should serve the purpose of protecting consumer expectations.

6.5.2 Consumers' informed consent

Information deficits are a major issue that affect consumer decisions. Unless a contractor is equipped with all relevant information surrounding the contract, including contract terms and goods specifications, the contract might not reflect the contractor's will. Remedying information issues has the potential to deal with many consumer issues. The supply of the right information has the ability to empower the consumer into making informed decisions.[981] Although the English law of contract does not recognise a general duty to disclose information under the law of contract, information remedies is an essential aim of consumer regulations. Information disclosure is enforced in almost all aspects of consumer transactions.[982] Information remedies regulate three aspects: (1) removing restraint on information; (2) correcting misleading information; and (3) encouraging additional information.[983] These remedies therefore potentially cover a wide range of information, including the quality of products and services, their price, including the cost of credit and the actual terms of consumer transactions.[984]

Generally, honesty and transparency are promoted by the rules of Shariah for the purpose of preserving fair dealing. However, to what extent can Shariah rules reflect the above values to ensure that consumers' informed consent is promoted? We suggest that the information rules of the Shariah law of contract should be separated into two categories. First, there is the general duty of disclosure which is applicable in all contractual relations. Second, there is a specific disclosure duty which is limited to a particular type of contractual relations.

[981] See section 4.2.1.4
[982] See section 5.6.3
[983] Beales, Craswell and Salop (n 604)
[984] Collins Scott and Black (n 806) 337-40

6.5.2.1 The general duty of disclosure

In the normal course of contracting the contractor is under an obligation to disclose three types of information under the rules of the Shariah law of contract. First, there is the requirement to disclose information needed for determining the subject matter. As part of the requirement of determination of the subject matter explained above in relation to the condition of sale, the seller is required to disclose all relevant information in order to specify the subject matter with reasonable certainty. This includes the description, quality and quantity and all relevant information for the purpose of specifying the subject matter.[985]

In this regard, we can say that the seller is under a general duty to disclose every piece of information known to him at the time of the conclusion of the contract that is related to identifying the subject matter. This is evident from the requirement of the sale based on rough estimation (*juzaf*) mentioned above.[986] The validity of sale of *juzaf* is conditional on the fact that the seller has no information about the exact quantity of the goods which he is keeping secret from the buyer. If the seller does keep information that could contribute to the determination of the subject matter secret, the seller is then in breach of contractual obligations.

Second, there is the requirement to disclose information regarding any defect known to the seller. Under the doctrine of defect disclosure the seller is under a duty to disclose any defect known to him at the time of the conclusion of the contract. There is no exception to this rule. The discovery of a defect that existed at the time of the conclusion of the contract qualifies the buyer for the option of defect (*khiyar al-aib*). It allows the buyer to rescind the contract upon the discovery of a defect or fault that was present at the time the sale was concluded. The defect must be one that affects the value of the goods according to normal commercial usage.[987]

Third, in addition to the disclosure of information related to the subject matter, disclosure of information regarding the condition of the contract is encouraged under the doctrine of *gharar*. Under the Shariah law of contract each party has the right at the time of the

[985] See section 6.5.1.5
[986] See section 6.5.1.5.3
[987] Coulson, *Commercial Law in the Gulf States* (n 374) 57-67

conclusion of the contract *ipso facto* of how much she is stand to gain.[988] This means that each contracting party must know for sure at the time of the conclusion of the contract all rights and obligations set by the contract. Gross uncertainty as to the contract terms and obligations renders the contract void.[989]

6.5.2.2 The specific duty of disclosure

In addition to the general duty of disclosure, there is the specific duty of disclosure which is limited contracts concluded in special circumstances. This applies according to the doctrine of unfair exploitation when the contract is concluded with a person in a vulnerable situation. Under this rule the seller is not only required to disclose all relevant information as to the subject matter and sale terms, but also to disclose the real value of the commodity on the market. Under the doctrine of unfair exploitation the seller is according to specific conditions required to disclose the market price to the other party who is ignorant or contracting out of urgent need. Three practices are regulated under the doctrine of unfair exploitation: (1) necessity sale; (2) sale by inexperienced persons; and (3) the sale concluded with Bedouin traders before reaching the city market. The three practices share the characteristic that they are concluded with the person in a vulnerable or needy situation.

In addition to disclosure based on vulnerability or need, there is the disclosure duty based on trust. When there is a trust relationship between the contractors (e.g. *Morabaha* contract of sale) the seller comes under a duty to disclose the actual value of the commodity. This sale is based on the trust relation between a fiduciary and a beneficiary. Failure of disclosure is a betrayal of the trust relation that amounts to responsibility and gives the buyer the option to rescind the contract.[990]

6.5.2.3 Consumers' informed will and the regulation of Shariah

Information rules under Shariah regulations seem to meet the values protected by consumer information remedies. It encourages the removal of information restraints and the supply of additional information in relation to the subject matter and the contract terms. In fact the

[988] Obeid (n 457) 55
[989] See the position of the Saudi court regarding uncertain contract terms under section 3.6.3
[990] Alalaili (n 561) 355; See section 3.8.6

Shariah rules go beyond this by enforcing a duty to disclose the market price or the real value of the commodity in certain situations. The effective causes in these situations are either the vulnerability of the contractor or the trust relationship between the contracting parties. Arguably the two factors (vulnerability and trust) are applicable in the consumer supplier relationship. Therefore, the specific duty of discourse should be applied in consumer contracts for the proper application of Shariah law.

Consumer vulnerability is a major factor in the need for consumer protection in general and information remedies specifically. Causes of consumer vulnerability have been discussed before, including poverty and procedural vulnerability (information, redress, supply, pressure and impact).[991] The three practices are regulated under the doctrine of unfair exploitation in terms of three types of vulnerability: poverty, supply vulnerability and information vulnerability.

The situation in the case of the necessity sale can be explained under poverty and supply vulnerability. Necessity sale is a type of sale that is concluded to satisfy a basic need of the contractor (food, clothes etc). This is usually accompanied with an element of urgently or necessity, meaning that the sale is concluded in abnormal circumstances. The special regulation of this type of sale is arguably based on poverty since the consumer is contracting to satisfy basic needs. Furthermore, it could be also understood as supply vulnerability. Supply vulnerability, as has been explained, occurs when the consumer lacks choice because there is no alternative package offered anywhere else.[992] This is exactly the case in a necessity sale: the buyer has no choice and cannot afford to refuse to enter the contract. Sale to inexperienced persons can be explained under information vulnerability. The special regulation of this type of sale is made based on the buyer's ignorance of market price, and lack of information is also considered as a cause of vulnerability in respect to consumer protection.[993]

This rule applies not only when the lack of knowledge of the value of the commodity is certain but also when it is presumed, as in the situation of meeting Bedouin traders before reaching the city. Here the law presumes that those Bedouins are ignorant of the market price

[991] See section 4.1.2.1.1
[992] See section 4.1.2.1.2
[993] See section 3.8.5

since they have not yet reached the market. We have seen that the Saudi court presumes the lack of knowledge of market price whenever the contract is concluded at a grossly unfair price.[994]

In this light, it might be possible to generate the rule that whenever it appears that the buyer is contracting from a vulnerable position the seller is under a duty to disclose the market price. This vulnerability could be as a result of poverty or necessity or procedural vulnerability, as a consequence, for example, of a lack of information or a lack of bargaining skills. This rule does not apply to situations where parties are negotiating from equal bargaining positions. In other words, the special duty of disclosure of the value of the goods is applicable to consumer contracting but not commercial contracting.

Furthermore, it can be argued that the consumer/supplier relationship is in many instances accompanied by an element of trust. This is especially true when the consumer is relying on the commercial name or reputation of the supplier. In this case the consumer is putting his trust into the supplier who is under an obligation to honour this trust. Honouring the trust between the contracting parties is promoted by Shariah law. When there is a trust relationship between the contractors the seller comes under a duty to honour this trust. Betrayal of trust in a contract based on trust amounts to responsibility.[995] Honouring trust requires the buyer to supply information about the value of the goods in the market.

6.5.3 Consumers' voluntary consent

A basic right of any contractor is to be bound only by contract that she has concluded through her free will. This is a right that no law of contract would deny. This value is protected under rules that protect contractors against coercion, such as the doctrines of duress and undue influence. However, the protection of the consumer calls for more than the protection from obvious actions of coercion. Consumer contracts are sometimes concluded in circumstances that are likely to vitiate the consumer's will. This is likely where the contract is concluded outside the business premises or in distance contracting. Such situations are usually dealt by the cooling-off or cancelation period. This technique is designed to give the purchaser time to reflect and gives her a remedy if she feels she was prejudiced by a transaction.

[994] See section 3.8.5.4
[995] Alalaili (n 561) 355; See section 3.8.6

The Shariah law of contract recognises the right of parties to rescind the contract upon reflection. Parties are given avenues to rescind the contract on the simple basis that they have had second thoughts and no longer wish to proceed. The option to rescind (*khiyar al-faskh*) exists either as matter of law (*khiyar al-mjlis*) or by agreement between the parties (*khiyar al-shart*).[996]

6.5.3.1 *Khiyar al-majlis* (the option of the contractual session)

The session option is based on the simple ground of second thought.[997] The purpose of the option is to allow time for reflection before the contract becomes absolute. The parties to the contract of sale have the option of repudiation before the contractual session (*majlis al-aqd*) breaks up.[998] This option is based on a tradition attributed to the Prophet according to which he said: 'Each of the parties to a contract of sale has the option against the other party as long as they have not separated.'[999]

The option of session is determined by physical proximity in that the parties must be in the same place. There are no specified time limits for the determination of the option; it continues until the parties are physically separated from each other or as indicated by ordinary common sense. In other words, the right to rescind continues as long as the two parties are still in the place where the contract was concluded. Parties can exit the contract by agreeing upon a stipulated period of option. The extension of the option terminates in one of the following ways: (1) natural termination of the contractual session, even when this is effected deliberately by one of the contracting parties; (2) renunciation of the option by either party (such recession is effective only against the party who made it), which might be oral and express or implied; (3) loss of the object of the contract during the session (this is could be by passing the ownership to a third party by a second contract); (4) when the parties agree on a certain period for the option.[1000]

[996] Coulson, *Commercial Law in the Gulf States* (n 374) 57-67
[997] Nabil Saleh 'Freedom of Contract: What Does It Mean in the Context of Arab Laws?' (2001) 16 Arab Law Quarterly 346
[998] Hasbullah Abd Rahman 'Offer and Acceptance in Islamic Law of Contract' (2000) 8 Jumal Syariah 15
[999] Al-Bukhari, *Sahiah*, vol 3, 34, Hadith 324
[1000] Coulson, *Commercial Law in the Gulf States* (n 374) 57-67

6.5.3.2 *Khiyar al-shart* (option by stipulation)

When the contract of sale is *inter absentes* the application of the option of session is not practical. This being said, it might be held that a constructive contractual session exists in these cases at the time and place of the recipient of the offer. The notion of physical proximity is however essential for the contractual session option. Thus, the only way for the parties to gain time for reflection is by agreeing upon a fixed time for rescission.

The contracting parties are permitted to agree upon a period of time during which either or both contracting parties can rescind the contract. Such an agreement is considered valid as it reinforces the fundamental aim of certainty of contractual commitment.[1001] Ibn-Qudamh disallows any option that could lead to a loss or exhaustion of some of the benefits contracted for during the period of the option.[1002]

The option by stipulation must satisfy the following requirements. First, parties must agree upon a certain period for the option. There is no limit of duration set by the law. But it must be determined in unambiguous way. For example to say 'as long as I choose' or 'until it rains' is not valid due to uncertainty. However, the option 'until harvest' is valid as long this is being within reasonable time, since it this is known by experience and custom. Second, the options' period must start from the time of the conclusion of the sale. Third, the option must be agreed in good faith. This means that it must be agreed on for the purpose of reflection. The option is void if it transpires that it has been made for a different reason. For example, if the buyer wanted to secure a short-time gain, by benefiting from the subject matter during the option period. The option terminates at the end of its specified time or by unilateral renunciation without the presence or concurrence of the other party. It also terminates with the loss of the sale subject in the same way the option of the session can be extinguished.[1003]

6.5.3.3 Consumers' voluntary will under Shariah regulation

The application of the option of the contractual session on consumer transactions amounts to giving the consumer a very short cooling-off period. This period ends as soon as the

[1001] Coulson, *Commercial Law in the Gulf States* (n 374) 57-67
[1002] Al-Maqdisi, *Al-Moughni*, vol 4 (n 928) 86
[1003] Coulson, *Commercial Law in the Gulf States* (n 374) 57-67

contracting parties are physically separated. This means that the cooling-off period ends as soon as the consumer leaves the store from which he bought the goods. As a result, it could hardly contribute to the protection of the consumer's voluntary will. Moreover, it is not beneficial to the protection of the consumer in distance selling, as it requires physical proximity.

The option by stipulation is linked to the contractor who can choose whether or not to have it and can decide on its duration. This does not suit the nature of consumer protection, which tends to be legally enforced rather than optional. Thus, the protection of the voluntary consent of the consumer would require the enforcement of a cancellation period by law when the contract is concluded in circumstances that are likely to vitiate the consumer's will.

Nothing in the rules of Shariah contradicts with the enforcement of a cooling-off period in a distance contract. On the contrary, a cancellation period would serve the fundamental aim of certainty of contractual commitment as it would give the buyer the chance to inspect the subject matter upon reception before the contract becomes binding. Furthermore, the idea of cancelling a contract upon second thought is not foreign to Shariah law. It is enforced for instant contracts under the option of the contractual session thus it is should also be enforced in the case of distance contracts. The regulation of a mandatory cooling-off period in a Shariah-ruled country should reflect the conditions of the option by stipulation. It should be set for a certain period of time, starting from the time of the conclusion of the contract, and it must encourage good faith.

6.5.4 Balance and fairness of the contract terms

Consumer policies generally derive from the idea of inequality of bargaining power between consumer and supplier. There tends to be a disparity in power between the producer and consumer, due to a disparity of bargaining power, knowledge and resources between the two sides.[1004] This is likely to result in imbalanced contractual obligations. As a result, the attainment of fairness and balance of contract has become a major value of consumer protection.

[1004] Iain Ramsay, *Rationales for Intervention in the Consumer Marketplac*e (Office of Fair Trading 1984) 50

The fairness test under English law is a judicial technique which tests the balance and equity of terms of consumer contracts. Three criteria are employed for the purpose of deciding on the fairness of the terms, as addressed in chapter three. These are the requirement of good faith, transparency and significant imbalance. Significant imbalance refers to the substance of the contract terms. It requires the court to consider whether the consumer is deprived of an advantage which he normally has under national law. In doing so, the court needs to consider the significance, purpose and practical effect of the term in question. Also, the term must be consistent with the reasonable objective that the relevant term seeks to protect. However, the imbalance must be 'significant', and thus a 'slight' imbalance does not render the term unfair. Accordingly, the consumer will not be able to rely on legislative protection against unfair terms just because he has made a 'bad bargain'. The good faith requirement is explained in the light of reasonable expectations on the part of the consumer. It imposes 'social market conditions' on to the fairness test. It adds the condition that the goods or services supplied must be of at least the minimum quality that consumers might reasonably expect. The transparency requirement requires that the terms be in 'plain, intelligible and legible' language. Yet, non-transparent terms are not automatically unfair. When a consumer would be surprised by the term upon being told of it after entering into the contract, it will generally be subject to the test of fairness.

The Shariah law of contract does not include a similar technique for testing the fairness of contract terms. Nonetheless, fairness and justice of exchange is a stressed value in the law of contract. Next a formula for a test of fairness that is derived from the Shariah conception of fairness and justice is proposed. All rules and legal principles that have been invoked throughout the research are acknowledged by this formula. There are three requirements that would constitute a potential fairness test based on Shariah principles these are: freedom from advantage taking, transparency and agreement with the purpose of the contract. These requirements will be addressed next.

6.5.4.1 Free from advantage taking

We have seen that advantage taking is condemned by the Shariah law of contract mainly by the principle of the equivalence of counter-values. Under the doctrine of fair price or the price of the equivalent (*thaman almithel*), contracts ought to be concluded at a just or fair price. The significance of the doctrine lies in pursuing justice and denouncing the overcharging of a

trusting customer. The general assumption is that the just price of something is the price which is paid for similar objects at a given time and place. For this reason, classical jurists used the term (*thaman almithel*) the price of the equivalent. The price of equivalent is 'that rate at which people sell their goods and which is commonly accepted as equivalent for it and for similar goods at that particular time and place.'[1005]

The price of the equivalent is variable, determined by the forces of supply and demand and affected by the will and desire of the people concerned. A fair price is established by the free play of market forces of supply and demand. The price of the equivalent must be a comparative price and there must be no fraud. Accordingly, the profit in the contract of sale must be fair. Fair profit or the profit of the equivalent is a normal profit that is usually earned in a particular type of trade without harming others. Profit is generally permitted until it becomes abnormal or exploitive. A term or agreement will not satisfy the test of fairness under Shariah unless the profit made by it is considered fair under the doctrine of just price.[1006]

Unfair profit or advantage taking is also protected under the doctrine of unfair exploitation. This protects people who are not aware of the normal conditions of the market. The doctrine of unfair exploitation is a means to enforce the principle of the equivalence of counter-values. The prohibition in each of these three practices is meant to protect the weakness or vulnerability of one of the contracting parties. The essence of the doctrine is to give special attention to people who are ignorant of the market price or bargaining from a weak position as a result of urgency or necessity.[1007]

Generalising these rules enables the prohibition of any form of advantage taking. This includes any imbalance between the rights and obligations of the contracting parties. The fairness of the price is the core element of the test. All terms and conditions of the contract should be tested against the price to determine its fairness. The Shariah principles in this regard disagree with the regulation under the English law of consumer protection, which excludes the price as a core term from the test of fairness.

[1005] See section 3.8.4
[1006] Islahi (n 546) 254
[1007] See section 3.8.5

6.5.4.2 Transparent

With respect to the transparency requirement, we shall invoke the information rules of Shariah. These are presented in the two doctrines of *gharar* and mandatory disclosure. The requirements of the two doctrines have been explained in depth earlier in relation to the requirement of the contract of sale and information disclosure. Overall, the conditions of the contract of sale need to be reasonably determined leaving no ambiguity. The seller is required to make all information known to him available to the buyer. The contract must be reasonably certain in the normal course of things and should accord with custom.[1008] This implies a condition that all contract terms must be transparent.

Here we need to pay attention to the fact that the lack of transparency in itself has the ability to render the contract unfair. We have seen that the doctrine of *gharar* is a major limit to the freedom of contract.[1009] This is different to the English practice of the fairness test, under which the lack of transparency does not in itself render the term unfair, it rather makes it subject to the fairness test.[1010]

6.5.4.3 Agrees with the purpose of the contract

A third requirement that can be added to the fairness test is that the terms should not contradict with the purpose of the contract. It has been mentioned before that the law of contract was originally based upon nominate contract which means that each contract has a certain essence that is attributed to it.[1011] In this light, the terms of the contract should not extend beyond the essence of the contract. This assumption agrees with the position taken by the Saudi court in that a condition which contradicts with the nature of the contract is void. For example, a condition to keep the subject matter of a contract of sale in the possession of the seller until all instruments are paid was held by the court to be void. The Saudi court explained that such conditions contradict with the contract of sale where the subject matter

[1008] See section 6.5.1.5
[1009] See section 3.6.2.2
[1010] See section 68 of the CRA 2015
[1011] Hussain (n 453)

must be effectively transferred to the buyer, which cannot occur without possession taking.[1012]

6.5.4.4 Remedy for unfairness

It is observed that all situations of unconscionability render the contract either null or voidable depending on the degree of unfairness. The contract is not regarded void or null unless there is no way to fix the fairness of the contract. As long as a means exists to remove the defect the contract is voidable. The defective contract remains voidable (non-binding) until the defect is removed or condoned by the aggrieved party. The issue is regulated by the doctrine of *faskh* (rescission). It provides the aggrieved party with a unilateral right to cancel a contract validly concluded, by which he exercises his right of *khiyer (*option). The corrective system of options is extensive. There are more than six different options, some of which have been mentioned before in this research-such as the option of *ghubn* and the option of defect.[1013]

Voidable contracts are different to *batil* (null) contracts. The latter are considered non-existent in the eyes of Shariah. Voidable contracts are existing contracts which are subject to dissolution for the benefit of the exploited party. The corrective system of option is to preserve the fundamental principles of Shariah jurisprudence. It maintains the highest possible degree of certainty in the rights and obligations arising from contracts. A contract does not acquire an absolute binding force unless all options of rescission have been dismissed. It is only when it has been established that none of the options exists that a contract acquires an absolutely binding legal force. The system of option potentially makes a ground for consumer protection under Shariah law.[1014]

An important point here is the extent to which advantage taking amounts to a remedy. Interestingly, although the Shariah law of contract stresses the importance of the equivalence of the counter-values highly the imbalance is required to be gross to acquire a remedy. This probably comes from an acknowledgement of the importance of keeping a stable contractual scheme at the cost of slight unfairness that might not always be avoided. This seems to be in

[1012] See Case 33368994 on 21/8/1433AH and Case 826/2/ق on 1428AH mentioned in section 3.6.3
[1013] See sections 3.8.5 and 3.8.6
[1014] Coulson, *Commercial Law in the Gulf States* (n 374) 57-67

line with the English requirement for the imbalance to be significant. A gross imbalance renders the contract voidable for the benefit of the exploited party who has the option to rescind the contract upon learning the real value of the commodities in the market place.[1015]

This has been affirmed by the Saudi court. It explained that what amounts to exploitation is related to custom. It is a matter of deciding whether the price charged is of usual profit or not. In this regard, the court mentioned the Maliki school position, which indicates that a transaction is considered unfair exploitation if the price charged is above the equivalence price by the third or more. The court, however, did not attempt to set a certain standard in this regard. Instead it was held that if in a given situation the contract price is three times more than market price, this is an absolute case of unfair exploitation.[1016] Bringing certainty to the test of fairness would require setting standards as to what amounts to an unfair price. The Maliki scholars rule that the price is unfair if it is proved to be above the equivalence price by a third or more can be adopted.

6.6 Concluding remarks

Unlike English law where the theory of consumer protection makes challenge to the established principles of the law of contract, the ideas upon which consumer protection is based fit easily within the general principles of the Shariah law of contract. This chapter has proved that most ideas underlying consumer protection are already acknowledged by the Shariah law of contract. Just like modern consumer protection regimes, the Shariah law of contract encourages social responsibility and care for others. This is reflected by the distributive function attributed to the law of contract. Moreover, public intervention into contractual autonomy is promoted by the Shariah law of contract; it is based on the principle of permissibility rather than freedom of contract. Overall, the Shariah law of contract is heavily regulated for the purpose of securing free dealing for everyone in a way that excludes any notion of '*caveat emptor'*.

Furthermore, the way the general ideas of distribution and fairness are implanted in the Shariah law of contract has some similarities with those employed for consumer protection. The typical values protected by consumer measures are to some extent already reflected by

[1015] Omar (n 555)
[1016] Case 34167086 on 21/3/1434AH

the rules of Shariah contract law. For example, the way the Shariah law of contract regulates contracts by introducing certain conditions into contracts is very similar to the imposition of terms into consumer contracts for the purpose of protecting consumers' expectations. The above discussion has shed light on these rules and has proposed a formula to extract the maximum benefit from them in a consumer protection context. The proposed formula should protect the following values: consumers' informed will, voluntary consent, legitimate expectations and balanced contractual obligations. The adaptation of this formula by Shariah-ruled countries should enhance consumer protection.

Chapter Seven: Contractual justice and consumer protection: a critical approach to English and Shariah law

7. Introduction

This chapter offers final remarks as to where the two relevant legal systems stand in relation to contractual justice. A comparative method is invoked in light of all that has been discussed throughout the research in relation to the general law of contract and consumer theory in both Shariah and English law. It starts by outlining the extent to which the legal doctrines of both legal systems serves substantive or procedural justice. It brings attention to certain issues that have been touched upon throughout the thesis regarding the situation of contractual justice and consumer protection under Shariah or English law, which call for explanation. In relation to Shariah law, the good faith requirement and commercial and consumer contract separation will be addressed. Under the English law of contract these issues include: the effect of the rejection of a general doctrine of substantive fairness on English law; the European influence on English law and the regulation of price justice. Finally, justice norms adopted by both Shariah and English law are addressed. These norms might seem at first glance very different and consequently incomparable. Here, we must recall the principle of functionality mentioned in the methodology section, according to which things are only comparable if they fulfil the same function.[1017] Thus, the matters discussed in this chapter are brought together by the following question: 'How does the law respond to perceived unfairness?'

7.1 Procedural or substantive fairness

Most of the discussion of this research is focused on contractual justice as a distributional norm. Nonetheless, the research acknowledges that this is not the only aspect of fairness. While modern concepts of fairness attribute to the state the role of ensuring that contractual relations are fairly concluded, there is another approach to contractual fairness which flows from 'utilitarian premises'.[1018] The latter used to be dominant in the classical period of

[1017] See section 1.3.2
[1018] Schwartz 'Justice and the Law' (n 8)

English law. It was reflected in the domination of the notions of freedom and sanctity of contract.[1019] People are seen to be the best judges of what will maximise their own utility and thus, society as whole. Just outcomes are achieved by leaving people to do the best they can according to the circumstances. Equity was implemented through common law duress and undue influence (the procedural perspective of fairness).[1020]

It seems the idea of fairness as a utilitarian premise is still, to a certain extent, valid today. There remain those who believe that fairness is best achieved through a free market. From this perspective, market imperfections must be dealt with by institutions other than the law of contract. Contract law is not the right avenue for improving wealth utilities since the only tool judges can use within the law of contract is enforcing contract terms. Enforcing contract clauses tends to make, according to this conception, people poorer rather than richer.[1021]

Whereas this idea of fairness rarely ever forms the basis of the Shariah law of contract, we have seen that such ideas have never diminished in English contract law. Some judges as well as scholars still insist that the classical notion of sanctity of contract is the best way to achieve contractual justice. Supporters of the utilitarian approach to fairness believe that regulation of fairness under the law of contract should be focused on the process rather than the substance of the contract. This is different to the approach taken by the supporters of the distributive function of the law of contract (or those who believe that contractual autonomy should be fairness-oriented). The latter approach supports the view that achieving fairness through the law of contract should not be focused only on the process of contract but must also be concerned with the substance of the transaction. The extent to which procedural and substantive fairness are reflected by Shariah and English law is highlighted next.

There is no broad line of differentiation between the two types of fairness since some doctrines of contract regulation are based on both substantive and procedural aspects. For example, the doctrines of undue influence and inequality of bargaining powers have procedural and substantive aspects in their formation. Nevertheless, we will rely here on the dominant aspect of the doctrine (where the claim starts from). A claim under the doctrine of undue influence is invoked when there is issue with the process of the contract. By contrast, a

[1019] See section 2.1.1
[1020] Brownsword, *Contract Law* (n 3) 46-7
[1021] Schwartz 'Justice and the Law' (n 8)

claim under the doctrine of inequality of bargaining powers starts when there is an imbalance between the rights and obligations of the contracting parties. Thus, the latter is regarded as a substantive doctrine and the former is regarded as procedural. Such differentiation is useful to highlight the ideological biases of the law and the way fairness is understood under both legal systems.

7.1.1 Procedural fairness

In both legal systems contract obligations are voluntary based on mutual consent. Duress is an essential equity doctrine by which the law ensures that the consent is voluntary and real. Duress is generally regarded as a defect affecting consent in contract and therefore the validity of the consent. Common law duress in its historical form involves actual or threatened violence to the person. It was closely associated with the legal control of criminal and tortuous conduct. The essential elements of duress were established as early as the mid-thirteenth century.[1022] Early analysis of duress focused on the act of coercion itself and its effect on the victim in inducing fear. The concept of duress in common law used to be a very narrow one that was restricted to actual or threatened physical violence to the person.[1023]

The practice of common law duress in England has developed a wider scope with regard to contractual freedom. Duress is no longer restricted to actual or threatened physical violence to the person but includes the threat to seize another's property or to damage it,[1024] in addition to mere economic duress. Economic duress consists of using superior power in an 'illegitimate' way in order to coerce the other contracting party to agree to a particular set of terms.[1025] Furthermore, the focus of the doctrine has turned to the wrongfulness of the threatened conduct rather than the consequences to the coerced party.[1026] It includes unlawful threats and lawful threats which are used to support unlawful demands.[1027] However, the 'rough and tumble of the pressures of normal commercial bargaining' does not amount to illegitimate pressure.[1028]

[1022] Ogilvie (n 132)
[1023] Peel (n 135) 441-7
[1024] Poole (n 60) 548-56; Peel (n 135)441-7
[1025] Mckendrick, *Contract Law* (n 135) 293-99
[1026] Halson (n 131)
[1027] Mckendrick, *Contract Law* (n 135) 293-99
[1028] Poole (n 60) 548-56

Shariah duress somewhat resembles the classical common law duress. Duress is generally regarded as a defect affecting consent in contract and therefore the validity of the consent. Shariah duress is invoked where there is injury to the victim or one of his relatives or damage to property. The approach of Shariah towards duress consists of both subjective and objective elements. The formation of fear in the victim's mind when she feels she is being left without any choice is an essential requirement for Shariah duress. However, the doctrine is restricted in that the threat must be immediate and serious with respect to the injury to person or one of his relatives or damage to property.[1029]

A second doctrine of procedural justice is undue influence. Under the English law the equitable doctrine of undue influence operates to release parties from contracts that they have entered into as a result of being influenced by the other party. Undue influence is presumed where there is a trust relationship between the parties. Generally, it seems that the court would allow release based on undue influence if the claimant's decision was made by excessive reliance or dependence on the defendant.[1030]

The modern approach to undue influence in English law requires wrongful conduct on the part of the defendant. Generally, it is observed that most cases of undue influence contain such an element of 'wrongful' conduct, in the form of an act of exploitation or taking advantage of the claimant's vulnerability.[1031] Transactions that amount to undue influence are the kind of transaction that claimants would not have entered into under normal circumstances. In other words, it is when the victim receives no benefit from entering into such a transaction.[1032]

The Shariah law of contract stands against all forms of advantage-taking and exploitation. Nevertheless, no similar procedural doctrine is admitted.[1033] It seems that Shariah law does not give as much attention as English common law to procedural justice. Duress is the only procedural doctrine of equity under the Shariah law of contract. Moreover, the doctrine is only linked to criminal conduct and cannot be invoked based on mere economic pressure.

[1029] Coulson, *Commercial Law in the Gulf States* (n 374) 48-9
[1030] See section 3.8.2
[1031] Mckendrick, *Contract Law* (n 135) 293-99
[1032] *Bank of Credit and Commerce International SA v Aboody* [1990] 1 QB 923
[1033] Nannu Mian and Shalina Akter 'A Comparative Study of a Restitutionary Remedy for an Undue Influence between the English Law and the Islamic Legal Principles' (2013) 12 IOSR Journal Of Humanities And Social Science 37

Even though the doctrine adopts a subjective perspective by acknowledging the formation of fear in the victim's mind, the doctrine is restricted by the objective requirements that the threat is immediate and of serious injury to a person or one of his relatives or damage to property.[1034]

The English law of contract has noticeably paid much more attention to procedural fairness than the Shariah law of contract. This is perhaps due to the fact that Shariah law is involved more in setting the substance of the contract, whereas English common law is reluctant to acknowledge substantive fairness. The two procedural doctrines of fairness have been developed in modern times to create more limitations within the law of contract. The development of the two doctrines represents the main modern changes in the acknowledgment of contractual fairness in English law. Contractual freedom is restricted by the relatively new development of the doctrine of economic duress and the stress on 'wrong doing' as the basis for the two doctrines. This involves restriction of the substance of the contract since the two doctrines are invoked when there is imbalance between the counter-values of contract.[1035] Nevertheless, the basis of the two doctrines remains procedural since it cannot be invoked unless there is something wrong with the process by which the contract was concluded. As a result, it intervenes into the substantive fairness of the contract in a very limited sense.

7.1.2 Substantive fairness

At first glance, it seems that the two legal systems are based on very distinct ideological bases. On the one hand, the English law of contract is traditionally bound by a strict freedom of contract that has been softened in modern times to 'wealth maximisation' and 'cooperation'. The Shariah law of contract is bound by a restrained freedom of contract and reflects ideas of fair distribution. While the English law has gone through some sort of transformation in modern times, there has hardly been any change in the Shariah law of contract at least in relation to its basis and general conceptions. The extent to which two relevant jurisdictions regulate substantive fairness is outlined next.

[1034] Fadl (n 519)
[1035] See sections 2.3.1,2.3.2 and 2.4

7.1.2.1 Shariah law and substantive fairness

The Shariah law of contract is one that is heavily regulated for the purpose of securing a fair and equitable deal for everyone. Fairness in Shariah is a ideal that is accepted and directly promoted. Intervention into parties' autonomy to fix the balance of the contractual relations is completely accepted by Shariah law. It is even noticed that the law has been occasionally 'over-regulated' for this reason. Overprotection of such values has led at times to the creation of very strict rules. Some legal thoughts presented in this research reflected this very strict approach. For example, the conservative approach with regard to the issue of parties' autonomy under the doctrine of *shurut* (ancillary conditions).[1036] An approach in support of having very limited contractual freedom, which arose from the fear that allowing individuals to freely arrange the effect of their contractual relationships (according to their whims), generates the risk of having imbalanced economical relations.[1037] Another example is found in the requirement of the existence of subject matter. Many legal thoughts have required that the subject matter must exist at the time of the conclusion of the contract for the purpose of protecting certainty.[1038]

In modern days, the Saudi court still does not hesitate to intervene into the substance of the contract. Contractual relations are not regarded as sacred as under English law. The Saudi court will intervene on a case-by-case basis to review the fairness of the substantive aspects of the contract. A major concern of the court is to ensure the case in hand is fair and equitable. It would not hesitate to impose its own standards of justice which come from Shariah principles.[1039]

Justice in Shariah means the prohibition of all forms of advantage-taking. This is reflected by the principles of the equality of counter-values and transparency and has been implemented through multiple doctrines. The exchange of unequal quantities of similar fungibles is prohibited under the doctrine of *riba* that is meant to prohibit excessive inequality between the exchanged values.[1040] The equality of the exchanged values is further protected by the doctrine of just price. A just price is the price of the equivalent, which is the 'rate at which

[1036] See section 3.6.1.1
[1037] Obeid (n 457) 32
[1038] See section 6.5.1.4
[1039] See for example cases related to unfair exploitation in section 3.8.5.4 or to defect in section 3.8.6 and *gharar* in section 3.6.3
[1040] See sections 3.6.2.1.1 and 3.8.2

people sell their goods and which is commonly accepted as equivalent for it and for similar goods at that particular time and place.'[1041]

The doctrine of *gharar* regulates certainty of contract. It ensures that transactions are free from unexpected and future inequality. It also aims to allocate responsibility and risk equally between the parties.[1042] Certainty is further enhanced by the doctrine of mandatory disclosure under which all information that could affect the value of the subject matter must be disclosed, especially any defect known to the buyer.[1043] Under the doctrine of unfair exploitation, the need and vulnerability of the contracting parties is protected from being exploited by the superior party, the stress is on charging an unjust price.[1044] However, two issues that are related to substantive acknowledgment of fairness call for explanation: (1) the requirement of good faith and (2) the differentiation between commercial and consumer transactions. These are addressed below.

7.1.2.1.1 Good faith requirements of Shariah Law

Although substantive fairness of contract is regulated under the Shariah law of contract, there is no specific Shariah rule that enforces a general duty of good faith under the law of contract. Obviously fairness and equity are generally promoted by the spirit of the law. For example, according to the principle of *ehsan*, individuals are encouraged to enhance and strengthen their relationship with each other. Market actors are encouraged to go beyond their legal agreements by being generous, forgiving and tolerant.[1045] Furthermore, honouring trust is encouraged when it is assumed by the counter-party.[1046] This resembles the explanation by Sir Thomas Bingham of the meaning of the doctrine of good faith as a principle of fair and open dealing' that requires 'playing fair,' 'coming clean' or 'putting one's cards face upwards on the table.'[1047]

Nevertheless, the way the Shariah law of contract deals with perceived unfairness is material. Other than cases of fraud, when a claim regarding an unfair deal is brought to court the judge

[1041] Ibn-Taimiyah, *Majmoua Fatawa*, vol 29 (n 551) 254
[1042] See sections 3.6.2.2 and 3.8.3
[1043] Alalaili(n 561) 355
[1044] See section 3.8.5
[1045] Ali (n 915) 202
[1046] Alalaili (n 561) 355
[1047] *Intterfoto Picture Library Ltd v Stiletto Visual Programmes Ltd* [1989] QB 433,439

will look at the material facts rather than the intention of the superior party. This approach has been obvious in the way the Saudi court approaches perceived unfairness. The court tends to look at the balance of the relation rather than the intention of the superior party. It does not make a difference to the court whether or not the superior party was acting in good faith or not as long as the transaction was found to be unbalanced or unfair. Accordingly, it might be misleading to claim such general requirement under the Shariah law of contract unless carefully qualified and viewed in a way that gives effect to its specific nature.

7.1.2.1.2 Commercial and consumer contract separation of Shariah law

For all of the reasons that have been mentioned throughout the research especially in chapter four,[1048] the separation between consumer and commercial contracting is a theme in the current state of contract law. The separation between the two relates to the modern need to serve the special nature of each contract scheme. The English law of contract follows this theme. Different sets of rules are regulated for consumer and commercial transactions that arguably follow from very distinct ideological grounds. By contrast, Shariah law is unified. Legal principles under the law of contract are applicable to all contractors. It does not make a difference whether the transaction was concluded between consumer and trader or between two traders; the same sets of rules are applicable to all transactions.

A large proportion of this research has been devoted to testing the viability of consumer protection under the Shariah law of contract. The discussion has revealed that ideas underlying consumer protection fit perfectly with the general theory of the Shariah law of contract. The proposed formula for consumer protection presented in the previous chapter employs some rules of Shariah. Most of these rules were originally set in abstract for the benefit of all contractors and both parties. This means that not only the consumer benefits from the protection offered by the law of contract but also the supplier. For example, both would have the right to benefit from the cancellation right. This is different from modern consumer protection laws that are focused on correcting the consumer's position; the cooling-off period under the English law is set for the benefit of consumer only. Furthermore, in relation to commercial transactions, efficiency might be a point against Shariah law. It is generally noticed that the Shariah law of contract is sometimes heavily regulated, it has even

[1048] In relation to consumer protection rationales in section 4.2

occasionally become 'over-regulated' for the purpose of preserving fairness. Such restrictive regulation, although generally beneficial for consumers, might at times be an obstacle to commercial transactions that require speed and flexibility.

This research upholds that it would in the public interest to have some sort of line of differentiation between commercial and consumer relations.[1049] It is not sufficient to have consumer protection within the law of contract, there needs to be some line of separation between the two sets of rules. Being bound by the same set of rules even if consumer values are well protected could cause irritation to both consumer and commercial transactions. Pursuing justice by the Shariah law of contract should not hinder human development (commercial exchange in this case).

Two points are suggested here on which to differentiate between commercial and consumer regulation: (1) the variation between the legal thoughts of the schools; and (2) the doctrine of unfair exploitation in the following sense. On different occasions throughout the research we have seen that the pursuit of justice has led at times to the creation of very conservative legal thought. These conservative rules might become a burden to commercial dealing. However, less restrictive legal thoughts do usually exist in parallel to the restrictive rules. It is very difficult to categorise the legal schools of Shariah into conservative and less conservative categories sense there is no clear pattern. The same school on one occasion may offer a very restrictive legal opinion could reach a less restrictive opinion on another.

We suggest the employment of the variation within the legal thoughts of the schools for the separation between commercial and consumer transactions.[1050] This could be done by adopting the least restrictive rules for commercial relations and the most restrictive ones for consumer relations. It is noteworthy here that modern scholars tend to prefer the least restrictive legal opinion as better serving commercial requirements.[1051]

The most obvious example concerns judicial opinions in relation to parties' autonomy.[1052] While the three schools of jurisprudence adopt a restrictive position in relation to the doctrine of *shurut* (ancillary condition), the Hanbali school adopts a more liberal one. According to

[1049] See the discussion on public interest as sources of law in section 3.3
[1050] As a matter of public interest see the sources of the law 3.3
[1051] Obeid (n 457) 40
[1052] See section 3.6

the Hanbali school, parties to a contract have the freedom to 'decide as they wish the content of their judicial acts and determine the effects on the condition that these effects are not contrary to public order and morals'.[1053] The Hanbali position is the more favourable one for contemporary use because it serves commercial requirements.[1054]

The difference between judicial opinions could be employed for the purpose of drawing a line between commercial and consumer contracting. For example, it would be useful to have a restrictive parties' autonomy in relation to consumer contracts. Nevertheless, such a restrictive position would be against commercial needs. Thus, it might be viable to adopt the conservative position in relation to consumer relations and the most liberal opinion on commercial contracting. Such an action needs close consideration.

Another factor that could serve the separation between commercial and consumer regulation is the doctrine of unfair exploitation within the Shariah law of contract. The unfair exploitation doctrine has been referred to several times in this research.[1055] In its essence the doctrine is meant to protect contractors who are in need or in vulnerable situations. It therefore represents a potential ground for many consumer measures and consequently enhances the separation of commercial and consumer law. For example, the discussion of the matter of information provision with regard to Shariah, in the previous chapter, revealed that the application of the doctrine potentially leads to the creation of a specific duty of disclosure.[1056] A seller who is dealing with a person in need is under an obligation not only to disclose all material information but also to disclose the real value of the subject matter. The doctrine of unfair exploitation has the potential to be employed as a matter of analogical deduction '*qias*'[1057] to form the basis of many consumer rules. *Qias* is s a jurisprudence methodology that involves the application of a ruling on a similar case where the law is silent. The doctrine of unfair exploitation could be expanded on this basis to form a ground for consumer regulation where needed.

[1053] Ibn-Taymiyah, *Alfatawa AlKubra,* vol 4 (n 473) 16
[1054] Obeid (n 457) 40
[1055] See section 3.8.5
[1056] See section 6.5.2.2
[1057] See sources of the law and judicial methodologies of Shariah under section 3.3

7.1.2.2 English law and substantive fairness

The way the English law regulates substantive fairness is neither as certain as procedural fairness nor as direct as it is regulated by Shariah law. A major cause is that, while there is much discussion about values protected under the English law due to this ideological battle, Shariah law is bound by a single rigid ideology that is not subject to change. Classical law of contract is based on the assumption that free dealing is fair dealing.[1058] Justice is enforced in a contract by ensuring that the process by which the contract was concluded has been freely agreed upon.[1059]A transformation is said to have taken place in the late nineteenth century with the doctrine of *laissez-faire* falling out of favour.[1060] The alleged transformation of the law is understood to have been reflected in the adoption of values of fairness and cooperation. Notions of inequality of bargaining power, unconscionability, reasonableness and good faith were thus introduced to the law of contract.[1061]

The inequality of bargaining powers is invoked as a starting point for the differentiation between consumer and commercial transactions.[1062] Furthermore, the idea of relative bargaining powers is employed in the statutory regimes which regulate exclusion clauses under the test of reasonableness.[1063]

The notion of reasonableness seems to stand at the core of modern law of contract.[1064] Reasonableness is widely employed in the contemporary law of contract. It is imposed by legislation on several occasions and has a great effect in the rules and doctrinal formation of the modern law. The most obvious example is the test of reasonableness imposed by legislation in the UCTA 1977.[1065]

In recent years, good faith has been frequently invoked and wide range of literature is devoted to discussion of the principle of good faith. The English court has shown some willingness to acknowledge the principle of good faith by the law of contract.[1066]

[1058] Devlin (n 64) 47
[1059] See sections 2.1.1.5.2 and 2.1.1.5.3
[1060] Epstein (n 582)
[1061] See section 2.3
[1062] Brownsword, *Contract Law* (n 3) 72-3
[1063] See section 2.3.3.1.2
[1064] Roger Brownsword, *Contract Law* (n 3) 93-110
[1065] Coote 'Unfair Contract Terms Act 1977' (n 250)
[1066] Summers (n 315); Paterson (n 342); Zhou (n 343)

Furthermore, the notion of good faith is employed in the statutory regimes.[1067] A contract can be ruled out based on unconscionability if there is evidence of 'taking advantage' of a disadvantageous party. Yet, the courts' requirement of unconscionability is difficult to satisfy and there is hardly ever a successful claim on unconscionability grounds alone.[1068]

Nevertheless, these notions of substantive fairness are best described as supplementary rather than limiting notions, which soften the rigidity of the law. Despite the alleged transformation of the law, intervention into the substance of contract to fix the balance of the contractual relation remains minimal. Intervention is mainly limited to procedural doctrines of undue influence and duress, and the intervention by the reasonableness test is limited to exclusion clauses. This indicates that the sanctity freedom of contract is softened but still dominant. Although there is a movement towards the creation of a general doctrine of fairness by English common law, such movement has been hampered. At one point, the idea that fairness should be a condition of the validity of the contract prevailed in the courts. This was later on dismissed by liberal ideas and more precisely by the notion of freedom of contract.[1069]

The current state of the English law of contract in relation to substantive fairness brings about the next question: does the rejection of a general doctrine of substantive fairness (outside consumer transactions) by the English courts negate the idea that fairness is relevant to contract validity? This question is addressed next.

7.1.2.2.1 The effect of the rejection of a general doctrine of substantive fairness in English law

We have seen that the English law of contract has rejected the development of a general doctrine of substantive fairness. By contrast, substantive fairness is promoted and protected under the consumer theory. One might question why the English law would accept that contract fairness is relevant in one case (consumer transactions) but not relevant in the other case (commercial transactions). This obviously brings in the ideas discussed under the

[1067] For example the duty to act in good faith under the Commercial Agents (Council Directive) Regulations 1993 (SI 1993/3053) and Unfair Terms in Consumer Contracts Regulations 1999 (SI 1999/2083)
[1068] Poole (n 60) 574-9
[1069] See sections 2.1.1.5.3, 2.3.7 and 2.4

rationale of consumer protection including inequality of bargaining power, market failure and distributive ideas and so on.[1070]

There is an assumption in this situation that commercial contractors are always contracting at arm's length and of equal bargaining positions. But what if this proves not to be the case? For example when a small and newly established company is contracting with a large powerful company, it would be hard to imagine that they are contracting from equal positions. Why would make the law ignore such inequality whilst acknowledging it in relation to consumers? In other words, how does the law ensure that contracting commercial parties are equal?

However, it is observed that English courts in fact only reject the name of doctrine but not contractual fairness itself.[1071] Even though courts avoid the admission that fairness is a relevant consideration within contract validation, fairness is still evaluated under the guise of other doctrines.[1072] McKendrick indicates that as easy as it seems for an English judge to rule against common principles of fairness, a judge will 'think hard and long before ruling against principles of good faith and fair dealing'.[1073]

Waddams observes that even though courts try to show commitment to the freedom of contract, relief is everyday given against agreements that are unfair, inequitable, unreasonable or oppressive.[1074] Atiyah has rejected the idea that contract regulation is still concerned only with procedural unfairness or the bargaining process and not with the substance of the contract. He says that fairness is protected by courts even without the assistance of statute. It is also widely acknowledged that judges tend to give effect to their sense of justice through constructing contracts or implying terms.[1075] Paterson explains that the fairness notions

[1070] See section 4.1
[1071] McKendrick 'Good faith: A Matter of Principle?' (n 315) 41-2
[1072] Thal observes that considerations of fairness have often been determined by the court under the doctrines of duress and undue influence. He cites the courts' decisions in the *North Ocean Shipping v Hyundai Construction, The Atlantic Baron* [1979] QB 705(duress) and *Allcard v Skinner* (1887) 36 Ch D 145 (undue influence) in support of his argument. See Thal (n 365) 19-21
[1073] McKendrick 'Good faith: A Matter of Principle?' (n 315) 46
[1074] Waddams observes that consideration of substantive fairness is viewed by the court in relation to penalties, deposits, exemption clauses, incorporation of documents, documents and consents, interpretation, duress, protection of weaker parties, withholding discretionary remedies, consideration, and restraint of trade. See generally: S.M.Waddams 'Unconscionability in Contract' (1976) 39 The Modern Law Review 369
[1075]Atiyah suggests that 'it is no longer possible to accept without serious qualification the idea that law is today solely concerned with the bargaining process and not with the result' (procedural fairness but not substantive fairness). He argues that the English court has over the years expressed real concern with substantive fairness. He cites in this regard the decisions of the English Court of Appeal in *Staffordshire Area Health Authority v South Staffordshire Waterworks* [1978] 1 WLR. 1387 and *Tito v Waddell* [1977] Ch. 106. He adds that even in

without doubt will continue to be implied into the law of contract regardless of whether the court is prepared or not to recognise a general duty of fairness. This includes the promotion of duties of loyalty to the contract by precluding parties from engaging in dishonest, uncooperative, opportunistic or irrational behaviour that would undermine their commitment to the contract relationship.[1076]

At this point one may be confused as to the approach of the modern law of contract towards fairness of exchange. On one hand, fairness and cooperation are important values that are indicative of the modern transformation of the law of contract. On the other hand, the law seems reluctant to adopt a general doctrine that protects the fairness of deals. The tendency of the English law of contract to shy away from commitments to explicit principles of fairness raises questions about its commitment to protecting the fairness of contract. How do the English courts respond to the adversarial values of the law of contract? Or more precisely how do they respond to inequality of bargaining power and unfairness in contracts?

A. English law approach to protecting contractual fairness

The modern law of contract acknowledges the fact that contractors hardly negotiate from even bargaining positions. To respond to this fact without causing the contract institution to collapse, a corrective approach has been followed.[1077] For example, situational monopoly is regulated by the doctrine of economic duress to protect commercial contractors who are being put under pressure to renegotiate a contract.[1078]

As long as the measures employed are taken to be corrective, the institution of contract will remain based on free and informed consent. Modern corrective intervention is taken to be a restatement of classical contract law and the freedom of contract. Brownsword explains this point in relation to the doctrine of inequality of bargaining power, which could read either as plaintiff-sided or defendant-sided. It could be defendant-sided in the sense that the stronger

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cases that are based on traditional procedural doctrines such as undue influence and duress, substantive fairness considerations were taken into account by the court, in this regard he cites the English court decisions in *Lloyds Bank Ltd v Bundy* [1975] QB. 326, *Cresswell v Potter* [1978] 1 WLR 255 and *Backhouse v Backhouse* [1978] 1 WLR 24. See Atiyah 'Contract and Fair Exchange'(n 58) 12-7

[1076] Paterson (n 345); Paterson made this opinion in relation to the principle of good faith in the light of *Yam Seng* see section 2.3.6.2

[1077] Brownsword, *Contract Law* (n 3) 88-92

[1078] Ibid

party has taken unfair advantage of the weaker party and plaintiff-sided in the sense that the weaker party has not given a free and informed consent to the transaction.[1079] As long as the measures taken are understood to be plaintiff-sided, the doctrine could be viewed as a restatement of the ideal of freedom of contract. By contrast, if it were to be defendant-sided, it would mean that it is concerned with fairness and militating against unconscionable advantage-taking. The modern law then, according to Brownsward, 'is taking on a major reconstruction of institution of contract'.[1080]

In order to respond to these demonstrated problems of unfairness, Sir Thomas Bingham explains that the English law of contract has 'developed piecemeal solutions.'[1081] Honest behaviour in contract is achieved without adopting a general doctrine but rather through 'the adaptation of specific rules that, in particular context, make honesty the best policy'.[1082] To some, the English approach serves well enough the way it is. McKendrick points out that the refusal to adopt a general doctrine could be taken as evidence of strength in the law. According to him, the English law manages to serve in other ways what different legal systems pursue through a general doctrine of morality. For example, in dealing with the events occurring after the formation of the contract that have the effect of rendering the performance of a contract impossible, illegal or impracticable, English law responds through the distinct doctrine of frustration. By contrast, German law has to resort to the doctrine of good faith to regulate the matter. Thus, it does not make sense to McKendrick to abandon a clearly-focused doctrine such as frustration in favour of the more amorphous doctrine of good faith.[1083]

B. Is it time for reconstruction?

Atiyah has argued that the 'basic conceptual apparatus' of the English law reflects the situation in the nineteenth century rather than the contemporary moment. These values reflect

[1079] See Birks and Yin (n 193) 57-98
[1080] Brownsword, *Contract Law* (n 3) 88-92
[1081] *Interfoto Picture Library Ltd v Stiletto Visual Programmes Ltd* [1989] QB 433,439
[1082] S.M.Waddams 'Pre-contractual Duties of Disclosure' in Peter Cane and Jane Stapleton (eds), *Essays For Patrick Atiyah* (Clarendon 1991) 237-56
[1083] McKendrick 'Good faith: A Matter of Principle?' (n 315) 42; McKendrick failed in making a sensible argument first, because he did not make good bases for his claim that the adaptation of a good faith doctrine requires abounding the doctrine of frustration. Second, he mentioned that German law deals with issues of impossibility, illegality and impracticability in contract formation by referring to the doctrine of good faith whereas in fact these issues are dealt with by legislation through the German Civil Code; illegality is dealt with in section 134, impossibility 275 (1); impracticability 275 (2)

liberal traditions of belief in the value of the rights of the individual. Nonetheless, Atiyah argues that current values of society contradict what used to be admirable in the nineteenth century. Therefore, it is the time to revise the concepts to reflect current societal values.[1084]

It is preferable that fairness is dealt with directly by a doctrine that makes an explicit ground for it, rather than covertly through the manipulation of technical rules. Indeed, trying to achieve fairness in the absence of a general doctrine produces incoherent outcomes, leaving judges unable in some situations to achieve justice. The answer could be to adopt a general doctrine of morality which would provide coherent regime that enables judges to deal effectively with unfairness.[1085]

Dealing with the matter explicitly by adopting a general principle (or principles), according to Trebilcock, would serve the ends of constructive judicial law-making as well as rational independent analysis and the evaluation of the aptness of legal rules. He argues that it would even be cost efficient, because it gives guidance to other parties in their actions, through rules that have some generality of application. He explains that 'decisions that are ostensibly confined in their application to narrow technical or factual circumstances only relevant to the case under adjudication.'[1086]

So, what would it take for the English law to adopt a general doctrine of fairness? Perhaps the first obstacle to the creation of a doctrine is the question of defining the idea of fairness of exchange and indeed whether the idea of fairness in exchange is itself a theoretically defensible idea.[1087] Moreover, the issue of how to define the limitation on the freedom of contract doctrine is the most difficult to resolve.[1088] The problem has been raised both by judges and legal scholars.[1089] The issue was concisely stated by Treitel, who explains that the alleged principle is very wide and not well defined. According to him, English courts, unlike American courts, have no intention of taking the matter far to give clarity to the law. Thus, the matter is better left to Parliament.[1090]

[1084] Atiyah 'Contracts, Promises and the Law of Obligations'(n 39) 10-56
[1085] Raphael Powell 'Good Faith in Contracts' (1956) 9 Current Legal Problems 16
[1086] Trebilcock 'The Doctrine of Inequality of Bargaining Power' (n 262)
[1087] Atiyah 'Contract and Fair Exchange'(n 58)
[1088] Thal (n 365)
[1089] Some of the best discussions of this problem are found in David Tiplady 'The Judicial Control of Contractual Unfairness' (1983) 43 The Modern Law Review 601; Beale 'The Inequality of Bargaining Power' (n 233); *National Westminster Bank plc v Morgan* [1985] AC 686
[1090] Peel (n 135) 467-9

Different approaches have been suggested in this regard. Trebilcock takes the position that in order to have an effective instrument that tackles contractual unfairness, the adopted doctrine 'needs to be sharp in its focus, conceptually sound and explicit in its policy underpinnings, and operational in terms of both the process of judicial inquiry it envisages and the remedial instruments available to a court to abate objectionable phenomena.'[1091] Treitel on the other hand, focuses only on the substantive side of the matter, suggesting that to have a sufficiently formalised doctrine we need to define what amounts to an unfair outcome. Thal rejects Treitel's proposal, and instead proposes a procedural approach. His view is that the only way to define unfairness is by focusing on the bargaining process and not the outcome.[1092]

Brownsword emphasises the importance of having a specific moral reference point. According to him there are two principle options for such a reference point: (1) the standards of fair dealing recognised by the community of which contracts are most proximately a part; (2) the standards of fair dealing that would be prescribed by the 'best'. Though, the latter option looks difficult to justify either in terms of the practical legitimacy of judicial decisions or in terms of their theoretical justification. He sees a tendency in the English law of contract towards adopting morality doctrines to reflect the expectations associated with good practice in both the field of consumer and of commercial contracting.[1093]

Atiyah on the other hand, acknowledges the fact that courts are giving effect to their sense of justice in construing contracts or implying terms. He rightly explains that ideas of fairness and customary behaviour interact. When a judge implies a term to give effect to his sense of justice rather than the intention of the parties', his sense of justice derives in part from patterns of customary behaviour.[1094]

This research upholds the conclusion that the English law of contract should deal with substantive fairness of contract directly and clearly through the adoption of a general principle. The fear that the institution of contract would collapse and the uncertainty regarding a moral reference point should not be an excuse to remain bound by values that no longer reflect society. Continuing to serve justice disguisedly and indirectly in addition to

[1091] Trebilcock 'The Doctrine of Inequality of Bargaining Power' (n 258) 384-5
[1092] Thal (n 365)
[1093] Brownsword, *Contract Law* (n 3) 134-5
[1094] Atiyah 'Contract and Fair Exchange'(n 58)

being costly and lacking clarity restricts proper development of the law. It would be much more efficient, clear and simple to militate against unconscionable advantage-taking rather than correcting the wrongdoing when it occurs. Furthermore, when the issue is dealt with directly and clearly through an accepted doctrine mentoring the judicial practice will become more practicable. A sense of justice is always derived from customary behaviour. Thus, allowing judicial intervention both in relation to the process and substance of the contractual relation is likely to reflect societal values.

7.1.2.2.2 Consumer protection and substantive fairness

The discussion of this research has shown that the law does in fact serve substantive fairness to a large extent. Although the general principles of English contract law are reluctant to adopt a formal doctrine of contractual fairness in order to avoid intervening into parties' autonomy, the situation is different in consumer contracting. In other words, while the common law of England is still reluctant to intervene into parties' autonomy, statutes are making enormous interventions into consumer contract. Under consumer law contractual justice is an accepted and promoted value. Although the relationship between consumers and suppliers is deemed to be contractual, the modern law of consumer contract operates in a quite distinct way from the classic notions of individual autonomy and legal non-interventionism. It follows a different pattern of control over the consumer/supplier relationship.[1095]

Introducing the consumer experience of English law illustrates a tendency towards preserving contractual justice. The modern consumer scheme represents a domination of contractual relations. Protecting fairness in the field of consumer contracting brings significant fairness to society. In spite of their ideological differences, this brings the regulations of Shariah and English law in line to a large extent. The previous chapter on the viability of consumer protection under the Shariah law of contract outlines many similarities between the general law of Shariah contract and the English law of consumer protection. Some of the legal techniques that are employed by the Shariah law of contract for the protection of contractual fairness in general resembles the legal techniques that are designed to protect consumer interests under English law. For example, the condition of the counter

[1095] Howells and Weatherill (n 5) 31-5

values in the contract of sale under Shariah law is very similar to the imposed terms by the CRA 2015 in consumer contracts.[1096] However, there are two points related to consumer protection under English law that call for explanation: the European influence on English law and fair price regulation. These two issues will be addressed below.

7.1.2.2.3 European influence on English law

We have seen that a good deal of consumer protection in England is a mere implementation of EU Directives. As a result, one could say that the current status of consumer protection does not reflect the position of the English law. Indeed, it is arguable that the English law is still under the impression that substantive fairness is not relevant to contract. This is evident from the fact that the English law resists a development of a single doctrine of contractual fairness. Arguably, over time there may be a decrease in consumer protection after the exit from the EU when the UK is no longer obliged to satisfy European requirements. However, in addition to the facts invoked before in relation to commercial and economic factors[1097] , it seems that the European law has influenced the legal thinking of the English law in a way that is not likely to diminish any time soon. A major reason for this is that the Europeanization of consumer law was made through Directives that are imposed into national law.[1098]

Although imposing the Directives into national law might be successful in bringing harmonisation, it has the ability according to Twigg-Flesner to disrupt the 'unity of domestic law'. While rules of such Directives might sometimes reflect existing law, they also at times introduce novel rules to the English system.[1099] A EU Directive could then introduce ideas that are not familiar to national judges or that contradict the general conception of the law. Nevertheless, ideas which seemed novel at the beginning could merge with the law in a more unified way. The most notable example of this is the concept of good faith in contracting.[1100] The notion of good faith was rarely invoked by the English common law of contract. Yet, as a matter of implication of EU Directives, the English law now includes an obligation to

[1096] Compare section 5.6.2 with section 6.5.1
[1097] See section 4.7
[1098] Christian Twigg-Flesner, *The Europeanisation of Contract Law: Current Controversies in Law* (Routledge 2013) 150
[1099] Ibid
[1100] See section 5.4

contract in good faith, for example the duty to act in good faith under the Commercial Agents (Council Directive) Regulations 1993[1101] and the CRA 2015[1102].

While English lawyers remain 'suspicious' of the idea that parties should act in good faith[1103], the concept has started to become familiar in English courts. As a result, even though the English law of contract does not impose a general duty to act in good faith courts occasionally uphold the good faith requirement, which represents hospitality to change.[1104] This is taken to be an indication that good faith is likely to be recognised in the future.[1105] Judges and scholars of English law have become familiar with the doctrine of good faith and its role in regulating contract. Thus, it might be only a matter of time before the adoption of the good faith requirements by the English common law. Therefore, it is possible to say that although consumer protection in England originally came from a European movement, it has gained acceptance in England. Furthermore, it has become part of the English law and even to some extent has changed legal thinking on contract law.

7.1.2.2.4 Just price regulation

Determination of the price is a core consideration for any contractual relation. It would be very difficult to assess the fairness of a certain contract distinctly aside from price consideration. This is simply because it is not possible to judge how balanced the relationship is without knowing how much each party is getting in return for what he is giving. A related issue is addressing what amounts to a fair price. Under the Shariah law of contract, a just price is the equivalence price. The price of the equivalent is the 'rate at which people sell their goods and which is commonly accepted as equivalent for it and for similar goods at that particular time and place.' The equivalence price is a variable phenomenon, determined by

[1101] SI 1993/3053
[1102] SI 1999/2083
[1103] See section 2.3.6.2
Adams and Brownsword, *Understanding Contract Law* (n 128) ; Adams and Brownsword 'The Ideologies of Contract' (n 48)
[1104] See the court decisions in *Yam Seng Pte Limited v International Trade Corporation Limited. Pte Limited v International Trade Corporation Limited* [2013] EWHC 111 (QB), 131-53; *Trading Agency LLC v Prime Mineral Exports Private Ltd Teare* [2014] EWHC 2104 (Comm), 59-63; *Bristol Groundschool Ltd v Intelligent Data Capture Ltd* [2013] EWCA Civ 200, 105 mentioned in section 2.3.6.2
[1105] See Summers (n 315); Paterson (n 345); Zhou (n 346)

the forces of supply and demand and affected by the will and desire of people concerned.[1106] This is more or less the same as the market price.

By contrast, under the general conception of English contract law consideration need not be adequate.[1107] Moreover, price in consumer contracts is excluded from being subject to the test of fairness under section 64 (1) of the CRA 2015 (as a core term). The discussion of the fourth chapter on consumer protection under English law has indicated a high level of consumer protection. However, the exclusion of the price from the test of fairness is a major factor in holding down the level of protection.

Although the effect of excluding price from the test of fairness is now softened under the CRA 2015 section 64 (2) where only 'transparent and prominent' price terms are excluded from the test of fairness, this also means that there is less regulation of price fairness. Even though the requirements of transparency and prominence minimise the charging of unfair hidden costs, there is no guarantee that transparent prices are fair or reflect market price.

Collins observes in relation to the requirement of significant imbalance under the fairness test of consumer contract that 'the directive is concerned to establish a framework for market transactions which encourages traders… to supply good products at competitive price'[1108] This is likely to mean that when addressing a contract term the price paid becomes a relevant consideration. However, one would wonder why legislators would exclude the price from the test of fairness if the intention is to regulate it under the requirement of significant imbalance. Even if Collins' theory is right, the assessment of the price under the requirement of significant imbalance is limited by the fact that the imbalance needs to be 'significant'[1109]. Thus it does not protect the consumer against a 'bad bargain'.[1110]

Traditionally, the exclusion of the adequacy of consideration from judicial review is based on an assumption about rational behaviour. It is generally believed that people only consent to what represents their will. This comes from the belief that the market price is what makes a

[1106] Ibn-Taimiyah, *Majmoua Fatawa*, vol 29 (n 547) 520-2
[1107] Mckendrick, *Contract Law* (n 135) 293-99
[1108] Collins 'Good Faith in European Contract Law' (n 752) 251
[1109] See *Director General of Fair Trading v First National Bank plc* [2001] UKHL 52; *Office of Fair Trading v Ashbourne Management Services Ltd* [2011] EWHC 1237 (Ch), [2011] ECC 31 [174] (Kitchin J); *West Ian Finlay& Associates*[2014] EWCA Civ 316
[1110] Davies (n 748) 226

just or fair price.[1111] Similar arguments are made in relation to the exception of the price as a core term from the test of fairness. The exclusion of price from regulation is seen as a compromise that is made by the legislator for the sake of contractual autonomy by leaving the market free to regulate price.[1112] Howells and Wilhelmsson point out that the intention behind the exclusion of the core terms (price and main subject matter) by the Directive was to be cautious not to intervene into 'anything resulting directly from the contractual freedom of the parties'.[1113] Moreover, it is regarded as unacceptable from the standpoint of freedom of contract for the trader or supplier to give the consumer the right to undo a bargain freely entered into on the grounds that they later regretted their original willingness to pay a given price for given product.[1114]

Such an argument does not make sense since an obvious intervention into parties' autonomy has been made by the legislator on many occasions, including the implication of the quality of goods. It is incoherent to say that it is against the consumer's will to supply a fair price, but that it is an implementation of his will to supply goods of satisfactory quality. On the contrary, it is of obvious benefit to the consumer to pay for as much as he gets in return, but it might not always be his choice to receive goods of standard quality.

Perhaps it is the belief in the power of the market that has led to the exemption. Smith observes that although the regulation does not regard it as unfair to 'advertise a pencil for sale at the non-negotiable price of £1000, it is simply ~~a~~ bad business'.[1115] Indeed, it seems that the argument that market price is what determines the fair price is the largest challenge for adopting fair price regulation in English law. But, even if the market price is the only criterion to determine fair or just price, how does the law ensure that the agreed price reflects the market price? How does the law deal with contracts when the agreed price is above the market price? Against traditional ideas, the price charged in the free market is always the market price; reality proves that market failure frequently happens. Imperfection in the market occurs for many reasons and people have been proved to not always act rationally and consciously on the basis of information.[1116] As a result, transparency is no solution for the

[1111] Atiyah 'Contract and Fair Exchange'(n 58)
[1112] O'Sullivan and Hilliard (n 752) 215
[1113] Geraint and Wilhelmsson, *EC Consumer Law* (n 757) 94
[1114] O'Sullivan and Hilliard (n 752) 215
[1115] J.C.Smith 'Contracts–Mistake, Frustration and Implied Terms' (1994) 110 Law Quarterly Review 400
[1116] See discussion on market failure section in 4.1.1 consumer vulnerability in section 4.1.2.1

issue of overcharging. According to Atiyah, issues of overcharging happen even in 'highly competitive markets'[1117]

Therefore, the exclusion of the just price requirement from fairness considerations does not reflect current economic and social behaviour developments. Furthermore, it is difficult to make sense of why the fairness of contract term (in consumer contracting) is made relevant to the law but not the fairness of price, which is a core contract term of any contract. This is especially the case when price and terms are complementary, in the sense that a price that is higher or lower than the fair price may allow for terms that are more unfavourable than fair terms. Indeed, it does not make sense to exclude price from judicial review as resulting from parties' autonomy when obvious intervention into parties' autonomy has been made by the legislator (in consumer contracting) on many occasions including the implication to the quality of goods. It is illogical to say that it is against the consumer's will to supply a fair price, but it is an implementation of his will to supply goods of satisfactory quality. By contrast, it is of obvious benefit to the consumer to pay as much as he gets in return, but it might not always be his choice to get goods of standard quality. Thus, this research upholds the enforcement of a requirement of just price by the English law of contract especially in relation to consumer contracts. A requirement of fair price is essential if the law is to aim for maximal welfarism.[1118]

7.2 Justice norms

Speaking about the role of contract in pursuing justice and allocating resources leads to the question of justice norms. In general terms, most of modern debates on the normative justice of contact theories advocate either corrective justice (based on right) or distributive justice (welfare distribution).[1119] The concept of distributive justice has been mentioned several times in this research.[1120] Aristotle in the fifth book of the *Nicomachean Ethics* defines distributive justice (*dianemetikon dikaion*) as 'the distribution of honour or money or any of other things divisible among those who share in the regime'.[1121] Various conceptions of

[1117] Atiyah 'Contract and Fair Exchange'(n 58)
[1118] See Willett ideas on maximal welfarism in Willett, *Fairness in Consumer Contracts* (n 642) 378-81
[1119] Mahmood Baghri 'Conflict of Laws, Economic Regulations and Corrective/Distributive Justice' (2007) 28 University of Pennsylvania Journal of International Economic Law113
[1120] See sections 4.1.2.1 and 6.3.1.1
[1121] Otfried and Fernbach (n 622) 125-48

distributional justice have been attached to socialist concerns.[1122] Three commonly suggested norms of distribution have been illustrated in the previous chapter. These are the need norm, the equality norm and the equity norm.[1123]

Socialists generally agree, according to Ogus, on the general theme of pursuit of equality through the abolition of advantages of power, privilege and wealth. In addition this also involves ensuring individuals' access to resources that enable them to participate equally and fully in the community.[1124] Corrective justice (*diorthotikaion dikaion*) on the other hand is contrasted with distributive justice. Corrective justice plays a corrective role in private transactional relations to maintain equality.[1125] The concern here is to illustrate the extent to which Shariah and English law reflect both norms of justice.

Both legal systems refer to corrective and distributive norms to differing degrees. The general theory of English contract law tends to deal with unfairness correctively. This is apparent from the fact that the law prefers to deal with injustice without imposing a general requirement that contract must be fair. The previous section explains that although the English law of contract does not impose a general doctrine of contractual fairness, it deals with perceived cases of injustice correctively. There is no evidence that the general theory of English contract is yet serving a distributional function in the sense of setting standards to move wealth from one group to another. By contrast, distributive justice is a major cause of intervention in consumer contracting. Under consumer theory, distribution is made for the purpose of moving wealth from trader to consumer based on poverty and vulnerability (the need norm).[1126]

On the other hand, the Shariah law of contract serves a distributional function on the bases of 'equity' and 'need' norms.[1127] The equity norm involves the matching of 'inputs' with 'return' or contributions with 'rewards'. This reflects the fundamental principle of Shariah that counter-values must be equivalent. The 'need' norm of distributive justice is also manifest in Shariah law of contract on several occasions, including the doctrine of unfair

[1122] See George and Wilding (n 624) 44-68
[1123] See section 6.3.1.1
[1124] Ogus (n 589) 46-54
[1125] Otfried and Fernbach (n 622) 125-48
[1126] See section 4.1.2.1
[1127] See section 6.3.1.2

exploitation which aims to protect the weakness or vulnerability of one of the contracting parties.[1128]

The corrective norm of justice is occasionally referred to by the Shariah law of contract when speaking about contractual remedies represented in the 'corrective scheme of option'. Therefore, we could say that the Shariah law of contract serves distributive justice through the illegality doctrines (*riba*, *ghara*r, just price, unfair exploitation and mandatory disclosure) whereas defect is dealt with by corrective measures (option of defect, option of description, option to rescind, option of inspection etc).[1129]

Yet, it might be appropriate to address here the argument made by Hassan against this research conclusion that the Shariah law of contract serves distributive justice. Hassan asserts that the Shariah law of contract serves corrective justice.[1130] He argues that distributive concerns are served under Shariah legal traditions outside the institutions of contract. It is made under other institutions which are meant to ensure just and equitable circulation. The most important mechanism of wealth distribution is *Zakah*, which is the payment given annually to the poor and the needy. The list includes many other mechanisms of social wealth distribution such as *kharaj* (land tax) and *jizya* (poll tax).[1131]

The role of contract is then, according to Hassan's theory, to make sure that the result of distribution is achieved. This is made through corrective justice, he suggests, which ensures the maintenance of equality so that after a transaction is concluded parties come out neither richer nor poorer than they were before. Hassan refers to corrective justice as explained by Aquinas who uses the term 'commutative justice' to refer to what Aristotle called 'corrective justice.' According to Aquinas, commutative justice is a form of corrective justice which is not limited to correction. Conversely, corrective justice (commutative justice) requires that the exchange performances be of equivalent value in the sense that contractors should come out of the contracting agreement with the same level of wealth they had before entering into the contract.[1132] Thus, corrective justice in contract ensures that the performance exchanged

[1128] See section 6.3.1.2
[1129] See for example sections 6.5.3.1 and 6.5.1.5.6
[1130] Hassan (n 8)
[1131] Ibid
[1132] John Finnis, *Natural Law and Natural Rights* (2nd edn, OUP 2011) 179- 83

by the parties are of equal value,[1133] which according to Hassan agrees with the general concept of Shariah that exchanged values must be equal.[1134]

However, Hassan bases his thesis on an over-estimation of the Shariah principle of equivalence of counter-values. To say that the contracting parties should come out of the contracting agreement with the same level of wealth they had before is the same as saying that profit making is prohibited by Shariah. It is very difficult to imagine a contract scheme where legitimate profit is discarded. Thus, the prohibition of advantage-taking should not be interpreted to mean that profit making is disallowed. This leads to the question of how profit is earned under Shariah law.

Just profit or the profit of the equivalent is a normal profit that is usually earned in a particular type of trade without harming others. Profit is generally permitted until it becomes abnormal or exploitive.[1135] Under Shariah philosophy, profit must be earned; it requires a combination of property and labour for the purpose of development. Profit is, accordingly, associated with a real effort that constitutes validity of investment for the purpose of allocating resources. The profit of Shariah is therefore, a quest profit which includes effort and mobility of resources that serves economic value.

7.3 Concluding remarks

At first glance Shariah and English laws of contract seem to have very distinct approaches as to intervention into parties' autonomy. The two legal systems rest on very distinct ideological bases. While contracts under Shariah rules are concluded by the principle of permissibility, freedom of contract is the general rule in English law. Yet, deeper analysis of the rules of the two systems, especially by including English consumer protection in the picture, demonstrates that this is not entirely true. Furthermore, the fact that the English judicial system occasionally intervenes into the substance of the contract , albeit indirectly, and deals directly with the contractual fairness of consumer relations makes it difficult to say that

[1133] James Gordley 'Equality in Exchange' (1981) 69 California Law Review 1587; Wil Waluchow 'Professor Weinrib on Corrective Justice' in Spiro Panagiotou, Justice, *Law and Method in Plato and Aristotle Academic* (Print. & Pub 1987) 153-5
[1134] Hassan (n 9)
[1135] Islahi (n 546) 80-85

substantive fairness is not relevant to contract validation. This brings the rules of Shariah and English law considerably in line.

Justice is a relative and changing phenomenon, this is why it should reflect current societal values. This is a point of vital importance to the development of both Shariah and English law. On the one hand, the English law still insists on remaining bound by the traditional liberal approach, even though the liberal approach has proved incapable of coping conceptually with social and economic developments. The determined commitment to this liberal ideology has led to inconsistency in the development of the law. More fundamentally, it means that the law struggles to respond to current needs with an outdated theoretical framework. The English system needs to accept that a change of circumstances requires at times a change of those principles that are protected by the law.

On the other hand, Shariah law consists of a wealth of neglected materials reflecting the needs and circumstances of many centuries ago. Most analysis included in this research was guided by the classical law of Shariah from the classical period which constitutes the largest part of Shariah jurisprudence. For many reasons that have been mentioned throughout the research the development of the law has been hampered in modern times. The decline in Shariah during the nineteenth century has left the law with a gap, since the law has generally remained unchanged in its classical form. Although the jurists of the classical period created a significant body of material covering every aspect of the law of contract, their work represents their times.

The most obvious cause of decline of the Shariah law of contract is related to the displacement of human reasoning in developing the law.[1136] This most likely arose as a result of caution regarding changes to the nature of the law and being sceptical about choosing the right people who could oversee such a process. Nevertheless, Shariah is more than just law for most Muslims; it is a system of duties that covers matters of morality as well as jurisprudence. To avoid the criticism that Shariah law is holding back nations who adopt it, restatement of the law to fit the contemporary needs of market has become a necessity. Indeed, the law is now under pressure to keep up with recent developments. One of the most

[1136] See discussion on human reasoning as source of law in section 3.3

urgent needs is to adjust the law of contract to respond to the needs of consumers and commercial entities in the modern market.

Immutability of the principles of the law should not be overestimated otherwise it is will be a major obstacle to the natural development of the law in relation to changing social and commercial circumstances. Introducing the rules of Shariah in a modern context will have an ever changing effect on the development of Shariah. Codification of the law could be one answer to the current difficulties facing Shariah.

Chapter Eight: Conclusion

This thesis was conducted with two aims in mind. The first is to investigate the situation of contractual justice under the English and Shariah laws of contract. The second is to test the viability of consumer protection under the Shariah law of contract. Shariah and English laws of contract have been reviewed from classical to contemporary times with emphasis placed on contractual justice, equity and acknowledgment of contractual vulnerability in both legal systems. Notions of fairness as implemented in each of the relevant legal systems have been explored. The English experience of consumer protection is introduced to the research in order to highlight the role of the law of contract in bringing fairness and equity to society. The research outlines the rationales behind the regulation of consumer contracts. It also illustrates the extent to which intervention is made into parties' autonomy by exploring the major regulation techniques of consumer protection. The theoretical and practical aspects of the Shariah law of contract have been tested for their capacity to provide consumer protection.

Enforcing justice or distributive considerations into contractual relations, as well as being a modern tendency, was also a characteristic of medieval contract laws. The Shariah law of contract, as the product of the eighth century, acknowledges the distributive role of the law of contract and enforces fairness notions into contractual scheme. Although the medieval roots of the English law of contract are surrounded with controversy there is some evidence that substantive contractual justice is promoted by the law.[1137] The rise of the liberal state in the eighteenth century had its effect on the law of contract. The English law is an example of a law of contract that was highly influenced by liberal ideas, and indeed still is. The Shariah law of contract on the other hand, being an immutable legal system, and for many other reasons (social and political) was not affected by liberal movements.

By the twentieth century, the direction of the English law of contract had shifted; ideas of social justice and cooperation were introduced into the law of contract. This movement was mainly the result of an increased recognition of consumer rights. This was associated with social and economic studies against liberal contract theory. Since the issue of consumer

[1137] Horwitz (n 33)

protection is not one to be ignored in the modern world legislative intervention became indispensible. Legislation has enforced ideas into contract that the common law would require a very long time, if ever, to accept. Consumer protection is a reflection of the distributive function of the law of contract and social contract thinking. Outside consumer protection the general law of contract was shaped by two opposing tendencies. One of which represents a departure from contract liberalism and the other a revival of liberalism.

The Shariah law of contract did not witness any major reform in the same modern period. Furthermore, the law of contract was never bound by liberal notions of contract. On the contrary, social responsibility is reflected by the law of contract to the extent that it is possible to say Shariah is a law that is bound by the principle of permissibility of contract rather than freedom of contract. This agrees with the modern social and economic analysis of the law of contract. However, the law suffers from serious issues caused mainly by negligence. Although the Shariah law was never abandoned in the Middle East, it remained to a large extent undeveloped. The law is to a large extent the same as that developed by the classical jurists of the eighth to tenth centuries. The fear of changing the nature of the Shariah law prevented any attempt to develop and codify it. One of the major challenges for the Shariah law of contract is responding to the need for consumer protection. While the Shariah law of contract promotes cooperation and social responsibility, it does not recognise the concept of the consumer, simply because the concept of the consumer was not known at the time of the evolution and development of the law.

In chapter two, the situation of contractual justice under the English law of contract was explored. The discussion began with the classical period of the law of contract as forming the cornerstone of the contemporary law. The two primary principles of freedom and sanctity of contract that controlled the classical law of contract were explored. Being of an individualistic nature, the concept of fairness of the classical law of contract was procedurally-oriented. The process of transformation from the classical to the contemporary law of contract was outlined. Modern developments in the law of contract were traced by invoking the innovative notion of fairness that was introduced to the law. This included the notions of equality of bargaining power, reasonableness, unconscionability and good faith. Furthermore, modern developments of the classical equity doctrines of duress and undue influence were examined. The discussion focused on the evolution, meaning, effect and scope of these doctrines. This was done for the purpose of testing the extent to which the modern

law of contract serves contractual justice. The analysis reveals that the English law of contract has not travelled very far in regulating the fairness of contractual relations since the classical period. The liberal notions of contract seem to still be dominant and the notion of freedom of contract is forming a serious obstacle to the development of any general doctrine of substantive fairness. Modern notions of fairness that have been introduced into the law of contract are merely supplementary notions, which soften the rigidity of the law rather than being limitation doctrines.

Chapter three moved on to investigate the situation of contractual justice under the Shariah law of contract. Owing to the distinct nature of the Shariah law of contract the first part of this chapter was devoted to an overview of the law. It explored the evolution of the law in the seventh and eighth centuries and the sources and nature of the law. It further illustrated the general theory of contract by addressing the ongoing debate over the existence of a general theory that binds the Shariah law of contract. The major limitations to contractual autonomy were presented by invoking the doctrine of *shurut* (ancillary condition). It was indicated that the Shariah law of contract is a legal system that is closely regulated for the purpose of preserving moral principles and ethics. This led to the conclusion that the Shariah law of contract is bound by the principle of permissibility of contract rather than freedom of contract. Furthermore, fairness notions under the law of contract were explored. Discussion was focused on the meaning, effect and scope of the doctrines of duress, *riba*, *gharar*, unfair exploitation and just price. By doing so, the meaning and concepts of contractual justice under Shariah law were determined. In addition, the extent to which contractors are legally bound to act fairly and justly towards each other was investigated. The discussion reveals that substantive fairness is a promoted and accepted value by the Shariah law of contract. Two primary principles distinguish the meaning of fairness under the Shariah law of contract. These are equality of counter-values and that profit must be a result of work of labour not a matter of exploitation of the needs of others.

In chapter four the theoretical grounds of the consumer protection were addressed from economic and social perspectives. Modern thinking in support of the intervention into the market place was presented to rationalise consumer protection. From an economic perspective consumer protection is rationalised based on the idea that a free market system produces failure that needs to be rectified by intervening into private transactions. From a social justice perspective consumer protection is needed to support the distributive function

of the law of contract and promote fairness and cooperation in society. The discussion of this chapter indicated that the law of consumer protection directly intervenes into the private sphere of contract for the purpose of preserving the fairness of the contract and giving effect to the distributive function of the law of contract. Protection of consumers by the law of contract was shown to be a matter of theory as well as practice. Consumer protection involves the promotion and enforcement of ideas of cooperation and fairness by the law of contract. This requires intervention into the private sphere of contract by a public authority. Furthermore, the legal rules of consumer protection are of a special nature in that they are set in order to balance the contractual relation for the benefit of the consumer rather than being set in the standard way for the benefit of both contracting parties. The discussion of this chapter serves the second aim of the research by distinguishing the main theoretical characteristics of consumer protection to be tested under the Shariah law of contract.

Chapter five explored the consumer protection experience under English law. This chapter investigated the extent to which contractual justice is promoted under the consumer theory of contract law. The evolution of English consumer law, its main characteristics and the influence of European law upon were outlined. It was illustrated that the evolution of the law of consumer protection in the twentieth century was a departure from the classical *laissez-faire* theory of contract. The major techniques of consumer protection within the law of contract were further explored. The relevant analysis revealed that these techniques were mainly designed to protect four essential values with respect to the consumer: legitimate expectation, free will, informed consent and fair contract terms. The discussion indicated that consumer protection under English law follows a theory that is distinct from the general law of contract.

In chapter six, the question of the viability of consumer protection under the Shariah law of contract was addressed. In the first part of the chapter, the question was investigated from a theoretical perspective. It seems that the rational grounds of consumer protection agree with the theoretical bases of Shariah law. The Shariah law of contract performs a distributional function based both on 'equity' and 'need' norms. Paternalist motives are the theoretical basis for a significant proportion of Shariah rules. Furthermore, public intervention into the marketplace has been practiced since the early days of Islam through the institution of the *hisbah*. Finally, values of honesty, fair dealing, unity and encouragement of cooperation are promoted by Shariah philosophy. The following section then moved on to test the practical

aspects of the Shariah law of contract. The discussion was guided by the modern regulations of the English law of consumer protection. Finally, a formula of consumer protection under the Shariah law of contract was offered.

Chapter seven provided final remarks as to where the two relevant legal systems stand in relation to contractual justice. It determined that while the concept of fairness under the Shariah law of contract is substantively oriented, the doctrinal foundation of the English law of contract is still to large extent procedurally oriented. Attention was turned to certain issues related to the situation of contractual justice and consumer protection under Shariah or English law that call for explanation. It was explained that while the Shariah law of contract encourages fairness it does not impose a general requirement of good faith. This is because fairness of contractual relation under the Shariah law of contract is tested by looking at the material facts rather than the intention of the parties. Furthermore, it was suggested that it is not sufficient to have consumer protection within the law of contract, there also needs to be some line of separation between the two sets of rules (consumer and commercial). In this regard, a formula for the separation between commercial and consumer law under the Shariah law of contract was suggested. The discussion then moved to a discussion of issues related to contractual fairness under the English law of contract. It was mentioned that English courts are at present only rejecting the name of doctrine not fair dealing itself. Therefore, it is to the benefit of the English law to adopt a general doctrine of substantive fairness. It was further explained that the exclusion of price fairness from consumer regulation under the English law is holding the level of consumer protection back. Moreover, the exclusion of price from the fairness test does is not consistent with the overall orientation of consumer protection. Finally, justice norms adopted by both Shariah and English law were addressed.

8.1 Outcomes and recommendations

- The modern law of English contract rejects a general doctrine of substantive fairness but not the idea that fairness is a relevant consideration for contract validity. As a result, fairness is dealt with by indirectly and covertly through doctrinal manipulation. This causes issues of inconsistency and stands against the development of the law. It seems to be primarily the fear that the contract institution would collapse without it that makes the law keen to preserve a liberal ideology that does not reflect current values. However, as Lord Devilin states ‘the true nature of common law is to override theoretical distinctions when they

stand in the way of doing practical justice.'[1138] Thus, any obstacle in front of the application of practical fairness should be removed. The English law should respond to modern social and economic developments by adopting a general doctrine of substantive fairness. It should be recognised in the law of contract that liberalisation is no longer the best way to achieve justice. The creation of a doctrine of substantive fairness is a necessary development of the law. The introduction of a substantive doctrine would serve the consistency, efficiency and clarity of the law.

- Although generally consumer protection under the English law supports a high degree of fairness, this is limited by excluding price from the fairness consideration. It would be very difficult to assess the fairness of a certain contract distinctly from a price consideration. This is simply because it is not possible to judge how balanced the relationship is without knowing how much each party is getting in return for what he is giving. The exclusion of a just price requirement from fairness considerations does not reflect current economic and social behaviour developments. More importantly, it does not consist with the overall orientation of consumer protection; it is hard to make sense of why the fairness of contract terms (in consumer contracting) is made relevant to the law but not the fairness of price, which is arguably the consumer's most important consideration. It is of obvious benefit to the consumer to regulate price fairness to pay as much as he gets in return, but it might not always his choice to attain goods of standard quality. This research has thus upheld enforcing a requirement of just price by the English law of contract especially in relation to consumer contract. A requirement of fair price is essential if the law is to aim for maximal welfarism.

- The research has revealed that the Shariah law of contract is fit both from a theoretical and a practical perspective to serve the aim of consumer protection. In terms of theory, all ideas that underpin consumer protection fit easily with the general principles of the Shariah law of contract and indeed most of these ideas are already acknowledged by the Shariah law of contract. Just like modern consumer protection regimes, the Shariah law of contract encourages social responsibility and care for others. This is reflected in the distributive function attributed to the law of contract. Public intervention into the law of contract is promoted by the law of contract. This is apparent from the fact that it is based on the principle of permissibility rather than freedom of contract. The law of contract is heavily

[1138] *Ingram v Little* [1961] 1 QB 31,66

regulated for the purpose of securing a free deal for everyone in a way that excludes any notion of '*caveat emptor'*. From a practical standpoint, the thesis has indicated that the majority of values protected by modern consumer measures are to some extent reflected in the rules of Shariah contract law. A formula for the employment of some established rules of the Shariah law of contract for creating consumer protection code is proposed. This formula attends to the minimum consumer values necessary to offer satisfactory protection. It includes the protection of consumers' informed will, voluntary consent, legitimate expectations and balanced contractual obligations. The research suggests that the issuance of a single legislation compatible with Shariah rules is likely to be the key solution to most consumer issues in Shariah-ruled countries. Such a code should extract the maximum benefit out of Shariah rules by modernising, crystallising and introducing elements of sophistication to the law in order to respond to modern needs. This would bring much needed elements of clarity and consistency to the law. The codification of consumer protection in Shariah-ruled countries along with the creation of a stable and clear system is likely to enhance the legitimacy and moderation of the practice of consumer protection.

- The research has illustrated that most rules which protect contractual fairness under the Shariah law of contract are set in abstract, meaning they are applicable to every contractual relation in the same manner regardless of who the parties are. It does not make any difference if the contract was concluded between consumer and trader or even between two commercial entities. Although this serves the modern tendency towards intervention into marketplace, Shariah law in some occasions can be very restrictive. Thus, efficiency might be a point against Shariah law especially in relation to commercial transactions. This research argues that it would in the public interest to establish a line of differentiation between commercial and consumer relations. Pursuing justice by the Shariah law of contract should not become an obstacle to human development (commercial exchange in this case). Two points are suggested here on which to base the differentiation between commercial and consumer regulation. These are the variation between the legal thoughts of the schools and the doctrine of unfair exploitation

- Comparing the situation of contractual justice under the two relevant jurisdictions suggests that achieving practical justice requires intervention into the process as well as the substance of the contract. Being focused on one aspect of fairness rather than the other

(procedural fairness in the English law and substantive fairness under the Shariah law) is likely to produce unjust outcomes. Furthermore, ignoring contemporary economic and social developments and needs is likely to produce injustice. This is because fairness is a relevant phenomenon that changes with time and circumstances. This is the main issue facing the development of both English and Shariah laws of contract. The English law of contract struggles in dealing with perceived injustice as a result of the determination to remain bound by liberal theory while ignoring changes in economic and social factors. Similarly, the Shariah law of contract is held back as a result of the overestimation of the immutability of the law. The fear that the nature of the law is going to change is what has led to the Shariah law of contract being to a large extent undeveloped and still representing the needs of many centuries ago.

8.2 Future research

A further research is suggested in relation to the following issues. First of all, a formula for a general doctrine of substantive fairness in English law is needed. Second, there should be further acknowledgment of the extent to which it is possible to differentiate between the regulation of consumer and commercial contract under the Shariah law of contract. Third, in investigating the viability of consumer protection under Shariah law the discussion of the thesis was limited to analysing the contract of sale, therefore further research is needed to consider other aspects of consumer protection such as in relation to supply of services and product liability. Fifth, when discussing values to be protected by the Shariah law of consumer protection the analysis focused on four essential values, further research in relation to the protection of other values is suggested. Finally, a draft for the codification of the Shariah contract, and consumer law is still to be prepared.

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