Lost Profit Damages for Breaches of Commercial Contracts: Examining Common Law and Civil Law Approaches to Recovery and Lessons for Saudia Arabia

A Thesis Submitted for the Degree of Doctor of Philosophy

By

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Abstract

This thesis explores the rationale behind the Saudi court's refusal to award damages for loss of future profit in cases of breach of contract. Specifically, the thesis aims to demonstrate that the strict application of the uncertainty principle by the court, which serves as the basis for this denial, has resulted in unjust outcomes for the non-breaching party. Therefore, the thesis has two principal arguments.

First, this study contends that the absence of legal rules that provide a framework for establishing certainty in cases involving the loss of future gains from commercial opportunities has caused the Saudi court to treat such losses as uncertain damages that are not eligible for compensation.

Second, the thesis employs a comparative investigation to examine how Common and Civil law courts respond to the uncertainty of future damages arising from a breach of contract. It demonstrates that both legal systems strive for certainty by imposing limits on compensatory damages. Additionally, the study illustrates how the legal rules on limiting contractual damages in each jurisdiction aid the court in achieving a level of certainty in the recovery of damages for loss of profit. The ultimate aim is to compensate the claimant for the loss without imposing undue liability on the defendant. Consequently, the primary objective of this study is to provide insights and inspiration for both Saudi courts and legislators, with the ultimate aim of enhancing the current legal practices concerning the recovery of lost profits as damages within the Saudi jurisdiction.

1 Chapter One: Introduction

Commercial law regulates and organises business activities to protect rights and settle commercial disputes. Similarly, commercial contracts ensure that every business counterpart is free to create business obligations upon other parties involved and transfer those obligations into a binding agreement.[1] These obligations can vary widely based on the nature of the commercial transactions, whether they are commercial leases or acquisition agreements.[2] Therefore, a commercial contract is critical to formulating the parties' responsibilities and protecting their interests under the contract.[3]

Thus, commercial contracts are premised on mutual obligations that the parties must fulfil as outlined in the agreement. However, due to the financial interests associated with these contracts, disputes may arise during their duration. For instance, in the context of private equity acquisitions, the parties may enter into a stock purchase agreement which transfers ownership of stocks and any associated liabilities to the acquirer. If, during the due diligence process, hidden liabilities are not detected, a legal dispute may arise between the parties. Similarly, when the seller of goods or products delays delivery to the buyer, disputes can arise, potentially resulting in litigation. All of these disputes can occur because one party fails to honour their obligations as specified in the contract, resulting in the innocent party suffering a financial loss, such as a loss of profit that may likely occur in the future.

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[1] Arancibia J, 'Judicial Review of Commercial Regulation' in Judicial Review of Commercial Regulation (Oxford University Press 2011) https://0-oxford-universitypressscholarship-com.serlib0.essex.ac.uk/view/10.1093/acprof:oso/9780199609079.001.0001/acprof-9780199609079-chapter-1 accessed 24 March 2022

[2] Bonell MJ, An International Restatement of Contract Law: The UNIDROIT Principles of International Commercial Contracts (Martinus Nijhoff Publishers 2009)

[3] Ibid

In light of the loss suffered, the innocent party may seek compensatory damages from a court of law to recover the loss of profit. However, the assessment and awarding of damages for loss vary across jurisdictions. For instance, common law jurisdictions may base the assessment of damages on protecting the expectation interests of the non-breaching party or the wasted expenditure. On the other hand, Egyptian law recognizes the principle of full reparation for any harm or loss caused to others, as stated in Article 163, which guides the court's assessment of damages. Similarly, Saudi law follows a similar approach, where any loss suffered by the innocent party must be compensated, and the judge has full discretion in assessing the damages.

In assessing the loss suffered by the innocent party, the court takes into consideration the need to avoid imposing excessive liability on the breaching party and to establish a degree of certainty that the defendant's breach caused the loss. To this end, Civil, Common, and Saudi courts apply legal rules that function as limitations for recovering contractual damages. These rules serve as boundaries that enable the court to achieve the objectives outlined above. Some of these legal rules are universally recognisable in different jurisdictions, such as the foreseeability rule, which can be found in common law, such as English law, and in civil law, such as Egyptian law.[4] Moreover, rules are designed by the national court to overcome certain legal challenges associated with the assessment of damage, such as the application of the *Ghrara* (uncertainty) principle by the Saudi court to deny the recovery of loss of profit.

The legal rules used by the court to limit contractual damage are essential in determining the recoverability of damage—for example, the assessment of damage for an opportunity whose future profit has been lost. It has a snowball consequence because “opportunities breed further

[4] In common law, the foreseeability principle is located in the landmark case of *Hadley v Baxendale* (*[1854]*. In Egyptian law, the foreseeability principle can be found in articles 221-2 of the and in the French in articles 1231-3.

opportunities".[5] Thus, the importance of these legal rules is to ensure a degree of certainty that the breaching party is liable only for the loss caused by the breach. Nevertheless, these rules differ in their degree of allowance as well as the purpose for the recovery of lost profit. For instance, the legal rule of *Gharar* in Saudi law is just a tool used by the Saudi court to justify the denial of the recovery of lost profit.[6] In contrast, the English court applies a different method to assess the recoverability of lost profit, which is that such a loss should be foreseeable when the contract is formed.[7]

1.1 Statement of the Problem

This study carries out an academic investigation of a legal issue within Saudi law related to the recovery of lost profit as damage in commercial disputes and associated obstacles and solutions. In light of a breach of contract, the Saudi court does not recognise the compensation or impose contractual liability on depriving opportunities that have unrealised gains. The main concern for the Saudi court, which leads to the denial of the recovery of the loss of future profit, is the uncertainty surrounding the loss of profit. This is for two reasons:

- the first is the lack of an appropriate and clear principle or guideline that limits the recovery of loss of profit within Saudi law, and
- the second, which is considered a consequence of the first reason, is that the Saudi court does not feel confident in imposing liability for future events that may or may not occur that could result in imposing harsh liability on the defendant.

[5] Hart HLA and Tony Honoré, 'Causation and Contract' in Causation in the Law (2nd edn, Oxford 1985; online edn, Oxford Academic, 22 Mar 2012) 311 https://doi.org/10.1093/acprof:oso/9780198254744.003.0013 accessed 17 August 2021.
[6] See chapter 2 P 59.
[7] See chapter 3 P 85.

Instead of employing a principle that may permit the recovery of loss of profit, the Saudi court takes the opposite approach, which is adopting the *Gharar* (uncertainty) principle derived from Islamic law as a justification for denying the claim of loss of profit.[8] The origin and application of the *Gharar* principle are within contract law, which means, for example, that if the subject matter or the price of the contract is uncertain, then the contract is void.[9] However, when the Saudi court faces an obstacle in justifying its denial of the recovery of loss of profit, the court, by analogy, adopts the *Gharar* principle. The *Gharar* principle limits the recovery of damage to what is actual and well defined. Thus, since the nature of future profit loss is uncertain, the court rejects the awarding of loss of profit.

There are several cases and statements that demonstrate the current practice and the Saudi court's practice with respect to recovery of loss of profit in commercial despite. For example, in 2017, the Court of Appeal heard a case involving a lost-profit claim arising from a breach of contract suit.[10] The claimant sought the amount of nine million Saudi riyals, which is equal to GBP 1,992,653.37 in damages for lost profit, alleging a breach of commercial contract by the defendant. The alleged breach occurred when the defendant refused to fulfil their obligation under the contract by providing only 900 of 3,000 air conditioner units. The court rejected the claim on the grounds that recovering lost profit is not permitted under Islamic law because it is uncertain and merely possible, not assured. Compensation must be for actual damage, not for what is merely possible, and lost profits are not actual but probable.[11]

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[8] Saleh W and Ajaj A, 'Unlawful Gain and Legitimate Profit in Islamic Law: Riba, Gharar and Islamic Banking' in Unlawful Gain and Legitimate Profit in Islamic Law (Brill 1992) 12.

[9] Ibid

[10] Contracting company v. Limited Company, Dewan al-Madalim (The Court of Appeal Business Division in the Board of Grievance), case no 117, 2017

[11] Ibid

In addition, the 2017 workshop statement for judges entitled ‘Litigation Compensation Arising from Project Damage’ concluded that no compensation for the lost profits should be awarded because they are indirect and unconfirmed. This opinion was based on the application of a strict interpretation of the principle of *Gharar*, which governs this issue under Saudi law. It is noticeable that the workshop statement for judges has resolved the question once and for all, that the Saudi court does not recognise the lost profit as recoverable damages. However, this statement is considered advice for the judges in this matter, and it is not legally binding.

Despite the non-binding nature of this advisory opinion, the workshop statement has, in fact, been influenced and followed in practice. However, it should be noted that such an influence is not directly stated or linked to the statement of the workshop, but more generally to the concept of its opinion. For example, in the most recent case in 2021 that involves a claim for lost profit due to a breach of a commercial contract between *Abdulaziz Al-Buraikan, a sole trader* (the claimant), and *Tolatelah Trading and Contracting Company* (the defendant), the claimant sought to recover the loss of profit due to the defendant's breach of contract. The Court of Appeal found that the defendant was in breach; however, the loss of profit was unrecoverable for a set of reasons.[12] One of these reasons is that it has been judicially established that the loss of profit is not recoverable.[13] Here, the court's reference to the judicial stability of the restriction on the loss of profit can be indirectly linked to the influence of the workshop statement.

[12] *Abdulaziz Al-Buraikan, a sole trader v. Tolatelah Trading and Contracting Company* [2021] 2322 The Court of Appeal Commercial Division (Saudi Arabia).
[13] Ibid

1.2 Research question

This study aims to address the following research questions:

1. What legal tools do civil and common law courts use to limit the recovery of damages and cope with uncertainties related to the loss of future earnings resulting from a breach of contract?
2. How do these legal tools differ in terms of rules and practices between civil and common law systems, and what impact do they have on achieving a degree of certainty in resolving such cases?
3. To what extent can the investigation of these legal systems and their practices inform and inspire the Saudi court to enhance their current approach to the recovery of lost profit?

1.3 The Importance of the Topic

There are a number of reasons that motivated me to conduct a doctoral thesis to investigate the Saudi practice towards the recovery of loss of profit in the business context due to its importance from a legal and economic perspective.

First, according to published cases by the Ministry of Justice, there has been a notable increase in the number of cases seeking recovery of lost profits in recent years. For instance, this study identified more than 24 cases that were rejected by the court.[14] It is notable that upon examining these cases, the majority (approximately 17) pertain to commercial contracts, where a claim is made for the loss of profit due to delayed delivery.

[14] This study located more than 24 published cases seeking damage for loss of profit. https://sjp.moj.gov.sa

Second, an overview of the academic literature reveals that legal academics have failed to reach a consensus on a clear and ascertainable legal principle to govern the recovery and measurement of damages for loss of unrealized gain resulting from a breach of contract.[15] Moreover, they have failed to address the main concern of the Saudi court, which is the uncertainty of the loss of future profit. Their argument takes shape by concluding that loss of future profit is allowed to be recovered under Saudi law, yet their argument does not address the uncertainty issue, how certainty can be assessed or what degree of certainty it may require.[16] Thus, the court has not been influenced by such an academic perspective due to the absence of guiding legal rules that can resolve the uncertainty issue.

Third, one aspect of the Saudi 2030 Vision is "opening Saudi Arabia for further businesses ... and improving its business environment".[17] The essential condition to realise this is for foreign investors have confidence that the judicial remedy can meet the standards of international commercial practice. For example, in cases where conflicts and disputes between foreign investors and a counterparty are settled through international arbitration, compensation awarded in such arbitral awards may be denied by a Saudi court if it includes lost profits.[18]

Therefore, an academic investigation is necessary to address this issue and improve the current legal practices in Saudi Arabia, particularly if the country aims to continue attracting businesses. It is crucial to examine other legal systems and understand how they resolve the uncertainties associated with claims for loss of profit. This can potentially inspire the Saudi courts to adopt

[15] Al-Zuhayli Wahbah, Daman Theory in Islamic law, 1998.
[16] E.g. Aljofan Nasser, Compensation for Lost Profit That is Certain, 2007. Al-Zuhayli Wahbah, Daman Theory in Islamic law, 1998. Aljofan Nasser, Compensation for Lost Profit That is Certain, 2007.
[17] https://www.vision2030.gov.sa/v2030/overview/thriving-economy/
[18] Al-Magily, Abdul Hamid, Compensation for Lost Profit, 2018

suitable solutions based on practices from various legal systems, thus refining their own approach to these complex cases.

As this study is the first that investigates the issue of the recovery of loss of future profit and seeks solutions comparatively, it could offer great insight for the Saudi legislature when forming a as well as for the court to observe the practice and experiences of the issue of this study in other legal systems.

1.4 The Scope of this Thesis

The scope of this study can be determined in three ways. First, the study is concerned with recovering loss of future profit. It investigates the positions of Saudi law and the compared jurisdictions regarding recovering the loss of future profit. It should be noted that this study approaches the issue in terms of the judicial sense and legal rules and excludes any discussion of agreed-upon damages that are formed in the contract, such as liquidated damages.

Second, this study focuses on damage to loss of profit due to breach of commercial contract. This means that the primary discussion is about contractual liability in a commercial context. It does not focus on liability resulting from tort action or invoke the legal rules of tort law. Moreover, it does not discuss the loss of profit within other areas, such as the loss of profit in medical negligence or consumer contracts.

Third, in exploring the issue from a broader sense, this study determines the legal rules limiting the recovery of damage, such as those pertaining to fault, causation, remoteness and mitigation in the chosen jurisdictions. It also examines how these legal rules operate within the selected jurisdictions as well as the court's application of such rules and what the contribution of these rules is to resolving the uncertainty of the recovery of lost profit.

1.5 Research methodology

The primary methodological approach utilised in this study is a combination of doctrinal and comparative legal research methods. Therefore, this section consists of three parts: the first part discusses the doctrinal method; the second part examines the comparative method, and the last part justifies the selection of the comparative jurisdictions.

1.5.1 Doctrinal Method

An important goal of conducting a legal study is that the study should adequately examine and analyse the legal rules and their association, sources and authority. Thus, a critical part of legal research is that it should carry out an academic investigation of the primary and secondary sources of law. To achieve this, the appropriate method is to employ the doctrinal legal research method. Utilising the doctrinal method in conducting a legal study can ensure that the researcher is guided and directed during the research journey with a suitable method that enables them to investigate and analyse the legal rules the study counted on.[19]

The essence of the doctrinal legal method is based on three characteristics, as illustrated by Van Gestel and Micklitz.[20] First, conducting legal scholarly work depends on locating the primary and secondary sources of law, such as legal code, statutes text, legal rules and principles applied

[19] Hutchinson T and Duncan N, 'Defining and Describing What We Do: Doctrinal Legal Research' (2012) 17 Deakin L Rev

[20] VanGestel R and Micklitz HW, 'Revitalizing Doctrinal Legal Research in Europe: What About Methodology?' (2011) https://cadmus.eui.eu/bitstream/handle/1814/16825/LAW_2011_05.pdf accessed March 2022.

by the court and academic work.[21] Second, the functionality of law is considered to "somehow represent a system.[22] Through the production of general and defeasible theories, legal doctrine aims to present the law as a coherent net of principles, rules, meta-rules and exceptions, at different levels of abstraction".[23] Third, “Decisions in individual cases are supposed to exceed arbitrariness because they have to (be) fit into the system. Deciding in hard cases implies that existing rules will be stretched or even replaced but always in such a way that in the end the system is coherent again”.[24]

Therefore, adopting the doctrinal legal method means that the study will be involved in a two-stage process.[25] The first stage is identifying and locating the primary and secondary sources of law that are being examined.[26] This can be performed by allocating the necessary legal sources, such as legal codes and binding and non-binding legal rules and principles. The relevant scholarly legal work for the investigated law will also be consulted. However, the collection and allocation of the legal authorities for the doctrinal legal study cannot be done without assessing and evaluating their reliability.[27] For example, binding precedents and legal rules are more relevant and reliable than non-binding rules.[28] Moreover, the legal academic work that credible authors have produced in their field is more reliable than work by those who are not credible.[29]

The second stage is that the located sources must be investigated, analysed and synthesised.[30] Thus, two methods of legal reasoning have been incorporated into this thesis with

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[21] Ibid
[22] Ibid
[23] Ibid
[24] Ibid
[25] Hutchinson T, 'The Doctrinal Method: Incorporating Interdisciplinary Methods in Reforming the Law' (2015) 8 Erasmus L Rev 43.
[26] Hanson, Sharon. Legal method and reasoning. Routledge-Cavendish, 2012.
[27] Ibid
[28] Farrar, John Hynes, Legal Reasoning (Thomson Reuters 2010).
[29] Ibid
[30] Hutchinson (n 25) 46.

the aim of fulfilling the second stage, which is deductive and inductive reasoning. The employment of deductive reasoning means "going from the general to the specific—that is, from the statement of a rule to its application to a particular legal case".[31] For example, the exploration and examination of the doctrine of *Gharar* and its used purpose invoke the current practice by the Saudi court, as it is manifested in individual cases. Furthermore, the employment of inductive reasoning means "the process of going from the specific to the general. It comes into play whenever we move from a specific case or legal opinion to a general rule".[32] This approach has been extensively adopted in this thesis. For instance, the identification and investigation of the legal rules that limited contractual liability on all comparative jurisdictions adopted in this study were with intent and aimed to manifest that such a legal rule is a way for the court to ensure that a degree of certainty has been achieved when determining the liability of the defendant.

1.5.2 Comparative Method

Alongside the doctrinal method, this study also employed a comparative method. Adopting the comparative approach is not intended only to locate the similarities and differences among and between the comparative jurisdictions and articulate them. It is also intended to offer a deep understanding of how the legal rules function within its jurisdiction by academically investigating how the legal rules operate in specific jurisdictions, as well as the historical development of such rules.[33] For example, in Chapter Three, this study tracks the historical development of the remoteness rule in common law jurisdictions and the reasons that led the court to invent such a

[31] Worster, William Thomas, 'The Inductive and Deductive Methods in Customary International Law Analysis: Traditional and Modern Approaches' (2013) 45 Geo J Int'l L 445.
[32] Ibid
[33] Van Hoecke, Mark, 'Methodology of Comparative Legal Research' in Law and Method (2015)

rule. Thus, it is worth mentioning that invoking the comparative approach in this study was meant to illuminate how the legal rules that limit the recovery of lost profit can actually ensure a degree of certainty in being applied. This would be valuable as guidance for the legislature and law reform with the aim of improving the current practice of the Saudi court.

Comparing the legal rules of two or more jurisdictions has several advantages.[34] Comparing legal rules and the court practice of a national legal system with a foreign jurisdiction provides a critical view of the national law and offers deeper insight into the legal issue when exploring such an issue from different angles and perspectives.[35] Moreover, the comparative approach delivers an extended comprehension of the origin and context of the legal rules that are being examined comparatively.[36] All these key factors are achieved naturally by conducting a comparative study because it aims to determine, elucidate and explain the differences and similarities. The study would spontaneously explore the legal history of the compared rule and its development as well as the relevant motivations of economic and cultural aspects in shaping the legal rules.[37] Moreover, a comparative legal study has its usefulness within legal academia, as it presents the legal rules to be recognised internationally for further comparative legal study or for adoption by foreign jurisdictions.[38]

Carrying out a comparative legal study by evaluating, assessing and comparing legal rules between jurisdictions assists in understanding the causes of the obstacles to legal rules and offers solutions. In doing so, two approaches can be taken when comparing legal systems, whether on a large scale or a small scale.[39] When conducting a comparative study and selecting the large-scale

[34] De Cruz, Peter, Comparative Law in a Changing World (Routledge-Cavendish 2008)
[35] Ibid
[36]Zweigert, K, Kötz, H, and Weir, T, Introduction to Comparative Law (vol 3, Clarendon Press 1998).
[37] Siems M, Comparative Law (3rd ednCambridge University Press 2022)
[38] Zweigert, Kötz, Weir (n 36)
[39] Ibid

approach, the study intends to compare the style and general legal theory as recognised in every jurisdiction.[40] On the other hand, using a small-scale approach known as micro-comparison means that the goal of comparing legal rules is to resolve specific legal issues and provide suitable solutions from the comparative jurisdictions.[41] This study employed the micro-comparison style, which invokes the legal rules that limit the recovery of lost profit within a commercial contractual liability context and asks how these rules resolve the uncertainty associated with loss that has future gain, which is considered the leading issue that results in denying the recovery of loss of future profit in Saudi law.

Conducting a comparative legal study is essential for the development of national law.[42] This is because foreign law may already have a solution for the legal issue that exists in the national law or may offer a new perspective on how legal issues can be settled.[43] This is important for reforming the law and the current practice, which this study is seeking and proposing with respect to denying the awarding of damage for loss of future profit for a breach of contract due to uncertainty.

Consequently, this thesis investigates and compares how the selected comparative jurisdictions deal with the issue of uncertainty associated with the loss of future profit claims. It is notable that the chosen jurisdictions differ in resolving the issue of uncertainty. Thus, this study presents two approaches. The first approach comes Egyptian laws, which deal with the uncertainty of the loss of future gain by applying the theory of the loss of chance and avoiding solving the issue under causation rules. The principle of lost chance in this context means that the claimant's actual loss is

[40] Ibid
[41] Ibid
[42] Mattei, Ugo, 'Efficiency in Legal Transplants: An Essay in Comparative Law and Economics' (1994) 14 International Review of Law and Economics 14.1.
[43] Ibid

not the unrealised profits, but rather the lost opportunity to execute the contract.[44] Therefore, calculations of damages should focus on the contract's value at the time of the breach, rather than on potential earnings. This principle affirms that the harm to the claimant lies in the loss of the opportunity to fulfil the contract, not in missed profits. Consequently, quantifiable damage should be based on the value of this lost opportunity.[45]

In other words, the loss of chance approach eliminates the need for the court to investigate whether the lost profit was too remote or fell within the parties' contemplation when the contract was formed. Rather than probing into what the claimant might have gained if the contract had been executed as agreed, and questioning the remoteness of such gains, the court should redirect its focus towards determining the value of the opportunity presented by the contract itself. Compensation should then be awarded based on the loss of this valuable chance or opportunity.

Therefore, the loss of chance here can limit the uncertainty of the loss of profit by avoiding an investigation into the link between the action of the breach and the final loss. This investigation could lead to uncertainty, as it deals with hypothetical gains; instead, based on the application of the principle of the loss of chance, the focus should be on investigating the relationship between the breach and the chance of gaining future profit. This is in contrast with the English law approach, which favours resolving the issue of uncertainty within legal causation rules, particularly under the rules of remoteness, by not allowing damages for loss of profit if they are deemed too remote.

However, there are two important points that should be taken into consideration when investigating the practices and experiences of the compared jurisdictions. The first point is whether the current practice of the foreign jurisdiction and its solution for the legal issue that is being

[44] Jeremy L. Pryor, 'Lost Profit or Lost Chance: Reconsidering the Measure of Recovery for Lost Profits in Breach of Contract Actions' (2006) 19 Regent U L Rev 561
[45] Ibid

proposed and investigated have been an acceptable solution and established its adequacy in its origin country.[46] The second point is whether the legal solution from foreign jurisdictions and its approaches would function adequately and without defects in the adopted country.[47] These two points can be addressed as follows. First, the legal rules of the chosen jurisdictions must have shown their adequacy in demonstrating how such legal rules as remoteness can function to ensure that a degree of certainty has been established when determining liability and recovery of loss of future profit. Second, this study must satisfy two elements. First, it must examine the compatibility of the suggested measure within the legal principles of Saudi law.[48] Second, it must modify the offered measure whenever it is necessary to be in line with Saudi law.[49]

It is worth mentioning that exploring and examining the practices and experiences of comparative jurisdictions can be useful in addressing the issue of uncertainty by providing a range of potential solutions. It does not intend to blindly transplant or borrow the comparative legal rules into the Saudi legal system. This is because, imposing legal rules from foreign jurisdictions without careful examination of how they can be fitted with the general theory of the legal system may generate issues of incompatibility or inconsistency.[50] Alternatively, the legal rule may not be applied correctly by the court to solve the legal issue.[51]As a result, the main aim of this study is to investigate, analyse and explore the similarities and differences between the legal rules that limit the recovery of damages for breach of contract in the comparative jurisdictions. It is also important to understand how these legal rules function as a limitation of recovering damages for breach of

[46] Ewald, William, 'Comparative Jurisprudence (II): The Logic of Legal Transplants' (1995) 43 The American Journal of Comparative Law 43.4.
[47] Watson, Alan, Legal Transplants: An Approach to Comparative Law (University of Georgia Press 1993).
[48] Cruz, Peter (n 34)
[49] Ibid
[50] Van Hoecke, Mark (ed), Methodologies of Legal Research: Which Kind of Method for What Kind of Discipline? (Bloomsbury Publishing 2011)
[51] Ibid

contract as well as to offer a degree of certainty and make the court confident that no excess burden of liability is imposed on the defendant.

1.6 Justification for Choosing the Jurisdictions.

The law of contract is one of the fields that is extensively studied comparatively.[52] Furthermore, contract law has been a favourite of legal scholars and lawyers for comparative study.[53] One reason for this is that the domination of business globalisation and the increase in international trade lead to reliance on a private contract.[54] Thus, international lawyers need to comprehend and understand the similarities and differences between various national legal systems to be able to allocate the risks and consequences when negotiating or drafting a commercial contract.[55]

This thesis allocates and incorporates two legal systems for the comparative analysis: common law, civil law legal systems. In accordance with this, two jurisdictions have been selected to investigate how these jurisdictions approach the uncertainty issue associated with the recovery of lost profit. The first is English law, as a model of common law practice; the second is civil law, as it is applied in Egyptian law. These jurisdictions offer different approaches to dealing with the uncertainty inherent in lost profit claims. For example, there is a remoteness rule in English law, and there is also a loss of chance doctrine in Egyptian law.

All of these jurisdictions agree that the non-breaching party, who has been deprived of attaining future business opportunities because the breaching party does not perform their obligations

[52] Reimann, Mathias and Reinhard Zimmermann (eds), The Oxford Handbook of Comparative Law (Oxford University Press 2019)
[53] Ibid
[54] Ibid
[55] Ibid

adequately, is entitled to a judicial remedy. Therefore, in light of assessing the recovery of damage for the deprived opportunity, the court employs legal rules that assist in determining whether such an opportunity is entitled to recovery. Thus, exploring the current practice in chosen jurisdictions can offer inspiration and guidance to improve the current practice in Saudi law as applied by the Saudi court.

The nature of the Saudi legal system is grounded in the principles of Islamic law, which govern the contractual relationships between parties. However, a distinctive aspect of Saudi law is its incorporation of elements from both Common and Civil law traditions over the years. This amalgamation indicates a strong influence on various areas of legal practice within the country.[56]

With respect to Civil Law, the influence on the Saudi legal system primarily comes from the Egyptian legal framework. Egypt was the first country in the Arab world to adopt and implement a legal structure that met Western standards.[57] As a leader in the legal field, Egypt has influenced many countries, including Saudi Arabia, in various aspects such as judicial, academic, and legislative domains.[58]

From a judicial perspective, the Saudi legal system has adopted and implemented the Egyptian judicial structure. Academically, numerous prominent Egyptian legal scholars have significantly contributed to the field by conducting comparative studies between Civil Law and Islamic Law. Their research is widely popular in Saudi academic circles and has shaped and inspired Saudi legal scholars, as well as the judiciary. Notable examples include the work of Abd Al-Razzak Al-Sanhuri and Soliman Morcos.

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[56] The inspiration for Saudi Arabia's legal system comes from both systems, primarily through issued regulations and academic legal work.

[57] Guy Bechor, '"To Hold the Hand of the Weak": The Emergence of Contractual Justice in the Egyptian Civil Law' (2001) 8 Islamic L & Soc 179 http://www.jstor.org/stable/3399209.

[58] Ibid

Moreover, both in the past and present, many legal educators in law departments across Saudi universities have come from Egypt.[59] These educators, with their background in Civil Law, bring their rich knowledge to Saudi academic settings. Often, they utilise textbooks related to the Egyptian Civil Code, such as those on contract law.[60]

With regard to legislation, Saudi lawmakers have been inspired by and have benefited from Egyptian laws. For example, in codifying laws such as the Law of Procedure, Saudi legislators have drawn heavily from the Egyptian Law of Procedure.[61]

On the other hand, the influence of Common Law, particularly English law, on the Saudi legal system has grown more prominent in recent years. This influence is especially noticeable in three areas: legislation, business, and legal practice, and, more recently, academia. In the legislative context, many of Saudi Arabia's laws and regulations related to the capital market and insolvency law have been largely modelled on Common Law practices.[62]

With respect to business and legal practice, the economic relationship between the United Kingdom and Saudi Arabia has been growing in recent years. The most recent data on trade and investment between the UK and Saudi Arabia, released on 21 September 2023, indicates that the total trade in goods and services between the two countries has reached £18.5 billion.[63] This represents a 65.8% increase from the previous year. Furthermore, ongoing talks for a Free Trade

[59] Muamar Salameh and Jaida Aboul Fotouh, 'The Development of Legal Education in the Kingdom of Saudi Arabia', (2017) 11(3) FIAT JUSTISIA 290 http://jurnal.fh.unila.ac.id/index.php/fiat accessed 6 February 2024.
[60] Ibid
[61] A. Al-Salmi, 'Differences in the Saudi Law of Procedure' (Scientific Publishing Centre, King Abdulaziz University 2021) 23 https://law-dr-ali.com/images/books/books/Book-Pdf-New-2021-05-06-6094535f17742-1620333407.pdf accessed 6 February 2024.
[62] Joseph W. Beach, 'The Saudi Arabian Capital Market Law: A Practical Study of the Creation of Law in Developing Markets' (2005) 41 Stan J Int'l L 307
[63] UK Government, 'Saudi Arabia Trade and Investment Factsheet' (21 September 2023) https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1185804/saudi-arabia-trade-and-investment-factsheet-2023-09-21.pdf.

Agreement between the UK and the Gulf Cooperation Council, represented by Saudi Arabia, could lead to substantial financial gains for both countries if approved.[64]

The significant growth in Saudi Arabia has various implications for legal practice within the country. For example, the use of English law as the governing law in major commercial and investment transactions involving foreign parties has become increasingly common.[65] Additionally, many commercial contracts are now drafted in accordance with English law principles.[66]

Lastly, in recent years, many Saudi universities have developed English law courses that teach students about various aspects of English law.[67] As a result, the new generation of young Saudi lawyers and even judges will be more familiar with the concepts of English law.

As a result, when examining these two legal systems—Egyptian and English—and their practices regarding the recovery of loss of profit, they cannot be considered foreign to Saudi law. As already illustrated, both systems have had a significant impact on legal practice within Saudi Arabia. Therefore, it would be beneficial to study and explore how courts in these two legal systems resolve the uncertainty surrounding the loss of profit. Such an exploration could inspire Saudi courts and also provide the legal community with insights and an overview of the Saudi courts' standpoint. Additionally, comparing these legal systems could reveal how they differ in their practices, enriching our understanding of each.

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[64] 'Talks Continue on Free Trade Deal' Arab News (2 August 2023) https://www.arabnews.com/node/2348381/business-economy.

[65] 'Governing Law and Dispute Resolution Provisions for Commercial Agreements' Mondaq https://www.mondaq.com/saudiarabia/arbitration--dispute-resolution/96076/governing-law-and-dispute-resolution-provisions-for-commercial-agreements.

[66] ibid

[67] Anna Rogowska, 'English Law in Saudi Arabia' (2013) 27 Arab L Q 271 https://ssrn.com/abstract=2327697.

1.7 Thesis Outline

This doctoral thesis is divided into an introduction, four chapters, and a conclusion, which are summarised as follows:

Chapter One: Introduction

Chapter Two: The issue of recovering loss of profit under Saudi law

This chapter aims to determine the source of contract and remedy laws on which the Saudi court relies, as Saudi Arabia is the only Middle Eastern country that does not codify contracts law and remedies. This is undertaken via an examination and analysis of court decisions to identify the primary sources of the remedy laws to which the court refers regarding these decisions. Moreover, this chapter aims to locate the available remedy for the aggrieved party in a case of breach of contract under Saudi law. It also discusses the Saudi court's denying of loss of profit. To foster a deeper understanding of how the Saudi court denies loss of profit claims, chapter two (A) investigates the court's four tools for determining whether a loss should be compensated, i.e. fault, harm, causation and *Gharar* (uncertainty); and (B) illustrates how the court uses the Gharar principle to deny loss of profit claims because the certainty of the expectation of a loss of profit is not attained.

Chapter Three: Recovering loss of profit under English law

Since Saudi law does not permit the recovery of loss of profit in a breach of contract, this chapter examines the common law by using the English legal system as a model to determining certainty in loss of profit claims. The common law approach defines the principles that limit compensatory damages and uses these principles to attain a degree of certainty in determining loss of profit, as it would be unacceptably harsh for the defendant to be held responsible for all the consequences of his actions. This chapter identifies the English law principles for limiting recovery of damages, such as legal causation, the remoteness principle and the policy behind invoking such principles in claims for damages for breach of contract. Next, the chapter conducts a deep doctrinal analysis of how the English court actually uses these rules for ensuring that the degree of certainty of the claimed loss is justified. It also investigates the extent of the liability required by the court to recover a loss of profit.

Chapter Four: Recovering loss of profit under Egyptian law

The purpose of chapter four is to examine the civil law by using Egyptian legal system as model approach to determine loss of profit within a commercial context. Thus, the chapter begins by identifying the Egyptian principles for limiting compensatory damage and examining how the Egyptian courts applies these principles with the aim of limiting the defendant's contractual liability to ensure certainty of damage. This chapter reveals that there are two approaches used by the Egyptian courts to reduce the uncertainty associated with recovering loss of profit. The first is resolving such uncertainty using causation rules. This involves identifying the three elements

contractual liability, i.e. the fault, the loss and the causal connection between them, and, accordingly, determining the extent of the defendant's liability. The second approach avoids investigating the causal relationship between the breach of contract and the loss by applying the loss of chance doctrine. This doctrine aims to overcome the challenges associated with the certainty of recovering a loss of future profit.

Chapter Five: Enhancing Saudi Law: Insights from Comparative Legal Systems.

This chapter comparatively discuss the aforementioned approaches to reducing the uncertainty of future profit due to lost opportunity in both common and civil law legal systems. Also, it investigates whether Saudi law can employ these two legal approaches to determine the certainty of loss of profit. The chapter also illustrates how the Saudi court could benefit from such approaches in terms of determining the required degree of certainty and of reducing uncertainty for the recovery of lost profits.

Chapter six: Conclusion

The final chapter summarises the thesis and discusses outcomes and recommendations.

Chapter Two: Saudi Legal System and the Legal Framework of Contract Law.

This chapter seeks to examine the rationale behind the Saudi court's refusal to allow the recovery of future profit losses, as this approach constitutes the primary focus of the research questions in this study. The central question examined in this chapter is why the Saudi court disallows the recovery of lost profits and which methods the court employs to justify this denial.

2 Introduction

Saudi contract law and the available legal remedy for non-breaching party can be considered the greyest area within Saudi law. This is because Saudi contract law has not been codified.

This raises ambiguity about what rule should be applied for each case. From a theoretical perspective, it is true that Saudi contract law is fundamentally based on Islamic contract law. However, in the Saudi court practice, such a claim cannot be taken for granted because the Saudi court has, in some sense, departed from applying the principle of Islamic contract law and developed its own approach. Moreover, the Saudi court is heavily influenced by civil law practice within legal contract rules, particularly Egyptian contract law.

This chapter intends to navigate this grey area of Saudi contract law with the purpose of presenting a clear picture as possible of what Saudi contract law is and the legal remedy source as applied by the Saudi court. Laying out a demonstration of how contract law operates within Saudi law is necessary to establish a solid background of the issue this thesis is investigating, that is, the issue of denying the recovery of loss of profit by Saudi courts. This chapter starts by outlining the general legal framework of Saudi law. It then presents and identifies the legal structure and source of governing contract law as applied by the Saudi court. This includes locating the source of contract law under Saudi law and the court developments of the contract law.

This chapter also outlines the available remedy arising from breach of contract. It investigates the approach of the Saudi court to limit the recovery of damage concerning the breach of contract. Finally, this chapter concludes by discussing the issue of recovering loss profit and demonstrating the court's perspective for denying such a recovery.

2.1 Overview of the Legal Framework of Saudi Arabia.

2.1.1 The Structure of the Legal System.

The Saudi legal system is based on the comprehensive guidelines of Islamic law principles. Thus, when a need arises for government regulation, it must follow the principles of Islamic law, or it would be unconstitutional.[68] Consequently, when the court sits for cases regarding contract and liability arising from breach of contract, the judges derive their decisions following the Islamic law principles. Because of the vagueness or broad meaning of some Islamic law principles, the rules of Islamic law are not well defined, and judges can derive different interpretations based on the facts in each case.[69] The judges' interpretations are drawn from four schools of thought in Islamic history. These schools have various understandings, opinions, interpretations and judgments of Islamic law principles.[70] The purpose of the schools of thought is to provide interpretations and illustrations of general Islamic principles, as well as offer opinions on various matters from an Islamic perspective. This may pertain to contracts, such as cases involving

[68] The Basic Law of Governance, Royal Order No. A/90, 27/8/1412H (1992), art. 48.
[69] Talbi Othman, Tort Reform in Saudi Arabia: Obstacles and Solutions (2015) 126.
[70] The schools of thought within Islamic jurisprudence include the Hanafiyya, Malikiyya, Shafiyya, and Hanbali schools. Collectively referred to as Fiqh, these schools of thought play a central role in interpreting Islamic law. Given that Islamic law governs every aspect of Muslim life, the primary function of these schools is to interpret the Quran and the Sunna. This interpretation aids Muslims in understanding and following Islamic law, and provides guidance on matters that may arise in their daily lives.

defective goods, or any other aspect of a Muslim's life. However, the judicial system and the judges in Saudi Arabia are not bound by any of these schools when they interpret a statute or individual case, and thus, the judgments of Saudi courts are unpredictable.[71]

2.1.2 Judicial System

Filing a claim in relation to a commercial dispute, particularly one involving a contract, is not always a straightforward process. In Saudi Arabia, legal practitioners must first determine the appropriate court that possesses jurisdiction over the parties involved in commercial contract disputes. This jurisdiction is outlined in the Judicial Act, which was issued in October 2007 and delineates the structure of the court system.

Adhering to the civil law system, the 2007 Judicial Act acknowledges the distinction between public and private laws. Based on this distinction, a General Court is granted jurisdiction over any claim that involves individuals. In contrast, the Board of Grievances possesses jurisdiction over cases that involve government agencies.

1) General Courts

The Judiciary Act of 2007 structured the General courts into three levels. The High Court is the highest authority in the judicial branch.[72] In fact, the High Court exercises significant authority; for example, it determines if the law in the Kingdom complies with Islamic law and

[71] In 1944, King Abdulaziz issued a royal decree stating that all courts adhered solely to the legal opinions of the Hanbali School of Law. However, a change occurred in 2001, allowing courts to adopt legal opinions from various Islamic schools of thought. This shift is detailed in Al-Nasir Faisal's study, "The Practices of the Cassation Courts Contrary to the Hanbali School: A Collective Case Study" (2017).

[72] Law of the Judiciary art 8

reviews decisions upheld by the Court of Appeals. Also, the High Court issues judicial principles for lower courts as guides for judges in various legal issues.

The second level, according to the Judiciary Act of 2007, is the Courts of Appeals. The Courts of Appeals have jurisdiction over all the First Instance Courts judgements.[73] The courts of appeals comprise five circuits: labour, commercial, criminal, personal status and civil. The Judiciary Act of 2007 introduced the Courts of Appeals as a safeguard, authorising them to reverse decisions by the First Instance Courts.

Third, the First Instance Courts are located in each region in the Kingdom, and they are divided into specialized courts, for instance, general courts which have jurisdiction over all claims, litigations and cases not under the jurisdiction of the other courts.[74] Furthermore, there are criminal, personal status, labour and commercial courts or circuits as needed. These courts comprise one or three judges.

Finally, according to Article 19 of the Judiciary Act of 2007, each general court should have circuit enforcement.[75] However, due to the existence of claims and cases regarding the execution of judgments and enforcing foreign judgment, the legislature issued a law to establish Enforcement Courts in the Kingdom.[76]

2) The Board of Grievances

The Board of Grievances is the second body of the judicial structure. It was reformed in 2007 when the legislature issued an overhaul of it.[77] It exercises its jurisdiction over all cases and claims involving government departments as litigants. The main function of the Board of

[73] Law of the Judiciary art 8
[74] Law of the Judiciary art 12
[75] Law of the Judiciary art 19
[76] Law No. 261 of 2012 (Enforcement Judgments), Jaridah Umm-Alqura, 2 July 2012 (Saudi Arabia)
[77] The Law of the Board of Grievances, Royal Decree No. M/78, art. 23 1 Oct. 1, 2007, O.G. Umm al-Qura

Grievances is to exercise jurisdiction over all cases and claims involving government departments as litigants. However, until 2018, the Board also had jurisdiction over commercial disputes. This changed in 2018 when the Ministry of Justice enforced the Judiciary Act, transferring the jurisdiction of commercial disputes from the Board of Grievances to the Commercial Court within the General Court. Consequently, cases prior to 2018 were heard and decided by the Board of Grievances Court. The Board of Grievances system comprises the High Administrative Court, the Administrative Courts of Appeals, and the Administrative Courts. The High Administrative Court exercises its jurisdiction by reviewing decisions reversed or upheld by the Administrative Courts of Appeals.[78] The administrative Court of Appeals' jurisdiction is to hear appealable rulings from the lower courts, which are the Administrative courts. Lastly, the Administrative Courts are the first courts to hear a case, and they also handle cases through specialised administrative and employment disciplines.

3) Legal Committees

In addition to the two judicial bodies, specialised legal committees have been established to exercise jurisdiction over specific cases. These committees aim to adjudicate cases related to particular regulations, such as those under the Capital Market Law. Members of these legal committees are legal experts possessing knowledge and experience in the specific regulations relevant to their committee. Examples of such committees include the legal committees for banking and financial disputes and violations, which handle claims involving the banking industry,

[78] The Law of the Board of Grievances art 26

and the legal committee for resolution of securities disputes, responsible for settling capital market disputes.

Having outlined the judicial structure, it is crucial to note that the nature of a claim determines the appropriate court or committee with jurisdiction over the matter. For instance, when seeking compensation for lost profits due to a breach of a share purchase agreement, the legal committee for Resolution of Securities disputes would have jurisdiction. Conversely, in cases involving a breach of contract for non-delivery of goods within the agreed-upon timeframe, the commercial court would hold jurisdiction. Therefore, it is essential to thoroughly investigate and examine the nature of the claim in order to determine the appropriate judicial body.

2.2 Legal Structure and Framework of Commercial Contract Law

2.2.1 The Source of Commercial Contracts Law in Saudi Law

Saudi Arabian law has not codified contract law as a legal statute governing all types of contracts; instead, there are few statutes that tackle a certain contract, such as franchise law that regulates franchise agreements to draw its own specialised rules. Thus, the Saudi court is left with no other option than to recognise and adopt multiple sources of law as governing rules for the contract.

Principally, in contract disputes, the Saudi court primarily recognises and implicates the contract itself, which is binding law for contracting parties under what was stipulated in their

contract and the provisions it implied.[79] This principle is known as *pacta sunt servanda* in civil law.[80] Thus, the court enforces the conflicting to uphold the original agreement.

Alternatively, if there is no answer in the contract terms for arising legal issues, then the court would depend on particular sources to create a legal framework that provides principles and rules for the court as a justification for its ruling. By examining and analysing number of published court decisions and Saudi legal scholars' studies regarding contracts, this study mainly determines and defines the types of sources that the Saudi court has frequently recognised and employed in contract cases.[81]

In this section, the study determines three sources that form contract law in Saudi Arabian court practice. These sources include Islamic law and its jurisprudence, legal opinions of jurisprudence institutions and legal regulation.

2.2.1.1 Court's Sources Framing Commercial Contracts in Saudi Arabia

In Civil law jurisdictions, the fundamental principles of contract law are typically enshrined in codified Civil Code s, such as the Egyptian Civil Code . Conversely, common law jurisdictions primarily depend on case law to establish the governing rules for contract law. In Saudi Arabia, however, the legal framework for contract law is derived from Islamic law, obligating the courts to adhere to its tenets.

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[79] The court in many cases has made explicit that the primary rule the court will apply is the contract itself. For Example, private company v. private company, general courts (Commercial court), case no 1444, session of 18 October.2017

[80] Sharp, Malcolm P, 'Pacta Sunt Servanda' (1941) 41 Columbia Law Review 783-798.

[81] In 2019, the Ministry of Justice in Saudi Arabia began publishing commercial court cases on a monthly basis. This initiative provides a valuable resource for investigating court practices in complex and often unclear areas of law, such as contract law. More information can be found on their official website: Ministry of Justice Research Center.https://www.moj.gov.sa/ar/Ministry/Departments/ResearchCenter/Pages/default.aspx

Diverging from civil and common law systems where legal rules and principles are explicitly defined, Islamic law encompasses a wide array of opinions, knowledge, and principles. As a result of Islamic law's richness, Saudi courts have developed a unique approach by identifying specific sources that serve as primary or secondary authorities for contract law. This method has arisen in response to the lack of codified contract law in the Saudi legal system, allowing courts to rely on a diverse array of resources that collectively shape commercial contract law and remedies.

This section presents a comprehensive analysis of the Saudi court practice in contract cases reveals the courts' approach in adopting and applying multiple sources as legitimate foundations for their judgements. This section aims to examine five distinct sources consistently utilised by the Saudi courts in this context.

1) Quran and Sunna

The first sources shaping contract law are the *Quran* and *Sunnah*; they are the primary sources that bind the courts when they hear contract disputes.[82] The reason that drives the court to adopt the *Quran* and the *Sunna* as main sources is that Saudi law binds the judges by the *Quran* and *Sunna* as primary sources to derive their decisions. For example, in the Law of Civil Procedures, Article 1 states: "Courts shall apply the provisions of Sharia to cases brought before them, as derived from the *Quran* and *Sunnah*," so the judge shall apply them first.[83]

[82] Alshaibani, Majed, Compensatory Damages Granted in Personal Injuries: Supplementing Islamic Jurisprudence with Elements of Common Law (2017) 83.
[83] Law of Civil Procedures, Royal Decree No.M/21, 19 August 2000, Umm al-Qura (Saudi Arabia)

In practice, the court has historically rendered decisions in a contract dispute by interpreting and applying provisions of the *Quran* and *Sunnah* to resolve legal issues. For example, the Court of Appeal sought to resolve an issue of whether there was a breach of contract by the defendant.[84] In reaching the decision, the court found that the defendant's action violated the Quran provision "you who believe Fulfil your obligations" and the Sunnah provision "Muslims are binding to their conditions." The principle of *pacta sunt servanda*, a widely recognized concept in civil law systems, bears resemblance to the two provisions mentioned. For instance, Article 147 of the Egyptian Civil Code states, "The contract is the law of the contracting parties and can only be altered or terminated through mutual consent or in accordance with the specific conditions outlined by the law." However, the provisions in the *Quran* and *Sunnah* do not operate identically to the principle of *pacta sunt servanda* as acknowledged in the Egyptian Civil Code. The distinction lies in the fact that the Saudi court cannot recognise a contract as the law of the contracting parties if it contravenes the general principles of Islamic law. For example, if a contract contains a clause stipulating the payment of interest, the court will not enforce it, as such an agreement conflict with Islamic law principles. Consequently, the Saudi court acknowledges a contract as the law of the contracting parties only if it does not violate the general principles of Saudi law. To this end, the Saudi court has formulated a principle derived from the two provisions in the *Quran* and *Sunnah*, which posits that a contract is the law of the contracting parties as long as it neither prohibits what is legally permissible nor legitimizes what is prohibited.[85]

[84] private company v. private person, administrative courts (Commercial court), case no 2949, session of 03 July.2014

[85] In judgement No 444 in 2015, the court stated that 'A contract serves as the governing law for the contracting parties, provided that it does not contain any provisions that contravene Islamic law.' https://www.bog.gov.sa/ScientificContent/JudicialBlogs/1437/Documents2

It is essential to emphasize that courts have frequently utilized the two provisions of the Quran and Sunnah as legal reasoning in breach of contract cases. These provisions have been applied to reinforce the principle formulated by the Saudi court, which shows language similarity to the principle of *pacta sunt servanda*, as previously observed.[86]

2) Classical Islamic School of Legal Thought

There are four Islamic schools of legal thought, each exhibiting systemic consistency in interpreting Islamic law texts.[87] Established in different geographical locations and historical periods, these schools offer interpretations of Islamic doctrine and principles that cater to the unique needs of their respective societies, whether economically, culturally, or politically.[88] The first school, the Hanafi School, was founded in 767, followed by the Maliki School in 795, the Shafi School in 820, and the Hanbali School in 855.[89] Their primary purpose is to provide interpretation and reasoning for novel issues or needs not explicitly addressed in the Quran and the Sunnah.[90]

The Saudi court is significantly influenced by these schools of thought in its practice, as their opinions and reasoning assist in understanding the meaning of the *Quran* and *Sunnah* texts.[91] This understanding aids the court in resolving contract disputes and enables the use of one school's

[86] In numerous Saudi court cases, the court prioritised reliance on the primary sources of the Quran and Sunnah. These texts are often the first resources consulted by courts to find answers to legal issues. See Talbi (n 59) at 35 for further details.
[87] Ministry of Islamic Affairs, 'Al-Mawsu'ah Al-Fiqhiyah Al-Kuwaitiyah' (2005) 2, 34
[88] Ibid
[89] Ibid
[90] Mustafa Shakaa, 'The Four Imams' (The Lebanese Book House for Printing, Publishing and Distribution 2010) 62.
[91] Faisal bin Ibrahim Al-Nasser, 'The Practices of the Cassation Courts Contrary to the Hanbali School: A Collective Case Study' (2017) https://drive.google.com/file/d/1BEAhgiys5EzECuKAfhw_kvQTsfk99_i_/view?pli=1 June 2020

opinion as legal authority for its judgment. Although not currently obligated to follow a particular school, the Saudi court is predominantly influenced by the Hanbali school in matters of contracts and their remedies.[92]

This influence is attributed to three reasons. First, a 1954 royal order mandated Saudi courts to follow and apply the Hanbali school's opinions as the primary source in any dispute to ensure uniformity and consistency in outcomes.[93] This requirement was later dismissed by the first article of the Law of Civil Procedures in 2001. Second, the Hanbali school is characterized by its liberal approach in most commercial matters, particularly contracts.[94] It was the first to adopt a liberal approach to the doctrine of freedom of contract, allowing contracting parties to stipulate any obligations or limitations.[95] This approach acknowledges new types of contracts, such as option contracts and mortgage contracts, and permits deviation from standard contracts and their obligations.[96]

Two recent Saudi court decisions exemplify how the Hanbali school's approach influences the court's handling of contract disputes. The first decision in 2019 involved the lawfulness of option contracts. In this case, the court followed the Hanbali school's approach, which prioritizes freedom of contract and permits parties to stipulate any conditions and obligations in the contract.[97] As a result, the court ruled in favor of the claimant, declaring the contract legally binding upon the

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[92] Ibid
[93] Amin Gamaz, 'The efforts of the Kingdom of Saudi Arabia in serving the Hanbali school of thought and contributing to its spread' https://bfda.journals.ekb.eg/article_41965_0ef4be020b572a5108d75deae13989af.pdf June 2020.
[94] Ibid
[95] Hisham Yousry Muhammad al-Arabi, 'The Hanbali School of Thought and Its Distinction in Financial Transactions' (2017) Islamic Awareness https://search.mandumah.com/Record/796439 accessed June 2020.
[96] Ibid
[97] Private Person v Private Person (General Courts, Commercial Division) Case No 983, 8 November 2019.

contracting parties and requiring the breaching party to pay the non-breaching party the option amount under the cited opinion from the Hanbali school.[98] To support this ruling, the court cited jurist *Ibn Qudama's* opinion in his book *al-Mughni* as a primary source presenting the Hanbali law opinion on the lawfulness of option contracts.

The second decision concerned the application of the Hanbali school's approach in a case where a sale/contract contained a defect. In such instances, the buyer can choose to either keep the purchase or terminate the contract, irrespective of the seller's knowledge or disclosure of the defect.[99] This approach was followed by the Saudi commercial circuit court in a 2017 breach of contract case.[100] The defendant had purchased a business from the claimant but failed to pay the contractually specified amount. The defendant argued that the claimant had initially breached the contract due to the non-transferability of the store's ownership license.[101] Upon analyzing the claims, the court ruled in favor of the defendant, as the contract was defective at the time it was made.[102] The court's decision aligned with the Hanbali school's approach, which allows the defendant to not perform their contractual obligations when the claimant fails to adequately perform the contract.

[98] Ibid
[99] al-Arabi (n 85)
[100] Private Person v Private Person (General Courts, Commercial Circuit) Case No 447, 22 February 2017.
[101] Ibid
[102] Ibid

3) Legal Opinion of Jurist Ibn Taymiyyah

Alongside the recognition of the Hanbali school of law, the Saudi court has also recognised the legal opinion of the famous Islamic scholar Ibn Taymiyya as legal authority in contract law.[103] His legal opinion in contract law strongly influences Saudi court practice by adopting his view.[104] For example, his presented legal opinion in his book *Majmu al-Fatawa* (A Great Compilation of Fatwa) is that if one of the contracting parties delays the performing of contractual obligations without an appropriate cause, then the aggrieved party has the right to terminate the contract.[105] The Saudi court has adopted and employed this opinion in many commercial contract cases as a legal justification.[106] Further, regarding freedom of contract, Ibn Taymiyya's argument established a more liberal approach. He stated that the fundamental legal concept in contract law is valid unless there is an explicit provision in the *Quran* and *Sunnah* that prevents it.[107]

In 2016, the Ministry of Justice published Heights Court principles on various legal matters, including a principle that is identical to Ibn Taymiyyah's view that the main principle in contract law is valid if it is not contained unlawfully.[108] It is worth noting that these principles are considered persuasive authority for the lower courts and are not binding. Also, in many contract decisions, the court clearly expressed that the principles in the contracts are valid and legitimate,

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[103] Dr. ALtaleb Fahad, The Impact of Ibn Taymiyyah's Legal Opinion in the Contemporary Judiciary in Saudi Arabia https://drive.google.com/file/d/1o5mVI753p8sLEhffe4yTnNmDZfReiMVT/view accessed June 2021, 37.
[104] Aḥmad ibn Taymiyyah was an Islamic legal scholar and logician who exerted significant influence on the Hanbali school of law, founded by Ahmad ibn Hanbal. He is distinguished from other Islamic scholars by his liberal approach, particularly in the commercial context. The Saudi courts have often favoured his approach, reflecting its alliance with contemporary legal practice. See, http://www.oxfordislamicstudies.com/article/opr/t125/e959
[105] Aḥmad Ibn Taymiyya, *Majmu al-Fatawa*, 257–259 (1995)
[106] Fahd Abdullah Al-Talib, 'The Impact of Imam Ibn Taymiyyah on Contemporary Saudi Judiciary' https://drive.google.com/file/d/1o5mVI753p8sLEhffe4yTnNmDZfReiMVT/view accessed March 2023
[107] Ibn Taymiyya (n 95) 130-137
[108] Ministry of Justice, 'Judicial Principles (2008)', Agency of the Ministry for Judicial Affairs https://www.moj.gov.sa/ar-sa/ministry/versions/Documents/50.pdf accessed 6 February 2024.

and this principle will not be overturned unless there is conclusive evidence. Thus, it is clear that the Saudi court has exercised Ibn Taymiyya's approach and employed his opinion in legal practice to achieve more freedom in contracts.[109]

4) Jurisprudence Institutions Framing Commercial Contracts in Saudi Arabia

The Islamic Fiqh Council (IFC) and the Council of Senior Scholars, along with their affiliated bodies, are two prominent institutions in Saudi Arabia responsible for issuing non-binding legal opinions, known as *fatwas*, in response to emerging legal issues.[110] These issues may arise from public necessities or individual inquiries. Although the fatwas issued by these institutions are not legally binding, they serve as persuasive authority for the Saudi judicial system. Consequently, the Saudi courts have relied upon the opinions of the IFC and the Council of Senior Scholars in adjudicating numerous contractual disputes.

Established in 1977, the Islamic Fiqh Council (IFC) operates independently, without supervision from any government authority.[111] Comprising esteemed Islamic legal scholars from across the globe, the IFC includes experts in various specializations, such as Islamic Financial law. The primary function of the IFC is to issue legal opinions grounded in the principles of Islamic law to address and resolve emerging legal issues as needed.[112]

It is important to note that the IFC's consideration of legal issues is contingent upon the extent to which these issues impact the public or involve public policy considerations. For instance,

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[109] Ministry of Justice-Principles of Highest Courts-2016

[110] OIC-Academy, 'Contracting and Construction Contract: Haqa, Adapt It, Shorouk', Decision 129 (Decision No 3 of Session No 14, 2003) <www.iifa-aifi.org/2118.html>.

[111] Islamic Fiqh Council, 'Decisions of the Islamic Fiqh Council' (2010) https://baitalzakat.com/files/decisions-laws/baitalzakat.com-L100025.pdf accessed 14 March 2023.

[112] Ibid

in 2010, the IFC issued a fatwa asserting that stock market manipulation is prohibited under Islamic law.[113] This opinion detailed various methods through which such manipulation can occur, reflecting the IFC's commitment to addressing matters of public concern and policy in accordance with Islamic principles.[114]

The Council of Senior Scholars and its affiliated bodies were established following the enactment of The Council of Senior Scholars Act by the Saudi legislator in 1971.[115] Article 2 of the Act stipulates that Saudi jurists are appointed as members of the Council by the King.[116] Article 3 delineates two primary objectives for the Council. First, to provide advice to the King or relevant government authorities on matters referred to the Council.[117] Second, to issue legal opinions consistent with Islamic law pertaining to novel societal matters, as well as to respond to inquiries from the courts or individuals regarding specific issues.[118] Thus, the Council of Senior Scholars plays an important role in assisting the Saudi court by offering expert advice on Islamic law.

The influence of the opinions issued by the aforementioned institutions on the Saudi court is apparent in two primary approaches adopted by the courts when utilising these opinions. The First approach when the courts employ such opinions to justify and support their rulings, bolstering the conclusions they have reached. This approach is typically employed by lower courts to persuade the court of appeal, thus utilizing the opinions from the IFC or COSS as justification for their decisions.

For instance, while option contracts are lawful under Saudi law, it is common for the Saudi courts to reference the IFC's opinion regarding the legitimacy of option contracts to strengthen

[113] Ibid
[114] Ibid
[115] Regulation of the Council of Senior Scholars Act (Royal Order A/137, Umm al-Qura 1971).
[116] Ibid
[117] Ibid
[118] Ibid

their judgments. A notable example of this practice occurred when the Commercial Courts adjudicated a claim involving an option contract.[119] In this case, the claimant sought enforcement of the option contract after the defendant rescinded the offer.[120] The court of first instance ruled in favor of the claimant, ordering the defendant to honor the option. In arriving at this judgment, the court relied upon a legal opinion from the IFC addressing option contracts as a legal authority to substantiate its decision.[121] This judgment was subsequently upheld by the Court of Appeal.[122]

It is observable here that the court's reliance on the IFC's opinion is not primarily aimed at determining the legality of the option contract. Rather, the court cites the IFC's opinion on option contracts to demonstrate that its conclusion is supported by the IFC, thereby reinforcing the court's decision. This approach shows the court's use of the IFC's opinions as a persuasive authority to enhance the credibility and strength of its judgments.

Likewise, the Saudi courts adopt a similar approach when referencing the opinions of the Council of Senior Scholars (COSS). For instance, in a 2017 case concerning *Riba* (interest), which is prohibited under Saudi law, the Circuit Commercial Courts faced a legal issue regarding the validity of a sale contract between parties if the contract contained *Riba*.[123] The court ruled that the contract was void due to the presence of *Riba*, rendering it illegal under Islamic law.[124] To substantiate its decision, the court cited a legal opinion from the COSS.[125] Similarly, with the IFC, the court reference to the COSS's opinion serves as a means of justifying the court's ruling, and

[119] Private Company v Private Person (General Courts, Commercial Circuit) Case No 4537, 03 July 2015.
[120] Ibid
[121] Ibid
[122] Ibid
[123] Private Person v Private Person (General Courts, Commercial Circuit) Case No 776, 20 December 2017.
[124] Ibid
[125] Ibid

showing the credibility and strength of its decision by aligning it with the authoritative opinion of the COSS.

The second approach adopted by the Saudi courts when utilizing the opinions of the aforementioned institutions involves seeking proper resolutions for legal issues. This approach is generally employed when the court aims to find the correct answer to a legal issue, particularly when the issue is considered novel or unprecedented.

For example, in 2017, the Circuit Commercial Courts dealt with a legal issue concerning a *Tawarruq* contract, a type of contract under Islamic finance law.[126] The *Tawarruq* contract encompasses two categories.[127] The court in this case have to address two tasks: first, to identify the specific category of the disputed contract, and second, to examine the particular category whether is legal and binding under Saudi law. In pursuing these tasks, the court adopted and employed the IFC Academy's opinion regarding the illegitimacy of two categories of *Tawarruq* contracts.[128] Upon examining the disputed contract in light of the IFC Academy's opinion, the court determined that the disputed contract fell into one of the illegitimate categories based on the IFC opinion.[129] Consequently, the court ruled that the contract between the parties was void. This decision was subsequently affirmed by the Court of Appeal.[130]

5) Legal Regulations Forming Commercial Contracts in Saudi Arabia

[126] Private Company v Private Company (General Courts, Commercial Circuit) Case No 7630, 03 September 2017.
[127] There are classical *Tawarruq* and Banking *Tawarruq*. The case here involves Banking Tawarruq contract.
[128] Ibid
[129] Ibid
[130] Ibid

The final source addressed in this section relates to specific contracts that are governed by Saudi legislation, which aims to organise and regulate the activities and nature of these contracts. There are two types of contracts that are regulated by law: e-commerce and franchise contracts.[131] The Saudi courts rely on these regulations as legal authorities when there is a disputed case involving these contracts. It is important to note that these laws are intended to establish certain requirements and mandate specific formalities such as procedural formality to be concluded, or the contract would be invalid. Consequently, these two laws can be categorized as procedural rules rather than substantive rules. Thus, for the substantive aspects of these contracts, Saudi courts still need to examine the disputed contract in line with the above sources.

Consequently, when a disputed contract concerns substantive rules, such as when one of the contracting parties seeks to have the contract declared void by the court, the court will examine if the contract is void in accordance with one or more of the sources mentioned above. A recent case in 2022 demonstrates the court's departure from applying franchise law and instead adopting the opinion of Islamic schools of legal thought.[132]

In this case, the claimant sought a judgment from the court declaring the franchise contract they had entered as legally void. The basis for this claim was an obligation in the contract requiring the franchisee to open 15 branches after opening the first store within a two-year period.[133] The court determined that this obligation pertained to the date of opening the first store, rather than the date of forming the contract. As a result, the court ruled in favor of the defendant, stating that the contract was not void.[134]

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[131] Franchise Law (Royal Decree No. M/22, 12 May 2020). E-Commerce Law (Royal Decree No. M/126, Umm al-Qura 10 July 2019).
[132] Gulf Food Oasis Co for Meal Services v Safwa Marketing Co (2022) 344276.
[133] Ibid
[134] Ibid

In reaching its decision, the court relied on the opinion of Islamic schools of legal thought, which posits that whoever attempts to overturn what they have done or participated in, their effort will be rejected.[135]

2.2.2 Breach of Contract in Saudi law

This section aims to establish a fundamental comprehension of the mechanisms employed by the Saudi court to provide a remedy for a claimant who has incurred losses due to a breach of contract. This section primarily pertains to the third question, which addresses the crux of the issue under investigation in this thesis: the denial of recovery for loss of profit by the Saudi court. However, the discussion is also relevant to the other two research questions, which are examined in subsequent chapters and primarily concerned with the system of compensatory damages in civil and common law jurisdictions. Therefore, it is imperative to analyse this section not only to clarify the position of the Saudi court regarding the breach of contract but also to facilitate a comparative analysis in the forthcoming chapters.

In the framework of the compensatory remedy system in Saudi law, the principal sources upon which the court depends for authoritative guidance in rendering its judgments can be found in the previously discussed section. It is important to note, however, that the Saudi court has developed a distinct approach that diverges from the fundamental concept of compensatory remedy in Islamic law. A prime illustration of this divergence is the Saudi court's prioritization of damages as the primary remedy for contractual breaches, in contrast to the emphasis on specific performance as the primary remedy found in both Islamic and civil law systems.[136]

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[135] Ibid

[136] Alshmrani, A. 'Monetary Punishment in Islamic Jurisprudence and Its Applications in The Kingdom Of Saudi Arabia', Al Adl Journal, 59th edn (2013).

What is a breach of contract in the context of Saudi law?

In Saudi law, the notion of breach of contract aligns with other legal systems, including common and civil law jurisdictions. However, the criteria used to determine what constitutes a breach of contract may differ. A breach of contract occurs when one of the contracting parties explicitly or implicitly refuses or fails to meet their obligations stipulated in a legally binding and enforceable agreement.[137] This can manifest in various forms, including refusal to perform, failure to perform, delayed performance, and defective performance.[138]

The Saudi court acknowledges all these forms of contractual breaches and adjudicates accordingly. For instance, in a 2019 ruling, the court scrutinised a commercial contract, determining that one party had breached the contract through inadequate performance of their obligations. Consequently, the court held the breaching party liable for the defective performance.[139] This raises a pivotal inquiry regarding the method and tools employed by the Saudi court to ascertain whether a particular action by one of the contracting parties constitutes a breach or not.

In the process of determining whether an action constitutes a breach of contract, the Saudi court adopts the theory of *Daman Alaqd* (Contractual Warranty) under Islamic law as a guiding principle.[140] The purpose of employing this theory is to aid the court in deciding whether a specific action should be considered a breach or not. The *Daman Alaqd* theory consisted of two principles,

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[137] Al-Nasser, A. 'Fiqhi Reviews in the Theory of Obligation' https://drive.google.com/file/d/1tNfEavhWlxdW3a_14t3Uy7bjXi52fO5V/view accessed 3 April 2023.
[138] Ibid
[139] Private Person v. Private Person, General courts (Commercial court), case no 943, session of 06 March.2019
[140] Khaled, M. 'Contract Principles', Sada Alkheer (2014) 67.

Damman and *Amana*, which function as the primary tools that equip the Saudi court to systematically approach the question of whether a given action constitutes a breach of contract.[141]

The concept of *Daman Alaqd* under Islamic law provides a framework for classifying contractual obligations as either *Damman* warranty (warranty) or *Amana* (trust). This classification, based on the nature of the contract and the court's interpretation.[142]

In the context of *Damman*, if a breach occurs for instance in a sale contract, such as the delivery of a defective product or the loss of the product due to unforeseen circumstances, the Saudi court would conclude that a breach of contract has occurred. This is because the breaching party has violated the *Damman* aspect of the contract, warranting compensation for the aggrieved party.[143]

In contrast, *Amana* is invoked when there is negligence or trespass committed by the breaching party in a manner that violates the trust of the aggrieved party.[144] *Amana's* scope of application is limited to contracts whose nature is built on trust, such as partnership and agency agreements.

It is important to highlight that most commercial contracts are mainly regarded as *Damman* in the Islamic law.[145] However, there may be instances where the court deems a contract to be a combination of both *Damman* and *Amana* principles.

In practice, Saudi courts are guided by these classifications under Islamic law to determine whether a breach of contract has occurred. An examination of the court's practice illustrates how these two principles, *Damman* and *Amana*, are employed when investigating contractual breaches.

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[141] Ibid
[142] Comair-Obeid, Nayla, The Law of Business Contracts in the Arab Middle East (1996) 104.
[143] Ibid
[144] Ibid
[145] Noor, M. 'Principles of Islamic Contract Law', (1988) 6 Journal of Law and Religion 115-130. Accessed 1 November 2020.

For instance, in a 2008 case, the defendant sold their business to the claimant.[146] However, the defendant failed to perform the contract by not completing the necessary paperwork to legally transfer the business to the claimant. Consequently, the claimant filed a case against the defendant, seeking damages and discharge from the contract. To ascertain whether the defendant's actions, namely the failure to complete the transfer procedures, constituted a breach, the court scrutinised the defendant's actions in light of the *Daman Alaqd* in both principles *Amana* and *Damman*.

Upon examination, the court determined that the contractual obligation was *Damman*. The defendant's action for not transferring the business to the claimant is an action of breach based on the *Damman* principle. As a result, the court discharged the contract. However, the court denied the recovery of damages because the claimant had already begun operating the store and no definitive loss had occurred.

In a distinct case related to contractual warranties under the principle of *Amana*, an airline agency initiated legal action in 2000. [147] The agency accused the defendant of unlawfully terminating their contract without providing prior notice. In response, the defendant submitted a counter-claim, alleging that the agency had engaged in fraudulent practices. After careful examination of the evidence provided by the defendant, the court found that the claimant had indeed participated in fraudulent activities.

This led the court to determine that the contractual relationship between the two parties was governed by the *Amana* principle. As a consequence, the claimant's fraudulent conduct was

[146] Contracting company v. Limited Company, Dewan al-Madalim (The Court of Appeal Business Division in the Board of Grievance), case no 29, 2008

[147] Company v. Company, Dewan al-Madalim (The Court of Appeal Business Division in the Board of Grievance), 2000

deemed a violation of the contract. The court further ruled that the defendant was not in breach of the contract, as the contract had already been compromised by the claimant's actions.

2.3 Available remedy for Breach of Commercial Contracts within Saudi law

In analysing the legal remedies available to an aggrieved party following a breach of contract, it is imperative to recognize that the Saudi court, as well as Saudi law, adopt a uniform approach to remedies, making no distinction between tort and contract.[148] This approach is fundamentally shaped by Islamic law, wherein the legal principles are not designed to differentiate between contract and tort.[149]

Upon establishing that a breach has transpired, the court endeavours to determine the most appropriate remedy to redress the non-breaching party's losses. The Saudi court has formulated a distinct approach to the types of remedies available to the non-breaching party, drawing upon Islamic law. This demonstrates unique features within the Saudi legal framework.

One example of the Saudi court's approach that had been mentioned earlier that is its consideration of damages as the primary remedy for contract breaches.[150] Additionally, the court often deliberates upon a combination of remedies, such as damages and contract dissolution, in order to provide a comprehensive resolution for the aggrieved party.[151] Consequently, there are

[148] In numerous cases concerning tort or contract, the court has implemented its method without any observable differences in application. For instance, Private Person v. Private Person, General courts (Commercial court), case no. 67976 and Private Person v. Private Person, General courts (Commercial court), case no. 0342. The first case involved damages resulting from a breach of contract, while the second case pertained to a tort claim. The court applied the same method in both cases without prejudice to either of them.
[149] Al-Sanhuri, A. Sources of Right in Islamic Jurisprudence, (Cairo: Dār Iḥyā' al-Turāth al-'Arabī, 1994).
[150] Al-Magily (n 18) 98
[151] Ibid

three main types of remedies that an aggrieved party can pursue in the Saudi court system: damages, specific performance, and contract dissolution.

2.3.1 Damages

Damages function as the primary remedy for breach of contract under Saudi law. The adoption of damages as the principal remedy represents an innovative approach by the Saudi court, diverging from the traditional Islamic law's emphasis on specific performance, which, as this study has observed, holds the most significant influence over the jurisdiction. One could argue that this adoption is a response to the requirements of modern society, as it enables the Saudi court to award damages for losses resulting from breaches, rather than exclusively relying on specific performance, which may not be suitable for every case.

The concept of damages, as applied by the Saudi court, posits that when a wrongful act results in harm or losses, the injured party is entitled to compensation.[152] This principle serves as the fundamental guideline for the Saudi court in awarding damages and closely aligns with the forthcoming discussion of civil law, which asserts that any fault causing harm to others warrants compensation.[153] However, this general principle merely legitimizes the recovery of damages; the question remains as to how the Saudi court assesses damages and determines which losses should be compensated and which should be excluded.

Regrettably, there exists no explicit and well-defined answer to the question of how the Saudi court assesses damages and determines the scope of liability. The assessment of damages remains an ambiguous area within the Saudi legal system, and the court has not provided a clear

[152] Privet Person v. Privet Person, the Court of Appeal commercial Division, case no 8963, 2018
[153] Abdul-Razzaq Al-Sanhuri, 'Sources of Rights in Islamic Jurisprudence' (1st edn, 1954) 47-48.

rationale for its decision-making process or approach. Nevertheless, this study endeavors to elucidate the methods employed by the Saudi court in assessing damages and defining liability. These methods can be categorized into three distinct tools: utilizing well-established principles of Islamic law, applying the concept of *Daman Alaqd* to determine the scope of liability, and employing the three fundamental principles of fault, loss, and causal link between them.[154] The Saudi court integrates these tools to ascertain the extent of the loss and the corresponding scope of liability to be borne by the defendant.

The first method employed by the Saudi court in assessing damages draws upon several well-established principles in Islamic law that pertain to damages. The initial principle asserts that there should be neither harm inflicted nor reciprocated.[155] This principle carries two implications: first, it prohibits causing harm to individuals who have not inflicted harm; second, it forbids retaliatory actions that result in harm to others.[156] The subsequent principle stipulates that harm should be removed, signifying that any harm incurred by others must be rectified.[157] Collectively, these principles endow the Saudi court with authoritative power to justify its rulings when awarding damages, as they recognize that harm has occurred to the non-breaching party and must be redressed, which is most feasibly achieved through monetary compensation.

The second method employed by the Saudi court involves utilizing the *Daman Alaqd* theory, previously discussed, to serve two distinct purposes. First, it determines the existence of a breach of contract and identifies the specific type of breach that occurred, whether *Damman* or *Amana*. Establishing the nature of the breach subsequently informs the scope of liability for the breaching party. If the breach is classified as *Damman*, the party cannot evade liability; however,

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[154] Ibid
[155] Muhammed Alzohaili, 'The Fiqh Principles and Their Application in the Four Schools of Thought' (2006).
[156] Ibid
[157] Ibid

if the court determines the breach to be *Amana*, the defendant may absolve themselves by demonstrating that the breach did not result from negligence and that reasonable care was exercised in the contract's performance. Thus, the distinction between *Damman* and *Amana* within the *Daman Alaqd* theory aids the court in determining the extent of losses that warrant compensation.

The third method utilized by the Saudi court consists of applying the three principles that are essential for establishing liability and determining its scope: fault, harm, and the causal link between them. These principles will be thoroughly examined in the following section.

As observed above, these three methods primarily focus on determining liability or defining its scope. There is no explicit discussion regarding the objectives or aims of the Saudi court when imposing liability and awarding damages. The question remains whether the court seeks to protect the expectation or reliance interests of the non-breaching party, as recognized in common law, which will be further examined in the ensuing chapter. The objective of awarding damages under Saudi law remains ambiguous. Some academic scholars suggest that the Saudi court aims to apply Islamic law principles in quantifying damages, wherein monetary compensation is equivalent to the loss or harm incurred. However, the manner in which the court applies this concept, or the methods employed remain ill-defined.

2.3.2 Specific Performance

Specific performance constitutes the second available remedy in Saudi law in the event of a breach of contract. Generally, specific performance can be categorized into two distinct types: forced performance and voluntary performance.[158] Forced performance transpires under a court

[158] Ismat Bakr, 'Contract Theory in Islamic Law' (1st ed, Alkutub Alemiah Book House 2009).

order, mandating the breaching party to fulfil their contractual obligations.[159] Conversely, voluntary performance occurs without a court order when the breaching party voluntarily performs the contract, thereby precluding the need for the non-breaching party to obtain a court order.[160]

Historically, the Saudi court would not order specific performance unless the aggrieved party explicitly sought such a remedy.[161] It was rare for the aggrieved party to request specific performance from the court. Consequently, if the aggrieved party petitioned for the enforcement of the contract, the court would examine and assess the enforceability of the contract. However, in the absence of the claimant's request for contract enforcement, it was unlikely that the court would render a decision based on specific performance. Nevertheless, the Saudi legislator has since regulated specific performance through the Enforcement Act.[162] This act aims to ensure that contracts meeting certain criteria can be enforced. Article 9 of the Enforcement Act stipulates that "Compulsory enforcement may not be carried out except with an enforcement document for a due and specified right. Enforcement documents are: ... attested contracts and documents; ... other contracts and documents having the power of the enforcement document under the law."[163] An analytical examination of this legal evolution reveals the changing dynamics of contract enforcement and the role of specific performance in the Saudi legal system.

It is important to note that the Saudi court possesses unique features that combine specific performance and damages as remedies for a breach of contract. For instance, in the case of a sales contract, the court may order the delivery of the product while also awarding damages to the aggrieved party.

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[159] Ibid
[160] Al-Magily (n 18) 90
[161] Ibid
[162] Enforcement Law (Saudi Arabia), Royal Decree No. M/53 dated 13/8/1433 H (2012).
[163] Ibid

2.3.3 Termination of the Contract

Under Saudi law, there are two types of contract termination that serve as remedies for the non-breaching party: judicial termination and termination initiated by the non-breaching party.[164] In this context, termination refers to the court's authority to dissolve the contract as a remedy for the aggrieved party, or to allow the non-breaching party to extricate themselves from the unfulfilled contractual relationships with their counterpart.[165] This rationale is inspired by Islamic law, wherein the concept of obligations is not based on mutual obligations between the contracting parties, but rather, each obligation stands independently.[166] Consequently, the non-breaching party is required to perform their obligations even if their counterpart fails to do so.

The first category involves the judicial termination of the contract. This type of termination can be further classified into two subtypes. The first subtype is related to the breaching party's performance, which may be defective, incomplete, or entirely unfulfilled. The second subtype pertains to the nature of the contract itself, such as when the contract contains interest (Riba). In these two subtypes, the court may order the discharge of the contractual obligations. If the reason for termination falls under the first subtype, the court may dissolve the contract while also awarding damages to the non-breaching party, but not for the second subtype.

The second category involves the aggrieved party's right to terminate the contract. In limited circumstances, the Saudi court allows the non-breaching party to terminate the contract

[164] Khaled, M. 'Contract Principles', Sada Alkheer (2014).
[165] Ibid
[166] Bakr (n 147)

without seeking permission from the court. However, this is not a common remedy, as the standard practice involves requesting the court to dissolve the contract and award damages.[167]

In court practice, it appears that the liberal approach toward contract dissolution by the non-breaching party is a consequence of adopting and citing the legal opinion of Islamic scholar Ibn Taymiyyah. His opinion posits that the buyer has the right to withdraw from the contract if the seller fails to fulfil their obligations within a reasonable time frame.[168]

2.4 Principle Limiting the Contractual Liability within Saudi Law

As we noted in section (2.3.1), the primary remedy in Saudi law is damage, yet how and when the Saudi court limits the recovery of damage is not straightforward. The limitations on damage recovery can be conceptualized into two approaches: traditional and present.[169] In the traditional approach, which is rooted in Islamic law, the court places significant emphasis on the harm resulting from a breach of contract. In this context, various legal scholars, such as Wahbah al-Zuhayli and Mustafa Al-Zarqa, have articulated several conditions under Islamic law that must be met for a harm to be deemed legally compensable. These conditions are as follows: (1) the harm must exist, (2) the harm must be real, and (3) the harm must be inflicted upon a legitimate aspect.[170] These conditions serve as limitations on harm. Consequently, any harm experienced by the innocent party due to the breach of contract must satisfy these conditions; otherwise, the harm will not be eligible for compensation.

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[167] Alkhodar, Fahad, 'Contractor Delay in Delivery of Works' (2020) 78.
[168] Al-Taleb, Fahad, 'The Impact of Ibn Taymiyyah's Legal Opinion in the Contemporary Judiciary in Saudi Arabia' https://drive.google.com/file/d/1o5mVI753p8sLEhffe4yTnNmDZfReiMVT/view accessed 9 April 2023
[169] Al-Sanhuori, Abdulrzzaq, The Intermediacy of Civil Law Explanation, (1970).
[170] Al-Zuhayli (n 15) 287 - 293

In the context of the Saudi court, when adjudicating cases involving damages for breach of contract, the court examines the harm or loss incurred in light of the aforementioned conditions. For instance, in a 2020 compensation case for breach of contract, the claimant sought to recover damages due to the counterparty's failure to perform the contract within the specified date.[171] The court aimed to determine whether the harm in this case had occurred or not. In doing so, the court assessed the harm under Islamic law, which stipulates that the harm must have actually transpired and be tangible. Upon finding that the harm met these criteria, the court awarded damages to the claimant.

The present approach limits damage recovery based on three elements: fault, loss and the causal relationship between them.[172] In recent years, this approach has gained wide attention and acceptance within Saudi court practice. It can argued that the present approach is now considered the standard approach the Saudi court applies to limit civil liability, particularly contractual liability. For example, in 2021, the Highest Court (Supreme Court) acknowledged in its judgement that recovery of damage cannot be achieved without applying and fulfilling the three principles of fault, loss and causal link.[173]

These principles originated in civil law, specifically in French law, and found their way to Saudi law owing to a lack of proper rules that guided and directed the Saudi court in determining contractual liability.[174] One possible explanation for how these principles found their way into the

[171] Privet company v. Privet company, the Court of Appeal commercial Division, case no 21, 2020

[172] This approach has been widely accepted among Saudi legal scholars as well as the Saudi court. For example, Dr Abu Saad, Defining civil liability as an aspect of Daman in Islamic jurisprudence, 1992, Dr Almarsogy Mohammed,Tort liability in Islamic Jurisprudence, Tobah library 2021. Moreover the court applied such an approach in a number of cases such as LLc company v. Private Person, General courts (Commercial court), case no 68, session of 06 March.2022

[173] Highest Court decision number 431403 in 2021 https://sjp.moj.gov.sa/Filter/AhkamDetails/39721

[174] The three elements of establishing civil liability find their origin in France law. Comparative Tort Law : Global Perspectives, edited by Mauro Bussani, and Anthony J. Sebok, Edward Elgar Publishing Limited, 2015. ProQuest Ebook Central, http://ebookcentral.proquest.com/lib/universityofessex-ebooks/detail.action?docID=2198058.

Saudi court is through the comparative work of Abd El-Razzak El-Sanhuri, a well-known legal scholar who draws comparisons between Islamic law and civil law. In his scholarly work, El-Sanhuri transplants the framework of these elements, as Islamic law recognizes them under its principles. Thus, these principles offered a suitable framework for determining and limiting liability. However, a close investigation of the application of these principles by the Saudi court, as well as by Saudi legal writers, reveals that the concept and legal rules under these principles differ from those in French or Egyptian laws. The following sections discuss these principles and how they limit damage recovery within Saudi court practice.

2.4.1 Fault

The framework of liability can be delineated into two primary categories: fault-based liability and strict-based liability. Pertaining to fault-based liability, the court holds the breaching party responsible if their actions demonstrate either intent or negligence in violating the contractual obligations.[175] Conversely, strict liability dictates that the court will impose liability on the breaching party when their actions, regardless of intent or negligence, engender loss in any form.[176]

At first glance, the presence of three requirements—fault, harm, and a causal connection between them—may imply that the Saudi court adopts a fault-based approach to liability, as advocated by certain legal scholars.[177] This view derives from emulating the fault concept and its role in the influential jurisdiction (Egyptian law), which has shaped the Saudi court's decision to adopt these requirements when determining liability. Nonetheless, the validity of this perspective

[175] Al-Sanhuori, Abdulrzzaq, The Intermediacy of Civil Law Explanation, (1970).
[176] Coleman, Jules L., 'Fault and strict liability', *Risks and Wrongs* (Oxford, 2002; online edn, Oxford Academic, 1 Jan. 2010), https://doi.org/10.1093/acprof:oso/9780199253616.003.0012, accessed 8 April 2023.
[177] Such as Dr Al-Samaani in his book the discretion of the Administrative Judge.

and its resulting conclusions cannot be substantiated by the Saudi court's historical practices (prior to the incorporation of the three constituents of contractual liability) or its current practices.

Consequently, this study argued that the fault requirement employed by the Saudi court does not necessarily indicate that liability for breach of contract is fault-based. Rather, the liability for breach of contract can be characterised as strict liability. This assertion can be substantiated through various means.

Firstly, the framework of liability within Islamic law is predicated on strict liability.[178] As such, Islamic law renders the breaching party accountable irrespective of the presence or absence of fault. The interpretation and application of the Islamic law principle stipulating that harm should be eliminated clearly indicates that any inflicted harm warrants reparation, without considering the fault element.[179] As previously mentioned, the Saudi court consistently invokes this principle when adjudicating cases involving damages.

Secondly, a recent ruling by the Highest Court illustrates and substantiates the notion that liability should be regarded as strict rather than fault-based. The claimant contended that the Court of Appeals had erroneously applied the legal requirements of fault, harm, and causal link to the case's facts.[180] Consequently, the awarded damages were legally unsound, as the fault requirement had not been established. Upon examining the case, the Highest Court concluded that the fundamental principle in compensation cases is the existence of harm or loss warranting compensation. The three requirements—fault, harm, and causal link—are intended as tools for the court to determine the extent of harm, and their application and interpretation are subject to the

[178] Saleh, Nabil, 'Remedies for Breach of Contract under Islamic and Arab Laws' (1989) 4(4) Arab Law Quarterly 269-290.
[179] Ibid
[180] Highest Court decision number 6334 in 2022 https://sjp.moj.gov.sa/Filter/AhkamDetails/39721

court's discretion. Furthermore, it falls outside the Highest Court's purview to examine the application of these tools.[181]

It is observable that the Highest Court adheres to the Islamic law approach, as its judgment is compatible with the Islamic law stance, which assigns significant weight and attention to the harm itself, advocating that any harm should be compensated for. Hence, the awarding of damages due to harm or loss is predicated on strict liability. However, the question arises regarding the role of the fault requirement in this context. The fault can be perceived as an instrument that assists the court in investigating and determining the existence of a breach of contract. Consequently, the breach of contract itself entitles the innocent party to seek damages without necessitating the demonstration that the breach was predicated on fault.

2.4.2 Harm

In the Saudi legal system context, the Highest Court's ruling elucidates that the primary, if not exclusive, focus in cases of contractual breach is the assessment of harm. It is noteworthy that under Saudi law, the terms "harm" and "loss" are often used interchangeably, denoting similar concepts. This section aims to accomplish two objectives: first, to identify the criteria that harm must fulfil to be deemed compensable, and second, to explore the various types of harm recognised under Saudi law.

Legal scholars have identified three criteria that must be present for harm to be compensable.[182] First, the occurrence of harm must be verified. In cases of contractual breach, the

[181] Ibid

[182] Al-Zuhayli (n 15) 287 – 293.

loss should have already transpired.[183] This requirement is crucial, as it enables the court to confirm the existence of harm and subsequently assess the loss. It is noteworthy that the strict and literal application of this condition by Saudi courts has occasionally resulted in the denial of recovery for lost profits.

Second, the harm must be genuine. In this context, "genuine" denotes that the action constituting the breach has resulted in a loss suffered by the non-breaching party.[184] Consequently, if a breach occurs and the loss is not genuine—for instance, because the aggrieved party actually benefits from the breach—the harm is considered non-genuine and thus ineligible for compensation.[185]

Third, the loss must be related to a subject matter that is lawful.[186] For example, if a contract breach involves the sale of alcohol, the Saudi court would not award damages, as the loss caused by the failure to deliver the purchased alcohol is deemed unlawful under Saudi law.[187]

In the context of Saudi contract law, two primary types of harm are recognised: financial harm and moral harm.[188] Financial harm refers to any economic loss suffered by the non-breaching party as a result of a contractual breach. Within this category, there are two subtypes: actual financial harm and future financial harm.[189] Actual harm pertains to losses that have already occurred and can be measured by the court, while future harm refers to anticipated losses, such as lost profits. These future losses may not have materialised at present but are expected to transpire in the future. Accordingly, the focus of this thesis lies in the examination of future financial harm,

[183] Ibid
[184] Ibid
[185] Ibid
[186] Ibn Qudamah, Al-Mughni, Book 4,(Dar Almanar ed).
[187] Ibid
[188] Alkhodar (n 156) 70.
[189] Ibid

particularly the Saudi courts' refusal to allow recovery of lost profits resulting from contractual breaches.

The second type of harm, moral harm, denotes harm associated with feelings or values.[190] For example, if a seller breaches a contract by failing to deliver a product, thereby damaging the buyer's reputation, the buyer can seek damages for the moral loss suffered due to the breach. It is worth noting that for an extended period, moral harm was deemed non-recoverable under Saudi law, as courts were unable to quantify such losses. However, current practices now permit the recovery of moral harm.[191] Interestingly, the rationale and justifications once employed by Saudi courts to deny damages for moral harm resemble those currently invoked to disallow the recovery of lost profits.

2.4.3 Causal Relationship

The third element of establishing contractual liability and recovering damage is establishing a causal link between fault and Harm.[192] This requirement makes it challenging to identify the court approach in determining and assessing causal links because the Saudi court has not been attracted to the dissection of the causation principle out of criminal law.[193] Moreover, the Saudi court enjoys a high level of discretion in determining whether the breach caused the loss. [194]

Surprisingly, the Saudi court has no obligation to show the Court of Appeal or the Highest Court how it assessed and concluded that the causal link had been satisfied.[195] It can be argued that

[190] Abdulaziz Al-Salama, 'Compensation for Moral Damages', Ministry of Justice Journal, 2014 https://drive.google.com/file/d/12PYgHItLDGlWthMfzl6RiegFPaJ9uIxZ/view accessed 2 May 2023
[191] Ibid
[192] Ibid
[193] Dr Abu Saad, Defining civil liability as an aspect of Daman in Islamic jurisprudence, 1992
[194] Al-Samaani Waleed, The discretion of the Administrative Judge, 2015
[195] Ibid

the perspective of the Saudi court towards causation is that if the breach and the loss have been determined and established, then it would assume the causal link between them has been established.[196] Thus, there is no need for further exploration of the causal enquiry. This view has been advocated by a number of Saudi legal scholars who simplified the application of the causation principle within damage recovery.[197] Hence, there are no theories or controversies within Saudi law regarding the application of causation as the case is opposite to common law and civil law.[198] Nevertheless, given the insignificance of the causation principle, in recent years, the Saudi court has implemented the *Gharar* principle (uncertainty) as discussed below, which can be categorised under the causation principle with the purpose of denying the recovery of damage that the court considers as uncertain.

2.4.4 Gharar

This section's discussion is divided into two parts. The first part explores the doctrine of *Gharar*, while the second part investigates the relationship between the doctrine of *Gharar* and its use by the Saudi court as a limitation on the recovery of damages, leading to the denial of lost profit awards.

The primary purpose and application of the doctrine of *Gharar* in Islamic law is to impose limitations that may invalidate contracts that are otherwise validly concluded.[199] In other words, *Gharar* aims to restrict contracting parties from engaging in uncertain transactions within a

[196] Alkhodar (n 156) 70.

[198] In English law, the academic writer advocates for the two steps of causation: factual causation and legal causation. In Egyptian law, adequate causation plays an important role in determining and assessing causal enquiry. See 'n 73' and 'n 150'

[199] Saleh and Ajaj (n 8) 12

contract, thereby preventing any adverse consequences that may arise from such unknown transactions and potentially causing injustice among the contracting parties.[200]

Gharar has been defined in various ways, including risk, gambling, uncertainty, and speculation.[201] Comir-Obeid explains that "*gharar* refers to benefits for one party that are impossible to accurately determine without knowledge in advance."[202] The legal doctrine of *Gharar* finds its foundation in Sunnah texts, with the Prophet mentioning the prohibition of *Gharar* in several instances. For example, the Prophet ordered that "whoever purchases food shall not sell it until he weighs it." The Prophet also forbade the sale of grapes until they turn black and the sale of grain until it is robust. Additionally, the Prophet declared that one should not buy fish in the sea, as it constitutes *Gharar*.[203]

Islamic scholars have paid close attention to the doctrine of *Gharar*, examining and analyzing its implementation in contractual transactions to limit exposure to *Gharar*-related risks. This heightened concern for *Gharar* has directed scholars to create nominated contracts, aiming to scrutinize individual contract elements and assess the impact of *Gharar* on the contract.

As previously observed, the natural application of *Gharar* in Islamic law serves as a restricting principle. However, the main purpose of *Gharar* is not to limit the recovery of damages in Saudi law. On the contrary, its primary objective is to restrict contracting parties from engaging in uncertain transactions. Therefore, any transaction containing *Gharar* (uncertainty) is deemed unlawful under Islamic law and, consequently, unenforceable.

Despite this primary objective, in recent years, the Saudi court has employed the *Gharar* (uncertainty) principle as a limitation on the recovery of damages. The primary function of *Gharar*

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[200] Ibid
[201] Nayla (n 131) 86
[202] Ibid
[203] Dr. Sadeeq Muhammad, Gharar in Contract and its Application in Modern Practice (1993) 32.

in this context is to provide the Saudi court with a tool to deny the awarding of lost profits, based on the court's assertion that such a loss conflicts with the fundamental doctrine of Islamic law, which is *Gharar* (uncertainty). This approach by the Saudi court raises the question of how the Saudi courts address this broad doctrine in lost profit cases, leading to their denial, which will be discussed below.

2.5 Issue of Recovering Loss of Profit

2.5.1 Factors Associated with Justification of Denying Loss of Profit.

The Saudi court has acknowledged that loss of profit is not eligible for recovery. This denial of lost profit recovery can be attributed to two fundamental factors. First, the absence of contract law codification leads the court to rely heavily on Islamic law, which remains silent on the recovery of lost profit. Professor al-Zuhayli explains the reason for that is because claiming damages for the lost profit did not occur and therefore it was not known to Islamic scholars at the time.[204] Consequently, the Saudi court interprets this silence negatively, assuming that Islamic law does not permit such recovery. Although not explicitly stated, this approach is evident in the court's reasoning. For instance, the court attempts to support its negative stance by invoking principles of justice under Islamic law, such as the principle that harm should neither be inflicted nor reciprocated. The Saudi court believes that recovering lost profit would mean imposing undue harm on the defendant.

Consequently, the Saudi court's negative interpretation, which leads to the unlawfulness of lost profit recovery, has prompted some Saudi scholars to challenge the court's approach. They

[204] Al-Zuhayli (n 15) 287 – 293.

argue that the Saudi court's selection of a principle to justify its denial is not well understood or supported by Islamic law principles. For example, Dr. Abdul Hamid Al-Magily contends that the principle under Islamic law, which prevents causing harm to others, has a stronger position in supporting the recovery of lost profit rather than the principle the Saudi court employs.[205] The court's rationale is that awarding lost profit would mean imposing harsh liability on the defendant.

The second factor contributing to the Saudi court's reluctance to award lost profit claims is the legal challenges it faces when addressing such claims, as lost profit falls under the category of future harm. As discussed earlier, future harm cannot be compensated for because it does not meet the specific criteria required for harm to be compensable. These criteria include the verification of harm and the requirement for harm to be genuine. These two conditions cannot be met when the loss resulting from a contract breach is lost profit. The following two cases illustrate the court's approach. Although the first case is indeed considered an administrative case, however, its substantive nature, coupled with the court's approach and conclusion, serves as a prime example demonstrating the court's requirement for harm to be verified. The second case demonstrates that for the court to effectively assess the harm, it must be genuine—a condition that cannot be satisfied in relation to lost profit claims.

The Court of Appeal had addressed legal issue concern the lost profit claim in Administrative Court in 2012 when the claimant brought a claim seeking damages and lost profit award against the Ministry of Environment in Saudi Arabia.[206] Alleging that the Infringement Committee established by the Ministry of Environment to investigate the claimant's encroachment

[205] Al-Magily (n 18) 36 -39

[206] Privet Person v. Ministry of Environment, Dewan al-Madalim (The Court of Appeal Business Division in the Board of Grievance), case no. 97, 2012.

of land owned by the government. And the false decision and action results from that committee had caused him to suffer loss.

The claimant owned housing complex in the northern part of his land, and he entered into a contract with a construction company to rent the complex for five years. However, the Infringement Committee ordered the removal of the housing complex due to the valuation of the government-owned property by the claimant base on Infringement Committee. The claimant challenged the order and allegations by the committee because the encroachment of government land was in the easter part of his estate. But there was not any encroachment in the northern part. The court found after the discovery that the committee made an error and included the north part of the claimant land as a violation, and it should be removed.

This action resulted that the construction company alleged a breach of contract and claimed one million and two hundred thousand from the claimant. Also, it causes him a loss of profit by not renewing the contract with the construction company for the next five years due to government action. For that reason, the Court of Appeal awarded him six million for the violation by the government to his property. But, regarding the lost profit claim, the court rejected it. The court's holding is based on the assumption that profit is not an actual and definitive outcome, as it may or may not materialize, regardless of any presumptions. In this context, the court implicitly states that such a loss cannot be verified, which is an essential element that must be met when assessing loss or harm.

Moreover, in another case, 2008 The court of appeal in administrative court rejected awarding lost profit, and the court's reasoning was that the calculation of lost profit was based on assumption and was not accurate which lead to uncertainty.[207]

[207] Contracting Company v. Limited Company, Dewan al-Madalim (The Court of Appeal Business Division in the Board of Grievance), case no. 113, 2018.

It manifests from the two cases above that the substantial court concern is that the future loss should be actual and direct, and the damage accurately calculated because the court does not want to impose unreasonable liability on the defendant for what is presumed based on the court's viewpoint.

2.5.2 Relation Between *Gharara* Principle and Loss of Profit Claim

It is worth noting that as the number of lost profit claims in the Kingdom has grown and in the absence of suitable rules and standards for the court to rely on when assessing and determining when the recovery of lost profit should be permitted, the court has adopted the *Gharar* doctrine as a tool to justify its denial of lost profit claims. Dr. Al-Magily criticizes the court's method of applying the *Gharar* principle in the context of recovering future damages.[208] He explains that *Gharar* is associated with sales contracts in Islamic law, requiring contracts to be free from *Gharar* in order to be valid. Consequently, according to him, it is neither appropriate nor effective to impose the principle of *Gharar* as grounds for denying lost profit claims. Thus, attempting to apply this principle as a test for recovering damages is inadequate.

It can be observed that the principle of *Gharar*, as applied by the court, functions to prevent the recovery of lost profit due to its uncertainty. In contrast, the foreseeability principle in common law and civil law serves as a limitation on recovering lost profit, ensuring a degree of certainty concerning the loss of profit can be met. Additionally, the notion of loss of chance, as applied in civil law, demonstrates how the court has innovated ways to overcome the challenges of uncertainty associated with future damages, such as lost profit. The following chapters will review

[208] Al-Magily (n 18) 42.

and discuss the applications of foreseeability and the notion of loss of chance in these legal systems.

2.6 Conclusion

In the context of commercial legal remedies within contractual relationships, there are no specific regulations or laws governing this matter in the Saudi Arabia legal system. Over the years, the Saudi court has primarily relied on sources from Islamic law as legal authority, shaping commercial contracts and liabilities arising from breaches of contracts. It is also noteworthy that Saudi courts have established its own legal principles applicable to remedies arising from contract breaches.

One of the available remedies for an aggrieved party in cases of contract breaches under Saudi law is damages. However, claimants are unable to recover loss of profit as damages, as it is considered future loss, deemed unverified and not genuine. As a result, the Saudi court has been interpreting claims for lost profit as irrecoverable. Several factors have driven the court to adopt this approach. First, the uncertainty of whether the claimed loss would materialize in the future. Second, the lack of legal tools and approaches enabling the Saudi court to achieve a degree of certainty when cases involve lost profit claims. These legal challenges have led the Saudi court to adopt the *Gharar* principle as a way of justifying its approach to denying lost profit claims.

Chapter Three: The System of Recovering Loss of Profit in English law

This chapter endeavors to investigate the Common law system's approach to restricting damages recovery in cases of contractual breaches, with English law serving as a model for this examination. The primary focus of the discussion centers on the interplay between legal rules that serve to limit the recovery of damages and the level of certainty associated with such damages. This chapter seeks to address the essential question of whether the system of limiting the recovery of damages, along with its corresponding legal rules, enables English courts to effectively manage the inherent uncertainty associated with claims of loss of profits resulting from breaches of commercial contracts.

3 Introduction

Breaching a contractual obligation entitles the aggrieved party to seek judicial remedy to compensate for the loss resulting from the breach. Nonetheless, legal jurisdictions share or differ in their approaches to judicial remedy. For instance, as we observed in the previous chapter, Saudi law recognises that damages are the primary remedy for an aggrieved party, which is similar to the recognition in common law but differs from the Civil Law approach, which will be discussed in the next chapter.

However, even if English law and Saudi law agree that damage is the primary remedy for the innocent party, they differ in their approach to measuring and limiting damage recovery. Judicial discretion in common law jurisdictions is guided and directed by general legal rules determining and limiting damages, which is different from the approach of Saudi courts. For example, while the common law allows for the recovery of loss of profit, this recovery is subject to legal rules that loss should be a causative effect to the breach, foreseeable to the defendant, mitigated by the claimant, and these rules limits any damages. By contrast, Saudi law takes a more conservative approach, which does not allow for the loss of profit, and any claim of loss of profit is not permitted, as we observed in the last chapter. The court’s reason for such a restricted approach to loss of profit is that any potential future gain that the claimant is deprived of due to a

breach is not certain. Therefore, such recovery is not allowed, and the court applies the certainty principle to justify its refusal. The objective of the Saudi court in making such a denial is not to impose liability on the defendant when the cause of the loss is uncertain. Consequently, as stated by Hart and Honoré, "all legal system in response either to tradition or social need both extend responsibility and cut it."[209]

This chapter is divided into three main sections. The first section provides a demonstration of the concept of a breach of contract under English law. The second section investigates the system of compensatory damages and determines the assessment of damage, and the general legal rules that restrict the recovery of damages within common law jurisdictions. Lastly, the third section focuses on analysing and assessing how these legal rules achieve certainty within the area of recovering loss of profit.

3.1 Understanding the Concept of Breach of Contract

Prior to examining the system of compensatory damages in common law and the corresponding legal rules employed by the English court to recover damages for a contractual breach, it is imperative to establish a comprehensive understanding of the concept of breach of contract. Therefore, the present section endeavors to elucidate what constitutes a breach of contract.

A breach of contract occurs when a promisor fails to fulfil its obligations under a binding agreement without a justifiable reason.[210] Therefore, a breach of contract is defined as the "violation of a contractual obligation by failing to perform one's own promise, by repudiating it,

[209] Hart and Honoré (n 5) 316
[210] TT Arvind, *Contract Law* (3rd edn, OUP 2022) ch 15

or by interfering with another party's performance."[211] Consequently, proving a breach of contract necessitates a legally binding agreement between two or more parties that outlines their obligations within a commercial relationship or transaction. When the contracting party unlawfully fails to meet its obligations, it is deemed a breach of contract, affording the aggrieved party legal entitlement and grounds for action against the breaching party.[212]

A breach of contract can take various forms, such as breach of condition, breach of warranty, innominate breach, and anticipatory breach.[213] Breaches of condition and warranty are traditionally perceived as the fundamental forms of contract breach, occurring when the contracting party fails to fulfil specific contractual terms.[214]

The breach of condition pertains to the failure to meet a term that is deemed fundamental within the contract. When a breach of condition occurs, it provides the non-breaching party with the option to either terminate the contract or seek damages.[215] The case of *Poussard v Spiers and Pond* [1876] serves as a prime illustration of what constitutes a conditional term.[216]

The case involved a singer who had contracted with the defendant to sing and perform the leading role in an opera.[217] Regrettably, she fell ill, resulting in her missing the first week of performances. During her absence, an alternate singer took her role. Upon her recovery, the opera management expressed that her services were no longer needed, thereby terminating her contract. In return, the singer filed a lawsuit for breach of contract.[218]

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[211] Robert Merkin QC and Séverine Saintier, *Poole's Textbook on Contract Law* (15th edn, OUP 2021) ch 13
[212] Ibid
[213] Ewan McKendrick, *Contract Law* (10th edn, OUP 2022) ch 22
[214] Ibid
[215] Ibid
[216] Poussard v Spiers and Pond (1876) 1 QBD 410.
[217] Ibid
[218] Ibid

The court found that the singer's inability to perform during the first week constituted a breach of condition, entitling the defendant to terminate the contract.[219] The court's rationale for its decision was rooted in the view that "the plaintiff's inability to perform on the opening and early performances went to the root of the matter and justified the defendants in rescinding the contract."[220] Thus, any term that is classified as fundamental or at the root of the contract can be identified as a conditional term.[221]

On the contrary, a breach of warranty refers to a term that is not critical, essential, or can be classified as a 'secondary obligation.'[222] The ruling in *Bettini v Gaye* [1876] serves as a counterpoint to the decision in *Poussard v Spiers and Pond* [1876]. In the *Bettini v Gye case*, an opera singer contracted with an opera house manager to perform for an entire season.[223] The contract, however, contained a clause requiring the singer to attend six days of practice. Due to illness, the singer could not fulfil this obligation, prompting the defendant to terminate the contract. The court deemed such termination as unlawful, concluding that the obligation to attend six days of practice was considered a warranty term, not a conditional term.[224] The court described this term as 'subsequent stipulations,' and it was not deemed crucial enough to be classified as a condition term.[225] The court's reasoning was that this clause 'does not go to the root of the matter, so as to require us to consider it a condition precedent' supporting its classification as a warranty rather than a conditional term.[226]

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[219] Ibid
[220] Ibid
[221] André Naidoo, Complete Contract Law (1st edn, OUP 2021) ch 8
[222] Ibid
[223] Bettini v Gye (1876) 40 JP 453
[224] Ibid
[225] Ibid
[226] Ibid

A significant distinction that emerges from comparing the cases of *Poussard v Spiers and Pond* [1876] and *Bettini* v Gye [1876] is the power to terminate the contract based on the classification of a term or clause as a condition or warranty. If a contractual term is deemed essential and serves as the basis of the contract, then the termination is deemed unlawful. On the other hand, if the term is not an essential part of the contract, then the defendant has no right to terminate the contract. In such cases, the defendant can only seek damages. This perspective is supported by Blackburn J's statement in *Bettini v Gye* [1876]: "The defendant must, therefore, we think, seek redress by a cross claim for damages."[227]

Determining whether a contract term is a condition or warranty can be difficult due to its complexity. However, the case of *Hong Kong Fir Shipping Co Ltd v Kawasaki Kisen Kaisha Ltd* [1962] offers a solution for instances when a term is challenging to classify.[228] This case established a new category called the breach of an innominate term, which deviates from the traditional approach of strictly categorising contractual terms as conditions or warranties.[229]

The facts and reasoning behind this case illustrate why and how the court established this developed approach in determining a contractual breach by recognising the breach of innominate terms. This approach aids in determining whether a contracting party has the right to terminate the contract when the nature of the term is complex and its categorisation as either a condition or a warranty is unclear.

The case in question involved a charter party contract wherein a ship was leased for two years. One of the conditions in the contract was that the ship had to be fit for regular cargo service, which is referred to as the seaworthiness clause.[230] However, the ship had an outdated engine and

[227] Ibid
[228] Hongkong Fir Shipping Co Ltd v Kawasaki Kisen Kaisha Ltd [1962] 2 QB 26.
[229] Arvind (n 199)
[230] Ibid

an insufficient crew, causing it to break down and need 20 weeks of repair. While the ship was being repaired, the charterer ended the contract, stating that the seaworthiness clause had been violated.[231] However, after the repairs were completed, more than 18 months remained in the contract, prompting the ship's owner, the claimant, to sue the charterer for unlawful termination. Notably, there was no disagreement over whether the seaworthiness term in the contract had been breached. The dispute concerned whether such a breach entitled the charterer to terminate the contract.

The legal question facing the Court of Appeal was whether the breach of the seaworthiness clause by the claimant entitled the non-breaching party to terminate the contract. Acknowledging the complexity of categorising the seaworthiness clause as either a condition or warranty, Lord Diplock LJ noted, "however, many contractual undertakings of a more complex character cannot be categorised as being 'conditions' or 'warranties.''[232]

Due to the complicated nature of such a term, the court developed the concept of innominate terms.[233] This concept implies that the court will evaluate the actual consequences of the breach. This means that the court will review the actual effects of a breach. If the breach has serious consequences that prevent the non-breaching party from receiving the benefits of the contract, then it is reasonable to terminate the contract.[234] But if the breach has minor effects, the non-breaching party cannot legally end the contract.[235]

Employing this new approach, the court concluded that the charter's termination of the contract was unlawful. This decision highlighted the new perspective that contractual terms could

[231] Ibid
[232] Ibid
[233] Arvind (n 199)
[234] Ibid
[235] Ibid

be more complex than a binary condition or warranty categorisation, and each breach's impact must be evaluated on a case-by-case basis. Professor McKendrick elucidates on the role of the breach of innominate by stating, "The main contribution which they have made is that they give to the courts a degree of remedial flexibility in that they can decide whether or not the breach was repudiatory by having regard to the consequences of the breach rather than the nature of the term broken."[236]

Another important concept in contractual breach is an anticipatory breach, which refers to a prospective breach of contract. This type of breach occurs when the breaching party informs the aggrieved party in advance that they will not fulfil their obligations under the contract, thereby constituting a breach of contract. An important aspect of anticipatory breach is that it doesn't automatically lead to the termination of the contract.[237] In fact, the non-breaching party can either end the contract or continue performing their contractual obligations despite the anticipated breach.

The decision by the House of Lords in *White & Carter (Councils) Ltd v McGregor* [1962] serves as an illustration of the English law approach regarding anticipatory breaches.[238] The case involved an advertising agent (the claimant) and a garage owner (the defendant). The claimant, who supplied bins to local councils and earned revenue from advertisements displayed on these bins, signed a contract with a representative of the garage to promote their business on the bins.[239] However, the garage owner disagreed with the contract and attempted to terminate it on the day it was formed, constituting an anticipatory breach.[240]

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[236] McKendrick (n 202)
[237] Merkin and Saintier (n 200)
[238] White & Carter (Councils) Ltd v M'Gregor [1962] SC (HL) 1.
[239] Ibid
[240] Ibid

Despite the garage owner's attempt to terminate the contract, the advertising agent affirmed it and performed their contractual obligations.[241] The contract was meant to last for three years and required weekly payments. According to the contract's terms, if the garage owner missed four consecutive payments, the full sum for the entire three-year period would be due immediately.[242] Therefore, the advertising agent proceeded to advertise the garage on their bins despite the defendant's failure to make payments during that period. As a result, in accordance with the contract's terms, the advertising agency sued the garage owner for the full three-year payment.[243]

The House of Lords ruled that in the case of an anticipatory breach, the non-breaching party has the choice to terminate the contract or affirm it and perform their obligations under the contract.[244] Lord Reid articulated this position by stating, "If one party to a contract repudiates it in the sense of making it clear to the other party that he refuses or will refuse to carry out his part of the contract, the innocent party has an option. He may accept that repudiation and sue for damages for breach of contract, whether or not the time for performance has come; or he may, if he so chooses, disregard or refuse to accept it and then the contract remains in full effect."[245]

It is noteworthy that the various methods and tools that English law uses to determine if an action constitutes a breach of contract, as explored above, are based on the principle that if a breach occurs, the affected party has the right to terminate the contract. This perspective differs considerably from the Saudi law standpoint. Hence, as a general rule, under Saudi law, the termination of a contract is a power exercised by the court, not a decision left to the discretion of

[241] Ibid
[242] Ibid
[243] Ibid
[244] Ibid
[245] Ibid

the parties involved. Consequently, as discussed in Chapter Two, the non-breaching party should seek contractual termination from the court.

Before moving on to the next section, it is important to summarise what this section is about and how it relates to the research questions. This section addresses the fundamental question of what constitutes a breach of a contract. This sets the groundwork for answering subsequent research questions about the legal tools used by common law to limit the recovery of damages. However, a discussion on limiting damages cannot occur without considering why a claim for damages arises in the first place.

Therefore, the legal entitlement to claim damages begins when there is a breach of contract, which occurs when the promisor fails to fulfil its obligations under a binding contract. This failure can take several forms, such as failing to perform fundamental terms or obligations in the contract, or failing to fulfil obligations that are not essential. These failures can manifest in various ways, such as not performing at all or defective or late performance.

Thus, if the failure to fulfil contractual obligations meets these criteria, the innocent party can seek damages for such a breach. However, the claim for damage must also meet certain criteria, which will be discussed in the following section.

3.2 The Recovery of Contractual Damage

A breach of contract may take place in several circumstances, including failure to perform, defective performance, or the inability to perform. In such scenarios, the non-breaching party is legally entitled to seek damage from the court for any losses incurred.[246] For instance, if the

[246] McKendrick (n 202)

breaching party fails to fulfill their contractual obligations, the non-breaching party may initiate a legal action to recover their losses.

However, a question arises as to how English courts determine whether the performance of a contract has been sufficiently fulfilled, especially in cases of defects and incomplete performance. The distinction lies between entire obligation and substantial performance.[247] Entire obligation implies that the party performing must fully complete the obligation before the other party is required to pay. This principle is highlighted in the case of *Cutter v Powell* [1756].[248]

In this case, Cutter was contracted to serve as a second mate on a ship journeying from Jamaica to Liverpool.[249] He was promised payment of a certain amount, due ten days after docking in Liverpool, contingent upon the condition that he "proceeds, continues and does his duty as second mate in the said ship from hence to the port of Liverpool."[250] Tragically, Cutter passed away before the ship reached Liverpool. Subsequently, his wife filed a lawsuit to receive a portion of his unpaid wages, arguing that he had fulfilled a significant part of the work.

Upon examining the case, the court found that Cutter's payment was contingent upon the completion of the entire trip, and would only be payable once the ship had docked.[251] Consequently, the court ruled that Cutter was not entitled to payment because his obligation was entire, meaning that the obligation to pay him was conditional upon the full completion of the contract.[252] The fact that Cutter did not fulfil the contract, even though it was not his fault, cannot serve as an exception to the principle of the entire obligation.[253]

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[247] Ibid at 198
[248] Cutter v Powell, 101 E.R. 573
[249] Ibid
[250] Cutter v Powell, 101 E.R. 573
[251] Ibid
[252] Ibid
[253] Ibid

The outcome of this case indicates that when a contract is classified under entire obligation, the employer is only obligated to pay upon the complete performance of the contract. This stringent principle was also applied in the case of *Sumpter v Hedges* [1898].[254] In this case, a builder was unable to complete the construction of properties due to insufficient funds, forcing the other party to complete the work.[255] The builder then sought to recover payment for the work he had performed. However, the court dismissed his claim, as the obligation was considered entire.[256]

Considering the stringent nature of the entire obligation rule, English courts have recognised an exception to it. This alternative approach, known as substantial performance, employs a less stringent perspective on the fulfilment of contractual obligations. The case of *Hoenig v Isaacs* [1952] illustrates the application of this approach.[257] In this case, Isaacs hired Hoenig to decorate his flat. Hoenig received £300 during the work. Upon completion, when Hoenig requested the remaining £350, Isaacs only paid an additional £100, refusing to pay the remaining amount due to defects in Hoenig's work.[258]

The Court of Appeal ruled in favor of Hoenig, awarding him the remaining payment but deducting £55 because of the defects in his work.[259] The court's rationale behind this judgment was that Hoenig's performance was considered substantial performance.[260] Consequently, he was eligible to receive the agreed-upon payment, with the exception of an amount deducted due to the defects in his work.

[254] Sumpter v Hedges, [1898] 1 Q.B. 673
[255] ibid
[256] Ibid
[257] Hoenig v Isaacs, 1952 All E.R. 176
[258] Ibid
[259] Ibid
[260] Ibid

From the cases discussed, it can be observed that a clear distinction exists between entire obligation and substantial performance. Entire obligation pertains to an incomplete performance, while substantial performance refers to a completed obligation that may contain minor defects. This distinction is further confirmed by Lord Denning MR's statement in *Hoenig v Isaacs* regarding the application of the substantial performance rule.[261] He stated that the court applies this rule when it aims to prevent categorizing an obligation as entire, which could result in one party not receiving payment due to minor faults.[262]

Subsequently, if an English court ascertains that a contract has not been fulfilled, it then has the responsibility to safeguard the primary interest of the non-breaching party. Namely, the performance of the contractual obligation. This protection, derived from the law, comes in the form of enabling the non-breaching party to seek a secondary interest which is damage for the loss caused by the contract's breach.[263] As Professors Pearce and Halson have noted, 'the English courts already recognise that their primary objective in awarding a remedy for breach of contract is the vindication of the claimant's rights under that contract.'[264] Hence, under English law, there is an ingrained presumption that any breach of contract compels the breaching party to pay damages intended to compensate the suffered loss.

Once the court has established that the defendant breached the contract, and the aggrieved party has incurred a loss as a result, the court proceeds to the second stage, which involves determining the appropriate amount of compensation that corresponds to the loss caused by the

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[261] Ibid

[262] "When a contract provides for a specific sum to be paid on completion of specified work, the courts lean against a construction of the contract which would deprive the contractor of any payment at all simply because there are some defects or omissions." Hoenig v Isaacs [1952] 2 All ER 176

[263] McKendrick (n 202)

[264] D Pearce and R Halson, 'Damages for Breach of Contract: Compensation, Restitution, and Vindication' (2007) Oxford Journal of Legal Studies.

defective or unfulfilled performance. This task is complex, as the court must consider two objectives when assessing the loss. Firstly, the aim of contractual damages is not to punish the defendant. Secondly, it aims to avoid imposing an unfair and excessive liability on the defendant.[265] To achieve both objectives, the court follows the system of compensatory damages.

3.3 How the System of Compensatory Damages Work:

The system of compensatory damages in common law consists of two fundamental components: the legal principles that establish how to measure damage and the legal principles that limit the recovery of damages. The aim of this system is to provide assistance to the court in determining the suitable amount of damages to be awarded to the aggrieved party for the loss incurred due to the breach of contract.

3.3.1 Principles of Measuring the Contractual Damage.

The primary objective of compensatory damages is established in the *Robinson v Harman* decision [1848], which states that "Where a party sustains a loss by reason of a breach of contract, he is, so far as money can do it, to be placed in the same situation, with respect to damages, as if the contract had been performed."[266] This decision sets out the aim of compensatory damages to put the innocent party in the position they would have been in had the breach never occurred.[267]

Furthermore, the influential article "The Reliance Interest in Contract Damages" by Fuller and Perdue has significantly impacted the measurement of contractual damage recovery in the

[265] J Cartwright, 'Remoteness of Damage in Contract and Tort: A Reconsideration' (1996) 55 The Cambridge Law Journal 490.
[266] Robinson v Harman, 154 E.R. 363
[267] McKendrick (n 202)

Common law.[268] Professor McKendrick notes that "Its major impact has been on the terminology which we use when describing the different measures of damages that can be recovered on a breach of contract."[269] Therefore, the English court aims to address the aim of contractual damage by protecting two different interests: expectation loss and reliance loss. These two approaches assist the court in answering the question of what exactly the claimant has lost.

The expectation measure is applied to protect the claimant's performance interest.[270] The court's objective is to compensate the claimant for the loss they would have received if the defendant had fulfilled the contract as promised.[271] Although the claimant did not technically lose the expected gain, they expected this loss because the defendant did not honor their promise. In this situation, the court employs the contractual damage aim, which protects the profit the claimant expected by putting them in "the position they would have been in if the contract had been performed."[272]

Consider the following hypothetical example that demonstrates how the expectation measure works. A store owner, who operates an ice cream store, requires a new commercial ice cream maker as their previous machine was damaged. They entered into a contract with Company A to deliver and install the machine on the same day before 4:00 PM. The store owner emphasised the urgency of the situation, as it was in the summer season, and the store could not operate without the machine. Company A promised to deliver and install the machine before 4:00 PM on the same day. However, they failed to do so and only delivered and installed the machine three days later, constituting a breach of contract.

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[268] Ibid
[269] Ibid
[270] Arvind (n 199)
[271] Ibid
[272] Ibid

So, in this hypothetical scenario, how is the loss determined by applying the expectation measure principle? The loss is the result of the store being unable to operate for three days, causing the store owner to suffer a loss of profit. This is because the loss is the expected profit that the store owner was anticipating to gain from selling the ice cream, which the breach by Company A prevented them from realising.

The reliance measure is applied when the expectation measure is unsuitable for measuring the loss because the expected loss is ambiguous or speculative.[273] Instead, the court protects the claimant's wasted expenditure and aims to put them "in the position they would have been in had the contract never been formed"[274] by compensating for the wasted expenditure incurred when relying on the defendant's promise to perform the contractual obligations. The following example illustrates how reliance interest is applied. A company enters an agreement with a supplier to purchase goods and assumes responsibility for handling shipping and storage, contracting with various companies for these services. However, the supplier fails to fulfil their contract due to manufacturing issues with the goods. Consequently, the company can seek damages for the costs incurred, such as shipment and storage costs, arising from their reliance on the agreement.

[273] Ibid
[274] Ibid

3.3.2 Principles Limiting the Recovery of Damage.

In the analysis of the second component of the compensatory damages system, the focus is directed towards the principles that impose limitations on the available damages. All legal systems acknowledge certain principles that act as limitations on recoverable damage for breach of contract. However, the objective of these principles or what they aim to achieve remains unclear. In attempting to reveal this ambiguity, Professor Guenter Treitel discusses that there are two primary explanations for this.[275] First, these limitations can assist in preventing similar breaches and avoiding private wars in the future.[276] However, Treitel challenged this deterrent idea, as it did not align with some common-law legal rules.[277]

Second, he proposed that the apparent rationale for the need for these limitations is that providing unlimited protection for reliance and expectation interests may serve as an overly powerful deterrent to taking on contractual obligations. Additionally, it could lead to an "undue raising of charges to cover such unlimited liability."[278] There is also reluctance to make a breaching party accountable for large amount of damage when the sum they are paid or owed under the contract is minor compared to the overall loss.[279] Thus, it could be argued that limiting principles of recovery of damage for breach of contract assists in providing a balance between protecting the claimant's interests and not imposing undue liability on the defendant.

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[275] G Treitel, 'Causation' in Remedies for Breach of Contract: A Comparative Account (OUP 1988) https://oxford.universitypressscholarship.com/view/10.1093/acprof:oso/9780198255000.001.0001/acprof-9780198255000-chapter-4 accessed 10 May 2020.
[276] Ibid
[277] Ibid
[278] Ibid
[279] Ibid

Within English law, there are three different principles that limit damages for breach of contract: there must be a causal link between the breach and the loss; the damages must not be too remote; and the claimant must reasonably mitigate the damages. The basis of these three limitations is not clearly defined. There are two different views concerning the roots forming these principles. The majority view holds that these principles serve as legal restrictions on the recovery of damage.[280]

However, this view is challenged by legal theorist Michael Moore and Lord Andrew Burrows.[281] They categorise the principles of limitation, which include causation and remoteness, but exclude the principle of mitigation, as they consider it to fall under the umbrella of causation. Moore highlights that the concept of causation is divided into two aspects, and multiple tests are applied under each of them, both of which are crucial in determining liability. The first aspect, referred to as factual causation or "cause in fact", includes tests such as the but-for test. Moore emphasises that cause, in fact, is perceived by most lawyers as the only original causal component.

The second aspect is known as legal causation or "cause in law." An example test used for this type of causation is remoteness. Burrows acknowledges that it is reasonable to classify both remoteness and causation under the umbrella of cause in law, as "both principles are essentially concerned with the same policy."[282] However, Moore acknowledges that the differentiation between cause in law and cause in fact is less clear. He emphasizes that this is because the cause

[280] Most textbooks on contract law espouse this view.
[281] Michael Moore, 'Causation in the Law' in The Stanford Encyclopedia of Philosophy (Winter 2019 Edition) https://plato.stanford.edu/entries/causation-law/ accessed 2 May 2023; A Burrows, Remedies for Torts, Breach of Contract, and Equitable Wrongs (OUP 2019) https://oxford.universitypressscholarship.com/view/10.1093/oso/9780198705932.001.0001/isbn-9780198705932 accessed 2 May 2023.
[282] Ibid

in law "is an evaluative issue, to be resolved by arguments of policy, or whether it too is a matter of causal fact."[283]

In light of this, the section has been structured accordingly. The following discussion focuses on causation and relevant legal rules. Causation is divided into two elements: the first concerns factual causation and its legal rules in determining the cause in fact, while the second pertains to legal causation and its relevant rules, such as remoteness.

3.3.3 Causation

As stated above the concept of causation is fundamental in limiting the recovery of loss of profit and ensuring a degree of certainty in the common law jurisdiction. The English court relies on causation for two primary reasons. Firstly, the uncertainty of loss of profit is regarded as a causation issue.[284] Thus, the court applies causation and its associated legal rules to ascertain the existence or extent of the loss of profit. Secondly, the court addresses causation issues under various doctrines.[285] Thus, the concept of causation encompasses two aspects. The general requirement of causation and legal rules that limit the recovery of damage. These aspects collectively aid the court in achieving a degree of certainty, as highlighted by Fuller and Perdue's statement that "What is principally revealed in the actual application of the standard of certainty is a judicial disinclination to impose on the defendant liability for those injurious effects of his breach

[283] Ibid
[284] Andrew Burrows (ed), 'Judicial Remedies' in English Private Law (3rd edn, OUP 2013; online edn, 26 Sept 2013) https://doi.org/10.1093/acprof:oso/9780199661770.003.0021 accessed 8 Oct 2020.
[285] Ibid

which do not result directly."[286] Therefore, clarifying the concept of causation, including the requirement and the principle of limiting the recovery of damage, is essential to answering the research question of this thesis, which aims to explore how the common law addresses uncertainty in compensating for lost opportunities that have future gain.

However, the concept of causation in common law is a complex and multifaceted one, primarily due to two reasons. Firstly, the court addresses causation issues under multiple legal doctrines, such as remoteness or mitigation.[287] Secondly, there is a discrepancy between the legal academic and judicial practice in English law regarding the approach to the concept of causation.[288]

Therefore, given the intricacy of the concept of causation, this section seeks to provide clarity and understanding of this fundamental legal concept within the common law system, specifically within the context of English law. This aim is achieved by presenting a comprehensive overview of both the academic and English court approaches to causation. Additionally, this section will explore and discuss the general requirement of causation based on the academic approach, and subsequently scrutinize the legal rules that function as a limitation on the recovery of damage, which is considered an integral aspect of causation.

Academic Approach

Legal philosophers such as Professor Jane Stapleton have advocated for the separation and distinction of causation into two requirements or, as they are referred to, two stages to establish a

[286] Lon Luvois Fuller and William R Perdue, 'The Reliance Interest in Contract Damages: 2' (1937) The Yale Law Journal 373.
[287] Burrows (n 273).
[288] Richard Goldberg, Perspectives on Causation (Hart Publishing 2011) https://portal-igpublish-com.uniessexlib.idm.oclc.org/iglibrary/obj/HARTB0000637 accessed 12 May 2020.

causal link between a wrongful act and the associated harm. Based on this view, the two distinct steps operate independently.[289]

To demonstrate this idea, the distinction between the two stages requires two processes. First, factual causation can be established by allocating the relevant facts related to the breach or wrongful act.[290] Then, the allocated facts should be examined to determine whether the finding facts count as a cause in fact.[291] If the decided fact is not considered a cause, then there is no need for the second stage. In contrast, if the determined facts satisfy the requirement of a cause in fact, then the second stage involves the analysis and assessment the finding facts to determine whether they are characterised as legal causation or within the scope of liability.[292]

The previously discussed academic approach to the two-stage theory of causation has demonstrated its impact not only on legal literature but also on various Common law jurisdictions, including Australia and the United States. For instance, the Australian Civil Liability Act has been influenced by a two-step test of causation. The two steps have been articulated in a manner that is similar to the style of legal academics, maintaining a clear distinction between the two stages. Article D5 highlights this distinction between 'factual causation' and 'scope of liability".[293]

In the United States, the notion of two stages of causation has been adopted and employed in the Restatement (Third) of Torts.[294] Professor Benjamin Zipursky emphasises that "there is actually law on causation and law on scope of liability".[295] In practice, it is notable that the court

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[289] D Hamer, 'Factual Causation and Scope of Liability' (2014) 77 Mod L Rev 155 https://0-doi-org.serlib0.essex.ac.uk/10.1111/1468-2230.12063 accessed 2 June 2021.
[290] J Stapleton, 'Legal Cause: Cause-in-Fact and the Scope of Liability for Consequences' (2001) 54 Vand L Rev 941.
[291] Ibid
[292] Hamer (n 278).
[293] 'A determination that negligence caused particular harm comprises the following elements—(a) that the negligence was a necessary condition of the occurrence of the harm (factual causation), and (b) that it is appropriate for the scope of the negligent person's liability to extend to the harm so caused (scope of liability).' Civil Liability Act 2002 (WA).
[294] Restatement (Third) of Torts: Physical and Emotional Harm § 6, Special Note (2010).
[295] BC Zipursky, 'Foreseeability in Breach, Duty, and Proximate Cause' (2009) 44 Wake Forest L Rev 1247.

has appreciated the effort to adopt and articulate a modern approach towards causation. For example, regarding the two-stage approach, the Court of Appeals for the Tenth Circuit in *Safe Streets All. v Hickenlooper* stated, "It is my hope, however, that the Supreme Court will one day cast aside the confusing and discredited notion of proximate cause. A much sounder approach to addressing the same issues can be found in the discussions of factual cause and scope of liability in Chapters 5 and 6 of Restatement (Third) of Torts".[296] Moreover, in 2014, the Supreme Court of Iowa ruled in *Asher v OB-Gyn Specialists* that the district court had applied the causation test incorrectly, and that the proper test that should have been applied as it is articulated in the Restatement (Third) of Torts.[297] The court confirmed its approach by stating, "As a result, we adopted the standard as articulated by the drafters of the Restatement (Third) of Torts … factual cause and scope of liability (a more nuanced term for what was previously known as proximate cause) are addressed separately".[298] Thus, the American court's approach regarding causation has been influenced by the modern approach to causation, as we can observe in the decision of the Supreme Court of Iowa.

English Court Approach

The position of English law regarding the causation approach is to be understood differently from the academic approach previously mentioned. There is a distinction between causation in the legal academy, as the concept appears in textbooks, and causation in court practice.[299] In the

[296] Safe Streets Alliance v Hickenlooper 859 F 3d 865, 914 (10th Cir 2017).
[297] Asher v. OB-Gyn Specialists, P.C., 846 N.W.2d 492 (Iowa 2014)
[298] Ibid
[299] Goldberg (n 277).

textbook on the law of contracts, the distinction between cause in fact and legal causation is noticeable.[300] However, a definitive line between the two is missing in court practice.[301]

It seems that the English court has not been influenced by the distinction between a cause in fact and scope of liability, as a legal academic such as Professor Stapleton has emphasised.[302] One reason behind this might be Lord Hoffman's observation that "few judges are regular readers of academic publications because judges seldom do any legal research of their own".[303] Nevertheless, Lord Hoffman attempted to elucidate how the English court approached the concept of causation.[304] Based on his illustration, the English court considers causation only when legal rules require a causal requirement to impose liability.[305] For example, to hold the defendant responsible for a breach of contract, the claimant must affirmatively demonstrate that the breach has caused the loss.[306] In other words, the concept of causation is only concerned with the court when particular legal rules, such as negligence and a breach of the contract, require causal requirements to hold the defendant legally liable.[307] As a derivative of this step, the court will assess the facts of a particular case to determine whether they can fulfil the causal requirement.

However, Lord Hoffman admitted that the process of considering causal links is based on two stages, the first of which involves identifying the facts, and then examining whether the facts satisfy the causal requirement.[308] Lord Hoffman argued that this two-step process is just a fundamental element of any 'decision-making' process, which is essentially different from

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[300] For example, the valuable book of Lord Andrew Burrows 'Remedies for Torts, Breach of Contract, and Equitable Wrongs (4th Edition)'
[301] Goldberg (n 277).
[302] Lord Hoffman comments that 'Why does causation appear to be an exception to the current practice of taking note of academic work? Goldberg (n 277).
[303] Ibid
[304] Ibid
[305] Ibid
[306] Ibid
[307] Ibid
[308] Goldberg (n 277).

maintaining that causation should be understood in terms of two legal concepts: ‘cause in fact’ and ‘scope of liability’.[309]

After outlining the diverse approaches to causation and examining how the academic and English court practices approach the concept, the ensuing discussion delves further into the academic approach. Therefore, the following sections scrutinize two causation aspects: factual and legal.

3.3.3.1.1 Factual causation

The primary step in attributing liability via a causal link is establishing factual causation, which entails that the defendant's tort or breach of contract has led to the claimant's loss.[310] In this context, factual causation involves analysing the breach to ascertain if it has indeed caused a loss for the claimant. It is crucial to acknowledge that factual causation in contract cases is generally less contentious in breach of contract situations as opposed to tort cases.[311] This is primarily because establishing factual causation in a breach of contract is typically a more straightforward process.[312]

In such cases, the court's responsibility is to ascertain whether there is an action of breach based on the presented facts and subsequently examine and assess if these facts can contribute to establishing factual causation.[313] Nevertheless, if the court does not explicitly invoke factual causation by articulating and stating it clearly in limiting the availability of damages, it does not necessarily imply that cause-in-fact has not played a significant role in limiting the recovery of

[309] Ibid
[310] Moore (n 270).
[311] Burrows (n 273)
[312] Ibid
[313] Summers, Andrew, 'Commonsense Causation in the Law' (2018) Oxford Journal of Legal Studies.

damages. In fact, the concept of factual causation and its relevant legal rules and tests provide the court with the authority to limit the recovery of damages, as will be observed below.

In general, causation in practice is not as straightforward as it might seem, particularly when the loss involves physical object destruction, such as goods.[314] This complexity is evident in the ongoing debate among legal scholars regarding factual causation. Various methods and approaches exist to examine and determine cause-in-fact, with the but-for test being the most prevalent. This test aims to show that the relevant harm would not have occurred "but for" the defendant's wrongful conduct.[315] The but-for test involves asking hypothetical questions about the facts to establish a causal link.[316]

The application of this test consists of two processes: identifying the events behind the breach and demonstrating such factual events; then judging the event in light of the attributed responsibility.[317] Specifically, it is crucial to determine whether the defendant's breach was the primary cause of the loss or if the loss would have occurred anyway, even without the defendant's breach.[318]

An interesting case illustrating how the court considers factual causation is *Automotive Latch Systems Ltd. v Honeywell International Inc*. Although the court found that the claimant failed to establish a breach of contract, it examined factual causation in a hypothetical sense (i.e., "What if the defendant's breach was unlawful?").[319] The court seemingly applied the but-for test without explicitly framing it as such.

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[314] Ibid
[315] Peter Nash Swisher, 'Causation Requirements in Tort and Insurance Law Practice: Demystifying Some Legal Causation Riddles' (2007) 43 Tort Trial & Ins Prac LJ 1.
[316] Moore (n 270).
[317] Hamer (n 278).
[318] Ibid
[319] Automotive Latch Systems Ltd v Honeywell International Inc [2008] WL 4125383

It is unclear whether the court invoked the issue of causation in this case, as it was determined to be an unnecessary aspect after the court found that there was no breach. However, it seems the court takes this approach to justify and support its ruling by stating that, even if the claimant succeeds in establishing that there was a breach by the defendant, the claimant will fail to succeed in showing a causal link between the breach and the loss.

Although the but-for test is widely used, it has faced criticism for its insufficiency in practice.[320] Professor Michael Moore identifies four issues with the test's application.[321] The first problem involves evidence proof, as counterfactuals are inherently challenging to prove with certainty. The second problem is the test's vagueness, as it assumes a hypothetical act to replace the defendant's act, potentially yielding different answers. The third and fourth issues concern additional sufficient events, specifically in coincidence and overdetermination cases. These issues are more commonly associated with tort claims than breach of contract claims.

To address the but-for test's limitations, legal scholars, such as Professor Richard Wright, have attempted to modify and develop the test.[322] Wright proposed the NESS test (Necessary Element of a Sufficient Set) to determine whether the breach is a necessary element of the conditions sufficient for the loss.[323] However, the English court has not adopted this modification.[324]

In some cases, the court has deviated from the but-for test in favor of a more appropriate approach, such as the material increase of risk doctrine. The court's rationale for not applying the but-for test is based on policy grounds, as justice may not be achievable with such a test. Lord

[320] Stapleton (n 279).
[321] Moore (n 270).
[322] Burrows (n 273).
[323] Ibid
[324] Ibid

Nicholls in *Fairchild v Glenhaven Funeral Services Ltd*. states that "On occasions the threshold "but for" test of causal connection may be overexclusionary. Where justice so requires, the threshold itself may be lowered. In this way, the scope of a defendant's liability may be extended".[325] Thus, in achieving justice, the court is willing to accept that factual causation has been proven and disregard the but-for test.

An alternative approach, as demonstrated in tort law through the case of *McGhee v National Coal Board*, illustrates judicial flexibility in causation that could be pertinent to contract law. [326] In McGhee, the House of Lords moved away from the stringent but-for test in favour of the material increase of risk doctrine. [327] This doctrine acknowledges the difficulties in establishing causation via conventional methods, particularly in scenarios marked by evidential complexities. The ruling in McGhee highlighted a judicial readiness to adjust causation benchmarks, recognizing that rigid adherence to the but-for test could result in inequitable outcomes.[328] Such a willingness to adapt causation principles to ensure fairness implies that the material increase of risk doctrine's underlying principles might be effectively incorporated into contract law, especially in instances where the but-for test is insufficient.

3.3.3.1.2 Legal Causation

Legal causation operates as a fundamental mechanism in limiting a defendant's liability concerning contractual damages.[329] In evaluating the defendant's liability, courts initially establish factual causation, which ascertains whether the defendant's action of the breach directly led to the

[325] Fairchild v Glenhaven Funeral Services Ltd (t/a GH Dovener & Son), [2003] 1 A.C. 32
[326] McGhee v National Coal Board, [1973] 1 W.L.R. 1
[327] Ibid
[328] Ibid
[329] Hart and Honoré (n 5) 311 - 324

claimant's loss. Following this determination, courts apply legal causation and its associated legal rules to assess the extent of the defendant's legal responsibility.[330]

According to Professor Burrows, legal causation encompasses two distinct components that aid courts in determining whether the breach has legally caused the claimant's loss.[331] Firstly, the identification of an intervening cause entails determining whether an external factor, rather than the defendant's breach of contract, has led to the claimant's loss.[332] In essence, the intervention of another cause could alter the outcome of the case.

Secondly, the assessment of remoteness establishes the scope of liability in breach of contract cases.[333] Under this principle, a defendant's liability is limited to the extent that the consequences of the breach were within the contemplation of both contracting parties at the time the contract was formed. This ensures that defendants are held responsible only for reasonably foreseeable damages.

Lastly, the mitigation rule constitutes another crucial component within the context of legal causation by examining whether the aggrieved party could have taken measures to avoid or minimise the loss.[334] This concept effectively reduces the defendant's liability if it is determined that the claimant contributed to the final loss they suffered.

Examining these legal principles addresses the second research question and demonstrates how English courts resolve the issue of uncertainty surrounding lost profit damages. By evaluating such damages within the context of these legal rules, courts ensure that they do not impose excessive

[330] Ibid
[331] Burrows (n 273).
[332] Ibid
[333] Ibid
[334] Ibid

liability on the defendant. Furthermore, these principles provide certainty by holding the defendant liable only for the consequences directly attributable to their breach while considering.[335]

A question arises regarding the basis on which the court determines if an breach has legally caused the loss. Similar to the controversy surrounding factual causation, as discussed in the previous section, legal scholars and courts also diverge on the criteria that the court should use to establish legal causation. In the United States, the court determines legal causation based on legal policy.[336] For example, a decision by the Tennessee Supreme Court illustrates that "proximate or legal cause is a policy decision made by the legislature or the courts to deny liability".[337]

In contrast, English law adopts a different approach, wherein the court seeks to attribute legal causation based on common sense. For instance, the House of Lords' decisions *in Stapley v Gypsum Mines Ltd.*[338] articulated and acknowledged the notion of common sense. Lord Reid expressed this by stating, "To determine what caused an accident from the point of view of legal liability is a most difficult task. ... The question must be determined by applying common sense to the facts of each particular case."[339]

Furthermore, Lord Wright elucidated the meaning of common sense in *Yorkshire Dale Steamship Co Ltd v Minister of War Transport.*[340] According to Lord Wright, "This choice of the real or efficient cause from out of the whole complex of the facts must be made by applying common sense standards. Causation is to be understood as the man in the street, and not as either the scientist or the metaphysician, would understand it." Thus, Lord Wright's opinion indicates

[335] Ibid
[336] Swisher (n 302).
[337] Ibid
[338] Stapley v Gypsum Mines Ltd, [1953] A.C. 663
[339] Ibid
[340] Summers (n 302).

that the court will approach the case and make its decision regarding the issue of legal causation based on what an ordinary person's understanding of a causal deduction might be.

3.3.3.1.3 Intervening Cause

An intervening cause refers to "that act or omission [of the defendant] which, in a natural and continuous sequence, unbroken by an efficient intervening cause, produces the event, and without which that event would not have occurred".[341] Consequently, legal scholars have identified three categories of intervening causes that the court considers, which are natural events, the conduct of a third party, and the conduct of the claimant.[342]

Intervening natural events: An apt example illustrating the court's approach regarding intervening natural events can be found in *Monarch Steamship Co Ltd. v A/B Karlshamns Oljefabriker*, a breach-of-contract case.[343] The claimant sued the defendant for damages resulting from a breach of contract, asserting that the defendant's breach had caused the loss. In this case, the claimant contracted with the defendant to provide a vessel for transporting a shipment of soya beans to Sweden. However, the defendant delayed the delivery of the ship, as it was deemed unseaworthy. During this delay, World War II broke out, rendering it impossible for the ship to arrive in Sweden. Consequently, the claimant was compelled to hire another vessel and sued the defendant for damages.

The defendant argued that the loss had not been caused by its breach of contract but by the intervening natural event, which was the outbreak of War. The court found that the intervening

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[341] Burrows (n 273).
[342] For example, A Burrows, Remedies for Torts, Breach of Contract, and Equitable Wrongs (OUP 2019) https://oxford.universitypressscholarship.com/view/10.1093/oso/9780198705932.001.0001/isbn-9780198705932 accessed 2 May 2021; M Chen-Wishart, Contract Law (OUP 2012).
[343] Monarch Steamship Co Ltd v A/B Karlshamns Oljefabriker, [1949] A.C. 196

event transpired "at a time when war is likely to occur."[344] Therefore, the intervening natural event had not broken the chain of causation because the claimant was expected to anticipate the likelihood of such an event.[345]

This case offers a suitable example that demonstrates how the court may simultaneously utilize different legal rules under the broader concept of legal causation. In this case, the defendant attempted to limit their liability by asserting that the intervening natural event, the outbreak of World War II, was the legal cause of the loss. However, the court examined the occurrence of the natural event and assessed its sufficiency to break the chain of causation in line with the foreseeability test. The court applied this test to determine whether the natural event could break the chain of causation or if the defendant should have foreseen the occurrence of war, as it was likely to transpire.

Intervening conduct of a third party: the second intervening cause that may break the causal connection between the claimant's loss and the defendant's conduct is third-party conduct. This type of intervening cause has been categorized into two types: in the first case, the defendant has an obligation under the contract to guard against third-party conduct, such as protecting against theft during the performance of the contract, as the forthcoming case will illustrate; in the second case, the defendant has no such obligation.

The case of *Stansbie v Troman* exemplifies the English court's perspective regarding situations wherein the defendant is legally responsible under the contract to guard against a third party's actions.[346] In this case, the court addressed the issue of the intervening conduct of a third party, specifically, whether such conduct breaks the chain of causation. In this instance, the

[344] Ibid
[345] Ibid
[346] Stansbie v Troman, [1948] 2 K.B. 48

claimant hired a decorator for their house. The decorator needed additional wallpaper during the work, so they left the house without locking the door. During the decorator's absence, which totalled several hours, a thief entered the house through the unlocked door and stole valuable property from the claimant.

Consequently, the claimant brought a claim against the decorator, alleging a breach of contract and seeking damages. The defendant attempted to excuse themselves from liability, arguing that the third party's actions broke the chain of causation. In examining whether the action of the third party broke the causal link between the breach and the loss, the court found it did not, as the defendant had an obligation to guard against third-party conduct.

The second type of intervening cause involving third-party conduct stands in contrast to the first type, wherein the defendant is not contractually obligated to guard against a third party.[347] In this scenario, case law differentiates between a wrongful act by a third party and a non-wrongful act concerning the breaking of the chain of causation. Lord Burrows has clarified this distinction by stating, "The policy is therefore one of showing more leniency towards the defendant if a third party's intervening conduct has been wrongful, so that the claimant can claim against him, than it is if non-wrongful. Moreover, the greater the culpability of the third party's wrong, the greater the leniency."[348] Similar to the intervention of a natural event, the wrongful or non-wrongful act will not break the chain of causation if it is only likely to intervene. In this context, the court assesses the likelihood in line with the foreseeability test, as discussed earlier in the *Monarch Steamship Co Ltd. v A/B Karlshamns Oljefabriker* case.

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[347] A Burrows, Remedies for Torts, Breach of Contract, and Equitable Wrongs (OUP 2019) https://oxford.universitypressscholarship.com/view/10.1093/oso/9780198705932.001.0001/isbn-9780198705932 accessed 2 May 2021.

[348] Ibid

Intervening conduct of the claimant: Under this principle, the intervening act of the claimant will only break the chain of causation if it is unreasonable.[349] A good explanation of such an unreasonable act by a claimant that breaks the causal connection between the breach and the loss can be found in the *Quinn v Burch Bros* case. In this case, the defendant was in breach of the contract by not providing the claimant with a step ladder, which resulted in the use of a trestle by the claimant to carry out the work.[350] Consequently, the claimant fell and was injured. The Court of Appeal found that the claimant's use of the trestle was unreasonable; therefore, the chain of causation between the breach of contract and the claimant's injury had been broken by the claimant's act.[351] Similar such damage had also been denied in *Lambert v Lewis.* Here, the House of Lords found that the claimant's continuation of using the broken trailer coupling was an intervening cause that broke the causal connection between the breach of contract and the loss.[352]

3.3.3.2 What is the Essence of Causation

Having examined the law of causation, three primary takeaway points elucidate the role of causation and the appropriate legal rules under causation that the court often refers to in order to resolve and limit the recovery of loss of profit. These points should be emphasised before delving into a detailed discussion of the role of remoteness in limiting the available damages.

First, as Hart and Honoré highlighted in their book, Causation in the Law, the concept of causation in a breach of contract is underpinned by two fundamental rules.[353] The first rule establishes the existence of liability by examining whether the breach in question has indeed

[349] Mindy Chen-Wishart, Contract Law (OUP 2012).
[350] Quinn v Burch Bros (Builders) Ltd, [1966] 2 Q.B. 370
[351] Ibid
[352] Lambert v Lewis, [1982] A.C. 225
[353] Hart and Honoré (n 5) 311

caused the loss, while the second rule determines the extent of liability, referring to the proportion of the loss attributable to the breach.[354]

The second point to consider is that the extent of liability is often connected to and explored within the framework of legal causation.[355] In evaluating the extent of liability, Lord Glidewell LJ identified three elements that can aid in determining whether a breach of contract constitutes the effective cause of the loss. The first element involves considering the presence of an intervening cause; subsequently, the likelihood of such an intervention can be scrutinized based on the doctrine of foreseeability, and this examination should employ the principle of common sense.

The third point, which emerges from case law, highlights that the court frequently emphasises the concept of remoteness when contemplating limitations on liability for loss of profit, as compared to intervening causes and mitigation. In fact, Hart and Honoré assert, "When, however, compensation is claimed for loss of profits or other economic advantages, the court is not concerned with assessing the relation between an earlier act and a later event in light of some third factor." This stresses the significance of remoteness in the context of limiting liability for loss of profit losses as an issue requiring special treatment.'[356]

3.3.4 Remoteness

Remoteness serves as the second legal rule that limits the recovery of damages. Recalling the statement by Hart and Honoré mentioned earlier, when the court examines the legal cause of a breach resulting in the loss of future profit, its primary concern is not with the intervening third

[354] Ibid
[355] Ibid
[356] Ibid

factor that may bear responsibility. This is because the action constituting the breach has already occurred, but the loss has not yet materialized; instead, it is likely to occur in the future.

In addressing the recovery of loss of profit as damages, English courts deal with a distinct scenario compared to the typical situation involving the occurrence of a breach resulting in a loss. In the latter case, the court's duty is to investigate the relationship between the breach and the loss. However, when a claim involves loss of profit, the claimant argues that the breach occurred, but the loss has not yet materialised, though it will be in the future. In such cases, there is a need for a specialised tool to aid the court in examining the extent of this hypothetical loss that, according to the claimant's argument, will become real in the future. English law addresses this scenario by applying the remoteness legal rules to determine if the loss of profit is the legal consequence of the breach. [357]

Thus, remoteness is mainly associated with restricting the recovery of loss of profit.[358] The English court's common law invented and designed the remoteness principle to limit the recovery of lost profit as laid down in *Hadley v. Baxendale* [1854] for the purpose of not "imposing an unreasonable burden of liability on a defendant".[359]

Hadley v. Baxendale has made a major contribution to common law of contract.[360] Professor Wayne Barnes describes Hadley as "a triumph of the common law system".[361] The case reaches all the common law jurisdictions; furthermore, some states have codified the rules of the

[357] Two terminologies have the same purpose, which is Remoteness and Foreseeability. However, the House of Lords in The Heron II had criticized the use of reasonable foreseeability in the contract. Consequently, we shall use the term of 'Remoteness'.
[358] The foundation of remoteness rules in Hadley v. Baxendale (1854) has related to loss of profit claim. Also, the reshaping of remoteness in case law, such as in Victoria Laundry (Windsor) Ltd v Newman Industries Ltd and in Koufos v Czarnikow Ltd, The Heron II had associated with loss of profit claim. However, in general the rule covers the special damages, which loss of profit is considered one of them.
[359] Burrows (n 333).
[360] 'It has been widely celebrated as a landmark in the law of contracts' Wayne Barnes, 'Hadley v Baxendale and Other Common Law Borrowings from the Civil Law' (2004–2005) 11 Tex Wesleyan L Rev [v].
[361] Ibid

Hadley v Baxendale decision, such as the United States and India.[362] Over the years, there has been some modification to the rules of remoteness with respect to recovering lost profit by the English court, and some states have followed the English court approach.[363] Eventually, the English court formulated a new approach in line with the classical approach.[364]

3.3.4.1 The English court position prior to *Hadley v Baxendale*

Before delving into the discussion and analysis of the development of the remoteness principle, which was first established in *Hadley v Baxendale* and later developed and has further interpretations in subsequent cases. However, it is important to present a quick background on how courts have dealt with lost profit cases before *Hadley v. Baxendale*. This is the aim of understanding what the law was like before this case and why it needed to be changed.

Before the *Hadley v Baxendale* decision, the court mainly sought to protect the aggrieved party's expectation interest, as established in the *Robinson v Harman* case. This implies that before the remoteness rule existed, the English court held the breaching party liable for any losses suffered by the aggrieved party, regardless of how unforeseen these losses were.[365] Consequently, the jury would invariably take into account the loss of profit when determining the amount of damage.[366] To illustrate further, the case of *Black v Baxendale* [1847] serves as a prime example of how the

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[362] James Edelman and Lauren Bourke, 'Hadley v Baxendale' in Obligations VIII, Revolutions in Private Law (University of Cambridge 2016) 19–22. The rules had influenced the drafting of contract in India contract law and uniform commercial code in the U.S.

[363] Lord Andrew Burrows manifest that 'The traditional contract remoteness test has been dealt with in three leading cases.' Burrows (n 333).

[364] 'English law currently incorporates two different approaches to determining when a harm is too remote a consequence of a breach to be recoverable ... The second is much more recent, and first appeared in 2008 in The Achilleas' Arvind (n 199) ch 16

[365] Charles T McCormick, 'The Contemplation Rule as a Limitation upon Damages for Breach of Contract' (1935) Minnesota Law Review 992 https://scholarship.law.umn.edu/mlr/992.

[366] Ibid

law was introduced before the concept of remoteness in terms of recovering lost profits.[367] This is due to the fact that the *Black v Baxendale* [1847] case was adjudicated seven years prior to Hadley v Baxendale, and it had similar facts, issues, and the same defendants, and was even heard by the same judge.

The case in question involves a claimant who had a contract with a defendant to deliver certain goods from London to Bedford. The objective was to sell these goods on the Bedford Saturday market.[368] However, the defendant defaulted on delivery within the agreed-upon time frame. Consequently, both the claimant and his agents, who had journeyed to Bedford with the expectation of selling goods, were subjected to substantial inconvenience.[369] They also incurred additional costs, wasted time, and lost potential profits that could have been acquired from selling goods in the Bedford market.[370]

As such, the court instructed the jury to decide whether these losses were reasonable and, based on this decision, determined the proper amount of damage for these losses, including the loss of profit.[371] The jury determined that the defendant was responsible for all losses, including lost profits, and granted the claimant substantial damage.[372]

This case emphasises two primary elements. First, the losses arising from the contract breach were evaluated based on the causation concept, which involved assessing the reasonableness of the loss as a direct consequence of the breach.[373] This evaluation was granted to

[367] Black v Baxendale and Others (1847) 154 ER 174
[368] Ibid
[369] Ibid
[370] Ibid
[371] Ibid
[372] Ibid

the jury, as Alderson, B articulated, "Whether these expenses were reasonable was entirely a question for the jury." Professor McCormick emphasized this point by stating, "Before the eighteenth century, the jury, by and large, had a free discretion when money damages were claimed to determine the amount of the award."[374] This indicates that the jury had the ultimate authority to decide which losses could be compensated and the amount of money to be awarded for such losses.[375]

Second, there are no distinct treatments or rules to manage the uncertainty associated with the loss of profit. The loss of profit was treated like any other loss; that is, if the jury deemed the evidence persuasive, then the loss of profit would be awarded accordingly.[376] This approach was validated by Alderson in the *Waters v Towers* [1853] case and was decided a year prior to *Hadley v Baxendale*.[377] He asserted, "The jury are not bound to adopt any specific contract ... ; but if reasonable evidence is given that the amount of profit would have been made as claimed, the damages may be assessed accordingly."[378]

However, the evaluation of what constitutes reasonable evidence was left to the jury to determine its reasonableness, as exemplified in the *Black v Baxendale* [1847] case mentioned earlier. Reflection on the judicial approach before *Hadley v Baxendale*, Professor McCormick noted that "one who failed to carry out his contract was, so far as legal theory went, liable for any

[374] McCormick (n 348).
[375] Edelman and Bourke (n 345).
[376] Ibid
[377] Waters v Towers 8 Exch 401
[378] Ibid

and all resulting loss sustained by the other party, however unforeseeable such loss may have been."[379]

This historical investigation illuminates how the loss of profit before the Hadley ruling was subject to unlimited liability and was recoverable without any restrictions. This was primarily because of the absence of a legal rule capable of isolating the elements of profit loss from the jury's overall loss assessment.[380] This practice troubled judges, as several in the *Black v Baxendale* [1847] case expressed disagreement with the amount of damage awarded by the jury.[381] Parke B. explicitly stated, "I think there ought to be no rule ... The damages given by the jury were too large" Similarly, Pollock, C. B. remarked, "The jury was wrong in giving too large an amount of damages"[382]

Hence, one of the driving reasons leading the English court to establish the rule of remoteness was "the outgrowth of a widened control by the judge over the jury."[383] Consequently, a more cautious approach to claims for lost profits appeared with the *Hadley v Baxendale* ruling. The court substituted the jury's power to assess whether the lost profit was reasonable using the principle of remoteness, as we shall explore in the following section. This long-standing approach, which is currently accepted by all common law jurisdictions, limits the recovery of lost profits to what could be "in the contemplation of both parties."[384] In addition, some jurisdictions have even codified Hadley v Baxendale's decision into law.

[379] McCormick (n 348).
[380] Ibid
[381] Black v Baxendale and Others (1847) 154 ER 174
[382] Ibid
[383] McCormick (n 348).
[384] Hadley v Baxendale, 156 E.R. 145

Upon examining the historical context of *Hadley v Baxendale*, it is evident that the English court's rationale for limiting the recovery of lost profits is at odds with that of Saudi courts. This derives from the fact that prior to the establishment of the rule of remoteness, the recovery of lost profits was allowed without any restriction. However, such recovery became limited following the introduction of the remoteness rule as we shall see below. Conversely, under Saudi law, claims for the loss of profits have historically been rejected because of uncertainties.

The English court, on the other hand, restricts the recovery of lost profits to those which could have been reasonably foreseen at the time the contract was made. This approach derives from the English court's belief that it is inappropriate to impose liability for all losses caused by the defendant under the common law's expectation interest principle. As Professor Andrew Robertson suggests, the court's underlying intention in formulating the remoteness principle is that "the defendant should have a reasonable opportunity to consider the risks that might arise".

3.3.4.1.1 The Case of Hadley v Baxendale and Its Evolution

Reasonable contemplation test: the remoteness principle, which has been celebrated and accepted across common law jurisdictions, was born in 1854 in a landmark case, *Hadley v Baxendale*, heard by the English court.[385] Professor Robert Hillman explains that "Hadley v Baxendale may be the most famous contracts case. Perhaps it is one of the most famous cases in any field of Anglo-American jurisprudence."[386] The fame of *Hadley* comes from its worthy legal opinion, which has distinguished between direct and indirect losses and also has founded the

[385] Barnes (n 343).
[386] Robert A Hillman, Principles of Contract Law (2nd edn, 2009) 18.

remoteness principle, which performs as a tool in judging whether lost profit should be recovered or not.[387]

The claimant (*Hadley*) was the owner of a corn mill operated by a steam engine in Gloucester, England.[388] The mill's crankshaft was broke, and when the claimant discovered the broken shaft, he ordered a new one from the manufacturer.[389] The manufacturer needed to have the damaged part to ensure that the new shaft was compatible with the mill, so the claimant contracted with the defendant, *Baxendale*, a local carrier, to have the damaged shaft delivered to its manufacturer in Greenwich.

The defendant agreed to deliver the broken part in one day.[390] However, rather than delivering it the next day, the defendant negligently delivered it after five days.[391] As a result, the claimant's mill was stopped from working during the entire period, which caused the claimant to lose the profit for that period.[392] Thus, the claimant brought a breach of contract claim and sought a lost profit award due to the negligent delay by the defendant.

Baron Alderson delivered his judgment in this case, which is recognized as the most frequently cited opinion in contract law.[393] This is because his opinion formulates the remoteness principle as expressed in the following rule:

> if the special circumstances under which the contract was actually made were communicated by the plaintiffs to the defendants, and thus known to both parties, the damages resulting from the breach of such a contract, which they would reasonably contemplate, would be the amount of injury which would ordinarily follow from a breach of contract under these special circumstances so known and communicated. But, on the other hand, if these special circumstances were wholly

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[387] Florian Faust note that 'Hadley's fame is based on the fact that the case formally introduced the rule of foreseeability into the common law of contract...' Barnes (n 343).
[388] Hadley v Baxendale, 156 E.R. 145
[389] Ibid
[390] Ibid
[391] Ibid
[392] Ibid
[393] Ibid

> unknown to the party breaking the contract, he, at the most, could only be supposed to have had in his contemplation the amount of injury which would arise generally, and in the great multitude of cases not affected by any special circumstances, from such a breach of contract. For, had the special circumstances been known, the parties might have specially provided for the breach of contract by special terms as to the damages in that case; and of this advantage it would be very unjust to deprive them.[394]

As a result, the court determined *Baxendale* was not liable for *Hadley's* lost profit. This raises the question: Why and how did the English court change its method in the Hadley v Baxendale decision, awarding lost profit and imposing the remoteness principle as a limitation on such damages?

In reaching this conclusion, Anderson B examined what the defendant delivery company might have been aware of when entering the contract. The court established that the defendant knew two things: the item was a broken crankshaft, and the claimant owned the mill. These points were considered when the contract was formed. However, the court found that the defendant could not have known that the mill would cease operations while the crankshaft was being repaired. It would have been reasonable at the time of the contract's creation to assume that the mill possessed a spare crankshaft. Consequently, the claimant should have informed the defendant of the particular circumstances, including the unavailability of a spare shaft and the consequent closure of the mill, when the contract was made.

The court's perspective is that it is not proper to expect the carrier to take a high level of precaution when there is no expression or prior communication from the sender to the carrier about the high value of the package.[395] In that instance, the carrier will spontaneously deal with the package as of normal value and not as of high value. Thus, it is not acceptable to impose liability

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[394] Hadley v Baxendale, 156 E.R. 145

[395] Jeffrey M Perloff, 'Breach of Contract and the Foreseeability Doctrine of Hadley v. Baxendale' (1981) 10 J Legal Stud 39

on the carrier because he could not precisely anticipate how valuable the package was to the sender, especially without having been notified by the sender.[396]

Another understanding of the court's perspective is that it is unreasonable to expect the carrier to exercise a high level of precaution without prior communication or indication from the sender regarding the package's high value. In such cases, the carrier would naturally treat the package as having normal value rather than high value. As a result, it is inappropriate to impose liability on the carrier, as they could not accurately anticipate the package's importance to the sender, particularly in the absence of any notification from the sender. Accordingly, Professor Mindy Chen-Wishart elucidates the underlying objective of the Hadley ruling:

> "The external point of view regards the remoteness limit as aimed at alleviating the potential harshness of liability on a defendant if it is imposed irrespective of the foreseeability of the loss, the disproportion between the contract price and the size of the liability, and the defendant's ability to bear or bargain around it."[397]

Two Limbs of *Hadley v Baxendale*: the remoteness rules established in the *Hadley v Baxendale* decision have been divided into two separate rules. However, as will be discussed later in this chapter, several decisions have been made as if there is only one rule.[398] Lord Andrew Burrows notes that the rules are not "mutually exclusive", but they are "overlapping".[399] To present a clear demonstration of how the *Hadley v Baxendale* rules perform, the following paragraphs explore them separately, then an illustration of how these rules merge into one rule is presented.

The first rule discussed is that the aggrieved party is entitled to recover general damage, which is damage that "aris[es] naturally, i.e., according to the usual course of things, from such

[396] Ibid
[397] Chen-Wishart (n 335).
[398] Such as Victoria Laundry (Windsor) Ltd v Newman Industries Ltd (1949)
[399] Burrows (n 333).

breach of contract itself".[400] In light of losses resulting from ordinary events, the aggrieved party can recover these losses even if they were not in the contemplation of the contracting parties when they formed the contract.[401]

To illustrate the application of this rule in a hypothetical scenario, consider a case where a breach of contract has occurred, resulting in losses for the aggrieved party. The losses amount to 100, which represents the difference between the contract price of 100 and the market price of 200 due to the breach. By applying the first rule established in *Hadley v Baxendale*, the aggrieved party would be entitled to receive the difference in prices as general damages.[402]

The second rule pertains to the so-called consequential damages, also known as indirect damages, which do not arise naturally from the breach of the contract. In other words, consequential damages "are the damages above and beyond general damages that flow from a breach as a result of the buyer's particular circumstances."[403]

The second rule is set to explain when the non-breaching party is entitled to recover the loss, which is only if the loss was "such as may reasonably be supposed to have been in the contemplation of both parties, at the time they made the contract, as the probable result of the breach of it".[404] This is known as the reasonable contemplation test of remoteness. *Hadley v Baxendale*'s second limb's innovation was meant to impose limitations on the recovery of consequential loss.[405] The contemplation test in this regard was intended to assess whether the

[400] Hadley v Baxendale, 156 E.R. 145
[401] Thomas A Diamond and Howard Foss, 'Consequential Damages for Commercial Loss: An Alternative to Hadley v Baxendale' (1994) 63 Fordham L Rev 665 https://ir.lawnet.fordham.edu/flr/vol63/iss3/1 accessed 17 Jan 2021.
[402] Ibid
[403] Ibid
[404] Melvin Aron Eisenberg, 'The Principle of Hadley v. Baxendale' (1992) 80 Calif L Rev 563
[405] Arvind (n 199).

special events that caused the consequential loss were communicated in advance to the defendant to make him aware when the contract was made.[406]

In applying both rules to the present case, *Hadley* failed to meet the criteria for either the first or second rule concerning damages. Regarding the first rule, the loss incurred was not classified as a general damage. During that period, it was uncommon for the absence of a shaft to disrupt operations for mill owners, who usually had spare parts available.[407] However, consider a scenario where *Hadley* incurs additional costs for expedited shipping, these costs could be recoverable as general damage under the first rule, being a natural consequence of the breach.

Regarding the second rule, *Hadley* also falls to meet its criteria. The special loss was not mutually contemplated by both parties. The defendant could not have reasonably foreseen that the mill would remain non-operational until the shaft was delivered to the claimant.[408]

Consequently, recovery of consequential damages only occurs if such loss was in the parties' contemplation at the time the contract was formed. Because the nature of this loss involves exceptional circumstances, these circumstances should be communicated to the performer of the contract to enable him to take a greater level of precaution as justification for the imposition of liability in the case of a breach.

Eventually, the common law rules limiting the recovery of damage that have been laid down in the Hadley decision have been codified in many common law jurisdictions.[409] For example, the rules were articulated as general damage and consequential damages in the Sale of

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[406] Ibid

[407] Melvin A Eisenberg, 'The Principle of Hadley v Baxendale' in Foundational Principles of Contract Law (New York 2018; online edn, Oxford Academic, 18 Oct 2018) https://doi.org/10.1093/oso/9780199731404.003.0019 accessed 21 August 2023.

[408] Hadley v Baxendale, 156 E.R. 145

[409] Adam Kramer, An Agreement-Centered Approach to Remoteness and Contract Damages (Hart Publishing 2005).

Goods Act in English law.[410] Similarly, in US law, the codification of the Hadley rules is located in Article 2 of the Uniform Commercial Code (UCC).[411] However, it is notable that the language in the article differs from the language in Hadley. Professors Thomas Diamond and Howard Foss state in a clarification, "Courts interpreting section 2-715(2)(a) have tended to adopt the common law approach of addressing the issue of consequential damages under the Code as a question of foreseeability, allowing recovery if damages are foreseeable and denying recovery if they are not."[412]

3.3.4.2 Foreseeability Doctrine

The common law establishing and developing the notion of remoteness rules aims to provide a practical solution to the problem of the unfairness of holding the breacher of the contract liable for all the losses his action causes.[413] It does so by formulating the remoteness rules to enable the court to limit the recovery of consequential losses.

Moreover, the essence of the contemplation test of remoteness founded by the *Hadley v Baxendale* decision is the foreseeability doctrine.[414] Foreseeability is "the ability to see or know in advance, hence the reasonable anticipation, that harm or injury is the likely result of acts or omissions."[415]

With regard to the application of foreseeability in the contractual context, it has been inferred from the *Hadley v Baxendale* ruling, the award of damages depends on whether the losses

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[410]‘ It was a significant influence in the drafting of the Sale of Goods Act 1893 (UK)’ Edelman, James, and Lauren Bourke. "Hadley v Baxendale." University of Cambridge, Obligations VIII, Revolutions in Private Law (2016): 19-22.

[411] U.C.C 2-715(2)(a) (2002) 'Consequential damages resulting from the seller's breach include (a) any loss resulting from general or particular requirements and needs of which the seller at the time of contracting had reason to know and which could not reasonably be prevented by cover or otherwise'

[412] Diamond and Foss (n 384).

[413] Cartwright (n 254).

[414] Adam Kramer, The Law of Contract Damages (Hart Publishing 2014).

[415] Harry G Fuerst, 'Foreseeability in American and English Law' (1965) 14 Clev-Marshall L Rev 552.

have been in the "reasonable contemplation" of the contracting parties. Based on that, if the loss is reasonably unforeseeable when the contract is formed, then the loss is too remote and the recovery of damage will be denied, and if the loss is reasonably foreseeable when the contract is made, then the damage will be awarded.

Several features are associated with foreseeability in the contractual relationship, which differentiates foreseeability in breach of contract from tort. For example, in the Hadley decision, the question of whether a loss was foreseeable "at the time they made the contract" applied and was tested by the court.[416] Any special knowledge or circumstance that had been communicated to the defendant after the contract was formed and before the breach was excluded.[417]

Further, Alderson stated in Hadley that losses must be "in the contemplation of both parties". An essential point in the modern rule is that the loss should be foreseeable to the defendant despite the opinion in the *Hadley* decision that both parties should foresee the loss.[418] The court's primary goal of applying the test of remoteness is to assess whether the losses were in the contemplation of the defendant.[419] The claimant's duty in this respect is to ensure that the defendant knows special circumstances that would lead to losses so that the defendant can foresee them in advance.

Additionally, the legal investigation regarding the foreseeability and remoteness of losses is determined by the court through the implementation of an objective standard, taking into account the contemplation of a reasonable person. This criterion is not exclusively applied by courts in common law jurisdictions but has also been codified such as in the Restatement (Second) of

[416] Daniel P O'Gorman, 'When Lightning Strikes: Hadley v Baxendale's Probability Standard Applied to Long-Shot Contracts' (2015) 47 Loy U Chi LJ 859.
[417] Ibid
[418] Ibid
[419] O'Gorman (n 399).

Contracts in the United States which posits that "the test is an objective one based on what he had reason to foresee."[420]

Victoria's case incorporating two Limbs in one rule: In practice, difficulties associated with applying the remoteness principle as laid down in *Hadley v Baxendale* have appeared.[421] In particular, the "contemplation of both parties can be understood in more than one way. It could mean that circumstances that lead to losses should be foreseeable at the time the contract is made", or it could mean that the claimant should notify the defendant about these circumstances when the contract is made.[422] Also, there was a misconception related to recovering lost profit claims is that such recovery is associated only with the second rule of *Hadley v Baxendale*.[423] Therefore, the claimant should disclose special knowledge that he has to the defendant when they make the contract as the second rules require in order to recover lost profit.

The English Court of Appeal attempted to address these issues in *Victoria Laundry (Windsor) Ltd v Newman Industries Ltd*.[424] This is a leading case in the remoteness principle, which has reshaped the application of the remoteness test.[425] Victoria was a launderer that entered into a supply contract to obtain a boiler from Newman, a boiler supplier.[426] The defendant was notified that the claimant urgently required a larger boiler, in anticipation of a profitable contract with the relevant government department..[427] However, the defendant committed a breach of contract by delaying the delivery of the boiler for five months.[428] The claimant sought recovery of

[420] Restatement (Second) of Contracts § 351 (1981)
[421] Arvind (n 199)
[422] Ibid
[423] Ibid
[424] Victoria Laundry (Windsor) v Newman Industries, [1949] 2 K.B.
[425] Burrows (n 333).
[426] Victoria Laundry (Windsor) v Newman Industries, [1949] 2 K.B.
[427] Ibid
[428] Ibid

the profit he would have made during those five months if the boiler had been delivered on time. The claimant sought two types of damages: general loss of profit from the operation of the business and exceptional loss of profit resulting from being unable to fulfil contracts he could have made.[429] Consequently, the Court of Appeal applied the rules of *Hadley v Baxendale* and ruled in favour of the claimant by awarding him a general loss of profit. However, the court rejected the recovery of exceptional loss of profit because that loss was too remote. The court provided a rationale for the recoverability of general loss and the non-recoverability of exceptional loss by emphasising that the buying of a large boiler is evidently intended for commercial purposes. The claimant's insistence on the urgent need for the boiler indicates that ordinary lost profit was deemed a reasonably foreseeable consequence of the breach. In contrast, the profit arising from a special contract was not considered foreseeable, as the defendant was unaware of the potential loss. [430]

The *Victoria Laundry* case introduces three significant contributions. These provide a fresh perspective and interpretation of the remoteness rule established in Hadley and additionally introduce new tools for applying these rules. Firstly, Asquith LJ consolidates the two rules of the Hadley case into one comprehensive single rule, stating that any loss of profit should be "reasonably foreseeable as liable to result from the breach."[431] Secondly, Asquith LJ defines the concept of "reasonably foreseeable", explaining, "It does not depend on actual knowledge, but on what a reasonable person would contemplate."[432]

Thirdly, Asquith LJ establishes the standard for a loss to be deemed "liable to result from the breach". In this context, the loss of profit should be deemed "likely," "a serious possibility," or

[429] Ibid
[430] Ibid
[431] Victoria Laundry (Windsor) v Newman Industries, [1949] 2 K.B.
[432] Ibid

"a real danger" to arise from the breach.[433] Thus, the loss of profit will be assessed as likely to result if, at the time of contract formation, a reasonable person would have contemplated such a loss as a probable outcome, either due to the obvious consequences of the breach or based on the information shared between the contracting parties.

Lord Burrows comments on the *Victoria Laundry case*, "Since *Victoria Laundry*, while the courts have sometimes continued to talk of two rules of remoteness, they have tended, like Asquith LJ, to think in terms of one rather than two rules."[434] However, he also notes, "It is hard to see that anything of substance should turn on whether one formulates the test in two rules or one."[435]

Notably, the English court approach recognises the recovery of loss of profit as direct damage, as stated in the *Victoria Laundry v Newman* decision. Thus, the award of loss of profit may occur as direct or indirect damages depending on the circumstances. The English court's approach has been adopted in different common law jurisdictions, such as Australia and New Zealand.[436] However, in this regard, claimants in American courts may face challenges when attempting to recover loss of profit. One such challenge is that loss of profit is categorised as an indirect loss, which means that additional rules, beyond the principle of remoteness, are applied by American court.[437] This approach has historical roots in the court practice of loss of profit

[433] Ibid
[434] Burrows (n 333).
[435] Ibid
[436] 'The US courts accepted Hadley v Baxendale as the leading authority, their application of the remoteness of damage test was much more restrictive. Loss of profit and/or loss of revenue was generally accepted to be an 'indirect' or 'consequential'loss, which was only recoverable in special circumstances.At the opposite side of the globe, however, the Australian and New Zealand courts followed the English approach and considered that loss of profit and/or loss of revenue could, depending on the circumstances, be a 'direct' loss.' Simon Oats and Gregory Buckley, Direct and Consequential Losses - A single international approach and understanding?, 2015, https://www.evershedsutherland.com/global/en/what/articles/index.page?ArticleID=en/Construction_And_Engineering/direct-and-consequential-losses
[437] Ibid

recovery. Consequently, it is essential to clarify the American approach, a task that the subsequent paragraphs aim to achieve.

The approach taken by American courts is generally to classify loss of profit as a special loss. This means that any claim involving the recovery of lost profits is automatically deemed as an indirect loss.[438] This approach in American jurisprudence has historical roots that differ from English law. These historical factors have two primary implications: one before the establishment of the *Hadley v. Baxendale* rules, and the other after these rules were set in place.

Before the establishment of the *Hadley* rules, the typical approach of American courts regarding the recovery of lost profits was to deny such recovery. Professors Robert Lloyd and Nicholas Chase emphasised that while lost profits were awarded in some cases, these instances were exceptional and limited.[439] The prevailing view was that lost profits were not recoverable.[440] Justice Joseph Story, who served on the Supreme Court of the United States, explained that American courts considered lost profits unrecoverable because awarding them would be "unfavourable to the interests of the community."[441] As a result, American courts did not require rules to limit the recovery of lost profits, as they already "provided the jury with explicit instructions on how damages were to be calculated."[442] This is in contrast to English courts. As Lloyd and Chase note, it is "probably true that English judges were less inclined to instruct the

[438] Ibid
[439] Robert M. Lloyd & Nicholas J. Chase, 'Recovery of Damages for Lost Profits: The Historical Development' (2016) 18 U Pa J Bus L 315
[440] Ibid
[441] The Lively, 15 F. Cas. 631 (C.C.D. Mass. 1812)
[442] Lloyd and Chase (n 422).

jury on the measure of damages than their American counterparts."[443] This was observed in the English courts before the establishment of *Hadley v. Baxendale* principles, as previously discussed.

However, after the establishment of the rules of remoteness as articulated in *Hadley v. Baxendale,* American courts were not significantly influenced in terms of allowing for the recovery of lost profits, provided the claims passed the test of remoteness.[444] Lloyd and Chase suggested that the concept of remoteness was already familiar to American courts, as evidenced in *Masterton v. Brooklyn* case.[445] In this case, the court applied reasoning similar to what would later appear in *Hadley v. Baxendale*, as well as in several other cases.[446] Therefore, Lloyd and Chase challenged the notion that English courts influenced American jurisprudence in this area; they argued that the influence was, in fact, the other way around.[447]

It may be true that American courts were not immediately influenced by the *Hadley* rules; however, some influence can be observed in the categorisation of lost profits. After the establishment of the *Hadley v. Baxendale*, damages were generally divided into general damages and special damages, and American courts "did begin awarding lost profits as consequential damages."[448]

Treating lost profits as consequential damages led to implications that required American courts to handle this special loss in a different manner, as it is a loss that has not already occurred

[443] Ibid
[444] Ibid
[445] Ibid "In general," says Pothier, "the parties are deemed to have contemplated only the damages and interest which the creditor might suffer from the non-performance of the obligation, in respect to the particular thing which is the object of it, and not such as may have been incidentally occasioned thereby in respect to his other affairs."
[446] Such as Fox v. Harding 61 Mass. 516, 516 (1851). Water Lot Co. v. Leonard, 30 Ga. 560, 577 (Ga. 1860)
[447] Lloyd and Chase (n 422).
[448] Ibid

but is anticipated to occur in the future. To address the distinctive features associated with the recovery of lost profits, American courts have developed supplementary rules to assist in dealing with such cases. These rules include the reasonable certainty principle and the new business rule.

The rule of reasonable certainty stipulates that lost profits must be proven with a reasonable certainty.[449] This rule acts as a limitation on the recovery of lost profits, emphasising the need for certainty in the occurrence of damage rather than its amount.[450] Furthermore, this requirement pertains to the factors and methods that the court employs to determine whether the claimed lost profits meet the standard of reasonable certainty.[451] However, professor Lloyd acknowledges that this requirement "is an issue that is far more complex and challenging than the rule in *Hadley v. Baxendale*."[452] He emphasises, however, that the concept of reasonable certainty offers the court a degree of flexibility in determining whether the profits are reasonably certain.[453]

Yet, this flexibility is not without its drawbacks. The flexible nature of the reasonable certainty standard has created vagueness and ambiguity about what the criteria or standards actually are. Professor Lloyd argues that American courts, in enjoying this flexibility, have created a situation that leads to outcomes that are "confusing and inconsistent."[454] Moreover, Justice Dean Bryson of the Oregon Supreme Court expressed his own uncertainty about the concept in

[449] Robert M Lloyd, 'The Reasonable Certainty Requirement in Lost Profits Litigation: What It Really Means' (2010) 12 Transactions: Tenn J Bus L 11, 63.
[450] Ibid
[451] John M. Golden, 'Reasonable Certainty in Contract and Patent Damages' (2017) 30 Harv J L & Tech 257
[452] Lloyd (n 432) 67.
[453] Ibid
[454] Ibid

Hardwick v. Dravo Equipment Co., stating, "I must confess... that I have no more idea what 'reasonable certainty' means than I have as to the meaning of 'certainty.”[455]

The new business rule stipulates that if a business suffering a loss of profit due to a breach of contract is a new enterprise, it will not be granted a recovery for such a loss.[456] This is based on the rationale that, "in the absence, of a history of past profits, future profits are too uncertain, contingent, and speculative."[457]

The application of the supplementary rules by American courts to address the issue of lost profits indicates that the principles outlined in *Hadley v. Baxendale* are no longer a significant concern in modern litigation.[458] As a result, there is minimal discussion of the *Hadley* principles in relation to lost profits in American courts; the focus has shifted to the previously mentioned supplementary rules. This contrasts with English courts, where the *Hadley* principles continue to be frequently cited in cases concerning the recovery of lost profits.

As a result, American courts, unlike their English counterparts, believe that the application of the remoteness rule is not the issue. Rather, the focus when recovering lost profits concerns specific legal rules that apply exclusively to such cases. This raises the question: Does adding additional limitations beyond remoteness represent a conservative stance by American courts? Labelling the American approach as either conservative or liberal appears to be far more complex than it initially seems.

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[455] Hardwick v. Dravo Equip. Co., 569 P.2d 588, 594 (Or. 1977)
[456] Victor P. Goldberg, 'The New-Business Rule and Compensation for Lost Profits' (2016)1 Criterion J on Innovation 341
[457] Ibid
[458] Lloyd (n 432) 65.

It could be argued that to determine whether American court practices are conservative or liberal, one must examine whether the court applies these rules in a relaxed manner or the opposite. Consequently, the existence of these rules does not necessarily indicate that American courts take a conservative approach towards the recovery of lost profits in modern times, even if their past practices suggest otherwise.

Despite this, the remoteness rule remains the essential test under American jurisprudence. This is due to the fact that damages for lost profits will not be awarded unless the loss arising from the contract breach was foreseeable to both parties at the time the contract was formed. Without fulfilling this criterion, the recovery of lost profits is not possible.

Degree of Likelihood: The level of foreseeability is a significant element in the recovery of loss of profit. The fact that the loss needs to be foreseeable alone is not accurate because any loss could be foreseeable;[459] the core issue is how likely the foreseeable loss is to be recoverable.[460] The House of Lords discussed the degree of foreseeability required in the leading case of *Koufos v C Czarnikow* (the *Heron II* case). *Heron II* is related to a contract between the charterers of a ship and the shipowner. The claimant alleged a breach of contract by the defendant, the shipowner, for nine days of delay in delivering a shipment of sugar to Basrah.[461] The delay caused the claimant to lose value from the sugar shipment because during those nine days, many sugar shipments arrived at Basrah and caused the market price of the sugar to fall.[462] The shipowner did not know that the shipment owner was planning to sell his shipment upon arrival.[463]

[459] O'Gorman (n 399).
[460] Arvind (n 199) ch 16
[461] Koufos v C Czarnikow Ltd (The Heron II), [1969] 1 A.C.
[462] Ibid
[463] Ibid

In reaching the decision, the court applied the remoteness principle as developed in *Victoria Laundry v Newman* and judged for the claimant and awarded him the loss of profit.[464] The House of Lords discussed the required degree of foreseeability that the loss would be recovered and decided that the level of foreseeability in the case should be categorized as "not unlikely" or "substantial degree of probability".[465] Thus, the focus in the contract should be on the likelihood of the result, and in particular on whether "it was quite likely to happen".[466] Like the English court approach, the Restatement (Second) of Contracts in the US has employed a high level of foreseeability and states, "This standard presumably means that the loss must be more likely than not."[467]

Notably, the court distinguished between the application of the remoteness test in tort and its application in contract and decided that they do not have the same measure of applicability.[468] The application of the remoteness test in a contract will require a higher degree of foreseeability in contract claims than in tort. Lord Burrows notes, "Perhaps the clearest way of expressing the essence of their Lordships' reasoning is that, while a slight possibility of the loss occurring is required in tort, a serious possibility of the loss occurring is required in the contract."[469]

Type of loss: The cases discussed above primarily concern the loss of profit resulting from financial losses.[470] However, loss of profit can also result from physical damage, as demonstrated

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[464] Burrows (n 333).

[465] Lord Burrows commented on that 'So, on the facts, the loss of profit from the market fall was not too remote because the defendant should have reasonably contemplated that loss as a serious possibility had it thought about the breach at the time the contract was made.' Burrows (n 333).

[466] Arvind (n 199)ch 16

[467] Restatement (Second) of Contracts § 351 (1981)

[468] Ibid

[469] Burrows (n 333).

[470] Lord Denning highlighted that "class of case is now covered by the three leading cases of Hadley v. Baxendale, 9 Exch. 341; Victoria Laundry (Windsor) Ltd. v. Newman Industries Ltd. [1949] 2 K.B. 528; and C. Czarnikow Ltd. v. Koufos [1969] 1 A.C. 350. These were all "loss of profit" cases: and the test of "reasonable contemplation" and

in *Parsons (Livestock) Ltd v Uttley Ingham & Co Ltd [1978]*. It is important to note that the primary focus of this study is the loss of profit arising from economic losses. Nonetheless, the *Parsons* case is interesting, not only because it addresses the loss of profit associated with physical damage but also because it offers significant developments in the law of remoteness. It provides interpretations and clarifications of the remoteness rule as oulined in the *Heron II*, which also applies to financial losses resulting from a breach of contract.

Therefore, *Parsons'* case contributed significantly to the development of the law of remoteness by adopting a more flexible approach to the recovery of lost profits. This case asserts that the contemplation of the loss should focus on the type of loss, irrespective of its extent.[471] This implies that if the contracting party contemplates the type of loss during the contract's formation, then the loss of profit is recoverable regardless of the extent of that loss.[472] This contribution is further elaborated below when examining the case and considering the court's ruling.

The claimants in *Parsons'* case were pig farmers who purchased £275 animal feed hoppers, including the installation. However, because of the defendant's negligence in failing to open the ventilation lid, the stored pignuts became mouldy. The consumption of these mouldy pignuts led to an E. coli outbreak among the pigs, causing 254 fatalities.[473] The claimant sued for breach of contract against the installer, seeking compensation for the loss of pigs and subsequent profits amounting to over £36,000.[474] The defendant, however, argued that the damage was too remote.

"serious possibility" should, I suggest, be kept to that type of loss or, at any rate, to economic loss." *H Parsons (Livestock) Ltd v Uttley Ingham & Co Ltd [1978] QB 791.*

[471] H Parsons (Livestock) Ltd v Uttley Ingham & Co Ltd [1978] QB 791.

[472] Ibid

[473] Ibid

[474] Ibid

They maintained that mouldy pignuts would typically not be fatal to pigs and that the E. coli outbreak was an extraordinary event.[475]

Both the trial judge and the Court of Appeal affirmed the farmers' claim, determining that the loss was not too remote. However, within the court, two differing opinions emerged, yet both resulted in the same outcome. Lord Denning's perspective, representing the minority, differs from the majority viewpoint articulated by Lord Scarman.[476]

Lord Denning's approach differentiated between the application of the remoteness rule in cases of contract breach that resulted in either economic loss or physical damage.[477] In the case of lost profit, categorised as economic loss, the rule of remoteness, as articulated in *Heron II*, is applied. He stated: "The defaulting party is only liable for the consequences if they are such as, at the time of the contract, he ought reasonably to have contemplated as a serious possibility."[478]

Conversely, in cases of physical damage, the tort rule as set out in the *Wagon Mound* case would be applied. Therefore, Lord Denning found that the loss of profit resulting from the deaths of pigs was not too remote by treating the case as a tort case rather than a contract case, hence applying the foreseeability test in tort. It should be noted that Lord Denning's view appears to have been influenced by the academic approach as articulated by Professors Hart and Honoré. He stated, "I go back with relief to the distinction drawn in legal theory by Professors Hart and Honoré in their book Causation in the Law (1959)."[479]

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[475] Ibid
[476] Ibid
[477] Ibid
[478] Ibid
[479] Ibid

Lord Scarman, who represented the majority approach, rejected Lord Denning's reasoning. He disagreed with such a distinction and maintained that the law of remoteness in contracts should be applied regardless of whether the loss is economic or physical.[480] However, Lord Scarman introduced a new clarification for how the remoteness rule, as articulated in the *Heron II* case, should be applied: "It is reasonable to suppose that the loss would have been in the contemplation of the parties as a serious possibility."[481]

He acknowledged an unresolved problem from the *Heron II* case, which is the definition of a "serious possibility". To resolve this, he clarified that only the type of loss had to be a serious possibility contemplated by both parties when the contract was formed.[482] According to this reasoning, the majority determined that a defective food storage unit, which cause a serious possibility of illness, provided sufficient grounds for the recovery from the loss. Therefore, it was irrelevant that the parties did not contemplate the extent of the loss.[483]

The ruling in the *Parsons* case can be interpreted as adopting a claimant friendly approach. Indeed, the ruling in the *Parsons* case serves as evidence that the court adopted a more relaxed approach to the application of the remoteness rule. It now places greater emphasis on the type of loss that should have been contemplated by the contracting parties while disregarding the extent of that loss. The majority's approach has been applied in several subsequent cases, such as *Brown v KMR Services Ltd [1995*], where Stuart Smith stated, "If the parties ought to have contemplated a particular type of loss... they need not have contemplated the extent of that loss."[484]

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[480] Ibid
[481] Ibid
[482] Ibid
[483] Ibud
[484] Brown v KMR Services Ltd [1995] 4 All ER 598

However, the majority approach in *Parsons's* case has been subject to criticism by some commentators.[485] The point of contention is a potential conflict with the ruling in the Victoria Laundry case. If the *Parsons* rule were applied to the *Victoria Laundry* scenario, it would imply that the loss of profit from a special government contract would be recoverable.[486] This is because one could argue that the loss of the government contract constitutes a serious possibility of the same type of loss as ordinary profits.

In response to this argument, Stuart Smith stressed in *Brown v KMR Services Ltd* that the ruling of the *Parsons* case did not conflict with the *Victoria Laundry case*. He stated, "I do not see any difficulty in holding that loss of ordinary business profits is different in kind from that flowing from a particular contract which gives rise to very high profits, the existence of which is unknown to the other contracting party who therefore does not accept the risk of such loss occurring."[487] In essence, Stuart Smith emphasised that applying *Parsons's* rule to the *Victoria Laundry* case would yield the same result, as the loss of daily profit and the profit from the government contract are different types of losses.

3.3.4.3 The Achilleas: Modern Approach to Foreseeability

The case of *Transfield Shipping Inc v Mercator Shipping Inc*, commonly known as The Achilleas, is recognised as a recent and significant development in the law of remoteness.[488] The case addressed challenges related to the traditional remoteness test, particularly in relation to

[485] Naidoo (n 210) ch 8.
[486] Ibid
[487] Brown v KMR Services Ltd [1995] 4 All ER 598
[488] Transfield Shipping Inc v Mercator Shipping Inc; The Achilleas [2008] 4 All ER 159

identifying the type of loss and determining what is foreseeable as being 'not unlikely'. In the case of *The Achilleas*, the House of Lords was tasked with determining whether a loss of profit could be considered "not unlikely" or "sufficiently likely" based on the Heron II test.[489] Before examining how the House of Lords delivered its judgment, it would be beneficial to provide a detailed account of the facts of the case.

The Achilleas case involved a claim for the recovery of lost profit due to the delayed return of a chartered ship. Under the terms of the contract, the defendant was obliged to return the ship to the owner no later than May 2, 2004. However, the defendant failed to return the ship on the agreed date, instead, returning it on May 11, nine days late. This constituted a breach of contract.[490]

As a result of this delay, the shipowner was forced to renegotiate the next charter contract they had already entered, as the new charterers were supposed to receive the ship on 8 May. Due to a drop in market prices, this renegotiation led to the shipowner having to reduce the price of the charter, resulting in a loss of $1,364,584.[491]

Consequently, the shipowner sought to recover this loss from the defendant as lost profit. The defendant argued that this loss was too remote, asserting that they should only be liable for losses foreseeable at the time the contract was made.[492] Specifically, they believed that they should be responsible for the difference between the market price and the contract price for the nine-day period, amounting to $158,301.[493]

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[489] Koufos v C Czarnikow Ltd (The Heron II), [1969] 1 A.C.
[490] Transfield Shipping Inc v Mercator Shipping Inc; The Achilleas [2008] 4 All ER 159
[491] Ibid
[492] Ibid
[493] Ibid

In reaching judgment, both the arbitrators and the Court of Appeal ruled in favour of the shipowner, holding the defendant liable for the lost profit of $1,364,584.[494] This decision was founded on the application of the traditional remoteness test as explained in *Heron II*. The arbitrators and court reasoned that it was "not unlikely" that a follow-on charter would occur. Consequently, they found that such a loss should have been contemplated.[495]

In contrast, the House of Lords unanimously decided that the defendant's foreseeable loss was only limited to the difference between the contract price and market price. Therefore, they found the defendant liable only for $158,301, ruling that the shipowner's claim for the loss of profit from the follow-on charter contract was too remote.[496]

In the House of Lords' ruling, lordships were divided into two different lines of reasoning. The first approach was based on the traditional concept of reasonable contemplation, as formulated in the landmark case of *Hadley v Baxendale* and later interpreted in *Heron II*. Lord Rodger, Lord Walker, and Lady Hale supported this first approach.

In applying this perspective, they held that the claimed loss was too remote according to the traditional principle of remoteness. Their reasoning was grounded on the notion that neither party would reasonably have contemplated that a delay of nine days would cause the owners the kind of loss they were claiming as damage.[497] Given the "extremely volatile market conditions",

[494] Ibid
[495] Ibid
[496] Ibid
[497] Ibid

they contended that such a loss would not have been in the contemplation of both parties when the contract was made. As such, they deemed the loss too remote.[498]

The second approach, introduced by Lord Hoffman, marked a shift in understanding the remoteness rule. This perspective focuses on the assumption of responsibility rather than the foreseeability of loss. According to his viewpoint, while the arbitrators and Court of Appeal established that the loss was likely, the defendant charterer was not liable for it, because they did not intend to assume responsibility for such a loss.[499] This assertion was in line with the shipping industry's general understanding that a delay would necessitate payment only of the difference between the contract price and a higher market rate.

Therefore, guided by the principle of the assumption of responsibility, Lords Hoffman concluded that the loss was too remote. They reasoned that the defendant would not have intended to take on liability for such a loss at the time of contract formation regardless of its likelihood.[500]

The modern approach adopted in *the Achilleas,* as outlined by Lord Hoffman, could be interpreted as an effort to overcome the challenges associated with this case. Specifically, the challenge revolved around the state of market stability when the vessel returned. Lord Hope noted, "the appropriate measure of damages for late redelivery of a vessel is the difference between the charter rate and the market rate."[501] Altering this established standard could have significant implications in the commercial context. This perspective underscores the importance of carefully

[498] Ibid
[499] Ibid
[500] Ibid
[501] Ibid

considering the potential impacts of legal decisions on established industry practices and wider commercial environments.

Applying the traditional remoteness rule without consideration of the specific context such as the shipping industry in this case suggests that the loss should be contemplated as a serious possibility, as affirmed by the Court of Appeal and the arbitrators. However, when Lord Hoffman redefined the remoteness rule as a mechanism to determine the parties' intentions, the assessment began to encompass not only the parties involved but also the general context, such as market industry norms.

Lord Hoffman noted, "limitations on the extent of liability in particular types of contract arising out of general expectations in certain markets, such as banking and shipping, are likely to be more common."[502] Therefore, his fresh interpretation of the remoteness rule served not only to overcome the challenges in this particular case but also to maintain consistency with case law in the shipping industry.[503] Moreover, it avoided imposing undue liability on the defendant that they had not agreed to, in line with the shipping industry standards. Had they foreseen such a liability, they could have either restricted it through a contract or negotiated the contract's terms differently. Consequently, Lord Hoffman's interpretation of the remoteness rule is a flexible, alternative approach that brings legal understanding more in line with industry standards and parties' expectations.

Many academic writers, including Adam Kramer and Lord Andrew Burrows, have advocated for the concept of assumption of responsibility. Lord Burrows described this as a

[502] Ibid

significant contribution to the law of remoteness.[504] This assumption of the responsibility test aims to restrict the breaching party's liability solely to those losses for which they had assumed responsibility at the time the contract was formed.[505] This approach focuses on the intentions of the contracting party, involving an “interpretation of the contract as a whole viewed against its commercial backdrop”.[506] The process involves scrutinising the nature and purpose of the contract to ascertain the responsibilities the parties accept upon the formation of the contract.

However, it is important to highlight that applying the remoteness rule based on the parties' intentions should not be interpreted as supplanting the principle of remoteness. To illustrate, Sir David Keene clarified in the case of *John Grimes Partnership Ltd v Gubbins*, that "it seems to me quite clear that Lord Hoffmann was not seeking to depart wholesale from the 'reasonably foreseeable' test of remoteness".[507] Consequently, the traditional test of remoteness remains the primary framework within which the concept of the 'assumption of responsibility' is applied.

3.3.5 Mitigation

We now turn to the last legal rule, mitigation, which acts as a limitation on damage recovery. Mitigation means that an innocent party should act by taking a reasonable step towards limiting or reducing the loss.[508] The legal policy behind mitigation rules is that the aim of damage is not the transferral of all the claimant’s loss, so it must be compensated by the defendant.[509] Instead, according to the mitigation principle, the cost of the loss should be divided between the

[504] Burrows (n 333).
[505] Ibid
[506] Kramer (n 397).
[507] John Grimes Partnership Ltd v Gubbins, [2013] P.N.L.R. 17
[508] Mitigation and Contributory Negligence, UKBC-DUXBURY 475799235
[509] Arvind (n 199)

claimant and the defendant.[510] Thus, when a breach of contract occurs on the part of an aggrieved party, the innocent party has a duty to mitigate the loss.[511] Here arises the question of what a criterion for mitigating the loss on the part of the innocent party might be. Common law has discussed this in terms of two aspects.[512]

The first aspect is the claimant's failure to act to limit the loss.[513] This angle of mitigation was demonstrated in the case of *Payzu Ltd v Saunders.* Here, the claimant contracted with the defendant for the sale of a good.[514] The defendant was to deliver the good every month for nine months, and the claimant was expected to make an instalment payment each month within one month of delivery.[515] However, the claimant failed to pay for the first instalment. Then, the defendant refused to deliver any further goods and offered an alternative payment method to the claimant, which was to pay in cash when ordering the goods.[516] The claimant refused and sued for damage due to a breach of contract.[517] The court found that the claimant failed to mitigate the loss by accepting the defendant's offer. Thus, the claimant could not recover the damage between the market price and the contract price.[518]

The second aspect concerns an improper act of mitigating the loss, which is the opposite of the first aspect.[519] The case of *Compania Financiera Soleada SA v Harmoor Tanker Corpn Inc*. illustrates this.[520] The claimant took a high-interest loan to mitigate the loss of releasing a ship that

[510] Ibid
[511] Chen-Wishart (n 335) 559
[512] Ibid
[513] Ibid
[514] Payzu Ltd v Saunders, [1919] 2 K.B. 581
[515] Ibid
[516] Ibid
[517] ibid
[518] Ibid
[519] Burrows (n 333).
[520] Compania Financiera Soleada SA v Hamoor Tanker Corp Inc (The Borag), [1981] 1 W.L.R. 274

was retained because of a breach of contract by the defendant.[521] The Court of Appeal found that the claimant could not recover the high interest, as such interest was unreasonable.[522]

It is notable that mitigation requires an investigation into whether the claimant took proper action to reduce the loss caused by the defendant's breach. This is unlike the earlier legal rules, where the primary objective was the attribution of blame on the defendant. For example, the remoteness rules mentioned in section (B), which is the court's objective, examine whether such a loss was considered by the defendant when the contract was formed. Further, the function of the mitigation rule has some characteristics of causation, as the primary goal of mitigation is to examine whether it is "the claimant's unreasonable behaviour that has caused the loss, not the defendant's breach".[523]

3.4 The Concept of Certainty within the Principles of Limiting Liability

In the previous chapter, we investigated the position of Saudi law regarding the loss of profit as a form of damage. The Saudi court's perspective on the matter is that any hypothetical future loss, particularly those depriving the claimant of opportunities with potential future earnings, remains uncompensated due to the inherent uncertainty associated with such damages. Although the court relies on uncertainty as a justifiable rationale for refusing recovery of loss of profit, a legitimate question arises concerning the court's policy for denying such losses. The underlying objective of the court in not awarding loss of profit remains unclear in the relevant court decisions, such as whether the denial is motivated by a desire to avoid imposing harsh liability on the defendant.

[521] Ibid
[522] Ibid
[523] Burrows (n 333).

Nevertheless, it appears to be implied from the court opinions that recovering future loss carries a risk of leading to unjust enrichment for the claimant, which would be unfair for the defendant. This notion can be compared to the common-law concept, which does not put the claimant in a better position.

Therefore, this section aims to address the first research question, which is what legal tools common law courts utilise to limit the recovery of damages and manage uncertainties associated with the loss of future earnings arising from a breach of contract.

Within the judicial sense of English court, certainty pertains to the application of legal rules that limit liability, providing a structured approach for courts to address specific challenges related to the recovery of lost profit. Professor Paul Neuhaus sought to elucidate the concept of certainty in the judicial domain. According to his definition, the court's utilisation of legal rules to restrict the recovery of damages functions as a general guideline, enabling the court to address the need for "deciding current, concrete disputes adequately, by giving due weight to the special and perhaps unique circumstances of each case."[524]

This implies that during the decision-making process, the court employs appropriate legal rules to determine the fairness of recovering damages in each case individually. For instance, the court may utilise the remoteness rule or the mitigation principle to restrict the defendant's liability. Consequently, legal rules limiting liability serve as a standard tool for the court to apply, ensuring that no excessive burden is imposed on the defendant, which is essential for preventing the emergence of arbitrary judicial decisions. Professor Neuhaus argues that this is necessary for the court because "judgment cannot be purely personal or irrational; the judge must be guided by generally recognized standards capable of rational cognition."

[524] ibid

Considering these factors, the primary purpose of legal rules that aim to limit liability, such as the but-for test for determining factual causation or remoteness for determining the scope of legal causation, is to aid judges in finding appropriate answers to legal questions while keeping legal policy and justice in mind. This is particularly relevant in cases of lost profit, where the claimant should not be placed in a better position. It is accurate that legal rules for limiting liability share a common purpose (i.e., limiting liability) as they function as tools under the categories of legal causation or factual causation. Thus, the court may use one or a combination of legal rules to evaluate a claim.

Accordingly, there exists a degree of overlap between these legal rules, and judges may choose to rely on one rule over another. This has been observed in cases involving remoteness and legal causation, where judges often lean heavily on the concept of remoteness when assessing claims for breach of contract. Lord Burrows commented on this matter, stating that "since all these principles are concerned with limiting compensatory damages, it is not surprising that the same outcome may frequently be achieved by applying more than one of them."

As a result, this section will examine how the English court incorporates the three previously described sets of legal rules causation, remoteness, and mitigation, regarding limiting liability, to assist the court in establishing that the certainty of the opportunity with a future profit is not just speculative.[525] Establishing that certainty can ensure the common-law compensatory of damages objective, which is not in putting the innocent party in a better position, but in the position

[525] Hart and Honoré argued that speculation about the loss of profit is an inherent characteristic that can not be overcome. “in order to estimate loss, we must speculate not about a single act but about the hypothetical gains...” Hart and Honoré (n 5) 311

in which they would have been had the contract been performed.[526] Moreover, the limiting rules will assist the court in not imposing a harsh liability on the defendant[527].

3.4.1 Judicial Approach in Ensuring Certainty for Loss of Profit Claims

Because the nature of the opportunity has a future profit, there is a narrow difference in the judicial discretion involved in examining and assessing the loss of profit due to a breach of contract, as compared to that of any other remedy.[528] For that reason, the court's primary focus is to investigate future events, specifically, "would the opportunity occur or not".[529]

Hart and Honoré formulated the definition of a loss of profit as having two aspects: economic harm and economic loss. "Economic harm" indicates that the breach of contract by the defendant dispossessed a stipulated opportunity, and the economic 'loss of profit' prevented the innocent party from opportunity that had future gain.[530] However, preventing the claimant from a specific opportunity that contains future profit is vague and unclear, as Hart and Honoré stress by stating, "opportunity for gain may have a snowball effect: opportunity breed further opportunity."[531] Consequently, the legal rules for limiting liability function as resolving this obstacle. The claimant must demonstrate that the existing loss of profit was caused by the breach of contract. Then, the claimant "must show that the loss is within the scope of the relevant rules of legal policy", which, in this case, means legal causation rules such as remoteness.[532] The following

[526] Burrows (n 333).
[527] Perloff (n 378).
[528] "some writers and judges have come to see an analogy between the rules limiting recovery for physical harm in tort and the rules in Hadley v. Baxendale. In truth the two are not comparable" Hart and Honoré (n 5) 314
[529] Ibid
[530] Ibid
[531] Ibid
[532] Ibid

discussion will demonstrate how judicial discretion utilises the principle of limiting liability to ensure that a degree of certainty is achieved when imposing legal responsibility on the defendant.

But-For Test: the factual causation concerning the loss of profit claim is to pursue an answer for the causal question regarding whether the claimant would obtain the hypothetical future profit if the defendant had not committed the breach.[533] The 'but-for' test, discussed earlier, will be applied in formulating a response to this causal question. This approach provides certainty by ensuring that the court possesses a proper method and standard rule to follow when investigating whether the event of a breach was the cause of a deprived opportunity that had a future profit. For that reason, establishing the causal connection between the breach and the loss is limited to the answer to the causal question.

Speculative Loss: in some cases in which the claimant successfully proves the existence of liability based on the but-for test, it is difficult to determine what is the extent of the future opportunity that the breach has deprived.[534] Consequently, the likelihood of such an opportunity is uncertain; accordingly, the loss of profit from that opportunity is difficult to assess because "value cannot be established with any degree of certainty".[535] This appears as professor Mindy Chen observed, "where the claimant's loss depends on a contingency that might occur".[536]

The court approach of resolving this issue is found in *Chaplin v. Hicks.* In this case, the claimant entered into a beauty competition, and she was successful in it.[537] She was selected, along with other 50 competitors, for interviews in the final round of the event, in which twelve of them

[533] According to Hart and Honoré, establishing a but-for test in loss of profit claim "opportunity' is not difficult as it just proves the occurrence of the breach of contract. 'If this 'but for' relationship is proved, there is no further 'causal' question ..." Hart and Honoré (n 5) 311
[534] Ibid
[535] Chen-Wishart (n 335).
[536] Ibid
[537] Chaplin v Hicks, [1911] 2 K.B. 786 Star pages *786

would be chosen to be actresses.[538] The defendant failed to inform the claimant about the interview date, which resulted in her missing the interview and, consequently, not being selected. At that juncture, the claimant sued for loss of profit.[539] The court found that the defendant was in breach of contract.[540] In examining the extent of the defendant's liability, the court considers the causation question as it relates to an uncertain future event; in this case, it would have been had the claimant been selected by the defendant.[541] In answering the causation question, the court determined that the chance of the claimant winning the competition was 25%.[542] For that reason, it awarded the claimant damage for the loss of profit based on that percentage.

Consequently, an uncertain opportunity that has future profit will be assessed based on the chance 'probability' of that opportunity occurring. Lord Diplock illuminates this point in *Mallett v. McMonagle;* he stated:

> But in assessing damages which depend upon its view as to what will happen in the future or would have happened in the future if something had not happened in the past, the court must make an estimate of what the chances are that a particular thing will or would have happened and reflect those chances, whether they are more or less than even, in the amount of damages which it awards.[543]

Foreseeability of Loss: the remoteness rule works in conjunction with the factual causation rule to ensure that no excess liability is imposed on the defendant.[544] In doing so, factual causation determines the existence of liability if it is established in a loss of profit claim. In comparison, the remoteness rule examines the extent of that liability.[545] For that reason,

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[538] Ibid
[539] Ibid
[540] Ibid
[541] Chen-Wishart (n 335)..
[542] Chaplin v Hicks, [1911] 2 K.B. 786 Star pages *786
[543] Mallett v McMonagle, [1970] A.C. 166 Star pages *166
[544] According to Professor John Cartwright 'it would be unacceptably harsh for every tortfeasor or contract breaker to be responsible for all the consequences which he has caused.' J Cartwright, 'Remoteness of Damage in Contract and Tort: A Reconsideration' (1996) 55 Cambridge LJ 488–514 http://www.jstor.org/stable/4508250.
[545] Andrew Robertson, 'The Basis of the Remoteness Rule in Contract' (2008) 28 Legal Stud 172–196.

remoteness is an essential rule for the courts to utilise to limit lost profit recovery and achieve certainty in not imposing harsh liability on the defendant. Remoteness is an important element in deciding lost profit claims because, after establishing a causal connection based on a but-for test, the remoteness rule comes next to assess and examine the extent of the liability. Its function is to estimate the economic loss that occurs because of the breach.[546] For that reason, a court will use the remoteness rule to examine the extent of the economic loss and, subsequently, hold the defendant liable for what it found to be within the extent of liability.

The link between remoteness and certainty can be conceptualised by certainty only when it is determined whether the loss of profit was within the contemplation of the defendant when the contract was made, to enable him to foresee the loss to hold him liable. On these grounds, if the loss is not within the contemplation of the defendant, it is not reasonable to expect him to foresee the loss.[547] Certainty cannot be achieved on this basis, and the awarding of damages would not be fair for the defendant.[548]

Now, because it naturally contains uncertainty, let us continue by breaking down several aspects associated with the loss of profit claim and illuminate the court approach in resolving uncertainty. The first aspect relates to the certainty of the opportunity that includes the future gain that the claimant alleges has been lost because of the defendant's breach. In this question, the best example in demonstrating the court method is to reconsider the case of *Victoria Laundry*, which is mentioned in section (B). Two future profits were lost in *Victoria Laundry*, and the claimant sought recovery.[549] One loss was in the profit of the operation of the business for the period of five months, and the second was in the profit of the contract with the Ministry of Supply, which the

[546] Hart and Honoré (n 5) 376
[547] Cartwright (n 526)
[548] Ibid
[549] Victoria Laundry (Windsor) v Newman Industries, [1949] 2 K.B.

claimant would enter.[550] Both profits will be denied under the current practice of the Saudi court involving these two opportunities.

In *Victoria Laundry*, the court found that the first opportunity in which the usual profit of the operation of the business was recoverable.[551] However, in contrast to the first opportunity, the second opportunity, which involved losing profit from the contract with the Ministry of Supply, was irrecoverable because the defendant did not contemplate such an opportunity when the contract was formed. In view of the foregoing, the defendant could not reasonably foresee the loss for the second opportunity. [552]

The second aspect of a loss of profit claim is uncertainty with the state of the breach, which is because it coexisted with other circumstances that jointly caused the future profit of the claimant to be deprived.[553] This issue was an inherent discussion in *Hadley v. Baxendale,* which was discussed in detail in section (B). In this case, not only did the breach cause the loss of profit, but it also caused the millers to stop working.[554] Therefore, the court examined the issue to determine whether the breach was responsible for the loss of profit or the intervening fact that the millers were not working.[555] Hart and Honoré commented: "they did not know that unreasonable delay on their part would result in the loss since the millers might have had another shaft or their machinery might have been out of order for some other reason."[556] On these grounds, when applying the test of remoteness, Alderson B found that the loss of future profit was not within the contemplations of the defendant when the contract was made. Nonetheless, uncertainty remains about how to

[550] Ibid
[551] Ibid
[552] Ibid
[553] Hart and Honoré (n 5) 312
[554] Hadley v Baxendale, 156 E.R. 145
[555] Hadley v Baxendale, 156 E.R. 145
[556] Hart and Honoré (n 5) 311

determine whether the coexistence of such circumstances was the cause of the loss of profit and not the breach. The rejoinder for that is located in the *Heron II* case. Here, the court's approach to resolving uncertainty in this context was to investigate the degree of likelihood for such circumstances to be responsible for the loss of profit.[557] The requisite for this degree of likelihood is that it be a "very substantial degree of probability".[558]

The third aspect of the loss of profit claim is the certainty of the amount of future profit that the claimant would gain, but-for the defendant's breach being deprived. Hart and Honoré express how such an amount of future profit be determined that, "the amount of profit recoverable is, in the absence of actual notice of a specially profitable subcontract, restricted to the ordinary profit ..." Here again, the "contemplated or "foreseeable" profit means the usual profit."[559]

The rule of remoteness is an essential tool that is employed by the court for both limiting the liability and ensuring that the defendant will not be exposed to an excessive burden of liability, as explored above. Hart and Honoré articulated a significant statement that elucidates how the remoteness rule provides certainty and justice:

> Rules of legal policy intended to promote a fair balance between the contracting parties. They try to ensure that a contracting parties is not held liable for items of loss of a sort that would not enter into his calculations when deciding whether to make the contract or on what terms to make it. They are of special importance in setting limits to the items of prospective gain for the loss of which recovery can be had in an action for breach of contract.[560]

The Claimant's Responsibility: The issues associated with the claim of loss of profit will be resolved primarily under remoteness rules.[561] However, because mitigation is 'fact-specific' and it considers assessing the extent of the defendant's liability, the court will consider the

[557] Koufos v C Czarnikow Ltd (The Heron II), [1969] 1 A.C. 350
[558] Ibid
[559] Hart and Honoré (n 5) 317.
[560] Ibid 312 – 320.
[561] Burrows (n 273).

mitigation rule in a claim of loss of profit if the claimant did or did not act reasonably to prevent or reduce the loss, as we explore in section (C).[562] The notion of this rule is for the court to assess the defendant's legal responsibility if the claimant has extended the defendant's legal responsibility by contributing to the resulting loss.[563]

The case of *Compania Financiera Soleada SA versus Harmoor Tanker Corpn Inc*., discussed earlier in the mitigation section, serves as a clear example of this principle. In this instance, the claimant navigated the situation, a breach of contract, by obtaining a high-interest loan. Undoubtedly, this action expanded the defendant's potential liabilities.

Consequently, the court's duty is to assess, based on mitigation principles, whether the claimant's course of action was justifiable and lawful and to what extent the defendant should bear responsibility for the high interest of the loan. Thus, mitigation rules provide certainty by ensuring that the court evaluates the claimant's actions that may increase the defendant's liability, and decides if, and to what extent, the defendant should be held accountable.

Before moving on to the next chapter, it is important to summarise this section and how it relates to the research questions. This section endeavoured to provide a comprehensive answer to the second research question, which explores how limiting legal rules under English law contributes to achieving a degree of certainty in claims for loss of profit. It reveals that these rules operate within the framework of the legal causation concept. This implies that English courts handle claims for the loss of profit as causation issues, posing the question of whether the breach is the legal cause of the loss of profit. Consequently, in determining an appropriate answer, courts heavily rely on the rule of remoteness to establish whether the loss of profit has a legal cause and to define its scope.

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[562] Chen-Wishart (n 335)
[563] Arvind (n 199)

Conclusions

Within common law jurisdiction, the three principles of causation, remoteness, and mitigation limit the existence or extent of contractual liability when the court awards recovery of damages in general and loss of profits in particular. Each has a unique function for limiting the damage recoverable. For example, under causation, the court uses the but-for test technique to examine the availability of damage. On the other hand, the remoteness rule limits the defendant's responsibility for his breach of contractual obligations to what was foreseeable to the defendant when the contract was made. The rules of causation and remoteness investigate the defendant's action or knowledge; in contrast, the mitigation rule investigates the claimant's reasonableness in taking or not taking action to reduce the loss suffered.

It can be observed that the court has evolved and employed these legal rules to achieve certainty in balancing two aspects: ensuring that the aggrieved party is fairly entitled to recover the loss of profits that he or she suffered and at the same time not holding the contact breaker unreasonably accountable for all losses caused.

Chapter Four: Recovering Loss of Profit in Egyptian Law.

This chapter seeks to determine how the court in the Civil law system deals with the uncertainty associated with the claim of loss of profit due to a breach of contract. In addressing this issue, this chapter explores and examines the Egyptian court's approach to tackling the issue of uncertainty connected to the claim of loss of profit. Therefore, this chapter focuses on the loss of chance doctrine that allows the court to award damage for loss of profit in breach of contract. Moreover, this chapter further addresses the legal rules that function as a limitation on recovering damage and how these rules assist the court in ensuring a degree of certainty for lost profit claims. The main question this chapter aims to answer is whether the doctrine of loss of chance and the system of limitation on the recovery of damage assist the Egyptian court to tackles the issue of uncertainty inherent in the claim of loss of profit.

4 Introduction

In Egypt, which follows Civil law jurisdiction, innocent parties who breach a contract and cause a loss of future earnings may seek judicial remedies against the party in breach for not fulfilling their contractual obligations. Compensatory damages are available remedy to the innocent party for the loss of profit they have suffered, as stipulated in Article 221-1 of the Egyptian Civil Code, which states that "compensation includes harm suffered by the creditor and deprived profits."[564]

However, the recovery of damages in a breach of contract case is limited to losses that result directly from the breach.[565] As a result, it becomes the responsibility of the court to determine whether the loss is a result of the breach and to what extent. This duty, however, can be particularly challenging in cases where the loss is a loss of future profits, as such losses often contain uncertain

[564] Egyptian Civil Code , art 221-1, Law no 131 of 1948 (in force since 15 October 1949) (Egypt)
[565] Abd Al-Razzak Al-Sanhuri, 'A Treatise on the Explanation of the Civil Code ' (1987) 276.

elements, given that they have not yet occurred but are expected to in the future based on the claimant's claim.

In order to balance the need to compensate the claimant for their loss while avoiding imposing undue liability and overcompensation on the defendant, the court employs legal rules designed to establish a degree of certainty in two dimensions: (1) ensuring that the loss of profit is not speculative and (2) determining the extent of the loss. By doing so, the court is better positioned to make a fair determination regarding the appropriate compensation owed to the claimant without unfairly burdening the defendant.

Therefore, ensuring a degree of certainty regarding the two dimensions mentioned above the Egyptian court achieved through two approaches. The first approach is the application of the French doctrine of loss of chance. The aim of this doctrine is to avoid investigating the uncertain causation between the breach and the loss of profit. Instead, it recognizes the chance of gaining future profit as a harm that requires compensation without investigating the causal connection between the breach and the loss of profit.

The second approach, on rare occasions, is similar to the English law approach discussed in chapter three. In this approach, the court investigates whether the causal link between the breach and loss of profit has been established.

The Egyptian court uses legal rules such as fault, harm, foreseeability, and causation to assess the defendant's liability in both of its approaches for establishing certainty in compensating the claimant for their loss of profit.[566] Through the application of these rules, the court is better equipped to determine the defendant's liability while also limiting their responsibility.

[566] Ibid

The first part of this chapter introduces an overview of the Egyptian and judicial system, including a brief history of how the Egyptian legal system transitioned to a Civil law tradition. It also offers an explanation for why the current practice of the Egyptian court follows the French court's approach to the recovery of loss of profit. The second part identifies and discusses the general legal rules that limit the recovery of damages. The third part addresses the issue of certainty in the recovery of lost profit and explains how the court resolves the issue of uncertainty under the loss of chance doctrine.

4.1 The Historical Development of the Egyptian Legal System

In order to fully understand the Egyptian legal system and Civil Code , the present Egyptian legal system requires examining the evolution of the judicial system and over time. Egypt was the first Middle Eastern country to adopt codified laws based on European-style and western standards. This step not only shaped the contemporary Egyptian legal system but also had significant effects on the Arab world as a whole.[567] The Egyptian is often referred to as “the father of modern Arab Civil” by legal scholars because many Arab countries drew inspiration and derived their codification movement from Egypt's experience.[568]

It is necessary to discuss the impact of the French legal system on the Egyptian legal system and Civil Code , as the Egyptian legal system was influenced by the French legal system for an extended period due to various historical, political, and cultural factors.[569] Investigating the extent

[567] El-Saghir HA, 'The CISG in Islamic Countries: The Case of Egypt' in Larry A DiMatteo (ed), International Sales Law: A Global Challenge (Cambridge University Press 2014).
[568] Ibid
[569] Al-Qasem A, 'The Unlawful Exercise of Rights in the Civil Code s of the Arab Countries of the Middle East' (1990) 39 Int'l & Comp LQ 396.

of this influence is essential to understanding the development of the Egyptian Civil Code , particularly in understanding why the Egyptian court addressed the uncertainty element associated with the compensation for loss of future profit in the same way as the French court. Therefore, the relationship between the two legal systems can be categorized into two stages: the establishment of the Mixed Courts in 1875 and the launch of the National Courts by the Egyptian government in 1883.

4.1.1 The Mixed Courts 1875 – 1949

The Mixed Court was formed as a result of various European countries' demand that the Egyptian government create a judicial system that granted their citizens judicial privileges, due to the existing system being chaotic.[570] This demand was based on the extension of treaties between the Ottoman Empire and European countries, which granted European citizens certain privileges in Ottoman territory, including Egypt, which was occupied by the Empire for centuries.[571] In 1875, the Egyptian government founded the Mixed Court, which had jurisdiction over any dispute involving foreign citizens, whether between foreign citizens or between Egyptian and foreign citizen.[572]

The establishment of the Mixed Court marked the first step in the French legal system's influence on the Egyptian legal system, which occurred in two forms. Firstly, the judges in these courts were mostly Europeans, many of whom were from France.[573] Secondly, a French lawyer

[570] Latifa Salem, The Modern Egyptian Judicial System (Dar Al-Shorok 2017) ch 2.
[571] Ibid
[572] Ibid
[573] Sameer Tanago, The General Theory of Law (Knowledge Facility Publisher 1986).

named Manouri, who lived and practiced law in Alexandria, was appointed to draft laws and regulations for these courts.[574]

When drafting the Civil Code , Manouri relied heavily on the French Civil Code , which he often copied and presented as the Egyptian Civil Code .[575] Professor Al-Sanhuri commented on this by stating that "the Egyptian codification was in the form of a distortion of the French laws, and the drafter rushed in drafting it and had no qualification or skill to perform the task adequately."[576] Al-Sanhuri went on to explain that the Egyptian government was not interested in formulating an appropriate codification; their priority was to structure a court system with jurisdiction over foreign nationals.[577] The Egyptian government and European countries agreed that the French legal system, particularly the Civil Code , would be the driving source of the Egyptian Civil Code , as it was considered modern and well-developed.[578]

It is worth noting that the drafter of the used French in drafting it, and then the Mixed Court applied French as an official language for litigation.[579] This not only allowed the French to find its way into the Egyptian court but also allowed the French court's opinions and jurisprudence to influence the interpretation and application of the laws, as the judges in the Mixed Courts relied on French legal sources for this purpose.[580]

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[574] Ibid
[575] Al-Sanhuri (n 547) 286
[576] Ibid
[577] Ibid
[578] Ibid
[579] Salem (n 552) 65
[580] Ibid

4.1.2 The Civil Courts 1883 – 1949

After eight years of launching the Mixed Courts, the success they had demonstrated in judicial litigation inspired the Egyptian government to create a new court in 1883 called the National Courts. These courts governed any litigation involving national citizens and employed the same structure as the Mixed Courts.[581]

The regulations for the new Civil Courts relied on the laws that were used in the Mixed Courts. To achieve this, the Egyptian government formed a special committee to translate the laws that were applied in the Mixed Courts from French to Arabic language.[582] As a result, the scope of the laws that were imitated from France expanded to govern every Individual in Egypt, whether they were citizens or foreigners, after being only limited to foreigners. This arrangement continued for approximately 75 years.[583]

4.1.3 The Present Judicial System 1949-Present

The Egyptian people welcomed the founding of National Courts and the introduction of regulations. The legal community especially received this change with optimism towards their judicial system. El-Sanhuri elaborated on this by stating, "There is no doubt that the Egyptian generation that received this codified law at the end of the last century was happy with the new

[581] Tanago (n 555)
[582] The Explanatory Memorandum of the Egyptian Law No. 131 of 1948 Promulgating the Civil Code .
[583] Ibid

law ... The mixed and national court's laws, despite their flaws, were a tangible improvement compared to the worst of the past."[584]

Nevertheless, in the early and mid-20th centuries, opposition and criticism arose regarding the old Egyptian and the factors associated with its drafting, as well as the foundation of the Mixed courts and National courts between 1875 and 1883 by the anti-colonial nationalism movement.[585] This movement aimed to establish a new unified judicial system and Egyptian that reflected Egyptian values.[586]

After Egypt gained independence in 1922, a new generation of Egyptian legal professionals, including lawyers, judges, and law professors, emphasised the need for judicial reform in two areas: unifying the judicial jurisdiction into a single court system and reforming and revising the to meet the country's needs.[587]

A strong advocate for the reform of the was Professor Al-Sanhuri. In an article published in 1933, he detailed the inherent defects of the old and the need for reform to meet the demands of the new era in Egypt.[588] He suggested a process that the Egyptian government should consider when revising the and highlighted its insufficiencies. He explained that the reason for such defects was that "our legislature blindly imitated French law, apparently considering it superior... the

[584] Al-Sanhuri (n 547) 286
[585] Guy Bechor, 'To Hold the Hand of the Weak: The Emergence of Contractual Justice in the Egyptian Civil Law' (2001) 8 Islamic L & Soc 179–200 http://www.jstor.org/stable/3399209 accessed 2 April 2022.
[586] Ibid
[587] Al-Sanhuri (n 547) 278
[588] Ibid

defects in many articles in the could not be explained except that it is just an imitation of the original."[589]

Al-Sanhuri's argument is supported by the explanatory memorandum of the current Civil Code . It states that the old Civil Code was codified in 1883 in French language and then translated into Arabic, and this translation contains errors and faults. Most of its parts present brief and distorted versions of French law.[590]

The government eventually responded to the demand to unify the Mixed and National court systems into a single court and reform the Civil Code . In 1936, the Egyptian government formed a committee, composed mostly of foreigners, to revise the Civil Code . However, this committee was short-lived and dissolved after three months due to disputes among its members and their inability to complete their task. After that another committee was formed, but the same outcome ensued, and it was also dissolved.[591]

Then, the Ministry of Justice requested the appointment of a prominent law expert to lead the task of revising the Civil Code. In response, in 1938, the Egyptian government appointed Professor Al-Sanhuri and French law Professor Edward Lambert to undertake this project.[592] The two completed the revision of the in 1942, and it was subsequently adopted and entered into force in 1949[593]. Al-Sanhuri explained that the revised drew on three sources: the previous used in Mixed and National courts, the opinions of these courts, and the principles of Islamic law.[594]

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[589] Ibid
[590] The Explanatory Memorandum of the Egyptian Law No. 131 of 1948 Promulgating the Civil Code .
[591] Salem (n 552).
[592] Ibid
[593] Tanago (n 555).
[594] Ibid

This brief overview delved into the historical backdrop of the Egyptian and court system, highlighting how it was influenced by the French legal system. In fact, some legal scholars even went as far as to call the legal system of Egypt before 1949 the Franco-Egyptian legal system.[595] However, despite the reform of the Civil Code, the new version could not entirely escape from the impact of the French legal system, which had permeated the Egyptian court and academic institutions over the course of 75 years. However, this is understandable that completely discarding French influence and introducing an entirely new overnight would create chaos within the judicial system and the populace.

4.1.3.1 The Civil Code and Judicial Structure in Egypt

As discussed above, Egypt follows a Civil law jurisdiction that is founded on a codified legal system. The current Egyptian is a modification of the prior Civil Code, which was applicable in both the Mixed and National courts. In this regard, Al-Sanhuri, the drafter of the current Civil Code , clarified that the drafting process aimed to improve and rectify the previous Civil Code .[596]

This section provides a concise overview of the Egyptian judicial system and the relevant legal provisions on legal remedies for breaches of contract. It is essential to gain a comprehensive understanding of the laws governing breach of contract cases, the available legal remedies for such breaches, and how the court interprets and applies these laws.

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[595] L G H Wood, 'Reception of European Law, Origins of Islamic Legal Revivalism, and Foundations of Transformations in Islamic Legal Thought in Egypt, 1875-1960' (PhD thesis, ProQuest Dissertations & Theses Global 2011) https://www.proquest.com/dissertations-theses/reception-european-law-origins-islamic-legal/docview/856602995/se-2 accessed 17 April 2022.

[596] Al-Sanhuri (n 547) 286

1- Egyptian Court Structures

The Egyptian judicial system is characterized by two distinct court structures, with each influenced by the traditional differentiation between public and private law as recognised by the French legal system.[597] The first court structure is outlined in the Judicial Authority Law of 1972, which specifies three levels of courts: the Courts of First Instance, the Courts of Appeal, and the Court of Cassation, according to Article 1.[598] Under article 15 of the same law establishes the jurisdiction of these courts, which encompasses all dispute matters except for administrative disputes.[599] The Courts of First Instance, which are defined in Articles 9-11 of the Judicial Authority Law, are the primary courts for most civil and criminal cases.[600] On the other hand, the second-degree court, the Court of Appeal, reviews the legal and factual decisions made by the lower courts, specifically the Courts of First Instance, and comprises eight courts primarily located in major cities.[601]

The Court of Cassation, which occupies the highest position in the Egyptian judicial hierarchy, serves as a court of law and is responsible for monitoring the proper application and interpretation of laws, examining the validity of judicial decisions, and ensuring the uniformity of jurisprudence. Furthermore, under Article 5 of the Judicial Authority Law, the Court of Cassation

[597] Salem (n 552) 265
[598] Judicial Authority Law art 1 : Promulgated by Law of 1972 in force since 18 May 1972
[599] Ibid
[600] Ibid
[601] Ibid

has the authority to issue and publish judicial principles that guide the lower courts in their decision-making.[602]

The State Council Law of 1972, on the other hand, outlines the administrative judiciary structure, which consists of various courts. Article 1 stipulates that the Council of State is an independent judicial entity, and the administrative court is a key component of this structure.[603] This court has jurisdiction over any administrative or agency-related disputes.[604] Article 3 defines the four courts within the State Council, including the disciplinary, administrative, administrative justice, and the Supreme Administrative Court. Article 15 of the State Council Law defines the disciplinary court's jurisdiction over financial or administrative violations against civil servants.

The administrative court, which is the first-degree court in administrative disputes, handles all disputes involving government agencies, including administrative contract disputes and objections to administrative decisions. Meanwhile, the courts of administrative justice serve as a Court of Appeal or second-degree court for administrative court decisions. Finally, the Supreme Administrative Court, which is comparable to the Court of Cassation, is the highest court in the administrative judiciary. Its primary role is to review decisions from disciplinary and administrative justice courts and ensure proper interpretation and application of the law.

[602] Ibid
[603] The State Council Law, art 1, Promulgated by Law of 1972
[604] Salem (n 552) 265

2- Egyptian Civil Code

The Egyptian Civil Code , a fundamental legal document, was enacted on 15 October 1949, serving as a set of general principles to regulate and systematize private law. The legal principles and rules set forth in the Code are widely acknowledged to exhibit a high degree of flexibility.[605] This flexibility enables the Egyptian court to apply and interpret them according to the specific legal needs of the situation. According to the first article of the Code, all legal matters within its scope are subject to the provisions listed therein.[606]

One of the central aims of the is to regulate individual and financial relationships, as indicated by the order and structure of its contents.[607] The Code is organized into two sections, four books, seventeen parts, forty-nine chapters, and an impressive one thousand one hundred forty-nine articles. This hierarchical organization reflects the Code's comprehensive nature, ensuring that its legal provisions are both exhaustive and systematic.

- **The Source of the Egyptian Civil Code**

The sources of the Egyptian can be divided into two parts. The first part pertains to the sources utilized by the draftsman during the reform process. Al-Sanhuri identified one primary and two secondary sources that have collectively influenced the Civil Code ’s current form.[608] The primary source is the old Egyptian and judicial opinions, which provided the legal framework for the Civil Code .[609] Many legal scholars assert that the reform did not escape the French legal

[605] The Explanatory Memorandum of the Egyptian Law No. 131 of 1948 Promulgating the Civil Code .
[606] The Egyptian art 1 : Promulgated by Law no. 131 of 1948 in force since 15 October 1949
[607] Al-Sanhuri (n 547)
[608] Al-Sanhuri (n 547)
[609] Ibid

system's influence, arguing that the new code is simply a reform of the old Civil Code , which was an imitation of the French Civil Code imposed on the Egyptian legal system for 75 years.[610] Additionally, judicial decisions were influenced by French jurisprudence when the old was silent on a legal issue brought before the court.[611]

While there might be a certain inclination towards devising a novel legal framework from scratch to reflects Egypt's distinct identity, it is crucial to weigh the possibility of ensuing chaos and confusion this might cause. As Al-Sanhuri emphasized, “utilizing existing legal frameworks is crucial.[612] Therefore, relying on the old Egyptian and judicial opinions can be viewed as a practical choice to ensure legal stability and continuity”.[613]

Regarding, the other two secondary sources of the Civil Code are Islamic law and comparative law. Islamic law serves two functions in the Egyptian Civil Code.[614] Firstly, Islamic law aids the draftsman in selecting or denying the adoption of legal principles. As Dr. Richard Abraham explains, "Shari'ah principles should be employed as criteria in the selection of rules of law from other legal systems." Secondly, the incorporates various legal rules and principles derived from Islamic law, which govern family and inheritance laws.[615]

In the context of comparative law, the reform of the legal system in Egypt was not confined to the old Civil Code, judicial opinions, the French legal system, and Islamic law. The reform process also drew upon legal principles and doctrines from Germany, Switzerland, and Italy.[616]

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[610] Wood (n 577)
[611] Ibid
[612] Abd El-Razzak El Sanhouri, A Treatise on the Explanation of the Civil Code
[613] Ibid
[614] Ibid
[615] Debs, Richard A. *Islamic Law and Civil Code : The Law of Property in Egypt*. Columbia University Press, 2010. *JSTOR*, https://doi.org/10.7312/debs15044. Accessed 5 Mar. 2023.
[616] Bechor, Guy. “‘To Hold the Hand of the Weak’: The Emergence of Contractual Justice in the Egyptian Civil Law.” *Islamic Law and Society* 8, no. 2 (2001): 179–200. http://www.jstor.org/stable/3399209.

According to Al-Sanhuri, drawing on multiple legal jurisdictions in drafting the new was necessary due to the inadequacy of the old Egyptian and its influenced source, the French Civil Code, to meet the needs and demands of modern Egyptian society.[617]

The incorporation of comparative law has been beneficial for Egyptian law, as seen in the reform. For instance, the reform abandoned the individualistic-liberal approach that was present in the old code, and replaced it with a "moral-sociological approach of social justice" that prioritizes the common good over individual interests.[618] The adoption of the doctrine of abuse of rights is one example of this approach, which according to the explanatory memorandum, was inspired by German law. Which this doctrine is also recognised as a theoretical concept in Islamic law.[619]

Article 4 of the Egyptian Civil Code states that a “person lawfully exercising their rights cannot be held responsible for any resulting damage”.[620] This provision can be seen as an introduction to the doctrine of abuse of rights, which is elaborated in Article 5. The latter provision recognizes that the exercise of a right can be unlawful and specifies three cases in which the exercise of a right is considered unlawful: if the only intention is to harm another person; if the interests intended to be achieved are of less significance and entirely out of proportion to the harm caused to another person; or if the interests intended to be achieved are illegitimate.[621]

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[617] Al-Sanhuri (n 547)
[618] Guy Bechor, 'To Hold the Hand of the Weak: The Emergence of Contractual Justice in the Egyptian Civil Law' (2001) 8 Islamic L & Soc 179–200 http://www.jstor.org/stable/3399209.
[619] The Explanatory Memorandum of the Egyptian Law No. 131 of 1948 Promulgating the Civil Code .
[620] The Egyptian art 4 : Promulgated by Law no. 131 of 1948 in force since 15 October 1949
[621] The Egyptian art 5 : Promulgated by Law no. 131 of 1948 in force since 15 October 1949

The second part of this section discusses the sources that Egyptian judges should use when applying or interpreting the law for specific cases. Essentially, four sources are recognised: Egyptian law, customary law, Islamic law, and the principles of natural law and justice.[622] The first article of the determines these sources by stating that "legislative provisions should govern all matters to which they apply in wording or content".[623] The article provision addresses the primary source for Egyptian judges, which is relevant legislation issued by Egyptian authorities.

However, in the absence of such law, the second part of Article 1 of the Civil Code permits judges to rely on three other sources. If no legislative provision is applicable, judges should rule according to custom. If there is no relevant custom, judges should apply principles of Islamic law. If there are no relevant Islamic principles, judges should base their ruling on principles of natural law and the rules of justice.[624]

4.2 Available Remedy for Breach of Contract

The Egyptian delineates various sources of obligations, among which a contract is one. The provides 72 articles that establish the principles of contract law and the duties of the parties entering into a contract. Moreover, in the event of a breach of contract, the sets forth in articles 199 and 215 the available remedies for the aggrieved party, namely specific performance and damages.

[622] The Egyptian art 1 : Promulgated by Law no. 131 of 1948 in force since 15 October 1949
[623] Ibid
[624] ibid

4.2.1 Specific Performance

The primary remedy available to an innocent party in enforcing a breaching party to fulfill their contractual obligations is specific performance. Article 199 of the Egyptian confirms this, stating that "The obligation execute compulsorily on the debtor."[625] Additionally, the first part of Article 203 notes that "The debtor, after being notified in accordance with Articles 219 and 220, is obliged to perform its contractual obligations when it is attainable."[626] It is important to clarify that the term 'debtor' in this context refers to any individual or entity legally bound to settle a debt or complete a financial duty towards another party, known as the 'creditor', who possesses the legal authority to insist on the repayment or execution of said duty.

According to the explanatory memorandum of the Egyptian Civil Code , Article 203 indicates that the primary remedy for the innocent party is to seek specific performance from the court.[627] However, the article also outlines two exceptions in which the innocent party cannot obtain specific performance relief from the court. The first exception is when the performance of the contract is impossible. The second exception is when performing the contract would cause the aggrieved party an excessive burden. In such cases, the court may order monetary damages for the innocent party instead of specific performance. The explanatory memorandum notes that the second exception was influenced by the German Civil Code .

[625] The Egyptian art 199: Promulgated by Law no. 131 of 1948 in force since 15 October 1949
[626] The Egyptian art 203: Promulgated by Law no. 131 of 1948 in force since 15 October 1949
[627] The Explanatory Memorandum of the Egyptian Law No. 131 of 1948 Promulgating the Civil Code .

4.2.2 Damages

The legal rules for compensatory damages in Egyptian law can be found in three articles of the Articles 215, 163, and 122. Article 215 establishes the primary rule for recovering damages due to a breach of contract.[628] This article states that compensation should be provided to the innocent party when specific performance is unavailable. In other words, when the debtor is unable to perform their contractual obligation, they must provide compensation for failing to fulfill the obligation. This article is considered the primary legal rule for recovering damages due to a breach of contract.[629]

In the event of a breach, the court will examine it according to Article 163, which states that “anyone who causes harm to others due to a fault must provide compensation”.[630] This article establishes two factors relevant to Egypt's compensatory damage system. Firstly, liability in contracts is fault-based, rather than strict liability as in English law.[631] Secondly, Article 163 outlines three legal rules that the court must consider when assessing damages for breach of contract, namely fault, harm, and the causal link between them.[632] These legal rules also function as a limitation on damage recovery, as will be discussed later in this chapter.

Furthermore, article 221-1 of the Egyptian discusses general legal rules that guide the court when quantifying damages resulting from a breach of contract. This article specifies that "compensation includes harm suffered by the creditor and profits that have been deprived provided that they are the normal result of the failure to perform the obligation or delay in performing it."[633]

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[628] The Egyptian art 215: Promulgated by Law no. 131 of 1948 in force since 15 October 1949
[629] Ibid
[630] The Egyptian art 163 : Promulgated by Law no. 131 of 1948 in force since 15 October 1949
[631] Al-Sanhuri (n 547)
[632] Soliman Morcos, A Treatise on the Explanation of the Civil Code , vol 2 (1988 edn).
[633] ibid

This article is essential in determining the extent of compensation for the loss incurred by the innocent party.

4.2.3 The Assessment of Damage

The compensatory aim of damages is not well defined in Egyptian law. In the absence of a provision for measuring damages in the Civil Code , the Egyptian court adopted the same principle employed by the French court, which is call full reparation in assessing damage.[634] The purpose of full reparation aims to put the claimant as much as possible to the position they would have been in if the non-performance or late performance had not occurred.[635] In 2018, a Court of Cassation commercial contract case held that the court's compensatory approach was the principle of full reparation, in which every direct harm a creditor suffers will be compensated.[636] The purpose of this principle was to return the creditor to the position they would have enjoyed had the harm not occurred.

However, alongside the principle of full reparation, which is the primary aim of measuring damage, the Egyptian court also adopted the concept of protecting the claimant's expectation interest. This has appeared in several cases of the Court of Cassation. For example, in 2011 the Court of Cassation ruled that the judiciary perspective of this court established that an innocent party is entitled to recover the expectation that they hoped to gain.[637] However, this expectation is limited to what the court finds reasonable.[638] It is not clear how the court has been influenced by

[634] Ibid
[635] Ibid
[636] private company v. private company, Court of Cassation (commercial division), case no 7863,.2018
[637] private company v. private person, Court of Cassation (commercial division), case no 6534,.2011
[638] Ibid

such a principle. Also, the court has not elucidated under what circumstances would apply the full reparation principle or protect the innocent party's expectations.

4.3 Principles Limiting the Recovery of Damage.

4.3.1 Fault

The process of establishing contractual damage begins with the principle of contractual fault, which represents the primary consideration for the court. This stands in contrast to English law, where both contract and tort liability are based on strict liability. In contrast, Egyptian contract and torts law operates on a fault-based system, as established by Article 163, which affirms that "Every fault that causes harm to others requires compensation from the person who committed it."[639] This legal provision highlights the critical role of contractual fault in establishing contractual damage in Egypt.

It should be noted, however, that the requirement of fault is only necessary when a claimant seeks to recover damages. In other words, the court need not investigate contractual fault if the claimant seeks alternative remedies such as specific performance.

There is a notable distinction between the role of fault in seeking damage in the old Egyptian code and the current Civil Code.[640] The former placed a significant emphasis on fault, such that if claimant wished to demonstrate that the defendant had failed to fulfill their contractual obligations, they had to seek recovery of damages and prove that the defendant's non-performance

[639] The Egyptian art 163 : Promulgated by Law no. 131 of 1948 in force since 15 October 1949
[640] Morcos (n 614)

constituted a fault. In other words, fault played a crucial role in determining whether the claimant could recover damages under the old Civil Code.

In the current Civil Code, proving that non-performance is the defendant's fault is not required. Al-Sanhuri defines fault in contractual liability as “the debtor's non-performance of their contractual obligations”.[641] If the defendant fails to perform or delays in performing their contractual obligation, this is considered a contractual fault, irrespective of the cause. Professor Sulaiman Morcos explains that “compensation must be provided to the innocent party when specific performance is unavailable. Failure to perform the contract or performing it late is considered a contractual fault that requires compensation”.[642]

The illustrations by Morcos and Al-Sanhuri are supported by a 1972 ruling from the Egyptian Court of Cassation. The court held that “failure to perform contractual obligations by the debtor is a fault in itself, resulting in contractual liability. The debtor cannot escape liability unless they can prove that non-performance was due to a foreign cause that negates the causal link”.[643]

An important aspect to consider is that the concept of contractual fault does not serve as a determining factor for the existence of a breach of contract. As previously noted, nonperformance is considered to be a fault. However, the court will not examine the fault requirement when the claimant seeks alternative legal remedies, such as specific performance.[644] This requirement is only applicable when the claimant seeks contractual damages for the defendant's failure to fulfill their contractual obligations.

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[641] Al-Sanhuri (n 547)
[642] Morcos (n 614)
[643] Egyptian Court of Cassation, Session held in 1972, Challenge No. 7368,
[644] Al-Sanhuri (n 547)

Al-Sanhuri clarifies why a breach of contract does not automatically give rise to the right to damages. “This is because, in the event of a breach of contract, the innocent party may opt for specific performance, for which no fault is required. On the other hand, when the innocent party seeks damages, either alone or together with specific performance, the determination of contractual liability must be based on the presence of fault”.[645] Al-Sanhuri supports his argument by citing Article 215 of the Egyptian Civil Code, which states that in cases where specific performance by the debtor is impossible, they will be responsible for paying damages for their nonperformance.[646]

Furthermore, the emphasis on the requirement of contractual fault when seeking recovery of damages has been demonstrated in court practice. For instance, in 2013, the Egyptian Court of Cassation ruled that contractual fault is a necessary element that the court must consider when awarding compensation for nonperformance.[647]

One may question why the court places such emphasis on the concept of fault in contractual liability, particularly when non-performance or delayed performance of a contract is already classified as a fault. The answer lies in the significant role that the concept of contractual fault plays in Egyptian court practice, following the revolutionary framework presented by the famous French legal scholar in 1920, which introduced the idea of contractual fault.[648] This framework distinguishes between two types of contractual obligations: obligations de résultat (obligations to achieve specific results) and obligations de moyens (obligations to exercise reasonable care).[649] This differentiation has had a profound influence on both Egyptian court practice and

[645] Ibid
[646] Ibid
[647] Egyptian Court of Cassation, Session held in 2013, Challenge No. 9271,
[648] Solene Rowan, 'Fault and Breach of Contract in France and England: Some Comparisons' (2011) European Business Law Review, Forthcoming https://ssrn.com/abstract=1837505.
[649] Ibid

jurisprudence. As a result, the importance of contractual fault, and its potential use by the court as a limit on the recovery of damages, depends on whether the contractual obligation is an obligation to exercise reasonable care or an obligation to achieve specific results.

The scope and implementation of contractual fault are determined differently depending on the distinct obligations recognised under Egyptian law. The requirement of fault has no effect on the obligation to achieve specific results. However, for obligations to exercise reasonable care, the concept of contractual fault plays a significant role in assessing contractual damage by the Egyptian court and limiting the liability of the defendant, as it explores further in the following paragraphs.

The obligation of Exercising completed results means that contractual obligation has an inherent goal that does not absolve the promisor's obligations without exercising the completed result that was stipulated in the contract.[650] In other words, "the party is obliged not simply to show due diligence, but to achieve the result envisaged".[651] For example, for a carrier contracted to deliver goods, the obligation under contract will not be excused by showing that reasonable care has been taken. The defined result in the contract should be achieved. Consequently, the contractual fault in this obligation can be determined by showing that the defendant has not fulfilled the desired result.[652] Invoking contractual fault to limit liability in this type of obligation is less relevant than the obligation of exercising reasonable care as it is difficult to escape or limit the defendant's liability if the claimant successfully proves that the intended result under the

[650] Solene Rowan, 'Compensation' in Remedies for Breach of Contract: A Comparative Analysis of the Protection of Performance (OUP 2012; online edn, 26 Jan 2012) https://0-oxford-universitypressscholarship-com.serlib0.essex.ac.uk/view/10.1093/acprof:oso/9780199606603.001.0001/acprof-9780199606603-chapter-4.
[651] Ibid
[652] Morcos (n 614)

contract has not been performed.[653] The only option for the defendant is to limit their liability under the causation principle but not under the fault principle.[654]

In contrast to the obligation to achieve a particular result is not required by the obligations to exercise reasonable care. [655] The contractual obligation in this case is satisfied by showing that the defendant adhered to the contract with reasonable care.[656] In other words, "the promisor is obliged to exercise reasonable care in the performance of his obligation but has no duty to achieve a particular result".[657] An example of a contract that considers an obligations to exercise reasonable care is a legal service contract. A lawyer is not required to achieve a result and must only demonstrate that they exercised due diligence in fulfilling the contract. Therefore, contractual fault in this type of obligation is essential for establishing and limiting liability.

The question of what norm the court uses in assessing whether a defendant committed contractual fault to hold him liable arises.[658] the Egyptian clearly states in article 211 that the required norm is defined as what is reasonable for a normal person.[659] In 1980, the Egyptian Court of Cassation held that "the standard the court adopted in assessing the existence of the contractual fault was what an ordinary person could perform with reasonable care".[660]

[653] Ibid
[654] Al-Sanhuri (n 142) 174
[655] Rowan (n 629)
[656] Ibid
[657] Ibid
[658] Ibid
[659] The Egyptian art 211 : Promulgated by Law no. 131 of 1948 in force since 15 October 1949.
[660] private company v. private company, Court of Cassation (Labor division), case no 658,.1980

4.3.2 Harm

The Egyptian court examines harm as the second element in investigating contractual liability and determining the extent of recovery damages for which the defendant would be liable. Article 163 states that "compensation is necessary for any wrongdoing that causes harm to others". In individual cases, the Egyptian court has the flexibility to determine which losses result from non-performance. This is because the principle of full reparation grants the court complete discretion to determine the existence and extent of loss based on the facts of each case. In contrast, the English court is primarily guided by the expected interests of the innocent party. Additionally, the Egyptian court tends to be a claimant-friendly environment.[661] Professor Morcos notes that "the court's approach exhibits an intense desire to assist the innocent party in obtaining compensation for the harm they have suffered."[662]

In the context of contractual damages, the terms harm and loss are used interchangeably by the Egyptian court and legal scholars, despite the language of Article 163, which specifically refers to harm. Thus, when the court or scholars use the term harm, they may also mean loss, and vice versa. Professor Morcos, for example, defines harm within contractual damages as "the failure to perform the obligation that caused a loss or a missed opportunity for profit."[663]

The French legal system similarly does not distinguish between harm and loss, as noted by Professor Pietro Sirena: "At present, the terms *dommage* and *préjudice* are used interchangeably

[661] Al-Sanhuri (n 547)
[662] Morcos (n 614)
[663] Ibid

by French courts and scholars."[664] However, the proposed legal reform of French Civil Liability in 2017 includes a distinction between harm and loss.[665]

Egyptian law distinguishes between two types of harm: Material Harm and Moral Harm.[666] In cases of non-performance or late performance, contractual liability may arise. Material harm is the primary type of harm for which the Egyptian court provides compensation in cases of contractual damage. On the other hand, claims for moral harm in such cases are relatively uncommon. Nonetheless, it is worth noting that the Egyptian permits the recovery of Moral Harm, as stated in Article 222, "The compensation includes moral harm." Moreover, several cases demonstrate that the Egyptian court allows for the recovery of moral harm in case of contract breaches, provided the claimant seeks such recovery from the court.

It is important to note that while it is possible for the innocent party to establish non-performance that does not clearly indicate the existence of harm, the claimant must still demonstrate that such non-performance resulted in a loss. The court should then investigate whether the non-performance caused harm to the innocent party and determine the extent of that harm.

4.3.2.1 Material Harm

Material Harm within the context of contractual damages can be defined as "a violation of the pecuniary interest of the innocent party." Material Harm can be further categorised into four types of losses: actual losses, future losses, possible losses, and loss of opportunity or chance.[667]

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[664] Jean-Sébastien Borghetti and Simon Whittaker (eds), French Civil Liability in Comparative Perspective (Bloomsbury Publishing 2019) http://ebookcentral.proquest.com/lib/universityofessex-ebooks/detail.action?docID=5983826 accessed 23 April 2022

[665] Ibid

[666] Al-Sanhuri (n 547)

[667] Ibid

Actual loss is the primary purpose of compensation, and it refers to losses that have occurred in a certain and definite manner. Future loss refers to losses resulting from non-performance that would occur in the future but can be supported by factual events that have already taken place. Possible losses refer to non-performance that occurs in the present but has not resulted in an actual or future loss.[668] This type of loss is not recoverable as the court could not determine the certainty of such losses.[669]

The loss of chance or opportunity: the loss of chance or opportunity refers to a situation where non-performance or late performance of a contract results in the innocent party losing a financial opportunity that may or may not have occurred.[670] The principle of loss of chance was originally formulated by the French courts as a way to address issues related to uncertain causality. This concept has since been adopted by the Egyptian courts as well. In Egyptian law, the two terms chance and opportunity are used interchangeably without differentiation. The principle of lost chance implies that the actual harm suffered by the claimant is not the profits that went unrealised, but rather the squandered opportunity to fulfil the contract. Therefore, the assessment of damages should focus on the contract's value at the time of the breach, rather than on potential future earnings. This approach establishes that the claimant's harm is rooted in the missed opportunity to fulfil the contract, rather than in the absence of profits. As a consequence, any measurable damages should be calculated based on the value of this lost opportunity. In such cases, the court does not investigate the causal link between non-performance and the final loss or whether the loss is certain or not. Instead, the court considers the deprivation of the chance or opportunity to gain financial benefit as harm that needs to be compensated. The Egyptian Court of Cassation clarified the

[668] Ibid
[669] Ibid
[670] Morcos (n 614)

concept of loss of chance in a 1965 ruling, stating that "The law does not prevent the compensation of what would have been probable earnings that the innocent party missed out on due to the illegal action. If the opportunity was probable, then depriving the party of that opportunity is certain and must be compensated for."[671]

The question arises as to how the Egyptian court assesses the loss of chance. The general principle in the assessment of damages is that when a court is responsible for determining the appropriate compensation for an aggrieved party, the initial step usually involves quantifying the financial loss.[672] This entails calculating a monetary amount that adequately compensates for the harm suffered. When this principle is applied to the concept of loss of opportunity or chance, two distinct judicial approaches emerge.[673]

The first approach posits that the loss of an opportunity to gain profit has its own intrinsic value, separate from the potential earnings that the aggrieved party hoped to realise had the contract been performed.[674] From this perspective, the loss of opportunity or chance is assessed based on this intrinsic value. Additionally, the Egyptian court has discretionary power to estimate the appropriate monetary sum for the value of such an opportunity or chance.

The second approach, in contrast, disregards the intrinsic value of the opportunity itself, treating it merely as a means to achieve anticipated financial gains. In this view, the opportunity holds no independent value; rather, its worth is intrinsically tied to the unrealised gains that could

[671] Egyptian Court of Cassation, Session held in 1965.
[672] Dr Ibrahim El-Desouki, Compensation for the Missed Opportunity (Kuwait University- Academic Publishing Council 1986).
[673] ibid
[674] ibid

have potentially occurred had the contract not been breached.[675] Consequently, the court should base its assessment of the loss of such an opportunity or chance by considering and examining the loss of profit, and compensate for such a loss.

In both approaches, it should be noted that the Egyptian court views loss of chance as a distinct form of harm. This must satisfy both fault and causation criteria to qualify for compensation.

4.3.2.2 The Extent of the Harm

The Egyptian court has adopted the French notion of full reparation for harm caused.[676] Article 211 of the Egyptian specifies that full reparation includes "compensation for harm suffered by the creditor and profits that have been deprived." Furthermore, the Egyptian Court of Cassation in 2000 stated that "compensating for harm requires evaluating two crucial factors: the victim's losses and the foregone gains. The judge assesses these elements in monetary terms, ensuring that the compensation neither falls short nor exceeds the actual harm incurred."[677] Therefore, the court must first assess the harm suffered due to non-performance and any associated loss of profit. However, legal rules such as certainty of the loss and foreseeability of the loss function as controlling devices within the court when determining the loss suffered and profits deprived. These legal rules assist the court in limiting the harm for which the defendant is responsible for compensating.

[675] ibid
[676] Ibid
[677] Egyptian Court of Cassation, Session held in 2000, Challenge No. 8012,

Certainty of the loss: the loss, whether actual or future, must be certain according to the principle of certainty of the loss.[678] The Egyptian Court of Cassation emphasised in its 2005 ruling that "harm must be certain to have occurred or its occurrence in the future must be inevitable, and a mere possibility of future damage is insufficient to recover compensation." Therefore, the court must evaluate factual factors to determine whether the non-performance or late performance resulted in certain harm that has occurred or would inevitably occur in the future. This assessment is based on Article 221-1, which states that "the harm is a natural consequence of non-performance or late performance."[679] Additionally, future losses must be certain to occur as a normal result of the non-performance.

Foreseeability: The principle of foreseeability is a fundamental factor in ascertaining the existence and scope of harm in contractual damages. Within the context of Egyptian law, it serves as one of the key factors utilised in evaluating and establishing the harm. It is worth noting that the topic of foreseeability does not generate controversy in Egyptian legal literature, but is rather regarded as an unequivocal and firmly established element.

The foreseeability rule is employed to determine whether a contracting party could have reasonably predicted a loss at the time of concluding the contract, and to aid the court in either expanding or limiting a defendant's legal responsibility. This legal principle has been incorporated into the Egyptian Civil Code , as Article 221-2 states that, “in the case of an obligation arising from a contract, a debtor who has not committed fraud or gross negligence will only be responsible for the harm that could have been typically foreseen at the time of contract conclusion”. Consequently, the Egyptian court imposes a requirement for the application of foreseeability in

[678] Al-Sanhuri (n 547)

[679] The Egyptian art 221-1 : Promulgated by Law no. 131 of 1948 in force since 15 October 1949

the case of fraud or gross negligence, where the defendant's liability cannot be excused or restricted, and the defendant will therefore be held liable for any foreseeable or unforeseeable loss.

The notion of foreseeability has been recognised in Egyptian law since the drafting of the old Egyptian in 1875.[680] It was influenced by the French legal system, as previously discussed. Scholars have confirmed that the French legal system originated the foreseeability rule, which has subsequently influenced many legal systems, including English law, as well as Egyptian law.[681] Professor Franco Ferrari has explained the originality of foreseeability by stating, "This rule was subsequently adopted by the Code Napoleon, which, by serving as [a] model [for] a number of other legal systems, served as a "vehicle" for the transplantation of the rule of foreseeability into numerous legal systems."[682] Furthermore, Ferrari has argued that the foreseeability rule is not a judicial invention of common law, as the rules were already present in the of French law, and the Court of Exchequer was aware of the existence of such a rule and employed it.[683] Professor Ferrari emphasised, 'It is apparent that the judges of Hadley were aware of the aforementioned American case law based on the French "foreseeability" limit, and they were aware of the French rule since they stated that "the sensible rule appears to be that which has been laid down in France, and which is declared in their code-Code Civil 1149, 1150, 1151".[684] Although the rule of foreseeability may have its origins in French law, common law jurisdictions, particularly English courts, have significantly developed this principle over the years.

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[680] Tanago (n 555)
[681] For example, professor Guenter Treitel in his book remedies for breach of contract: a comparative account, Professor Reinhard Zimmermann in his article Limitation of Liability for Damages in European Contract Law, and Professor Franco Ferrari in his article Comparative Ruminations on the Foreseeability of Damages in Contract Law.
[682] F Ferrari, 'Comparative Ruminations on the Foreseeability of Damages in Contract Law' (1992) 53 La L Rev 1257.
[683] Ibid
[684] Ibid

The foreseeability standard: the Egyptian outlines the standard that the court uses to determine foreseeability in cases of breach of contract. Article 221-2 describes foreseeability as that which is "normally foreseen," a concept that Egyptian legal scholars have elaborated upon by applying an objective standard.[685] Accordingly, the court assesses whether harm was normally foreseen based on whether a reasonable person in the same situation could have foreseen the harm. If a defendant fails to foresee harm that a normal person in the same circumstances would have anticipated, then the court will not excuse the defendant, as Article 221-2 specifies that the foreseeability must be normal.

In practice, the Egyptian court applies an objective standard to determine foreseeability in cases of breach of contract. For instance, in 2016, the Court of Cassation ruled that "the assessment of the foreseeability of harm must be based on an objective standard rather than a subjective one".[686] This means that a reasonable person in the same circumstances as the debtor when the contract was formed would have foreseen the situation. Moreover, the court held that not only the foreseeability of harm but also the extent of the harm must have been apparent to a normal person under normal circumstances.

It is worth noting that the Egyptian court applies the same standard in both contract and tort cases, which is the "normal person" test.[687] However, English law distinguishes between the standards used in contract and tort. In contract cases, the test is whether the loss resulting from the breach is a natural consequence of the breach, while in tort cases, the test is whether a reasonable person in the same situation would have acted in the same way.

[685] Morcos (n 614)
[686] Egyptian Court of Cassation, Session held in 2016, Challenge No. 2441
[687] Al-Sanhuri (n 547)

The degree of foreseeability: Article 221-2 states that for an obligation arising from a contract, a debtor who has not committed fraud or gross negligence will only be held liable for the harm that could normally be foreseen at the time of concluding the contract. However, it is unclear whether the foreseeability requirement pertains to the cause of the harm or the value of the harm. Professor Morcos argues that both the cause and the value should have been foreseeable at the time of forming the contract.[688] This interpretation is based on the language of the legal provision, which suggests that "The foreseeability requirement of Article 221 pertains not to the cause of the harm but to the harm itself."[689]

Therefore, the extent of required foreseeability can be illustrated through a well-known example. If a carrier company agrees to transport a normal parcel, and it gets lost along the way, the company cannot be held responsible if it could not have foreseen that the parcel contained valuable items. Under Egyptian law, the carrier is only responsible for the expected cause of the damage. For instance, if the parcel was lost due to a mistake made by its workers, the defendant is liable only for the extent of the loss that could have been foreseen. In this example, the company is not liable for the value of the parcel containing valuable items as it could not have been foreseen.

This approach is in line with the common law approach adopted in the *Hadley v Baxendale* decision. In this case, the defendant was not liable for delivering a damaged shaft to its manufacturer as it could not have foreseen that the claimant would consider it a valuable parcel. Therefore, the defendant was considered to have attempted to deliver a normal parcel, and the court found it not liable.

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[688] Morcos (n 614)
[689] Ibid

Does Egyptian law recognise the common law categories of general and special knowledge, as articulated in the *Victoria Laundry* case? The answer is yes. Egyptian law follows the common law approach and recognizes this distinguishing feature. The Egyptian court limits the extent of the defendant's liability by the knowledge the defendant possesses. The court will determine if the knowledge is general or special by assessing whether a reasonable person could have foreseen the loss.[690] If a reasonable person could have foreseen the loss, the defendant would be held liable. However, if no reasonable person could have foreseen the loss, the defendant's liability would be limited, as the claimant should have communicated the special circumstances when forming the contract. Therefore, damages will be limited to what a reasonable person could have foreseen, and what knowledge the claimant shared with the defendant. The defendant cannot be held liable based on the foreseeability principle, particularly when the claimant was involved in causing the loss by not informing the defendant about their unique circumstances.

Before delving into the rule of causation as a limitation of recovery of damages under Egyptian law, it is necessary to consider the intersection of the foreseeability and causation rules. The foreseeability rule serves two main purposes in court. Firstly, it limits the defendant's liability to the extent of the loss foreseen when the contract was formed. Secondly, it acts as a tool for the court to determine the directness of the causal relationship between the fault and the harm suffered. Thus, the foreseeability rule helps the court evaluate whether the loss is a direct or indirect result of the fault and whether the defendant should be held responsible.

[690] Al-Sanhuri (n 142)

4.3.3 Causation

In Egyptian law the principle of causation is the third required principle of assessing and determining the contractual liability of the contract breaker. The essence of the causation rule is to act as a restriction on compensation by eliminating indirect loss to ensure that the defendant only compensates for the losses they caused.[691] In 2006 the Egyptian Court of Cassation expressed that 'the causal relationship is a fundamental principle in contractual liability and that its availability is a necessary condition for the establishment of liability and then for the judicial remedy'.[692] The functionality of causation is meant to investigate the relationship between the fault and harm to determine whether a relationship exists to impose contractual liability.[693] To illustrate this, when the non-breaching party suffers losses due to breach of contractual obligations by the breaching party, then for the realization of contractual responsibility upon the breaching party, there must be a causal link between the fault principle and the harm or loss principle, which means that the breach of contractual obligation has caused the loss.

Therefore, it is noted that in Egyptian law, causation has a similar purpose as in English law, as we explored in the last chapter, specifically regarding the principle of legal causation. In compatibility with common law, the sense of causation in Egyptian law works as a filter to identify and allocate all the facts and factors associated with the breach of the contract and the resulting loss to determine the extent of the defendant's liability. The notion behind this is that the contract

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[691] Morcos (n 614)

[692] private person v. private person, Court of Cassation (Commercial division), case no 963, 2006.

[693] S Whittaker, 'Liability for Products: English Law, French Law, and European Harmonization' (OUP 2005; online edn, 29 Sep 2005) https://oxford.universitypressscholarship.com/view/10.1093/acprof:oso/9780198256137.001.0001/acprof-9780198256137.

breaker can only be legally obligated to compensate for the damages that result from the fault they committed, which is the breach of the contract.[694]

4.3.3.1 Source of Causation

The principle of causation has been codified in Egyptian Civil Code . Such a requirement is located in article 163 and 221 of the contains a reference to the causation requirement.[695] In article 163 which is the primary reference of the required causal link between the harm and non-performance. In addition, article 221 states that the compensation includes losses suffered by the creditor and profits that have been deprived, provided that they are the 'normal result' of the non-performance or delay in performance.[696] These losses shall be considered a 'normal result' if the creditor cannot avoid them by making a reasonable effort.[697] In analysing the article, it appears that Egyptian law categorises the causation principle as what is understood as a normal result. Thus, when the claimant suffered a loss due to the defendant's fault, then causal enquiry can be determined by investigating whether the loss was a normal result of the fault.

The terms for normal cause in the Egyptian are indefinite and undermined. In terms of the causal link, it appears from the language of the Article 221 in the Egyptian that causation differs from French law requirement of the causal link which it should be a direct cause of the harm. But in fact, it does not. Egyptian legal scholars have interpreted the meaning of normal cause in Article 221 as referring to a direct cause between the loss and fault, which is equivalent to causation in

[694] Treitel (n 264).
[695] The Egyptian art 221: Promulgated by Law no. 131 of 1948 in force since 15 October 1949
[696] Al-Sanhuri (n 547)
2011.
[697] Ibid

French law.[698] Al-Sanhouri elaborates on the meaning of the normal result, which is that 'the measurement and assessment of the causal link between loss and fault is valid if the loss is a direct consequence of the fault'.[699] Thus, he defines normal results as what can be found to be a direct cause. Al-Sanhouri's elucidation of what normal cause means has been influential on court practice. This can be seen in the delivered judgement of the Court of Cassation. For example, in 2016, the Court of Cassation stressed that 'compensation is determined by investigating whether the loss is directly caused by the fault'.[700]

4.3.3.2 Functionality of Causation Principle within Egyptian Law

As we reviewed in the causation section of chapter three, legal scholars within common law jurisdictions are fond of exploring, developing and analysing the rules of causation within civil liability. Thus, legal rules of causation have been controversial among legal scholars in common law jurisdictions. Not only do differences appear among scholars, but such differentiation has also been extended to completely distinct approaches to academic and judicial practice, as is the case in England.

On the contrary, in civil law system such as Egyptian legal scholars are not attracted to the discussion and analysis of the concept of causation within civil liability, and it discussion regarding the causation principle is limited to the interpretation of the causation requirement in the Civil Code .[701] In fact, Egyptian court practice lacks extensive discussion of how or why the court applies the causation principle in various cases. Consequently, unlike in common law, the causation

[698] Ibid
[699] ibid
[700] private company v. private company, Court of Cassation (Commercial division), 2016
[701] M Infantino and E Zervogianni, 'The European Ways to Causation' in Marta Infantino and Eleni Zervogianni (eds), Causation in European Tort Law (Cambridge University Press 2017).

principle in its nature is considered an uncontroversial subject within the legal literature of Egypt.[702] This applies to any legal issue that can be challenging to resolve under the causation rule, such as a loss of profit claim. Thus, the court would not hesitate to depart from applying the causation rule and settle the issue under a different legal rule. For example, as explained earlier when the French court devised and formulated the loss of chance theory that the Egyptian court adopted.[703] This method meant to offer an alternative to causation that aims to avoid the difficulties and complications associated with applying the causation principle.[704]

However, the disinterest of legal scholars in the causation rule and its application in contractual liability and the absence of adequate reasoning and articulation by the court of how the causation rule is applied does not mean the causation rule has no significant role in determining and assessing contractual liability. Also, Professor Morcos, stated that 'the investigating a causal link in contractual lability is important because repelling the contractual liability can only be done under the causation requirement'. Therefore, the causation rule is critical for the court because it serves to determine what loss would count as direct and what would not.[705]

4.3.3.3 Causation approaches

There are two approaches that can be implemented by the court to distinguish between what is considered direct and indirect. The first approach is adequate cause which is the most dominant

[702] ibid
[703] Bruno Tassone, 'The Loss of Chance Doctrine in a Comparative Perspective' (2020) Annali del CERSIG–Centro di Ricerca sulle Scienze Giuridiche, Eurilink, Rome.
[704] Rui Cardona Ferreira, 'The Loss of Chance in Civil Law Countries: A Comparative and Critical Analysis' (2013) 20 Maastricht J Eur & Comp L 1.
[705] Mauro Bussani and Anthony J Sebok (eds), Comparative Tort Law: Global Perspectives (Edward Elgar Publishing 2015) http://ebookcentral.proquest.com/lib/universityofessex-ebooks/detail.action?docID=2198058.

and influential and is the standard approach used by the Egyptian courts. The second approach but-for test approach has less influence on court practice.[706]

Egyptian court imposes requirements for recovering damage due to breach of contract that the loss must be direct result of non-performance.[707] The words direct function as a filter limiting the contract breaker's responsibility.[708] Thus, the contract breaker is only responsible for the losses that are determined to be the direct consequences of the breach.[709] However, there is a dilemma associated with this words as to how loss can be defined and classified as direct. For example, suppose a contractor fails to complete a building project on time. As a direct consequence, the building owner loses a lucrative lease agreement with a prospective tenant who had planned to rent the space. In this context, the loss of rental income could be considered a direct result of the contractor's failure to deliver the project as agreed. The legal question would revolve around whether the lost lease agreement and subsequent income can be directly linked to the contractor's breach.

Adequate causation theory: the Egyptian court has adopted the German legal theory, which came to the Egyptian legal system through the influence of the French legal system. This theory, known as adequate causation theory, helps to resolve the challenge of determining what constitutes direct and immediate causation.[710] The German jurist Von Kries established the adequate causation theory in 1880.[711] The first application of the theory was within the scope of criminal law, and then

[706] Duncan Fairgrieve, Product Liability in Comparative Perspective (Cambridge University Press 2005).
[707] French Civil Code , art 1231–4 (in force since 2016) http://www.textes.justice.gouv.fr/art_pix/THELAW-OF-CONTRACT-2-5-16.pdf.
[708] Ibid
[709] P Marsh, Comparative Contract Law: England, France, Germany (1st edn, Gower Publishing Ltd 1994).
[710] Goldberg (n 277)..
[711] Tobias Wagner, 'Limitations of Damages for Breach of Contract in German and Scots Law—A Comparative Law Study in View of a Possible European Unification of Law' (2014) 10 Hanse L Rev.

it expanded to other areas of law.[712] Thus, it could be said that adequate causation theory is the standard legal rule used by the court to determine the causal directness between the breach and the loss. Professor Fairgrieve confirms that ‘the stipulation of causal directness is expressed by the courts through the test of la théorie de la causalité adéquate'.[713] The test formulation of adequate causation, as Professor Snyman formulated it, is that 'an act is a legal cause of a situation if, according to human experience, in the normal course of events, the act has the tendency to bring about that type of situation’.[714]

Let's explore this example to illustrate how the test of adequate causation may work in the case of a breach of contract. When the breaching party does not perform their contractual obligations, then by applying adequate causation, the scope of their liability is limited only to the loss that would occur in the normal course of things from the breach. However, the test will exclude any loss that appears unlikely to result from the breach. Thus, the test of adequate causation recognises two categories in which the loss might fall: the loss is part of the normal course of things, or the loss is unlikely to occur.

Let us apply the adequate causation test to the previous example presented above regarding the stolen car. Driving the vehicle at a fast speed is the normal course of things to cause an accident, but it is unlikely to cause an accident just because the car was not secured by the owner. Professor Tobias Wagner demonstrates this by stating that ‘if the act that leads to liability is in general, and not only in very peculiar and unlikely circumstances which must remain out of consideration in the usual course of things, capable of resulting in this loss’.[715] It is worth mentioning that the core functionality of the test of adequate causation is to limit the liability of the loss that can be

[712] Ibid
[713] Duncan (n 683).
[714] Snyman, C. R. "Criminal Law 4ed (2002).
[715] Tobias (n 689)

recovered to only what is considered part of the ordinary course of things and eliminate any unnormal course of things.

There is a question that arises regarding the relationship between adequate cause and directness of cause. Professor Morcos explains that both adequate cause and directness operate as two stages of causation.[716] The application of two-stages will first use the test of adequate causation to determine the 'threshold situation' to determine whether the claimant is responsible.[717] If the first stage is established, then the next stage is to determine the extent of responsibility by applying the directness test to assess how far the defendant is liable. The framework of the two-stage method of causation bears a resemblance to the two-stage method discussed in Chapter 3 of the common law system, indicating a possible influence of common law on French legal scholars, who, in turn, have influenced Egyptian legal scholars.[718]

The distinction between an adequate causation test and the requirement of directness, which they meant to be two rules, not a single rule.[719] As a result, the categoriseion of the test of adequate causation and the directness requirement as two separate tests.[720]

Let us elucidate how the two-stage approach functions when there is a breach of contract case. According to the proponents of such a method, the court should first consider all the facts associated with the breach and then determine whether the defendant's conduct violates the contractual obligations by using an adequate causation test.[721] This is because it is essential to examine and assess whether the defendant's breach is the only sufficient cause of the loss or

[716] Morcos (n 614)
[717] Ibid
[718] Treitel (n 264).
[719] Ibid
[720] Ibid
[721] Ibid

whether other factors may also be considered an adequate cause for the loss.[722] If the court unsuccessfully established the first step, then there is no need to move to the next step, but if the court finds that the defendant's breach is the adequate cause of the loss, then the court should apply the directness test to assess the extent of liability and what loss the defendant is responsible for compensating.[723]

But For Test: there is evidence that the court has employed the but-for test to determine causation.[724] However, there is no sufficient evidence demonstrating the degree to which Egyptian jurisprudence is influenced by the but-for test. To my limited knowledge, there is no analysis by legal scholars of the adoption and application of the but-for test by the Egyptian court.

The application of the but-for test appeared in 2017 in one of the Court of Cassation's judgments.[725] The case started when the claimant sought recovery of loss of profit, alleging that the defendants' unfair competition and the infringement of the claimant's intellectual property right caused the company to lose a future profit between 2006 and 2009 and sought fifteen million pounds for recovery.[726] In determining liability, the court found that the defendant committed fault by impersonating the name and brand of the claimant. Further, in determining the causal relationship between the defendant's fault and the loss of profit, the court applied the directness requirement and found that the loss directly resulted from the defendant's fault. However, the court did not elucidate how they reached this conclusion.

The surprising aspect, in this case, is that the court employed the but-for test, as described and discussed in Chapter Three of this thesis.[727] As stated in the court opinion, the application of the

[722] Ibid
[723] Ibid
[724] private company v. private company, Court of Cassation (Commercial division), 2017
[725] Ibid
[726] ibid
[727] Ibid

but-for test is to determine whether the loss of profit was caused by the defendant's actions or due to general financial losses by the company. The aim was to answer this causal enquiry by applying the but-for test. Thus, the court found that, but for the defendant's fault, the claimant would not suffer the loss. The court was confident that the loss was because of the defendant's error. The court went further in its justification of its opinion by utilising the but-for test. The court stated that even if the company's financial statements show an increase in its profit during the time of the defendant committing a fault, this cannot be understood as meaning that the defendant's fault does not cause the loss. On the contrary, the defendant's action may deprive the claimant from gaining more profit in accordance with the but-for test.

This is a rare case of applying the but-for test in Egyptian law. It is ambiguous but understandable why the Court of Cassation employed the but-for test to solve the issue of the causal relationship between the fault and the loss. It can be understood when there is no legal rule within Egyptian law that can assist in resolving the issue of causation in the case above, but this is not the case here. For example, instead of relying on the but-for test to determine the causal relationship, the court could employ a foreseeability rule that has a strong foundation within Egyptian law and that has been codified in the Civil Code , which can function as an alternative solution for the court to determine causal relationships.

4.3.3.4 Multiple Causes

The discussion above regarding the principle of causation in Egyptian law was in case there is only one cause of the loss due to breach of contract. However, as we observed in the common law chapter, there may be multiple causes limiting the defendant's liability. This means that there is

more than one cause that contributed to the loss.[728] Put differently, the chain of causation of the breaching party can be intervened in by another event that may transfer the cause of the loss from the defendant's action to a particular event. Similarly, to English law, Egyptian law have the same approach regarding multiple causes. They recognise three sets of events that can break the causation chain and limit the contract breaker's liability, which are third-party intervening actions, an intervening fault by the non-breaching party and the intervention of a natural event.

In this context, the meaning of a third party refers to any party who is not part of the contractual relationship. In light of a breach of contract, the contract breaker can limit and escape liability in whole or in part if the third party's action contributed to the cause of the aggrieved party's loss.[729] This means that the defendant can limit contractual liability when an intervening event by the third party may break the chain of causation.

However, under Egyptian laws, it is not easy for a contract breaker to escape liability in the event of third-party intervention. Thus, there are several factors recognised that assist the court in determining when the third-party action can and cannot break the chain of causation. The first factor is when the third party is solely responsible for the aggrieved party's loss.[730] The Egyptian court takes a stricter approach to this factor by imposing certain legal rules that need to be satisfied. The first rule is foreseeability; thus, the contract breaker must prove that the third party's action was unforeseeable to the defendant.[731] Also, the defendant must prove that the third party's action

[728] Burrows (n 273).
[729] Abdul Fattah al-Sharqawi, 'Compensate for the loss of profit in Saudi law, study of cases'(2016) Vol.31 No1 Al Azhar University, School of Law.
[730] Rowan (n 629)
[731] C Lombardi, 'Causation Rules in National Courts' in Causation in Competition Law Damages Actions (Cambridge University Press 2020).

cannot be mitigated.[732] These two rules shape the limitation of the contract breaker, which they must prove to escape total liability and hold the third party liable for the aggrieved party's loss.

Moreover, there is the event in which both the breaching party and the third party contribute to the aggrieved party's losses. Then, Egyptian law recognise the notion of holding the third party and the breaching party jointly liable, which means that the liability for the contractual damage caused to the innocent party is apportioned among the wrongdoers. The position in Egyptian law concerning the division of liability is based on the application of the adequate causation theory. This is due to the fact that every participant in causing the harm is responsible for the causal impact of their actions.

Intervening fault by the non-breaching party: the claimant's conduct can break the chain of causation, and as a result, it may excuse or reduce the defendant's liability. It emphasises that a claimant whose own action contributed to their loss does not have the right to claim compensation. For example, in Article 2016, the Egyptian stresses that 'The judge may reduce the amount of damages or may even refuse to allow damages if the creditor, by his own fault, has contributed to the cause of, or increased, the loss'.[733]

In determining the responsibility of the claimant in contributing to the loss, certain rules assist the court. First, the claimant's own conduct must be considered a fault. The court will assess this by examining whether the claimant's conduct meets the standard of a reasonable person.[734] Second, the claimant's conduct cannot be due to the defendant. For example, if the claimant performs the contractual obligation based on the defendant's instructions, then the defendant

[732] Ibid
[733] Al-Sanhuri (n 547)
[734] Ibid

cannot escape liability by showing that the claimant's action contributed to the loss, as the claimant was following the defendant's instructions.

Intervention of a natural event: a natural event can limit the defendant's liability by breaking the causation chain. Under Egyptian laws, the intervention of the natural event is called *force majeure*.[735] However, the distinguishing point between common law and civil law in this regard is that Egyptian law does not always exclude the defendant's liability due to intervention in a natural event, but the court may reduce the defendant's liability because of this.[736] However, in English law, intervening in a natural event limits the defendant's liability, but it does not reduce it.

4.4 Certainty of Loss of Profit

In the previous section of this chapter, the principles that limit contractual damages in Egyptian laws were identified and explored, with an attempt to understand how these principles function as a general limitation of contractual liability. The current section aims to investigate how the Egyptian court resolves the uncertainty of loss of profit by applying these limitation principles of contractual damage. It also questions the efficiency of these principles in ensuring that a degree of certainty is achieved without imposing harsh liability on the defendant. This investigation will be done by demonstrating the functionality of these principles and how the court employs them to meet certainty when considering loss of future profit claims. The elucidation of the Egyptian court's approach, which links these principles to ensuring certainty, can offer a deeper understanding of the uncertainty issue associated with loss of profit claims in Saudi law.

[735] Marsh (n 686).

[736] Mauro Bussani and Anthony J Sebok (eds), Comparative Tort Law: Global Perspectives (Edward Elgar Publishing 2015) http://ebookcentral.proquest.com/lib/universityofessex-ebooks/detail.action?docID=2198058.

Additionally, the experience and practice of the selected jurisdiction in this chapter may provide insight into how Saudi law could overcome such an issue.

Certainty means that damages awarded by the court 'must be certain, both in their nature and in respect to the cause from which they proceed'.[737] The aim of the Egyptian court is to establish the certainty of damages. To achieve this, the court follows a decision-making process to determine the certainty of a lost profit claim. The court assesses whether the loss of profit is a future damage that will inevitably occur or a mere possibility. If it is the latter, the court applies the loss of chance or opportunity doctrine. The court investigates the defendant's liability for the loss of profit from both factual and legal perspectives.

The claimant's claim of a loss of profit is subject to scrutiny by the court, which applies legal principles that limit contractual liability and investigates the legitimacy of the claim. These principles include fault, loss, and the causal link between them. These legal rules apply whether the loss is categorized as future damage or a loss of opportunity.[738] Thus, this process is crucial because it ensures that the defendant is not unfairly burdened with harsh liability, and the claimant's recovery of damages does not put them in a better position. The claimant's claim must pass the tests of these rules to recover the loss of profits.

It is worth noting that, during the decision-making process, the court utilizes the principle of limiting the recovery of damages to either permit or reject the recovery of loss of profit. Unfortunately, in the Egyptian court system, judges do not typically provide any reasoning to justify their decisions, nor do they explain why a particular legal rule was applied in a given case. Similarly, French judges tend to follow a comparable approach, as noted by Professors Borghetti and Whittaker, whereby judgments by French courts may lack clarity and conciseness, and their

[737] Alex Y. Seita, 'Uncertainty and Contract Law' (1984) 46 U Pitt L Rev 75
[738] Al-Sanhuri (n 547)

reasoning may be difficult to comprehend.[739] In particular, the courts often do not clarify the connection between their rulings on the current case's facts and prior judgments.

The following scenarios are presented to provide a clear understanding of the Egyptian law position regarding the application of legal principles to recover loss of profit. In the first scenario, A purchases products from B, with a promise of delivery within five days. A intends to resell the products to multiple customers, and consequently enters into contracts with them for later payments. However, B fails to deliver the products within the agreed time, causing A to lose its customers and the expected profit. The second scenario has similar facts, but A does not enter into contracts with prospective customers. Nonetheless, A expects to resell the products if B delivers them on time.

Accordingly, the following two sections will address each scenario separately. The first section discusses the application of the loss of chance doctrine and how it can provide the Egyptian court with an alternative approach to address uncertainty when assessing the final loss of profit. The second section examines the traditional legal rules that limit the recovery of damages and how these rules assist the court in determining the certainty of loss of profit.

4.4.1 Loss of Chance Doctrine.

The loss of chance or opportunity concept is relevant when it is legally difficult to hold the defendant accountable for the final loss that arises from a contract breach.[740] Professor Nils Jansen emphasises that the loss of chance doctrine is particularly useful in cases where causation is

[739] Goldberg (n 277).
[740] Dr Ibrahim El-Desouki, Compensation for the Missed Opportunity (Kuwait University- Academic Publishing Council 1986).

unclear.[741] As a result, uncertainty and an unclear causal relationship may exist between the defendant's non-performance and the final loss suffered by the innocent party.

However, despite this uncertainty, the doctrine of loss of chance can establish a confirmed causal relationship between the defendant's breach of contract and the loss of an opportunity to obtain financial gain. As Dobbs demonstrates, 'this approach allows the claimant to recover the market or contract value of the chance as an alternative when they cannot satisfy the certainty rule regarding the profit they claim to have lost'.[742] This is because, as Jansen asserts that the idea of loss of chance establishes legal rights that limit tracing hypothetical consequences, especially in cases where establishing a causal connection between a damaging event and the resulting loss is fundamentally impossible.[743]

In light of this, the Egyptian court applies the loss of chance doctrine when dealing with losses that have uncertain causation.[744] This approach recognises that chances have intrinsic value as legal rights that can be lost due to the defendant's breach of contract, even if there is no direct causal relationship between the breach and the resulting loss.[745]

The ruling of the Egyptian Court of Cassation affirms that the law permits the loss of opportunity to be counted as an element of compensation if the innocent party had reasonable grounds to hope to obtain it. Therefore, the court acknowledges that the claimant has a right to compensation for the loss of the opportunity to obtain financial gain, even if it cannot be directly attributed to the defendant's breach of contract.

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[741] Nils Jansen, 'The Idea of a Lost Chance' (1999) 19 Oxf J Legal Stud 271.
[742] Todd S Aagaard, 'Identifying and Valuing the Injury in Lost Chance Cases' (1998) 96 Mich L Rev 1335 https://doi.org/10.2307/1290180.
[743] Jansen (n 719).
[744] Al-Sanhuri (n 547)
[745] El-Desouki (n 718)

The first application of the loss of chance doctrine was in 1889, when the French Court of Cassation awarded damage relying on the doctrine.[746] The early application of loss of chance was as an alternative to the causation principle within liability for the legal profession. The court determined the lawyers' fault as the reason for contractual liability, and the assessment of damage was based on the loss of chance doctrine due to uncertain causation.[747]

The introduction of the loss of chance theory to Egyptian jurisprudence was first noted in the works of Egyptian legal scholars, who conducted a comparative study with French law and jurisprudence. This theory was subsequently codified in Article 221 of the Egyptian Civil Code. The article states that compensation includes losses suffered by the creditor and profits that have been lost, which refers to the loss of chance. The Egyptian Court of Cassation clarified the intended meaning of the profits that had been lost in 2007. The court interpreted the loss of profit in Article 221 as compensation for the chance of gaining the profit when there is reasonable ground for it.[748]

Let us now consider the second scenario mentioned above, where B fails to deliver the products to A within five days, and upon arrival, the products' market value has diminished. Unlike the first scenario, A has not yet resold the products. Therefore, if the opportunity to receive future profits and their realisation cannot be certain, can A recover the lost profits, or would it be overcompensation?

This scenario is similar to the Heron II case in English law, where the House of Lords resolved the issue of uncertainty under the remoteness rules. However, in Egyptian law, such an issue is resolved through the loss of chance doctrine. Under this doctrine, the court does not

[746] Bruno Tassone, 'The Loss of Chance Doctrine in a Comparative Perspective' Annali del CERSIG–Centro di Ricerca sulle Scienze Giuridiche.
[747] Ibid
[748] Egyptian Court of Cassation, Session held in 2007, Challenge No. 2951.

investigate the causal link between the breach and the future loss. Instead, the court examines whether the opportunity to gain future earnings is real or not.

As a result, the loss of chance doctrine provides precise guidance for courts in determining loss of profit claims, with two key concepts: (1) some recovery should be permitted for lost opportunities to make profits, even if the potential gains are uncertain, and (2) uncertainty does not necessarily make an opportunity worthless.[749]

4.5 Principles for Establishing Certainty through Limiting Compensatory Damages

The traditional approach means that the court will use the standard legal principles mentioned in the first part of this chapter to meet the certainty of damage. Thus, in the first scenario presented above, the issue of the certainty of damage can be settled in Egyptian court by following the traditional approach to determining the certainty of damage. This is because, in the first scenario, the causal relationship between fault and loss can be examined because the loss can manifest in losing the prospective customers with whom A made a contract. Therefore, the loss of future earnings is not based on speculative or hypothetical assumptions, but the future damage is imminent and incontrovertible.

The Egyptian courts would resolve the first scenario by employing an approach based on causative certainty, which enables the assessment of loss. In doing so, there are two steps that enable the court to determine the contractual liability and certainty of the damage. The first step is to investigate the claim under the fault principle, so if the claim of a loss of profit passes, this step will proceed to the next step.[750] The second step is determining the causal link, and if the claim

[749] El-Desouki (n 718)
[750] Rowan (n 629)

successfully passes this step, then the claimant is entitled to recover the loss of profit. Accordingly, in Egyptian law, the chance of the claimant recovering the loss of profit depends on success in both steps. However, if the claimant succeeded in the first step but not in the second, then the claim of loss of profit would be rejected based on the failure to establish a causal link. As a result, the following sections address the legal principles that are used by the courts to contribute to the certainty of the recovery of loss of profit: the fault principle and the causation principle.

- **Fault**

The fault principle is the first tool used by the court to ensure the certainty of the damage. It simply investigates whether the defendant's valuation of the contractual obligations is considered a fault.[751] However, fault has two categorisations, which are based on the type of contractual obligations. Thus, the first functionality of the fault principle is to investigate whether the defendant's obligations under the contract should be performed as achieving a particular result or only performing the obligations by due diligence.[752]

To illustrate this, in the first scenario, it is clear that the B default category is that it should achieve a particular result of the contract, which is delivering the products as stipulated in the contract. Thus, upon failure to do so, the court would ensure the certainty of damage by confirming that B committed a breach of contract. On the other hand, suppose B stipulated in the contract that the obligation of delivering the products to A is considered *obligation de moyens*, not o*bligations de résultat.*[753] Then, in this case, the court's assessment of fault is different because the court will

[751] F Lawson, 'Fault and Contract – A Few Comparisons' (1975) 49 Tul LR 295, 301.
[752] Ibid
[753] B Nicholas, 'Fault and Breach of Contract' in J Beatson and D Friedmann (eds), Good Faith and Fault in Contract Law (Clarendon Press Oxford 1997)

examine whether B performed the contact with reasonable due diligence. In doing so, the court uses the norm of an ordinary person to assess whether B performed the court with due diligence.[754]

- **Causation**

When the claimant successfully passes the first step, which is proving that the defendant's does not perform the contract, then the court moves to the next step, which is determining the causal relationship between the fault and the loss. It is worth mentioning that since the claimant proves the non- performance, it is unlikely to not succeed in the second step. This is because Egyptian laws have a similar experience to Saudi law, which does not offer thoughtful attention to deciding the causal enquiry. This is contrary to English law, where causation plays an important role in permitting or not permitting the recovery of loss of profit, as this thesis observed in Chapter Three. However, the case will be different when there are multiple causes of loss, as Egyptian courts will closely examine each cause and its contribution to the loss. Therefore, the court's tools to archive certainty of damage under the causation principle can be classified into three types: adequate causation, foreseeability and the requirement of directness.

Adequate Cause

The function of adequacy theory is to allocate the potential causes that may cause the opportunity to be lost.[755] These causes may differ from the defendant's action, third-party interventions and the claimant's conduct. Thus, the court applies adequate causation theory to assist

[754] Ibid
[755] Infantino and Zervogianni (n 678).

the court in determining which of the multiple causes caused the loss.[756] Thus, the functionality of adequacy theory is to identify an adequate cause but also at the same time limit and exclude any other causes.[757] The importance of adequate causation in relation to the certainty of damage is the ability to limit the causation principle to what the court considers a sufficient cause for the loss.

- **Foreseeability**

Egyptian law have not been attracted to applying the foreseeability rule to limit the loss of profit, as in common law.[758] This is due to the alternative method used, which deals with the loss of profit under the loss of chance doctrine. However, the foreseeability principle has a similar concept to English law, which we observed earlier in this chapter. This means that the foreseeability principle limits the recovery of damage to losses that are foreseeable when the contract is formed.[759] Accordingly, the foreseeability principle works alongside adequacy theory to determine the loss that should be compensated.[760] So, after selecting the appropriate cause of the loss based on adequate causation theory, the court applies the foreseeability test to examine whether such a loss was foreseeable when the contract was made.[761] This means that the court ensures certainty that the defendant will be liable only for the foreseeable loss.

- **Directness requirement**

[756] Ibid
[757] Lombardi (n 709).
[758] Ferrari (n 659)
[759] ibid
[760] Infantino and Zervogianni (n 678).
[761] Ibid

The Egyptian court and jurisprudence stress that the causal relationship between the breach and the loss should be direct. The primary purpose of the directness requirement is to assess the extent of the liability of the defendant, which is to limit any loss that is not direct.[762] Thus, Dr Claudio Lombardi expresses that by stating, "The causal connection between the breach of law and the damage has to be therefore "direct and certain", where these characteristics do not refer to specific abstract categories but rather tend to limit the judicial application of causation".[763]

A careful examination of the directness requirement reveals that the direct cause functions as a filter that eliminates any indirect loss.[764] So, after identifying the proper cause by applying the adequacy theory and testing with the foreseeability test, the court assesses the extent of the liability because, as we mentioned before, in case of a loss of future profit, the court needs to ensure that the defendant is only liable for what has legally caused an opportunity to be lost. This is because opportunity has a snowball effect.[765] Professors Duncan Fairgrieve and Florence G'Sell-Macrez illustrate the duty of the directness requirement by noting that "The adequacy theory is applied to determine the "threshold situation" where the court is establishing whether the defendant is liable at all. The extent of liability of one who has caused tortious damage is determined by the test of directness, so that the courts hold that too indirect consequences are not recoverable".[766]

Therefore, causal directness is a tool that helps the court to achieve certainty of damage and no overcompensation to be awarded. However, ambiguity has also surrounded the nature of this directness as regards what is meant and how the court applies it in individual cases to determine whether the loss is direct or indirect. This is based on French legal scholars, who attempt

[762] Ibid
[763] Lombardi (n 709).
[764] Ibid
[765] Hart and Honoré (n 5).
[766] Goldberg (n 277).

to reveal the opacity of such a concept. The court considers causal directness as a test in the individual case as to whether the breach is regarded as an ordinary course of events in causing the loss.[767]

Professor René Chapus described that "the correct enquiry is whether the defendant's act could "in the normal run of things" be considered as having played a "particular" role in causing the damage".[768] Moreover, Dr. Michel Paillet articulates the court approach in applying the directness test by stating "the judge will undertake a selection of the various [potential causes] of the loss in order to accept those which, in the ordinary course of events, must logically have caused [the loss]".[769]

Consequently, it is observable that one feature of the directness rule is its vagueness, for the reason that "the looseness of the test affords a margin of discretion to the judiciary".[770] Thus, the court could enjoy flexibility in limiting the defendant's liability to what can be considered certain based on court interpretation.

4.6 Conclusions

In Egyptian law, there are two approaches to the recovery of damages. The first approach serves as the default solution for ensuring certainty when claiming damages. Under this framework, the court examines the causal relationship pertinent to the claim. This is achieved by

[767] Treitel (n 264).
[768] Askeland, B., Yamamoto, K., Oliphant, K., Moréteau, O., Menyhárd, A., Ludwichowska-Redo, K., ... & Cardi, W. J. (2015). Basic questions of tort law from a comparative perspective (p. 914). Jan Sramek Verlag.
[769] Ibid
[770] Jean-Sébastien Borghetti and Simon Whittaker (eds), French Civil Liability in Comparative Perspective (Bloomsbury Publishing 2019) http://ebookcentral.proquest.com/lib/universityofessex-ebooks/detail.action?docID=5983826.

initially establishing contractual liability through the identification of three key elements: fault, loss, and the causal link between them. Subsequently, the court determines the causal connection between the fault and the loss by applying legal principles related to causation, such as adequate causation, foreseeability, and the requirement of directness.

The second approach involves the application of the loss of chance principle, designed to ensure a degree of certainty in cases involving the loss of profit. The objective of this approach obviates the need for the court to examine whether the lost profit was too remote or fell within the parties' contemplation at the time the contract was formed. Instead of delving into hypothetical gains that the claimant might have realised if the contract had been fulfilled as agreed, and questioning the foreseeability of such gains, the court shifts its focus to the valuable opportunity presented by the contract itself. Compensation is then awarded for the loss of this valuable chance or opportunity. In this way, the court can be certain that the loss exists and is not speculative, as it is represented by the lost chance or opportunity that occurred due to the contract not being performed.

Chapter Five: Enhancing Saudi Law: Insights from Comparative Legal Systems.

In this chapter, a comparative reflection is conducted between Common Law and Civil Law systems to elucidate their respective approaches towards addressing the uncertainty of lost profit claims resulting from breaches of contract. The primary objective of this examination is to address the third research question of the present study, which is to examine how these legal systems may provide valuable insights for the improvement of Saudi law, particularly with respect to its current practice of denying recovery for lost profits.

5 Introduction

This study seeks to identify solutions to the uncertainty in recovering lost profits, an issue that leads Saudi law to deny such claims. This chapter presents a comparative examination of English and Egyptian law, examining their respective approaches to ensuring a degree of certainty in awarding damages and reducing uncertainty in lost profit recovery. The chapter commences with a comparison of the two legal systems, discussing methods of limiting contractual liability and highlighting common aspects between English and Egyptian laws. Furthermore, it addresses the issue of uncertain lost profit claims in a commercial context and explores how limiting principles of liability can mitigate such uncertainty.

Two approaches to achieving certainty of lost profit are presented: first, addressing certainty through causation, which is the English law method, as the issue associated with lost profit is considered a causation problem that can be resolved by applying legal rules under causation, such as remoteness. Second, resolving uncertainty by avoiding causation, which is the Egyptian law approach. Instead of investigating the causal link between the breach and the final profit that has been deprived, Egyptian law acknowledges the principle of loss of chance and recovers lost profit by applying this principle.

Consequently, this chapter is structured into three parts: the first part discusses the uncertainty of lost profit as a causation issue, the second part examines resolving uncertainty through the loss

of chance concept, and the third part explores how the practices of compared jurisdictions can aid Saudi law in enhancing its current system.

5.1 Starting points

The functionality and applicability of the legal principles that limit contractual liability is a device used by the court to ensure certainty of damage as no overcompensation is regarded to the claimant.[771] To have a complete picture of this condition, the two points that facilitate the understanding of how the limiting principles achieve certainty should be acknowledged. Accordingly, how legal systems relate to one another and identify their commonality can be demonstrated.

5.1.1 First Point

It entails identifying and discussing the substantive purpose of damages that guide courts in the selected jurisdictions of this thesis. This process involves exploring the aim of compensatory damages for contractual liability. When a defendant breaches contractual obligations, a secondary obligation arises for the defendant to pay damages to the innocent party. Courts, when assessing damages, are guided by principles that facilitate their task in such assessments.

In English law jurisdictions, the primary aim of damage assessment is to protect the expectation or reliance interests of the innocent party. The expectation interest seeks to place the innocent party in a position where the defendant properly executes the contract. This principle,

[771] Matthew Milikowsky, 'A Not Intractable Problem: Reasonable Certainty, Tractebel, and the Problem of Damages for Anticipatory Breach of a Long-Term Contract in a Thin Market' (2008) 108 Colum L Rev.

which originated in Robinson v Harman, assists courts in their duty to "protect the performance interest." Parke B emphasized that the innocent party should "be placed in the same situation with respect to damages, as if the contract had been performed."

Additionally, courts may protect the reliance interest when assessing damages, aiming to protect any efforts the innocent party made in performing their obligation under the contract. However, courts cannot adopt both principles when assessing damages. As Lord Denning MR expressed in the context of lost profit, a claimant must elect between claiming for loss of profits or wasted expenditure, but cannot claim both. He stated that

> It seems to me that a plaintiff in such a case as this has an election: he can either claim for loss of profits; or for his wasted expenditure. But he must elect between them. He cannot claim both. If he has not suffered any loss of profits - or if he cannot prove what his profits would have been - he can claim in the alternative the expenditure which has been thrown away, that is, wasted, by reason of the breach.[772]

In contrast, Egyptian law does not recognise the distinction between expectation and reliance interests, as in common law. The type of interests that Egyptian courts protect for claimant's is not as clear or well-defined as in English law. Instead, Egyptian law adopts a broader view in assessing damages through the full reparation or full compensation principle. As per Article 221 of the Egyptian Civil Code, compensation includes losses suffered by the creditor and lost profits. Consequently, the leading guide for Egyptian courts in assessing damages due to contractual breaches is the full reparation principle, which aims to compensate for all losses incurred by the innocent party.

In 2018, the Egyptian Court of Cassation interpreted Articles 170, 221, and 222 of the Egyptian Civil Code, ruling that damage recovery is governed by the full reparation principle. The court's interpretation incorporated French legal terminologies, emphasising that awarded

[772] Denning (n 470).

compensation should cover losses suffered and lost profits. Notably, it is apparent that the approach adopted by Saudi law closely aligns with Egyptian law. The objective of damages in Saudi law is to ensure that monetary compensation is equivalent to the loss or harm incurred, a concept that shares similarities with the full reparation principle.

5.1.2 Second Point

The second point argues that the primacy legal principle that limits liability and is used by the court as a device to ensure certainty of damage is causation. Causation plays an important role in deciding the recovery of lost profits. As discussed in Chapters 3 and 4, causation may have a positive effect on allowing the claimant to recover the loss of profit or a negative effect by denying the recovery of lost profit. This situation can be demonstrated by how English law relies on the remoteness rule in determining the recovery of lost future profit. In addition, the Saudi courts adopted the *Ghrare* (uncertainty), which is a legal rule that tests the causal relationship to deny loss of profit. Moreover, Egyptian courts acknowledge the obstacle to establishing a causal link within the loss of profit claim and provide the loss of chance theory as an alternative to causation.

Therefore, a critical understanding is necessary of how the general framework of the causation principle functions in damage recovery between the compared jurisdictions in this thesis. Dr Eleni Zervogianni and Dr Marta Infantino formulate multiple approaches to comparing how different jurisdictions apply the causation concept and determine the causal enquiry.[773] This chapter discusses two relevant approaches to comparing legal systems: “overarching causation” and “pragmatic causation”.[774]

[773] Infantino and Zervogianni (n 678).
[774] Ibid

Overarching causation is adopted in the legal practice of Egypt.[775] Egyptian law has an "open-ended approach to liability".[776] According to Dr Infantino and Dr Zervogianni, a jurisdiction that recognises overarching causation "has a large role to play, because it is used as a privileged instrument to weigh the interests of the parties as well as policy interests in the absence of preliminary filters other than fault and damage".[777] However, rather than articulating and discussing these interests in the court's ruling, they are "generally unexpressed and concealed under the manipulation of the ordinary principles and requirements of causation".[778]

In contrast, pragmatic causation is linked to English law.[779] It refers to the court's decision in determining contractual liability.[780] The court interprets and applies the legal rules of causation flexibly considered as "case-tailored solutions".[781] These solutions enable the court to achieve "a concrete and overt policymaking effort" for a specific case".[782] Thus, as discussed in Chapter 3, the remoteness rule is not applied as a dogmatic adherence legal rule but as a tolerated legal rule for every case. Therefore, the remoteness rule has evolved over the years within English law.

5.2 First approach: Resolving the Issue of Uncertainty in Lost Profit Through Causation.

From a business perspective, any business opportunity to realise a future profit has an element of uncertainty.[783] Thus, the court may approach any claim to recover the lost opportunity

[775] Ibid
[776] Ibid
[777] Ibid
[778] Ibid
[779] ibid
[780] Ibid
[781] Ibid
[782] Ibid
[783] Elmer J Schaefer, 'Uncertainty and the Law of Damages' (1978) 19 Wm & Mary L Rev 719 https://scholarship.law.wm.edu/wmlr/vol19/iss4/4.

to receive future gains through two legal ways. First, the court can deny the recovery of compensatory damage for such lost opportunity due to its uncertainty, such as the Saudi law approach. Second, the court may acknowledge the aspect of uncertainty associated with the claim of loss of profit as well as the condition that such an aspect does not entitle the aggrieved party to recover damage for the lost opportunity. This approach is employed in the comparison of jurisdictions discussed in Chapters 3 and 4, where the uncertainty element does not justify the denial of such damage.[784] Rather, the court should respond to the uncertainty issue by establishing a causal link between the breach and final loss. Thus, the court reduced the uncertainty by applying legal principles in determining the damage for the lost profit and ensuring no unjust decision is imposed on the defendant by balancing between the claimant's loss and the defendant's action.[785]

The general framework of these principles is indistinguishable as they serve the same purpose of limiting the recovery of damages. Although certain legal rules under these principles in civil and common law are almost identical, the court's approach, interpretation and application of these legal principles rules in an individual case differ between the compared jurisdictions. For instance, the foreseeability rule originates in French law and then found its way to English law.[786] However, the court's application of such a rule varies between Egyptian and English laws.[787] In English law, the foreseeability of the loss significantly impacts the decision on whether to allow or deny the recovery of lost profit.[788] However, in Egyptian law, foreseeability plays a less critical role in permitting the recovery of lost profit.[789] Accordingly, the following sections present

[784] Carmen D Caruso and Bruce S Schaeffer, 'Damages for Lost Future Profits in Franchise Disputes—Overcoming the New Business Rule and Establishing Reasonable Certainty' (2016) 36 Franchise LJ.
[785] Lloyd (n 432).
[786] Ferrari (n 659)
[787] Treitel (n 264).
[788] Burrows (n 273).
[789] Rowan (n 629)

comparative discussions on how the legal principle of limiting damage reduces the uncertainty of lost profit claims in different contexts.

Requirement of the fault principle: In Civil law countries, such as Egypt, the fault principle is significant in three aspects: establishing the contractual liability, determining the extent of that liability and limiting the liability of damage.[790] In contrast, English law does not consider fault as an element of contractual liability.[791] The general notion of a fault within English law is that it does not exist.[792] In England, Professor Treitel highlighted that "in relation to a claim for damages for breach of contract, it is, in general, immaterial why the defendant failed to fulfil his obligations and certainly no defence to plead that he had done his best".[793]

However, in English law, the fault principle can be categorised as a substantive understanding of the breach of contract but not the damage of such a breach. As Professor Treitel explains, this approach is necessary "in order to determine whether there is a breach, rather than in connection with the remedies for a breach, assuming that one has occurred".[794] The English law view of the fault principle is similar to Saudi law's perspective. Saudi law does not impose fault as a prerequisite condition that the claimant should show the defendant's breach was a fault. Rather, the occurrence of a breach arises from contractual liability.

In contrast, in Egyptian law, the existence of a breach does not arise from contractual liability by default.[795] The Egyptian court requires the claimant to prove that the defendant's breach was at fault.[796] Accordingly, the fault principle is critical as it limits the defendant's responsibility

[790] B Nicholas, 'Fault and Breach of Contract' in J Beatson and D Friedmann (eds), Good Faith and Fault in Contract Law (Clarendon Press Oxford 1997) 337.
[791] Treitel (n 264).
[792] Ibid
[793] Ibid
[794] Ibid
[795] Ibid
[796] F Lawson, 'Fault and Contract – A Few Comparisons' (1975) 49 Tul LR 295, 301.

to the court's determination whether the breach is considered a fault or not. The functionality of the fault principle as a limitation of the damage recovery depends on the difference between obligations *(الالتزام بعناية)* and (*الالتزام بنتيجة*) .[797] *(الالتزام بعناية)* promises of best efforts requires taking reasonable steps to fulfil the contract's obligations without any required result to be achieved. Here, the claimant should prove for the recovery of lost profit that the defendant did not perform their side of the promise efficaciously.[798]

On the contrary, (*الالتزام بنتيجة*) promises of resulting this type of obligation requires the promisor to achieve a particular result promised to be fulfilled.[799] Thus, the claimant who seeks recovery of lost profit in this kind of obligation should show that the promised obligation has not been performed. Consequently, the significance of the fault principle in Egyptian law is employed as a device that guides the court to limit the defendant's liability. Accordingly, the court filters and identifies the type of obligation as promises of best efforts or promises of the result. Thus, for the court to be confident that the defendant committed a legal fault which, it needs to be compensated if it passes the causation phase.

Causation: From a theoretical perspective, English law and Egyptian law have different approaches to determining causal enquiry, particularly in the case of recovering loss of profit. Each court's jurisdiction employs a unique technique for reducing the uncertainty element associated with the loss of profit by investigating and examining the causal relationship between the breach and the loss. However, despite the various techniques used by the courts of the compared jurisdictions, the outcome could be the same.[800] Thus, although English law and Egyptian law

[797] Marsh (n 686).
[798] Rowan (n 629)
[799] Ibid
[800] Lombardi (n 709).

employ different techniques in answering the causal enquiry, the outcome could be the same in limiting or recovering loss of profit as damage.

Furthermore, legal writers have advocated that determining a causal link invokes the application of two stages, namely, the factual and legal causation stages.[801] English law is based on Lord Hoffman's observation that such two stages do not exist in English courts.[802] However, he acknowledged that English courts invoked a two-stage process in deciding a causal link from the decision-making process.[803] In contrast, such acknowledgement does not exist in French law, though French legal writers incorporate the two stages of causation into French law. No evidence has been found that their effort influences the court practice. The following sub-sections present a comparative discussion on the application of the causation principle in the recovery of lost profit.

5.2.1.1 Factual Causation

The first notable difference between Egyptian and English laws lies in the initial procedure of investigating a causal link, specifically the factual cause. In English law, determining the factual cause constitutes the first step in examining facts associated with a breach and establishing whether the breach is a factual cause of the loss. The English court applies the but-for test to determine causation. For instance, in cases involving a lost opportunity with potential future gains, the court examines whether the defendant's opportunity would have been lost without their breach.

In contrast, Egyptian law employs a combination approach, utilizing both the but-for test, as observed in the Court of Cassation's judgment in Chapter 4, and the adequate causation theory.

[801] Hamer (n 278).
[802] Goldberg (n 277).
[803] Ibid

Under the adequate causation theory, the court investigates facts associated with the action of the breach and determines whether they consider it an adequate cause in fact for the breach.

5.2.1.2 Legal Causation

Legal causation aims to investigate whether the defendant is responsible for the loss from a legal perspective. Thus, after the court establishes the factual causation in English law, the court can establish that the defendant's breach is the cause of the claimant's loss.[804] The factual causation is based on the facts associated with the breach of contract. Then, the court moves to the next step, namely, examining whether the defendant's breach is the legal cause of the loss.[805] Accordingly, the English court depends on the legal causation stage as it provides the necessary elements and legal rules that the court can apply to limit the defendant's contractual liability.[806] Thus, legal causation considers an essential concept for limiting liability and reducing the uncertainty of the loss of profit and ensuring the certainty of damage.

Alternatively, in Egyptian law, the legal causation stage of the loss of profit claim is not as crucial as in English law. This condition is because of the existence of the loss of chance theory that can provide a reliable solution for uncertainty elements and avoid the issue of lost profit under the causation principles.[807] However, the Egyptian court may decide and resolve the uncertainty issue of loss of profit under the causation principle in an infrequent situation.

It is worth noting that a key distinction between Egyptian and English law lies in the flexibility of shifting the burden of proof between the defendant and claimant. For instance, if the

[804] Hamer (n 278).
[805] Ibid
[806] Ibid
[807] G'Sell, Florence. "Alternative Causation under French Law." Eur. Rev. Private L. 25 (2017)

claimant demonstrates that the breach constitutes a contractual fault, the defendant cannot prove otherwise. The only option for the defendant is to escape contractual liability based on causation. Therefore, if the defendant proves that the causal link was not met, the claimant cannot prove the contrary.

Regarding legal causation, the compared jurisdictions in this study agree that legal rules labelled under legal causation provide the necessary tools that assist the court in determining the contractual liability and limiting the recovery of damage. However, the types, names and functionality of these legal rules differ. Within a jurisdiction, the legal rules under legal causation also vary. For example, in English law, the type of case encountered by the court determines the rules the court may or may not use, such as in the case of loss that resulted from a contract or tort. In contract, the court would likely invoke the remoteness test in determining and assessing liability, but not in tort, in which the court may invoke contributory negligence. Thus, the type of case determines which legal rules the court would invoke to limit the defendant's liability. This condition could be because such a legal rule is a judge-made law, which imposes flexibility in selecting the appropriate legal rule to limit damage recovery.[808]

On the contrary, the legal rules of limiting liability in Egyptian law are standard legal rules derived from the Civil Code , which are applied to contracts and tort claims.[809] For example, the requirement of the directness of causal link can be found in Articles 222 of the Egyptian Civil Code .[810] However, although the legal rules are uniform, the Egyptian court rely on one rule to limit the damage recovery in certain instances. For example, the court may limit the recovery of lost profit because the loss is not a direct cause of itself without any consideration of the

[808] Infantino and Zervogianni (n 678).
[809] Borghetti and Whittaker (n 748).
[810] The French art 1231–4 in force since 2016. Cited from http://www.textes.justice.gouv.fr/art_pix/THELAW-OF-CONTRACT-2-5-16.pdf

foreseeability principle. On the contrary, English law would most likely apply the remoteness test to any case involving a claim for recovery of lost profit. Such a loss is examined whether it was in the contemplation of both parties when the contract was formed. The following paragraphs discuss and compare the legal rules of limiting the recovery of loss of profit to overcome the uncertainty issue.

5.2.1.2.1 Adequacy Theory of Causation

The adequate causation theory plays an important role in Egyptian law to limit the recovery of damage. This process is performed by examining and assessing the probability of whether the breach of contract is considered an adequate cause for the lost opportunity with future profit. As mentioned in Chapter 4, such a theory has been adopted by French law from German jurisprudence.[811] When examining its application within German law, adequate causation theory falls within the scope of legal causation.[812] The reason is that German law takes the same approach as the common law in separating causation into two steps, namely, equivalence theory and adequacy theory.[813] Equivalence theory concerns factual causation, whereas adequacy theory regards legal causation.[814] Thus, adequacy theory is not recognised in common law.

[811] Al-Sanhuri (n 547)
[812] Wagner, Tobias. "Limitations of damages for breach of contract in German and Scots law-a comparative law study in view of a possible European unification of law." Hanse L. Rev. 10 (2014)
[813] Ibid
[814] Ibid

5.2.1.2.2 Foreseeability Rule

The foreseeability rule is the most famous legal rule applied in most jurisdictions. The origin of the foreseeability rule can be traced back to French jurisprudence, specifically to the work of French jurist Charles Dumoulin. He formulated the foreseeability doctrine in 1546, stating that "the general rule that compensable damage resulting from a breach of contract had to be limited to foreseeable damage." Ultimately, Dumoulin's perspective on recognising foreseeability was codified in the French of 1804.

Therefore, English and Egyptian law recognise and acknowledge such rules as a device that limits the damage recovery and reduces the uncertainty associated with the nature of loss of future profit. In common law, foreseeability is founded in the *Hadley v Baxendale* case, in which the English court used the foreseeability rule to limit the recovery of damage. The first application of the foreseeability rule within common law jurisdictions aimed to limit the recovery of lost profit.[815] Thereafter, the English case of *Hadley v Baxendale* found its way to being recognised in all Common law jurisdictions.[816]

In the context of Egyptian law, the foreseeability rule was not acknowledged until the introduction of the Civil Code of 1949. Article 221-2 stipulates that when the foreseeability principle is applied, the debtor will be held liable only for the harm that could normally be foreseen at the time of concluding the contract. This provision establishes the role of foreseeability in determining the extent of liability for contractual breaches within Egyptian law.

The birth of foreseeability in civil and common law was to limit the defendant's liability. However, in English law, foreseeability has been founded precisely and was used by the court for

[815] Burrows (n 333).
[816] Eisenberg, Melvin Aron. "The principle of Hadley v. Baxendale." Calif. L. Rev. 80 (1992): 563.

limiting the liability, as demonstrated by the *Hadley v Baxendale* case. Thus, the court's standard rule for deciding the recovery of loss of future profit is to ensure the certainty of damage and reduce the uncertainty by invoking the remoteness rule. However, in Egyptian law, foreseeability is a general requirement for limiting compensation with less or no attention to lost profit.

Common and civil law agree that the foreseeability of loss should be at the date of creating the contract, not when the breach occurs. Alderson stressed in *Hadley v Baxendale* that loss is foreseeable "at the time they made the contract", whereas it is foreseeable at the time of conclusion of the contract in Egyptian law.[817] Despite their similarity, Egyptian law impose a condition that when the breach is based on a dishonest act, the defendant cannot escape the liability by showing that the loss was not foreseeable. This concept is articulated in Article 221-2 of the Egyptian Civil Code , "except where non-performance was due to a gross or dishonest fault",.[818] Regarding English law, such a condition related to the application of foreseeability does not exist. Thus, the condition that a breach should not be based on a gross or dishonest act demonstrates that the foreseeability rule is defendant-friendly.[819] Therefore, if the defendant's breach is considered gross or dishonest, they cannot be excused from contractual liability.[820]

Turning to the last point of this comparative discussion is the criterion for assessing a foreseeable or unforeseeable loss in the compared jurisdictions. The level of foreseeability accepted by the court should be set because every loss could be foreseeable.[821] English law takes a vague approach in determining whether the loss is foreseeable or not. The English law approach

[817] Hadley v Baxendale, 156 E.R. 145
[818] The French art 1231–3 in force since 2016. Cited from http://www.textes.justice.gouv.fr/art_pix/THELAW-OF-CONTRACT-2-5-16.pdf , The Egyptian art 221-2 : Promulgated by Law no. 131 of 1948 in force since 15 October 1949
[819] Whittaker (n 670)
[820] Ibid
[821] Hart and Honoré (n 5)

can be found in the opinion of *Koufos v C Czarnikow* (*The Heron II* case).[822] The court stated that the required degree of foreseeability is "not unlikely" or not a "substantial degree of probability".[823] These devising measures of assessing what is foreseeable and what is not have uncertain elements. These tools aim to assist the court in its process of assessing what has been in the contemplation of the parties to assess the award of loss of profit. However, these rules also have a degree of uncertainty as to what is considered not unlikely. Thus, the English law could be argued to have achieved certainty of damage by applying uncertain and unpredictable tools in determining the damage.

Conversely, Egyptian laws utilise methods that grant the court full authority to interpret whether the loss is foreseeable or not. The standard in Egyptian law is based on the reasonable person principle. Consequently, the Egyptian court examines foreseeability in accordance with what a reasonable person would anticipate under the same circumstances at the time the contract was formed.

5.2.1.2.3 Directness Requirement

In addition to foreseeability, Egyptian law require that the causal link must be "immediate and direct".[824] However, whether a loss is direct or indirect is difficult to define.[825] Nevertheless, such a requirement limits the recovery for damage. Professor Treitel explained that such requirements follow the foreseeability rule, namely, what is foreseeable is direct and what is

[822] Koufos v C Czarnikow Ltd (The Heron II), [1969] 1 A.C.
[823] Ibid
[824] The French art 1231–3 in force since 2016. Cited from http://www.textes.justice.gouv.fr/art_pix/THELAW-OF-CONTRACT-2-5-16.pdf
[825] Infantino and Zervogianni (n 678).

unforeseeable is indirect.[826] Here, a similar challenge arises as noted above in English law when the court used uncertain tools and terminologies to assess the recovery of damage. Thus, the terminologies “not unlikely”, “substantial degree of probability” and “directness” are used by the court to reduce the uncertainty and ensure a degree of certainty of damage. However, they also experience uncertainty. Such an uncertainty associated with these tools aims to provide the court with flexibility in allowing or limiting damage.

5.2.2 Duty to Mitigate

There is no standard principle for mitigation under Egyptian law as it appears in English law. However, even in the absence of a mitigation principle, this does not mean that the claimant has to mitigate their loss; it does not exist in Egyptian law. In fact, it does, but the court determines whether the claimant mitigates the loss under the legal rules of causation, not under separate principles, as in English law.[827]

Therefore, the court would decide whether the claimant mitigated their loss when the defendant raised the issue by applying the legal rule of the contributed fault by the claimant under the causation rule.[828] Thus, the court considers it a causation issue, not a mitigation issue. Thus, the court would be assessing whether the claimant’s conduct attributed to their loss by examining two aspects. The first aspect is that “the plaintiff may be bound to take positive steps to minimise the loss which would otherwise flow from the defendant's default”.[829] The second aspect is that

[826] Treitel (n 264).
[827] ibid
[828] Ibid
[829] Ibid

"he may be bound to refrain from taking steps which but for the default would have been properly taken under the contract, but which in view of the default may unjustifiably contribute to the loss".[830]

5.3 Second Approach: Resolving the Issue of Uncertainty Through the Loss of Chance Concept.

The remoteness test is the primary method English law applies in reducing the uncertainty element associated with the loss of profit claim. In contrast, Egyptian law adopt and recognise the loss of chance theory as the primary solution for uncertainty in the loss of future profit.[831] Then, the Egyptian courts mainly resolve the issue of uncertainty based on the loss of chance theory.[832]

Egyptian law' logic behind recognising such a theory is based on the situation that the causal link between the lost opportunity with future earnings and the final loss cannot be established with certainty due to uncertain elements in such a loss.[833] Thus, the loss of chance theory addresses such an obstacle by avoiding proving and establishing causation and recognising the chance as a legal right that entitles compensation.

Numerous reasons support and justify Egyptian law approaches in determining loss of profit based on the loss of chance principle. First, the chance of receiving a future profit is an important aspect to people; thus, depriving this chance should be legally protected.[834] Second, Professor Jansen explained that "endangering human interest in situations where only a chance is

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[830] Ibid
[831] Jansen (n 719).
[832] Ibid
[833] Ferreira, Rui Cardona. "The loss of chance in civil law countries: a comparative and critical analysis." Maastricht journal of European and comparative law 20.1 (2013): 56-74.
[834] Schaefer (n 760).

left must not be without a legal sanction" (deterrence function).[835] Finally, the loss of chance principle can be a helpful approach for the court to deliver justice as failing to establish causation due to uncertainty in a breach of contract of the final hypothetical loss does not indicate that the claimant has no right to compensation.[836] Thus, rather than denying the recovery of loss of profit, the court should provide justice to the claimant while not imposing harsh liability on the defendant. Accordingly, the loss of chance approach offers "a well-balanced solution, which takes the interests of both parties into account".[837] It addresses the uncertainty of damage as well as the obstacle of proving causation.

English law also recognises the loss of chance to address the need to establish causal link issues. The loss of chance has been applied in numerous cases as an alternative to establishing causation. However, such an approach is attracted to contract cases but not tort cases.[838] However, Egyptian law apply the loss of chance to both cases. The loss of chance was first applied in *Chaplin v Hicks (1911)* to determine the loss of profit as the final loss cannot be determined with certainty because it involves hypothetical future events.[839] Thus, the court departs from applying the standard causation rule, namely, the remoteness test, and applies the loss of chance theory. However, the English law's acknowledgement of the loss of chance is not favoured by the court for resolving the issue of uncertainty within the loss of profit claim.[840] The court used it as a tool to compensate the claimant on rare occasions.[841] As Professor Jansen addressed this issue, "English

[835] Jansen (n 719).
[836] Ibid
[837] Ibid
[838] Ibid
[839] Burrows (n 333).
[840] Jansen (n 719).
[841] Ibid

courts have in some cases recognised a lost chance as a harm giving rise to a claim ... it is important to see that these decisions did not establish this as a general principle".[842]

5.4 Saudi Law in the Recovery of Lost Profit: Egyptian law versus English law

An examination of the English law and Egyption law in terms of certainty of damage shows that both legal systems acknowledge that absolute certainty of loss of profit is impossible to determine.[843] However, the nature of uncertainty in the loss of profit claim does not justify the court to deny the recoverability of loss of profit and compensate the innocent party as Saudi law does.[844] On the contrary, the court in both legal systems reduced the uncertainty by applying a legal rule that assisted the court in achieving justice and balance between the legal rights of the contracting parties.[845]

The solutions to the uncertainty issue of the compared legal systems in this study are highlighted to understand how Saudi law can benefit from their experiences and practice regarding the uncertainty of loss of profit. Saudi law has two approaches to dealing with uncertainty: applying the causation rule and avoiding causation. The first approach is applied in English law practice. It reduces the uncertainty of loss of profit by applying the remoteness test. The second approach is the loss of chance principle as applied in Egyptian law.

[842] Ibid
[843] McCormick (n 348).
[844] Schaefer (n 760).
[845] Ibid

5.4.1 Determining the Uncertainty Issue Through the Causation Principle

Saudi courts deny the recovery of lost profits, primarily based on the *Gharar* (uncertainty) principle. Chapter Two explains that this principle is applied for two key reasons. First, the court requires that the loss must exist in the present, categorising lost profits as future losses. Second, if the elements of the loss are indeterminate, a causal link between the fault and the loss cannot be established. Consequently, the court concludes that such a causal link is unestablishable due to *Gharar*. Given this context, the remoteness test could be suggested as a potential solution, as it operates within the causation concept.

However, the application of the remoteness test to claims for lost profits within Saudi law could present challenges and complexities. Notably, Saudi law has not shown a keen interest in discussing and analysing the concept of causation within the realm of contractual liability. While causation rules are significant in Saudi criminal law, they are less prominent in civil and contractual liability. Additionally, as explored in Chapter three, remoteness in Common law was initially designed to limit the recovery of lost profits, not to facilitate such claims. The remoteness test can also be unfavourable to the claimant, as illustrated in cases like *Allied Maples Group Ltd v Simmons & Simmons* and *Chaplin v Hicks*.[846] Furthermore, the remoteness rule has not demonstrated consistent effectiveness in resolving claims for lost profits in commercial disputes, at least under English law.[847] Over time, English courts have evolved the rule either to restrict the

[846] Allied Maples Group Ltd v Simmons & Simmons, [1995] 1 W.L.R., Chaplin v Hicks, [1911] 2 K.B. 786

[847] This could be argued in a negative or positive way which is remoteness rule offers flexibility for the court to develop such a rule. Yet, the remoteness rule is not yet stable as it appears in the Achilleas case.

defendant's contractual liability or to enable the claimant to recover damages, with the most recent and contentious application being the *Achilleas* case.[848]

5.4.2 Determining the Uncertainty Issue Through the Loss of Chance Concept

Recovering a loss of profit in a commercial dispute is the primary method of Egyptian law. This approach has the advantage of avoiding the legal challenges in establishing causation as the loss of chance "ensures the plaintiff some compensation when the final damage confirmation is random".[849] This approach can assist Saudi in reducing the uncertainty of damage for the recovery of lost profit by not examining the final loss, namely, the future profit. Rather, the chance of pursuing an opportunity with an unrealised gain is examined. In other words, Saudi law would transfer the issue of certainty of future profit by examining the present loss rather than the future events that may or may not occur. This present loss refers to the chance that the breaching party's action has been deprived. Thus, the court ignores the hypothetical future loss and shifts its focus to the lost chance of benefiting from the opportunity. Therefore, the court could ensure certainty based on the claimant's evidence that if the present chance has been deprived due to the breaching party's action, then the court can compensate for that chance that has been lost.

Consequently, the loss of chance concept has several features that attracted the attention of scholars to resolve the issue of uncertainty of lost profit. First, as Dr. Murcos acknowledges, the recovery of damages under Egyptian court practice is considered claimant-friendly.[850] Thus, the creation of the concept of lost chance aimed to allow for the recovery of damage, which is contrary

[848] Transfield Shipping Inc v Mercator Shipping Inc (The Achilleas), 2008 WL 2596066
[849] Jansen (n 719).
[850] Oman, Nathan B., "A Theory of Civil Liability" (2014). Faculty Publications. 1669. https://scholarship.law.wm.edu/facpubs/1669

to the foreseeability rule. The concept of loss of chance was adopted by the Egyptian court to overcome the challenge of establishing a causal connection between a contractual fault and the final result within the legal profession.[851] Similarly, in English law, loss of chance was applied in *Chaplin v Hicks (1911)* for the same purpose, that is, to permit the recovery of lost profit.[852]

Another interesting aspect is that the notion of lost chance is recognised and acknowledged in all Civil Code s of Islamic countries in the Middle East, except Saudi Arabia. The Civil Code s include Article 292 of the Code of Civil Transactions in the United Arab Emirates, Article 266 of the Jordan Civil Code , Article 2030 of the Kuwait and Article 162 of the Bahraini Civil Code . These countries consider lost chance as the damage that should be recovered; they follow the same language in Article 221 of the Egyptian Civil Code .[853]

5.4.3 An Examination of the Application of the Loss of Chance and Rule of Remoteness in Saudi Court Cases

Now, an investigation into how Saudi courts determine cases concerning the loss of profit, specifically examining whether they apply the loss of chance principle, or the rules of remoteness could inspire the Saudi court to overcome the uncertainty and allow for the recovery of lost profits.

One point that needs to be emphasised is that Saudi courts place significant importance on the nature of the loss. In cases of breach of contract, three criteria must be met: loss must exist, it must be real, and it must concern a legitimate aspect. Therefore, when evaluating potential solutions to improve Saudi court practices regarding the recovery of lost profits, as discussed in

[851] G'Sell, Florence. "Alternative Causation under French Law." Eur. Rev. Private L. 25 (2017): 1109.
[852] Chaplin v Hicks, [1911] 2 K.B. 786
[853] Article 221 of the Egyptian states that compensation includes losses suffered by the creditor and profits that have been lost. The meaning of (profits that have been lost) in the article is meant to be for loss of chance, as the Egyptian Court of Cassation illustrated.

Chapters Three and Four—it is essential to ensure that the proposed solutions do not conflict with existing Saudi court practices. In other words, a key reason for Saudi courts' refusal to award damages is that loss must exist in the present. Any profits that the claimant hopes to gain in the near future are considered future losses, which are uncertain because of the *Gharar* principle. In the following sections, we will discuss a set of Saudi court cases that were examined in detail in Chapter Two, with a focus on claims for lost profits. We will then explore how the rules of remoteness, or the loss of chance principle could assist in improving current practices.

First case: One case addresses the issue of the loss of profit, particularly focusing on losses that may occur in the future. This makes it challenging for the Saudi court to ascertain whether the elements of loss discussed in Chapter Two are satisfied. This was evident in a case outlined in Chapter Two, where the Court of Appeal denied awarding the claimant for the loss suffered because it was uncertain.[854] The claimant had been deprived of profits from a contract with a construction company for an additional five years due to the defendant's actions. Although the court acknowledged that the defendant was at fault and had caused harm, it struggled with the loss element. The issue arose because the loss resulting in lost profits was not actual, meaning it couldn't be verified by the court and was therefore deemed uncertain. The court acknowledged the speculative character of lost profits, viewing them as future losses that may or may not occur.[855] On this basis, the court concluded that such losses could not be recovered, as they could not be deemed actual or definitive.[856]

[854] Privet Person v. Ministry of Environment, Dewan al-Madalim (The Court of Appeal Business Division in the Board of Grievance), case no. 97, 2012.
[855] Privet Person v. Ministry of Environment, Dewan al-Madalim (The Court of Appeal Business Division in the Board of Grievance), case no. 97, 2012.
[856] Ibid

Second case: the same approach was evident in a 2018 Court of Appeal ruling involving a claimant who sought recovery for loss of profit.[857] The loss was attributed to the negligent actions of his partner, resulting in the closure of their manufacturing business. While the court acknowledged that the defendant's actions had led to the claimant's loss, it adopted a strict approach towards future losses, as demonstrated in this case. Such losses are not deemed compensable because their certainty cannot be verified in the present. Consequently, the court refused to award damages for loss of profit, citing the uncertainty surrounding such a loss as the reason.[858]

Third case: the claimant sought recovery for loss of profit due to the defendant's breach of contract involving the purchase of 3,000 air conditioners.[859] The claimant had expected that upon receiving the air conditioners, they would be able to enter into a lucrative contract with the government, as their business model primarily depended on dealings with government entities. Unfortunately, the defendant delivered only 900 air conditioners. The claimant subsequently sued for breach of contract and sought recovery of the lost profits they expected to gain from the government contract had the defendant fulfilled their obligations. The Court of Appeal ruled in favour of the defendant, stating that the loss of profit could not be recovered because the loss was neither actual nor verifiable.

It is evident from these cases that the court places significant emphasis on the nature of the loss itself. If the lost profit fails to meet the established criteria for being considered a loss—for example, if the court concludes that the loss does not exist in the present—then the concept of *Gharar* (uncertainty) prevents the claimant from recovering those lost profits. This consideration

[857] Contracting Company v. Limited Company, Dewan al-Madalim (The Court of Appeal Business Division in the Board of Grievance), case no. 113, 2018.
[858] Ibid
[859] Privet company v. Privet company, the Court of Appeal commercial Division, case no 62, 2019

is crucial when examining solutions found in other legal systems, such as Egyptian law and English law. The aim is to determine how the practices of these comparative legal systems could align without contradicting the prevailing practice in Saudi courts. Therefore, now we should turn our attention back to the rules of remoteness and the loss of chance principle as they are applied in English and Egyptian laws. Could the application of these legal rules potentially alter the outcomes of the cases previously mentioned?

Loss of chance principle: first, it is worth examining Egyptian law's approach to applying the loss of chance principle with the aim of recovering lost profits. Could this approach assist Saudi courts in overcoming the challenges associated with the uncertainty of such claims? In Egyptian law, the loss of chance principle means that depriving a claimant of the chance to gain future profits is considered a loss that should be recoverable.[860] However, the court's approach here does not focus on the lost profits that might be gained in the future, as that would involve uncertainty.[861] Instead, the Egyptian court considers whether the chance to pursue that profitable opportunity has been deprived. In other words, rather than investigating the occurrence of the final loss, the court looks at the lost opportunity to gain that profit as a right that should be compensated for.[862]

In applying this rule to the Saudi court cases mentioned earlier, this would mean, for example, in the first case, that the Saudi court would not need to assess whether the Infringement Committee's actions legally caused the claimant to lose profits. As seen in that case, the court hesitated to investigate or examine losses that might occur in the future. Instead, the court would focus on whether the defendant's actions have deprived the claimant of an opportunity that is both

[860] El-Desouki (n 718)
[861] Ibid
[862] Ibid

actual and definitive. Thus, the court would shift its focus from investigating future losses to determining whether the defendant's actions deprived the claimant of the chance to gain future profits. This opportunity is viewed as a legal right that should be protected and compensated for.

A similar notion could be applied to the second and third cases. However, in the second case, it could be challenging for the claimant to demonstrate that he had a chance of gaining future profit or opportunity that was deprived due to his partner's negligent actions. This is because the opportunity in question concerns both parties, not just one of them. Thus, if the claimant expects to benefit from pursuing this opportunity, his partner would also stand to benefit. This contrasts with the majority of cases where the loss of profit primarily concerns one contractual party, and the other party's actions deprive them of it.

Turning to the third case, the facts indicate that the claimant had the potential to secure a government contract if the defendant had honoured their obligations. However, the court considered the expected future profit as uncertain because the loss could not be verified, given that it had not occurred in the present but was expected in the future. Applying the loss of chance principle to this particular case could offer the court an alternative approach. It could consider the opportunity to win the government contract as a chance that the claimant lost due to the defendant's breach of contract. Hence, the court could award damages, as the loss of chance has already occurred in the present. This would allow the court to verify the loss by applying the three elements that determine a loss: fault, the actual loss, and the causal link between them.

Remoteness: the next discussion will turn to the potential application of the rule of remoteness in Saudi courts, using the third case mentioned earlier as a point of comparison with

Victoria Laundry (Windsor) v Newman Industries case.[863] According to the established test for remoteness, as outlined in *Hadley v Baxendale*, a loss of profit can only be recovered if it was within the contemplation of the parties at the time the contract was formed.[864] This means that for the loss of profit to be recoverable, it must not have been a remote possibility; rather, it should have been either an unlikely or highly possible outcome in order to be considered foreseeable.[865]

An examination of how the rule of remoteness could be applied to the third case suggests that the recovery of lost profits might be allowable. The facts of this case share some similarities with *Victoria Laundry (Windsor) v Newman Industries*. In both cases, the defendant failed to fulfil their contractual obligations. In *Victoria Laundry*, the defendant did not deliver the boiler as promised, causing the claimant to lose a profitable contract with a relevant government department, for which they then sought to recover lost profits. This is close to the third case, where the claimant also sought to recover lost profits from a potential government contract. However, a key distinction between the *Victoria Laundry* case and the third case lies in the issue of foreseeability. In *Victoria Laundry* case, the claimant's emphasis on the urgency of receiving the boiler suggested that a loss of profits resulting from a breach was a foreseeable consequence within the realm of ordinary business activity. However, the defendant did not consider the potential profits from a government contract to be foreseeable, as they were unaware of this specific potential loss at the time.

Conversely, if the claimant in the third case primarily offers services to government entities, then under the rule of remoteness, the Saudi court would likely award the lost profits as

[863] Victoria Laundry (Windsor) v Newman Industries, [1949] 2 K.B.
[864] Hadley v Baxendale, 156 E.R. 145
[865] Arvind (n 199)

general damages. However, if their main business activity is not primarily with the government, then the Saudi court would need to examine whether both the claimant and the defendant could have foreseen the loss of profits from the government contract at the time the contract was made. This foreseeability should align with a "substantial degree of probability" or be "not unlikely" for the court to award the claimed loss of profits.[866]

Last point: It should be reiterated that the Saudi court bases its refusal to recover lost profits on the fact that such losses are future-oriented and therefore cannot be assessed using the court's existing criteria, such as the requirement that the loss must exist. As a result, lost profits fall under the concept of *Gharar* (uncertainty). This consideration should be taken into account when proposing solutions to improve current practices. Upon examining Civil and Common law practices, it could be argued that the loss of chance principle aligns well with this perspective and does not propose a radical change within the Saudi court approach. It simply recognises the loss of chance as a compensable loss. The Saudi court could also apply its own criteria to ascertain whether the chance itself exists and is actual, without concern for the final loss.

On the other hand, the rule of remoteness could face challenges in its application. This is because the nature of the remoteness test, as established by English courts, aims to limit the recovery of lost profits rather than facilitate it. Even if the Saudi court were to adopt and employ the remoteness test, it would still struggle with defining what may be considered remote or too remote. As we observed in the chapter three on Common law, the concept of remoteness is not a settled rule but is still evolving.

[866] Koufos v C Czarnikow Ltd (The Heron II), [1969] 1 A.C.

5.5 Conclusion

Egyptian and English laws adopt similar principles in limiting the recovery of damages, recognising concepts such as causation. However, a detailed examination reveals significant differences between Egyptian and English laws in terms of applying legal theories that govern these principles.

Moreover, common and Civil law systems exhibit distinct approaches in determining and assessing the awarding of lost profit. Egyptian law acknowledges that the issue of uncertainty cannot be resolved by adhering to the causation principle alone. Therefore, an alternative method must be adopted—specifically, the loss of chance theory. This theory shifts the burden of proving a causal link in such a loss to recognising a chance as the harm that should be compensated. In contrast, English law favors resolving the issue by following the causation principle and assessing the recovery of lost profit by applying the remoteness rule.

The diverse approaches of the compared jurisdictions in this study to recovering lost profit in Civil and Common law offer valuable lessons and guidance for the Saudi court system. As these approaches address the uncertainty issue that concerns the Saudi court when deciding on a loss of profit.

Chapter six: Conclusion

6 Conclusion

This study was conducted with two primary aims: first, to investigate the stance of the Saudi court, which denies the recovery of future lost profits in a commercial context due to uncertainty; and second, to explore and examine how both Common Law and Civil Law jurisdictions address the issue of uncertainty associated with the recovery of lost profits. To fulfil these aims, this study examines the legal rules employed by the compared jurisdictions to minimise the element of uncertainty when adjudicating claims for lost profits.

Most business litigation aims to receive a monetary award, and because the nature of the business activity is complex and involves risks, uncertainty is the main characteristic of business transactions.[867] As a result, determining and assessing damage within a business context cannot be done without involving uncertain elements.[868] Therefore, it is generally understood that loss cannot be absolutely certain when parties seek damages for violations of business transactions, such as a breach of a commercial contract.[869] This is particularly evident in cases seeking recovery for loss of profits. While the element of uncertainty is inherent in such damages and cannot be entirely eliminated, it can nonetheless be reduced.[870]

In this regard, the Saudi court adopts a strict approach, disallowing the recovery of lost profits entirely. The underlying reason for this restrictive stance appears to be the court's requirement that such damages must be absolutely certain. However, achieving absolute certainty is logically

[867] Maguire Jerry, Future lost profit damage in Business Litigation, 1996 https://www.rjo.com/wp-content/uploads/2017/04/FutureLostProfitDamages.pdf
[868] Ibid
[869] Ibid
[870] Schaefer (n 760).

unattainable in any type of damages claim, as no damages can be measured with 100% certainty; speculation is inevitably involved in any assessment. Therefore, it is normal for business losses to involve elements of uncertainty. The degree of this uncertainty, however, varies among different types of business losses, with lost profits generally bearing a higher degree of uncertainty.[871] Thus, the reason that led the court to disallow the recovery of loss of profit is that the Saudi court does not have proper legal rules that assist in reducing uncertainty in these cases. This may be partly because claims for loss of profit represent a relatively new trend that the court has only recently encountered.[872]

This stands in contrast to English law, where the courts have been dealing with claims for the recovery of lost profits for decades. As we observe in Chapter Three, English courts have employed legal rules to both limit the recovery of damages and ensure their certainty, thereby reducing elements of uncertainty in damage recovery in general, and in lost profits in particular. Similarly, Egyptian law also aims to reduce uncertainty through the concept of loss of chance, which has influenced Egyptian legal practice to allow for the recovery of lost profits. Consequently, both Egyptian and English courts have developed and employed legal principles to minimise the element of uncertainty in claims for lost profits, whether through the remoteness test in English law or the loss of chance principle in Egyptian law

Chapter Two delved into the issue of the denial of recovery for lost profits under Saudi law, beginning with an overview of the features of the Saudi legal system. The chapter highlighted that contract law in Saudi Arabia has not yet been codified, making it challenging to identify a general legal framework governing contracts. To address this, the study examined Saudi contract cases with the aim of identifying the primary sources the court refers to when adjudicating commercial

[871] Al- Sharqawi (n 707)
[872] Al-Magily (n 18) 98

contract disputes. This investigation revealed that the sources of contract law used by the Saudi court vary, ranging from classical Islamic law to the opinions of selected modern Islamic institutions that influence the court. Moreover, the Saudi court is increasingly willing to develop its own approach, even if it means departing from the application of traditional Islamic law.

Moreover, this chapter delved into the available legal remedies for the non-breaching party seeking judicial redress. It was noted that the Saudi court primarily recognises damages as the main remedy available to the claimant. This stands in contrast to Islamic law and the laws of neighbouring Islamic countries, where specific performance is often considered the primary remedy. The chapter then identified the principles that limit the recovery of damages, outlining the legal rules that the Saudi court employs to establish the right to such recovery. Specifically, there are four principles that the Saudi court invokes in cases of contract breach: fault, harm, the causal link between them, and the principle of Gharar (uncertainty). The latter has been recently cited by the Saudi court as justification for denying claims for lost profits. The chapter concludes by discussing the issue of recovering lost profits within Saudi law, attributing the court's refusal to allow such recovery to the inherent uncertainty associated with future lost profits.

Chapter Three proceeded to explore how English Common Law addresses the issue of uncertainty in damages associated with the recovery of lost opportunities for future gain. It identified the legal rules that limit the recovery of damages within English law, specifically focusing on causation, remoteness, and mitigation. While the external function of these legal rules is to limit the scope of recoverable damages, their internal function serves to ensure certainty by providing a framework that guides the court in assessing damage. The chapter revealed that English law tackles the issue of uncertainty in lost profit claims by examining the causal relationship and applying the test of remoteness to reduce uncertainty.

Chapter Four investigates how Egyptian laws work to ensure certainty in damage assessments and to mitigate the uncertainty associated with claims for lost profits. An exploration of the Egyptian legal framework is crucial for a comprehensive understanding of this issue. It also allows for the consideration of solutions that have proven effective in other jurisdictions, with an eye toward assessing their potential applicability to the Saudi legal system. Given that Egyptian law is a mixed legal system, incorporating elements of both Civil and Islamic law, it may offer valuable insights into resolving the issue of uncertainty in damage assessments.

One notable finding of Chapter Four is the multifaceted approach Egyptian law takes in limiting contractual liability. Egyptian law provides two potential solutions to overcome the issue of uncertainty in recovering lost profits. The first approach aims to reduce uncertainty through the application of causation rules. In this context, the court investigates the causal link between the contract breach and the hypothetical future gain. The second approach avoids the challenges of establishing causation, which is often seen as disadvantaging the claimant. Instead, the court applies the loss of chance principle, viewing the lost chance as a legal right in itself that warrants compensation, irrespective of whether the future profit is certain or uncertain.

Chapter Five offers final remarks on the comparative relationship between the study's selected jurisdictions. This chapter reveals that the general legal frameworks governing the legal principles of limitation of damages have much in common between the jurisdictions compared here; in all cases, these legal principles assist the court by guiding and directing the court when determining contractual liability and assessing the extent of the defendant's liability for the purpose of reducing the uncertainty of damages and ensuring that no harsh liability is imposed on the defendant.

However, despite the common conceptual aspect of the principles limiting the recovery of damages between the jurisdictions compared, this chapter also addressed several differences, such

as how the legal rules governing causation differ between Common law and Civil laws. For example, the most invoked principle that limits the recovery of loss of profit in English law is the remoteness rule. In contrast, Civil law jurisdictions often rely on the adequacy theory and the requirement of directness. Ultimately, this chapter suggests that the Saudi court could draw inspiration from solutions found in Egyptian law to improve its practices and allow for the recovery of lost profits. In terms of English law, the application of the remoteness test may present challenges, as it would require the Saudi court to significantly alter and reshape its existing practices.

6.1 Outcomes and Recommendations

This study examines the issue of the denial of recovery for lost profits under Saudi law and explores potential solutions by comparing the legal rules of selected jurisdictions. Based on its findings, the study concludes by offering a series of recommendations.

All legal systems selected in this study share a common concept: the court cannot offer an absolute certainty for recovering a loss of profit. Instead, the court can attempt to reduce uncertainty of loss of profit by utilising the legal rules that assist the court in accomplishing its mission in awarding damage for loss of profit. The intention of these legal rules is to limit the defendant's liability and help the court achieve a degree of certainty simultaneously.

This study conducted a comparative analysis of English and Egyptian law, revealing distinct approaches to addressing the issue of uncertainty in claims for lost profits. English law mitigates uncertainty through legal causation, specifically by employing the test of remoteness. This approach contends that uncertainty can be reduced by establishing and assessing the causal link between the contract breach and the hypothetical future loss. The English court applies the

remoteness test to determine whether such a loss was foreseeable at the time the contract was made.

Conversely, Egyptian law avoids tackling uncertainty through causation. Instead, it conceptualises lost profits as the loss of a chance to earn future profits. In this approach, the Egyptian court recognises the lost chance as a form of harm that warrants compensation. This means that the calculation of damages should focus on the contract's value at the time of the breach, rather than on potential profit. So, this principle affirms that the harm to the claimant lies in the loss of the opportunity to fulfil the contract, rather than in missed profits.

Accordingly, Saudi law could address the uncertainty of damages by drawing inspiration from Egyptian court practices, specifically by acknowledging that the loss of a chance constitutes harm warranting compensation. The recognition of the loss of chance principle could enable the Saudi court to sidestep challenges associated with establishing causation and the uncertainty of the final loss. This approach has been adopted by various Islamic countries in the Middle East. Based on their experiences, Saudi legislators could confidently incorporate this principle, positing that any loss of profit implies a lost chance of realising future profit, and therefore the court should award an amount equivalent to that loss.

Regarding the adoption of the remoteness rule, which incorporates the principle of foreseeability, several concerns arise: First, the remoteness rule was originally established with the aim of limiting, rather than enabling, the recovery of lost profits. Second, the Saudi court has shown little interest in engaging with the causation rule or addressing causal inquiries. As a result, it remains uncertain whether the solution offered by English law could effectively address the issue of uncertainty in the Saudi context.

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