Remedies for the Breach of a Commercial Contract for the Sale of Goods: A Comparative Analysis between the English Sale of Goods Act 1979 and the Contract of Sale of Goods in Saudi Law

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A thesis submitted in partial fulfillment of the requirements for the Degree of Doctor of Philosophy
University of Stirling
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May 2018

Declaration

I hereby declare that this thesis is my own work and that it has not been submitted anywhere for any award. Where other sources of information have been used, they have been acknowledged.

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Date: 31/05/2018

Dedication

This work is dedicated to the souls of my late Father and Mother who contributed a lot to bringing me up and inspiring my life with their love and patience. It is dedicated, too, to my Wife (Ibtisam) and Children (Mohamed and Tamim).

Acknowledgements

This study would have never been possible and would have not sent the light without the encouragement and help of a number of people. My special thanks go to Professor Fraser Davidson, supervisor of this study, whose enthusiasm and remarkable constructive comments and contributions have played a significant role in facilitating the task of producing this work. I must thank him for his pleasantness; inspiration; patience; and wisdom.

I am grateful, again, to Mrs. Tikus Little, Head of Law and Dr David McArdle My gratitude is due, also, to the Library staff, at Stirling University, for their facilities.

My thanks go, also, to Dr. Mufleh bin Rabian Al-Qahtanimy Head of College of Law and Political Science and to my brother Abdul-Majeed as well for his support and encouragement during my study. My deepest appreciation is dedicated to my wife and my two lovely boys, Mohamed and Tamim.

Finally, I thank everyone who provided me with any kind of assistance necessary to help me go through this work; I know it is an endless list but thank you all.

Abstract:

This thesis focuses on remedies for a breach of the Contract of Sale of Goods under English and Saudi law, wherever the Contract is in the course of business. The primary aim of the thesis is to describe and analyse those remedies and how each of the above legal regimes has dealt with breaches. For this purpose, the remedies must be analysed to identify differences and similarities between the two regimes, while at the same time highlighting the weaknesses and strengths of each. In addition, the reasons why the two legal systems have adopted their respective approaches in favouring specific remedies will be considered, in order to determine whether there are any differences in the underlying legal principles affecting the *de facto* results for the Buyer and Seller. In so doing, the aim is to provide a detailed and ingenious analysis, which may be of assistance in understanding each regime.

Contents

Chapter 1: Introduction to the Thesis

1.1. Introduction:

The Contract for the Sale of Goods is increasingly the most common type of sales contract.[1] It necessarily follows that this rapidly growing use of the Contract for the Sale of Goods requires an effective and appropriate legal system to resolve any problems arising due to a breach of the Contract. When two commercial parties enter into a binding Contract of Sale, the law imposes obligations on them and these must be fulfilled by the parties to this Contract. In the event that they fail to fulfil their contractual obligations, the law provides remedies for the innocent party. Therefore, the law must be sufficiently capable of dealing with such breaches.[2] This current thesis compares remedies for a breach of the commercial Sale of Goods Contract, examining both English and Saudi law.[3]

It was decided to compare Saudi with English law; in particular, as it is the most popular choice of law for parties in cross-border commercial contracts worldwide. This is due to the fact that English law supports the needs of modern commerce.[4] Additionally, it provides a well-established statute that can be applied to Contracts for the Sale of Goods, dating back to 1893. In contrast, the Saudi legal system may appear less developed or coherent; it preserves the traditional model of Islamic (*Shari'ah)* law[5] and the Contract of Sale of Goods in Saudi law has not been codified,[6] but is rather determined by *Shari'ah* law,[7] specifically interpreted according

[1] Mahdi Zahraa and Shafaai M. Mahmor, 'Definition and Scope of the Islamic Concept of Sale of Goods' (2001) 16(3) Arab Law Quarterly, 215.
[2] Stewart Hancock, 'A Uniform Commercial Code for International Sales? We Have It Now' (1995) 67 New York State Bar Journal, 23.
[3] The sources and systems that will form the basis of this comparison will be described in detail in Chapter Two, as this Chapter deals with the sources of the Contract of Sale of Goods under English and Saudi law.
[4] Herbert Smith, *England and Wales: The Jurisdiction of Choice* (The Law Society of England and Wales N/A), 8.
[5] Ingeborg Schwenzer, Pascal Hachem and Christopher Kee, *Global Sales and Contract Law* (Oxford University Press 2012), 27; see also section 2.3. Sources of the Contract for the Sale of Goods in Saudi Law, 30.
[6] Nevertheless, this thesis will cite numerous cases decided by the Saudi commercial courts, in support of the arguments. These are therefore the subject of original analysis in this thesis.
[7] Under the Islamic *Sunnah,* there are four schools: *Hanifi, Hanbali, Maliki* and *Shafi*. The *Hanbali* School is the most conservative of the *Sunnah* law schools, but it is the most liberal in the majority of commercial matters (see John L.

to the *Hanbali* School.[8] Furthermore, the Contract for the Sale of Goods in Saudi law has not received adequate attention, compared to the English Sale of Goods. It is also worth mentioning that this study is the first attempt ever made to compare English law with Saudi law in this area.

The aim of this thesis, therefore, is to examine and analyse the approaches of the two above-mentioned legal systems to providing remedies for the Seller and Buyer in the event of a breach of non-consumer Contracts of Sale. Consequently, the principles underlying these remedies will be examined in a detailed analysis of the reasons why the two legal systems adopt the approaches that they do in favouring certain remedies, with particular reference to the underlying rationale in each case, as well as ascertaining whether there are any differences in the underlying legal principles that affect the *de facto* results for the Seller or Buyer.[9]

To be specific, the remedies presented consist of the Seller's remedies (where the Seller sells goods in the course of business), these being primarily the possessory remedies of the unpaid Seller; the Seller's right to the price; the Seller's right to damages for non-acceptance; the Seller's right to cure defective performance in Saudi law; the Seller's right to terminate the Contract, and the right to compensation for damages,[10] followed by the Buyer's remedies (that is, where the Buyer is not a consumer), which include the Buyer's right to reject the goods; the Buyer's right to specific performance (the right to require the Contract to be executed); the Buyer's right to terminate the Contract, and the right to compensation for damages.[11]

These are the remedies provided by the law; nevertheless, the parties to a commercial

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Esposito, 'Hanbali School of Law', *The Oxford Dictionary of Islam* (Oxford University Press 2004) <http://www.oxfordislamicstudies.com/article/opr/t125/e799> accessed 13 January 2018.

[8] This is the official school in Saudi Arabia (see Frank E. Vogel, *Islamic Law and Legal System Studies of Saudi Arabia* [1st edn, Brill 2000], 10; Florian Pohl, *Modern Muslim Societies* [1st edn, Cavendish Square Publishing 2010], 118; C.G. Weeramantry, *Islamic Jurisprudence: An International Perspective* [1st edn, Palgrave Macmillan 1988], 54).

[9] Of particular importance to the novelty of this thesis is the situation where English and Saudi companies enter into a Contract of Sale of Goods with each other, or where such a Contract attempts to incorporate English and Saudi law into its performance. If this Contract is breached, it poses the question of what remedies are available for the parties involved. This thesis consequently presents and analyses the remedies available to the Seller and Buyer, in the event of a breach of the Contract.

[10] Chapter Five deals with The Seller's Remedies for a Breach of the Contract for the Sale of Goods, 136.

[11] Chapter Six deals with the Buyer's Remedies for the Contract for the Sale of Goods, 199.

Contract can exclude or limit them through explicit contractual terms.[12] However, in the absence of such a clause, the law will provide remedies for the innocent party.

1.2. The Aim and Objectives of the Thesis:

The primary aim of this thesis is to describe and analyse remedies for a breach of the Contract for the Sale of Goods under the 1979 Act, within the wider context of Contract Law and in terms of the Contract for the Sale of Goods in Saudi law. For this purpose, the remedies must be analysed to look for differences and similarities between the above-mentioned regimes, while at the same time highlighting the weaknesses and strengths of each. This is because English and Saudi law do not necessarily structure their solutions in the same ways, despite the fact that they face similar problems. Consequently, the reasons why the two legal systems adopt their respective approaches in favouring specific remedies will be considered, in order to determine whether there are any differences in the underlying legal principles that affect the *de facto* results for the Buyer and Seller. In so doing, it aims to provide a detailed and ingenious analysis, which may be of assistance in understanding each regime.

In light of the above, the following points require examination and analysis:

- Remedies for a breach of the Contract for the Sale of Goods under English and Saudi law.
- The differences and common ground between the remedies in the above-mentioned regimes, highlighting the weaknesses and strengths in each legal system.

[12] These will not be discussed in this thesis, because they cannot be limited.

- To analyse the reasons why these two legal systems adopt such approaches in favouring certain remedies and to determine whether any differences in the underlying legal principles affect the *de facto* results for the contracting parties.[13]
- To discuss and analyse why Saudi law provides or applies certain remedies that do not exist in English law, and to identify whether these differences in approach significantly affect the outcome for the Buyer and/or Seller.[14]
- To examine the effect of certain remedies on the Contract of Sale of Goods under English and Saudi law, and to determine whether there are any differences that could affect the *de facto* results for the contracting parties.[15]

1.3. Scope and Limitations of the Thesis:

The scope of this thesis basically encompasses the remedies available to the Seller and Buyer under English and Saudi law,[16] where the Contract of Sale of Goods is entered into in the course of business.[17] In English law, the mainstay of the Contract of Sale of Goods is the 1979 Act, (as amended). This suggests that the current study will only examine the remedies available under the 1979 Act, but it does not necessarily mean that the 1979 Act provides remedies for all breaches anticipated to arise in a dispute over the sale of goods, even though it does provide remedies for many.[18] The reason why this Act in particular has been selected for analysis here is because it is considered as the main source of law covering the Contract for the Sale of Goods in English law. However, it may be seen that there are further remedies under other English

[13] Such as the primary remedy for the Buyer being specific performance or damages under both the above-mentioned regimes; moreover, the inquiry is into why they adopt these approaches and whether this affects the *de facto* results for the Buyer (see section 6.2.2. The Buyer's Right to Specific Performance, 214).
[14] Such as the Seller's right to cure defective performance (see section 5.3.4. The Seller's Right to Cure Defective Performance, 171).
[15] Such as the effect of the Buyer rejecting the Goods (see section 6.2.1.3. The Effect of Rejecting Defective Delivery, 212). Also, the effect of an unpaid Seller reselling the Goods (see section 5.3.1.5.2.1. Where the Goods Have Been Resold by the Unpaid Seller, Who is Entitled to Profit under English and Saudi Law, 161).
[16] Which are implied by law; nevertheless, the parties to the Contract can agree upon further remedies, but this thesis will only analyse the remedies provided under the Act.
[17] A consumer contract does not form part of this thesis.
[18] Law Commission, *Sale and Supply of Goods* (Law Com No 160, 1987), 2.

laws, which are relevant to the Contract of Sale of Goods. However, these are precluded here, since such inclusion would render the scope of the study too broad. Nevertheless, these laws are cross-referenced where necessary.[19] Furthermore, the 1979 Act not only governs the Contract of Sale of Goods in England, but also across the entire UK, even though this thesis specifically examines the remedies for a breach of the Contract of Sale of Goods in England (and by implication, Wales). In contrast, under Saudi law, the rules concerning the sale of goods have not been codified in a specific, uniform Act, as the Contract for the Sale of Goods is instead governed by Islamic Commercial Law, interpreted according to the *Hanbali* School.[20] Therefore, the Saudi courts rely heavily on the *Hanbali* interpretation of Islamic law.[21] This thesis will consequently present numerous cases decided by the Saudi commercial courts with regard to the Contract of Sale of Goods to support its arguments. These cases have not previously been subject to a comprehensive analysis, having only become available since 2015. Therefore, they are a subject of original analysis in this thesis.

1.4. Review of the Literature:

English and Saudi law have identified several remedies for breaches of the Contract for the Sale of Goods. These will be examined in the present thesis, but they are not always clear cut, as the Sale of Goods Act 1979 is itself unclear. Furthermore, the Contract for the Sale of Goods in Saudi law represents a more complex approach than that of English law, because it focuses on provisions of Islamic law, rather than being codified in a specific uniform Act.[22]

For example, Bridge states that the 1979 Act cannot be expounded systematically or neatly, because it is neither systematic nor neat in itself. To illustrate this, he cites examples,

[19] The sources and systems that will form the basis of comparison will be described in detail in Chapter Two (see section 2.2. Sources of the Contract for the Sale of Goods in English Law, 17).
[20] Vogel (N 8) 10; Pohl (N 8) 118 and Weeramantry (N 8), 54.
[21] See section 2.3. Sources of the Contract for the Sale of Goods in Saudi Law, 30.
[22] Schwenzer (N 5), 27.

such as the time of delivery in commercial cases under the Act. Here, section 10 of the 1979 Act does not regard time of delivery as the essence of the Contract,[23] whereas case law does.[24] Thus, Bridge views the time of delivery as the essence of the Contract in commercial cases.[25] This is supported by Schwenzer, who considers that time of delivery is the essence of the Contract in a commercial Contract under English law,[26] and early delivery is discussed under the heading of time being of the essence in English law.[27] As a result, the different approaches under the 1979 Act and English case law give rise to varying remedies concerning the Buyer's right to reject the goods or claim for damages.[28]

Furthermore, in the 1979 Act, it will be ascertained whether the Buyer's right to reject the goods is distinct from his right to terminate the Contract of Sale. Moreover, it will be established whether the circumstances affording the Buyer the right to reject the goods are the same as those surrounding the right to terminate the Contract of Sale. Bridge is of the view that the 1979 Act is not explicit in its treatment of termination and rejection. In fact, the effect of termination and rejection and the link between them is left obscure.[29]

Aside from the above, where the unpaid Seller resells goods under section 48(3), the question arises of whether or not the original Contract is rescinded. The 1979 Act is unclear on this point, although it specifies in section 48(4) that when the Seller expressly reserves the right to resell goods, the original Contract of Sale is rescinded. However, does section 48(3) indicate

[23] The Sale of Goods Act 1979, s. 10.
[24] See the case of *Hartley v Hymans* [1920] 3 KB 475; *SHV Gas Supply & Trading SAS v Naftomar Shipping & Trading Co Ltd* [2005] EWHC 2528 Comm.
[25] Michael Bridge and others, *Benjamin's Sale of Goods* (10th edn, Sweet & Maxwell Ltd. 2017), 279-280.
[26] Schwenzer is talking about time being of the essence in the context of the terms for interpreting contracts, rather than as a principle of law (see Schwenzer [N 5], 725).
[27] See case of *Bowes v Shand* [1877] 2 APP Cas 455. In this case the CIF contract called for a cargo of rice to be shipped during March or April. However, the shipment took place in February, under this circumstance, the court allowed the buyer to reject the Goods and terminate the contract.
[28] See section 4.3.3.1.2.1. 'Time of Delivery' in English Law, 88.
[29] Michael Bridge, *The Sale of Goods* (3rd edn, Oxford University Press 2014), 533; see also section 6.2.1.3.1. The Effect of Rejecting Defective Delivery in English Law, 212; section 6.2.3.1. The Buyer's Right to Terminate the Contract in English Law, 226.

that it is not rescinded? In the case of *Gallagher v Shilcock*,[30] Lord Finnemore determined that when an unpaid Seller resold goods under section 48(3), he was reselling the Buyer's goods and acting as a quasi-pledgee, rather than as the owner. Therefore, he did not rescind the original Contract of Sale. Lord Finnemore found that section 48(3) did not involve the rescission of the Contract on resale by the Seller.[31] In contrast, there have been some cases, where it was decided that when the Seller resells goods under section 48(3) or (4), the Contract is rescinded, as in *R V Ward Ltd v Bignall*.[32] Consequently, the 1979 Act and English case law cannot be described as clear about the effect of an unpaid Seller reselling goods and thus terminating the original Contract.[33]

In the literature, Bridge states that the effect of a Seller reselling the goods is indeed to terminate the original Contract.[34] Furthermore, Twigg-Flesner, claiming that where the unpaid Seller resells goods under section 48(3), the original Contract is rescinded, and he adds that it is unfair to give a Buyer who has breached the Contract any right to profit made by the Seller through a resale.[35] Consequently, Twigg-Flesner is of the view that when the unpaid Seller resells goods under sections 48(3) or (4), any profit made therefrom shall be retained by the Seller. As a result, the above authors consider that Lord Finnemore's decision in *Gallagher v Shilcock*[36] is unsatisfactory in many ways. It would in fact be outrageous for a Buyer who has defaulted in his obligation to be entitled to collect additional profit earned through the Seller's

[30] [1949] 2 KB, 765.
[31] In this case, Lord Finnemore took this view; section 48(3) does not involve the rescission of the Contract on re-sale by the Seller, with Lord Finnemore stating that: *"*The Act says that the unpaid seller may re-sell the goods, and, if that sale does not reimburse him, he may still recover damages for any loss which he has suffered. In such a case the unpaid seller does not sell as an absolute owner. The property has already passed, and the lateness of payment does not rescind the contract. It follows that as there is no complete resumption of the right of property on the part of the seller, he must, when he re-sells, bring into account any deposit which he has already received from the buyer*"* (see *Gallagher (*N 30) 765.
[32] [1967] 1 QB 534. Here, the Court found that the Seller had rescinded the Contract, since he was no longer able to perform it, given that one of the cars under the original Contract had been sold.
[33] See section 5.3.1.5.1. The Seller's Right to Resell Goods in English Law, 155.
[34] *Benjamin's Sale of Goods* (N 25), para 15-003.
[35] Christian Twigg-Flesner and others, *Atiyah and Adams' Sale of Goods* (13th edn, Pearson Education Limited 2016), 403-405.
[36] *Gallagher* (N 30).

efforts in selling the goods.[37]

Thus, the differences in approach between the 1979 Act and English case law can grant different rights to the Seller and Buyer. For instance, one question that arises here is whether an unpaid Seller who resells goods has the right to retain any profit from such a resale. Stated in other terms, can the Seller retain more than the contracted price?[38]

In Saudi law, the Contract for the Sale of Goods involves a more complex approach than the one adopted in English law, because it focuses on provisions of *Shari'ah* law, which have not been codified in a uniform Act. Schwenzer sees the Saudi legal system as preserving the traditional Islamic legal model,[39] with remedies for breaches of the Contract of Sale being derived from *Shari'ah* law. Vogel also observes that Saudi law is interpreted according to the *Hanbali* School,[40] as opposed to being codified in a uniform Act. Nevertheless, the prevalence of a single school of Islamic law in Saudi law does not rule out differences in rulings and procedures. Therefore, there may still be difficulties in obtaining an authoritative legal opinion, given that diverse interpretations persist according to variations in opinion and philosophy amongst scholars of the *Hanbali* School of Islamic law.[41]

Meanwhile, one cannot deny that according to other Islamic legal interpretations, there have been earlier works of codification, the most prominent being the *Majalat Alahkam Al'Adliah*. This was modified to correspond to Islamic law under the *Hanafi* School.[42] However, in the mid-19th century, *Majalat Alahkam Al'Adliah* started to disappear in most Islamic

[37] *Atiyah and Adams' Sale of Goods (N 35)*, 403.
[38] See section 5.3.1.5.2.1. Where the Goods Have Been Resold by the Unpaid Seller, Who Is Entitled to Profit under English and Saudi Law? 161.
[39] Schwenzer (N 5), para 2.103. Remarkably, this only refers to two main cases in Saudi law, due to a lack of cases at that time. However, since that date, there have been a large number of cases published; see The Board of Grievance, 'Commercial Judgments: A Contract of Sale' (*Judicial Blogs*). www.bog.gov.sa/ScientificContent/JudicialBlogs/Pages/default.aspx
[40] Vogel (N 8), 10.
[41] Abdullah Ansary, 'A Brief Overview of the Saudi Arabian Legal System' (Hauser Global Law School Program 2008) <http://www.nyulawglobal.org/globalex/Saudi_Arabia.html.> accessed 11 April 2017.
[42] The Ottoman Courts Manual (*Hanafi: Majalat Alahkam Al'Adliah*) (1876) www.kantakji.com/media/8577/n252.pdf

countries and the last version was revoked in Kuwait in 1980, when the countries of the Middle East and Arab world re-codified their laws based on civil codes. However, as *Shari'ah* law continues to exist in Middle Eastern and Arab legal systems, alongside private codification, *Majalat Alahkam Al'Adliah* is used as a reference for the principles of Islamic law.[43] Nevertheless, the Saudi legal system, in particular, preserves the traditional model of an Islamic legal system[44] and it cannot be separated from its *Shari'ah* origins.[45]

Weeramantry notes that the Contract for the Sale of Goods in Islamic law has its own characteristics, which differentiate it from Commercial Law in other regimes. It is primarily based on principles of Islamic law outlined in the Holy Qur'an and *Sunnah*.[46] Therefore, Saudi law does not permit anything that God has forbidden and does not deny anything that God has permitted.[47] The Contract for the Sale of Goods is governed by traditional Islamic rules that are difficult to understand. However, *Al-Sanhuri* has explored these, along with contemporary legal developments, in an attempt to incorporate them into the study of comparative jurisprudence.[48] To date, it remains the main reference for authors dealing with comparative law and codification.[49]

In light of the above, the Contract for the Sale of Goods in Saudi law represents a more complex approach than the one adopted in English law, sometimes failing to provide a rule for solving a problem. In such cases, the court derives an appropriate rule through logical inference and analogy, with no rule governing the court's analogy. Therefore, there may still be

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[43] Schwenzer (N 5), para 2.100
[44] Ibid, para 2, 103.
[45] Abdulrahman Al-Shalhob, *Basic Law of Governance in Saudi Arabia* (4th edn, Alshegrey 2004), 205.
[46] Weeramantry (N 8), 32-34.
[47] In consequence, usury *(Riba*) is forbidden in all transactions in Saudi law. Nevertheless, there are some Islamic countries, such as Egypt and Iraq that permit *Riba*, even though it contradicts their constitutions based on Islamic law. However, in Saudi law, since the Quran is its fundamental source, usury is forbidden. Thus, one of the implications of forbidding usury is that this prohibition eliminates usury from all Contracts of Sale.
[48] Abd al-Razzāq al-Sanhūrī, *Discuss Civil Law* [*Al-Wasit Fi Sharh Al-Qanun Al-Madani*] (3rd edn, Al-Halabi Legal Publications 2011).
[49] Enid Hill, 'Islamic Law: The Place and Significance of Islamic Law in the Life and Work of Abd al-Razzaq Ahmad al-Sanhuri, Egyptian Jurist and Scholar, 1895-1971 [Part II]' (1988) 3(2) Arab Law Quarterly, 192.

difficulties in obtaining an authoritative legal opinion, given the diversity of opinion amongst scholars of Islamic law.

1.5. The Methodology of the Thesis:

This thesis is a comparative study between the English Sale of Goods Act and the Contract for the Sale of Goods in Saudi law. Its aim is to analyse the remedies for a breach of the Contract for the Sale of Goods under the above-mentioned regimes; examining the underlying principles and identifying why the two legal systems favour certain remedies, with particular focus on whether there are any differences affecting the *de facto* results for the Seller and Buyer.[50] The method deemed to be most suitable for achieving the objective of this study is a comparative functional methodology.

Comparative Law juxtaposes various laws, such as national and foreign laws.[51] Saleilles states that Comparative Law is mainly an instrument for improving domestic law and legal doctrine,[52] while Collins claims that *"*the aim of comparative law should be to improve and understand one's domestic legal system by analysing how foreign jurisdiction have dealt with the same problem*"*.[53] There may well be different aims in comparing legal systems, but one that has come to the fore is the acquisition of knowledge and ongoing learning.[54] Zweigert and Kötz support this, demonstrating that "the primary aim of comparative law, as of all sciences,

[50] See section 1.2. The Aim and Objectives of the Thesis, 3.

[51] Comparative Law was first established in Paris in 1900. Nowadays, legal comparisons can be made between different rules in a single legal system, such as between different paragraphs of the German Civil Code (see Konrad Zweigert and Hein Kötz, *Introduction to Comparative Law* (3rd edn, Oxford University Press 1998), 2.

[52] *"*At the end of the nineteenth century and early twentieth century in France, Raymond Saleilles and others saw comparative law mainly as an instrument for improving domestic law and legal doctrine, as a way of renovating the approach*"* see Mark Van Hoecke, *Methodologies of Legal Research: Which Kind of Method for What Kind of Discipline?* (1st edn, Hart Publishing 2011), 1.

[53] Hugh Collins, 'Methods and Aims of Comparative Contract Law' (1991) 11 Oxford Journal of Legal Studies, 399; see also, Gerhard Danneman, 'Comparative Law: Study of Similarities or Differences' in Mathias Reimann and Reinhard Zimmermann (eds), *Oxford Handbook of Comparative Law* (1st edn, Oxford University Press 2006), 403.

[54] Ralf Michaels, 'The Functional Method of Comparative Law' in Mathias Reimann and Reinhard Zimmermann (eds) *Oxford Handbook of Comparative Law* (1st edn, Oxford University Press 2006), 364.

is knowledge".[55]

Collins identifies another potential aim of Comparative Law, namely "to identify better legal solutions in foreign legal systems and then to recommend their incorporation into domestic law.."[56] However, he argues that this is not always effective,[57] due to different social and economic structures.[58] Moreover, the concepts form clusters of concepts; combining as a coherent and consistent set of rules and principles for the regulation of aspects of social life. It is not possible to transplant a single foreign concept into domestic law, without considering the coherence of its conceptual scheme, which can result in confusion and discrepancy.[59] Consequently, this thesis will not argue that the remedies in one legal regime are superior to those of another, or that they should be applied by another. Any such approach would be unrealistic and futile. Instead, the focus of the monograph is upon analysing English remedies for a breach of the Contract of Sale of Goods by comparison with Saudi law and will consist of a detailed analysis of the reasons why the two legal systems adopt the approaches that they do.

Comparative Law can also contribute to an existing legal system and the harmonisation of law;[60] as in the development of International Commercial Law by harmonising the Contract for the Sale of Goods. The harmonisation of law arises exclusively in Comparative Law and seeks to *"*effect an approximation or co-ordination of different legal provision or systems by eliminating major differences and creating minimum requirements or standards*"*.[61] This can be achieved if countries embark on modifying their domestic commercial laws in a way that absorbs the international conventions that are already in place at regional and international

[55] *"*The method of comparative law can provide a much richer range of model solutions than a legal science devoted to a single nation, simply because the different systems of the world can offer a greater variety of solutions than could be thought up in a lifetime by even the most imaginative jurist who was corralled in his own system" (see Zweigert [N 51], 15).
[56] Collins (N 53), 397.
[57] If this cannot be, then it should at least be an improved domestic law; see Michaels (N 54), 373.
[58] Ibid, 397.
[59] Ibid, 398.
[60] Patrick Glenn, 'Aims of Comparative Law'*, Elgar Encyclopedia of Comparative Law* (2nd edn, Cheltenham Edward Elgar 2012), 65-72.
[61] Zweigert (N 51), 28.

level.[62] There are in fact six methods applied to Comparative Law: structural, functional, analytical, common-core, law-in-context, and the historical method.[63] As mentioned earlier, however, the most suitable approach to achieving the current study objectives is the comparative functional methodology.

A comparative functional methodology is typically applied in micro-comparisons,[64] such as remedies for breaches of the Contract for the Sale of Goods. The idea is basically to explore problems arising in different legal systems and ascertain how these can be resolved practically.[65] Every legal system differs in terms of its legal concepts, rules and procedures.[66] Notwithstanding this, legal systems may still be offered identical solutions. If this is reasoned out, the means of reaching a legal solution may differ, but the solution could be the same. It is certainly true that there are remedies available in English and Saudi law, wherever the Sale of Goods contract is breached, such as damages versus specific performance. The function of these remedies is to return the innocent party to the position he would have been in, if the Contract had not been breached.

As mentioned above, the functional methodology best reflects the aims of this thesis, which is to present and analyse remedies for a breach of the Contract for the Sale of Goods under English and Saudi law; looking at the common ground and differences between these regimes, and why the two legal systems adopt the approaches that they do in favouring certain remedies, as well as whether there are any differences affecting the *de facto* results for a Seller

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[62] Sappideen Razeen, 'Harmonizing International Commercial Law through Codification' (2006) 40(3) Journal of World Trade, 425.

[63] Mark Van Hoecke, Methodology of Comparative Legal Research (Law and Method, Research Gate 2015) <https://www.bjutijdschriften.nl/tijdschrift/lawandmethod/2015/12/RENM-D-14-00001.pdf> accessed 28 September 2016, 8.

[64] Ibid, 11.

[65] Jaakko Husa, 'Comparative Law, Legal Linguistics and Methodology of Legal Doctrine' in Mark Van Hoecke (ed) *Methodologies of Legal Research: Which Kind of Method for What Kind of Discipline?* (1st edn, Hart Publishing 2011), 221-222.

[66] "The idea behind functionalism is to look at the way practical problems of solving conflicts of interest are dealt with in different societies according to different legal systems. This allows us to perceive those problems (largely) independently from the doctrinal framework of each of the compared legal systems", ibid, 221-222.

or Buyer.

It is therefore necessary in this study to begin by comparing various solutions adopted for a breach of the Contract for the Sale of Goods in both the regimes under study, raising problems and analysing the specific solutions prescribed in the relevant legal system. These materials will then be used as the basis for a comparative assessment to help reveal how and why English and Saudi law deal with a breach of the Contract for the Sale of Goods. As mentioned earlier, when examining English law, the primary focus is on the English Sale of Goods Act 1979,[67] but a more complex approach is adopted when examining Saudi law, because the Contract for the Sale of Goods in Saudi law has not been codified in a specific uniform Act, but is rather based on provisions of Islamic law according to the *Hanbali* School.[68] Nevertheless, this thesis will cite numerous cases decided by the Saudi commercial courts, in support of the arguments. These cases are in fact the subject of original analysis in this thesis.

1.6. Structure of the Thesis:

This thesis is divided into seven chapters. The first chapter introduces the topic, study aims, scope and limitations of the thesis. Also introduced are the literature review and methodology.

In Chapter Two, the sources of the Contract for the Sale of Goods under English and Saudi law are explained. The aim of this chapter is to provide an overview of these sources as the material drawn upon by the courts when disputes arise over Contracts for the Sale of Goods under the above-mentioned regimes. This chapter therefore provides an overview of the laws and principles governing the Contract for the Sale of Goods.

In the third chapter, the requirements of the Contract for the Sale of Goods under English

[67] The Sale of Goods Act 1979 not only governs the Contract of Sale of Goods in England and Wales, but also the Contract of Sale of Goods in the whole of the UK, but this thesis only provides remedies for a breach of the Contract of Sale of Goods in England (and Wales).
[68] Vogel (N 8) 10; Pohl (N 8), 118; Weeramantry (N 8), 54.

and Saudi law are examined and analysed. Here, the requirements of the Contract for the Sale of Goods under both regimes are examined. A definition of the Contract for the Sale of Goods is subsequently presented, as a means of distinguishing it from other kinds of Sales Contract. Therefore, the meaning of the term 'goods' shall be explored, this being the object of a Sales Contract under the above-mentioned regimes. Further to this, the effects of the Contract for the Sale of Goods will be pinpointed, in an analysis of the transfer of property in goods from the Seller to the Buyer under a Sales Contract. Here, there is an important distinction made between English and Saudi law.

In Chapter Four, there will be a focus on the Seller and Buyer, examining and analysing their obligations under English and Saudi law, where the Contract for the Sale of Goods is in the course of business.[69] In this chapter, the principle of good faith is considered for the performance of Contracts for the Sale of Goods and the wider context in which the sales regimes operate; focussing on the position of good faith in relation to the performance of Contracts for the Sale of Goods in the two legal systems.

Chapter Five then examines and analyses the Seller's remedies, when the Buyer breaches a Contract for the Sale of Goods in English and Saudi law. Here, the Seller's remedies under the above-mentioned regimes are examined and analysed, wherever the Seller sells goods in the course of business. These are principally the possessory remedies of the unpaid Seller; the Seller's right to the price; the Seller's right to damages for non-acceptance; the Seller's right to cure defective performance in Saudi law; the Seller's right to terminate the Contract, and the Seller's right to damage compensation. Furthermore, in this chapter, the ways in which Saudi law deals with the Seller's right to cure defective performance is analysed, as well as the reasons

[69] Nevertheless, in the commercial Sale of Goods Contract, the parties may themselves be able to exclude or limit obligations under the express terms of the Contract. However, the law imposes several statutory restrictions on attempts to exclude or limit liability for breach of contract, such as in English law under the Unfair Contract Terms Act 1977 (see section 2.2.5.1. Freedom of Contract (in English Law), 27; section 2.3.4.2. Freedom of Contract (in Saudi Law), 42).

why English law does not usually award this remedy to the Seller.

Meanwhile, Chapter Six is specifically concerned with remedies for a breach of the Contract for the Sale of Goods, available to the Buyer in English and Saudi law (that is, where the Buyer is not a consumer). These consist of the Buyer's right to reject the goods; the Buyer's right to specific performance; the Buyer's right to terminate the Contract, and the Buyer's right to damage compensation.

In summary, therefore, the main purpose of Chapters Five and Six is to analyse the remedies that can be availed of by either the Seller or Buyer under the Contract for the Sale of Goods in English and Saudi law, if the other party violates his contractual obligations. Furthermore, these two chapters analyse why English and Saudi law provide some remedies, but not others, with particular reference to the reasons for this and to whether there are any differences in the underlying legal principles affecting the *de facto* results for a Seller or Buyer.

Ultimately, this thesis is specifically concerned with comparing the Contract for the Sale of Goods in English and Saudi law. The main body of the study deals with the rules governing remedies for a breach of this Contract under the above-mentioned regimes. Therefore, the methodology adopted involves highlighting the common features and differences between the two regimes, and the reasons why they adopt the approaches that they do in favouring certain remedies. Additionally, it will be determined whether there are any differences affecting the *de facto* results for the Buyer and Seller.

Chapter 2: Sources of the Contract for the Sale of Goods in English and Saudi Law

2.1. Introducing the Sources:

This chapter aims to clarify the sources that the courts take recourse in, when disputes arise over the Contract for the Sale of Goods under English and Saudi law. In the first instance, a general overview of these sources is presented in English law, consisting of the 1979 Act [70] and a number of other laws; a body of case law, and the general Common Law rules on Contract Law, when these are not inconsistent with the 1979 Act.[71] Thus, in this chapter, the 1979 Act will be examined - this being the key legislation governing the Sale of Goods in English law - along with other applicable measures in this area.[72]

In the second instance, this chapter provides the sources of the Contract for the Sale of Goods in Saudi law. It involves a more complex approach, because the Contract for the Sale of Goods in Saudi law has not been codified in a specific uniform Act. Instead, the Saudi courts apply provisions of Islamic law according to the *Hanbali* School, from which remedies for breaches of the Contract for the Sale of Goods are derived. [73] Thus, in order to gain a clear understanding of the sources of the Contract for the Sale of Goods in Saudi law, it is first necessary to gain a general understanding of Islamic law. Therefore, the sources of the Contract will be identified here as four distinct areas: the sources of Islamic law; the laws linked with the Contract for the Sale of Goods, such as Commercial Insolvency in Saudi law; case law in the Saudi judiciary, and principles of Islamic Contract Law.[74]

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[70] The Sale of Goods Act 1979.
[71] *Atiyah and Adams' Sale of Goods (N 35)*, 3.
[72] See section 2.2. Sources of the Contract for the Sale of Goods in English Law, 17.
[73] The *Hanbali* School is one of the Islamic schools of legal thought (*madhhab*). It is the official school in Saudi Arabia and Qatar. However, the *Hanbali* School is the most conservative of the *Sunni* Law schools, albeit the most liberal in most commercial matters; see John L. Esposito 'Hanbali School of Law', *The Oxford Dictionary of Islam* (Oxford University Press 2004) http://www.oxfordislamicstudies.com/article/opr/t125/e799 accessed 13 January 2018.
[74] See section 2.3. Sources of the Contract for the Sale of Goods in Saudi Law, 30.

2.2. Sources of the Contract for the Sale of Goods in English Law:

The English Sale of Goods Act forms part of Contract Law, but is governed by its own statutory code, set out in the Sale of Goods Act 1979.[75] As part of Contract Law, it is governed by Common Law rules and other Acts, applicable to the sale of goods.[76] Under English law, domestic law on the sale of goods is to be found in four main sources.[77] First, there is the Sale of Goods Act 1979, which consolidates a number of amendments. Secondly, the sale of goods falls under several other Acts, such as the Factors Act 1889;[78] the Unfair Contract Terms Act 1977,[79] and the Insolvency Act 1986. There are also certain other statutes, such as the Bills of Sale Act 1878 and the Carriage of Goods by Sea Act 1992, which can affect the remedies available to parties to a Contract under specific circumstances.[80] Thirdly, a body of case law has interpreted the relevant Acts, such as the Sale of Goods Act 1893 and the 1979 Act.[81] Finally, general Common Law rules on Contract Law are applied, when these are not inconsistent with the 1979 Act.[82] For instance, the 1979 Act section 62(2) provides that the rules of Common Law apply to Contracts for the Sale of Goods, where they are not inconsistent with said Act.[83] These sources are discussed below.

[75] However, the 1979 Act specifically governs this area, even though it does not provide remedies for every conceivable breach arising in a dispute over the sale of goods. Nevertheless, it has provided remedies for many such breaches (see Law Commission [N 18], 2).
[76] William Hibbert and Henderson Chambers, *Sale of Goods: Remedies* (Sweet & Maxwell Ltd. Westlaw UK 2014), para 1.
[77] *Atiyah and Adams' Sale of Goods (N 35)*, 3.
[78] The Factors Act 1889 is most directly relevant, some of the provisions of which are repeated in the Sale of Goods Act 1979, in substantially the same form. Thus, section 47(2) of the Sale of Goods Act 1979 is substantially the same as section 10 of the Factors Act 1889. Furthermore, sections 24 and 25 of the Sale of Goods Act 1979 are reproduced with minor omissions and changes to the language, from sections 8 and 9 of the Factors Act 1889.
[79] Much of the Unfair Contract Terms Act 1977 has moved to the Consumer Rights Act 2015 for consumers, which does not form part of this thesis. Therefore, this thesis will not be dealing with the 2015 Act.
[80] *Benjamin's Sale of Goods* (N 25), para 15-009.
[81] *Atiyah and Adams' Sale of Goods (N 35)*, 3.
[82] *Benjamin's Sale of Goods* (N 25), 7-11.
[83] The Sale of Goods Act 1979, s. 62(2).

2.2.1. The Sale of Goods Act 1979:

The Contract of Sale in English law is governed by the 1979 Act, which is the statute governing all Contracts for the Sale of Goods and agreements to sell.[84] The principal aim of the 1979 Act is to consolidate the relationship between the Seller and Buyer. It remains at the heart of the law on remedies in respect of Contracts for the Sale of Goods.[85]

In fact, the 1979 Act is based on general principles of Contract Law, but there are a number of additional remedies available for breaches of the Contract for the Sale of Goods.[86] The 1979 Act is largely depicted as influenced by the Sale of Goods Act 1893, which was in turn a partial codification of English Common Law[87] and a statement of principles derived from cases decided by the English courts at the time.[88] However, the 1893 Act failed to provide remedies for all breaches anticipated to arise in a dispute over the sale of goods (although it did provide remedies for many,[89] hence its longevity).[90] The 1893 Act was thus amended by the 1979 Act.[91]

It should be clarified here that the principles set out in the 1893 Act were derived from a time when parties to a Contract for the Sale of Goods had more freedom to agree on the terms of their Contract,[92] compared to the conditions of the 1979 Act. Thus, many changes were introduced into English law, especially restrictions on the freedom to reduce the Seller's liability to below that which the 1893 Act would otherwise have imposed. Such a restriction is

[84] See section 2 of the Sale of Goods Act 1979; see also Hugh Beale, *Chitty on Contracts* (32nd edn, London Sweet & Maxwell 2016), 4-7.
[85] The Sale of Goods Act 1979 is still by far the most important Act governing Contracts for the Sale of Goods and an agreement to sell in the UK; see *Atiyah and Adams' Sale of Goods (N 35)*, 3.
[86] Hibbert (N 76), para 1.
[87] Law Commission, Sale and Supply of Goods (Law Com No 85, 1983), 11.
[88] Law Commission (N 18), para 1.6.
[89] Ibid, para 1.5.
[90] Ibid, para 1.9.
[91] The Sale of Goods Act 1893, with its amendments has been consolidated into the sale of Goods Act 1979, which is now solely entitled the 1979 Act. However, the present 1979 Act contains the 1893 Act with minor modifications (see Law Commission [N 18] para 1.8; *Benjamin's Sale of Goods* [N 25], 3).
[92] See section 2.2.5.1. Freedom of Contract, 27.

contained in the Unfair Contract Terms Act 1977,[93] which can only be departed from in non-consumer transactions and insofar as the law permits.[94]

Aside from the above, the longevity of the provisions of the original 1893 Act may have stemmed from the many instances in which the Act was not relied upon in practice. For example, in non-consumer transactions, the parties may well agree on their own terms. They often (and, for example, in international commodity transactions, frequently do) use standard forms, which have been carefully worked out to take account of the conflicting interests of the various parties. To a considerable extent, therefore, Buyers and Sellers in trade have superseded many of the provisions of the Act by creating their own provisions.[95] What is more, there have been considerable changes in the laws of other countries, given that many Common Law jurisdictions have reconsidered their laws on the sale of goods in recent years,[96] since the UK's legal system is by no means unique in encountering problems of this nature. Moreover, the Uniform Law of International Sales was incorporated into UK law by the Uniform Laws on International Sales Act 1967.[97]

Thus, for all the above-mentioned reasons, the Sale of Goods Act 1893 has been re-enacted in the 1979 Act; incorporating changes to address difficulties within the 1893 Act. As a result, the 1979 Act has now replaced the 1893 Act and a number of other enactments to incorporate changes have already been made to these Acts by amending legislation.[98] The 1979 Act has in turn been amended by the Sale and Supply of Goods Act 1994 and the Sale of Goods (Amendment) Act 1995.[99] However, these and other Sales Contracts for Goods fall outside the

[93] Much of the Unfair Contract Terms Act 1977 has moved to the Consumer Rights Act 2015 for consumers, which does not form part of this thesis. As such, this thesis will not be dealing with the 2015 Act.
[94] Law Commission (N 18), 2.
[95] Ibid, 3.
[96] Such as Canada; Australia "the Goods (Sales and Leases) Act 1981 (Victoria)"; the Republic of Ireland "Sale of Goods and Supply of Services Act 1980".
[97] Law Commission (N 87), 8.
[98] Law Commission (N 18) para 1.8; *Benjamin's Sale of Goods* (N 25), 3.
[99] *Atiyah and Adams' Sale of Goods (N 35)*, 120.

scope of this current thesis.[100]

The 1979 Act applies to Contracts of Sale for all types of goods transacted in the UK;[101] it makes no distinction between the sale of new and second-hand goods,[102] but it does distinguish between consumers and non-consumers.[103] Aside from the above, the Act does not usually make a distinction between the Contract of Sale and the agreement to sell, although it does distinguish between a conditional sale and a hire-purchase agreement.[104]

2.2.2. Related Laws:

In the English courts, there are many Acts considered by the courts when a Contract for the Sale of Goods is breached, such as the Factors Act 1889; the Unfair Contract Terms Act 1977; bankruptcy rules, and the Insolvency Act 1986. In the following sections, these related laws will be examined.

2.2.2.1. The Factors Act 1889:

The Factors Act 1889 replaces and in part extends earlier Factors Acts[105] dealing with the powers of disposition of a commercial agent.[106] Where such a commercial agent is in possession of goods with the consent of the owner, the Factors Act 1989 provides that the

[100] See section 1.3. Scope and Limitations of the Thesis, 4.

[101] The Sale of Goods Act 1979, not only governs the Contract of Sale of Goods in England, but also applies to the Contract of Sale of Goods in the whole of the UK, but as already mentioned, this thesis provides remedies for a breach of the Contract of Sale of Goods specifically in England (see section 1.3. Scope and Limitations of the Thesis, 4). Furthermore, in a Contract of International Sale, the contracting parties could choose the Uniform Laws on International Sales Act 1967. This 1967 Act is now in force in relations between the UK and a number of countries that have ratified the Convention, but it does not mean that it will automatically apply to all Contracts for International Sales. In fact, it will only apply when it has been chosen by the parties as the law of the Contract. Consequently, the Sale of Goods Act 1979 will not govern all Contracts of Sale of Goods formed in the UK; see The Uniform Laws on International Sales Act 1967, Art 1(4).

[102] *Benjamin's Sale of Goods* (N 25), 6.

[103] As mentioned earlier, the Contract of Sale for a consumer and the Consumer Rights Act 2015 are entirely beyond the scope of the present thesis (see section 1.3. Scope and Limitations of the Thesis, 4).

[104] It should be noted that English law makes a distinction between a conditional sale and a hire-purchase agreement. In the first instance, a conditional sale is within the scope of the Sale of Goods Act 1979 under its section 2(3), whereas a hire-purchase agreement is not. Under English law, in a hire purchase agreement, there is only an option to purchase, with the factor of the Buyer not merely having the option of full title by paying the full price being an important condition at one time. However, the Buyer in a conditional Sales Contract could pass good title to an innocent third party purchase, whereas a party who had merely hired the goods with an option to purchase could not; see Schwenzer (N 5), 114.

[105] These were Factors Acts passed in 1823, 1825, 1842 and 1877.

[106] The Factors Act 1889, s. 1.

owner is authorised to deal with such goods, so long as the party with whom he is dealing acts in good faith.[107]

The interaction between the 1979 and 1889 Acts is set out in section 21 of the 1979 Act. This section recognises that an agent with consent does indeed have the power to sell the goods, whereby section 21 of the 1979 Act implicitly recognises estoppel in the wording of "unless the owner of the goods is by his conduct precluded from denying the seller's authority to sell".[108] Here, when the goods are being sold by someone other than the owner, the Buyer acquires no better title to the goods than that of the Seller. However, this section refers to the provisions of previous Factors Acts in sections 21(2)(a)[109] and 61(1)(b) of the 1979 Act. In the case of the latter, the decision over the document of title to the goods has the same meaning as in previous Factors Acts;[110] while sections 61(1)(b) of the 1979 Act adopts a specific definition from these Acts.[111] What is more, in the case where the Seller sells goods that he is in possession of, section 24 of the 1979 Act[112] contains provisions that parallel those of section 8 of the 1889 Act[113] whereby similar protection is afforded to innocent third parties in possession of the goods.

[107] The Sale of Goods Act 1979, s. 2.

[108] Ibid, s. 21(1) provides that *"*Subject to this Act, where goods are sold by a person who is not their owner, and who does not sell them under the authority or with the consent of the owner, the buyer acquires no better title to the goods than the seller had, unless the owner of the goods is by his conduct precluded from denying the seller's authority to sell".

[109] Ibid, s. 21(2)(a) provides that *"*Nothing in this Act affects, (a) the provisions of the Factors Acts or any enactment enabling the apparent owner of goods to dispose of them as if he were their true owner".

[110] Ibid, s. 61(1)(b) provides that "'document of title to goods' has the same meaning as it has in the Factors Acts".

[111] Ibid, s. 61(1) provides that *"*Factors Acts' mean the Factors Act 1889, the Factors Act (Scotland) 1890, and any enactment amending or substituted for these".

[112] Ibid, s. 24 provides that *"*Where a person having sold goods continues or is in possession of the goods, or of the documents of title to the goods, the delivery or transfer by that person, or by a mercantile agent acting for him, of the goods or documents of title under any sale, pledge, or other disposition thereof, to any person receiving the same in good faith and without notice of the previous sale, has the same effect as if the person making the delivery or transfer were expressly authorised by the owner of the goods to make the same".

[113] The Factors Act 1889, s. 8 provides that "Where a person, having sold goods, continues, or is, in possession of the goods or of the documents of title to the goods, the delivery or transfer by that person, or by a mercantile agent acting for him, of the goods or documents of title under any sale, pledge, or other disposition thereof, or under any agreement for sale, pledge, or other disposition thereof, to any person receiving the same in good faith and without notice of the previous sale, shall have the same effect as if the person making the delivery or transfer were expressly authorised by the owner of the goods to make the same".

Moreover, section 25(1) of the 1979 Act[114] runs parallel to section 9 of the 1889 Act,[115] but sections 8 and 9 of the 1889 Act have not been repealed, because they are broader than the provisions of the 1979 Act; providing similar protection for innocent third parties in possession of the goods. Despite this, Bridge notes differences in wording between the two Acts, albeit insignificant.[116]

The consequence of the 1979 Act is that the Seller has the right to resell goods once he has possession of the documents of title to them and is in possession of the goods (under section 24 of said Act). The Seller also has this right under section 8 of the Factors Act. Moreover, when the unpaid Seller has exercised his right to lien or stoppage of the goods in transit, he still has right to resell the goods under section 48(2) of the 1979 Act. However, under section 24 of the 1979 Act and section 8 of the Factors Act, the Seller does not have such a right.[117]

2.2.2.2. The Unfair Contract Terms Act 1977:

The 1977 Act is normally used in conjunction with the 1979 Act,[118] with the latter referring to provisions of the Unfair Contract Terms Act 1977. Here, section 55(1) of the 1979 Act provides:[119] *"*Where a right, duty or liability would arise under a contract of sale of goods by implication of law, it may (subject to the Unfair Contract Terms Act 1977) be negatived or

[114] The Sale of Goods Act 1979, s. 25(1) provides that "Where a person having bought or agreed to buy goods obtains, with the consent of the seller, possession of the goods or the documents of title to the goods, the delivery or transfer by that person, or by a mercantile agent acting for him, of the goods or documents of title, under any sale, pledge, or other disposition thereof, to any person receiving the same in good faith and without notice of any lien or other right of the original seller in respect of the goods, has the same effect as if the person making the delivery or transfer were a mercantile agent in possession of the goods or documents of title with the consent of the owner".

[115] The Factors Act 1889, s. 9 provides that "Where a person, having bought or agreed to buy goods, obtains with the consent of the seller possession of the goods or the documents of title to the goods, the delivery or transfer, by that person or by a mercantile agent acting for him, of the goods or documents of title, under any sale, pledge, or other disposition thereof, or under any agreement for sale, pledge, or other disposition thereof, to any person receiving the same in good faith and without notice of any lien or other right of the original seller in respect of the goods, shall have the same effect as if the person making the delivery or transfer were a mercantile agent in possession of the goods or documents of title with the consent of the owner".

[116] *Benjamin's Sale of Goods* (N 25), 16.

[117] Section 48(2) of the Sale of Goods Act envisages the possibility of a resale by the seller not in possession of the Goods, so it is to extent wider than these two sections (see section 5.3.1.5.1. The Seller's Right to Resell Goods in English Law, 155; *Atiyah and Adams' Sale of Goods* [N 35], 401-402).

[118] *Atiyah and Adams' Sale of Goods (N 35)*, 80.

[119] *Benjamin's Sale of Goods* (N 25), 11.

varied by express agreement, or by the course of dealing between the parties, or by such usage as binds both parties to the contract.*"*[120] In fact, the 1977 Act restricts the operation and legality of some contractual terms[121] and applies to contracts in general, not merely to the Contract for the Sale of Goods.[122] One of its most important functions is to limit the applicability of disclaimers of liability to a breach of contract.

The 1977 Act declares exemption clauses to be totally ineffective in certain situations, with its section 6(1) providing that liability for a breach of the obligations arising from the Seller's implied undertakings as to title cannot be excluded or restricted by reference to any contractual term.[123] The 1977 Act also provides that certain exclusion clauses are only valid if they are reasonable, such as when they attempt to exclude or limit liability for a breach of the terms concerning quality or fitness for purpose[124] (implied by section 14 of the 1979 Act).[125] Thus, under the 1977 Act's limitation and exemption clauses, which attempt to minimise liability through reference to contractual terms, they are sometimes completely invalid, while others may only be valid if they are reasonable.

2.2.2.3. The Insolvency Act 1986:

The 1979 Act makes reference to the insolvency Act in its section 62(1), whereby it is stipulated that *"*the rule in bankruptcy relating to contracts of sale apply to those contracts

[120] The Sale of Goods Act 1979, s. 55(1).
[121] Much of the Unfair Contract Terms Act 1977 has moved to the Consumer Rights Act 2015 for consumers, which does not form part of this thesis and so it is the 2015 Act that is dealt with in this study.
[122] *Benjamin's Sale of Goods* (N 25), 226.
[123] The Unfair Contract Terms Act 1977, s. 6(1) provides that *"*Liability for breach of the obligations arising from section 12 of the Sale of Goods Act 1979 (seller's implied undertakings as to title, etc.) cannot be excluded or restricted by reference to any contract term*"*.
[124] Under the Sale of Goods Act 1979, s. 14 there are implied terms of quality for goods, thus providing protection for the Buyer. However, in the 1977 Act, this liability can be excluded, so long as it is reasonable and where the Contract for the Sale of Goods is in the course of business. Nevertheless, in consumer contracts, this is completely prohibited. Section 6(1A)(a) of the 1977 Act provides that the Seller's implied undertakings as to the conformity of goods and their quality or fitness for a particular purpose cannot be excluded or restricted, except insofar as the term satisfies the requirement of reasonableness.
[125] The Unfair Contract Terms Act 1977, s. 6(1A); Beale, Chitty on Contracts (N 84), 30.

notwithstanding anything in this Act*"*.[126] The 1979 Act has therefore given the unpaid Seller an action concerning goods,[127] for when a Buyer becomes insolvent;[128] for example, under section 39(1)(b), when the Buyer becomes insolvent and possession of the goods has not yet arrived with the Buyer, but is "still with the carrier", the Seller has the right to stoppage of the goods in transit.[129]

For the meaning of 'insolvency', reference should be made to section 61(4) of the 1979 Act, which states that this is incurred when a party has either ceased to pay his debts in the ordinary course of business, or cannot pay his debts as they become due.[130] Under this circumstance, the 1979 Act has given the Seller rights to the goods themselves, namely power over the goods and priority over the Buyer's general creditors.[131]

Under this circumstance, the 1979 Act must be read together with the Insolvency Act 1986, in the case where the Buyer becomes insolvent without paying the price of the goods. It should be noted that there are some Acts linked with the Contract for the Sale of Goods, such as the Torts (Interference with Goods) Act 1977[132] and Compensation Act 2006,[133] but this cannot be said of them all. Thus, in addition to the above, other Acts may be connected to the Contract for the Sale of Goods. Furthermore, there is a body of case law interpreting the Act, as presented below.

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[126] The Sale of Goods Act 1979, s. 62(1); it should be noted that the Bankruptcy Acts were abolished by the Insolvency Act 1986 and there is now only one ground for making a bankruptcy order (see *Atiyah and Adams' Sale of Goods* [N 35], 390).

[127] See section 5.3.1. The Rights of the Unpaid Seller, 140

[128] See section 5.3.1.4.1.1. Stoppage of the Goods in English Law, When the Buyer Becomes Insolvent, 152.

[129] See section 5.3.1.4.1. The Seller's Right to Stoppage of the Goods in Transit in English Law, 150.

[130] The Sale of Goods Act 1979, s. 61(4) provides that *"*A person is deemed to be insolvent within the meaning of this Act if he has either ceased to pay his debts in the ordinary course of business or he cannot pay his debts as they become due, whether he has committed an act of bankruptcy or not; and whether he has become a notour bankrupt or not".

[131] See section, The Unpaid Seller's Rights in English Law. However, under the sale of Goods Act 1979, if a Buyer becomes insolvent, this does not of itself terminate the Contract for the Sale of Goods; meaning that if a Buyer becomes insolvent, it does not necessarily lead to the Contract being terminated (see *Benjamin's Sale of Goods* [N 25], para 15-025).

[132] Here, under the Contract of Sale, if the property in the goods has not transferred to the Buyer, but he (the Buyer) has possession of them and the unpaid Seller seeks specific restitution for his goods from the Buyer, it will be necessary to rely upon section 3 of the Torts (Interference with Goods) Act 1977 (see Hibbert [N 76], para 11).

[133] The 2006 Act specifies certain factors that may be taken into account by a court determining a claim in breach of statutory duty, in order to make provision for damages.

2.2.3. Case Law:

The 1893 Act is a statement of principles derived from cases decided by the courts.[134] In turn, it is these cases that have helped to constitute the 1893 Act. As mentioned earlier, the 1979 Act is largely depicted as heavily influenced by the Sale of Goods Act 1893 and incorporates changes made to the latter.[135] Case law can help resolve ambiguity, where the provisions of an Act are ambiguous. Under English law, some case law interprets the Sale of Goods Act and with regard to the Act of 1893, the body of case law is considerable; much of which remains relevant to an interpretation of the Act of 1979. Additionally, there is still a certain amount of relevant case law that pre-dates the Sale of Goods Act 1893,[136] which can help to resolve ambiguity.[137] Under such circumstances, the English courts will refer to these cases, where disputes arise over Contracts for the Sale of Goods.

Finally, as the Contract for the Sale of Goods is part of Contract Law, general Common Law rules apply, provided that they are not inconsistent with the 1979 Act.

2.2.4. General Common Law Rules for the Law of Contract:

Generally speaking, whereas the 1979 Act cannot provide remedies for every possible breach, Common Law still offers the fundamental rules governing all aspects of the law on contracts, including the Contract for the Sale of Goods.[138] Despite the statute governing the Contract for the Sale of Goods, namely the 1979 Act,[139] not all the rules on Contracts have been codified.[140]

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[134] Law Commission (N 18), para 1.6.
[135] See section 2.2.1. Sale of Goods Act 1979, 18.
[136] There is naturally a body of case law interpreting the sale of Goods Act 1979 itself: see *Atiyah and Adams' Sale of Goods* (N 35), 3.
[137] For instance, according to Lord Herschell in the case of *Bank of England v Vagliano Bros*, if the provisions of the Act are ambiguous, the case may help to resolve this ambiguity. However, if the provisions of the Act are unambiguous, then it is necessary to expand these provisions in their natural and ordinary sense. Lord Herschell stated: "I think the proper course is in the first instance to examine the language of the statute and to ask what is its natural meaning." These observations were made with reference to the Bills of Exchange Act 1882, but they apply to all codifying statutes alike (see [1891] AC 107, 144-145).
[138] Sale review group, *Report on the Legislation Governing the Sale of Goods and Supply of Services* (The Stationery Office [n.d.], 9).
[139] See section 2.2.1. Sale of Goods Act 1979, 18; see also Beale, Chitty on Contracts (N 84), 4-7.
[140] *Benjamin's Sale of Goods* (N 25), 7-9.

Thus, the general rules of Common Law still provide the fundamental rules governing some applications of the Contract for the Sale of Goods. One example involves offer and acceptance in a Contract, although there is no notion of offer and acceptance in the 1979 Act.[141] This means that general Common Law rules already cover it,[142] since the 1979 Act leaves it to these rules.[143] Furthermore, the 1979 Act itself makes reference to Common Law rules in section 62(2).[144] In accordance with this section, the rules of Common Law apply to Contracts for the Sale of Goods, where they are not inconsistent with the 1979 Act.

To summarise, the 1979 Act codifies the special rules of law governing the Contract for the Sale of Goods in the UK. However, the 1979 Act has not codified all contractual rules and so the general rules of Common Law provide the fundamental principles governing some applications of the Contract for the Sale of Goods.

2.2.5. Fundamental Principles of Contract Law:

The 1979 Act is based on general principles of Contract Law[145] and so these still basically govern aspects of the law applying to contracts, including the Contract for the Sale of Goods.[146] However, two linked principles remain of fundamental importance: the principles of freedom of contract and the binding force of the contract,[147] which are discussed in the following sections.

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[141] *Atiyah and Adams' Sale of Goods (N 35)*, 36.
[142] See section 3.3. The Mechanics of Forming a Contract for the Sale of Goods, 72.
[143] *Atiyah and Adams' Sale of Goods (N 35)*, 5.
[144] The Sale of Goods Act 1979, s. 62(2) provides that *"*The rules of the common law, including the law merchant, except in so far as they are inconsistent with the provisions of, and in particular the rules relating to the law of principal and agent and the effect of fraud, misrepresentation, duress or coercion, mistake, or other invalidating cause, apply to contracts for the sale of goods".
[145] See section 2.2.1. Sale of Goods Act 1979, 18.
[146] Hibbert (N 76), 1.
[147] Beale, Chitty on Contracts (N 84), 20.

2.2.5.1. Freedom of Contract:

Freedom of contract is the backbone of Contract Law. It encompasses several principles, such as the freedom to enter into a contract; the freedom to choose with whom one contracts; the freedom to determine the terms of a contract, and most importantly, when to mention the freedom of contract.[148] Common Law recognises the principle of freedom of contract, whereby the contracting parties are free to decide on the terms of their contract. Nevertheless, this freedom is not absolute, but limited by law.

In section 55(1) of the 1979 Act, the principle of freedom of contract is affirmed, whereby it is provided that when a right, duty or liability arises under the Contract for the Sale of Goods by implication of law, it may be negated or deviated from by express agreement.[149] This is because the Seller and Buyer in a commercial contract may wish to agree over the provisions governing it. As a result, they have greater freedom to draft their own Contract.[150]

As a consequence, the parties to a Contract of Sale are free to choose the terms of their Contract, and can exclude or limit remedies provided by the 1979 Act, according to the express terms of their Contract. Nevertheless, this freedom is not absolute, but limited through exemption and limitation clauses, regulated under the Unfair Contract Terms Act 1977.[151] However, the latter provides that exemption clauses are totally ineffective in certain situations; especially when they attempt to exclude liability for a breach of obligations arising from section 12 of the 1979 Act.[152] The 1977 Act also provides that certain exclusion clauses are only valid

[148] Schwenzer (N 5), 64.

[149] The Sale of Goods Act 1979, s. 55(1) provides that *"*Where a right, duty or liability would arise under a contract of sale of goods by implication of law, it may (subject to the Unfair Contract Terms Act 1977) be negatived or varied by express agreement, or by the course of dealing between the parties, or by such usage as binds both parties to the contract". Thus, under section 55(1) of the above Act, freedom of contract is limited by the Unfair Contract Terms Act 1977.

[150] Law Commission (N 18), 3.

[151] See section 2.2.2.2. The Unfair Contract Terms Act 1977, 22.

[152] The Unfair Contract Terms Act 1977, s. 6(1) provides that *"*Liability for breach of the obligations arising from section 12 of the Sale of Goods Act 1979 (seller's implied undertakings as to title, etc.) cannot be excluded or restricted by reference to any contract term".

if they are reasonable, such as when they attempt to exclude or limit liability for breach of quality and fitness for purpose, implied by section 14 of the 1979 Act.[153] What is more, the Unfair Contract Terms Act 1977 gives the courts discretion in a wide range of other cases to deny the effectiveness of an unfair or unreasonable exemption clause.[154] Accordingly, the 1977 Act has intervened to guide parties in their contractual terms, in order to effectively achieve balance between them. This gives the courts discretion in some cases to deny the effectiveness of an exemption clause, if it is found to be unfair or unreasonable.

In reality, freedom of contract still exists within the law today, but with limitations.[155] For example, there are many examples of statutory interference in the freedom of contract, such as in the Unfair Contract Terms Act 1977, where there is significant restriction on the freedom of contract and the 1979 Act itself refers to the 1977 Act in section 55(1).[156]

2.2.5.2. The Principle of the Binding Force of the Contract:

The principle of the binding force of the contract means that the contract must be performed,[157] so long as it is lawful.[158] Moreover, the obligation derived from a contract has the force of an obligation derived from law.[159] The rule of the binding force of the contract is accepted in both Common and Civil Law regimes.[160] Indeed, English law has the expectation of the binding force of the contract; ensuring that the contracting parties fulfil their obligations under the contract that they have entered into.[161]

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[153] This is where the Contract of Sale of Goods is in the course of business. However, in consumer contracts, it is absolutely prohibited.
[154] Beale, Chitty on Contracts (N 84), 30.
[155] Schwenzer (N 5), 64-66.
[156] Under section 55(1) of the Sale of Goods Act 1979 Act, freedom of contract is limited by the Unfair Contract Terms Act 1977 (see *Benjamin's Sale of Goods* [N 25], 11).
[157] According to the general principle of *pacta sunt servanda,* the Contract must be kept, see Schwenzer (N 5), 561.
[158] This means that the Contract must be lawful or legally possible (thus, not contrary to Common Law, but legally executable); see Beale, Chitty on Contracts (N 84), 30.
[159] See section 4.2. The Nature of Obligation in the Contract of Sale.
[160] Rodrigo Momberg Uribe, *The Effect of a Change of Circumstances on the Binding Force of Contracts: Comparative Perspectives* (PhD thesis, University of Utrecht School of Law 2011), 6.
[161] Beale, Chitty on Contracts (N 84), 28.

The binding force of the contract is imposed on the contracting parties, so that they fulfil the obligations arising from a contract and which are exercised in good faith. As a consequence, the basis and limitations of the obligation of good faith in implementation are inherent within the binding force of the contract.[162] However, English law does not recognise a general principle of good faith in the Contract of Sale.[163] As a result, it is inappropriate to state that the rule of the binding force of the contract includes the principle of good faith under English law.[164] Furthermore, in general terms, the primary remedy for a Buyer before the English courts is damages, not specific performance,[165] which does not correspond to the rule of the binding force of the contract. This is because in English law, pragmatism reigns over principle.[166] Consequently, care must be taken in interpreting what is meant by the binding force of a contract in English law.[167] It should also be noted here that the recognition of this principle in English law does not mean that contracts will always be enforced. In some cases, they are not performed, such as when they are unlawful.[168]

Furthermore, important changes have been made to the binding force of contractual terms, as a result of modern legislative intervention, such as the Unfair Contract Terms Act 1977.[169] Moreover, under the binding force of the contract, the courts must consider several factors,

[162] Beale, Chitty on Contracts (N 84), 28.

[163] It should be noted that English Law does not recognise a general principle of good faith in the Contract of Sale between the contracting parties. Under the Sale of Goods Act 1979, there is no specific duty that can be attributed to the term 'good faith': the *"*English courts are in fact extremely reluctant to consider good faith as an appropriate doctrine in cases that raise questions of good faith between contracting parties. Their excuse is that the judge has no authority to determine the common intention of the contracting parties. Otherwise, he is only permitted to rely on what they have explicitly agreed. This, however, should not be understood as English Law recognising bad faith or encouraging the contracting parties to deal in bad faith, but is rather due to the fact that bad faith is dealt with thoroughly using other devices, like misrepresentation, duress, undue influence, etc. and there is no relationship with the notion of good faith as an overarching principle.*"* See Mohammed Al-Othman, Good Faith in Contract Law: with particular reference to commercial transactions in England, Scotland and selected common-law jurisdictions (Australia, South Africa and USA)' (University of Aberdeen School of Law 2005), 24; see also Beale, Chitty on Contracts (N 84), 28; section 4.4.2. The Position of English Law on Good Faith in the Performance of the Contract for the Sale of Goods, 124.

[164] Robert Bradgate, *Commercial Law* (3rd edn, Oxford University Press 2000), 26.

[165] Schwenzer (N 5), paras 565-566.

[166] P.S. Atiyah, *Pragmatism and Theory in English Law* (13th edn, Stevens & Sons 1987), 32 (see section 6.2.2.1. The Buyer's Right to Specific Performance in English Law, 215).

[167] In contrast, the Contract of Sale in Saudi law includes the principle of good faith and the primary remedy for the Buyer is specific performance.

[168] This means that the Contract must be lawful or legally possible (thus not contrary to Common Law, but legally executable); see also Beale, Chitty on Contracts (N 84), 30.

[169] See section 2.2.2.2. The Unfair Contract Terms Act 1977, 22; section 2.2.5.1. Freedom of Contract, 27.

including any undue hardship that may be inflicted on the Seller, impossibility, unfairness and frustration.[170]

2.3. Sources of the Contract for the Sale of Goods in Saudi Law:

In Saudi law, as mentioned earlier, the Contract of Sale of Goods is governed by Islamic Commercial Law, interpreted according to the *Hanbali* School,[171] corresponding to the entire Saudi legal system. Article 7 of the Basic Law of Governance provides for this.[172] In fact, for a clearer perspective of the relationship between Islamic and Saudi law, it is necessary to understand Article 7 of the Basic Law of Governance, whereby the Holy Qur'an and the *Sunnah* (Prophet's practice) is the sole source of the Saudi legal system.[173] This means that there are no Saudi laws deviating from the Holy Qur'an or *Sunnah*. To some extent, this differs from other Islamic countries, where Islamic law is the main, but not exclusive source of law, with some laws possibly deviating from it.[174]

According to Article 48 of the Basic Law of Governance, the Saudi courts apply provisions of Islamic law to cases brought before them in the administration of justice, *"*as indicated by the Qur'an and the Sunnah; together with any laws not in conflict with the Qur'an and the Sunnah, which the authorities may promulgate.*"*[175] The primary understanding is that the courts are bound in the first instance to apply both the Holy Qur'an and *Sunnah* in any cases

[170] English law has adopted the general approach of classifying 'frustration' according to Lord Ratcliffe's statement that *"*[it] occurs whenever the law recognizes that without default of either party a contractual obligation has become incapable of being performed because the circumstances in which performance is called for would render it a thing radically different from that which was undertaken by the contract*"*. See *Davis Contractors Ltd v Fareham Urban District Council* [1956] AC 696); see also Ndubuisi Nwafor, *Comparative and Critical Analysis of the Doctrine of Exemption/Frustration/Force Majeure under the United Nations Convention on the Contract for International Sale of Goods, English Law and UNIDROIT Principles* (PhD thesis, University of Stirling 2015), 18-19.

[171] Vogel (N 8), 10; Pohl (N 8), 118; Weeramantry (N 8), 54.

[172] The Basic Law of Saudi Governance, 'The Constitution' Act 1992, Art 7 provides that *"*Governance in the Kingdom of Saudi Arabia derives its authority from the Book of God Most High and the Sunnah of his Messenger (peace be upon him [PBUH]), both of which govern this Law and all the laws of the State".

[173] The laws and regulations in Saudi Arabia are composed of Royal Decrees, which address contemporary legal concerns, matters and practical affairs. These are considered as another significant source for the Saudi courts. In addition, Saudi Arabia also conforms to international conventions, insofar as these are recognised and accepted by the government and are in agreement with Islamic Law.

[174] The Saudi legal system still preserves the traditional model of an Islamic (*Sharia*) legal system; see Schwenzer (N 5), 27.

[175] The Basic Law of Saudi Governance, 'The Constitution' Act 1992, Art 48.

arising. However, in the second part of the above Article, there is the potential to apply other laws, apart from the Qur'an and *Sunnah,* provided that these applicable laws do not contradict them.

Consequently, the Contract of Sale of Goods in Saudi law is governed by four main sources, as explained earlier in this chapter: Islamic law; a number of laws linked with the Contract for the Sale of Goods; Saudi case law, already decided by the courts, and the principles of Islamic Contract Law. For a clear understanding of these sources, this section will be broken down into four distinct areas: the first will indicate the sources of Islamic law, initially covering the necessary information on the division of sources of Islamic law. These are further divided into two main types, primary and secondary sources. Thus, any attempt to address this subject without this prior information could lead to ambiguity. Secondly, a number of laws are discussed here, which are linked with the Contract for the Sale of Goods, for example, Commercial Insolvency in Saudi law. Thirdly, case law decided by the courts in the Saudi judiciary will be closely examined. Finally, the following sections will be concluded by an exploration of a number of principles of Islamic Contract Law.

2.3.1. Sources of Islamic Law:

The sources of Islamic law are generally classified into primary sources (the Holy *Qur'an* and *Sunnah*) and secondary sources (*Ijma,* 'unanimity' and *Qiyas,* 'analogy'). These are recognised and accepted by all schools of Islamic law, including the *Hanbali* School. In order to provide a basic foundation for these sources, the Holy Qur'an and *Sunnah* will be examined, before moving on to secondary sources, namely unanimity and analogy.

2.3.1.1. Primary Sources:

2.3.1.1.1. The Holy Qur'an:

The Holy Qur'an is held by Muslims to be God's sacred book. It includes the divine heavenly revelations received by the Prophet Muhammad (peace be upon him), Messenger of Allah. In addition, it is the basis and highest authority of Islamic law. Therefore, all other sources need to be consistent with it in Islamic jurisdictions.[176] However, it should be noted that the verses of the Holy Qur'an are very brief and general. Therefore, it could be said that it does not provide directly applicable legal rules. For instance, the principle contained in a single sentence may be the foundation for a whole Act.[177] To be more specific, Zweigert and Kötz observe that *"*only a few of the statements in the *Koran* constitute rules of law capable of direct application. It consists mainly of precepts of proper ethical behaviour too generally phrased to have the precision and point of legal rules.*"*[178]

2.3.1.1.1.1. How the Holy Qur'an Explains the Legality of a Contract for the Sale of Goods:

In effect, there are some Qur'anic verses in Commercial Law, as over 70 verses of the Holy Qur'an deal with legal topics relating to obligations and contracts.[179] For example, in *Sūrat al-māidah* 5:1, the Holy Qur'an prescribes what a Muslim must fulfil in a contract: *"*O you who have believed, fulfil [all] contracts.*"*[180] This means that a Muslim must fulfil any kind of contract, regardless of its nature. Nevertheless, the Holy Qur'an does not prescribe any legal

[176] Abdal-Haqq, Irshad, 'Islamic Law - An Overview of Its Origin and Elements' (1996) 11(1) Journal of Islamic Law and Culture, 39.
[177] Weeramantry (N 8), 32.
[178] Zweigert (N 51), 305.
[179] Javaid Rehman and Aibek Ahmedov, 'Sources of Islamic Law: Teaching Manual' (2011), 19 <http://www.academia.edu/5927219/Sources_of_Islamic_Law_Teaching_Manual_Contents.> accessed 17 February 2017.
[180] The Holy Qur'an {*sūrat l-māidah* 5:1} { يَا أَيُّهَا الَّذِينَ آمَنُوا أَوْفُوا بِالْعُقُودِ }

consequences for failing to observe this commandment.

In short, the Holy Qur'an does not specifically mention many legal matters, but instead outlines and explains the goals and aspirations expected of Muslims. For example, in *Surah Al-Baqarah* 2:275, the Holy Qur'an specifies what is permitted and what is forbidden: *"*Whereas Allah has permitted trading and forbidden *Riba* (Usury)."[181] Furthermore, in *Surah Al-Muṭaffifīn* (The Defrauding), the Holy Qur'an emphasises the need for honesty in weights and measures: *"*Woe to those who give less [than due], who, when they take a measure from people, take in full. But if they give by measure or by weight to them, they cause loss.*"*[182] Here again, however, this verse does not prescribe any legal consequences for failing to observe this commandment. Zweigert and Kötz note that *"*the *Koran* prescribes that a Muslim must act in good faith and that he must abstain from usury and gambling, but it does not specify what legal consequences, if any, attach to a disregard of these commandments.*"*[183]

To summarise, as mentioned earlier, the Holy Qur'an does not constitute a rule of law capable of direct application. Thus, the rules governing the Contract for the Sale of Goods in Saudi law may be found under Islamic jurisprudence. The latter refers to the body of Islamic law extracted from detailed Islamic sources, including the Holy Qur'an; *Sunnah*; unanimity, and analogy.[184]

2.3.1.1.2. The Sunnah:

The *Sunnah* is considered as the second primary source of Islamic law. It records most of the sayings and utterances, deeds (as in actions and daily practices) of the Prophet Muhammad in response to his followers' acts and practices.[185] In the event that the Holy Qur'an does not

[181] The Holy Qur'an, {*Surah Al-Baqarah* 2:275} {وَأَحَلَّ اللَّهُ الْبَيْعَ وَحَرَّمَ الرِّبَا}
[182] Ibid, {Surah *Al-Muṭaffifīn* 83:1-3} (3) وَإِذَا كَالُوهُمْ أَوْ وَزَنُوهُمْ يُخْسِرُونَ (2) الَّذِينَ إِذَا اكْتَالُوا عَلَى النَّاسِ يَسْتَوْفُونَ (1) (وَيْلٌ لِلْمُطَفِّفِينَ)
[183] Zweigert (N 51), 305.
[184] Mohammad Kamali, *Principles of Islamic Jurisprudence* (3rd edn, The Islamic Texts Society 2002), 12.
[185] Mohammad Maulana, *Encyclopaedia of Quranic Studies* (Anmol Publications Pvt Ltd. 2006), 136.

provide for a matter,[186] or if there is any ambiguity revealed within it, then guidance must be sought in an external source - in this case, the *Sunnah*. Thus, the *Sunnah* encompasses interpretations of the Holy Qur'an.[187] The Holy Qur'an itself references the *Sunnah*, according to *Surat Al-hashr*: *"*And whatever the Messenger has given you - take; and what he has forbidden you - refrain from.*"*[188]

Furthermore, the Prophet Muhammad (peace be upon him [PBUH]) appointed *Muadh Ibn Jabal* as a judge and asked him, "What will you judge?", to which *Muadh* replied that he would judge according to the Holy Qur'an. The Prophet asked him how he would judge a matter, if he found nothing on it in the Holy Qur'an and *Muadh* replied that he would refer to the *Sunnah.* The Prophet then asked him, "What if you find nought therein?" and *Muadh* replied that he would endeavour to form his own judgment. The Prophet's response to this was: *"*Praise be to Allah who has guided the messenger of His Prophet to that which pleases His Prophet.*"*[189]

Consequently, if the Holy Qur'an does not provide for a matter, or if it is ambiguous on a certain point, then the *Sunnah* is considered as the second source of Islamic law. However, if the primary sources of Islamic law, namely the Holy Qur'an and *Sunnah*, fail to provide remedies for a breach of the Contract for the Sale of Goods, then the court will move on to the secondary sources, namely unanimity and analogy.

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[186] As mentioned earlier, the Holy Qur'an does not constitute rules of law capable of direct application (see section 2.3.1.1.1. The Holy Qur'an).

[187] Mahmud Abu Rayyah, *The Sunnah of Prophet Muhammad in Islam* (Create Space Independent Publishing Platform. 2017), 3.

[188] The Holy Quran {*Surah al-Hashr*, 59:7} {وَمَا آتَاكُمُ الرَّسُولُ فَخُذُوهُ وَمَا نَهَاكُمْ عَنْهُ فَانْتَهُوا}

[189] Muhsin Kahn, *Translation of Sahih Bukhari: Sale And Trade* (Center for Muslim-Jewish Engagement N/A), *Hadith* No. 3585.

2.3.1.2 Secondary Sources:

2.3.1.2.1. Unanimity 'Ijma':

Unanimity is recognised as a secondary source of Islamic law. It refers to unanimity among Islamic scholars of a particular age, in relation to the applicable legal rule for the matter at issue. The authority of unanimity is based upon distrust of individual opinion.[190] However, contradictory interpretations exist in relation to the meaning of the word, *Ijma*.[191]

The *Sunnah* refers to unanimity in the *Hadith,* where the Prophet Muhammad (peace be upon him) states: *"*My nation will not agree unanimously in error.*"*[192] This means that a consensus reached by Muslim scholars will not be erroneous. However, what does this mean in the present context?[193] In fact, there is no consensus amongst Muslim scholars over the definition of *Ijma*; some define it as the consensus of the entire Muslim *Ummah,*[194] but in reality, it is impossible to achieve unanimity amongst all Muslim scholars.

Furthermore, there are many academies of Islamic jurisprudence all over the world, such as the International Islamic *Fiqh* Academy in Jeddah, Saudi Arabia; the *Fiqh* Council of North America, and the Islamic *Fiqh* Academy in India. It is consequently impossible to imagine unanimity being achieved amongst them all. Under these circumstances, it could be said that unanimity is impossible to achieve on a matter nowadays. However, this does not mean that unanimity has been revoked.

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[190] Weeramantry (N 8), 39

[191] "There is no consensus about the definition of *ijma*. Some define it as the consensus of the Companions of the Prophet. Others define it as the consensus of the scholars. Still, others define it as the consensus of the entire Muslim *Ummah.*" See Mohammad Farooq, *The Doctrine of Ijma: Is there a consensus?* (Upper Iowa University 2006), 7.

[192] Kahn (N 189), *Hadith* No. 2167.

[193] As a detailed exposition of the meaning of *Ijma* is not the focus of this thesis, it will not be discussed here.

[194] Farooq (N 191), 7.

2.3.1.2.2. Analogy 'Qiyas':

An analogy is considered as an additional secondary source of Islamic law, along with unanimity. It includes various arrangements of analytical interpretation, namely methods of deducing laws on matters that are not explicitly covered by the Holy Qur'an or *Sunnah*,[195] which sometimes fail to provide a rule for solving a problem.[196] Moreover, as mentioned above, Islamic jurists do not always reach unanimity on such rules. Judges will then derive an appropriate rule through logical inference, thus resorting to *Qiyas,* or analogy. Consequently, since the Holy Qur'an and *Sunnah* cannot always be used as a source for establishing adaptation to new situations, the best and most practical means of doing so is analogy.[197]

There is some similarity between analogy and the principle of case law in English law. This is where the English courts seek to extract the general principle underlying a decision from the particular facts of a case and apply it to an analogous case that arises later.[198] Similarly, the Saudi courts will seek to extract the principle underlying a decision from primary sources of Islamic law. If these are found to be parallel, then they are applied to new cases.

Secondary sources of Islamic law include unanimity and analogy in Islamic jurisprudence (*Fiqh*). The latter results from scholarly views and judgments accumulated throughout history.[199] Nevertheless, the primary sources of Islamic law, namely the Holy Qur'an and the *Sunnah,* remain the bedrock of Islamic jurisprudence, representing the origin of Islamic Commercial Law and the foundation of the Contract for the Sale of Goods. However, these primary sources are not necessarily adaptable to new situations, as indicated earlier. This is

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[195] John L. Esposito, 'Qiyas', *The Oxford Dictionary of Islam* (Oxford University Press 2004) http://www.oxfordislamicstudies.com/article/opr/t125/e1936. accessed 17 February 2017.

[196] The Holy Qur'an itself is not a compendium of laws and codes; only a very small section of the Holy Qur'an may be actually related to establishing guidance on what is or is not allowed. Thus, the Holy Qur'an cannot be used as a source for establishing an adaptation to new situations (see section 2.3.1.1.1. The Holy Qur'an).

[197] M. Kabir Hassan and Mervyn K. Lewis, *Handbook of Islamic Banking* (Edward Elgar 2009), 404.

[198] Weeramantry (N 8), 41.

[199] Imran A.K. Niyazee, *Islamic Jurisprudence* (Adam Publishers & Distributors 2004), 21.

where the court will need to draw upon secondary sources of Islamic law, especially by analogy. It is consequently the method applied when seeking new remedies for a breach of the Contract for the Sale of Goods in contemporary life, while at the same time adhering to Islamic rules.

Nevertheless, it cannot be denied that there are many laws in Saudi Arabia, which link with Commercial Law, such as the Commercial Court Act and the Commercial Insolvency Act, as described below.

2.3.2. Related Laws:

2.3.2.1. The Commercial Court Act:

In accordance with the Commercial Court Act, the Seller and Buyer must perform their commercial activities honestly and in good faith. This means that they must not engage in any form of deception; deceit, or other behaviour in breach of the principles of honesty and good faith.[200] This is just one Article found to have an effect on Contracts for the Sale of Goods under the above-mentioned Act. However, it is too general and does not constitute a rule of law capable of direct application, when a Contract for the Sale of Goods is breached. Moreover, a principle of this nature, contained in a single sentence, could serve as the foundation for an entire Act to ensure that commercial activities are practiced honestly and in good faith.

After this Article, the Act moves on to the topic of bankruptcy, re-enacted by the Commercial Insolvency Act.[201] It is followed by Maritime Trade and Commercial Boat Rights. The final Chapter of the Act provides for the formation of the Commercial Court and its competence. However, none of this has any effect on Contracts for the Sale of Goods.

[200] The Saudi Commercial Court Act 1932, Art 5 provides that *"*A merchant must practice the commercial activities honestly and in good faith, therefore, he must not be engaged in any form of fraud, deceit, deception, injustice, betrayal, violation, or any other behavior breaching the principles of honesty and good faith. In case of committing any of the stated actions, the merchant shall be subject to the deterrent penalty set forth in this Law" (see section 4.4.3. The Position of Saudi Law on Good Faith in the Performance of the Contract for the Sale of Goods, 131).

[201] The Saudi Commercial Insolvency Act 2018.

Therefore, it is irrelevant to explore this Act any further here.

2.3.2.2. Commercial Insolvency: The 'Bankruptcy Act':

In Saudi law, the term 'bankrupt' tends to be used as a synonym for 'insolvent'. In certain other legal systems, bankruptcy is applied to a legal process involving individuals, as opposed to companies, but bankruptcy refers to both in Saudi law.[202]

Saudi law gives the unpaid Seller an action over the goods,[203] if the Buyer becomes insolvent. For example, the Seller has the right to stop the goods in transit.[204] Therefore, it is essential to know when a party to a Contract for the Sale of Goods becomes insolvent. However, the Commercial Insolvency Act makes a distinction between actual insolvency and difficulty in paying debts. For instance, the latter may be a case of non-payment of debts, without actually becoming insolvent.[205] However, an insolvent party will be unable to defray debts that have matured and will be declared insolvent by the courts.[206] This means that no one is called 'insolvent', until the competent court decides as such.[207]

Under the above-mentioned Act, before a decision is made by the court, a trader under threat of insolvency is given the opportunity to reach a compromise with his creditors, before direct recourse to the decision of the court. This system is called a 'settlement that prevents bankruptcy'.[208] Accordingly, the parties may agree to write off certain debts, or postpone their settlement to a future date. If not, then the competent court will decide whether or not said party is insolvent.

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[202] Such as in Canada, where the term 'bankruptcy' refers to an individual's legal process, as opposed to that of a company, while the term 'debts' is used for both individuals and companies; see Rafael Efrat, 'Global Trends in Personal Bankruptcy' (2002) 76 American Bankruptcy Law Journal, 82.
[203] See section 5.3.1.2. The Unpaid Seller in Saudi Law, 142.
[204] See section 5.3.1.4.2. Stoppage of the Goods in Transit under Saudi Law, 154.
[205] Chapter Three of the Act discusses the settlement that prevents bankruptcy.
[206] Chapter Five of the Act discusses insolvency.
[207] The Saudi Commercial Insolvency Act 2018, Art 140.
[208] Chapter Three of the Act discusses the settlement that prevents bankruptcy.

Under the Insolvency Act, a party to a Contract for the Sale of Goods becomes insolvent when the total financial responsibilities (debts) of that party amount to more than his total rights (assets). In such a situation, the trader will be found incapable of paying his debts, as the debts exceed the debtor's available funds.[209]

In the case where the court decides that one of the parties to a Contract is insolvent, there will be several legal effects. Firstly, the dates of all immature debts shall be dropped, where these are found to be due to insolvency. For such an effect, the date of the court's judgement shall be taken into account.[210] Secondly, the trader will be prohibited from making any disposals during the latter stages of the court's decision; according to Article 126 of the Act, *"*where the court declares his bankruptcy… His physical and verbal actions shall not be effective as from the date of declaring bankruptcy.*"*[211] Therefore, any disposals made in this regard shall be considered ineffectual in relation to the creditors concerned. Thirdly, the court shall call for a liquidation committee to dissolve the respective company. In light of this, the liquidator shall make a list of all remaining assets (inventory) during the initial stages, before stepping in to sell them off at public auction. This is all aimed at paying off the debts of the insolvent trader.[212]

2.3.3. Case Law in the Saudi Judiciary:

Under Saudi law, in the case where the sources of Islamic law and any other applicable laws do not provide for a matter, the court will turn to cases that have already been decided. Therefore, under the Law of the Judiciary, Article 13 submits that a general panel should be constituted in the Supreme Court and assigned to issue decisions on matters referred to the judiciary.[213]

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[209] The Saudi Commercial Insolvency Act 2018, Art 1.
[210] Ibid, Art 131.
[211] Ibid, Art 126.
[212] Ibid, Art 141.
[213] Under the Law of Saudi Judiciary Act 2007, Art 13 provides that *"*(1) The Supreme Court shall have a general panel headed by the Chief Judge of the Court, with all its judges as members. (2) The General Panel of the Supreme Court shall undertake the following: (a) Determining general principles in issues relating to the judiciary. (b) Reviewing matters assigned to it by this Law or other laws. (3) The meeting of the General Panel shall not be valid unless attended by at least two thirds of its members, including the Chief Judge or whoever acts on his behalf. (4) The decisions of the General Panel

Furthermore, Article 14 explains the mechanism for waiving previous decisions of the courts.[214]

Under these Articles, the judge in a Saudi court will turn to cases decided by the Supreme Court and Court of Appeal, if sources of Islamic law and other applicable laws fail to provide for a matter. This is because there may still be difficulties in obtaining an authoritative legal opinion, given the diverse interpretations arising from variations in opinion and philosophy amongst scholars of the *Hanbali* School of Islamic law.[215] As a result, the courts must turn to cases that have already been decided by the Supreme Court.[216] A wide range of decided cases will be drawn upon here from Saudi Commercial Courts. They are therefore the subject of original analysis in this thesis.

2.3.4. The Principles of the Contract in Saudi Law:

In Saudi law, the principles of the Contract for the Sale of Goods come from Islamic Commercial Law. Therefore, for a better understanding of these principles, it is first necessary to explain the concept of Islamic Commercial Law and its effect on the Contract of Sale, before examining the principles of the Contract of Sale of Goods in Saudi law.

2.3.4.1. Islamic Commercial Law and Its Effect on the Contract of Sale:

Islamic Commercial Law has its own characteristics, which differ from those of modern Commercial Law in other regimes.[217] First, Islamic Commercial Law is mainly based on principles of Islamic law, according to the Holy Qur'an and *Sunnah*. Consequently, Islamic

shall be taken by majority vote of members present. In case of a tie, the Chief Judge shall have the casting vote, and its decisions shall be final*"*.

[214] The Law of Saudi Judiciary Act 2007, Art 14 provides that *"*If a Supreme Court Panel decides – in connection with a case before it – not to follow a precedent adopted by it or by another panel in the same court, or if a court of appeals panel decides not to follow a precedent established by a Supreme Court Panel, the matter shall be put before the Chief Judge of the Supreme Court to refer it to the General Panel of the Supreme Court to decide it".

[215] Ansary (N 41).

[216] Nevertheless, it should be noted that discrepancy in judicial judgment is a common feature of the Saudi judicial system, since judgments rendered for the same case may vary from one judge to another. For example, judges have not always rendered a judgment of compensation for lawyers' fees in a Contract of Sale (see Case Nos. 258/T/3 (N 1018), Case No. 564/S/7, 191and Case No. 218/S/3, 191, compared with Case Nos. 228/S/3, 191 and Case No. 392/S/3, Judicial Blogs, Contract of Sale, Vol. 3 (A. H. 1431 "2010"), where the Courts decided otherwise).

[217] Brian Kettell, *Introduction to Islamic Banking and Finance* (1st edn, John Wiley 2011), 39-48.

Commercial Law guarantees the individual freedom to invest. Nevertheless, this economic freedom is not absolute, since Islamic law also imposes limitations, such as the prohibition of *Riba* (usury).[218]

For a better understanding of Islamic Commercial Law and the way in which it is formulated in Islamic countries, it is necessary to understand that for a Muslim, nothing is permitted that God has forbidden, while nothing is denied that has been permitted, as set out in the Holy Qur'an: *"*Have you seen what Allah has sent down to you of provision of which you have made [some] lawful and [some] unlawful? Has Allah permitted you [to do so], or do you invent [something] about Allah?*"*[219] Under these conditions and using the example of *Riba* in terms of the Contract of Sale, Saudi law makes no provision, because usury is forbidden in Islamic law.[220] Therefore, the Saudi courts have no jurisdiction where *Riba* is concerned.[221] Furthermore, under Islamic Commercial Law, the notion of obligation derives its power and legitimacy from certain values set out in Islamic law, such as the 'principle of the contract's obliging force'.[222]

There are in fact 12 main ethical rules in an Islamic Sales Contract, which play a major role in ensuring that the idea of obligation comes from within one's own self.[223] To elaborate further on the above, the Prophet Muhammad (peace be upon him) states that the 'truthful' are to be rewarded on the Day of Resurrection, together with the prophets, faithful ones, martyrs

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[218] The Contract of Sale must be not for usury (*Riba*), otherwise it will be void. An example of this is where the goods in a Contract of Sale constitute gold and the time of delivery and payment of the price are not concurrent conditions, whereby the Contract will enter into usury (see section 4.3.4.2.2.2. 'Time of Payment' in Saudi Law, 116; see also Case Nos. 361/S/3 , 275/S/3 and 695/S/3, 117.

[219] The Holy Quran at {*Surat Yūnus} (Jonah)* 10:59 (قُلْ أَرَأَيْتُم مَّا أَنزَلَ اللَّهُ لَكُم مِّن رِّزْقٍ فَجَعَلْتُم مِّنْهُ حَرَامًا وَحَلَالاً قُلْ آللَّهُ أَذِنَ لَكُمْ أَمْ عَلَى اللَّهِ تَفْتَرُونَ 59)

[220] As it is written in the Holy Qur'an {*Surah Al-Baqarah* 2:275}(وَأَحَلَّ اللَّهُ الْبَيْعَ وَحَرَّمَ الرِّبَا), "Whereas Allah has permitted trading and forbidden *Riba* (Usury)".

[221] See section 5.3.6.2.2.1. The Position of Saudi Law on Charging Interest on Overdue Sums, 192.

[222] See section 2.3.4.3. The Principle of the Contract's Obliging Force: "Binding Force of the Contract", 43; see also Nicholas Foster, *Islamic Commercial Law (I): An Overview of Some Principles and Rules* (School of Law and School of Oriental and African Studies, University of London 2007), 5.

[223] Kettell (N 217), 39-48.

and pious.[224] At the same time, the Prophet (peace be upon him) also warns against the dishonest trader, who is despised by both believers and God - attested to in the Holy Qur'an as follows: *"*O you who believe! Eat not up your property among yourselves unjustly except it be a trade amongst you, by mutual consent.*"*[225] The Prophet (peace be upon him) also made the point, *"*Surely, whoever deceives in business transactions, is not (or does not behave like) one of us*"*.[226]

Consequently, the parties to a Contract of Sale under Islamic Commercial Law need to be trustworthy and uphold principles of integrity and good faith.[227] In other words, Islamic law compels dealers to operate under conditions of trust, sincerity, good faith and honesty, even if a party detects a legal loophole that could release him from liability. These are just some, but not all of the rules of Islamic Commercial Law that are linked with the Contract of Sale. The following section therefore elaborates further on the principles of the Contract for the Sale of Goods in Saudi law.

2.3.4.2. Freedom of Contract:

The general principle governing contracts in Saudi law is the principle of freedom of contract.[228] It refers to the freedom to choose the terms of a Contract for the Sale of Goods. The basic origin of this principle of freedom of contract may be traced back to declarations of the Prophet Muhammad (peace be upon him), such as *"*Muslims are bound by their stipulations except for a stipulation which makes the unlawful lawful*"*.[229] The above *Hadith* provides contracting parties with the capacity to make any stipulations that they wish to in a Contract,

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[224] Kahn (N 189), *Hadith* No. 1209.
[225] The Holy Quran *Surah An-Nisa* 4:29.(يَا أَيُّهَا الَّذِينَ آمَنُواْ لاَ تَأْكُلُواْ أَمْوَالَكُمْ بَيْنَكُمْ بِالْبَاطِلِ إِلاَّ أَن تَكُونَ تِجَارَةً عَن تَرَاضٍ مِّنكُمْ).
[226] Kahn (N 189), *Hadith* No. 326.
[227] See section 4.4.3. The Position of Saudi Law on Good Faith in the Performance of the Contract for the Sale of Goods, 131.
[228] Noor Mohammed, 'Principles of Islamic Contract Law*'* (1988) 6 Journal of Law and Religion, 115-130; see also Larry A. DiMatteo, *International Sales Law; A Global Challenge* (1st edn, New York Cambridge University Press 2014), 507.
[229] Kahn (N 189), *Hadith* No. 1419.

except where these stipulations are for rendering the unlawful, lawful. An example of this would be charging interest on an overdue sum, as it is prohibited under Islamic law.[230]

Consequently, freedom of contract in Islamic and therefore Saudi law is not absolute, but rather specific, with limitations being imposed by *Shari'ah.* As mentioned earlier, one of these limitations consists of the prohibition of *Riba* on a Contract of Sale. The Holy Qur'an qualifies this further: *"*…Allah has permitted trading and forbidden *Riba (Usury).*"[231] and in *Sūrat Aal-Imran, "*O you who have believed, do not consume usury*".*[232] The Prophet Muhammad (peace be upon him) also warns: *"*Avoid the seven great destructive sins – among which - to consume *Riba."*[233] In light of the texts cited above, it is unlawful for the parties to a Contract of Sale to charge interest on overdue sums under Saudi law, as in Case No. 506/T/3.[234] Consequently, although the parties to a Contract of Sale are free to choose their own contractual terms, this freedom is not absolute, but limited by Islamic law.

2.3.4.3. The Principle of the Contract's Obliging Force: The 'Binding Force of the Contract':

It has already been stated that[235] the binding force of the contract is accepted in both Common and Civil Law.[236] Therefore, Saudi law recognises this binding force.[237] For instance, the Holy

[230] Mohammed Al-Tusi, *'A Concise Description of Islamic Law and Legal Opinions'* (Published by ICAS Press 2008), 288.
[231] The Holy Quran {*Surah Al-Baqarah* 2:275}(وَأَحَلَّ اللَّهُ الْبَيْعَ وَحَرَّمَ الرِّبَا).
[232] Ibid, {sūrat Aal-Imran 3:130}{يا أيها الذين آمنوا لا تأكلوا الربا أضعافا مضاعفة}
[233] Kahn (N 189), *Hadith* No. 131.
[234] Judicial Blogs, Contract of Sale, Vol. 2 (A. H. 1427 "2006") 2460. In this case, the parties agreed that each would pay additional fees, if they delayed fulfilling their obligations. However, this condition constitutes usury (*Riba*), or statutory interest, which is prohibited under Islamic Commercial Law. Also in Case No. 211/S/3, the Saudi Court decided that the Buyer should pay the price of the goods, without any additional charges being levied as compensation for late payment. In this case, the Buyer paid part of the price of the goods, valid at the time the Contract was formed. The Contract included a compensation clause for delayed payment, namely 10% of the price. The Buyer refused to pay the full price of the goods under this circumstance, while the Seller claimed for the price of the goods with compensation clauses for delayed payment. However, the Court decided to oblige the Buyer to pay only the price of the goods, without the compensation for delayed payment. See Judicial Blogs, Contract of Sale, Vol. 3 (A. H. 1431 "2010"), 1465; see also section 5.3.6.2.2.1. The Position of Saudi Law on Charging Interest on Overdue Sums, 192.
[235] See section 2.2.5.2. The Principle of the Binding Force of the Contract, 28.
[236] Uribe (N 160), 6.
[237] Foster (N 222), 5.

Qur'an prescribes that the parties to a contract must fulfil their obligations under it;[238] in *Sūrat I-māidah*, it is prescribed: *"*O you who have believed, fulfil [all] contracts.*"*[239] This is supported by numerous *Hadith* of the Prophet Muhammad (peace be upon him), with the result that it is a requirement for contractual obligations to be fulfilled. However, the obliging force of the contract will only stipulate that the contracting parties fulfil all their contractual obligations, if the criteria for the contract's legitimacy are properly met.[240] In short, the Seller and Buyer are not permitted to evade their obligations in a Contract of Sale, but the Holy Qur'an and *Sunnah* refer to nothing more than ways of confirming that contractual obligations should be fulfilled.

As mentioned earlier, the rule of the binding force of the contract is imposed on the contracting parties, so that they fulfil their contractual obligations and implement the contract in good faith.[241] As a result, the Contract for the Sale of Goods in Saudi law includes the principle of good faith, while the primary remedy for the Buyer is specific performance; corresponding to the rule of the binding force of the contract. Consequently, the Contract of Sale in Saudi law gives the right to each party to make demands of the other and give effect to performance of the Contract. By adopting this approach, where the Seller breaches obligations arising from a Contract of Sale, the Saudi courts may oblige him to perform it. Finally, in the same way as in English law, recognition of the principle of the binding force of the contract in Saudi law does not mean that contracts are always enforced; however, it remains the criterion for ensuring the legitimacy of a contract. The most common example here is the case of a contract itself being unlawful. Moreover, several factors must be considered, such as the principle of no harm or harassment: "undue hardship that may be inflicted on the seller,"[242]

[238] The Holy Qur'an *Sūrat l-māidah* 5:1, which prescribes: "O you who have believed, fulfil [all] contracts".
[239] Ibid {*sūrat l-māidah* 5:1} { يَا أَيُّهَا الَّذِينَ آمَنُوا أَوْفُوا بِالْعُقُودِ }
[240] See section 2.3.4.2. Freedom of the Contract, 42.
[241] See section 2.2.5.2. The Principle of the Binding Force of the Contract, 28.
[242] See below, section 2.3.4.4. The Principle of No Harm or Harassment (*al Darar wa-la Dirar*). 45.

impossibility and frustration.

2.3.4.4. The Principle of No Harm or Harassment (al Darar wa-la Dirar)*:*

The Contract for the Sale of Goods in Saudi law recognises the 'principle of no harm or harassment' (*al Darar wa-la Dirar*). The basic origin of this may be traced back to declarations made by the Prophet Muhammad (peace be upon him), namely: *"*There should be neither harming (*darar*) nor reciprocating harm (*dirar*).*"*[243] Under this *Hadith*, harm must be avoided, but not by means of other types of harm to the other party.[244] As an example, under the Contract for the Sale of Goods in Saudi law, the Seller has the right to cure defective performance. Nevertheless, this right is subject to several limitations. The principle of *al Darar wa-la Dirar* assures of the Seller's right to cure defective performance, while also ensuring the Buyer's right to terminate the Contract. However, the court must balance the parties' interests according to *al Darar wa-la Dirar*.[245] In adopting this approach, if the Seller insists on curing defective performance, resulting in a loss for the Buyer that exceeds the loss suffered by the Seller in terminating the Contract, it may be deemed unreasonable to grant the Seller the right to cure defective performance.

2.3.4.5. The Principle of Exceptio non Adimpleti Contractus*:*

The principle of *exceptio non adimpleti contractus* is one of the general principles governing obligations in reciprocal contracts. It is based on the correlation of obligations, as in a Contract for the Sale of Goods. This principle is a right that allows a party to withhold performance, until the other party fulfils theirs, but without ignoring the contract.[246]

In Saudi law, the principle of *exceptio non adimpleti contractus* rests on two obligations;

[243] Kahn (N 189), *Hadith* No. 2341.
[244] Chibli Mallat, *Introduction to Middle Eastern Law* (1st edn, Oxford University Press 2007), 288.
[245] See section 5.3.4.2. The Seller's Right to Cure Defective Performance in Saudi Law, 176.
[246] Al-Sanhūrī (N 48), 825-838.

each a consequence of and associated with the other.[247] For example, under the Contract of Sale, both the Seller and Buyer have the right to *exceptio non adimpleti contractus* regarding their obligations, until the other party fulfils his.[248] Accordingly, the Buyer may stop the payment when the Seller becomes insolvent, until he (the Buyer) has possession of the goods or has been given security for them,[249] or the Seller may retain the goods until the Buyer pays the price for them.[250] However, the right to *exceptio non adimpleti contractus* is general; by adopting this approach, the right to such a measure can even be exercised in situations where the right to lien is not available, i.e. in the handing over of documents. [251]

It should be noted that in Common Law countries, such as the UK, the principle of *exceptio non adimpleti contractus* is not a Common Law doctrine and is not explicitly referred to in case law.[252] Moreover, there is no precise equivalent in English legal remedies. However, a similar approach is provided for in English law, under section 39(2) of the 1979 Act,[253] where

[247] Mohammed Al-Talab, *The Exceptio Non Adimpleti Contractus: A Comparative Study* (1st edn, Sunrise House 2002), 50.

[248] It should be noted that modern legislation in a number of Arabic and Islamic countries contains the principle of *exceptio non adimpleti contractus,* applied to all contracts and especially to the Contract of Sale, e.g. Art 161 of the Egyptian Civil Code; Art 162 of the Syrian Civil Code; Art 280 of the Iraqi Civil Code, and Art 163 of the Libyan Civil Code. However, this principle is not only sustained in Islamic countries, but also in many countries with Civil Law systems, such as in the German Civil Code (BGB), Arts 320 and 321; the French Civil Code, Art 1612, and the Italian Civil Code, Arts 1460 and 1461. The German Civil Code, Art 320 provides that "A person who is a party to a reciprocal contract may refuse his part of the performance until the other party renders consideration, unless he is obliged to perform in advance". Moreover, Art 321 ('Deterioration of property') states: "if a person is obliged by a mutual contract to perform his part first, he may, if after the conclusion of the contract a significant deterioration in the financial position of the other party occurs whereby the claim for the counter-performance is endangered, refuse to perform his part until the counter-performance is made or security is given for it." Meanwhile, the French Civil Code, Art 1612 provides that "The seller is not obliged to deliver the thing where the buyer does not pay the price of it unless the seller has granted him time for the payment". See also, French Civil Code, Art 1653, which reads: "If the buyer is threatened or has good cause to fear the threat of an action, either to enforce a mortgage or for recovery of possession, he may suspend payment of the price until the seller has ended the threat, unless the latter prefers to give security, or unless it has been stipulated that the buyer shall pay notwithstanding the threat" and Italian Civil Code, Art 1460 ('Defence based upon non-performance), which states: "[I]n contracts providing for mutual counter-performance, each party can refuse to perform his obligation if the other party does not perform or offer to perform his own at the same time, unless different times for performance have been established by the parties or appear from the nature of the contract. However, performance cannot be rejected if, considering the circumstances, such rejection is contrary to good faith." This is in addition to the Italian Civil Code, Art 1461 ('Change in patrimonial conditions of contracting parties), which states: "[E]ach party can withhold the performance due by him, if the patrimonial conditions of the other party have become such as obviously to endanger fulfillment of the counter-performance, unless adequate security is given."

[249] See section 2.3.2.2. Commercial Insolvency: The 'Bankruptcy Act', 38.

[250] Al-Talab (N 247), 59.

[251] Klaus Berger, Philip O'Neill and Nawaf Salam, 'Is the *Exceptio Non Adimpleti Contractus* Part of the New *Lex Mercatoria'* in Gaillard (ed), *Transnational Rules In International Commercial Arbitration* (ICC Publ Nr 480, 4), Paris 1993, 147 et seq; Trans-Lex.Org' (Trans-lex.org) <http://www.trans-lex.org/116000.> accessed 11 April 2017.

[252] Ibid.

[253] See section 5.3.1. The Rights of the Unpaid Seller, 140.

the unpaid Seller has right to withhold delivery without avoiding the Contract.[254]

2.4. Conclusion:

In English law, the Contract of Sale of Goods has been codified by the Sale of Goods Act 1979. Its principal aim is to consolidate the relationship between the Seller and Buyer. Therefore, the 1979 Act remains at the heart of English law on remedies under the Contract of Sale of Goods. In contrast, the Contract of Sale of Goods in Saudi law is not codified. As a result, the two legal systems differ in their level of clarity, with English law being more clear-cut than Saudi law on this point. This is because it contains a well-established statute for the Contract of Sale of Goods, dating back to 1893. Therefore, the 1979 Act could be the effect of a clear remedy in the event of a breach of the Contract of Sale of Goods. For example, the aggrieved party has the right to terminate the Contract in both English and Saudi law. However, in English law, the court is not involved in the process of terminating the Contract. Therefore, the aggrieved party can terminate the Contract without the need to go to court. Nevertheless, this is not the case in Saudi law, since the court is inevitably involved, wherever an aggrieved party needs to terminate a Contract. As a result, English law provides a swift solution for aggrieved parties with regard to such matters.

Aside from these differences, the Contract of Sale of Goods in Saudi law is derived from Islamic Commercial Law.[255] According to Articles 7 and 48 of the Basic Law of Governance, the Saudi courts apply provisions of Islamic law to cases brought before them in the administration of justice. Consequently, Saudi law, being of a religious nature, offers less flexibility to its adherents, even in the case of rulers and governments, with regard to being able to override what is stipulated in the Qur'an and *Sunnah*.[256] An example of this is the

[254] Schwenzer (N 5), 549.
[255] See section 2.3: Sources of the Contract of Sale of Goods in Saudi Law, 30.
[256] This is the basic concept underpinning Islamic legal philosophy (see section 2.3.4.1. Islamic Commercial Law and Its Effect on the Contract of Sale, 40; see also Arts 7 and 48 of the Basic Law of Governance in Saudi Arabia).

prohibition of usury in the Contract of Sale of Goods, which becomes invalid if it enters into usury (*Riba*), with no remedies subsequently being available to the contracting parties in the event of a contractual breach.[257] However, this prohibition does not exist in English law, meaning that remedies are automatically available for the innocent party, if a Contract of Sale of Goods is breached.

[257] As a specific example, if the goods being transferred in a Saudi Contract of Sale consist of gold, then the time of delivery and payment of the price must be concurrent conditions; otherwise the Contract will enter into usury and become invalid (see section 4.3.4.2.2.2. Time of Payment in Saudi Law, 116; Case Nos. 34/T/S /195, 361/S/3, 275/S/3 and 695/S/3, 117.

Chapter 3: The Essential Requirements of the Contract for the Sale of Goods

3.1. Introduction:

In this third chapter, the requirements of the Contract for the Sale of Goods will be examined in the light of English and Saudi law. In discussing remedies for a breach of the Contract for the Sale of Goods, it is first necessary to examine the requirements stipulated under it, in order to distinguish it from other kinds of Sales Contract involving the transfer of ownership in exchange for money. Consequently, it is necessary to understand what is meant by 'goods'. These terms and characteristics are thus examined and analysed under English and Saudi law. What is more, it is important to establish the effects of a Contract for the Sale of Goods and to be able to identify the applicable remedy; thus, pinpointing when the property in the goods is transferred from the Seller to the Buyer. In this way, it may be ascertained whether the Seller has the right to claim for the price or for damages.[258] In this respect, there is an important distinction made between the above-mentioned legal systems.

In English law, there are three requirements for the Contract of Sale of Goods. The first of these is that the subject matter must constitute 'goods', as defined in the 1979 Act. The second requirement is the Seller's agreement to transfer the property in the goods. Thirdly, the Contract must stipulate a monetary consideration.[259] Meanwhile, Saudi law equally states three requirements for such Contracts, namely the Seller agreeing to transfer the property in the goods to the Buyer for a monetary consideration and goods constituting the subject matter of the Contract.[260]

To present the above points, this chapter is divided into three sections. The first defines

[258] This will be more fully examined in section 5.3.2. The Seller's Right to Recover the Price of the Goods, 162.
[259] See section 3.2.1. Contracts for the Sale of Goods in English Law, 50.
[260] See section 3.2.2. Contracts for the Sale of Goods in Saudi Law. 52.

the Contract for the Sale of Goods under English and Saudi law; distinguishing it from other kinds of Sales Contract and clarifying the meaning of 'goods' as the object of a Sales Contract in each of these regimes.[261] In the second section, the time of transferring the property in the goods from the Seller to the Buyer will be analysed under English and Saudi law.[262] Finally, the third section examines the mechanics of forming a Contract, namely the acts of offer and acceptance in each of the above-mentioned regimes.[263] Therefore, the essential requirements for forming a Contract of Sale of Goods will be examined in the light of English and Saudi law, because in both regimes, there are certain essential requirements for forming such a Contract, namely offer, acceptance consideration,[264] and the intention to establish a legal relationship.

3.2. Definition of the Contract for the Sale of Goods:

The aim of this section is to distinguish the Contract for the Sale of Goods from a number of other transactions, which normally differ from such Contracts. However, in certain circumstances, they may closely resemble it. These include a contract of barter or exchange; a contract for the supply of services; intellectual property licences; the sale of computer software, and a loan contract against the security of goods. As the primary purpose of this thesis is to analyse remedies for a breach of Contract for the Sale of Goods under English and Saudi law, it must be distinguished from other transactions, which fall outside the scope of this thesis.[265]

3.2.1. Contracts for the Sale of Goods in English Law:

The 1979 Act, section 2(1) defines a Contract for the Sale of Goods as any contract under which the Seller either transfers or agrees to transfer the property in goods to a Buyer in

[261] See section 3.2. Definition of the Contract for the Sale of Goods, 50.
[262] See section 3.2.5. The Transfer of Property in Goods from the Seller to the Buyer, 66.
[263] See section 3.3. The Mechanics of Forming a Contract for the Sale of Goods, 72.
[264] See section 3.2.4. The Consideration Paid for Goods Should Be Monetary.65.
[265] See section 1.3. Scope and Limitations of the Thesis, 4.

exchange for a monetary consideration - referred to as the price of the goods.[266] With this definition, the Contract for the Sale of Goods is distinct from other contracts, as it involves the transfer of ownership of property in goods, as opposed to other items. Moreover, this transfer is made in exchange for money, rather than any other type of consideration.[267] Consequently, the Contract for the Sale of Goods stipulates three requirements: the subject matter of the Contract must be 'goods', as defined in the 1979 Act; the Seller must agree to transfer the property in the goods, and the Contract must be for a monetary consideration. This definition therefore excludes any kind of Contract of Sale where the subject matter is not 'goods',[268] as in the case of software.[269] Furthermore, it also excludes any kind of Sales Contract where the consideration is not money, as in bartering, or where there is no consideration, as in a gift.[270]

Under the 1979 Act, there are two types of Contract: the Contract of Sale and the agreement to sell. Under section 2(4) of the Act, a Contract is deemed to be a Sales Contract, where the property in the goods is transferred from the Seller to the Buyer on concluding the Contract.[271] Moreover, according to section 2(5) of the Act, an agreement to sell either occurs when the transfer of the property in the goods is planned for a future date, or upon fulfilment of a condition. Such an agreement is then referred to as an 'agreement to sell', rather than an actual Sale.[272] Section 2(6) then explains how the agreement to sell becomes a Sale. This might take place when certain conditions are fulfilled, subject to which the property in the goods may

[266] The Sale of Goods Act, s. 2(1) provides that *"*A contract of sale of goods are a contract by which the seller transfers or agrees to transfer the property in goods to the buyer for a money consideration, called the price".

[267] Bridge (N 29), 33.

[268] The Goods will be more fully examined in section 3.2.3. The Goods Constituting the Subject Matter of a Contract of Sale, 54.

[269] Software alone does not represent 'goods' (see Bridge [N 29], 31). However, when software is provided as part of a physical medium, then it becomes goods. According to Schwenzer, *"*In English Law software is currently understood to be goods and thus the subject of a sale of goods contract only when it is provided as part of a physical medium, such as CD Rom or DVD". See Schwenzer (N 5), 104; see also *St Albans City and DC v International Computers Ltd* [1996] 4 All ER 481.

[270] *Atiyah and Adams' Sale of Goods (N 35)*, 11-12.

[271] The transfer of the property in the goods under English law will be more fully examined in section 3.2.5.1. Transfer of Property in English Law, 66.

[272] The Sale of Goods Act 1979, s. 2(4-5) provides that *"*(4) Where under a contract of sale the property in the goods are transferred from the Seller to the Buyer the contract is called a sale. (5) Where under a contract of sale the transfer of the property in the goods are to take place at a future time or subject to some condition later to be fulfilled the contract is called an agreement to sell".

be transferred.[273] It is evident that the transfer of property in goods from the Seller to the Buyer is the basic criterion for deciding this. Thus, a Contract for the Sale of Goods is an agreement to sell, until the moment the property passes from the Seller to the Buyer, whereupon it becomes a Sale - except where passing the property on the date of the Contract means that it was always a Sale.[274]

Finally, it should be noted that the English Contract for the Sale of Goods generally makes no distinction between a Contract of Sale and the agreement to sell,[275] as stipulated under the 1979 Act, section 61(1).[276] Nevertheless, hire purchase is not covered by the 1979 Act, because this is not a conditional sale.[277] A conditional sale is a Contract for the Sale of Goods, since the Seller and Buyer agree to sell and buy, respectively.[278] Section 2(3) of the 1979 Act provides that "a contract of sale may be absolute or conditional".[279]

3.2.2. Contract for the Sale of Goods in Saudi Law:

In Saudi law, the Contract for the Sale of Goods is defined as a Seller agreeing to transfer the property in goods to a Buyer for a mutually agreed monetary value, which is then paid. [280] Similarly, in Saudi law, the Contract for the Sale of Goods has three requirements, all of which must be met. First, the Seller agrees to transfer the property in the goods to the Buyer; second,

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[273] The Sale of Goods Act 1979, s. 2(6) provides that *"*An agreement to sell becomes a sale when the time elapses or the conditions are fulfilled subject to which the property in the goods is to be transferred".

[274] Bridge (N 29), 175.

[275] Ibid, 36.

[276] The Sale of Goods Act 1979, s. 61(1) provides that *"*the contract of sale includes an agreement to sell as well as a sale".

[277] It is covered by the Hire Purchase Act 1964 (see section 2.2.1. Sale of Goods Act 1979, 18).

[278] Schwenzer (N 5), 114.

[279] The Sale of Goods Act 1979, s. 2(3).

[280] There are some Schools of Islamic Law that define the Contract of Sale as the exchange of property [*Mal*] for property, such as according to the Ottoman Courts Manual (*Hanafi*) '*Majalat Alahkam Al'Adliah',* Art 105, which provides that a *"*Sale consists of exchanging property for property". Under this definition, the range of the Contract of Sale will be wide enough to cover every contractual aspect dealing with all types of property and will not a distinction between the contract of sale and barter. If this is applied within the scope of this thesis, then the range of the Contract will be wide enough to cover every contractual aspect dealing with transferred the property, whether sale or barter. However, in the *Hanbali* School, the definition of a Contract for the Sale of Goods is a contract where the Seller transfers the property in the goods to the Buyer for a monetary consideration, which must be in money; see Zahraa (N 1), 219; Md. Abdul-Jalil and Muhammad Rahman, 'Islamic Law of Contract Is Getting Momentum' (2010) 1(2) Journal of Business and Science 182, see also Al-Sanhūrī (N 48), 19-21.

the subject matter of the Contract must be goods, and third, there needs to be a monetary consideration.

In Saudi law, the Contract for the Sale of Goods is seen as a binding contract: binding on the Seller and the Buyer, because the Contract is an agreement giving rise to obligations that must be enforced by the contracting parties.[281] Furthermore, in Saudi law, the property in the goods is transferred from the Seller to the Buyer on concluding the Contract. Saudi law thereby recognises the Contract of Sale as the foundation for transferring the property in the goods from the Seller to the Buyer.[282] However, if the property in the goods is destined to be transferred at a future date, the contract is referred to as *Salam,*[283] not a Contract of Sale.

As discussed above, it may be seen that English and Saudi law have similar requirements in their Contracts for the Sale of Goods, namely the Seller's agreement to transfer the property in the goods to the Buyer, and the subject matter of the Contract being goods.[284] Moreover, there must be a monetary consideration for the goods transferred. this being the amount to be paid or 'price'.[285] However, English and Saudi law differ in their approach to the transfer of property in goods from a Seller to a Buyer. Under Saudi law, the property in the goods is transferred to the Buyer when the Contract is concluded, as stated earlier. In contrast, under English law, the contracting parties can agree when the property in the goods will transfer from the Seller to the Buyer.[286] The similarities and differences in the requirements of the Contract for the Sale of Goods under English and Saudi law will be examined in more depth below.

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[281] It will be more fully examined in Chapter Four, see section 4.3. Obligations of the Parties under a Contract for the Sale of Goods, 80.

[282] See section 3.2.5.2. Transfer of Property in Saudi Law, 71.

[283] This is the *Salam* contract*,* where the Buyer pays the price of the goods immediately, but the goods will be transferred to him in the future; see Mohd Zulkifli Muhammad, 'The Contract of "*Bay Al-Salam and Istisna*" in Islamic Commercial Law: A Comparative Analysis' (2007) 1 Universiti Malaysia Sabah (UMS) 22-23.

[284] This will be more fully examined under both regimes in section 3.2.3. The Goods Constituting the Subject Matter of a Contract of Sale, 54.

[285] This will be more fully examined under both regimes in section 3.2.4. The Consideration to Be Paid for Goods Should Be Monetary, 65.

[286] This will be more fully examined under both regimes in section 3.2.5. The Transfer of Property in Goods from the Seller to the Buyer, 66.

3.2.3. The Goods Constituting the Subject Matter of a Contract of Sale:

As explained previously, the subject matter of a Contract of Sale must consist of goods. Therefore, defining this term falls within the scope of the present thesis.[287] Moreover, in both English and Saudi law, if the goods forming the subject matter of a Contract are illegal, then the Contract will be invalid, and no remedies will be available to the contracting parties in the event of a breach of that Contract. Consequently, the terms of the goods must be discussed, in order for the Contract to be considered valid in the first place.[288]

Aside from the above, English and Saudi law have a different approach to the classification of goods, as in the case of existing or future goods.[289] In English law, a Contract of Sale can be for existing or future goods.[290] However, in Saudi law, the goods must exist at the time when the Contract is concluded. In contrast, if the goods do not exist, but could become available in future, the Contract is known as *Salam*[291] or *Istisna,* meaning 'manufacture'[292] in Saudi law. Therefore, it is necessary to be aware of specific aspects relating to the goods forming the subject matter of a Contract of Sale under both the legal regimes examined here.

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[287] See section 3.2.3.1. Meaning of the Term, 'Goods', 55. Alternatively, any Contracts of Sale that do not relate to the sale of goods fall outside the scope of this research. See section 1.3. Scope and Limitations of the Thesis, 4.

[288] See section 3.2.3.2. The Terms Governing Goods, 59.

[289] See section 3.2.3.4. The Classification of Goods, 63.

[290] The Sale of Goods Act 1979, s. 5(1) provides that *"*The goods which form the subject of a contract of sale may be either existing goods, owned or possessed by the seller, or goods to be manufactured or acquired by him after the making of the contract of sale, in this Act called future goods".

[291] Muhammad (N 283), 22-23. This is also the case in the Ottoman Courts Manual '*majalla al ahkam al adaliyyah'* under the *Hanafi* School, Art 123, which provides that *"*Sale by immediate payment against future delivery consists of paying in advance for something to be delivered later, that is to say, to purchase something with money paid in advance, thereby giving credit".

[292] The *Istisna* Contract in Saudi law is where the goods do not exist, but there is the potential of having them in future; for example, a businessman making a Contract to purchase products from a company in the future. In such a case, the products do not exist at the time of contracting, but will do so at a future date. This is also the case in the *Hanafi* School, according to the Ottoman Courts Manual (*Hanafi*) '*Majalat Alahkam Al'Adliah',* which defines an *Istisna* Contract as a contract to 'manufacture' in its Art 124: *"*a contract for manufacture and sale consists of making a contract with any skilled person for the manufacture of anything. The person making the article is called the manufacturer; the person causing the article to be made is called the contractor for manufacture, and the object made is called the manufactured article." However, it should be noted that the *Salam* and *Istisna* Contracts are not within the scope of this thesis. See section 1.3. Scope and Limitations of the Thesis, 4.

3.2.3.1. Meaning of the Term, 'Goods':

3.2.3.1.1. 'Goods' in English Law:

To summarise what has already been stated, the 1979 Act stipulates that the subject matter of a Contract of Sale must be goods.[293] Goods are specifically defined in section 61(1) of the above Act, where it is provided that

> all personal chattels other than things in action and money… and in particular 'goods' includes emblements, industrial growing crops, and things attached to or forming part of the land which are agreed to be severed before sale or under the contract of sale; and includes an undivided share in goods.[294]

Within this definition, 'goods' may consist of solid or liquid minerals,[295] vapours and gases.[296] Moreover, personal chattels will include small or large items, such as mobile phones, cars, ships or even aircraft. However, they must not come under any other Act.[297] Chattels also include animals, but not wild animals, because there is no absolute property in them.[298] Nevertheless, there is heated debate about whether software programs are to be considered as goods. For instance, computer software per se is not considered as 'goods',[299] but only the discs on which it is stored.[300] In the case of *St Albans City and DC v International Computers Ltd*,[301] the Court found that the disc containing software fell within this definition of goods, according to section 61(1) of the 1979 Act, even though the program stored on it did not constitute goods.

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[293] It may be a difficult question whether a particular contract is one that is in substance a Contract for the Sale of Goods; see *Benjamin's Sale of Goods* (N 25), paras 1-041 to 1-047.
[294] The Sale of Goods Act 1979, s. 61 (1).
[295] Including water.
[296] Even air, as in bottled air.
[297] *Benjamin's Sale of Goods* (N 25), para 1-082.
[298] Ibid, para 1-088.
[299] Software alone does not represent 'goods'; however, when software is provided as part of a physical medium, then it becomes goods. According to Schwenzer, "in English Law software is currently understood to be goods and thus the subject of a sale of goods contract only when it is provided as part of a physical medium, such as CD Rom or DVD". See Schwenzer (N 5), 104; Bridge (N 29), 31.
[300] A computer disk is clearly within the definition of goods under section 61(1) of The Sale of Goods Act 1979; see *Benjamin's Sale of Goods* (N 25), para 1-086.
[301] [1996] 4 All ER 481.

Another point concerning software programs relates to the 1979 Act only being applicable when the Contract is for the transfer of property in goods, or consists of an agreement to transfer same.[302] However, in most software supplies, there is no transfer of property; instead, the Contract is in the form of a licence and as such, does not involve a transfer of property. This was observed in *Southwark LBC v IBM UK Ltd*,[303] where the Court decided that there had been no transfer of property in the software, as "it was licensed" and not transferred. Thus, the 1979 Act did not apply,[304] because the software did not constitute 'goods'. Under these circumstances, the 1979 Act is irrelevant to the vast majority of software supplies.

Further to the above, neither does money constitute 'goods' according to the definition in section 61(1) of the 1979 Act. However, this excludes collector's items that are regarded as commodities, rather than as a means of exchange.[305] In the leading case of *Moss v Hancock*,[306] the Court did not regard currency as goods, unless it was being sold as a commodity worth more than its face value.

Meanwhile, the sale of land is distinct from the Sale of Goods, although there can be some difficulties involved in distinguishing between the two.[307] Thus, in defining goods, a line should be drawn between 'goods' and 'land',[308] whereby aspects of land are not classed as goods.[309] However, the question arises of whether and how the Sale of Goods and sale of interest in land can be distinguished from each other. Under the definition of goods set out in section 61(1) of the 1979 Act, they are said to include "emblements and industrial growing

[302] The Sale of Goods Act 1979, s. 2(1); see section 3.2.1. Contracts for the Sale of Goods in English Law, 50.
[303] [2011] EWHC 549 (TCC) QBD.
[304] Ibid.
[305] *Benjamin's Sale of Goods* (N 25), para 1-084.
[306] [1899] 2 QB 11; *Benjamin's Sale of Goods* (N 25), para 1-084.
[307] Hibbert (N 76), para 24.
[308] Bridge has noted that, it is therefore necessary for any definition of goods to draw a line of demarcation between 'goods' and 'land' as this is essential in a definition of land; see *Benjamin's* Sale of Goods (N 25), paras 1-090.
[309] In the Australian case of *Mills v Stokman* [1967] HCA 15-116 CLR 61, it was held that a part of an area of land did not constitute goods; see *Atiyah and Adams' Sale of Goods (N 35)*, 59.

crops, and things attached to or forming part of the land which is agreed to be severed before sale or under the contract of sale*"*.[310] Under this definition, items such as crops that are severed from the land constitute 'goods' under section 61(1) of the 1979 Act. Furthermore, the sale of an interest in land is covered by the 1989 Act.[311] It is also possible that the Contract for the Sale of Goods represents a contract for the sale of an interest in land,[312] in the meaning of section 2 of the 1989 Act.[313] However, the sale of an interest in land can only be made in writing,[314] according to the 1989 Act, section 2(1).[315]

Consequently, it is necessary to be aware of the meaning of 'goods' in the 1979 Act, which distinguishes the Contract for the Sale of Goods from other contracts, such as those involving the transfer of ownership of other property contracted for, including land.

3.2.3.1.2. 'Goods' in Saudi Law:

The meaning of 'goods' in the Contract for the Sale of Goods in Saudi law is similar to that of goods in English law. In Saudi law, goods include solid and liquid minerals, vapours and gases. They also include animals,[316] so long as they are not wild, as mentioned previously. To clarify this further, only wild animals that are obtained or owned by lawful means may be bought and sold and are valid as goods. [317]

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[310] The Sale of Goods Act 1979, s. 61(1).

[311] Law of Property (Miscellaneous Provisions) Act 1989.

[312] Twigg-Flesner has noted that this possibility arises from the fact that the definition given to goods by section 61 of the Sale of Goods Act 1979 includes *"*emblements, industrial growing crops, and things attached to or forming part of the land which are agreed to be severed before sale or under the contract of Sale". Therefore, there can be little doubt that this definition of emblements refers to certain goods that were once known as *fructus naturales*, at least in some cases, which were regarded as being an 'interest in land' in Common Law; see *Atiyah and Adams' Sale of Goods (N 35)*, 49.

[313] The Law of Property (Miscellaneous Provisions) Act 1989, s. 2 has since been replaced with section 40 of the Law of Property Act 1925.

[314] Bridge (N 29), 35.

[315] The Law of Property (Miscellaneous Provisions) Act 1989, s. 2(1) provides that *"*A contract for the sale or other disposition of an interest in land can only be made in writing and only by incorporating all the terms which the parties have expressly agreed in one document or, where contracts are exchanged, in each". Nevertheless, this is not the case with the Contract for the Sale of Goods, under its section 60 of the Sale of Goods Act 1979, which provides *"*Where a right, duty or liability is declared by this Act, it may (unless otherwise provided by this Act) be enforced by action"; see Bridge (N 29), 35.

[316] It should be noted that the animals must be beneficial by nature and *tahir* (pure); thus, can be valid as 'goods', see Zahraa (N 1), 227.

[317] However, Saudi law expands on the notion of goods in some depth, according to their validity as the subject matter of a Contract of Sale; see Zahraa (N 1), 223.

In the same way as in English law, money does not constitute goods in Saudi law, but when it is not being used as a means of exchange, but rather as a collector's item, it becomes 'goods'. In fact, Saudi law generally prohibits money from being bought and sold as a good.[318] The argument supporting this prohibition rests on the hidden element of usury, which is categorically outlawed by all Islamic Schools.[319] Additionally, the sale of computer software per se is not considered as the Sale of Goods in Saudi law, because the Contract of Sale relates purely to the transfer of property in goods from the Seller to the Buyer. In most software supply, there is no transfer of property; instead, the contract is made by means of a licence to use a software program.

Aside from the above, Saudi law classifies minerals and metals as goods, such as gold, but the time of delivery and payment must be the concurrent condition of the Sales Contract. Otherwise, the Contract will be invalid,[320] because usury is introduced. Consequently, care must be taken when the subject matter of a Contract of Sale is gold in Saudi law. Finally, land does not constitute goods in Saudi law, although the question here is whether items attached or affixed to the land are goods - for example, crops. Here, crops that can normally be harvested several times, such as tomatoes and aubergines, represent goods in Saudi law.[321] However, they need to have already been grown; otherwise, they will be considered as future goods[322] and therefore governed by a *Salam* contract. Thus, it is necessary to be aware of the meaning of 'goods' in Saudi law, in order to distinguish the Contract for the Sale of Goods from other contracts outside the scope of the present research.

In both the legal regimes under study, there are specific terms governing the goods that

[318] Zahraa (N 1), 217.
[319] See section 2.3.4.1. Islamic Commercial Law and Its Effect on the Contract of Sale, 40; section 2.3.4.2. Freedom of Contract, 42.
[320] See section 4.3.4.2.2.2. Time of Payment in Saudi Law, 116; Case Nos. 361/S/3 , 275/S/3 and 695/S/3, 117.
[321] Zahraa (N 1), 229-234.
[322] See section 3.2.3.4. The Classification of Goods, 63.

can be made available under a legitimate Sales Contract. Therefore, the nature of the goods being sold must be ascertained, in order to determine the validity of a Contract for the Sale of Goods.

3.2.3.2. The Terms Governing Goods:

In English and Saudi law, there are terms on which goods are accepted as the subject matter of a Contract of Sale and the goods must comply with these. Otherwise, the Contract will be invalid, with no remedies available for the contracting parties, such as in the case of illegal goods. Furthermore, goods need to be free of any defects, charges or encumbrance. If not, then the Seller will be in breach of the Contract and both English and Saudi law will provide remedies for the Buyer. The terms associated with goods are set out in more detail below.

3.2.3.2.1. The Goods Must Be Legal:

Both English and Saudi law recognise that goods must be legal[323] and this is of vital importance in each of the regimes, meaning that the goods should not have been proscribed by law and must not contravene public policy. Otherwise, the Contract itself will be invalid and unenforceable.[324] However, that said, English and Saudi law vary in their classification of legal goods, with English law providing more freedom in this regard. The result is that there are certain goods that are unacceptable under Saudi law, but acceptable in English law. The reason for this distinction lies in Islamic law, which is the basis of such prohibition in Saudi law.[325]

Aside from the above, Saudi law differs in its approach to the validity of certain contracts, such as its proscription of usury in Sales Contracts, even if the goods are legal. Thus, when a

[323] In Common Law rules, the goods may be considered illegal if proscribed by law (e.g. certain drugs), or if they contravene public policy, generally accepted behaviour, etc. In Saudi law, the goods must be beneficial by nature and *tahir* (pure).

[324] It should be noted that it is not just goods that must be legal, but also the objectives of the Contract. This means that if the Contract of Sale relates to the performance of some form of illegal or immoral Act, it will not be deemed to be valid. Under this circumstance, goods may well be legal, but this does not necessarily mean that the purpose for which they are used is also legal.

[325] See section 2.3. Sources of the Contract for the Sale of Goods in Saudi Law, 30.

Contract for the Sale of Goods enters into usury, the Contract becomes invalid[326] and no remedies will be available to the contracting parties under Saudi law. However, this is not the case under English law, where a Sales Contract is still valid, even if enters into usury, with remedies being available to the contracting parties in the event of a breach of the Contract.

3.2.3.2.2. The Goods Must Be Free of Any Defects:

English and Saudi law have the same approach to the condition of the goods being sold, in that they must be free of defects;[327]otherwise, the Seller will be in breach of the Contract, whereby both legal systems provide remedies for the Buyer.[328] In the 1979 Act, there is an implied provision dealing with the quality and fitness of the goods being supplied by the Seller to the Buyer. In other words, the goods must be of satisfactory quality, [329] or else the Seller will be in breach of the Contract and there will be remedies for the Buyer offered under the Act.[330] Similarly, in Saudi law, the goods must be free of any defects,[331] or the Buyer will have the right to terminate the Contract under the 'defects option' (*Khayar al-Iayb*).[332] Nevertheless, both regimes provide certain limitations to the application of the defects option.

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[326] As a specific example, if the goods being transferred in a Saudi Contract of Sale consist of gold, then the time of delivery and payment of the price must be concurrent conditions; otherwise the Contract will enter into usury and become invalid (see section 4.3.4.2.2.2. Time of Payment in Saudi Law, 116; Case Nos. 361/S/3 , 275/S/3 and 695/S/3, 117.

[327] The quality and fitness of the goods supplied by the Seller under English and Saudi law will be more fully examined in Chapter Four, where the Seller's obligation to deliver goods of the right quality is discussed (see section 4.3.3.1.4. 'Quality of the Goods', 96).

[328] The remedies under English and Saudi law will be more fully examined in Chapter Six, when discussing the Buyer's remedies, when the Contract of Sale of Goods is breached; see section 6.2.1.1. The Buyer's Right to Reject Goods for a Breach of Terms of Quality, 201.

[329] The Sale of Goods Act 1979, s. 14(2) (as amended); see also section 4.3.3.1.4.1. 'Quality of the Goods' in English Law, 96.

[330] See section 6.2.1.1.1. The Buyer's Right to Reject the Goods for a Breach of Terms of Quality in English Law, 201.

[331] This is also the case in the *Hanafi* School, in the Ottoman Courts Manual (*Hanafi*) '*al-majallah al-ahkam al-adliyyah',* where its Art 336 provides that *"*In a contract of sale, the Goods must be free from any defect. That is to say, although property is sold without stipulating that it shall be free from faults, and without stating whether it is sound, or bad, or defective, or free from fault, such property nevertheless must be sound and free from defect"; see section 4.3.3.1.4.2. Quality of the Goods in Saudi Law, 102.

[332] However, this option does not apply when the Seller informs the Buyer of the defect in the goods, or when the Buyer has examined the goods and the defect has been apparent (see section 6.2.3.2.1. The Buyer's Right to Terminate the Contract According to the Defect Option [*Khayar al-Aib*], 228).

3.2.3.3. The Seller's Ownership of the Goods:

In terms of ownership of the goods, English and Saudi law have the same approach, namely that the Seller must own the goods forming the subject matter of a Contract of Sale. However, in the 1979 Act, nothing can be found concerning notions of ownership, but under Common Law, proprietary rights are protected from tortious interference.[333] This means that the Seller cannot sell what he does not own and by implication, the Buyer cannot purchase goods from someone who does not own them. [334]

Further to the above, English law recognises that the Contract for the Sale of Goods involves a transfer of property to the Buyer.[335] Thus, if the Seller does not actually own the goods, the property in them cannot be transferred. However, according to the 1979 Act, the unpaid Seller has the right to resell goods and transfer the property in them to a new Buyer, even if he does not own the goods.[336] Therefore, the 1979 Act gives the unpaid Seller power over goods that he might not even own.

Furthermore, goods that are in existence, but not yet owned by the Seller, constitute future goods. Therefore, they may be the subject matter of an agreement to sell, but not of a Contract of Sale.[337] The 1979 Act consequently resolves any doubt that future goods may be the lawful subject matter of a Sales Contract,[338] namely as an agreement to sell. Conversely, the property in future goods does not pass to the Buyer in an agreement to sell.[339]

Likewise, under Saudi law, the Seller in a Contract of Sale must be the owner of the

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[333] Bridge (N 29), 60.

[334] Where goods are being sold by someone who does not own the goods, there is always a loser: the original owner of the goods, who loses his property, or the Buyer who loses his money when the goods are returned. Nevertheless, under the Sale of Goods Act 1979, sections, 21-26 are mainly concerned with the transfer of property by a non-owner, or a person with defective title.

[335] See section 3.2.5.1. Transfer of Property in English Law, 66.

[336] See section 5.3.1.5.1. The Seller's Right to Resell Goods in English Law. 155

[337] See section 3.2.3.4. The Classification of Goods, 63.

[338] Bridge (N 29), 55.

[339] See the case of *Lunn v. Thornton* (1845) 1 C. B. 379; see also Bridge (N 29), 56 and section 3.2.3.4. The Classification of Goods, 63.

goods at the time of concluding the Contract.[340] The Prophet Mohammad (peace be upon him), stated *"*Do not sell that which you do not possess*"*.[341] The reason for this lies in the effect of a Saudi Contract of Sale with regard to transferring the property in the goods from the Seller to the Buyer.[342] Thus, the Seller cannot transfer the property at the time of concluding a Contract, if he does not own the goods.[343] In fact, some scholars in Islamic jurisprudence are of the view that a Seller cannot sell goods that are not in his possession,[344] even if he (the Seller) is the owner of the goods.[345] This argument stems from the *Hadith* of the Prophet Mohammad (peace be upon him): *"*Do not sell that which you do not possess.*"*[346] However, according to the *Hanbali* School, the Seller can sell goods that are not in his possession, if he (the Seller) is the owner.[347]

To analyse this *Hadith* further, the word 'possess' does not indicate 'possession', but merely refers to legal ownership of the goods. This is illustrated by *Hakeem ibn Hizaam* (may Allah be pleased with him), who sought counsel from the Prophet Mohammad (peace be upon him), enquiring: "A man may come to me wanting to buy something that I do not possess; should I buy it from the marketplace and then sell it to him?" To this, the Prophet Mohammad

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[340] This is also the case in the Ottoman Courts Manual, Art 365 (*al-majallah al-ahkam al-adliyyah)*: *"*For a sale to be executory, the Seller must be the owner of the Goods, or the agent of the owner, or his tutor or guardian…"

[341] Kahn (N 189), *Hadith* No. 1318.

[342] In Saudi Law, it is perceived that the effect of the Contract of Sale is to transfer the property in the goods from the Seller to the Buyer. (see Case No. 159/S/3, 71; also, case No. 1417/T/27 Judicial Blogs, Contract of Sale, Vol. 2 "1996" 236). This is similar to the position adopted in the *Hanafi* School, in the Ottoman Courts Manual, '*al-majallah al-ahkam al-adliyyah'*, where its Art 369 states: "The effect of the conclusion of a sale is ownership, that is to say, the Buyer becomes the owner of the Goods and the Seller becomes the owner of the price"; see also section 3.2.5.2. Transfer of Property in Saudi Law, 71.

[343] It was decided in Case No. 1416/T/142 Judicial Blogs, Contract of Sale, Vol. 2 (A. H. 1408 "1987"), 275, see also Al-Sanhūrī (N 48), 23.

[344] In the *Shafi* School, possession is a condition of the Contract of Sale, while in the *Hanafi* School, possession is not an essential requirement of a sale, but rather a subsidiary condition (see Asyraf Dusuki and Abdelazeem Abozaid, 'Fiqh Issues in Short Selling as Implemented in the Islamic Capital Market in Malaysia' (2008) 21(2) Journal of King Abdulaziz University: Islamic Economics, 70).

[345] In addition, the Buyer cannot resell the goods before taking possession of them and completing the purchase transaction with the Seller, because the goods are not in his possession. Thus, it is not permissible for a Buyer to sell what he has bought until he (the Buyer) has taken possession of the goods. In the *Hanafi* School, according to the Ottoman Courts Manual, '*al-majallah al-ahkam al-adliyyah',* it is provided in Art 253 that *"*If the thing sold is real property, the Buyer can sell such real property to another person before taking delivery thereof. The Buyer may not, however, sell movable property".

[346] Kahn (N 189), *Hadith* No, 1318.

[347] Dusuki (N 344), 70.

(peace be upon him) replied: *"*Do not sell that which you do not possess.*"* In this situation, *Hakeem* did not own the goods that he intended to sell; he was first going to purchase them in the marketplace.

In conclusion, it is clear that English and Saudi law stipulate the ownership of goods as a precondition for a valid Contract of Sale. However, in the case of future goods, the regimes differ in their approach, as explored in greater depth below.

3.2.3.4. The Classification of Goods:

Generally speaking, all goods are either existing or future goods, but never both. It thus follows that the goods forming the subject matter of a Contract of Sale may be existing or future goods. However, English and Saudi law differ in their approach to future goods. For example, in English law, a Contract of Sale may be for existing or future goods under section 5(1) of the 1979 Act. Here, the types of goods are indicated and it is submitted that they may currently exist or represent future goods.[348] Furthermore, in the 1979 Act, goods that are in existence, but not yet owned by the Seller are indicated as 'future goods.[349] In light of this, the 1979 Act clarifies that future goods may lawfully be the subject of a Contract of Sale.[350]

However, under section 5(3) of the 1979 Act, if the subject matter of a Contract constitutes future goods, then the Contract will be considered as an agreement to sell, rather than as a Contract of Sale.[351] It is therefore evident that the classification of goods as either existing or future is the basic criterion for deciding this.[352] This means that in the 1979 Act,

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[348] The Sale of Goods Act 1979, S. 5(1) provides that *"*The goods which form the subject of a contract of sale may be either existing goods, owned or possessed by the seller, or goods to be manufactured or acquired by him after the making of the contract of sale, in this Act called future goods".

[349] See section 3.2.3.3. The Seller's Ownership of the Goods, 61; section 3.2.5.1. Transfer of Property in English Law, 66.

[350] Bridge (N 29), 55.

[351] The Sale of Goods Act 1979, s. 5(3) provides that "where by a contract of sale the seller purports to affect a present sale of future goods, the contract operates as an agreement to sell the goods".

[352] It should be noted that the Sale of Goods Act 1979 Act does not distinguish between the Contract of Sale and an agreement to sell; under the Act, the Contract of Sale includes an agreement to sell, as well as a sale, under its section 61(1); see also section 3.2.1. Contract for the Sale of Goods in English Law.50.

the Contract is valid, even though the subject matter does not yet exist. Equally, it may already exist, but not yet be owned by the Seller, as defined by the Act. However, in such circumstances, the property in the goods will not be transferred to the Buyer and section 5(3) makes it clear that there can be no passing of property for future goods.[353]

Meanwhile, in Saudi law, goods must already exist at the time of concluding a Contract of Sale.[354] This is because Saudi law stipulates that the effect of a Contract of Sale is to transfer the property in the goods from the Seller to the Buyer at the time of concluding the Contract.[355] Otherwise, as in the case of future goods, there can be no passing of property.[356] Nevertheless, this does not suggest that Saudi law mandates a universal ban on dealing in all future goods; for this, another kind of contract is available in the form of *Salam* or *Istisna*',[357] but as explained earlier, these are not Contracts of Sale.[358]

Consequently, it can be seen that English and Saudi law have a different approach to Contracts of Sale for future goods. In English law, for example, such a contract is considered as an agreement to sell, not a Contract of Sale. However, in general terms, no distinction is made between a Contract of Sale and an agreement to sell. In contrast, under Saudi law, a contract to sell future goods is known as a *Salam* or *Istisna* contract,[359] which is quite distinct from a Contract of Sale. Notwithstanding this difference, English and Saudi law concur in other areas, such as in the requirement for monetary consideration, namely the amount to be paid for

[353] See *Lunn v. Thornton* (1845) 1 C.B. 379; Bridge (N 29), 56.
[354] Nabil Saleh, 'Definition and Formation of Contract under Islamic and Arab Laws' (1990) 5(2) Arab Law Quarterly 101-116; this is similar to the position adopted in the Ottoman Courts Manual, '*al-majallah al-ahkam al-adliyyah'* (*Hanafi*), provided by Art 197 *"*the Goods must be in existence*"*; Art 205 further provides that *"*the sale of a thing which is not in existence is void*"* and Art 363 provides that *"*in order that any object may properly be the subject of sale, such object must be in existence".
[355] See section 3.2.5.2. Transfer of Property in Saudi Law, 71.
[356] That is because Islamic law bans *gharar* (uncertainty); see Nicholas C. Dau-Schmidt, 'Forward Contracts—Prohibitions on Risk and Speculation under Islamic Law' (2012) 19(2) Indiana Journal of Global Legal Studies, 534; Muhammad Ayub, *Understanding Islamic Finance* (1st edn, John Wiley & Sons Ltd. 2007), 99-127.
[357] Muhammad (N 283), 22-23.
[358] Saudi law makes a distinction between the Contract of Sale and the *Salam* or *Istisna* Contract.
[359] It should be noted that the *Salam* and *Istisna* Contracts are not within the scope of this thesis. See section 1.3. Scope and Limitations of the Thesis, 4.

the goods. This is explained in more detail below.

3.2.4. The Consideration Paid for Goods Should be Monetary:

A distinction should be made between Contracts of Sale and other transactions that are normally quite different from them, but may closely resemble them in some circumstances. An example of this is where the property in goods is transferred for a form of consideration that is not money; for example, a barter contract, or a transfer of property with no consideration, as in the case of a gift. Thus, the Contract for the Sale of Goods is distinguished from other contracts, in that the transfer of property in goods is made for a consideration paid in money. To be more precise, not every type of consideration can be accepted as the price in a Sale and this is a widely accepted principle in Sales Contracts; clearly differentiating them from barter contracts under English and Saudi law.

A Contract for the Sale of Goods therefore involves a monetary consideration paid by a Buyer for goods,[360] but this consideration may be paid by means other than cash, such as by cheque. In English law, a monetary consideration is referred to as the 'price' of the goods and under the 1979 Act, it is stipulated that "consideration must be in money" under a Contract for the Sale of Goods,[361] which also applies in Saudi law.[362] However, the Buyer is not obliged to pay the price in cash, but may do so by cheque. Under each of these regimes, however, the Contract for the Sale of Goods is distinguishable from other contracts involving the transfer of property in goods from a Seller to a Buyer and this is analysed in more detail below.

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[360] See section 3.2. Definition of the Contract for the Sale of Goods, 50.

[361] See section 3.2.1. Contracts for the Sale of Goods in English Law, 50.

[362] This is not so strange, when it is taken into account that a line must be drawn between Sales Contracts and barter contracts. In other words, therefore, it is only with money that the Buyer can legitimately perform his obligation to pay the price of a Sales Contract. Nevertheless, there are some Schools of Islamic Law that define the Contract of Sale as the exchange of property [Mal] for the property, such as according to the Ottoman Courts Manual (*Hanafi*) '*Majalat Alahkam Al'Adliah*', Art 105, which provides that a "Sale consists of exchanging property for property". Under this definition, the range of the Contract of Sale will be wide enough to cover every contractual aspect dealing with all types of property and will not a distinction between the contract of sale and barter. However, in the *Hanbali* School, the definition of a Contract for the Sale of Goods is a contract where the Seller transfers the property in the goods to the Buyer for a monetary consideration, which must be in money. See section 3.2.2. Contract for the Sale of Goods in Saudi Law, 52.

3.2.5. The Transfer of Property in Goods from the Seller to the Buyer:

The effect of the Contract for the Sale of Goods is to transfer property in goods from one party to another. In consequence, it is important to establish the point at which this property is actually transferred. This is especially necessary in the event of a breach of the Contract, in order to determine the remedy to apply and to ascertain whether the Seller has the right to claim the price or damages. It is also required for defining the position of the Seller or Buyer, if the other party becomes insolvent.

In this regard, English and Saudi law have a different approach to determining when the property in goods is transferred from the Seller to the Buyer. Under English law, the parties to a Contract can agree when this will take place, but in Saudi law, the contracting parties do not have this option and the effect of the Contract is rather to transfer the property in the goods at the time when the Contract is concluded. This is analysed more fully in the following section.

3.2.5.1. Transfer of Property in English Law:

Under the 1979 Act, the parties to a Contract of Sale can agree on when the property in the goods will pass to the Buyer, under section 17(1) of the Act.[363] Here, it is provided that where there is a Contract of Sale for specific or ascertained goods, the property in them is transferred to the Buyer at such a time as the parties to the Contract intend it to be transferred.[364] The obvious purpose of this is to secure the Seller as far as possible against the risk of non-payment, in the event of the Buyer becoming insolvent after taking possession of the goods.[365] Section 17(2) of the 1979 Act provides that *"*For the purpose of ascertaining the intention of the parties regard shall be had to the terms of the contract, the conduct of the parties and the circumstances

[363] The Sale of Goods Act 1979, s. 17(1).
[364] Thus, a Contract of Sale of Goods is an agreement to sell until the property passes, whereupon it becomes a sale, except where the passing of property at the contract date meant that it always was a sale; see Bridge (N 29), 175.
[365] See *Aluminium Industrie Vaassen BV v Romalpa Aluminium Ltd* [1976] 1 WLR 676; see also section 3.2.5.1.1. Retention of Title (ROT), 69.

of the case".[366] It is also important to note the provision in section 16, which states that if the Contract is a Contract of Sale for unascertained goods, then the property in the goods will not be transferred to the Buyer, unless and until the goods are ascertained.[367] Section 18 supports section 17 and sets out specific rules for ascertaining the intention of the parties as to the time when the property in the goods is expected to pass from the Seller to the Buyer.

In this context, it must be assumed that the provisions of section 18 should be analysed, from which may be derived five basic rules for deciding the intention of the parties regarding the transfer of property in the goods under the Contract. This section gives primacy to the parties' intention and describes how the provisions of section 18 apply, if this intention to transfer the property is unclear, or if the intention cannot be ascertained. According to section 18(1) of the 1979 Act, the property in ascertained or specific goods should be in a deliverable state. It asserts that if there is an unconditional Contract of Sale for specific goods and these goods are in a deliverable state, then the property in them will pass to the Buyer at the time of concluding the Contract. In such a case, the time of payment or delivery of the goods is immaterial when deciding the transfer of property in them.[368]

However, under Rule 2 of section 18 of the 1979 Act, there is an attempt to define the transfer of property in goods under a Contract of Sale, where specific goods are involved that are not in a deliverable state, thus requiring the Seller to render them fit for delivery. In this case, the property will not pass until the pending task is performed by the Seller, namely making the goods under the Contract available for delivery, with the Buyer being given due notice thereof. As per this rule, the property will only be passed when the Seller fulfils his duty to render the goods fit for delivery and to correspondingly inform the Buyer; giving the latter a

[366] The Sale of Goods Act 1979, s. 17(2).
[367] Ibid, s. 16.
[368] Ibid, s. 18(1).

reasonable period of time to take delivery of them.[369]

Meanwhile, section 18(3) of the 1979 Act applies to a Contract of Sale for specific goods in a deliverable state, but where the Seller is bound to weigh, measure, test or perform some other action relating to them, in order to ascertain their price. In this case, the property will not pass until such pending actions are performed by the Seller, and the Buyer is given proper notice of their completion. The difference between Rule 2 and Rule 3 is that Rule 2 applies when the goods are not in a deliverable state, while Rule 3 applies when they are, but actual delivery requires further actions to be performed by the Seller, pursuant to an agreement or in order to determine the price to be paid by the Buyer.[370]

Under section 18 of the 1979 Act, Rule 4 provides that the transfer of property in the goods takes place when the goods are delivered to the Buyer 'on approval', on 'a sale or return basis', or on other similar terms. In such a case, the property in the goods will pass to the Buyer, once he signifies his approval or acceptance to the Seller (expressed acceptance, such as giving notice of acceptance), or else when he performs some other act to adopt the transaction (implying acceptance). In this case, the Buyer will retain the goods without giving any notice of rejection. Then, the property in the goods will pass to the Buyer on expiry of the notice period indicated for return, or on the expiry of a reasonable period, if no such time for rejection/return is indicated.[371]

Rule 5 of section 18 defines cases of the transfer of property in a Contract of Sale for unascertained or future goods. In such a case, the property is transferred to the Buyer. Once such goods are unconditionally appropriated to the Contract, either by the Seller or the Buyer and with the assent of the other party. It may be noted that assent can be express or implied and

[369] The Sale of Goods Act 1979, s. 18(2).
[370] Ibid, s. 18(3).
[371] Ibid, s. 18(4).

may be given either before or after the appropriation is made. The title of the goods will pass when both the conditions - the appropriation of the Contract and assent of the other party - are satisfied.[372] However, the purpose of section 18(5) is to clarify that the property in goods that were not originally ascertained cannot be transferred to the Buyer without the cooperation of the Seller.[373]

As above, the parties to a Contract under the 1979 Act can agree on the time when the property in the goods will pass to the Buyer. This is because the goods might not yet be owned by the Seller or because it will secure him as far as possible against the risk of non-payment, in the event of the Buyer becoming insolvent after taking possession of the goods under the retention of title (ROT), which will be analysed below.

3.2.5.1.1. Retention of Title (ROT):

ROT is a contractual provision awarding a right that can be availed of by the Seller against the Buyer, where goods are sold. It means that the Seller still owns the goods after concluding a Contract, until a specific event takes place, as agreed between the parties.[374] It is also called 'reservation of title' or the *Romalpa* clause.[375] ROT can be applied by the Seller through the inclusion of a 'retention of title' clause in the Contract. The specific event that must take place, in order for the property in the goods to pass to the Buyer, is usually the payment of the price of the goods, but in any case, it is determined by the transacting parties.

In the 1979 Act, section 19(1) provides that in a Contract for the Sale of Goods, the Seller has the right to retain title over the goods, until certain conditions are met.[376] This usually

[372] The Sale of Goods Act 1979, s. 18(5).
[373] Bridge (N 29), 126.
[374] Susan Singleton, *Retention of Title: How to Keep Ownership of Your Goods and Recover Them When a Buyer Goes Under* (1st edn, Thorogood Publishing Ltd 2010), 18.
[375] It is now referred to as the *Romalpa* clause, after *Aluminium Industrie Vaassen BV v Romalpa Aluminium Ltd* [1976] 1 WLR 676.
[376] The Sale of Goods Act 1979, s. 19(1) provides that "Where there is a contract for the sale of specific goods or where goods are subsequently appropriated to the contract the seller may, by the terms of the contract or appropriation, reserve the right

involves paying the price of the goods and it is a condition that is provided for in the Contract. Therefore, under this section, the property is not passed to the Buyer until repairs have been carried out, as this is the presumed intention of the parties.[377] The purpose of section 19 is consequently to counter the presumptive passing of property rules in section 18 of the 1979 Act.[378]

The obvious purpose of including an ROT clause in a Contract is to provide some sort of security for the Seller against the risk of non-payment, after the Buyer takes possession of the goods. In the leading case of *Aluminium Industrie Vaassen BV v Romalpa Aluminium Ltd,*[379] where the Court held that *"*the obvious purpose of clause 13,[380] in the context of the general conditions, was to secure the plaintiffs as far as possible, in the event of insolvency, against the risk of non-payment after they had parted with possession…"[381] Under section 19 of the 1979 Act, it thus follows that the Seller has the right to retain title over the goods, with the property not being passed to the Buyer until certain obligations are fulfilled by the latter, usually the consisting of payment of the purchase price.

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of disposal of the goods until certain conditions are fulfilled, and in such a case, notwithstanding the delivery of the goods to the buyer, or to a carrier or other bailee or custodier for the purpose of transmission to the buyer, the property in the goods does not pass to the buyer until the conditions imposed by the seller are fulfilled".

[377] See the case of *Anderson v Ryan* [1967] IR 34, 37; see also *Atiyah and Adams' Sale of Goods (N 35)*, 254.

[378] Bridge (N 29), 120.

[379] [1976] 1 W.L.R. 676. Also in the leading case of *Armour v Thyssen Edelstahlwerke AG*, where the Court held that "[s]uch a provision does in a sense give the seller security for the unpaid debts of the buyer. But it does so by way of a legitimate retention of title, not by virtue of any right over his own property conferred by the buyer" (see [1991] 2 AC 339).

[380] Clause 13 is applied, which provides that "The ownership of the material to be delivered by [the plaintiffs] will only be transferred to the purchaser when he has met all that is owing to [the plaintiffs], no matter on what grounds" (*Aluminium* [N 379], 678).

[381] *Aluminium* (N 379), 678. It should be noted that when the property in the goods is transferred to the Buyer, the Buyer must bear the risk of the goods, unless otherwise agreed. This is according to the Sale of Goods Act 1979, section 20(1), where it is stated that the Seller shall bear the risk of the goods until transferring them to the Buyer, unless otherwise agreed; section 20(1) provides that "Unless otherwise agreed, the goods remain at the seller's risk until the property in them is transferred to the buyer, but when the property in them is transferred to the buyer the goods are at the buyer's risk whether delivery has been made or not". Under this section, the risk of the goods then passes to the Buyer when the property passes to him, unless otherwise agreed. However, in the case where the delivery has been delayed, if the fault lies with the Seller, then he shall bear the risk of the goods. On the other hand, if the fault lies with the Buyer, then he shall bear the risk of the goods, according to section 20(2) of the above Act, which provides: "But where delivery has been delayed through the fault of either buyer or seller the goods are at the risk of the party at fault as regards any loss which might not have occurred but for such fault."

3.2.5.2. Transfer of Property in Saudi Law:

As mentioned previously, the effect of the Contract of Sale in Saudi law is to transfer the property in the goods from the Seller to the Buyer immediately on concluding the Contract,[382] if the Contract of Sale is for specific goods. In the case of unascertained goods, the property in the goods is transferred to the Buyer once the goods are ascertained.[383] Consequently, in Saudi law, the Seller and Buyer do not have the right to agree on a time when the property in the goods will pass, because Islamic law prohibits *gharar* (uncertainty). Here, the uncertainty would be caused by a lack of clarity regarding goods in a Contract of Sale, where the Seller does not transfer the property in the goods to the Buyer.[384] However, it does not mandate a universal ban on this, but provides for it in another kind of contract, known as sale pending, which is not a done deal.[385]

Thus, in Saudi law, a Contract of Sale is the direct cause of the property in goods being transferred from the Seller to the Buyer. Case No. 159/S/3[386] supports this legal stance. Here, the contracting parties had signed two contracts: the first was a Contract of Sale, where *"*the Seller had sold cars to the Buyer", while the second was a rental contract, under which "the Buyer in the first contract had rented these cars from the Seller*"*. In this case, the Court ascertained that the second Contract was rescinded by the first Contract, since the property in the goods had transferred to the Buyer. Thus, the Seller could not rent out the cars, because he no longer owned them.

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[382] This is also the case in the *Hanafi* School, in the Ottoman Courts Manual (*al-majallah al-ahkam al-adliyyah*), which provides in its Art 369 that "The effect of the conclusion of a sale is ownership, that is to say, the Buyer becomes the owner of the Goods and the Seller becomes the owner of the price".

[383] Under Saudi law, in the same way as in English law, when the property in the goods is transferred to the Buyer, then the Buyer bears the risk of the goods.

[384] Ayub (N 356), 44.

[385] The *Murabahah* Contract refers to the sale of a good with an agreed profit. Consequently, there are two types of *Murabahah* Contract: the first Contract is between the Buyer and the bank, and the second is between the bank and the Seller. Under this circumstance, the Buyer orders the goods through the bank and then the bank buys them from the Seller, before selling them to the Buyer for a specified profit; see Monzer Kahf, *Islamic Finance Contracts* (2nd edn, Create Space Independent Publishing Platform 2015), 421.

[386] Judicial Blogs, Contract of Sale, Vol. 3 (A. H. 1430 "2009"), 1053; see also Case No 1417/T/27 (N 342), 236.

In light of the above, the English and Saudi regimes have a different view of the effect of the Contract in transferring the property in goods from a Seller to a Buyer. In English law, the parties to a Contract can agree when this will take place, but in Saudi law, the contracting parties do not have this option and the effect of the Contract is rather to transfer the property in the goods at the time when the Contract is concluded.

In the subsequent section, the mechanics of forming a Contract for the Sale of Goods will be examined, consisting of offer and acceptance. This confirms whether a Contract actually exists under English and Saudi law.

3.3. The Mechanics of Forming a Contract for the Sale of Goods:

As stated earlier, in both English and Saudi law, the mechanics of forming a Contract for the Sale of Goods comprise offer and acceptance.[387] Aside from this, there must be an intention to create a legal relationship, which may be proved by any means. Thus, unless offer and acceptance are present in a Contract for the Sale of Goods, a Contract has not been formed. Furthermore, there are certain vitiating factors, such as misrepresentation or error.[388] In some cases, these may entitle the contracting parties to set the Contract aside.[389]

In English law, the 1979 Act, Part II covers the formation of the Contract. Nevertheless, it does not mention anything about the notions of offer or acceptance.[390] Rather, it defines the Contract of Sale and presents the differences between a Contract of Sale and an agreement to sell. The 1979 Act has left the mechanics of forming the Contract for the Sale of Goods to the

[387] There must also be consideration in a Contract of Sale under English and Saudi law (see section 3.2.4. The Consideration Paid for Goods Should Be Monetary, 65).
[388] Such as in English law, in the leading case of *Raffles v Wichelhaus*. Here, the Seller and Buyer entered into a Contract for the sale of cotton, which was to be shipped from Bombay to Liverpool by a ship called the *Peerless*. However, there were two ships of this name sailing from Bombay, one in October and the other in December, which the above-mentioned contracting parties were unaware of. See *Raffles v Wichelhaus* [1864] 2 H&C, 906.
[389] These factors will not be considered in any depth in this current thesis.
[390] *Atiyah and Adams' Sale of Goods (N 35)*, 36.

general Common Law rules on contracts.[391] However, section 4(1) of the 1979 Act contemplates the various methods by which a Contract of Sale can be concluded. Here, a Contract of Sale may be expressed as a verbal or written agreement; an agreement that is a hybrid of verbal and written agreements, and implied performance, whereby acceptance is demonstrated in the conduct of the parties.[392] To this extent, the 1979 Act provides for the express and implied ways in which a Contract of Sale can be made between a Seller and Buyer.[393]

In the same way as English law, Saudi law recognises the Contract of Sale as the foundation of the compatibility of offer and acceptance, without specifying a particular form. Thus, in Saudi law, the Contract of Sale may also be made either in writing or verbally. As a consequence, neither the 1979 Act nor Saudi law requires the Contract for the Sale of Goods to take any special form and so it may be proved by any means. Nevertheless, it should be noted that the nature of the Contract of Sale in Saudi law comprises stages that differ from those of English law, in the mechanics of its formation. To elaborate on this, a party to a Contract is likely to be given certain options before the Contract becomes legally binding,[394] such as the option of the 'contract meeting place' or '*Khiyar al-Majlis*', whereby a party has the right to rescind the Contract or choose not to proceed with it within the corresponding period of the *Khiyar al-Majlis*.[395] Under this option, there is no breach of Contract and so no remedy is required. However, the concept of the 'contract meeting place' is unknown in

[391] Section 62(2) of the Sale of Goods Act 1979 provides that the rules of the common law are applied to the contract of sale of Goods when they are consistent with the provisions of 1979 Act.
[392] The Sale of Goods Act 1979, s. 4(1) provides that "Subject to this and any other Act, a contract of sale may be made in writing (either with or without seal), or by word of mouth, or partly in writing and partly by word of mouth, or may be implied from the conduct of the parties".
[393] Morwenna Macro, *Sale of Goods: Contract* (Sweet & Maxwell Ltd 2015), para 1.
[394] This will eventually affect the remedy required for the Contract and this option is unknown in English law.
[395] This option is for the Seller and the Buyer to rescind or choose not to proceed with the Contract of Sale, so long as the Seller and Buyer have not left the meeting place.

English law.[396]

In light of the above, despite this difference between English and Saudi law, it is vital to note that they share some common ground in the mechanics of forming a Contract for the Sale of Goods. When looking at the associated principles, two distinct parties emerge, the Seller and the Buyer. In both the above regimes, a Contract is subsequently formed through offer and acceptance, whereby an offer is made and then accepted to create a binding Contract. This process may be proved by any available means. In light of the above, there will be no more investigation of the mechanics of forming a Contract for the Sale of Goods, since these are irrelevant here.

3.4. Conclusion:

When looking at the essential requirements of a Contract for the Sale of Goods, it becomes clear that English and Saudi law have similar approaches, namely that the Seller agrees to transfer the property in the goods to the Buyer and that the subject matter consists of goods. Moreover, the transfer of property in goods must be for a monetary consideration in both these regimes.[397] This distinguishes the Contract for the Sale of Goods from other transactions.[398]

In terms of goods forming the subject matter of a Contract of Sale, the English and Saudi regimes run parallel, with goods being indicated as solid and liquid minerals, vapours and gases, etc. Conversely, neither software programs nor money constitute goods under these regimes.[399] Moreover, English and Saudi law specify certain limitations to freedom over the goods forming the subject matter of a Contract of Sale. For example, in order for a Contract to be deemed valid under the 1979 Act in English law, the goods must be legal, or else the

[396] As the topic of the thesis is remedies for breach of the Contract of Sale of Goods, the mechanics of forming a Contract will not be considered in any depth.
[397] See section 3.2. Definition of the Contract for the Sale of Goods, 50.
[398] See section 3.2.4. The Consideration to Be Paid for Goods Should Be Monetary, 65.
[399] See *St Albans* (N 301); *Southwark* (N 303); section 3.2.3.1. Meaning of the Term, 'Goods', 55.

Contract becomes invalid, with no remedies being available to the contracting parties. This underlying legal principle is the same in Saudi law, although there are certain goods that are unacceptable under Saudi law, but acceptable under the English 1979 Act.[400] This is because Islamic law prohibits goods that are not beneficial in nature. Therefore, goods that are not intrinsically beneficial cannot form the subject matter of a Contract of Sale in Saudi law. As a result, English law provides more freedom for the legality of goods, while Saudi law imposes more constraints, in accordance with Islamic law.[401]

Furthermore, Saudi law differs in its approach to the validity of certain contracts, such as its proscription of usury in Sales Contracts, even if the goods are legal. Therefore, as soon as a Contract of Sale of Goods enters into usury, the Contract becomes invalid,[402] with no remedies available for the contracting parties in the event of a breach. However, this is not the case under English law.[403]

Aside from the legality of goods, the two legal systems have a different approach to their classification, as in English law, a Contract of Sale can be for existing or future goods. However, in Saudi law, the goods must exist at the time of concluding the Contract, or else the Contract becomes invalid. This is because Islamic law prohibits *gharar* (uncertainty), caused by a lack of clarity regarding the goods in a Contract of Sale, where these goods do not exist. However, it does not mandate a universal ban on the Sale of future goods, but provides for these in another kind of contract, known as the *Salam* or *Istisna* (manufacturing) Contract.[404]

As a result, the heavy religious influence on Saudi law profoundly affects its operation and it gains power from its religious standing, whereas English law gains power from its legal

[400] See section 3.2.3.2.1. The Goods Must Be Legal, 59.
[401] See section 2.3.4.1. Islamic Commercial Law and Its Effect on the Contract of Sale, 40.
[402] As a specific example, if the goods being transferred in a Saudi Contract of Sale consist of gold, then the time of delivery and payment of the price must be concurrent conditions; otherwise the Contract will enter into usury and become invalid (see section 4.3.4.2.2.2. Time of Payment in Saudi Law, 116; Case Nos. 34/T/S /195, 361/S/3 , 275/S/3 and 695/S/3, 117.
[403] See section 3.2.3.2.1. The Goods Must Be Legal, 59.
[404]. See section 3.2.3.4. The Classification of Goods, 63.

standing. This means that there are some restrictions in Saudi law that do not necessarily exist in English law and these restrictions affect the remedies available to the contracting parties.

In brief, even though it can be seen that the essential requirements and elements of a Contract for the Sale of Goods are generally the same in the English and Saudi regimes, they differ in a few specific areas. Saudi law imposes certain limitations on the goods that may be bought and sold under a Contract of Sale, whereby there are certain goods that are not acceptable under Saudi law, but acceptable under the English 1979 Act. As a result, English law provides more freedom over the type of goods that may be bought or sold under a Contract of Sale, compared to Saudi law, which imposes constraints derived from Islamic law.

Chapter 4: Obligations of the Parties to a Contract for the Sale of Goods

4.1. Introduction:

When two commercial parties enter into a binding Contract of Sale, both English and Saudi law impose obligations on them, which they must fulfil according to the respective provisions. The aim of this chapter is to analyse the nature and scope of these obligations under English law (primarily under the 1979 Act) and Contract of Sale of Goods in Saudi law. Before proceeding to examine and compare the remedies available for a breach of obligations, it is first necessary to examine these obligations, in order to identify which have been breached. This will then help identify the remedy for the innocent party. The focus here will be on the Contract for the Sale of Goods in the course of business.

This chapter is consequently in four parts; firstly, the character of the obligations to be considered will be examined. Secondly, the obligations of the Seller under both regimes will be explained and analysed. These include the Seller's obligation to deliver the goods within the terms of the Contract, this being the Seller's basic duty under a Contract for the Sale of Goods. Thirdly, this chapter will discuss the Buyer's obligations under English and Saudi law. In each case, the Buyer has the obligation to accept the goods and pay the price for them on the date provided for in the Contract of Sale.[405] However, there will be no investigation of any additional obligations agreed between the parties themselves and not imposed by law, because the potential for additional obligations based on mutual agreement is limitless.[406] Finally, the principle of good faith in the performance of Contracts for the Sale of Goods will be considered; also examining the wider context in which sales regimes operate. Here, the position of good

[405] See section 4.3. Obligations of the Parties under a Contract for the Sale of Goods, 80.

[406] English and Saudi law gives adequate flexibility to the contracting parties to choose their own terms and conditions and the atmosphere in which they would like to enter into the Contract, as well as the manner in which one party expects the other to perform his contractual obligations. This means that in general, the parties to a Contract are free to agree to the terms of their choosing, provided that these terms are not at odds with law; see section 2.2.5.1. Freedom of Contract (in English Law), 27; section 2.3.4.2. Freedom of Contract (in Saudi Law), 42.

faith in relation to the performance of such Contracts will be explored in both the legal systems under study. This fourth section is further divided into two main parts; the first pertains to the position of English law on the obligation of parties to a Contract for the Sale of Goods to perform the Contract in good faith, while the second addresses this matter under Saudi law.[407]

4.2. The Nature of Obligation in a Contract of Sale:

The Contract of Sale is a type of contract that has obligations for both parties, the Seller and the Buyer. When the Contract is formed, it is binding for both these parties. This means that the parties to a Contract of Sale must fulfil their obligations, so as to avoid violating the Contract in any way.[408] The reason for this obligation is the principle of the binding force of the Contract, whereby the Contract must be performed. It means that the Contract has the force of law and the obligation derived from the Contract has the force of an obligation derived from the law, but only if the criteria for the Contract's legitimacy are properly met.[409]

Based on the above, obligations under the Contract for the Sale of Goods are binding in law, because the Contract is an agreement between a Seller and Buyer, giving rise to obligations that must be enforced. Consequently, the courts can compel the Seller or Buyer to perform the Contract.[410] This approach is actually justified, because the Contract of Sale is considered as a tool of mutual benefit, whereby the Seller and Buyer guarantee that the Contract has power and stability and the obligations will be performed, thus allowing them peace of mind in their transactions. [411]

In this regard, English law has the expectation of the binding force of the contract, which

[407] See section 4.4. The Role of Good Faith in the Performance of Contracts for the Sale of Goods, 121.
[408] The rule of the binding force of the Contract is accepted in both Common and Civil Law; Uribe (N 160), 6.
[409] Matthias E. Storme, *The Binding Character of Contracts, Cause and Consideration* (2nd edn, Kluwer/Ars Aequi 1998) <https://www.law.kuleuven.be/personal/mstorme/bindingcharactercontracts.pdf> accessed 21 June 2017.
[410] For example, the Buyer has the right to claim for performance of the Contract (see section 6.2.2. The Buyer's Right to Specific Performance, 214).
[411] Catherine Mitchel, *Obligations in Commercial Contracts: A Matter of Law or Interpretation?* (2016) 65(1) Current Legal Problems <https://doi.org/10.1093/clp/cus005.> accessed 21 June 2017.

ensures that the contracting parties perform their contractual obligations.[412] However, this recognition of the above principle in English law does not mean that contracts are always enforced. In some cases, they are not performed, such as when they are unlawful.[413] Furthermore, there have been important changes to the terms of the binding force of the contract, introduced as a result of modern legislative intervention, such as the Unfair Contract Terms Act 1977.[414] Aside from this, under the binding force of the contract, the courts must consider several factors, such as any undue hardship that may be inflicted on the party to the breach, impossibility, unfairness and frustration.[415]

Under Saudi law, the principle of the binding force of the contract is recognised[416] in the same way as in English law, but here again, the recognition of this principle does not mean that contracts are always enforced. Instead, certain criteria must be met.[417] Besides, the Saudi courts need to consider several factors, such as the principle of no harm or harassment,[418] impossibility and frustration.

Finally, it should be noted that the rule of the binding force of the contract is imposed on the contracting parties, so that they fulfil their obligations resulting from that contract and implement it in good faith. In addition, the basis and limitations of the obligation of good faith in contractual performance are inherent within this binding force.[419] However, English law

[412] Beale, Chitty on Contracts (N 84), 28.
[413] This means that the Contract must be lawful or legally possible (thus not contrary to Common Law, but legally executable); see also Beale, Chitty on Contracts (N 84), 30.
[414] See section 2.2.2.2. The Unfair Contract Terms Act 1977, 22; section 2.2.5.1. Freedom of Contract, 27.
[415] English law adopts the general approach of classifying 'frustration' according to Lord Ratcliffe's statement that "Frustration occurs whenever the law recognizes that without default of either party a contractual obligation has become incapable of being performed because the circumstances in which performance is called for would render it a thing radically different from that which was undertaken by the contract" (see *Davis* (N 170); see also Nwafor (N 170), 18-19).
[416] See section 2.3.4.3. The Principle of the Contract's Obliging Force: The 'Binding force of the Contract', 43.
[417] In Saudi Law, the principle of the binding force of the Contract means that the Contract should be implemented and the contractor will be unable to refuse this implementation. Therefore, just as the law has a binding force, so the Contract of Sale is binding for both the Seller and Buyer, as long as it is executed within the limits permitted by law, i.e. in terms of not being in violation of public policy or morality; see A. Alsarhani and N. Kahter, *Source of Personal Right* (1st edn, Dar Al-Thaqafa for Publishing and Distribution 2005), 243.
[418] See section 2.3.4.4. The Principle of No Harm or Harassment (*al Darar wa-la Dirar*), 45.
[419] Abdullah Al-Refaei, *Commitment to Tolerance* (1st edn, Dar Al-Nahdah for Publishing and Distribution 1996), 2-5; see also Beale, Chitty on Contracts (N 84), 28.

does not recognise a general principle of good faith between the parties to a Contract of Sale.[420] As a result, it is inappropriate to say that the rule of the binding force of the contract includes the principle of good faith under English law.[421]

In broad terms, the primary remedy for a Buyer before the English courts is damages, rather than specific performance. However, it may be argued that this does not correspond to the rule of the binding force of the contract.[422] In contrast, the Contract for the Sale of Goods in Saudi law includes the principle of good faith,[423] while the primary remedy for the Buyer is specific performance,[424] corresponding to the rule of the binding force of the contract.[425] Consequently, care must be taken in interpreting what is meant by this principle in English law.

4.3. Obligations of the Parties under a Contract for the Sale of Goods:

4.3.1. Obligations of the Seller and Buyer under English Law:

In English law, one of the essential obligations of the Seller is to deliver the goods in accordance with the terms of the Contract of Sale. The Buyer must then accept the goods and pay for them as prescribed by this Contract, pursuant to obligations derived from section 27 of the 1979 Act.[426] Furthermore, in English law, the Seller's obligation to deliver the goods and the Buyer's obligation to pay the price for them are concurrent conditions, unless otherwise agreed, according to section 28 of the above Act.[427] As a consequence, the Seller must be ready

[420] This will be explored in more depth in section 4.4.2. The Position of English Law on Good Faith in the Performance of the Contract for the Sale of Goods, 124.
[421] Bradgate (N 164), 26.
[422] See section 6.2.2.1. The Buyer's Right to Specific Performance in English Law, 215.
[423] See section 4.4.3. The Role of Good Faith in Performing the Contract of Sale of Goods in Saudi Law, 131.
[424] See section 6.2.2.2. The Buyer's Right to Specific Performance in Saudi Law, 221.
[425] In examining the remedies later in this thesis, a determination will be made on whether there is a practical or principled approach to remedies in each legal system and whether any such difference has any practical implications (see section 6.2.2. The Buyer's Right to Specific Performance, 214).
[426] The Sale of Goods Act 1979, s. 27 provides that "It is the duty of the seller to deliver the goods, and of the buyer to accept and pay for them, in accordance with the terms of the contract of sale".
[427] The Sale of Goods Act 1979, s. 28 provides that "Unless otherwise agreed, delivery of the goods and payment of the price are concurrent conditions, that is to say, the Seller must be ready and willing to give possession of the goods to the Buyer in exchange for the price and the Buyer must be ready and willing to pay the price in exchange for possession of the goods".

and willing to deliver the goods to the Buyer and the latter must be ready and willing to pay their price, unless otherwise agreed. This means that where the Contract of Sale is silent on the time of delivery and payment, these shall be taken as concurrent conditions.

4.3.2. Obligations of the Seller and Buyer under Saudi Law:

In Saudi law, the Contract for the Sale of Goods is dealt with as a set of reciprocal obligations, which impose binding obligations on both the Seller and Buyer. As a result, under the Contract for the Sale of Goods, the Seller has an obligation to deliver the goods to the Buyer, and the latter is required to accept the goods and pay the price for them within the terms of the Contract. Furthermore, under the Contract of Sale in Saudi law, good faith must be adhered to in contractual performance.[428]

Similar to English law, the Seller's obligation to deliver the goods and the Buyer's obligation to pay the price for them are concurrent conditions in Saudi law, unless otherwise agreed. In light of this, it can be seen that in both English and Saudi law, a Contract for the Sale of Goods imposes obligations on the Seller as well as the Buyer, which must be fulfilled to avoid any violation of the Contract. Therefore, the obligations of the Seller and Buyer under the Contract for the Sale of Goods will be thoroughly examined in this present chapter, in terms of the above-mentioned regimes. However, before discussing the Seller's obligations, it is first necessary to discuss the Seller's right to sell the goods, as outlined below.

4.3.2.1. The Seller Must Have the Right to Sell the Goods:[429]

Under English and Saudi law, the Seller must have right to sell the goods. If not, then the Contract will be deemed to have been breached, whereby both regimes provide a remedy for

[428] See section 4.4.3. The Position of Saudi Law on Good Faith in the Performance of the Contract for the Sale of Goods, 131.
[429] The Seller's right to sell the goods in this discussion does not mean that the Seller must be owner the goods, although it is evident that the Seller cannot sell what he does not own, and the Buyer cannot buy from a non-owner of the goods (see section 3.2.3.3. The Seller's Ownership of the Goods, 61).

the Buyer. However, it should be noted that this does not mean that the Seller necessarily owns the goods, as discussed earlier.[430] The Seller's right to sell the goods under both regimes merely signifies that goods can be sold, provided that they do not infringe a trademark.

The 1979 Act provides for a Contract of Sale and agreement to sell. There is an implied term for the Seller that in the case of a Sale, he has a right to sell the goods, but in an agreement to sell, this right may be exercised when the property passes to the Buyer.[431] Furthermore, in cases where the Seller does not have the right to sell goods under a Contract of Sale, the Act distinguishes between two situations: prior to and following the conclusion of a Contract of Sale.

In the first of these scenarios, the Buyer has the right to terminate the Contract, if the Seller has breached section 12(1) of the 1979 Act,[432] which is a condition.[433] This was held in the case of *Niblett v Confectioners' Material,*[434] where the Buyer had purchased 3,000 tins of preserved milk from the Seller, who had the right to transfer the property, but not to sell the goods. This was because the labelling infringed the Nestlé trademark, which resulted in the goods being detained by the customs authorities.[435] In the above case, the Court held that the Buyer had the right to terminate the Contract.[436]

In the second scenario, when the Seller does not have the right to sell the goods after a Contract of Sale has been concluded, the Buyer has the right to damages, because the Seller

[430] English and Saudi law adopt the same approach, whereby the Seller must have owned the goods in the Contract of Sale of Goods (see section 3.2.3.3. The Seller's Ownership of the Goods, 61).
[431] The Sale of Goods Act 1979, s. 12(1) provides that "In a contract of sale [there is the implication for the] Seller that in the case of a sale he has a right to sell the goods, and in the case of an agreement to sell he will have such a right at the time when the property is to pass".
[432] Ibid, s. 12(1).
[433] Ibid, s. 12(5A) provides that "As regards England and Wales and Northern Ireland, the term implied by subsection (1) above is a condition".
[434] [1921] 3 KB 387.
[435] The goods were detained by the customs authorities on the ground that their labels infringed the trade mark of a well-known English company; see *Atiyah and Adams' Sale of Goods (N 35)*, 86-87.
[436] *Niblett* (N 434).

has breached section 12(2), not 12(1) and this represents warranty.[437] Under the 1979 Act, subsections 12(2) (a) and (b) specify that the goods must be free of any charge or encumbrance, unless otherwise agreed, and that the Buyer can enjoy quiet possession of them. However, it not only applies at the time of the Sale, but also to the future. In this situation, if the Buyer becomes unable to enjoy quiet possession of the goods in future, then the Seller will have breached the Contract.

The notion of 'quiet possession' can be seen at work in the leading case of *Microbeads v Vinhurst Road Markings,*[438] where the Buyer bought 'road marking machines' and the goods were sold and delivered between January and April 1970. Later, on 11th of November 1970, a third party was granted patent rights over the goods. In this case, the Court held that the Buyer had the right to damages, but not to terminate the Contract.[439] The Court based this decision on the ground that the Seller was not in breach of section 12(1), because when he sold the goods, there was no patent right granted over them that would have interfered with the right to sell. However, the Seller was in breach of section 12(2), in that the Buyer could not enjoy quiet possession of the goods.

In the 1979 Act, subsection 12(5A), it is submitted that the term implied by section 12(1) is a condition and the terms implied by its section (2) refer to warranties;[440] meaning that the remedies differ from a right to terminate the Contract and the right to damages. As mentioned above in the light of the 1979 Act, where the Seller does not have the right to sell the goods in a Contract of Sale, *before* the Contract is concluded, section 12(1) is breached and the Buyer

[437] Section 12(5A) of the 1979 Act submitted that the term implied by subsection (1) of section 12 is a condition and the terms implied by subsection (2) constitute warranty, meaning that remedies differ between the right to terminate the contract under section 12(1), because the Seller does not have the right to sell the goods, and claim for damages, because the Seller has breached section 12(2), since the Buyer does not enjoy quiet possession of the goods.

[438] [1975] 1 WLR.

[439] Ibid, 219.

[440] The Sale of Goods Act 1979, S. 12(5A) provides that "As regards England and Wales and Northern Ireland, the term implied by subsection (1) above is a condition and the terms implied by subsections (2), (4) and (5) above are warranties".

has the right to terminate the Contract.[441] However, in the case where the Seller does not have the right to sell the goods *after* the conclusion of the Contract of Sale, section 12(2) is breached and the Buyer has the right to claim for damages.[442]

The reason why the 1979 Act distinguishes between these situations is because a Seller who does not have the right to sell the goods *before* the Contract has been concluded is not on the same footing as a Seller who has the right to sell the goods when the Contract has been concluded. For example, in *Microbeads v Vinhurst Road Markings,*[443] the Seller sold the goods when there was no patent right granted over them to interfere with the right to sell. However, after the Contract of Sale had been concluded, a patent right was granted over the goods, which interfered with the Buyer's quiet possession of them. In this way, the 1979 Act distinguishes between two possible situations.[444]

In the same way as English law, Saudi law stipulates that the Seller must be legally entitled to sell the goods. If the Seller does not have this right, then he will be deemed to be in breach of the Contract. In Saudi Trademark Law, Article 21 provides that a Seller in possession of a trademark becomes its exclusive owner, with the right to sell the goods that it refers to.[445] However, although this Law outlines the rules governing trademarks, it does not provide any remedy for the Buyer, in that the Seller has no legal right to sell the goods. But in the Saudi courts, remedies have been found for the Buyer in numerous cases, despite the fact that the courts do not differentiate between the Seller's right to sell the goods before or after concluding the Contract of Sale. Under these circumstances, a Seller with no right to sell the goods before

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[441] *Niblett* (N 434).
[442] *Microbeads* (N 438).
[443] Ibid.
[444] "The dishonest seller who knew that he had no right to sell the goods but he has concealed that fact to the Buyer cannot be treated on an equal footing with the seller in good faith who does not know that he had no right to sell the goods. Furthermore, it could be the seller who does not know that he had no right to sell the goods be given an opportunity to perfect his defective right to sell the Goods before the buyer can proceed to terminate the contract." See *Law Commission, First Report: Amendments to the Sale of Goods Act 1893* (Law Com No 24, 1969), para 15.
[445] The Saudi Law of Trade Marks 2002, Art 21.

the conclusion of a Contract of Sale is on an equal footing with the Seller who has the right to do so.

In support of the above, Case No. 5831/2/S,[446] which involved a Sale of Goods that the Seller had no right to sell when the Contract was concluded, because a trademark was being infringed, resulted in the award of damages to the Buyer by the Court. Islamic law is clear, where a Seller is aware of having no right to sell goods, but conceals this fact from the Buyer. Such a dishonest Seller cannot be treated on an equal footing with a Seller who behaves in good faith, but does not know that he has no right to sell the goods.[447]

4.3.3. Obligations of the Seller in the Contract for the Sale of Goods:

4.3.3.1. The Seller's Obligation to Deliver the Goods:

Under both English and Saudi law, the Seller has the obligation to deliver the goods within the terms of the Contract, this being the Seller's basic duty under a Contract for the Sale of Goods. Thus, under both regimes, the Seller has a responsibility to deliver the right goods at the right time, in the right place, of the right quality and in the right quantity. In light of this, it is the Seller's responsibility to deliver the goods exactly as the Buyer has demanded. Otherwise, the Seller will be in breach of his obligation, whereby both English and Saudi law provide remedies for the Buyer. This obligation under both regimes is examined in more depth below.

4.3.3.1.1. The Meaning of 'Delivery':

'Delivery' is a term of art, which means more than merely transferring the physical possession of goods. As a result, 'delivery' may be an actual delivery (the handing over of goods) or

[446] Judicial Blogs, Contract of Sale, Vol. 3(A. H. 1435 "2014") 2004.

[447] The Prophet (PBUH) warns against the dishonest trader who is despised by both believers and God - attested to in the Holy Qur'an as follows: "O you who believe! Eat not up your property among yourselves unjustly." The Prophet Muhammad (peace be upon him) also made the point, "Surely, whoever deceives in business transactions, is not (or does not behave like) one of us" (see section 2.3.4.1. Islamic Commercial Law and Its Effect on the Contract of Sale, 40).

delivery that does not necessarily mean making or taking delivery of goods, such as delivering documentation relating to the goods to the Buyer.[448] Furthermore, an actual delivery does not automatically mean sending the goods to the Buyer. because in English and Saudi law, the Seller may have a duty to send the goods to the Buyer, or the Buyer may have an obligation to take delivery of the goods from the Seller. In each case, this will depend on the express or implicit Contract concluded between the parties, since the transfer of physical possession underpins the Contract of Sale of Goods. Therefore, the following sections will explain the meaning of 'actual delivery' in English and Saudi law.

4.3.3.1.1.1. 'Delivery' In English Law:

The Seller's obligation to deliver the goods is one of the most important obligations imposed on the Seller by English law. Section 27 of the 1979 Act provides that the duty of the Seller is to deliver the goods. Therefore, it is important to examine and analyse the legal meaning of delivery. Here, delivery does not mean sending the goods or transferring the property in them to the Buyer,[449] but rather refers to the voluntary transfer of possession of them from the Seller to the Buyer,[450] according to section 61(1) of the 1979 Act.[451] Therefore, section 27 of the Act must be read in conjunction with its section 61(1). Under the 1979 Act, section 29 contains rules relating to the delivery of goods. However, this rule only applies, if the parties have not expressly or implicitly made other arrangements.[452] Thus, section 27 of the Act must be read in conjunction with its section 29.[453]

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[448] Documents can be electronic or paper documents.

[449] In English law, there is no rule requiring the Seller to send the goods to the Buyer or to transfer the property in them. See *Benjamin's Sale of Goods* (N 25), para 8-001; section 3.2.5.1. Transfer of Property in English Law, 66.

[450] "It should next be noted that the legal meaning of 'delivery' is very different from the popular meaning. In law, delivery means the 'voluntary transfer of possession' which is a different thing from the dispatch of goods. There is, indeed, no general rule requiring the seller to dispatch the goods to the buyer" (see *Atiyah and Adams' Sale of Goods* [N 35], 98).

[451] The Sale of Goods Act 1979, in s. 61(1) submits that 'delivery' means the voluntary transfer of possession from one person to another.

[452] Beale, Chitty on Contracts (N 84), para 44-240.

[453] Under these rules in section 29(1) of the Sale of Goods Act 1979, the Seller may have a duty to send the goods to the Buyer, or the Buyer may have an obligation to take delivery of the goods from the Seller, regardless of whether the Contract concluded was express or implicit. Moreover, the incidental expenses arising while putting the goods in a deliverable state

Aside from this, the 1979 Act distinguishes between the transfer of the property in the goods (i.e. title)[454] and delivery. These processes are sometimes performed at the same time and sometimes separately.[455] Generally speaking, the transfer of property in goods precedes the process of delivery, although the reverse may be true in exceptional circumstances, as in ROT.[456]

4.3.3.1.1.2. 'Delivery' in Saudi Law:

In Saudi law, the Seller has an obligation to deliver the goods to the Buyer and this is the most important obligation imposed by the Contract for the Sale of Goods.[457] As in English law, the Seller's obligation in Saudi law is to deliver the Goods to the Buyer, but this does not mean sending the goods or transferring the property in them to the Buyer.[458] Under Saudi law, delivery of the goods to the Buyer rather refers to the voluntary transfer of possession of goods from the Seller to the Buyer.[459] This can be achieved by placing them at the Buyer's disposal in a manner consistent with their nature.[460]

To summarise, the meaning of 'delivery' in the Contract of Sale under English and Saudi law is the voluntary transfer of possession of goods from the Seller to the Buyer. In neither of these regimes, however, is there any rule in the Contract for the Sale of Goods, which requires

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are presumptively borne by the Seller, unless otherwise agreed under section 29(6) of the 1979 Act; see Bridge (N 29), 272.

[454] See section 3.2.5.1. Transfer of Property in English Law, 66.

[455] The time of transferring the property in the goods is important for many reasons, such as the Seller's right to the price (see section 5.3.2.1. The Seller's Right to Claim the Price of the Goods in English Law, 162).

[456] See section 3.2.5.1.1. Retention of Title (ROT), 69.

[457] Al-Sanhūrī (N 48), 587.

[458] The delivery of the goods in Saudi law differs from transferring the property in the goods; the former mainly concerns material control over the goods and the obligations of the Seller in a Contract for the Sale of Goods. However, the transfer of property in goods involves transferring title to the goods from the Seller to the Buyer. As mentioned earlier, under the Contract for the Sale of Goods in Saudi law, this transfer of property in goods from the Seller to the Buyer automatically takes place when the Contract for the Sale of Goods is concluded (see section 3.2.5.2. Transfer of Property in Saudi Law, 71; see also Case No. 159/S/3,71; Art 369 of the Ottoman Courts Manual).

[459] This is also the case in the *Hanafi* School, according to the Ottoman Courts Manual, '*al-majallah al-ahkam al-adliyyah',* whereby its Art 263 provides that "The Goods must be delivered in such a way that the Buyer may take delivery thereof without hindrance. The Seller must give permission for such delivery".

[460] In Saudi law, the Seller bears the incidental expenses incurred by putting the goods in a deliverable state, unless otherwise agreed (see Case No. 1417/4/T/3 Judicial Blogs, Contract of Sale, Vol. 2 (A. H. 1417 "1996"), 173). This is similar to the position adopted in the *Hanafi* School, according to the Ottoman Courts Manual, '*al-majallah al-ahkam al-adliyyah'*, where its Art 289 provides that "Expenses connected with the delivery of the thing sold fall upon the Seller".

the Seller to send the goods to the Buyer. Therefore, the parties to a Contract of Sale must agree on whether the Seller has a duty to send the goods to the Buyer, or whether the Buyer has an obligation to take delivery of the goods from the Seller, depending in each case on the express or implicit Contract concluded between them.

4.3.3.1.2. The Seller's Obligation with Regard to 'Time of Delivery':

4.3.3.1.2.1. 'Time of Delivery' in English Law:

As explained earlier, the Seller may have an obligation to send the goods to the Buyer, or the latter may have an obligation to take delivery of the goods from the Seller. Under English law, where the Seller is bound to send the goods to the Buyer and if the time of delivery has been fixed in the Contract, the Seller must send the goods at this stipulated time.[461] Therefore, two situations need to be addressed in law.

The first of these scenarios is when the Seller is responsible for sending the goods to the Buyer, but no time of delivery is indicated by the contracting parties. Secondly, where the time for sending the goods is already established, it must be ascertained whether or not this time of delivery represents the essence of the commercial Contract of Sale. In the first scenario, section 29(3) of the 1979 Act has set out a number of provisions for the time of delivery. In this section, the Seller is bound to send the goods within a reasonable time.[462] In addition, section 29(5) provides that tender or demand for delivery must be made within a reasonable timeframe, in order to render the time of delivery effective.[463] The question here is clearly what constitutes a 'reasonable time'. In order to determine this, both section 29(3) and section 29(5) of the 1979

[461] Where the Buyer has an obligation to take delivery of the goods from the Seller, then the Seller must be ready and willing to give possession of the goods to the Buyer at the time specified in the Contract.
[462] The Sale of Goods Act 1979, s. 29(3) submits that "Where under the contract of sale the seller is bound to send the goods to the buyer, but no time for sending them is fixed, the seller is bound to send them within a reasonable time".
[463] Ibid, s. 29(5) provides that "Demand or tender of delivery may be treated as ineffectual unless made at a reasonable hour; and what is a reasonable hour is a question of fact".

Act must be read in conjunction with section 59 of said Act.

As indicated above, the concept of a reasonable time is a matter of fact and is rightly established under section 59 of the 1979 Act, which provides that *"*Where a reference is made in this Act to a reasonable time the question of what is a reasonable time is a question of fact*"*.[464] In this approach, a reasonable time is therefore determined based on the facts and circumstances of the case, according to the kind of goods covered by the Contract. At issue here will be the criteria relied upon by the court, the type of goods involved, or the place of delivery. In addition, circumstances may be to blame for untimely delivery, such as bad weather, berthing difficulties, or *force majeure.*[465] In the case of the Seller failing to deliver the goods within a reasonable time, the Contract will be deemed to have been breached. This is highlighted in the leading case of *SHV Gas Supply & Trading SAS v Naftomar Shipping & Trading Co Ltd.*[466]

In the second scenario, where the time for the Seller to send the goods to the Buyer is fixed in the Contract, the Seller must ensure that the goods are delivered on time. For this purpose, if the time of delivery is fixed as up until the end of May, delivery should take place at some point between the conclusion of the Contract and the end of May. However, delivery after 31st of May will constitute a breach of the Contract.[467] However, it should be noted that, where the Contract provides for a delivery period in May, June and July, delivery of 1/3 of the quantity contracted for may be required during each of the specified months.[468] Furthermore,

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[464] The Sale of Goods Act 1979, s. 59.

[465] The term, *force majeure* is so extensive and comprehensive that it covers the concept of external factors. English law adopts the general approach to *force majeure* (see Nwafor [N 170], 18-19)

[466] *SHV* (N24) In this case, there was an implied term that the goods would be delivered within a reasonable time, on the word of 'Laycan'. Consequently, the Court determined: "If no shipment period is specified, there is an implied term that the goods will be shipped within a reasonable time (section 29(3) of the Sale of Goods Act 1979). What was reasonable would depend on the circumstances. SHV could not be blamed for the weather or for the berthing difficulties and there was no evidence to suggest it had been dilatory in shipping the cargo" see *SHV* (N24) para 9.

[467] Similarly, if the Contract of Sale provides for delivery any time between 1st of January 2017 and 31st of December, 2017, delivery should be made within this time, thus constituting timely performance (see Schwenzer [N 5], 346).

[468] See Court of Arbitration 'ICC' (March 1998), *Award No. 9117* (ICC International Court of Arbitration 2000), 83.

where the time of delivery is not fixed in the Contract, but it is agreed that the Seller should deliver at the Buyer's request, the latter will be obliged to request delivery. If the Buyer fails to do so, then the Seller cannot be in breach.[469] However, if the Buyer makes such a request, then the Seller must deliver accordingly.

As outlined above, the Seller has an obligation to ensure that the goods are delivered on time. Failure to do so is tantamount to a breach of the Contract. However, the obvious question arising in English law is whether the time of delivery of the goods under a Contract of Sale is of the essence in a commercial Sales Contract. Under the 1979 Act, section 10, the time of delivery is not regarded as the essence of the Contract;[470] section 10(2) provides that *"*Whether any other stipulation as to time is or is not of the essence of the Contract depends on the terms of the contract.*"*.[471] This seems clear: it is the parties themselves who must determine whether or not time is of the essence in their Contract.

Nevertheless, this is not as clear-cut as it first appears; in English law, it is often found that the time of delivery is in fact the essence of the Contract, where commercial contracts are concerned. This point is also confirmed in the relevant academic commentary, with many writers claiming that under the 1979 Act, the time of delivery is the essence of the Contract in a commercial contract.[472] The English courts have also concurred with this, wherever the Contract for the Sale of Goods is a commercial contract, holding that time is often of the essence. According to McCardie in the leading case of *Hartley v Hymans,*[473] *"*In ordinary commercial contracts for the sale of goods the rule clearly is that time is prima facie of the essence with respect to delivery*"*.[474] Moreover, in *SHV Gas Supply & Trading SAS v Naftomar*

[469] This means that it is not just the time of delivery that is of the essence in a Contract; it is also the time of notice (see following case of *Bunge,* 91).
[470] *Benjamin's Sale of Goods* (N 25), 279-280.
[471] The Sale of Goods Act 1979, s. 10(2).
[472] Schwenzer states that in the English model, timely performance should amount to a condition (see Schwenzer [N 5], para 47,63; *Benjamin's Sale of Goods* (N 25), 279-280).
[473] Hartley (N 24) 475.
[474] Ibid, 484.

Shipping & Trading Co Ltd,[475] the Court gave the Buyer the right to terminate the Contract for the Sale of Goods, on the ground that the Seller had breached a condition for the time of delivery.

Notwithstanding the above, it is not only the time of delivery that is of the essence in a Contract, but also the time of notice, as highlighted in the leading case of *Bunge Corporation v Tradax SA*.[476] Here, the House of Lords affirmed that time was essential in commercial Contracts for the Sale of Goods, in the performance of many other contractual obligations.[477] Furthermore, in English law, a delivery made too early can also be discussed under the heading of time being of the essence in a Contract.[478] This was seen in the case of *Bowes v Shand,*[479] where the Buyer bought a cargo of rice to be delivered during March or April. However, the shipment actually took place in February. The Court decided that the Seller had breached the condition of the time of delivery under the Contract and therefore allowed the Buyer to terminate the Contract.

In short and as outlined above, despite the terms of section 10(2) of the 1979 Act, the time of delivery is not regarded as the essence of the Contract, but is in any case often found to be of the essence before the English courts, where the Contract for the Sale of Goods is in the course of business and unless otherwise agreed. Therefore, where the Seller breaches the condition of the time of delivery, a contractual condition is violated, giving the Buyer the right to terminate the Contract.

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[475] *SHV* (N 24).
[476] [1981] 1 WLR, 711.
[477] In this case, the Buyer bought 15,000 tonnes of soya beans, with the shipment to take place in consignments of 5,000 tonnes in May, June and July. Under this Contract, the Buyer was to give at least 15 days' notice of the vessel's probable readiness, 'by 12 of June and this term was stated as a condition'. However, the Buyer did not give notice until 17th of June. Here, the Court decided that the Seller was entitled to terminate the Contract, implying that they justifiably inferred from the delay in the required delivery that the Buyer intended to abandon the Contract (see also Beale, Chitty on Contracts (N 84), para 44-246).
[478] Schwenzer (N 5), para 47.65.
[479] *Bowes* (N 27).

4.3.3.1.2.2. 'Time of Delivery' in Saudi Law:

Similar to English law, under Saudi law, the parties to a Sales Contract can agree on whether the Seller has a duty to send the goods to the Buyer, or whether the Buyer has an obligation to take delivery of the goods from the Seller, depending in each case on the express or implied Contract between the Seller and Buyer. Therefore, in the case where the Seller is bound to send the goods to the Buyer and if the time of delivery has been fixed in the Contract, the Seller must send the goods at the contractually stipulated time. Meanwhile, where the Buyer has an obligation to take delivery of the goods from the Seller, the Seller must be ready and willing to give possession of the goods to the Buyer at this contractual time. Furthermore, in Saudi law, if the time of delivery has not been fixed in the Contract, then delivery should be on an immediate basis, "within a reasonable time". This means that the time of delivery in a Saudi Contract of Sale may either be immediate, "within a reasonable time", or postponed to another time, according to what has been agreed by the parties. The basic principle here is that goods must be delivered as soon as possible after the Contract of Sale has been concluded, unless the Seller and Buyer have set another date for delivery.[480] Irrespective of this, the question arises, in the case where the Seller is bound to send the goods to the Buyer at a time fixed in the Contract, of whether or not this represents the essence of a commercial Contract of Sale in Saudi law.

A look at case law in the Saudi commercial courts will subsequently reveal that the time of delivery is the essence of a Contract for the Sale of Goods, unless otherwise agreed. To support this, in the archives of the Saudi courts, there are many cases that have identified time of delivery as the essence of the Contract, like Case No. 344/S/3,[481] where the Seller failed to

[480] As mentioned above, in Saudi law, delivery of the goods to the Buyer may be achieved by placing them at his disposal in a manner consistent with their nature, without any entitlements (see section 4.3.3.1.1.2. 'Delivery' in Saudi Law, 87).

[481] In this case, the Court found that the time of delivery was essential to the Contract (see Judicial Blogs, Contract of Sale, Vol. 3 (A. H. 1431 "2010"), 1404-1408).

deliver the goods to the Buyer at the time established in the Contract and the Buyer therefore sought to terminate the Contract. In this situation, the Court decided that since the Seller had failed to deliver the goods to the Buyer at the time fixed in the Contract, the Seller was in breach of the contractual conditions and the Buyer was entitled to terminate the Contract.[482]

To summarise, the time of delivery in English and Saudi law can be fixed in the Contract of Sale. However, if the time of delivery has not been fixed in the Contract, then delivery should be made on an immediate basis, "within a reasonable time". This means that the time of delivery in a Contract of Sale under both regimes may be performed either on an immediate basis, "within a reasonable time" or postponed to another time, according to what has been agreed by the parties. Moreover, in both English and Saudi law, given the Seller's responsibility to send the goods to the Buyer and if the time of delivery is specified in the Contract, then the Seller must send the goods at the contractually stipulated time. Otherwise, the Seller will be in breach of the Contract and the Buyer will have the right to terminate it. This means that time of delivery is of the essence in a commercial Contract of Sale.

4.3.3.1.3. 'Place of Delivery':

4.3.3.1.3.1. 'Place of Delivery' in English Law:

In English law, under the 1979 Act, section 29(1), it is provided that the Seller may have a duty to send the goods to the Buyer, or the latter may have an obligation to take delivery of the goods from the Seller. This will depend on what has been agreed in each case by the contracting parties, whether expressly or implicitly.[483] Nevertheless, in the event that the parties to a

[482] The same was observed in Case No. 405/S/3, with the Seller failing to deliver the goods at the stipulated time. The Court subsequently decided that the Buyer had the right to terminate the Contract, since the time of delivery was of the essence in this case (see Judicial Blogs, Contract of Sale, Vol. 3 (A. H. 1431 "2010") 1409-1420).

[483] The Sale of Goods Act 1979, s. 29(1) provides: "Whether it is for the buyer to take possession of the goods or for the seller to send them to the buyer is a question depending in each case on the contract express or implied, between the parties." See also section 4.3.3.1.1.1. 'Delivery' in English Law, 86.

Contract have not agreed on the responsibility to deliver the goods, then section 29(2) of the 1979 Act makes provision for the place of delivery of the goods, stating that this should be the Seller's place of business and if there is no place of business, then the Seller's residence must apply:

> Apart from any such contract express or implied, the place of delivery is the seller's place of business if he has one, and if not, his residence; except that, if the contract is for the sale of specific goods, which to the knowledge of the parties when the contract is made are in some other place, then that place is the place of delivery.[484]

In this section, there are two elements: first, if the Contract of Sale is for specific goods and the goods are in another place that is known to the contracting parties, then the place of delivery will be the place where the goods are known to be located at the time of creating the Contract. Second, in all other cases in commercial contracts, the place of delivery will be the Seller's place of business. This means that it is the Buyer's duty to collect the goods.[485] From the above, it would seem evident that the place of delivery of the goods is the Seller's place of business, unless otherwise agreed, with the Buyer being responsible for taking possession of the goods from the Seller. Thus, in English law, it is basically the Buyer's duty to collect the goods, rather than the Seller's duty to send them, unless otherwise agreed.[486]

4.3.3.1.3.2. 'Place of Delivery' in Saudi Law:

As in English law, the parties to a Contract for the Sale of Goods under Saudi law can also agree that the Seller has a duty to send the goods to the Buyer, or that the latter has an obligation

[484] The Sale of Goods Act 1979, s. 29 (2).
[485] Beale, Chitty on Contracts (N 84), para 44-242; *Atiyah and Adams' Sale of Goods (N 35)*, 98.
[486] Furthermore, as explained earlier, the expenses of and incidental to putting the goods into a deliverable state are presumptively borne by the Seller, unless otherwise agreed, according to section 29(6) of the Sale of Goods Act 1979. However, section 29(6) does not deal with the expenses of the actual delivery. Here, the rule is that, unless otherwise agreed, the expenses of and incidental to making delivery of the goods must be borne by the Seller, but those of and incidental to receiving delivery must be borne by the Buyer (see also Beale, Chitty on Contracts (N 84), para 44-254; Bridge (N 29), 272; section 4.3.3.1.1.1. 'Delivery' in English Law, 86).

to take delivery of the goods from the Seller.[487] However, in the case where the parties to the Contract have neither expressly nor explicitly agreed on this matter, then the place of delivery will be the place where the goods are situated when the Contract for the Sale of Goods is concluded.[488]

From the above, it would appear that in Saudi law, where the parties to a Contract for the Sale of Goods have not agreed on terms for the place of delivery, then the place of delivery will be the place where the goods are situated when the Contract for the Sale of Goods is concluded. In these circumstances, Saudi law will recognise a place of delivery that is not the Seller's place of business. The question then arises of what happens regarding the Buyer's responsibility to take possession of the goods from the Seller, where the goods are not in the Seller's place of business. Here, the place of delivery will simply be the place where the goods are situated. This is because the Buyer has a responsibility to take possession of the goods and must therefore know where the goods are situated when the Contract of Sale is concluded.

By contrast, English law recognises the Seller's place of business as the place of delivery. As a result, if the parties to a Contract have not agreed on the responsibility to deliver the goods, then the place of delivery will be the Seller's place of business. However, if the goods are not located at the Seller's place of business, then their location at the time of concluding the Contract, which is known to the Parties at the time, will be the place of delivery.[489] Therefore, English law is clearer on this point, because there is a condition that the location of the goods must be known to the parties when the Contract is concluded.

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[487] See section 4.3.3.1.1.2. 'Delivery' in Saudi Law, 87. This is also the case in the *Hanafi* School, according to the Ottoman Courts Manual, *'al-majallah al-ahkam al-adliyyah'*, where its Art 287 provides that "Property sold with a condition for delivery at a given place must be delivered at that place".

[488] Al-Sanhūrī (N 48), 595. This is similar to the position adopted in the *Hanafi* School, according to the Ottoman Courts Manual, '*al-majallah al-ahkam al-adliyyah*, where its Art 285 provides that "In an unconditional contract the Goods must be delivered at the place where it was when the sale was concluded".

[489] See section 4.3.3.1.3.1. Place of Delivery in English Law, 93.

4.3.3.1.4. 'Quality of the Goods':

4.3.3.1.4.1. 'Quality of the Goods' in English Law:

In English law, under the Contract for the Sale of Goods, where the Contract is in the course of business, there is an implied provision that deals with the quality and fitness of the goods supplied by the Seller to the Buyer.[490] For instance, section 14(2) of the 1979 Act provides that *"*Where the seller sells goods in the course of a business, there is an implied term that the goods supplied under the contract are of satisfactory quality*"*.[491] This section is applied exclusively to the Seller selling goods in the course of business[492] and it contains one of the most important provisions in the Contract for the Sale of Goods, because most disputes arising therefrom refer to alleged defects in the quality of goods supplied by the Seller to the Buyer.[493] Therefore, the function of this section is to provide a basis for resolving such disputes.[494]

Section 14(2A) and (2B) of the 1979 Act set out the standard proposing that the goods must be of satisfactory quality.[495] To determine whether goods are of satisfactory quality, their fitness for purpose must be ascertained, according to the purposes for which goods of this kind are commonly supplied, along with their durability, safety, freedom from minor defects, appearance, and finish.[496] Furthermore, section (2C) deals with public statements disclosing

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[490] In English law, the terms implied by section 14(2) of the Sale of Goods 1979 Act are conditions. Section 14(6) of the above Act provides that "As regards England and Wales and Northern Ireland, the terms implied by subsections (2) and (3) above are conditions".

[491] Ibid, s. 14 (2).

[492] Consumer contracts are now dealt with by the Consumer Rights Act 2015, with the Contract of Sale for a consumer being entirely beyond the scope of the present thesis (see section 1.3. Scope and Limitations of the Thesis), 4.

[493] Nevertheless, liability for breach of this obligation can be excluded under section 55 of the Sale of Goods Act 1979, where the Buyer is not a consumer, but only if the obligation is reasonable under the Unfair Contract Terms Act 1977; see also section 2.2.2.2. The Unfair Contract Terms Act 1977, 22.

[494] Twigg-Flesner has noted that the Seller's obligations as to the quality of goods are "at the very heart of the law of sale" and are "in many respects the most important part" of that law (see *Atiyah and Adams' Sale of Goods* (N 35), 157; Sales Law Review Group (N 138), 148; Law Commission (N 444), para 27).

[495] The Sale of Goods Act 1979, s. 14(2A) provides that "For the purposes of this Act, goods are of satisfactory quality if they meet the standard that a reasonable person would regard as satisfactory, taking account of any description of the goods, the price (if relevant) and all the other relevant circumstances".

[496] Ibid, s. 14(2B) provides that "For the purposes of this Act, the quality of goods includes their state and condition and the following (among others) are in appropriate cases aspects of the quality of goods; (a) fitness for all the purposes for which goods of the kind in question are commonly supplied, (b) appearance and finish, (c) freedom from minor defects, (d) safety, and (e) durability". See *Atiyah and Adams' Sale of Goods (N 35)*, 136-137.

information on the quality of goods issued by a Seller to a Buyer. Therefore, any public statement by the Seller concerning the effect of the goods will protect him through subsection 14(2C)(a).[497] Section 14(3)[498] extends this to the purpose for which the goods are being purchased, whereby there is an implied term that the goods should be fit for this purpose.[499]

In the context of the above, it must be assumed that the provisions of sections 14(2A), (2B), (2C) and section 14(3) of the 1979 Act should be analysed as follows: section 14(2) especially submits that the goods supplied by the Seller to the Buyer must be of a satisfactory quality. This is determined with the help of an objective test, namely how a reasonable person would regard quality; taking into consideration the description, price and other factors in respect of the goods. This test is specifically referred to in section 14(2A) of the 1979 Act: *"*For the purposes of this Act goods are of satisfactory quality if they meet the standard that a reasonable person would regard as satisfactory, taking account of any description of the goods, the price (if relevant) and all the other relevant circumstances.*"*[500] To apply this, the court would consider whether a reasonable person would regard the goods as being of satisfactory quality. This assessment is in fact made objectively, in relation to what an ordinary, 'reasonable' person would think and not according to the Buyer's personal opinion.

In the leading case of *Aswan Engineering v Lupdine,*[501] the Buyer bought a liquid waterproofing product, described as being 'heavy duty' and suitable for storage outside. However, the Buyer stored the product outside in temperatures of up to 70°C, whereby it melted and was ruined. The Court held that "a reasonable user could have used the goods for the purposes for which they are commonly supplied". Consequently, no breach of Section 14 was

[497] The Sale of Goods Act 1979, s. 14(2C).
[498] Ibid, s. 14(3).
[499] In English law, the terms implied by sections 14(2) are conditions; according to the 1979 Act, s. 14(6), "As regards England and Wales and Northern Ireland, the terms implied by subsections (2) and (3) above are conditions".
[500] The Sale of Goods Act 1979, s. 14(2A).
[501] [1987] 1 All ER, 135.

found, as it was the extreme conditions under which the product was stored that had caused it to melt, while a "reasonable user could have used the goods without incurring damage".[502]

It should be noted that in section 14(2) of the 1979 Act, there is nothing mentioned to restrict the application of its provisions to new, as opposed to second-hand goods. This means that section 14(2) of the Act applies equally to new and second-hand goods, where these are sold in the course of business.[503] In support of such a legal stance, according to the leading case of *Bartlett v Sidney Marcus Ltd,*[504] where the Buyer bought a second-hand car and then submitted a claim based on section 14,[505] Lords Denning, Danckwerts and Salmon stipulated that

> In the absence of an express warranty, [this] was the most that the buyer of a second-hand car could require; that a second-hand car was of merchantable quality "which is later amended in the 1979 Act to satisfactory quality" and complied with the implied condition in section 14(2) of the Sale of Goods Act 1893.[506]

Furthermore, section 14(2) and section 14(2A) of the 1979 Act must be read in conjunction with section 14(2B). The latter section provides that the satisfactory quality of goods is represented by their fitness for all intended purposes; their appearance; freedom from minor defects; safety, and durability,[507] although there are several other factors that can increase or decrease levels of satisfaction with the quality of goods.[508]

Nevertheless, the 1979 Act provides certain limitations over the application of section 14(2), contained in section 14(2C), which should be analysed here. For instance, under

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[502] *Aswan* (N 501).
[503] *Atiyah and Adams' Sale of Goods* (N 35), 161.
[504] [1965] 1 WLR, 1013.
[505] However, the Buyer could not assert any rights under section 14 by virtue of section 14(2C), because the Seller had brought the defect to the attention of the Buyer.
[506] *Bartlett* (N 504) (see section 6.2.1.1.1. The Buyer's Right to Reject Goods for Breach of Terms of Quality in English Law, 201).
[507] The Sale of Goods Act 1979, s. 14(2B).
[508] Ibid, s. 14(2) provides: "…taking account of any description of the goods, the price (if relevant) and all the other relevant circumstances."

subsection 14(2C)(a) of the 1979 Act, there is an implied duty for the Seller to disclose any defects in the goods to the Buyer, prior to the Contract being formed. Thus, any public statement by the Seller concerning the effect of the goods will protect him through subsection 14(2C)(a) of the 1979 Act, pertaining to satisfactory quality.[509] This is because English law does not obstruct or prevent second-hand or substandard goods being sold. Therefore, the rule on unsatisfactory quality does not operate fairly where the Seller has specifically drawn the Buyer's attention to the true state of the goods, before the Contract is concluded. Therefore, in order to enable second-hand and substandard goods to be sold, a statement is required from the Seller as to the state of the goods. This will protect him through subsection 14(2C)(a).[510]

In the leading case of *Bartlett v Sidney Marcus Ltd*,[511] where the Buyer purchased a second-hand car, the Seller notified the Buyer that the clutch was defective. This amounted to a minor repair costing £2-£3. The Seller gave him the choice of either taking the car as it was, but at a reduced price (a £25 deduction), or alternatively, the Seller would repair it and charge the full price. The Buyer decided to accept the first option. However, it emerged that the fault would cost £84 to repair and so the Buyer sought to bring a claim under section 14 of the 1979 Act. Lords Denning, Danckwerts and Salmon stipulated that "The seller had brought the defect to the attention of the buyer and therefore the buyer could not assert any rights under section 14 by virtue of section 14(2C)".[512]

The second limitation to the application of section 14(2), which provides under its subsection 14(2C)(b) that[513] where the Buyer examines the goods in a way that should reveal the defect, but fails to do so, he will have no grounds on which to complain that the quality of

[509] The Sale of Goods Act 1979, s. 14(2C)(a) provides that "The term implied by subsection (2) above does not extend to any matter making the quality of goods unsatisfactory (a) which is specifically drawn to the buyer's attention before the contract is made".
[510] Law Commission (N 444), paras 49-52.
[511] *Bartlett* (N 504).
[512] Ibid, 1013.
[513] The Sale of Goods Act 1979, s. 14(2C)(b) provides as follows: "Where the buyer examines the goods before the contract is made, which that examination ought to reveal."

the goods is unsatisfactory.[514] This is because English law distinguishes between two potential situations: first, a Buyer examining the goods before a Contract is concluded, who does not trouble to find a defect and fails to do so, and second, a Buyer who is sufficiently diligent to examine the goods, where there is a defect that is not easily ascertained. Between these two situations, the former should not be put in a better position than the latter. [515]

The third limitation to the application of section 14(2), provided by its subsection, 14(2C)(c), bears upon goods bought on the basis of a sample. Here, it is assumed that defects will become apparent on a reasonable examination of the sample,[516] which is consistent with subsections 14(2C)(b) and 15(2)(c) of the 1979 Act.[517] This exclusion is presumably grounded on the assumption that a sample will be examined in the case of a sale by sample, although the Buyer may choose not to do so. Under these circumstances, it is appropriate that the Buyer should not be in a better position than the Buyer who is diligent enough to examine the goods, but fails to discover a defect that is difficult to find.[518] Therefore, section 14(2) of the 1979 Act must be read in conjunction with its subsections 14(2C)(a), (b) and (c).

Returning to the Seller's liability under section 14, the Seller is also liable for ensuring that the goods correspond to the purpose for which they were purchased. Under the 1979 Act, section (14)(3), regardless of the specific purpose for which the goods are being bought, implies the condition that they must be fit for that purpose.[519] Thus, where the Buyer has disclosed to the Seller his intended use for the goods, then the goods should be reasonably fit for such a

[514] It should be noted that, before the Contract of Sale is made, the Buyer is not obliged to examine the goods.
[515] Law Commission (N 444), para 47.
[516] The Sale of Goods Act 1979, s. 14(2C)(c) provides that "In the case of a contract for sale by sample, this would have been apparent on a reasonable examination of the sample".
[517] Law Commission, (N 18) paras 62-71.
[518] *Sales Law Review Group* (N 138), 165-167.
[519] The Sale of Goods Act 1979, s. 14(3) provides that "…any particular purpose for which the goods are being bought, there is an [implication] that the goods supplied under the contract are reasonably fit for that purpose, whether or not that is a purpose for which such goods are commonly supplied, except where the circumstances show that the buyer does not rely, or that it is unreasonable for him to rely, on the skill or judgment of the seller or credit-broker."

purpose, whatever it might be.[520]

As a test of fitness for purpose, the court will consider whether a reasonable Buyer could use the goods for purposes for which such goods are commonly supplied. In the leading case of *Aswan Engineering v Lupdine,*[521] when the Buyer bought waterproofing material in plastic pails to be used in Kuwait at temperatures of up to 70°C, the goods purchased were not fit for that purpose. However, the Court did not find the Seller to be in breach of its duty, since the goods were fit for most ordinary purposes. Conversely, if the Buyer had disclosed to the Seller that the goods would be used outside in temperatures of up to 70°C, the Court may have given the Buyer the right to reject the goods.[522]

As outlined above, where the Contract for the Sale of Goods is in the course of business, there is an implied provision that the goods supplied by a Seller to a Buyer are of satisfactory quality, pursuant to section 14(2) of the 1979 Act and fit for their intended purpose under section (14)(3). Therefore, to summarise, the 1979 Act provides certain limitations to the application of section 14(2), contained within 14(2C).[523] First, public statements disclosing information on the quality of the goods and issued by the Seller concerning the effect of the goods will protect the Seller based on subsection 14(2C)(a). The second limitation to the application of section 14(2) is provided by subsection 14(2C)(b) of the Act, where the Buyer examines the goods in a manner that ought to reveal the defect but fails to do so. In such a circumstance, the Buyer will not be able to complain that the quality of the goods is unsatisfactory. Meanwhile, the third limitation to the application of section 14(2) is provided in its subsection 14(2C)(c), where goods are bought on the basis of a sample and where any defect should have been apparent in a reasonable examination of that sample. Section 14(2) of

[520] Law Commission, (N 87), 22-23.
[521] *Aswan* (N 501).
[522] Because under English law, the terms implied by section 14(3) are in fact conditions.
[523] This is due to several reasons (see section 4.3.3.1.4.1. 'Quality of the Goods' in English Law, 96).

the 1979 Act must therefore be read in conjunction with subsections 14(2C)(a), (b) and (c) of the above Act.[524]

4.3.3.1.4.2. 'Quality of the Goods' in Saudi Law:

Equally, in Saudi law, the quality of the goods must be satisfactory, and they must be free from any defects. This means that if the goods supplied by the Seller to the Buyer are not of a satisfactory quality, or if they have defects, the Seller will be in breach of the Contract,[525] even if the goods are sold without this being stipulated as a contractual condition.[526] In addition, the goods must be fit for the purposes for which they were sold. This may be specified in the Contract itself, or when the parties agree over the basic purpose of concluding the Contract.[527]

In Saudi law, the satisfactory quality of the goods refers to their fitness for the purpose for which they were supplied, referring to their condition on delivery. Here, other factors should be accounted for, such as the fitness of the goods for the purposes that such goods are usually supplied to fulfil; their appearance and finish; their freedom from minor defects; their safety, and their durability. These conditions also extend to all extraneous items supplied under the Contract. For the purpose of satisfactory quality, the court will consider the opinion of a reasonable person. Therefore, this assessment is made objectively, in terms of what an ordinary,

[524] Nevertheless, the liability for breach of obligations under section 14(2) of the Sale of Goods Act 1979 can be excluded, so long as it is reasonable and where the Contract for the Sale of Goods is in the course of business (see section 2.2.2.2. The Unfair Contract Terms Act 1977, 22).

[525] Nevertheless, in the same way as in English law, liability for a breach of this obligation under Saudi law may be excluded by a contractual provision. This means that in the case where the Seller provides as such, he should be immune from any claim on account of a defect. As a result, the Buyer will not have any option on account of the defect found in the goods. This is similar to the position adopted in the *Hanafi* School, according to the Ottoman Courts Manual, '*al-majallah al-ahkam al-adliyyah*', Art 342, which provides that *"*If the vendor sells property subject to the condition that he shall be free from any claim on account of any defect, the purchaser has no option on account of the defect found therein*"*. Art 343 then provides that "If a purchaser buys property, including all defects, he cannot make any claim on account of any defect found therein". However, English law is clearer on this point; since there is the limitation that an exclusion must be reasonable under the Unfair Contract Terms Act 1977.

[526] This is also the case in the *Hanafi* School, according to the Ottoman Courts Manual, '*al-majallah al-ahkam al-adliyyah'*, where Art 336 provides that "In an unconditional sale, the thing sold must be free from any defect. That is to say, although property is sold without stipulating that it shall be free from faults, and without stating whether it is sound, or bad, or defective, or free from fault, such property nevertheless must be sound and free from defect".

[527] Mohammed Abd El Aal, *Agreement on Contractual Negotiations* (Dar Al Nahdhah Al Arabia 1998), 142.

'reasonable' person would think and not according to the Buyer's personal opinion.[528]

Furthermore, similar to English law, the Seller's liability for the quality of the goods will apply equally to new and second-hand goods under Saudi law. In support of this, Case No. 52/T/3, [529] may be cited, where the Buyer bought second-hand buses, which he inspected. This Buyer subsequently applied to terminate the Contract, because the buses were defective. However, the Court rejected this request, which was grounded in a defect in the goods, because the Buyer had examined the goods with due diligence and accepted them. In this case, the Court did not reject the Buyer's claim on the ground of the Seller's liability for the quality of the goods only applying to new goods, but rather because the Buyer had examined and then accepted them.

Moreover, in the same way as English law, there are certain limitations in Saudi law, which protect the Seller from claims against a defect in the goods. The first of these limitations consists of a statement from the Seller to the Buyer concerning the effect of the goods, aimed at protecting the Seller from actions based on a defect in the goods.[530] This is because Saudi law has similarly avoided rendering it impossible for substandard goods to be sold. However, in this case, the Seller has an implied duty to disclose any defects in the goods to the Buyer, prior to the Contract being formulated.[531]

To support the Seller with regard to a defect in goods, where a Buyer has already been made aware of such defects before concluding a Contract of Sale, Case No. 332/S/3[532] may be noted. Here, the Buyer claimed for a termination of the Contract, because the goods were

[528] Al-Sanhūrī (N 48), 714-723.
[529] Judicial Blogs, Contract of Sale, Vol. 2 (A. H. 1428 "2007"), 396.
[530] Al-Sanhūrī (N 48), 727.
[531] This is similar to the position adopted in the *Hanafi* School, according to the Ottoman Courts Manual, '*al-majallah al-ahkam al-adliyyah',* where Art 341 provides that "If the Seller declares at the time of sale that there is a defect in the thing sold, and the Buyer accepts the thing sold with the defect, he has no option on account of such defect". See section 6.2.3.2.1. The Buyer's Right to Terminate the Contract According to the Defect Option (*Khayar al-Aib*), 228.
[532] Judicial Blogs, Contract of Sale, Vol. 3 (A. H. 1431 "2010"), 1256.

defective. However, the Seller proved to the Court that the Buyer was aware of the goods being defective on concluding the Contract. In this situation, the Court decided to reject the Buyer's request to terminate the Contract, because he was aware of the defects in the goods at the time of concluding the Contract. The rationale behind this provision is that liability is drawn for cases where the Buyer is unaware of any defects in the goods. Conversely, if the Buyer knows about these defects before concluding the Contract, but accepts them with their defects, then the Seller is protected.[533]

The second limitation consists of the Buyer examining the goods before concluding the Contract, whereby the defect is apparent. In this case, the Seller will not be held liable, as the defect is apparent to the Buyer, although he has not made an objection. It will thus constitute evidence that he has approved the goods along with their defect.[534] The same applies to goods sold by sample, where a defect could have been noted on a reasonable examination of the sample. However, the question arises over the criteria for identifying whether a defect is apparent. This is ascertained according to whether the defect could have been detected through the efforts of a reasonable person. If not, then the defect will not be deemed to have been apparent.[535]

To summarise, the Seller's liability for the quality of goods under English and Saudi law, in Contracts for the Sale of Goods, is implied in a provision for the quality and fitness of goods supplied by the Seller to the Buyer, whereby goods must be satisfactory, free from any defects,[536] and reasonably fit for the purposes for which they are sold.[537] However, both regimes have provided for certain limitations to the application of the Seller's liability for the

[533] This is also the case in the *Hanafi* School (see the Ottoman Courts Manual, '*al-majallah al-ahkam al-adliyyah',* Art 343).
[534] Such as in Case No. 52/T/3, where the Court decided to reject the Buyer's request on the grounds that he had examined the goods with due diligence and the defect had been apparent; see case No. 52/T/3, 103.
[535] Al-Sanhūrī (N 48), 714-723.
[536] See section 4.3.3.1.4. 'Quality of the Goods', 96.
[537] This may be specified in the Contract itself, or when both parties agree upon the basic purpose of concluding the Contract, namely what they seek to achieve from it.

quality of the goods.[538] These refer to public statements disclosing information on the quality of the goods, and to the Buyer examining the goods to reveal detectable defects that are not in fact detected. These limitations also apply to goods bought on the basis of a sample, where defects would be apparent on a reasonable examination of that sample. In each case, the Buyer will not be able to claim that the quality of the goods is unsatisfactory.[539]

4.3.3.1.5. The 'Quantity of Goods':

4.3.3.1.5.1. 'Quantity of Goods' in English Law:

In English law, where the Seller delivers the goods to the Buyer, it is provided that the quantity of the goods must conform to what has been agreed under the Contract for the Sale of Goods. If this is not the case, then section 30 of the 1979 Act addresses the matter of delivering the wrong quantities. Here, where the Seller delivers the wrong quantity of goods to the Buyer, the Contract for the Sale of Goods is deemed to have been breached by that Seller. However, the 1979 Act distinguishes between two situations: the Seller delivering a quantity of goods to the Buyer that is less than the contractual quantity, or the Seller delivering in excess of the contractual quantity. By way of a remedy for the Buyer, the above Act considers the former to be a breach of the Contract, regardless of whether this difference is slight.[540]

In the second situation mentioned above, where a Seller delivers a quantity of goods that exceeds what has been contracted, the Seller will be deemed to have breached the Contract and

[538] That is for a number of reasons: see section 4.3.3.1.4. 'Quality of the Goods', 100-101, 104-105.

[539] In English and Saudi law, the liability for breach of this obligation can be excluded by a contractual provision. Nevertheless, English law is clearer on this point, since this provision is limited by the requirement of reasonableness (see section 2.2.2.2. The Unfair Contract Terms Act 1977, 22).

[540] Nevertheless, under no circumstances can a Seller protect himself from the consequences of a delivery that falls short of the contractual quantity by promising a completed delivery in due course, because section 31(1) of the Sale of Goods Act 1979 provides that "Unless otherwise agreed, the buyer of goods is not bound to accept delivery by instalments".

section 30(2) of the 1979 Act makes provision for this,[541] with a remedy for the Buyer that distinguishes between a slight and significant excess in the delivery of goods.[542]

4.3.3.1.5.2. 'Quantity of Goods' in Saudi Law:

In Saudi law, the Seller also has a duty to deliver the goods in the right quantities, namely the quantities that the Buyer has agreed to purchase. Under Islamic Commercial Law, according to the Holy Qur'an in *Surah Al-Muţaffifīn*, it is emphasised that the Seller must deliver the goods in the correct weights and measures: *"*Woe to those who give less [than due], who, when they take a measure from people, take in full. But if they give by measure or by weight to them, they cause loss.*"*[543] However, this verse does not prescribe any legal consequences for failing to observe the commandment,[544] although this does not mean that there is no remedy for the Buyer, if the Seller delivers the wrong quantity of goods.[545]

Similar to English law, Saudi law distinguishes between two situations: less than the contractual quantity,[546] or in excess of the contractual quantity. In each case, Saudi law also distinguishes between whether or not this difference is slight.[547]

To summarise, therefore, the quantity of goods to be supplied by the Seller to the Buyer under both English and Saudi law must be delivered in the quantities indicated in the Contract for the Sale of Goods. However, both regimes differentiate between a Seller delivering an excess quantity of goods to the Buyer, and a Seller failing to deliver the full quantity of goods contracted for. Moreover, both English and Saudi law distinguish between slight and major

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[541] The Sale of Goods Act 1979, s. 30(2) provides that "Where the seller delivers to the buyer a quantity of goods larger than he contracted to sell, the buyer may accept the goods included in the contract and reject the rest, or he may reject the whole".
[542] See section 6.2.1.2.1. The Buyer's Right to Reject the Goods for Breach of Terms of Quantity in English Law, 207.
[543] The Holy Qur'an at Surah *Al-Muţaffīfīn* 83:1-3 { وَيْلٌ لِلْمُطَفِّفِينَ (1) الَّذِينَ إِذَا اكْتَالُوا عَلَى النَّاسِ يَسْتَوْفُونَ (2) وَإِذَا كَالُوهُمْ أَوْ وَزَنُوهُمْ يُخْسِرُونَ }
[544] See section 2.3.1.1.1.1. How the Holy Qur'an Explains the Legality of a Contract for the Sale of Goods, 32.
[545] See section 6.2.1.2.2. The Buyer's Right to Reject the Goods for Breach of Terms the Quantity in Saudi Law, 210.
[546] Furthermore, in Saudi law, the Buyer has the right to reject the goods, if they are supplied in instalments by the Seller, unless otherwise agreed in advance by the parties to the Contract; see Al-Sanhūrī (N 48), 571.
[547] Al-Sanhūrī (N 48), 573.

breaches of contractual quantities, but do not permit a delivery of goods to be supplied to a Buyer in instalments, unless this has been previously agreed between the contracting parties. Finally, if a Seller breaches the obligation to deliver goods to a Buyer in the right quantities, both English and Saudi law provide remedies for the Buyer.[548]

Where Goods Are Sold by Description:

In English and Saudi law, where goods are sold by description, there must be "conformity with description". In English law, for example, there is an implied term that goods must correspond to their description, according to section 13(1) of 1979 Act,[549] in a condition stipulated in section 13(1A), which provides that in England, the term implied in section 13(1) is a condition.[550] This is because English law provides a very strict interpretation of the above section, whereby even a minor departure from the contractual description will entitle the Buyer to reject the goods. This will be irrespective of the fact that the goods are of satisfactory quality and fit for the purpose for which they were bought, within the meaning of section 14(2) of the 1979 Act.[551] Consequently, any breach of this section will give the Buyer the right to reject the goods.[552]

To illustrate the above, in the leading case of *Arcos v Ranaason* [1933],[553] the Buyer bought wooden staves for making barrels. These staves were described as being a 1/2 inch thick. However, some of the staves delivered by the Seller failed to conform to this measurement.[554] Therefore, although there was nothing wrong with the quality of the wood and

[548] See section 6.2.1.2. The Buyer's Right to Reject the Goods for Breach of Terms of Quantity, 207.
[549] The Sale of Goods Act 1979, s. 13(1) provides that "Where there is a contract for the sale of goods by description, there is an implied term that the goods will correspond with the description".
[550] Ibid, s. 13(1) provides that "As regards England and Wales and Northern Ireland, the term implied by subsection (1) above is a condition".
[551] Law Commission (N 444), para 21; *Atiyah and Adams' Sale of Goods* (N 35), 132.
[552] It should be noted that section 13 does not deal with quality or fitness for purpose. Therefore, the goods may be of satisfactory quality, but not correspond to their description.
[553] [1933] AC, 470.
[554] It should be noted that in this case, the staves delivered were not slightly different from the specification of being 1/2 an inch thick and so the Court decided that the Buyer had the right to reject the goods. However, according to the amended

it could still have been used for the intended purpose of making barrels, the Court found that the Seller had breached the Contract, because the goods were not as described.

Furthermore, if there is any breach of the description of quantity, then the Seller will be in breach of the Contract, even if the goods supplied to the Buyer are of the same contractual quantity, but packed or presented differently. To clarify this point, in the leading case of *Re Moore & Landauer* [1921],[555] where the Buyer bought 3,100 cans of peaches, the Contract described the tins as packed in cases of 30. However, the Seller delivered 3,100 tins of peaches packed in cases of 24. The Court subsequently found that the Seller had breached the Contract, because the goods were not as described, even though they had been delivered in the same total quantity.

Saudi law resembles English law, where goods are sold by description, in that the goods must correspond to the description. If not, then the Seller will be deemed to have breached the Contract, even if the goods are of satisfactory quality and in the quantity indicated in the Contract. Nevertheless, although the Buyer has the right to reject the goods,[556] the Seller may also have the right to cure defective performance.[557]

To summarise, in both English and Saudi law, where the goods are sold by description, they must correspond to that description, irrespective of their quality or quantity. However, in English law, even a minor departure from the contractual description will entitle the Buyer to reject the goods, because English law interprets section 13 of the 1979 Act very strictly.[558]

section 15A covering non-consumer sales, where the breach is found to be sufficiently slight, the Buyer cannot reject the goods.

[555] [1921] 2 KB, 519.

[556] See section 6.2.1.3.2. The Effect of Rejecting the Goods in Saudi Law, 213.

[557] See section 5.3.4.2. The Seller's Right to Cure Defective Performance in Saudi Law, 176.

[558] Se case of *Arcos*, 107; see also case *Re Moore*, 108.

4.3.4. Obligations of the Buyer in the Contract for the Sale of Goods:

Under English and Saudi law, the Buyer has an obligation to accept delivery of the goods in accordance with the terms of the Contract, paying the price for them on the date stipulated in the Contract. Such obligations are imposed by both English and Saudi law, but additional obligations[559] may be agreed between the parties to a Contract.[560] For instance, the Buyer has the obligation to give notice of delivery and this is a condition in English law.[561] The Buyer's obligations in English and Saudi law are discussed in more detail below.

4.3.4.1. The Buyer's Obligation to Accept Delivery of the Goods:

4.3.4.1.1. The Buyer's Obligation to Accept Delivery of the Goods in English Law:

There are obligations imposed on the Buyer under Part IV of the 1979 Act, where section 27 presents the obligations of the Buyer. Here, two important obligations are imposed, namely the obligation to accept the goods and the obligation to pay the price. It thus follows that the Buyer is obliged to accept the goods and pay for them in accordance with the terms of the Contract of Sale.[562] Nevertheless, in English law, the Buyer must not reject the goods in a wrongful manner, but only as prescribed by the 1979 Act. Therefore, there must be justifiable reason for rejecting the goods, as set out in section 30[563] and section 15(A).[564]

To clarify the above, in English law, the Buyer must accept the goods under the rules of

[559] Additional obligations agreed between the parties themselves and not imposed by law will not be discussed here, because there could be many additional obligations agreed between the Seller and the Buyer, and as such, they cannot be limited.
[560] English and Saudi law gives adequate flexibility to the contracting parties to choose their own terms and conditions and the atmosphere in which they would like to enter into the Contract, as well as the manner in which one party expects the other to perform his contractual obligation. This means that in general, the parties to a Contract are free to agree to the terms of their choosing, provided that these terms are not at odds with the law (see section 2.2.5.1. Freedom of Contract (in English Law), 27, section 2.3.4.2. Freedom of Contract (in Saudi Law), 42.
[561] *Bunge* (N 476).
[562] The Sale of Goods Act 1979, s. 27 provides that "it is the duty of the seller to deliver the goods, and of the buyer to accept and pay for them, in accordance with the terms of the contract of sale".
[563] See section 6.2.1.2.1. The Buyer's Right to Reject Goods for Breach of Terms of Quantity in English Law, 207.
[564] See section 6.2.1.1.1. The Buyer's Right to Reject Goods for a Breach of Terms of Quality in English Law, 201.

acceptance set out in sections 34 and 35 of the 1979 Act. Conversely, he loses the right to reject the goods under section 11 and section 53(1) of the above Act, if he elects to treat a breach of conditions as a breach of warranty. It should also be noted that under English law, if the Buyer has the right to reject the goods, he is not liable to return them to the Seller unless otherwise agreed, according to section 36 of the 1979 Act.[565] Nevertheless, for the general rule of liability, the Buyer must give the Seller notice of rejecting the goods. Furthermore, if the Buyer has an obligation to take delivery of the goods,[566] as requested by the Seller, then he must do so within a reasonable time. According to section 37(1) of the 1979 Act, the Buyer must take delivery when the Seller is ready to deliver the goods and requests the Buyer to accept them. The Buyer must then do so within a reasonable time. If the Buyer fails to take delivery within a reasonable time, he will be liable to the Seller for any damages incurred.[567]

However, the question that arises in this regard is whether the time for taking delivery of the goods is essential to the Contract. In fact, where the Buyer has a responsibility to collect the goods from the Seller, the time of collection is not the essence of the Contract, unless otherwise agreed. This is because the time of taking delivery and the time of payment should be the same.[568] Additionally, in English law, the time of payment is not the essence of the Contract, unless a different intention appears in the contractual terms, pursuant to the 1979 Act, section 10(1).[569]

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[565] The Sale of Goods Act 1979, s. 36 provides that "Unless otherwise agreed, where goods are delivered to the buyer, and he refuses to accept them, having the right to do so, he is not bound to return them to the seller, but it is sufficient if he intimates to the seller that he refuses to accept them".

[566] Under section 29(1) of the Sale of Goods Act 1979, the parties to a Contract can agree that the Seller has an obligation to send the goods to the Buyer, or the latter will be liable to take possession of the goods from the Seller. However, where they have not expressly or implicitly agreed on this, then the Buyer must take possession of the goods from the Seller's place of business or the place of the goods. Under the above Act, section 29(2) provides that the place of delivery is the Seller's place of business or the place of the goods, where the Contract of Sale is for specific goods (see also section 4.3.3.1.3.1. Place of Delivery in English Law, 93; *Atiyah and Adams' Sale of Goods* (N 35), 98; Beale, Chitty on Contracts (N 84), para 44-242).

[567] The Sale of Goods Act 1979, s. 37(1) provides that "when the seller is ready and willing to deliver the goods, and requests the buyer to take delivery, and the buyer does not within a reasonable time after such request take delivery of the goods, he is liable to the seller for any loss occasioned by his neglect or refusal to take delivery, and also for a reasonable charge for the care and custody of the goods".

[568] *Atiyah and Adams' Sale of Goods* (N 35), 236-237.

[569] See section 4.3.4.2.2.1. Time of Payment in English Law, 114.

4.3.4.1.2. The Buyer's Obligation to Accept Delivery of the Goods in Saudi Law:

In Saudi law, the Buyer has an obligation to accept the goods in accordance with the terms of the Contract of Sale. Therefore, the Buyer cannot reject the goods in a wrongful manner, but only as prescribed by Saudi law, such as when the Seller delivers defective goods.[570] In the same way as English law, where the Buyer is obliged to take possession of the goods from the Seller, Saudi law stipulates that he should accept them at the time and place specified in the Contract.[571] However, if the time has not yet been ascertained or agreed between the parties, the Buyer should take immediate delivery of the goods, with a timespan being allowed for their receipt. Nevertheless, the question in this instance is whether the time for taking delivery of the goods is essential to the Contract under Saudi law.

In Saudi law, the time when the Buyer must take delivery of the goods is not essential to the Contract, unless otherwise agreed by the parties to the Contract. In support of such a legal stance, according to Case No 96/D/32/1,[572] concerning a Contract for the Sale of Goods, the Buyer was obliged to take possession of the goods from the Seller, but failed to do so at the time agreed in the Contract. Moreover, he refused to pay the price for them. The Seller claimed for the price of the goods and the Court sentenced the Buyer to pay this price and take delivery of the goods from the Seller.[573]

To summarise, a Buyer's obligation to accept the delivery of goods under English and Saudi law means accepting the goods within the terms of the Contract. Consequently, the Buyer must not reject the goods in a wrongful manner, but only as prescribed by the relevant legal

[570] See section 6.2.1.1.2. The Buyer's Right to Reject Goods for a Breach of the Terms of Quality in Saudi Law, 205.
[571] As discussed above, under the Contract of Sale in Saudi law, the Seller may have an obligation to send the goods to the Buyer, or the latter may have an obligation to take possession of the goods from the Seller, according to the terms of the Contract (see section 4.3.3.1.1.2. 'Delivery' in Saudi Law, 87).
[572] 96/D/32/1/ (A. H. 1432 "2011"). See also Case No. 35/3/448; Judicial Blogs, Contract of Sale, Vol. 5 (A. H. 1435 "2014"), 2322.
[573] Nevertheless, in this case, the Seller also claimed compensation for storage expenses. However, the Court not decided to award them, even though Islamic law is clear and sweeping enough to include all damages.

regime. Furthermore, where the Buyer has an obligation to take delivery of the goods, then he must do so, but the time of collecting the goods from the Seller is not the essence of the Contract, unless otherwise agreed.

4.3.4.2. The Obligation of the Buyer to Pay the Price for the Goods:

In English and Saudi law, the second main obligation of the Buyer under the Contract for the Sale of Goods is to pay the price of the goods. The following section explains this liability of the Buyer, including determining the price to be paid, as well as the time and place of payment.

4.3.4.2.1. The Price to Be Paid:

In this section, the topic addressed will not be a matter of the type of consideration in a Contract of Sale, which must be money,[574] but rather the price to be paid to the Seller. This will be clarified as the price to be paid for the goods under English and Saudi law.

4.3.4.2.1.1. The Price to Be Paid for the Goods in English Law:

As discussed earlier, section 27 of the 1979 Act stipulates an obligation for the Buyer to pay the price of goods that he has accepted. The parties to the Contract may agree that this payment must be made in cash. In English law, 'payment in cash' means the Seller being able to use the money immediately, as in an immediate transfer.[575] However, English law does not bind the Seller to accept payment solely in cash; he may accept it in the form of a cheque or bill of exchange, although in the case of the latter, the Seller is entitled to retain the goods until the bill has been paid.[576] The question then arises of how to ascertain the price to be paid by the

[574] This has already been discussed in section 3.2.4. The Consideration to be paid for the Goods Should Be Monetary, 65.

[575] See *Awilco of Oslo A/S v Fulvia SpA di Navigazione of Cagliari* (The Chikuma). Here, it was found that where a clause in a charterparty requires payment of hire 'in cash', the payment must be in something as good as cash and capable of earning immediate interest. The Court consequently held that payment 'in cash' meant something as good as cash, which was not the case where the credit transfer could not be used to earn immediate interest; see [1981] 1 WLR, 314; see also Beale, Chitty on Contracts (N 84), para 21-046.

[576] See section 5.3.1. The Rights of the Unpaid Seller,140; see also section. 38(1)(b) of the 1979 Act; section 3(1) of the Bills of Exchange Act 1882; *Atiyah and Adams' Sale of Goods* (N 35), 231.

Buyer to the Seller in a Contract for the Sale of Goods under English law, namely "the price which must be paid".

In English law, the price that the Buyer is obliged to pay can be determined by looking at the Contract concluded by the parties, or as stated in *"*the course of dealing between the parties*"*. These rules for determining the price are set out under section 8(1) of the 1979 Act: *"*The price in a contract of sale […] fixed by the contractor may be left to be fixed in a manner agreed by the contractor [or] may be determined by the course of dealing between the parties.*"*[577]

Therefore, the price can either form part of the main Contract, or be ascertained at a later date through a supplementary agreement or separate Contract, provided that the amount determined is by mutual consent or decided during the parties' dealings with each other. Otherwise, the price may be determined under section 8(2) of the 1979 Act, which covers instances where the price has not yet been ascertained or agreed between the parties. In such a scenario, section 8(2) specifically provides that the Buyer is bound to pay a reasonable amount to the Seller as a price for the goods.[578]

The question emerging from this is whether the price demanded from the Buyer by the Seller is a reasonable price for the goods. According to section 8(3) of the 1979 Act: *"*What is a reasonable price is a question of fact dependent on the circumstances of each particular case.*"*[579]

4.3.4.2.1.2. The Price to Be Paid for the Goods in Saudi Law:

Equally, in Saudi law, the Buyer must pay the price for the goods in accordance with a

[577] The Sale of Goods Act 1979, s. 8(1).
[578] Ibid, s. 8(2) provides that "Where the price is not determined as mentioned in sub-section (1) above the Buyer must pay a reasonable price".
[579] Ibid, s. 8(3).

mechanism addressed by the Contract, which constitutes an obligation to pay the contractually stipulated price. Nevertheless, if the Contract is silent on this point, a price may be calculated at a later date through a supplementary agreement, provided that the amount determined is by mutual consent. If not, then the Buyer must pay the price that is decided in the course of dealing between the parties. Finally, in the absence of any of the above arrangements, the Buyer must pay a price deemed to be reasonable for the goods.[580] The notion of a reasonable price for goods under the Contract of Sale of Goods in Saudi law draws upon certain mechanisms, which can be adopted in this respect, according to the market price as a measure for identifying the price.[581] Moreover, in Saudi law, the Buyer shall bear the expenses of paying the price of the goods, unless otherwise agreed.[582]

4.3.4.2.2. Time of Payment:

4.3.4.2.2.1. 'Time of Payment' in English Law:

When the time of payment has not been decided by the parties to a Contract, it is presumed that the Buyer will pay the price of the goods at such time as the Seller expresses a wish to deliver them, as per the provisions of section 28 of the 1979 Act.[583] As discussed above, if no time of payment is specified in the Contract of Sale, then the payment of the price and delivery of the goods shall be a concurrent condition, according to section 28 of the 1979 Act.[584]

The question then arises as to who should fulfil their obligation first, the Seller or the Buyer? As under section 28 of the 1979 Act, delivery and payment are to be made

[580] Al-Sanhūrī (N 48), 783.
[581] Ibid, 364-376.
[582] This is also the case in the *Hanafi* School, according to the Ottoman Courts Manual, '*al-majallah al-ahkam al-adliyyah,* where Art 288 provides that "Expenses connected with the price fall upon the Buyer".
[583] The Sale of Goods Act 1979, s. 28 provides that "Unless otherwise agreed, delivery of the goods and payment of the price are concurrent conditions, that is to say, the seller must be ready and willing to give possession of the goods to the buyer in exchange for the price and the buyer must be ready and willing to pay the price in exchange for possession of the goods".
[584] See section 4.3.1. Obligations of the Seller and Buyer under English Law, 80.

simultaneously. However, section 28 of the 1979 Act does not prescribe payment of the price of the goods as a condition precedent for the Seller, who has an obligation to deliver the goods.[585] Instead, it provides that the Buyer should be "ready and willing" to pay the price. Nevertheless, under the 1979 Act, the unpaid Seller has rights over the goods themselves,[586] whereby the Buyer is not entitled to claim possession of the goods, unless he is ready and willing to pay the price for them under the Contract. This is because the Seller retains his ordinary right to retain the goods, pending payment of the price. Moreover, section 39(2) of the 1979 Act confirms the Seller's right to withhold delivery.[587] Conversely, the Buyer's failure to fulfil an obligation may result in a breach of the Contract for the Sale of Goods; whereby the 1979 Act provides remedies for the Seller.[588] As a result, it may be deduced that it is the Buyer who should fulfil his obligation first, because if he fails to pay the price of the goods, he is not entitled to claim possession of them.

That said, it should be noted that as a general rule, the time of payment does not represent the essence of a Contract, unless a different intention appears in the terms of the Contract, pursuant to the 1979 Act, section 10(1).[589] What must be ascertained in the case where a security deposit is made against payment under a Contract for the Sale of Goods is whether the time of payment of this deposit is the essence of the Contract. To clarify this further, where the Buyer fails to pay a deposit on the date provided for in the Contract, does this entitle the Seller to terminate the Contract?[590] In the leading case of *Portaria Shipping Co v Gulf Pacific*

[585] *Benjamin's Sale of Goods* (N 25), para 8-004.
[586] See section 5.3.1. The Rights of the Unpaid Seller, 140.
[587] Hibbert (N 76), para 4; see also *Atiyah and Adams' Sale of Goods (N 35)*, 231.
[588] See section 5.3.2.1. The Seller's Right to Claim the Price of the Goods in English Law, 162.
[589] Section 10(1) of the Sale of Goods Act 1979 provides that "Unless a different intention appears from the terms of the contract stipulations as to time of payment are not of the essence of a contract of sale".
[590] In English law, the fact of any other stipulation as to time being the essence of the Contract will depend on the terms of the Contract, according to section 10(2) of Sale of Goods Act 1979. As a consequence, the time of payment of a deposit or other advance payment being the essence of the Contract will depend on the intention of the parties and will be ascertained by construing the Contract. Therefore, the time for payment of a deposit will not be the essence of the Contract unless rebutted, either by express words or according to the intention of the parties to the Contract. See Beale, Chitty on Contracts (N 84), para 44-301.

Navigation Co Ltd,[591] where the Contract provided that a 10% deposit should be made on the purchase price within a period of 48 hours, the Buyer failed to pay within this time limit and so the Seller proposed terminating the Contract. The Court decided that the terms of payment, consisting of a deposit of 10% within 48 hours, was a condition that the Buyer failed to meet and so the Seller was entitled to terminate the Contract. In the above case, the Court found that the payment of a deposit as security in the correct execution of a Contract was interpreted as rendering the time of payment of this deposit essential to the Contract.[592]

To summarise the above, under English law, the time of payment of the price of goods is not generally the essence of a Contract, unless a different intention is expressed in the terms of that Contract. As a result, if the Buyer fails to pay the price of the goods at the time agreed in the Contract, but time is not the essence of that Contract, the Seller will have the right to claim for the price of the goods and will also be entitled to claim for special damages,[593] namely suing for the late payment of commercial debts.[594]

4.3.4.2.2.2. 'Time of Payment' in Saudi Law:

In Saudi law, the Buyer has the obligation to pay the price of the goods on the date provided for in the Contract.[595] In cases where the Contract of Sale is silent on this matter, delivery and payment will be taken as concurrent conditions.[596] As a general rule, in Saudi law, the parties to a Contract have the right to agree on the time of payment. Nevertheless, it should be noted that where the Contract of Sale is for the sale of gold, the time of payment and time of delivery shall be considered as concurrent conditions, or else the Contract of Sale will become invalid

[591] [1981] 2 Lloyd's Rep, 180.
[592] Bridge (N 29), 320-321.
[593] See section 5.3.6.2.1. The Seller's Right to Claim for Special Damages in English Law, 189.
[594] In English law, statutory interest may be payable under the Late Payment of Commercial Debts (Interest) Act 1998. This contains specific provisions for the calculation of the date from which statutory interest starts.
[595] Abdullah Hassan, *Sales and Contracts in Early Islamic Commercial Law* (3rd edn, The Islamic Research Institute 2007), 364-376.
[596] See section 4.3.2. Obligations of the Seller and Buyer in Saudi Law. 81.

under Saudi law.[597] The origin of the above provision is the *Hadith* of the Prophet Mohammad (peace be upon him), where it is stated, *"*Gold for gold is interest unless both hand over on the spot*"*.[598] This means that in a Saudi Contract of Sale for gold, the goods must be handed over at the time of payment and whoever defers payment causes the Contract to enter into *Riba*. This was found by the Saudi Courts in Case No. 361/S/3,[599] where a Buyer bought gold, but the time of delivery and payment of the price were not concurrent conditions. As a result, the Seller delivered the gold to the Buyer, but the latter refused to make the payment. The Seller subsequently claimed for the price, but the Court decided to invalidate the Contract, because it had entered into usury (see also Case Nos. 34/T/S/195;[600] 275/S/3,[601] and 695/S/3).[602]

Aside from the above, regarding a time of payment that has been fixed in a Contract, the question arises of whether this time of payment represents the essence of the Contract in Saudi law. In the Saudi courts, when a Buyer wrongfully neglects or refuses to pay for goods according to the terms of a Contract, the Seller may have the right to terminate that Contract. In this regard, there are numerous cases of the Saudi courts accepting the Seller's claim to terminate a Contract, where the Buyer has wrongfully neglected or refused to pay for the goods. However, although the Seller has this right before the Saudi courts, he is not entitled to exercise it while it is still possible for the Buyer to fulfil his obligation. In such a situation, the Seller predominantly has the right to recover the price of the goods,[603] because the performance of the Contract takes precedence over terminating it under Saudi law.[604]

It can therefore be seen that if there is no express right stipulated in a Contract, as regards

[597] This is because the Contract will enter into *Riba,* which is prohibited under Islamic law (see section 2.3.4.1. Islamic Commercial Law and its Effect on the Contract of Sale, 40).
[598] Kahn (N 189), *Hadith* No. 1586.
[599] Judicial Blogs, Contract of Sale, Vol. 3 (A. H. 1430 "2009"), 1007.
[600] Ibid, Vol. 2(A. H. 1427 "2006"), 1075.
[601] Ibid, Vol. 3(A. H. 1431 "2010"), 1220.
[602] Ibid, Vol. 3(A. H. 1431 "2010"), 1251.
[603] See section 5.3.2.2. The Seller's Right to Recover the Price of the Goods in Saudi Law, 165.
[604] It should be noted that the Seller only has the right to the price of those goods, rather than the right to interest on overdue sums (statutory interest), because this would otherwise lead to usury (*Riba*), which is prohibited under Islamic law.

the time of payment of any sums due being the essence of the Contract, then the time of payment is not of the essence. Nevertheless, it is far more common for an express time of payment to be indicated as the essence of a Contract by the Seller in a Contract of Sale. This is because, in the case of a Buyer failing to pay the price of the goods, the Seller only has the right to the price of those goods, rather than to interest on overdue sums (statutory interest), because this would lead to *Riba*, which is prohibited under Islamic law.[605] By accepting this effect, in the case where it is stipulated in a Contract, Saudi law provides that time is of the essence and if the Buyer refuses to make the payment in respect of that time, the Seller has the right to terminate the Contract. To support this, in the archives of the Saudi courts, there are many cases of the Seller claiming to terminate a Contract, because the Buyer refused to pay the price of the goods, as in Case No. 159/T/3.[606] Here, the Buyer refused to pay for the goods and the Seller had not yet delivered the goods to the Buyer, so the Seller applied to terminate the Contract of Sale. This was likewise decided by the Court.

To summarise, the time of payment in English and Saudi law may be legitimately agreed upon by the contracting parties. However, Saudi law has a different approach in Contracts of Sale where gold is the subject matter. In such instances, the time of payment and time of delivery are considered as concurrent conditions, or else the Contract of Sale will be invalid.[607] The reason for this lies in the prohibition of *Riba* under Islamic Law,[608] but there is no such prohibition under English law, even if the Contract enters into usury. Here, the Contract remains valid and remedies are available in the event of a breach of the Contract.

However, under both the above-mentioned legal regimes, if the time of payment has not been decided by the contracting parties, then it is presumed that the Buyer will pay the price of

[605] See section 5.3.6.2.2.1. The Position of Saudi Law on Charging Interest for Overdue Sums, 192.
[606] Judicial Blogs, Contract of Sale, Vol. 2(A. H. 1429 "2008"), 684.
[607] See Case Nos. 34/T/S/195(N 615); Case Nos. 361/S/3, 275/S/3 and 695/S/3, 117.
[608] See section 2.3.4.1. Islamic Commercial Law and Its Effect on the Contract of Sale, 40; section 3.2.3.2.1. The Goods Must Be Legal, 59.

the goods at the time when the Seller states that he will deliver them. Furthermore, the time of payment is not of the essence in a Contract in either English or Saudi law, unless a different intention appears under the terms of the Contract. The most important differences between English and Saudi law consist of the Seller's right to claim for special damages, resulting from the late payment of commercial debts. In English law, where the Buyer fails to pay the price of the goods at the time agreed in the Contract, the Seller has the right to claim interest on overdue sums (statutory interest). However, in Saudi law, the Seller only has the right to the price of the goods, rather than the right to late payment interest, because this would constitute *Riba*. Therefore, in English law, the Seller has a greater entitlement to compensation for damages, compared to Saudi law, which imposes more constraints in this regard, based on the underpinning principles of Islamic law.

4.3.4.3. Place of Payment:

4.3.4.3.1. 'Place of Payment' in English Law:

The parties to a Contract of Sale under English law are permitted to agree on the place of payment, but where this is not specified in the Contract, the general rule is that the Buyer has a duty to pay the price of the goods at the Seller's place of business or residence.[609] In the leading case of *Robey & Co v Snaefell Mining,*[610] there was no agreement as to the place of payment and so the Court held that the payment should be received at the Seller's place of business.

4.3.4.3.2. 'Place of Payment' in Saudi Law:

Under the Contract for the Sale of Goods in Saudi law, the contracting parties may agree to the

[609] Beale, Chitty on Contracts (N 84), para 21-056.
[610] [1887] 20 QBD, 152.

place of payment, either explicitly or implicitly. However, when the place has not yet been ascertained, or has not yet been agreed upon by the parties, then the price shall be paid in the place where the goods are delivered. [611]

To summarise the above, the place of payment in both English and Saudi law may be agreed upon by the contracting parties. However, where this has not been agreed, the above regimes adopt different approaches. In English law, the place of payment is the Seller's place of business or residence, whereas in Saudi law, it is the place where the goods are delivered. Therefore, this place of delivery could be the Seller's place of business. However, if the Seller has a duty to send the goods to the Buyer, then the place of payment will be the place where the goods are delivered.

From the above, it would appear that in Saudi law, where the parties to a Contract for the Sale of Goods have not agreed on the place of payment, the place of payment will be the place of delivery. This differs from English law, where the place of payment is the Seller's place of business or residence. Nevertheless, the question arises in Saudi law over what happens when the Seller has a duty to send the goods to the Buyer, and the time of payment and delivery of the goods are a concurrent condition. In such circumstances, the Seller has the right to withhold delivery until the Buyer pays the price of the goods, while the Buyer has the right to pay the price of the goods at the place of delivery. However, who must fulfil their obligation first, the Seller or the Buyer? Here, it could be said that it is the Seller who must fulfil his obligation first, because if he fails to deliver the goods, he will not be entitled to ask the Buyer to pay the price for them. Conversely, under English law, it is the Buyer who must fulfil his obligation first, because if he fails to pay the price of the goods, he will not be entitled to ask the Seller to deliver them. As a result, English law does not link the place of delivery with the place of

[611] Al-Sanhūrī (N 48), 795.

payment.

4.4. The Role of Good Faith in the Performance of the Contract for the Sale of Goods:

Under the Contract for the Sale of Goods in English and Saudi law, the regimes differ in their approach to the principle of good faith. Therefore, it will be ascertained here whether the contracting parties have a duty to perform the Contract in good faith and whether this has any effect on the outcomes. Consequently, this section is intended to assess the position of each of these legal regimes as regards the role of good faith in the performance of Contracts for the Sale of Goods. The rationale in this section is to attempt to locate such a principle in English and Saudi law.[612]

This section is in three parts: the first presents, explains and analyses the notion of good faith; the second ascertains whether English law regards good faith as an obligation in the performance of a Contract for the Sale of Goods, and the third clarifies the position of Saudi law on the obligations of parties to a Contract for the Sale of Goods to perform a Contract in good faith.

4.4.1. Definition of 'Good Faith':

The principle of good faith indicates honesty and fair dealing (covenant, honesty, legitimate trust and honour in transactions).[613] More specifically, it consists of the desire to avoid harming others, while taking any necessary precautions and avoiding carelessness, so as to ensure the enforcement of duties under a Contract of Sale. [614] Under the 1979 Act, the wording, 'good faith' can be found in section 61(3): *"*A thing is deemed to be done in good faith within the

[612] It must be borne in mind that in a Contract of Sale of Goods, the notion of good faith will vary during the negotiation and performance of the Contract. Therefore, only the role of good faith in the performance of Contracts for the Sale of Goods will be identified here.

[613] Vanessa Sims, 'Good Faith in Contract Law: Of Triggers and Concentric Circles' (2005) 2 King's Law Journal, <https://doi.org/10.1080/09615768.2005.11427612> accessed, 02 September 2017.

[614] Ibid.

meaning of this Act when it is in fact done honestly, whether it is done negligently or not.*"*[615] The 1979 Act therefore associates two main terms with good faith: honesty and the avoidance of carelessness. Likewise, in Saudi law, good faith means parties maintaining honesty and justice in a Contract of Sale. Moreover, it constitutes leniency in private or commercial transactions.[616]

In fact, the requirements of good faith will depend on fixed ethical foundations and principles upheld by a community. These foundations and principles represent a set of values and ideals, which dominate in dealings between individuals in that community. As a result, the community will regard the requirements of good faith as sophisticated, but also general and abstract principles. It will then elevate these customarily to serve as legal rules pertaining to honesty, legitimate trust and honour in transactions, even if these requirements do not include a legislative text.[617]

Nevertheless, the definition of good faith has rarely been set out in enactments[618] and so defining it is a controversial affair; it *"*lacks a fixed meaning because it is loose and amorphous*"*.[619] Furthermore, this task is assigned to lawyers and judges, giving them the opportunity and broad authority to deal with the principle of good faith in Contracts of Sale:[620] *"*an elusive term [good faith] best left to lawyers and judges to define over a period of time as

[615] The Sale of Gods Act 1979, s. 61(3).
[616] Mohd. Ma'sum Billah, *Applied Islamic Law of Trade and Finance: A Selection of Contemporary Practical Issues* (Sweet & Maxwell Asia 2007), 27.
[617] B. Al-Sauid, *On the Theory of The General Principle of Good Faith in the Civil Transaction* (PhD thesis, University of Cairo 1989), 89-100.
[618] However, the definition of good faith has been provided by the Uniform Commercial Code (UCC) Act No. 174, 1962 in the US, especially section 440.1201(19). This can be attributed to a specific definition of the term, 'good faith', which came about following several legal theories developed by the US courts. The latter deemed good faith to mean sincerity in implementing what has been agreed upon, while also taking into account the interests of the counterparty when contracting. This section submits that: "'Good faith' means honesty in fact in the conduct or transaction concerned." Section 2-103(b) of the UCC submits that "'Good faith' in the case of a merchant means honesty in fact and the observance of reasonable commercial standards of fair dealing in the trade".
[619] Friedrich Juenger, 'Listening to Law Professors Talk about Good Faith: Some Afterthoughts' (1994-1995) 69 Tulane Law Review, 1253-1254.
[620] Paul J. Powers, 'Defining the Indefinable: Good Faith and the United Nations Convention on the Contracts for the International Sale of Goods' (1999) 18 Journal of Law and Commerce, 333.

circumstances require.*"* [621] Thus, although it is vitally important to define good faith in Contracts of Sale, it is quite clearly not the mission of lawmakers to draft a definition of it. This task is instead assigned to lawyers and judges.

As a result, there have been numerous definitions of good faith developed by jurists. For example, Tetley defines it thus: *"*What is meant by the necessity of performing a contract with good faith is that it is necessary to abide by honesty and faithfulness and to seek economy and moderation in performance so that it does not become disastrous to the other contracting party.*"*[622] Tetley also points out that it is *"*faithfulness to an agreed common purpose and consistency with the justified expectations of the other party*"*.[623]

According to O'Connor, the notion of good faith is

> a fundamental principle derived from the rule 'pacta sunt servanda' and other legal rules distinctively and directly related to honesty, fairness and reasonableness, which supplements or supersedes normally applicable rules when this is necessary to ensure that the standards of honesty, fairness and reasonableness which prevail in the community also prevail in English law.[624]

Meanwhile, Powers points out that it is *"*an expectation of each party to contract that the other will honestly and fairly perform his duties under the contract in a manner that is acceptable in the trade community*"*.[625]

As can be seen from the above, however, these attempts are not accurate or specific enough to establish a legal definition of good faith in the Contract of Sale. Instead, they merely apply general and moral concepts, such as honesty and sincerity. This terminology therefore

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[621] Powers (N 620), 333.
[622] William Tetley, 'Good Faith in Contract: Particularly in the Contracts of Arbitration and Chartering' (2004) 35 Journal of Maritime Law & Commerce, 594; see also Robert Kolb, 'Principles as Sources of International Law (with Special Reference to Good Faith)' (2006) 53(1) Netherlands International Law Review, 7.
[623] Ibid, 20.
[624] John F. O'Connor, *Good Faith in English Law* (1st edn, Dartmouth Publishing Co Ltd. 1990), 11.
[625] Powers (N 620), 352.

needs to be legally specified, so that it will be easier to discern breaches. As explained above, good faith is an abstract and comprehensive term, which encompasses a sincere belief or motive, without any malice and with no desire to defraud others. However, existing definitions of good faith are not precise or specific enough to establish a legal definition of good faith; they merely apply general and moral concepts, such as honesty and sincerity. [626]

Finally, it should be noted that the principle of good faith in performing a Contract of Sale does not simply mean that the parties should not deceive each other – which is a principle any legal system must recognise;[627] it rather indicates a desire to avoid harming others, especially the parties to a Contract, while taking any necessary precautions and avoiding carelessness, so as to ensure that obligations are met.[628] In addition, good faith sets an objective standard for observing reasonable commercial standards of fair dealing in the conclusion and performance of transactions.[629] Furthermore, it does not require the sacrifice of self-interest for the benefit of the other contracting party. [630]

4.4.2. The Position of English Law on Good Faith in the Performance of the Contract for the Sale of Goods:

English law does not recognise good faith as an obligation for the performance of the Contract of Sale of Goods.[631] Therefore, in the 1979 Act, parties to a Contract of Sale have no specific duty to perform the Contract in good faith.[632] In the 1979 Act, the wording, 'good faith' is

[626] Mahmoud Fayyad, 'Measures of the Principle of Good Faith in European Consumer Protection and Islamic Law: A Comparative Analysis' (2014) 28 Arab Law Quarterly, 217

[627] Bingham LJ in the leading case of *Interfoto*, stated that "In many civil law systems, and perhaps in most legal systems outside the common law world, the law of obligations recognises and enforces an overriding principle that in making and carrying out contracts parties should act in good faith; this does not simply mean that they should not deceive each other, a principle which any legal system must recognise" (*Interfoto Picture Library Ltd. v Stiletto Visual Programmes* [1989] Q.B. 433 439).

[628] Sims (N 613).

[629] Johan Steyn, 'Contract Law, Fulfilling the Reasonable Expectation of Honest Men' (1997) 113 Law Quarterly Review 438.

[630] Michael Bridge, 'Good Faith, the Common Law, and the CISG' (2017) 22(1) Uniform Law Review, 99.

[631] Helen Pugh, *Contracts: God Faith* (Sweet & Maxwell Ltd. Westlaw UK 2018) paras 1 and 2.

[632] In English law, the term 'good faith' is defined in sections 23, 24-25 and 47(2) of the Sale of Goods Act 1979 and in sections 8 and 9 of the Factors Act 1889, However, these have not provided for good faith as an obligation of the parties to perform the Contract (see section 4.4.1. The Definition of 'Good Faith' 121).

found in section 23, in relation to the transfer of title to goods under a voidable Contract.[633] Furthermore, section 24 of the 1979 Act[634] and section 8 of the Factors Act[635] provide for the transfer of property by a non-owner, or a person with a defective title: "the sale by seller continuing in possession." Nevertheless, these do not address the Seller's obligation to perform the Contract in good faith, rather than the exception of a Seller in possession of the goods.[636] Moreover, neither is the term, 'good faith' in section 25 of the 1979 Act[637] and section 9 of the Factors Act[638] deemed to refer to obligations of the parties to perform the Contract in good faith, so much as to the exception of the Buyer in possession of the goods.[639] Furthermore, section 47(2) of the 1979 Act provides for a document of title to goods, which has been lawfully transferred to any person as Buyer or owner of the goods, who then transfers the document to a person who takes it in good faith and for valuable consideration.[640] Similarly, however, this section does not provide that good faith is an obligation of the parties in their performance of the Contract for the Sale of Goods.

Consequently, English law does not recognise an implicit duty binding the Seller or Buyer to perform a Contract for the Sale of Goods in good faith. Moreover, English law is even convinced of the irrelevance of good faith as a general principle of Contract Law. This is because English law is able, by virtue of more detailed rules, to ensure fairness in contracts;[641] achieving the same results without needing to apply a general principle of good faith to contractual performance.[642] Therefore, even though English law does not recognise an implicit

[633] The 1979 Act, s. 23 provides that "When the seller of goods has a voidable title to them, but his title has not been avoided at the time of the sale, the buyer acquires a good title to the goods, provided he buys them in good faith and without notice of the seller's defect of title" (see also Bridge [N 29], 168-167).
[634] The Sale of Goods Act 1979, s. 24.
[635] The Factors Act 1889, s. 8.
[636] Delivery of possession of the goods or documents of title to the second buyer.
[637] The Sale of Goods Act, 1979 Act, s. 25.
[638] The Factors Act 1889, s. 9.
[639] This is because English law aims to give a degree of protection to a *bona fide* Buyer; see Grant Gilmore, 'The Commercial Doctrine of Good Faith Purchase' (1954) 36(8) Yale Law School, 1057.
[640] The Sale of Goods Act 1979, s. 47(2).
[641] Bridge (N 630), 105-107.
[642] See case of *Interfoto*,127

duty of good faith binding the Seller or Buyer to perform a Contract for the Sale of Goods. this does not necessarily mean that the aggrieved party is without a remedy.

Furthermore, *"*the English courts are extremely reluctant to consider good faith as an appropriate doctrine in cases that raise questions of good faith between contracting parties*"*.[643] Their excuse is that the judge has no authority to determine the contracting parties' common intention, but can only rely on what they have explicitly agreed with "contractual certainty".[644] Nevertheless, this should not be understood as English law recognising bad faith or encouraging it in the dealings of contracting parties with each other. It is rather a case of bad faith being dealt with thoroughly through other devices, such as duress, undue influence, etc.,[645] which have a relationship with the notion of good faith as an overarching principle.[646]

In consequence, the English courts do not recognise a breach of contract, if the contracting parties have not attempted to deceive each other. In the leading case of *Smith v Hughes,*[647] when the Seller sold new oats by sample and the Buyer believed that he was purchasing the old oats, the Seller was aware that the Buyer was mistaken about the condition of the oats, but omitted to inform him that the oats were new. Moreover, the price was considered to be very high for the new oats at the time. Cockburn CJ thereby ruled that the Seller had not breached the Contract, explaining that

> The buyer persuaded himself they were old oats, when they were not so; but the seller neither said nor did anything to contribute to his deception. He has himself to blame. The question is not what a man of scrupulous morality or nice honour would do under such circumstances.[648]

[643] Al-Othman (N 163), 24.
[644] P.D.V. Marsh, *Comparative Contract Law: England, France, Germany* (1st edn, Gower Publishing Ltd. 1994), 178.
[645] English law relies upon distinct solutions, such as misrepresentation, duress and the unusual and onerous terms of doctrine to counter perceived unfairness; see also Pugh (N 631), para 6.
[646] See the case of *Interfoto,* 127; see also Beale, Chitty on Contracts (N 84), 28; Al-Othman (N 163), 24-25.
[647] *Smith v Hughes* [1871] LR 6 QB 597.
[648] Ibid, 603.

In the above case, Blackburn J ruled out the role of good faith and relied on the principle of *caveat emptor* (let the buyer beware) in his decision, as he clarified in the following statement:

> Even if the vender was aware that the purchaser thought that the section possessed that quality, and would not have entered into the contract unless he had so thought, still the purchaser is bound, unless the vendor was guilty of some fraud or deceit upon him. A mere abstinence from disabusing the purchaser of that impression is not fraud or deceit, for, whatever may be the case in a court of morals, there is no legal obligation on the vendor to inform the purchaser that he is under a mistake which has not been induced by the act of the vendor.[649]

Aside from this, there are many cases in English law, where judges have remained sceptical about needing a general requirement of good faith.[650] For example, in the leading case of *Interfoto Picture Library Ltd v Stiletto Visual Programmes,*[651] Lord Bingham LJ explained the tendency of the English courts to scrutinise fairness in contracts by applying specific doctrines, rather than a general principle such as good faith:

> English law has, characteristically, committed itself to no such overriding principle but has developed piecemeal solutions in response to demonstrated problems of unfairness. Many examples could be given. Thus, equity has intervened to strike down unconscionable bargains. Parliament has stepped in to regulate the imposition of exemption clauses and the form of certain hire-purchase agreements. The common law also has made its contribution, by holding that certain classes of contract require the utmost good faith.[652]

In this case, Lord Bingham LJ observed that English law is able to achieve fairness in contracts, by virtue of more detailed rules that produce the same results, without applying a general

[649] *Smith*, (N 647) 607.
[650] Bradgate (N 164), 26.
[651] [1989] Q.B. 433, 439).
[652] Ibid, 439.

principle of good faith to contractual performance.

Further evidence of this may be observed in the leading case of *Associated Japanese Bank (International) Ltd v Credit du Nord SA;*[653] whereby Lord Steyn stated: *"*I have no heroic suggestion for the introduction of a general duty of good faith in our contract law.*"*[654] It may be understood from this extract that English Contract Law has no requirement of good faith in contracts. Lord Steyn continued:

> It is not necessary. As long as our courts always respect the reasonable expectation of parties our contract law can be left to develop in accordance with its own pragmatic traditions. And where in specific contexts duties of good faith are imposed on parties our legal system can readily accommodate such a well tried notion after all there is not a world of difference between the objective requirement of good faith and the reasonable expectation of parties.[655]

It should be noted that the position of English law on the role of good faith in contracts is not limited to the performance phase, but extends to the pre-contractual phase.[656] This can be seen from the attitude adopted by the House of Lords,[657] particularly in *Walford v Miles;*[658] which asserted that a duty to negotiate in good faith is invalid, stating:

> The concept of a duty to carry on negotiations in good faith is inherently repugnant to the adversarial position of the parties when involved in negotiations. Each party to the negotiations is entitled to pursue his or her own interest, as long as he avoids making misrepresentations.[659]

In this case, Lord Ackner declared that *"*a duty to negotiate in good faith was unworkable in

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[653] [1988] 3 All ER 902. See also Steyn (N 629), 439; Bradgate (N 164), 29.
[654] Ibid.
[655] Ibid.
[656] Stathis Banakas, 'Liability for Contractual Negotiations in English Law: Looking for the Litmus Test' (2009) Vol. 1 InDret, 12-13.
[657] The House of Lords had ruled in very strong terms that there was no role to be accorded to such a principle in the adversarial world of contract formation. However, this firm stance did not rule out good faith in the performance of contracts, but there was no relish for the adoption of such a principle in that area. See Bridge (N 630), 105-107
[658] *Walford v Miles* [1992] 2 A.C. 128.
[659] Ibid.

practice and inherently inconsistent with the position of a negotiating party, since while the parties were in negotiation, both were entitled to break off the negotiations at any time and for any reason,"[660] which still denies the existence of a general obligation to negotiate in good faith.[661]

Nevertheless, it cannot be denied that some English judges have attempted to include a general contractual responsibility towards good faith, such as the decision issued over *Mellish v Motteaux*;[662] where Lord Kenyon stated that:

> There are certain moral duties which philosophers have called duties of imperfect obligation, such as benevolence to the poor, and many others, which courts of law do not enforce. But in contracts of all kinds, it is of the highest importance that courts of law should compel the observance of honesty and good faith.[663]

Further observations can be made in *Yam Seng Pte Ltd v International Trade Corp Ltd,*[664] where Leggatt JJ is cited as saying: *"*the traditional English hostility towards a doctrine of good faith in the performance of contracts, to the extent that it still persists, is misplaced.*"*[665] Furthermore, in *Carter v Boehm*,[666] an insurance case, Lord Mansfield stated that *"*the governing principle is applicable to all contracts and dealings. Good faith forbids either party from concealing what he privately knows, to draw the other party into of a bargain, from ignorance of that contrary"[667] In this case, Lord Mansfield attempted to include a general responsibility towards good faith in all contracts, but did not succeed, because it was only imported into English law in the context of an insurance contract. Thus, its scope is narrowly

[660] *Walford*, (N 658) 138.
[661] Banakas (N 656), 12-13.
[662] [1792] 170 ER 113, 157.
[663] Ibid.
[664] [2013] 1 CLC 662.
[665] Ibid, 701.
[666] [1766] 3 Burr 1905.
[667] Ibid*,* 1910. See also Beale, Chitty on Contracts (N 84), para 1-039.

drawn and excludes Contracts of Sale.[668]

In fact, as mentioned previously, such attempts to establish a general responsibility to perform a Contract for the Sale of Goods in good faith under English law have ultimately failed, as English law can equally achieve fairness in Contracts, without applying a general principle of good faith to contractual performance.[669] As result, English law does not currently recognise a universal implied duty of good faith incumbent on contracting parties in the performance of their obligations under the Contract for the Sale of Goods. Nevertheless, where there is an express stipulation of a duty of good faith in the Contract for the Sale of Goods, with regard to the performance of a Contract, the question arises of whether it is recognised under English law.

To answer this question, the leading case of *Compass Group UK and Ireland Ltd (t/a Medirest) v Mid Essex Hospital Services NHS Trust,*[670] may be examined, where the Court found that in the event of the parties to a Contract of Sale wishing to impose the requirement of good faith in contractual performance, they should do so expressly. This is because it was deemed to only apply to specific areas of the Contract, but was not an overriding duty that applied to the parties' general obligations under the Contract. Besides, it was heavily conditioned by its context.[671] In the above case, the Court determined that the term should be express, refer to specific areas, and take close account of the context. Conversely, it should not apply to all terms of a Contract and neither should it be a general overriding duty of the contracting parties. Further observations were made on this point in *Yam Seng Pte Ltd v*

[668] Al-Othman (N 163), 31-36

[669] As noted by Lord Bingham LJ in *Interfoto Picture Library Ltd v Stiletto Visual Programmes*. Holmes also states that "The historical distinction between equity and law blocked the emergence of good faith as a legal doctrine in English common law. Equitable good faith emerged but, there was no concept of legal good faith"; see Eric M. Holmes, 'A Contextual Study of Commercial Good Faith: Good-Faith Disclosure in Contract Formation' (1978) 39(3) University of Pittsburgh Law Review, 384.

[670] [2013] EWCA Civ 200. See also Pugh (N 631), paras 22-24.

[671] In English law, an express term imposing a duty of good faith has gained greater traction where the duty is to act in good faith, rather than to negotiate in good faith (see *Walford* [N 658], 19).

International Trade Corp Ltd,[672] whereby Lord Leggatt JJ declared that: *"*what good faith requires is sensitivity to context*"*,[673] with the Court ascertaining that to construe the provision widely could conflict with other express and specific provisions, as well their limitations.

Further to the above, in the leading case of *CPC Group Ltd v Qatari Diar Real Estate Investment Co,*[674] given the express term, *"*to act in the utmost good faith towards each other in relation to the matters set out (in the contract)*"*,[675] Lord Vos J did not find that the contracting parties had breached the obligation to act in good faith. As to the meaning of the obligation to act "in the utmost good faith", Lord Vos J noted that there was very little authority on this point and that the obligation must be regarded in the Contract's commercial context.

Nevertheless, even if good faith plays no role in contractual performance, it does not necessarily mean that bad faith is tolerated in the English courts. As mentioned above, the failure to establish a general responsibility to act in good faith does not mean that the English courts do not maintain reasonable expectations of parties. Furthermore, English law deals with bad faith via other instruments, such as undue influence, etc., but these bear no relationship to the notion of good faith as an overarching principle.

4.4.3. The Position of Saudi Law on Good Faith in the Performance of the Contract for the Sale of Goods:

In contrast, Saudi law recognises the role of good faith in contractual performance and as a result, good faith must be adhered to when executing a Contract for the Sale of Goods in Saudi law. In accordance with the Commercial Court Act, Article 5, the Seller and Buyer must perform their commercial activities honestly and in good faith.[676] This is an implied obligation

[672] *Yam Seng* (N 664).
[673] Ibid.
[674] [2010] EWHC 1535 (Ch); see Pugh (N 631), para 19.
[675] Ibid, see also Beale, Chitty on Contracts (N 84), para 1-048.
[676] In the Saudi Commercial Court Act 1932, Art 5 provides that "A merchant must practice the commercial activities honestly and in good faith, therefore, he must not be engaged in any form of fraud, deceit, deception, injustice, betrayal, violation,

of the Seller and Buyer to perform their contractual obligations.[677] The concept of good faith in Saudi law also comprises leniency in private or commercial transactions. Interrelation may be observed by applying such a provision to the Contract of Sale in a business context. To phrase this differently, both the Seller and Buyer under the Contract of Sale of Goods are required to behave in a way that demonstrates good faith in fulfilling their obligations.

Here, the question arises of why Saudi law recognises the role of good faith in contractual performance. The origin of this position may be found in the following *Hadith* of the Prophet Mohammad (peace be upon him): *"*May Allah's mercy be on him who is lenient in his buying, selling, and in demanding back his money.*"*[678] Furthermore the Holy Qur'an at *Surah Alnahl* 16:89 contains a provision that gives quite clear indications as to how good faith is regarded: "Allah commands (people) to maintain Justice and kindness."[679] Moreover, *Surat Al-Mā'idah* 5:2 has similarly qualified cooperation, prescribing that the parties also *"*cooperate in righteousness and piety*"*.[680] Based on this verse, Saudi law imposes the principle of mutual co-operation, which is subject to the cause of goodness. Further evidence of this consists of contracting parties with dishonest intentions being penalised for their deeds under Islamic law.[681] In fact, the Prophet Muhammad (peace be upon him) states that any transaction that is not carried out in good faith will have no effect in law.[682]

Aside from the above, under the Contract of Sale of Goods in Saudi law, both the Seller

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or any other behavior breaching the principles of honesty and good faith. In case of committing any of the stated actions, the merchant shall be subject to the deterrent penalty set forth in this Law".

[677] There are many Civil Law jurisdictions where the obligation of good faith is categorised as a legal obligation, such as in Germany, France and the UAE. Furthermore, such dealings are not only at national level, but are also recognised by a number of international conventions, e.g. the Principles of European Contract Law (PECL), and the United Nations Convention for the International Sale of Goods (CISG).

[678] Kahn (N 189), *Hadith* NO. 2076. In this text from the *Hadith*, the requirement of good faith depends on fixed ethical foundations and principles maintained by a community. These principles represent a set of values and ideas that dominate dealings between individuals in that community. As a result, this community will regard the requirements of good faith as sophisticated principles, which are both general and abstract, such as honesty, legitimate trust and honour in transactions; see also Al-Sauid (N 617), 89-100.

[679] The Holy Quran {*Surah Alnahl* 16:89} {إِنَّ ٱللَّهَ يَأۡمُرُ بِٱلۡعَدۡلِ وَٱلۡإِحۡسَانِ...}

[680] The Holy Quran { Surat Al-Mā'idah 5:2} { وَتَعَاوَنُوا عَلَى الْبِرِّ وَالتَّقْوَى }

[681] Billah (N 616), 27-28.

[682] Fazlul Karim, *Al Hadith: English Translation & Commentary of Mishkat Ul-Masabih with Arabic Text* (1st edn, Vol II, No 6 Islamic Book Service 2001), 269.

and Buyer are required to behave in a way that demonstrates good faith in fulfilling their obligations. Otherwise, the aggrieved party may have the right to terminate the Contract, based on a breach of good faith by another party failing to fulfil his obligations. As a result, where a contracting party fails to perform a Sales Contract in good faith, that Contract will be deemed to have been breached and the aggrieved party will have the right to terminate the Contract and claim for damages.[683] Nevertheless, in a search through the archives of the Saudi courts, it is not easy to find judicial cases of termination of Contracts for the Sale of Goods based on a breach of good faith, although such cases may be found in relation to insurance contracts.[684]

To summarise the role of good faith in the performance of Contracts for the Sale of Goods in English and Saudi law, it may be concluded that in Saudi law, the principle of good faith must be adhered to and this means that all obligations under the Contract must be executed in good faith. Therefore, there are no specific obligations to fulfil, but all obligations are subject to such a notion.[685] In contrast, English law does not recognise a general principle of good faith in a Contract of Sale between parties, whereby the 1979 Act does not acknowledge an implied duty binding the Seller or Buyer to a principle of good faith. English law is even quite convinced of the irrelevance of good faith as a general principle of Contract Law. Therefore, if the parties to a Contract of Sale wish to impose good faith on contractual performance, they must do so expressly, in specific areas of the Contract and according to its context.[686] Nevertheless, this should not be interpreted as bad faith being supported or encouraged in English law, but rather as bad faith being dealt with thoroughly via other devices, such as

[683] The topic of damages is a vast subject in itself. Generally speaking, however, damages can take one of two forms: general or special. Moreover, the function of damages under the Contract of Sale is to satisfy the aggrieved expectation of interest by awarding a monetary sum that puts him in the same financial position as he would have been in, had the other party performed his obligations under the Contract (see section 5.3.6. The Seller's Right to Claim for Damages; section 6.2.4. The Buyer's Right to Damages, 232).
[684] Case No. 0/T/1433 (08/01/2012).
[685] See section 4.4.3. The Position of Saudi Law on Good Faith in the Performance of the Contract for the Sale of Goods, 131.
[686] See *Compass* (N 670); *Yam Seng* (N 664); *CPC Group Ltd* (N 674).

misrepresentation, duress, and undue influence.[687]

4.5. Conclusion:

In English and Saudi law, various obligations are arranged between the Seller and Buyer, wherever a Contract of Sale of Goods is concluded. These include the obligation of the Seller to deliver the goods to the Buyer within the terms of the Contract; this being the Seller's basic duty under such a Contract.[688] Additionally, in both regimes, the Buyer has an obligation to accept the goods and pay the price for them on the date provided for in the Contract of Sale. Furthermore, under both English and Saudi law, the Seller's duty to deliver the goods and the Buyer's duty to pay the price for them are concurrent conditions, unless otherwise agreed.[689] Nevertheless, in Saudi law, where the Contract of Sale is for gold, the time of delivery and payment must be concurrent conditions. Otherwise, the Contract becomes invalid, because it enters into usury, which is forbidden in Islamic law. [690] As a result, Saudi law imposes some limitations on the freedom to determine a time of payment and the delivery of specific goods. However, this is not the case under English law, as the parties to a Contract have the freedom to agree on the time of payment and delivery of any kind of goods.

Aside from the above, apart from the difference in the time of fulfilling obligations, the two legal systems differ in the obligations that are incumbent on the Seller and Buyer, although they do share some similarities. One of these differences consists of the duty in Saudi law for parties to a Contract of Sale of Goods to perform the Contract in good faith. This obligation does not exist in English law and it is one of the most important differences between the two

[687] See section 4.4.2. The Position of English Law on Good Faith in the Performance of the Contract for the Sale of Goods, 124.
[688] However, in neither of the above-mentioned regimes does the delivery of goods mean sending the goods to the Buyer; it actually refers to the voluntary transfer of possession from the Seller to the Buyer (see section 4.3.3.1.1. The Meaning of 'Delivery', 85).
[689] See section 4.3.4.2.2.1. 'Time of Payment' in English Law, 114; section 4.3.4.2.2.2. 'Time of Payment' in Saudi Law, 116.
[690] See Case Nos 34/T/S/195, 361/S/3, 275/S/3 and 695/S/3, 117.

regimes. As a result, there is an implied term in a Contract of Sale of Goods under Saudi law that both the Seller and Buyer must behave in a way that demonstrates good faith in fulfilling their obligations. This is not the case in English law and so when the parties to a Contract of Sale under English law wish to impose good faith on performance, they must do so expressly in specific areas of the Contract, heavily conditioned by its context.[691] Nevertheless, it should not be understood from this that English law accepts bad faith, but that English law deals with bad faith thoroughly using other devices, such as misrepresentation, duress, and undue influence. Therefore, English law is able, by virtue of more detailed rules, to ensure fairness in Contracts and achieves the same results without needing to apply a general principle of good faith to contractual performance. Consequently, even if good faith plays no role in contractual performance, it does not necessarily mean that bad faith is tolerated in English law.

Aside from a difference between the two legal systems, consisting of the duties of the contracting parties, these duties are provided for in English law by the 1979 Act. Nevertheless, the details of the rules governing these obligations are not as clear-cut as it might first appear - such as the Seller having a responsibility to send the Goods to the Buyer and the Seller then having a duty to send them at the time thus established, or be deemed to have breached the Contract, with the Buyer subsequently having the right to terminate the Contract. This means that the time of delivery is the essence of a commercial Contract of Sale.[692] However, under section 10(2) of the 1979 Act, time of delivery is not regarded as the essence of the Contract, even though the English courts frequently find that it is.[693] As a result, there is a different approach between the 1979 Act and case law as regards time of delivery.[694]

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[691] See *Compass* (N 670); *Yam Seng* (N 664); *CPC Group Ltd* (N 674).

[692] Moreover, in Saudi law, the time of delivery is also the essence of the Contract, unless otherwise agreed and the Saudi courts uphold this, as highlighted in Case Nos. 344/S/3 and 405/S/3, where the Court found that the time of delivery was the essence of the Contract and the Buyer had the right to terminate the Contract, since the Seller had failed to conform to the time of delivery (see section 4.3.3.1.2.2. 'Time of Delivery' in Saudi Law, 92; Case Nos. 344/S/3, 92 and 405/S/3 (N 482), 1420).

[693] See case of *Hartley,*90 and case of *SHV Gas Supply,* 90 .

[694] See section 4.3.3.1.2.1. 'Time of Delivery' in English Law, 88.

Chapter 5: The Seller's Remedies for a Breach of the Contract for the Sale of Goods

5.1. Introduction:

Under the Contract for the Sale of Goods in English and Saudi law, there are several obligations to be fulfilled by the Buyer.[695] Moreover, in the case where the Buyer fails to perform his contractual obligations, these regimes provide remedies for the Seller.[696] The next question arising concerns the ways in which each system approaches the problem of a breach of the Buyer's obligations, the remedies available to the Seller, and the legal basis of these remedies. In analysing and comparing such remedies, this chapter will determine whether the approaches adopted in English and Saudi law differ from each other and if so, whether this affects the outcomes for the Seller and Buyer in contrasting ways.

This chapter therefore analyses and compares the remedies for the Seller, where the Buyer breaches the Contract of Sale of Goods in English and Saudi law. In English law, the mainstay of the remedies for a breach of the Contract of Sale of Goods is the 1979 Act. In Saudi law, however, a wide range of recently published cases decided by the Saudi commercial courts regarding the Contract of Sale of Goods will be sampled, constituting a subject of original analysis in this chapter.

The remedies examined in this chapter will be the Seller's remedies (when goods are sold in the course of business), where the Seller remains unpaid, namely the right to lien and to stoppage of the goods in transit (possessory title to the goods); the right to resell the goods; the

[695] The Buyer's obligations have been fully analysed in Chapter Four (see section 4.3.4. Obligations of the Buyer in the Contract for the Sale of Goods, 109).

[696] Nevertheless, in English and Saudi law, the liability for a breach of Contract may be excluded or limited by the express terms of the Contract. In the case where any such clause is absent, the task of this Chapter is to analyse the remedies that can be availed of by the Seller under the Contract of Sale of Goods in English and Saudi law (see section 2.2.5.1. Freedom of Contract (in English Law), 27; section 2.2.2.2. The Unfair Contract Terms Act 1977, 22; section 2.3.4.2. Freedom of Contract (in Saudi Law), 42).

right to the price; the right to damages, such as for non-acceptance, and the Seller's right to terminate the Contract.

The above remedies are provided in both English and Saudi law; however, the key difference between the two systems is that the Seller reserves the right to cure defective performance under Saudi law, which is not provided for in English law. One of the aims of the present chapter is to examine the principle underlying this remedy in Saudi law and to ascertain why English law differs on this point. It will subsequently be determined whether this distinction between the two regimes makes a difference to the outcome for the contracting parties.[697] Using a functional comparative methodology, the task of this chapter is therefore to analyse how each of the legal systems examined addresses the problem of a breach of Contract on the part of the Buyer. In so doing, it will look closely at the remedies that can be availed of by the Seller under a Contract for the Sale of Goods in English and Saudi law. Thus, it will be established whether there are any differences in terms of theory, approach or outcome.

However, before embarking on this investigation and analysis, it is first necessary to explain what constitutes a breach of the Contract for the Sale of Goods. This will help identify whether or not a breach has occurred and if so, whether it is a breach of a condition or warranty, implying remedies that differ accordingly.

5.2. Breach of the Contract for the Sale of Goods:

5.2.1. In English Law:

In English law, a breach of the Contract for the Sale of Goods means that one of the parties to a Contract has refused or failed to fulfil one or more of his contractual obligations. Generally

[697] See section 5.3.4. The Seller's Right to Cure Defective Performance, 171.

speaking, this means failing to perform one or more elements of the Contract, delayed performance, or defective performance.

In English law, the 1979 Act provides different rights for the aggrieved party, according to whether there is a breach of condition or warranty. This awards the aggrieved party the right to terminate the Contract, or the right to claim for damages.[698] Under the 1979 Act, there are obligations for the contracting parties[699] and in the event of a breach of a concomitant obligation, such a breach will be regarded as the failure to perform the Contract. For instance, under the 1979 Act, the innocent party has the right to terminate a Contract for the breach of a condition, meaning a breach of any of the conditions implied by the Act. The innocent party may also have the contractual right to treat the Contract as repudiated, even if the party's failure is due to circumstances wholly beyond his control.[700]

In the 1979 Act, a stipulation may be a condition, even if it is referred to as a warranty in the Contract, pursuant to section 11(3).[701] However, the 1979 Act has not specifically defined the term 'condition', although 'warranty' is clearly defined under section 61(1).[702] As a result, under section 11(3) of the 1979 Act, whether a stipulation in a Contract of Sale of Goods is a condition or warranty will depend in each case on the construction of the Contract.

5.2.2. In Saudi Law:

Meanwhile, in Saudi law, what constitutes a breach of the Contract for the Sale of Goods is a party refusing to perform his contractual obligations. Thus, the aggrieved party is relieved of

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[698] In English law, the Sale of Goods Act 1979 remains at the heart of the law on remedies in respect of Contracts for the Sale of Goods (see section 2.2.1. Sale of Goods Act 1979, 18).

[699] See section 4.3.1. Obligations of the Seller and Buyer under English Law, 80.

[700] G.H. Treitel, *Remedies for Breach of Contract: A Comparative Account* (1st edn, Clarendon Press 1988), 15.

[701] The Sale of Goods Act 1979, s. 11(3) provides as follows: "Whether a stipulation in a contract of sale is a condition, the breach of which may give rise to a right to treat the contract as repudiated, or a warranty, the breach of which may give rise to a claim for damages but not to a right to reject the goods and treat the contract as repudiated, depends in each case on the construction of the contract, and a stipulation may be a condition, though called a warranty in the contract."

[702] Ibid, s. 61(1) provides that "Warranty means an agreement with reference to goods which are the subject of a contract of sale, but collateral to the main purpose of such contract, the breach of which gives rise to a claim for damages, but not to a right to reject the goods and treat the contract as repudiated".

performing his obligations and has the right to claim for damages. Furthermore, a breach of the Contract may be represented as defective performance. Therefore, a breach of the Contract occurs when the Seller or Buyer unjustifiably refuses or fails to fulfil his contractual obligations, and this may be represented as defective performance.[703]

As in English law, Saudi law imposes a condition that may be expressed by the parties to a Contract of Sale, with an implied condition provided by law. However, Saudi law offers different remedies, according to whether a condition or warranty has been breached. These remedies consist of the innocent party's right to terminate a Contract of Sale on the grounds of the other party breaching a condition - or to claim for damages in the event of a breach of warranty under the Contract.[704] In Saudi law, a condition is a fundamental stipulation of the Contract, indispensable to its purpose. Conversely, warranty is an additional stipulation. Therefore, if a party breaches a condition, then the very purpose of the Contract is breached.[705]

To summarise, a breach of the Contract for the Sale of Goods in English and Saudi law constitutes a contracting party refusing or failing to satisfy one or more contractual obligations, delaying performance, or delivering defective performance. However, both legal regimes make a distinction between the breach of a condition, which gives the innocent party the right to terminate the Contract, and warranty, which gives the right to claim for damages. Thus, where a Buyer fails to fulfil a contractual obligation, both English and Saudi law provide remedies for the Seller, which are analysed below.

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[703] Jafarl Alfadli, *Brief in Civil Contracts, Sale: A Study in the Light of Islamic Development* (3rd edn, Jordan, Dar Althaqafa for Publishing and Distributing 2014), 76-78.

[704] Al-Sanhūrī (N 48), 563. This is similar to the position adopted in the *al-majallah al-ahkam al-adliyyah* (The Ottoman Courts Manual [*Hanafi*]), in its Art 353, which provides that "If cereals such as wheat prove to be earthy, though to an extent considered by custom to be negligible, the sale is valid and irrevocable. If, however, such cereals are considered by local opinion to be positively defective, the Buyer has right to terminate the contract". Moreover, Art 354 provides that "If such things as eggs and nuts prove to be bad and defective but not to a greater extent than that sanctioned by custom, such as three percent, the sale is valid. If the defect is considerable, however, such as ten per cent, the sale is invalid and the purchaser can return the whole amount to the vendor and recover the entire price".

[705] Al-Sanhūrī (N 48), 1-4.

5.3. The Seller's Remedies for a Breach of the Contract for the Sale of Goods:

When a Buyer violates his contractual obligations, there are remedies that can then be availed of by the aggrieved Seller under English and Saudi law, whereby the Seller has rights and power against the goods ('rights over the goods'), such as the right to lien,[706] the right to stoppage of the goods in transit,[707] and the right to resell the goods.[708] In both regimes, the Seller also has the right to claim for the price of the goods, if the Buyer wrongfully neglects or refuses to pay the price. He also has the right to damages for non-acceptance, the right to terminate the Contract and the right to compensation for damages ('general' and 'special' damages). These remedies have been proven in English and Saudi law. However, the Seller has the additional right to cure defective performance under Saudi law, which is not provided for in English law. These remedies are analysed more fully in the following section.

5.3.1. The Rights of the Unpaid Seller:

In English and Saudi law, the unpaid Seller has rights and power against the goods, represented as rights over the goods themselves. These rights have been proven by the above-mentioned regimes and not by contract, wherever the Seller is unpaid. Here, English law provides the Seller with rights over the actual goods under section 39(1) of the 1979 Act,[709] whereby the Seller has rights to lien over the goods or the right to retain them.[710] Furthermore, the Seller has the right to stop the goods in transit, once possession of the goods has been lost and before they arrive at the Buyer, but only if the latter becomes insolvent.[711] Moreover, the Seller has the right

[706] See section 5.3.1.3. The Unpaid Seller's Right to Lien over the Goods, 143.
[707] See section 5.3.1.4. The Seller's Right to Stoppage of the Goods in Transit, 150.
[708] See section 5.3.1.5. The Unpaid Seller's Right to Resell the Goods, 155.
[709] The Sale of Goods Act 1979, s. 39(1) begins with the wording: "Subject to this and any other Act." The other statute that is most directly relevant is the Factors Act 1889. There are also certain other statutes, such as the Bills of Sale Act 1878 and the Carriage of Goods by Sea Act 1992, which may have an effect on the Seller exercising remedies "against the goods" (see also *Benjamin's Sale of Goods* (N 25), para 15-009).
[710] The Sale of Goods Act 1979, s. 39(1)(a) provides for "a lien on the goods or right to retain them for the price while he is in possession of them".
[711] The Sale of Goods Act 1979, s. 39(1)(b) provides that "in case of the insolvency of the buyer, a right of stopping the goods in transit after he has parted with the possession of them".

to resell the goods under section 39 (1) (c) of the above Act.[712] Therefore, the 1979 Act gives the Seller rights to the goods themselves, with power over them and priority over the Buyer's general creditors.[713] Consequently, even when the property in the goods has been transferred to the Buyer, the Seller still has rights over the goods under English law (the right to lien, the right to stoppage of the goods in transit and the right to resell), as provided for in the 1979 Act.[714]

In the case where the property in the goods has not transferred from the Seller to the Buyer,[715] the unpaid Seller has the right to withhold delivery[716] under the 1979 Act, section 39(2).[717] This right of the unpaid Seller is a right against the Buyer, which means that in the case where the unpaid Seller withholds delivery, he is not in breach of the Contract. Furthermore, the term 'withholding delivery' is appropriate in the case where the property in the goods has not transferred from the Seller to the Buyer.[718]

Similar to English law, Saudi law states that if the Seller is unpaid, he is legally entitled to lien over the goods[719] and to stop them in transit.[720] He also has the right to resell the goods[721] and the right to withhold delivery of them. Thus, in light of each of the above regimes, it is necessary to begin by establishing when the Seller becomes 'unpaid'. This is defined below.

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[712] I The Sale of Goods Act 1979, s. 39(1)(c) provides for "a right of re-sale as limited by this Act".

[713] Section 38(2) of the Sale of Goods Act 1979 explains that for the present purposes, a Seller is any person who is in the position of a Seller; for instance, including an agent of the Seller. Under this section, where the Seller sells the goods via an agent, the agent is entitled to exercise any of the rights of the unpaid Seller. Meanwhile, section 38(2) of the 1979 Act provides that "In this Part of this Act 'seller' includes any person who is in the position of a seller, as, for instance, an agent of the seller to whom the bill of lading has been indorsed, or a consignor or agent who has himself paid (or is directly responsible for) the price"; *Atiyah and Adams' Sale of Goods (N 35)*, 388.

[714] The Seller has rights to the goods, even though the property in the Goods has transferred to the Buyer, but they have not yet come into the Buyer's possession; see Bzhar Ahmed and Hassan Hussein, 'Avoidance of Contract as a Remedy under CISG and SGA: Comparative Analysis' (2017) 16 Journal of Law, Policy and Globalization, 136.

[715] Under the Contract of Sale, when the property in the goods has transferred to the Buyer and he (the Buyer) has possession of them, if the unpaid Seller seeks specific restitution of his goods from the Buyer, it will be necessary to rely on section 3 of the Torts (Interference with Goods) Act 1977; see Hibbert (N 76), para 11.

[716] Because the Seller is the owner of the goods.

[717] The Sale of Goods Act 1979, s. 39(2); see Hibbert (N 76), para 4; see also *Atiyah and Adams' Sale of Goods (N 35)*, 387.

[718] This is because the Seller's duty to deliver the goods is conditional on the Buyer being ready and willing to pay the price in exchange for the property in the goods and for possession of the goods. Thus, the purpose of section 39(2) of the Act is to confirm the Seller's right to retain the goods, until the Buyer pays the price for them. See *Benjamin's Sale of Goods* (N 25), paras 15-010, 15-011.

[719] See section 5.3.1.3.2. The Right to Lien in Saudi Law, 147.

[720] See section 5.3.1.4.2. Stoppage of the Goods in Transit under Saudi Law, 154.

[721] See section 5.3.1.5.2. The Seller's Right to Resell Goods in Saudi Law, 159.

5.3.1.1. The 'Unpaid Seller' in English Law:

In English law, the price remains unpaid as long as the Buyer refuses or fails to meet his obligation to pay the full price of the goods under a Contract of Sale. This will mean that the Buyer has refused to pay all or part of the price of the goods, according to section 38(1)(a) of the 1979 Act.[722] Nevertheless, in English law, where the price has been apportioned by the Contract to different parts of the goods being sold and is payable separately for each of these parts, the right of the unpaid Seller may only be exercised in respect of the portion for which the price has not been paid as agreed.[723]

Furthermore, in the case where the Seller receives a negotiable instrument, such as in a bill of exchange[724] and this is not fulfilled, whether due to the instrument being dishonoured or for another reason, the Seller shall also be considered as unpaid and the goods not paid for, according to subsection 38(1)(b) of the 1979 Act.[725] Moreover, the Seller will be deemed to be unpaid, meaning that he has "powers against the goods".[726] This even applies where goods are being sold on credit,[727] with credit that has not yet expired, in the event of the Buyer becoming insolvent.[728]

5.3.1.2. The 'Unpaid Seller' in Saudi Law:

Similar to English law, the price of the goods remains unpaid under Saudi law, as long as the

[722] The Sale of Goods Act 1979, s. 38(1)(a) provides that "The seller of goods is an unpaid seller within the meaning of this Act: (a) when the whole of the price has not been paid or tendered".
[723] *Benjamin's Sale of Goods* (N 25), paras 15-119.
[724] In English law, the Seller is not bound to accept payment only in cash, but may accept it in the form of a cheque or Bill of Exchange (see section 4.3.4.2.1.1. The Price to Be Paid for the Goods in English Law112 ; The Bills of Exchange Act 1882, section 3(1).
[725] In section 38(1)(b) of the Sale of Goods Act 1979, the situation is explained as follows: "When a bill of exchange or other negotiable instrument has been received as conditional payment and the condition on which it was received has not been fulfilled by reason of the dishonour of the instrument or otherwise."
[726] The Sale of Goods Act 1979, s. 41(c) of 1979 Act; Bridge (N 29), paras 11.05-11.06.
[727] The Seller would remain 'unpaid', when the price became due, even if the goods were being sold on credit (see *McDowall & Neilson's Trustee v Snowball Co Ltd* [1904] 7 F 35). See also *Atiyah and Adams' Sale of Goods (N 35)*, 388.
[728] Under the Sale of Goods Act 1979, the meaning of 'insolvency' is given in section 61(4) as follows: "a person is deemed to be insolvent within the meaning of this Act if he has either ceased to pay his debts in the ordinary course of business or he cannot pay his debts as they become due, whether he has committed an act of bankruptcy or not, and whether he has become bankrupt or not."

Buyer refuses or fails to fulfil his obligation to pay it in full.[729] This means that the goods remain unpaid for, if the Buyer wrongfully refuses to pay the full price for them as agreed in the Contract.

To summarise, in both English and Saudi law, the Seller becomes unpaid when the full price of the goods has not been paid by the Buyer pursuant to the Contract. Furthermore, in both regimes, the unpaid Seller retains rights over the goods, even where the property in them has transferred to the Buyer. Thus, the rights of the unpaid Seller are directed at the goods themselves.[730] These unpaid Seller's rights over the goods under English and Saudi law are analysed in more depth in the following sections.

5.3.1.3. The Unpaid Seller's Right to Lien over the Goods:

5.3.1.3.1. The Right to Lien in English Law:

In English law, the unpaid Seller is granted a right to lien over the goods, if he is in possession of the goods and the price has not yet been paid by the Buyer. This is provided for by law and not by contract,[731] under subsection 39(1)(a) of the 1979 Act.[732] This is because English law offers a kind of security to the unpaid Seller against goods that have not yet been paid for.[733] Section 41 supports subsection 39(1)(a) and sets out specific rules for the unpaid Seller's right

[729] Raj Bhala, *Understanding Islamic Law (Shari'a)* (LexisNexis 2011), 444-448.

[730] However, when the property in the goods has transferred to the Buyer and he takes possession of them, the Seller has the right to the price of those goods, but not to the goods themselves. Nevertheless, in English law, if the unpaid Seller seeks specific restitution of his goods from the Buyer, it becomes necessary to rely upon section 3 of the Torts (Interference with Goods) Act 1977. It should, however, be noted here that under English and Saudi law, the unpaid Seller's rights over the goods are independent of his right to sue for their price, which means that the Seller has the right to claim for the price of the goods, even if he also has the right to lien or to stoppage of the goods in transit. Nevertheless, when the Seller resells the goods, he will have the right to compensation for damages, but not for the price of the goods (see section 5.3.1.5. The Unpaid Seller's Right to Resell the Goods, 155).

[731] *Laws of England: Being a Complete Statement of the Whole Law of England* (Butterworth 1907-1917), 2.

[732] In the Sale of Goods Act 1979, s. 39(1)(a) begins with the wording, "Subject to this and any other Act". The other statutes that are most directly relevant are the Factors Act 1889; the Bills of Sale Act 1878, and the Carriage of Goods by Sea Act 1992, which, in particular circumstances, may affect the Seller's exercise of his remedies against the goods (see section 2.2. Sources of the Contract for the Sale of Goods in English Law, 17).

[733] *Atiyah and Adams' Sale of Goods (N 35)*, 385.

to lien, as follows:

I. When the goods are sold by the Seller to the Buyer, but there is no preparation for any kind of credit.[734]

II. When the goods are sold by the Seller to the Buyer and the credit has expired, with the Buyer failing to comply with the terms of the credit.[735]

III. When the goods are sold by the Seller to the Buyer and the Buyer has become insolvent,[736] before paying the price of the goods, regardless of whether or not the goods are being sold on credit.[737]

The right to lien provided for in the 1979 Act, to be exercised by the Seller against the price, is only a special or particular right to lien for the price of the goods. This means that the Seller has the right to lien over the goods for the price of those goods, without any other charge.[738] Furthermore, the right to lien provided for under the 1979 Act gives the Seller a right of lien over the goods for any part of the price that remains unpaid. For example, where the Seller has made a partial delivery of the goods, then he can also exercise his full right of lien on those goods that remain undelivered, according to section 42 of the 1979 Act.[739] Therefore, it must be borne in mind that the Contract of Sale by instalments is still a single Contract and the Seller has the right to lien over any part of the goods for which the price has not been paid.[740] Nevertheless, in the case of a price being apportioned by the Contract to different sections of the goods sold – payable separately for each of these sections – the right of the unpaid Seller

[734] The Sale of Goods Act 1979, s. 41(1)(a) provides that "Subject to this Act, the unpaid seller of goods who is in possession of them is entitled to retain possession of them until payment or tender of the price… (a) where the goods have been sold without any stipulation as to credit…"

[735] Ibid, s. 41(1)(b) provides: "…where the goods have been sold on credit but the term of credit has expired; (c) where the buyer becomes insolvent."

[736] Ibid, s. 41(1)(c) provides: "…where the buyer becomes insolvent."

[737] This is because when the Buyer becomes insolvent; all stipulations concerning credit come to an end.

[738] Bridge (N 29), 587.

[739] Ibid, s. 42 provides that "Where an unpaid seller has made part delivery of the goods, he may exercise his lien or right of retention on the remainder, unless such part delivery has been made under such circumstances as to show an agreement to waive the lien or right of retention".

[740] *Atiyah and Adams' Sale of Goods (N 35)*, 389.

will arise only in respect of the section for which the price has not been paid as agreed.[741]

Finally, in English law, where the Buyer has resold the goods to a sub-buyer, the unpaid Seller is not deprived of his right to lien over the goods.[742] This means that in principle, the unpaid Seller's right prevails over that of the sub-buyer.[743] Nevertheless, he will lose his right to lien over the goods when a document of title to goods has transferred to the Buyer and he transfers the document by way of sale to a person who takes it in good faith, according to the above Act, section 47(2).[744]

5.3.1.3.1.1. Loss of the Right to Lien in English Law:

In English law, the unpaid Seller will lose his right to lien over the goods, once he has delivered the goods to a carrier for transmission to the Buyer, pursuant to section 43(1)(a) of the 1979 Act.[745] Furthermore, he will lose his right to lien over the goods, once the Buyer obtains possession of them, according to section 43(1)(b) the 1979 Act.[746] Consequently, in English law, once the Seller no longer has possession of the goods, he loses his right to lien over them, pursuant to section 43(1) and subsections (a) and (b) of the 1979 Act. Therefore, in order to be able to apply the right to lien over the goods, they must remain in the possession of the Seller.[747]

Nevertheless, the question arises of whether the right to lien over the goods can still be availed of by the Seller, when the Seller delivers the goods to the Buyer and the latter refuses

[741] *Benjamin's Sale of Goods* (N 25), paras 15-119.
[742] Hibbert (N 76), para 7.
[743] The Sale of Goods Act 1979, s. 47(1) provides that "Subject to this Act, the unpaid seller's right of lien or retention or stoppage in transit is not affected by any sale or other disposition of the goods which the buyer may have made, unless the seller has assented to it".
[744] Ibid, s. 47(2); see also Bridge (N 29), 591.
[745] This section provides that when the Seller delivers the goods to a carrier to transfer possession of them to the Buyer, without reserving the right to dispose of the goods, he (the Seller) loses his right to lien and the right of retention over the goods (see Sale of Goods Act 1979, s. 43(1)(a), which provides that "The unpaid seller of goods loses his lien or right of retention in respect of them: A. when he delivers the goods to a carrier or other bailee or custodier for the purpose of transmission to the buyer without reserving the right of disposal of the goods").
[746] The Sale of Goods Act 1979, s. 43(1)(b) provides that "The unpaid seller of goods loses his lien or right of retention in respect of them: …B. when the buyer or his agent lawfully obtains possession of the goods".
[747] Sarah Worthington, *Equitable Liens in Commercial Transactions* (1994) 53(2) The Cambridge Law Journal, 268-270.

to accept them. Indeed, if the Buyer refuses to accept the goods, it means that possession of them has not yet arrived at the Buyer and subsection 43(1)(b) does not apply. Therefore, the unpaid Seller will still have the right to lien over the goods.[748] Notwithstanding this, the question also arises of whether the Seller's right to lien over the goods can be resuscitated once it has been lost; such as when the Seller makes the delivery, but the Buyer returns the goods to the Seller for some specific reason, before becoming insolvent. In this case, does the Seller have the right to lien over the goods?

The answer to this question may be found in *Valpy v Gibson*,[749] where the Court submitted that the right to lien can only be exercised by the Seller, if the goods have not moved into the possession of the Buyer.[750] Once this has taken place, the right to lien cannot be exercised, even when the goods once again come into the possession of the Seller.[751]

Finally, the Seller will lose his right to lien over the goods through express or implied waiver, according to the 1979 Act, section 43(1)(c).[752] However, under section 43(3) of the above Act,[753] where the Seller has obtained a judgment or decree for the price of the goods, he will not lose his right to lien over them.[754]

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[748] However, it should be noted that, in English law, rejection of the goods and the termination of the Contract constitute a single remedy, which means that when the Buyer reject the goods, the Contract is terminated (see 6.2.1.3.1. The Effect of Rejecting the Goods in English Law, 212).

[749] *Valpy v Gibson* [1848] 136 ER 737, where the Seller sold a consignment of cloth to the Buyer and the Seller dispatched the goods in four cases via shipping agents, once the goods had been loaded onto the vessel, the Buyer's agent ordered them to be off-loaded and returned to the Seller, so that they could be repacked in smaller cases. The unpaid Seller was in possession of the goods when the Buyer was declared insolvent.

[750] It should be noted that when the Seller delivered the goods to the Buyer's agent, this was deemed to be a delivery of the goods to the Buyer.

[751] In this case, Lord Wilde, CJ, Coltman, Maule and Cresswell, JJ stated that "The property and possession of the goods having been vested absolutely in Brown, the defendants could not be entitled to retain them after they were sent back for the purpose of being packed… and the defendants neither having any lien after delivery by them …The right which it was contended the defendants had, as vendors in the actual and lawful possession of the goods, on the insolvency of the vendee, cannot, we think, be sustained. […] the complete property and possession having vested in Brown, they became his absolutely, without any lien or right of the vendors attaching to them, any more than on any other property of Brown; and their delivery to the defendants to be re-packed, could not have the effect of creating a lien for the price, without an agreement to that effect. We therefore think there must be judgment for the plaintiffs" (See *Valpy* (N 749); see also, W.B. Milne, 'The Seller's Right to Stop Goods in Transit' (1885) 10 Law Mag & L Rev 152).

[752] The Sale of Goods Act 1979, s. 43(1) provides that "The unpaid seller of goods loses his lien or right of retention in respect of them… C. by waiver of the lien or right of retention".

[753] Ibid, s. 43(3) provides that "An unpaid seller of goods who has a lien or right of retention in respect of them does not lose his lien or right of retention by reason only that he has obtained judgment or decree for the price of the goods".

[754] It should be noted that the Seller's right to the price is independent of his rights against the Goods. This means that the Seller can claim for the price of the Goods, even where he exercises lien over the Goods. Nevertheless, when the Buyer

5.3.1.3.2. The Right to Lien in Saudi Law:

Saudi law gives a Seller, who is still in possession of goods under a Contract of Sale, the right to retain such possession, when the price in the Contract or any part of it remains unpaid.[755] Basically, the right to lien consists of the privilege of maintaining possession of the goods and refusing to deliver them to the Buyer until their price has been paid.[756] As in English law, Saudi law provides that the unpaid Seller has the right to lien over the goods, in the case where the goods are sold with no stipulation as to credit;[757] where the period of the credit has lapsed, or where the Buyer becomes insolvent, even though the credit has not lapsed.[758] In fact, when the Buyer becomes insolvent, all stipulations concerning credit come to an end and the Seller has the right to lien over the goods until the full price of the goods has been paid.[759] Moreover, the Seller's right of lien in Saudi law extends to all the goods in his possession, as in English law, despite the Buyer having made a partial payment for them.[760] In other words, the Buyer does not have the right to claim for a partial delivery of the goods, if he has only paid part of the price.[761]

In the archives of the Saudi courts, there is abundant judicial indication of the Seller's

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pays the price of the Goods, the Seller remains bound to deliver them to the Buyer; see Michael Bridge, 'The UK Supreme Court Decision in the Res Cogitans and the Cardinal Role of Property in Sales Law' [2017] Singapore Journal of Legal Studies, 361.

[755] Furthermore; Saudi law gives the Seller the right to withhold his own performance until the Buyer performs his obligation (see section 2.3.4.5. The Principle of *Exceptio non Adimpleti Contractus* in Saudi Law, 45). Nevertheless, in Common Law countries, such as the UK, the principle of *exceptio non adimpleti contractus* is not a Common Law doctrine and is not explicitly referred to in Case Law. Moreover, there is no precise equivalent in English legal remedies. However, an approach similar to the principle of *exceptio non adimpleti contractus* can be found in English law under section 39(2) of the Sale of Goods Act 1979, where the unpaid Seller has the right to withhold delivery, without avoiding the Contract (see section 5.3.1. The Rights of the Unpaid Seller, 140; see also Schwenzer [N 5], 549).

[756] This is also the case in the *Hanafi* School, according to the Ottoman Courts Manual, '*al-majallah al-ahkam al-adliyyah',* Art 278, which provides that "In the case of a sale for immediate payment, the Seller has a right of retaining the Goods until the price is fully paid by the purchaser".

[757] In the case of a sale on credit, the Seller does not have this right. This is similar to the position adopted in the *Hanafi* School in the Ottoman Courts Manual, '*al-majallah al-ahkam al- adliyyah*', where Art 283 provides that "In the case of a sale on credit, there is no right of retention on the part of the Seller. He (the Seller) must deliver the thing sold to the purchaser forthwith in order to receive payment on due date".

[758] Al-Sanhūrī (N 48), 801.

[759] Abed Awad and Robert Michael, *Classical Islamic Law and Modern Bankruptcy* (Pace Law Faculty Publication 2010), 992; see also section 2.3.2.2. Commercial Insolvency: The 'Bankruptcy Act', 38.

[760] This is also the case in the *Hanafi* School, according to the Ottoman Courts Manual, '*al-majallah al-ahkam al-adliyyah',* where Art 279 provides that "if the Seller sells various articles en bloc, the whole of the things sold may be retained until the full price has been paid".

[761] Al-Sanhūrī (N 48), 813.

right of lien over goods. For instance, in Case No. 61/T/3,[762] where the Buyer failed to fulfil his obligation to pay the price, the Seller withheld delivery of the goods. Therefore, even though the Buyer claimed for delivery of the goods, the Court rejected his claim; adopting instead the stance of a right to lien over goods, with the Seller being awarded this right until the full price of the goods had been paid.

In the same way as in English law, Saudi law provides that the right to lien over goods can be exercised in response to a failure to pay the price of the goods, but not additional charges. To support such a legal position, Case No. 673/S/3[763] illustrates a situation where the Buyer refused to pay the price of the goods and the Seller withheld delivery of them until the price had been paid, together with charges for the care and custody of the goods. Here, the Court decided to oblige the Buyer to pay the contracted price of the goods. At the same time, it was decided that the Seller was obliged to deliver the goods. Nevertheless, the Court did not oblige the Buyer to pay the charges incurred by keeping the goods, as sued for by the Seller. Conversely, the Seller had the right to claim for damages, although not a right to lien over the goods for the charges incurred. From this judicial indication, it may be inferred that the right to lien over the goods is related to the price of the goods in the Contract, without going further to include additional charges. Nevertheless, in this case, the Seller had the right to compensation for damages, due to charges being incurred by keeping the goods, but no right to lien over the goods.

Finally, in the same way as English law, under the Contract of Sale in Saudi law, the unpaid Seller does not lose his right to lien over the goods when the Buyer resells them. This means that when the Buyer resells goods to a new buyer, the unpaid Seller retains his right to

[762] Judicial Blogs, Contract of Sale, Vol. 2 (A. H. 1428 "2007"), 401.
[763] Ibid, Vol. 3 (A. H. 1430 "2009"), 693.

lien over the goods, even with the new buyer.[764]

5.3.1.3.2.1. Loss of the Right to Lien in Saudi Law:

As in English law, the possession of goods is addressed in Saudi law, which means that the Seller must remain in possession of the goods, or else he will lose his right of lien over them. Thus, when the unpaid Seller actually delivers the goods to the Buyer or to a carrier, he loses this right of lien, because the possession of the goods no longer lies with him.[765] Furthermore, the unpaid Seller may lose his right of lien through an express or implicit waiver. [766]

Aside from the above, in the same way as English law, when the Seller loses possession of the goods under Saudi law, this possession is not resuscitated once lost. In the case where the Seller delivers the goods to the Buyer and the latter returns them to the Seller for some specific reason (such as for legitimate repairs), the Seller will not be able to exercise his right of lien over the goods, unless otherwise agreed.[767] To illustrate this legal position, in Case No. 142/T/3,[768] a contractual term gave the Seller the right to retake possession of the goods, if the Buyer failed to fulfil his commitment to pay the price. The Court subsequently decided to allow him to retake possession of the goods, even though they had already been delivered to the Buyer. This decision relied on a contractual term that granted the Seller such a right. Nevertheless, if the Contract had not contained this term, the Seller would have lost the right to lien over the goods, since he had already delivered them to the Buyer.[769]

To summarise, the unpaid Seller has a right of lien over goods in English and Saudi law.

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[764] Al-Sanhūrī (N 48), 809.

[765] This is also the case in the *Hanafi* School, in the Ottoman Courts Manual, '*al-majallah al-ahkam al-adliyyah',* where Art 281 provides that "if the Seller gives delivery of the Goods without receiving the price, he loses his right of retention. He (the Seller) cannot ask for the return of the Goods in order to hold it until payment of the price is made".

[766] Nayef Al-Rodhan, *The Role of the Arab-Islamic World in the Rise of the West: Implications for Contemporary Trans-cultural Relations* (1st edn, Palgrave Macmillan 2012), 70.

[767] Al-Sanhūrī (N 48), 809.

[768] Judicial Blogs, Contract of Sale, Vol. 2 (A. H. 1427 "2006"), 2213.

[769] In this case, the Seller delivered the goods to the Buyer and the latter then returned them to the Seller. Since the Buyer failed to pay the full price of the Goods, the Seller withheld delivery of the Goods, until the Buyer had paid their full price.

Both regimes grant this right, so long as the Seller is still in possession of the goods and while the price of the goods remains unpaid by the Buyer. Therefore, the two legal regimes offer security to the unpaid Seller against goods that have not yet been paid for. English and Saudi law consequently provide the unpaid Seller with the right to lien over the goods, in the event of the goods being sold with no stipulation as to credit, where the period of the credit has lapsed, or where the Buyer becomes insolvent, even though the period of credit has not lapsed. This is because all stipulations concerning credit come to an end, if the Buyer becomes insolvent.

Moreover, in both regimes, the Seller's right of lien extends to all the goods in his possession, despite the Buyer having paid for them in part. Therefore, the Buyer does not have the right to claim for a partial delivery of the goods, in the event that he has only paid part of the price. Nevertheless, in both English and Saudi law, the right of lien over goods can only be exercised in response to the price of the goods remaining unpaid and does not relate to additional charges. Moreover, the unpaid Seller's right of lien over goods refers to possession of the goods, which means that the Seller must remain in possession of them, or else lose the right to lien over them. Additionally, in both regimes, once the Seller loses possession of the goods, this possession cannot be resuscitated at a later date.[770]

5.3.1.4. The Seller's Right to Stoppage of the Goods in Transit:

5.3.1.4.1. The Seller's Right to Stoppage of the Goods in Transit in English Law:

In English law, when the unpaid Seller has lost possession of the goods and the Buyer becomes insolvent, he retains his right over them, which is known as the right to stoppage of goods in transit.[771] This represents the right to stop the goods, while the Seller is still in the process of

[770] In English law, see *Valpy* (N 749); in Saudi law, see Case No. 142/T/3 (N 819), 2213.
[771] This has been incorporated into the legislation of most Common Law regimes; see Caslav Pejovic, 'Stoppage in transit and right of control, "conflict of rules"?' (2008) 20(1) Pace International Law Review 132-133.

transporting them from his possession into the possession of the Buyer,[772] as set out in section 44 of the 1979 Act.[773] Thus, the right to stoppage of the goods in transit is a further entitlement that can be availed of by the Seller against the Buyer in English law, when the possession of the goods is lost by the Seller, but has not yet arrived with the Buyer.

Under the 1979 Act, the Seller gains this right when the Buyer becomes insolvent, despite the property in the goods being transferred to the Buyer.[774] This is because English law gives the unpaid Seller the right to regain possession of the goods, even if he has lost possession of them into the hands of the carrier.[775] Here, the right to lien is lost by the Seller, but he retains the right to stoppage of the goods in transit, if the Buyer becomes insolvent. Likewise, under English law, where the Seller has made a partial delivery of the goods, he can equally exercise his right to stop any goods that remain undelivered to the Buyer.[776] Section 44 supports subsection 39(1)(b) and sets out specific rules for the stoppage of goods in transit by the Seller, as follows:

I. The Buyer must have failed to make a full or partial payment to the Seller for the goods.[777]
II. The Buyer, along with failing to pay the price of the goods, must also have become insolvent.[778]

[772] For the duration of transit, see section 5.3.1.4.1.2. Definition of 'Goods in Transit' under English Law, 153.
[773] The Sale of Goods Act 1979, s. 44 provides that "Subject to this Act, when the buyer of goods becomes insolvent the unpaid seller who has parted with the possession of the goods has the right of stopping them in transit, that is to say, he may resume possession of the goods as long as they are in course of transit, and may retain them until payment or tender of the price".
[774] Ibid, s. 39(1). It should be noted here that it makes no difference whether or not the property in the goods has passed to the Buyer. This means that where the property in the goods has passed to the Buyer, the Seller has the right to stop the goods in transit, according to section 39(1)(b) of the Sale of Goods Act 1979. Moreover, if the property has not passed to the Buyer, then the Seller has the right to stop the goods in transit, because he retains ownership over them. It also means that the Seller has the right to withhold delivery (see the Sale of Goods Act 1979, section 39(2); *Atiyah and Adams' Sale of Goods* [N 36], 395).
[775] See section 5.3.1.3.1. The Right to Lien in English Law, 143.
[776] Moreover, in English law, when the Buyer has resold the goods to a sub-buyer, it does not deprive the unpaid Seller of his right to stop the goods in transit. This means that in principle, the unpaid Seller's right prevails over those of a sub-buyer. Section 47(1) of the Sale of Goods Act 1979 also provides that "Subject to this Act, the unpaid seller's right of lien or retention or stoppage in transit is not affected by any sale or other disposition of the goods which the buyer may have made, unless the seller has assented to it".
[777] See section 5.3.1.1. The Unpaid Seller in English Law, 142.
[778] See section 5.3.1.4.1.1. Stoppage of the Goods in English Law, When the Buyer Becomes Insolvent, 152.

III. The possession of the goods must not yet have arrived with the Buyer.[779]

As outlined above, under section 44 of the 1979 Act, there are three important terms that must be understood, when applying the Seller's right to stop the goods in transit. First, the Seller must be unpaid; second, the Buyer must be insolvent, and third, the goods must be in transit. The first condition has already been explained above,[780] while the second and third will be clarified below.

5.3.1.4.1.1. Stoppage of the Goods in English Law, When the Buyer Becomes Insolvent:

The unpaid Seller's right of stoppage in transit will only be triggered when the Buyer becomes insolvent. Therefore, the definition of insolvency is important in remedies against the goods. In the 1979 Act, the meaning of insolvency is defined in section 61(4),[781] while section 62(1) provides that "The rules in bankruptcy relating to contracts of sale apply to those contracts, notwithstanding anything in this Act".[782] The 1986 Act, section 123 deals with a situation where the Buyer is unable to pay debts.[783] Nevertheless, in English law, when the Buyer calls a meeting with his creditors, he is not necessarily implying that he is insolvent. This means that suspicion of the Buyer's insolvency is an insufficient ground for stopping goods in transit.[784] Furthermore, when a Buyer becomes insolvent, this will not of itself terminate the Contract;[785] if the goods are still in transit,[786] the Seller will still have an opportunity to exercise his right of

[779] See *Booth Steamship Co Lim v Cargo Fleet Iron Co Ltd* [1916] 2 KB 570; see also *Atiyah and Adams' Sale of Goods (N 35)*, 395.
[780] See section 5.3.1.1. The 'Unpaid Seller' in English Law, 142.
[781] See section 2.2.2.3. The Insolvency Act 1986, 23. In English law, the word 'insolvent' has often been construed, both in private instruments and upon the construction of a statute, to apply to a person labouring under a general disability to pay his just debts in the ordinary course of trade and business. See *Benjamin's Sale of Goods* (N 25), para 15-024.
[782] The Sale of Goods Act 1979, s. 62(1).
[783] Insolvency Act 1986, s. 123.
[784] "…there must be something, at all events, like proved or admitted insolvency, or circumstances shewing beyond all doubt that they were insolvent." See Milman, David, *Debt Enforcement Regimes outside Bankruptcy in English Law: Observations on Current Diversity and Future Complexity* (Markets and the Law 2013), 301-302.
[785] Nevertheless, the Buyer may make the declaration that he cannot perform his duty; under this circumstance, the Seller may treat the declaration as repudiation and terminate the Contract (see *Benjamin's Sale of Goods* [N 25], para 15-025).
[786] See section 5.3.1.4.1.2. Definition of 'Goods in Transit' under English Law, 153.

stoppage in transit, thus gaining priority over the general creditors.[787]

Nevertheless, in English law, the Buyer's trustee in insolvency may exercise his power to disclaim an onerous contract. Alternatively, he is entitled to choose whether or not to fulfil the original Contract by paying the price in cash to the Seller within a reasonable period from the Buyer's default of payment.[788]

5.3.1.4.1.2. Definition of 'Goods in Transit' under English Law:

In English law, goods are deemed to be in transit from the time when they are actually delivered to a carrier for the purpose of transferring them to the Buyer, until they are actually delivered by the carrier to the Buyer.[789] Furthermore, in English law, a carrier should hold the goods in the capacity of an independent individual and not as an agent of the Seller or Buyer. Otherwise, the Seller would have right of lien, but not to stoppage of the goods, because the Seller would still have legal possession of the goods, given that they are in the hands of his agent. In contrast, if a carrier holds the goods as an agent of the Buyer, the Seller will lose his right to stop the goods in transit, because delivery to an agent of the Buyer is equivalent to delivery to the Buyer.[790] However, the question arises here of whether the right to stoppage of the goods endures and can be availed of by the Seller, if the goods have reached the Buyer and the Buyer refuses to accept them.

In fact, under English law, when a Buyer refuses to accept the goods, possession of the goods will not be deemed to have arrived with the Buyer and the goods will still be in transit. Section 45(4) of the 1979 Act provides that goods are still in transit until the Buyer accepts

[787] *Benjamin's Sale of Goods* (N 25), para 15-026.
[788] Bridge (N 29), 585.
[789] The Sale of Goods Act 1979, s. 45(1), whereby s. 45 provides for the duration of transit.
[790] In this case, the unpaid Seller will have the right to claim the price of the Goods and becomes one of the Buyer's creditors (see section 5.3.2. The Seller's Right to Recover the Price of the Goods, 162).

delivery of them.[791] Under these circumstances, the Seller may still have the right to stop the goods in transit.[792]

5.3.1.4.2. Stoppage of the Goods in Transit under Saudi Law:

In Saudi Law, stoppage of the goods in transit is another important right over the goods for the unpaid Seller, if he loses his right of lien over them. He therefore has this other right to protect his interests, if the Buyer becomes insolvent.[793] Stoppage of the goods in transit refers to the Seller's right to recover possession of the goods, if the Buyer becomes insolvent and has not yet paid the full price of the goods. The underpinning notion of this right is that when the Seller has delivered the goods to a carrier for the purpose of transferring them to the Buyer, he loses possession of them. In this case, the Seller simply has no link to possession of the goods. Nevertheless, an exception to this rule also exists under Saudi law, namely the Seller's right to stoppage of the goods in transit, if the Buyer becomes insolvent and has not yet paid the full price of the goods.[794]

In the same way as in English law, there are three conditions for applying the Seller's right to stoppage of the goods in transit. First, the Seller must be unpaid;[795] second, the Buyer must be insolvent,[796] and third, the goods must be in transit.[797]

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[791] The Sale of Goods Act 1979, s. 45(4) provides that "If the goods are rejected by the buyer, and the carrier or other bailee or custodier continues in possession of them, the transit is not deemed to be at an end, even if the seller has refused to receive them back".

[792] Nevertheless, in English law, when the goods come into the possession of the Buyer, they are no longer in transit and the Seller loses his right to stoppage of the goods, even if he is once more in possession of them (see *Valpy* [N 749]).

[793] See section 2.3.2.2. Commercial Insolvency: The 'Bankruptcy Act', 38.

[794] Bhala (N 729), 727-730.

[795] See section 5.3.1.2. The Unpaid Seller in Saudi Law, 142.

[796] In Saudi law, no one is called insolvent, unless the competent court decides as such. Furthermore, as in English law, when a Buyer becomes insolvent under Saudi law, this will not of itself terminate the Contract (see section 2.3.2.2. Commercial Insolvency: The 'Bankruptcy Act', 38).

[797] Similar to English law, goods are deemed to be in transit under Saudi law, specifically while they are still in transit and not when they are in the possession of the Seller or Buyer. The crucial element of stoppage in transit is that the goods should be in the possession of a carrier and this carrier should be holding the goods in the capacity of an independent individual and not as an agent of the Seller or Buyer; see Ibrahim Alhowaimi, *Frustration of Performance of Contracts: A Comparative and Analytic Study in Islamic Law and English Law* (Thesis for the Degree of Doctor of Law, Brunel University School of Law 2013), 249-251.

To summarise, the unpaid Seller has a right to stop goods in transit under English and Saudi law. In both regimes, this is a further entitlement that can be availed of by the Seller against the Buyer, when the possession of the goods is lost by the Seller but has not yet arrived with the Buyer. In English and Saudi law, there are three conditions for applying the Seller's right to stoppage of the goods in transit. First, the Seller must be unpaid; second, the Buyer must be insolvent, and third, the goods must be in transit.

In both English and Saudi law, the differences between the right to lien and the right to stoppage of the goods in transit suggest that in the case of the former, the goods are still in the possession of the Seller, while in the case of the latter, the right is triggered, when the goods are in the possession of a carrier. This means that the Seller uses his right of stoppage of the goods in transit to regain possession of them, whereas he would exercise his right of lien to hold the goods until their price had been paid, in order "to recover payment for the goods from the Buyer". Other differences between the right to stoppage of the goods in transit and the right to lien relate to the circumstances of their use. The right to stoppage can only take place if the Buyer becomes insolvent and has not yet paid the full price of the goods, but the Seller can exercise his right of lien at any time, if the Buyer refuses to pay the full price of the goods.

5.3.1.5. The Unpaid Seller's Right to Resell the Goods:

5.3.1.5.1. The Seller's Right to Resell Goods in English Law:

In English law, when the property in goods has transferred from the unpaid Seller to the Buyer, and the Seller has exercised his right of lien or stoppage in transit, then he has the right to resell the goods under section 39(1)(c) of the 1979 Act. This section provides the unpaid Seller with the right to resell the goods, when the right to lien or stoppage of the goods in transit are of little

use to him.[798] Thus, he cannot be expected to hold these goods forever, especially where perishable goods are involved.

Section 48 of the 1979 Act supports subsection 39(1)(c) and provides rules for the resale of goods by the Seller. [799] Under section 48, the unpaid Seller puts himself in a position where he is able to resell the goods and deliver them to a new buyer.[800] Under this section, the situations giving rise to the Seller's right to resell the goods are as follows:

I. Where the Seller's right to lien over the goods and right to stoppage of the goods in transit are of little use to him: the unpaid Seller could subsequently resell the goods and the Buyer would acquire good title to them against the original Buyer.[801]
II. Where the goods being sold are of a perishable nature, with a consequent urgent need for the unpaid Seller to resell them to avoid any losses.[802]
III. Once notice has been delivered by the unpaid Seller to the Buyer, specifying that he (the Seller) intends to resell the goods, but with no answer being received by the Seller from the Buyer within a reasonable timeframe.[803]
IV. Where the Seller has expressly reserved to the right to resell the goods in the original

[798] However, this right is limited by the Sale of Goods Act 1979, section 39(1)(c), which provides for "a right of re-sale as limited by this Act".
[799] When the Goods are in the possession of the Seller, he also has right to resale within section 8 of the Factors Act or section 24 of the Sale of Goods Act. Nevertheless, these two sections impose requirements of continuity of possession, good faith and delivery. Unlike them, section 48 (2) of the 1979 Act does not require those, thus it is to extent wider than section 8 of the Factors Act and section 24 of the Sale of Goods Act. See Bridge (N 29), para 11.49; *Atiyah and Adams' Sale of Goods (N 35)*, 402.
[800] *Benjamin's Sale of Goods* (N 25), para 15-003.
[801] The Sale of Goods Act 1979, s. 48(2) provides that "Where an unpaid seller who has exercised his right of lien or retention or stoppage in transit re-sells the goods, the buyer acquires a good title to them as against the original buyer…" as mentioned above, the Seller also has right to resell the goods under section 24 of The Sale of Goods Act 1979. However, there is an important difference between section 24 and section 48(2) of the 1979 Act, in the latter, the original Buyer must be in default of payment or of tendering the price, so that the Seller becomes an 'unpaid Seller' within the meaning of s. 38(1). However, despite the differences mentioned in this paragraph, in many situations, the power to pass good title under section 48(2) will overlap section 24 of The Sale of Goods Act 1979. See *Benjamin's Sale of Goods* (N 25), para 15-103.
[802] The first part of section 48(3) of the Sale of Goods Act 1979 provides: "…or where the goods are of a perishable nature."
[803] The Sale of Goods Act 1979, s. 48(3) in its second part provides that "Where the unpaid seller gives notice to the buyer of his intention to re-sell, and the buyer does not within a reasonable time pay or tender the price, the unpaid seller may re-sell the goods and recover from the original buyer damages for any loss occasioned by his breach of contract".

Contract, if the Buyer refuses to make the payment for them.[804]

In such cases, the unpaid Seller has the right to resell the goods, even if part of the price has been paid. Nevertheless, when he resells the goods, he may be under an obligation to repay to the Buyer any sum that was not intended as a deposit. Furthermore, in English law, when the price has been apportioned by the Contract to different sections of the goods sold and is payable separately for each section, the right of resale will only arise in respect of the section for which the price has not been paid as agreed.[805]

Irrespective of the above, where the Seller resells the goods, the question subsequently arises of whether the original Contract is rescinded. Under English law, specifically in section 48(2) of the 1979 Act, it is provided that where the unpaid Seller resells the goods, the new Buyer acquires good title to them against the original Buyer.[806] This means that the Seller resells goods that have already passed to the original Buyer, but it does not mean that the original Contract is rescinded. Moreover, in the case where the Seller resells goods under section 48(3), this does not mean that reselling the goods will rescind the original Contract of Sale. Nevertheless, in the case where the unpaid Seller resells the goods under section 48(4), this section specifically provides that the resale of goods by the Seller rescinds the original Contract.[807] In English case law, Lord Finnemore held in *Gallagher v Shilcock*[808] that when an unpaid Seller resells goods under section 48(3), it means that he resells the Buyer's goods and acts as a quasi-pledgee, as opposed to an owner. Therefore, the original Contract of Sale is not rescinded.[809]

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[804] The Sale of Goods Act 1979, s. 48(4) provides that "Where the seller expressly reserves the right of re-sale in case the buyer should make default, and on the buyer making default re-sells the goods, the original contract of sale is rescinded but without prejudice to any claim the seller may have for damages".
[805] See section 5.3.1.1. The 'Unpaid Seller' in English Law, 142; *Benjamin's Sale of Goods* (N 25), para 15-119
[806] The Sale of Goods Act 1979, s. 48(2).
[807] Ibid, s. 48(4).
[808] *Gallagher* (N 30).
[809] It was held by Finnemore in *Gallagher v Shilcock*; see *Gallagher* (N 30) also *Atiyah and Adams' Sale of Goods (N 35)*, 403.

In *Gallagher v Shilcock*,[810] the Buyer purchased a boat for £665.00, paying £200.00 as a deposit. The Seller then sent notice to the Buyer to pay within 14 days, whereby the latter refused to pay within this period. The Seller consequently resold the boat for £700.00, with the Court finding that the £200.00 deposit as partial payment and the property in the boat had passed to the Buyer. Here, Lord Finnemore adopted the position that section 48(3) did not involve the rescission of the Contract on resale by the Seller, stating that:

> The Act says that the unpaid seller may re-sell the goods, and, if that sale does not reimburse him, he may still recover damages for any loss which he has suffered. In such a case the unpaid seller does not sell as an absolute owner. The property has already passed, and the lateness of payment does not rescind the contract. It follows that as there is no complete resumption of the right of property on the part of the seller, he must, when he re-sells, bring into account any deposit which he has already received from the buyer.[811]

However, in the event of the unpaid Seller reselling goods under section 48(3), another question arises: Does he have the right to retain any profit made through the resale? In *Gallagher*[812] Lord Finnemore concluded that the Seller reselling the goods was in a position analogous to a pledgee and could not retain more than the originally contracted price. It was therefore decided that any claim by the Seller to retain profits from a resale of goods, as under section 48(3), would conflict with Finnemore's reasoning.

Nevertheless, all is not as clear-cut as it might first appear, because in some cases, the English courts have decided that when the Seller has resold goods under sections 48(3) or (4), the Contract has been rescinded, as in the case of *R V Ward Ltd v Bignall.*.[813] Here, the Court found that the Seller had rescinded the Contract, since he was no longer able to perform it, given

[810] *Gallagher* (N 30).
[811] Ibid.
[812] Ibid.
[813] *R V Ward* (N 32).

that one of the cars under the original Contract had been sold. In this case, the Seller could not claim for the original Contract price. The Court subsequently decided that the unpaid Seller had the right to claim for damages for non-acceptance, but not for the price, because the resale had rescinded the Contract. Moreover, this would have equally been applicable, if only a portion of the goods had been resold. As a result, it would appear that the 1979 Act and English case law are unclear on this point, namely about whether the effect of a Seller reselling the goods terminates the original Contract of Sale.

To further illustrate this, Bridge has noted that the effect of a Seller reselling goods is in fact to terminate the original Contract.[814] Twigg-Flesner adds that it is unfair to give a Buyer who has breached the Contract the right to claim any profit made through a resale of the goods by the Seller.[815]

To summarise this effect in English law, it could be said that under section 48, reselling the goods terminates the original Contract and so the Seller retains any profit made.[816] Nevertheless, even though the unpaid Seller cannot claim the price, he will have the right to claim for damages.

5.3.1.5.2. The Seller's Right to Resell Goods in Saudi Law:

Similar to the position of English law, Saudi law provides that the unpaid Seller has the right to resell goods, if their price has not been paid. In fact, where this right does not exist, the unpaid Seller's rights over the goods, such as the right to lien or to stoppage of the goods in transit will be of no use, as they merely entitle an unpaid Seller to retain the goods indefinitely.[817] Furthermore, if the Buyer remains in default of payment of the price for the goods, the question

[814] *Benjamin's Sale of Goods* (N 25), para 15-003.
[815] *Atiyah and Adams' Sale of Goods (N 35)*, 404-405.
[816] See section 5.3.1.5.2.1. Where the Goods Have Been Resold by the Unpaid Seller, Who is Entitled to Profit under English and Saudi Law?, 161.
[817] Muhammad Baderi, 'General Rules Regarding Selling and Buying Transactions' (June, 2012) 6 Furqon Magazine 180; see also Dusuki (N 344), 63-78.

arises as to whether the Seller can be expected to hold these goods forever, especially where perishable goods are involved. It would appear that this is not the intention in Saudi law and so the Seller has the right to resell the goods, if the Buyer refuses to pay the price for them.

In such circumstances, the Seller should resell the goods at the market price and recover the difference, if any, between the price realised and the price agreed with the Buyer under the Contract. However, it should be noted that under Saudi law, where the unpaid Seller resells the goods, he is actually selling the Buyer's goods.[818] This is because the original Contract is not rescinded, and the Buyer is still the legal owner of the goods. By adopting this approach, where the Seller resells the goods for less than the price originally agreed in the Contract, he has the right to claim for damages, as in English law.[819] Conversely, if the price of the resale is higher than what was agreed with the Buyer under the original Contract, the Buyer will have the right to any profit made.[820] This is because the Seller has not borne any risk and is therefore not entitled to enjoy any return as profit, because Islamic law prohibits a person from enjoying any profit without liability.[821]

The Buyer's right to profit is supported by the Saudi courts, as evidenced by Case No. 233/S/3,[822] where the Court decided that the Buyer had the right to any profit gained by means of a resale.[823] The origins of this provision lie in the *Hadith* of the Prophet Mohammad (peace be upon him), *"*Liability accompanies gain*"*[824] and a further *Hadith*, which states that *"*gain

[818] Frank E. Vogel and Samuel L. Hayes, *Islamic Law and Finance: Religion, Risk, and Return* (1st edn, Arab & Islamic Laws Series 1998), 113.
[819] See section 5.3.1.5.1. The Seller's Right to Resell Goods in English Law, 155.
[820] If the unpaid Seller has terminated the Contract before reselling the goods, he will then be entitled to profit.
[821] In Islamic law, a person who owns the Goods asset has to bear all the risks associated with its ownership, but will have the exclusive right to the benefit of it. This is the basis for the entitlement to profit, according to the *Hanbali* School of interpretation. This is similar to the position adopted in the *Hanafi* School, Art 85 of the Ottoman Courts Manual (*Hanafi*), '*Majalat Alahkam Al'Adliah',* which provides that "The enjoyment of a thing is the compensating factor for any liability attaching thereto; that is to say, in the event of a thing being destroyed, the person to whom such thing belongs must suffer the loss and conversely may enjoy any advantages attaching thereto".
[822] Judicial Blogs, Contract of Sale, Vol. 3 (A. H. 1430 "2009"), 940.
[823] In this case, the Buyer bought cars and paid a part of the price, but refused to make the full payment of the price, with the result that the Seller re-sold the cars at a price that was higher than the one agreed on in the original Contract. The Buyer then claimed that he was entitled to the profit realised by way of the resale.
[824] Mohamed Abdul Khair and others, *Risk Sharing: A Fiqhi Perspective* (3 Rd ISRA – IRTI, Durham University School of Law, 2013), 12-13.

accompanies liability for loss"[825] (*al-kharaj bi al-daman*). Thus, the Buyer may benefit from any profits made, because he has borne the risk of loss over the goods, since the property in the goods has been transferred to him. This means that in Islamic Commercial Law, there is an essential link between risk and lawful gain.

5.3.1.5.2.1. Where the Goods Have Been Resold by the Unpaid Seller, Who is Entitled to Profit under English and Saudi Law?

In English law, it could be said that the effect of the Seller reselling the goods is to terminate the original Contract, with the Seller retaining any profit made in this way.[826] It relates to fair dealing, since the Buyer will have breached the Contract by wrongfully refusing to pay the full price of the goods. Thus, it is unfair to give a Buyer who has breached the Contract, the right to claim any profit made by the Seller reselling the goods.[827] In Saudi law, however, if the unpaid Seller resells the goods, the original Contract is not rescinded, and the Buyer retains legal ownership of the goods. Under this approach, the Buyer has the right to claim any profit, because the unpaid Seller does not bear any risk over the goods and so is not entitled to enjoy any profitable return.[828] Ultimately, English law seems to provide better treatment of this issue, because the Buyer is the one who is in breach of the Contract and so it is unfair to give him the right to claim any profit made by the Seller through the resale of the goods.

To summarise, the unpaid Seller has the right to resell goods in both English and Saudi law. Nevertheless, it may be noted that although these two regimes share some similarities in this area, the details of the governing rules vary considerably, such as in the effect of the unpaid Seller reselling the goods on the termination or retention of the original Contract. The question

[825] Vogel (N 818), 113.
[826] See *R V Ward* (N 32); *Benjamin's Sale of Goods* (N 25), para 15-003.
[827] See section 5.3.1.5.1. The Seller's Right to Resell Goods in English Law, 155.
[828] See section 5.3.1.5.2. The Seller's Right to Resell Goods in Saudi Law, 159.

also arises of whether he will gain any profit made as a result.

5.3.2. The Seller's Right to Recover the Price of the Goods:

English and Saudi law both give the Seller the right to sue the Buyer for the price of the goods. This right is independent of the Seller's rights over the goods themselves: the "right and power against the Goods". Therefore, the Seller can claim for the price of the goods, even though he has lien over them.[829] Furthermore, the Seller's right to claim the price of the goods may arise before actual delivery of the goods to the Buyer. The Seller's right to sue the Buyer for the price of the goods under English and Saudi law is consequently analysed below.

5.3.2.1. The Seller's Right to Claim the Price of the Goods in English Law:

Under the Seller's right to claim for the price of the goods, if the Buyer refuses to pay this price, English law distinguishes between two situations: the property in the goods being transferred from the Seller to the Buyer, or the property not being transferred. It represents a subtle but critical distinction. In the first of the above scenarios, the Seller has the right to sue the Buyer for the price of the goods. Section 49(1) the of 1979 Act provides that where the property in the goods has been transferred from the Seller to the Buyer and the latter refuses to pay the price, the Seller has the right to this price.[830] Under this section, for the Seller to have the right to sue the Buyer for the price of the goods, the property in the goods should have transferred from the Seller to the Buyer. [831] Secondly, the Buyer should have wrongfully neglected or refused to pay the price of the goods, irrespective of whether or not the goods have been delivered.[832]

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[829] As mentioned earlier, this right is independent of his rights against the Goods themselves, which means that the Seller has the right to claim for the price of the Goods, even though he also has the right to lien over the Goods. Nevertheless, it is clear that when the Buyer pays the price of the Goods, the Seller is liable to deliver the Goods to the Buyer; see section 5.3.1. The Rights of the Unpaid Seller, 140.

[830] The Sale of Goods Act 1979, s. 49(1) provides that "Where, under a contract of sale, the property in the goods has passed to the Buyer and he wrongfully neglects or refuses to pay for the goods according to the terms of the contract the Seller may maintain an action against him for the price of the goods".

[831] In the leading case of *Stein,* the Court saw that where the property had not passed, the Seller could not sue for the price and the Seller's claim was therefore for damages; see case of *Stein Forbes v County Tailoring Ltd* [1916] 115 LT 215.

[832] In English law, the Seller can sue the Buyer for the price of the goods, even if the goods have not been delivered. See

In the second scenario, the Seller has the right to claim for damages, but not for the price of the goods. Nevertheless, the Seller may even have the right to claim for the price of the goods, if the property in the goods has not yet transferred to the Buyer. This occurs where the price of the goods is payable on a specific day, irrespective of delivery. Section 49(2) of the 1979 Act provides that where the price of the goods is payable on a specific day, regardless of the time of delivery and the Buyer refuses to pay the price of the goods, the Seller has the right to claim for this price, even where the property in the goods has not transferred to the Buyer.[833] It can thus be seen that where the Seller claims for the price of the goods under section 49(2), there must first be a contractual condition that the price of the goods is payable on a specific day, irrespective of the actual time of delivery. Second, the Buyer should have wrongfully neglected or refused to pay the price of the goods on that specified day.[834] Likewise, in the case where the property in the goods has not been transferred to the Buyer and the Seller claims for the price of the goods under section 49(2), the Contract must stipulate that the payment be made at a certain point in time. This specified time will then determine the remedy for a failure to pay the price of the goods under section 49(2).[835]

It can be seen that the 1979 Act, sections 49(1) and (2) establish the circumstances that

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Minister for Supply and Development v Servicemen's Co-Operative Joinery Manufacturers Ltd [1951] 82 CLR 621. See also Daniel Webb, 'The Potential Danger of Retention of Title Clauses' [2014] Oxford University Undergraduate Law Journal 40-41; Paul Dobson and Rob Stokes, *Commercial Law* (8th edn, Sweet and Maxwell 2012), 218-220; Bridge (N 29), paras 11-68.

[833] The Sale of Goods Act 1979, s. 49(2) provides that "Where, under a contract of sale, the price is payable on a day certain irrespective of delivery and the buyer wrongfully neglects or refuses to pay such price, the seller may maintain an action for the price, although the property in the goods has not passed and the goods have not been appropriated to the contract". Meanwhile, in *Colley*, it was held that "Where the property has not passed, the seller's claim must, as a general rule, be special for damages for non-acceptance. An exception to the general rule is to be found in the cases provided for by section 49 subsection 2 of the Act" (see case of *Colley v Overseas Exporters* [1921] 3 K B 302, 310).

[834] In order for the Seller be able to claim for the price under section 49(1), he himself must not be in violation of the Contract. For example, in the case where the Seller has an obligation to transfer the property in the goods to the Buyer before payment, the Buyer will not have refused to pay the price of the goods, if the Seller has not transferred the property of the goods to him. In this case, the Seller cannot claim the price, because he is in violation of the Contract and has refused to transfer the property in the goods to the Buyer before payment (see Robert Bradgate and Fidelma White, *Commercial Law Blackstone Legal Practice Course Guide* (1st edn, Oxford University Press 2007), 18.

[835] When the Buyer wrongfully neglects or refuses to accept and pay for the goods, the Seller has right to claim for the price of them under section 49 of the Sale of Goods Act 1979, or to claim for damages for non-acceptance under section 50(1) of the above Act, meaning a claim for damage for non-acceptance (see section 5.3.3.1. The Seller's Right to Sue the Buyer for Non-acceptance in English Law, 167).

entitle the Seller to sue the Buyer for the price of the goods.[836] The question consequently arises of whether the Seller can apply for the price under section 49(2), if the property in the goods has not passed to the Buyer, but the Seller has delivered the goods to the Buyer with ROT.[837] ROT should be addressed on a case-by-case basis, relying on the payment clause.[838] This clause must ensure that the price is payable on a date that is unrelated to the time of delivery of the goods. Therefore, a clause providing that payment is due on "the last day of the month following the month of delivery*"* for example, would not satisfy section 49(2), since the required date of payment is not certain, 'irrespective of delivery'.[839] In the case of *Caterpillar v Holt*,[840] Evans commented: *"*If a seller wants to retain title in order to have the ability to recover his goods, he will not be able to claim the price of those goods unless his payment term is drafted so as to fit within s. 49 (2). *"*[841]

To summarise, the Seller has the right to recover the price of the goods under English law, where the property has passed from the Seller to the Buyer, but the Buyer has failed to make the payment to the Seller, based on section 49(1) of the 1979 Act. Moreover, where the Contract of Sale provides that the price is payable on a particular day, irrespective of delivery,

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[836] These are as follows: section 49(1) of the Sale of Goods Act 1979, which provides that an action may be brought by the Seller against the Buyer, when the goods have transferred from the former to the latter, but with the Buyer neglecting or failing to pay the price to the Seller, and section 49(2), which provides that when the property in the goods has not passed to the Buyer, but the price becomes payable at a specific point in time, the Seller can avail himself of a remedy that consists of bringing an action against the Buyer to obtain the price, regardless of whether or not the goods have moved to the Buyer. The distinction between sections 49(1) and (2) is that the first deals with non-payment, where the property in the goods has already been transferred to the Buyer. In contrast, the second deals with non-payment, where the property in the goods has not been transferred to the Buyer, but the price is due to become payable at a certain point in time. This is a subtle but critical distinction. Nevertheless, if the Seller does not come under section 49(2), where the price of the goods is not payable on a specific day, then he may fall under section 50(1) of the Act, which means a claim for damages for non-acceptance (see *Workman Clark Ltd v Lloyd Brazilero* [1908] 1 KB 968).

[837] See also section 3.2.5.1.1. Retention of Title (ROT), 69.

[838] "ROT clauses are used primarily to protect sellers in the event of the buyer's insolvency; if the buyer is not insolvent, a seller would normally want to sue for the price and not repossess the goods" (see Louise Gullifer, 'Sales' on Retention of Title Terms: Is the English Law Analysis Broken?' (2017) 133 (244) Law Quarterly Review, 9).

[839] Gavin Evans, 'Retention of Title May Mean Losing Payment!' (The Wilkes Partnership N/A) <https://www.wilkes.co.uk/retaining-title-may-mean-losing-payment/> accessed 07 November 2017.

[840] [2013] EWCA Civ 1232: "In this case the Seller entered into an agreement to sell generators and parts to the Buyer. After the Buyer refused to pay a number of invoices, the Seller purported to exercise its right under ROT, although by that stage, the goods had been sold (and shipped) by the Buyer to its Nigerian subsidiary and so in practice the clause was of no use. The goods were in Nigeria and so the Seller then sought to sue the Buyer for the price." See Webb (N 832), 39.

[841] Gavin Evans, 'Retention title may mean losing payment!' (The Wilkes Partnership, N/A) <https://www.wilkes.co.uk/retaining-title-may-mean-losing-payment/> accessed 07 November 2017.

but the Buyer fails to make the payment, even though the property in the goods has not passed to him, the Seller also has the right to the price under section 49(2) of the above Act. In order to bring an action under section 49, however, the price of the goods must be payable on a specific day, regardless of the time of delivery.[842]

5.3.2.2. The Seller's Right to Recover the Price of the Goods in Saudi Law:

Saudi law has given the Seller the right to sue the Buyer for the price of the goods, if the Buyer wrongfully neglects or refuses to pay this price, even if the goods have been not delivered to the Buyer.[843] As in English law, the Seller's right to claim the price of the goods in Saudi law may arise before the goods are actually delivered to the Buyer. Furthermore, the Seller can claim for the price of the goods, even though he has the right of lien over the goods.[844] As stated earlier, the effect of the Contract of Sale of Goods in Saudi law is to transfer the property in the goods immediately from the Seller to the Buyer.[845] By accepting this effect, in each Contract of Sale, the Seller has the right to claim for the price of the goods, if the Buyer fails to pay the purchase price.[846]

In the archives of the Saudi courts, numerous judicial indications may easily be found addressing the Seller's right to claim the price of the goods, if the Buyer fails to pay it;

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[842] See *Workman* (N 836).

[843] Generally speaking, the Seller's right to the price of the goods at the place where the goods are to be delivered and its date of maturity shall in this case correspond to the time of delivery, unless otherwise agreed (see section 4.3.4.2.2.2. 'Time of Payment' in Saudi Law, 116).

[844] As mentioned earlier, this right is independent of his rights against the goods themselves, which means that the Seller has the right to claim for the price of the goods, even though he has lien over the goods. Nevertheless, it is clear that when the Buyer pays the price of the Goods, the Seller is liable to deliver them to the Buyer (see section 5.3.1. The Rights of the Unpaid Seller, 140).

[845] Under Saudi Law, the Contract of Sale is a direct cause of the transfer of property in Goods from the Seller to the Buyer (see section 3.2.5.2. Transfer of Property in Saudi Law, 71. See also Saleh (N 354), 101-116; Bhala (N 729), 484-485; Al-Sanhūrī (N 48), 409. This is similar to the position adopted in the *Hanafi* School, according to the Ottoman Courts Manual, '*al-majallah al-ahkam al-adliyyah*', which provides in its Art 369 that "The effect of the conclusion of a sale is ownership, that is to say, the Buyer becomes the owner of the Goods and the Seller becomes the owner of the price".

[846] In the case where the parties to the Contract have agreed that the property in the goods will transfer in the future, then the Contract will change from being a Contract of Sale to a *Salam* Contract and this is the basic criterion for deciding whether a Contract is for Sale or *Salam* in Saudi law.

irrespective of whether the goods have been delivered to the Buyer.[847] In Case No. 455/S/3,[848] the Buyer refused to pay the price of the goods, while the goods remained in the possession of the Seller. In this case, the Seller claimed the price of the goods. The Court accepted the claim and decided to oblige the Buyer to pay the price of the goods, even though the goods had not been delivered to him.[849] It should be noted here that in the Saudi courts, when a Buyer refuses to pay the price of the goods, the Seller only has the right to the price, rather than the right to interest on overdue sums (statutory interest), given that this leads to *Riba*.[850]

To summarise, the Seller's right to claim the price of the goods under English and Saudi law gives the Seller the right to sue the Buyer for the price of the goods. Furthermore, in English and Saudi law, this right is independent of the Seller's rights over the goods themselves: "right and power against the Goods." Therefore, the Seller can claim the price of the goods, even when he has lien over them. This means that the Seller can claim the price of the goods before actually delivering the goods to the Buyer.

Nevertheless, in English law, under the Seller's right to sue the Buyer for the price of the goods, two distinct situations may arise, according to whether or not the property in the goods has been transferred from the Seller to the Buyer. In the first scenario, the Seller has the right to sue the Buyer for the price of the goods, pursuant to section 49(1) of the 1979 Act. In the second scenario, the Seller also has the right to claim for the price of the goods under section 49(2), but only when the price of the goods is payable on a specific day, irrespective of delivery. If not, he will have the right to claim for damages instead.[851]

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[847] It should be noted that the Seller only has the right to the price of those goods, rather than the right to interest on overdue sums (statutory interest), because this would lead to usury (*Riba*), which is prohibited under Islamic law (see section 5.3.6.2.2.1. The Position of Saudi Law on Charging Interest on Overdue Sums, 192).

[848] Judicial Blogs, Contract of Sale, Vol. 3 (A. H. 1431 "2010"), 1070.

[849] The same decision was issued in Case No. 826/S/7 (A. H. 1432 "2011"), 724; Case No. 174/S/3 (A. H. 1431 "2010"), 1201; Case No. 229/S/7 (A. H. 1432 "2011"), 551; Case No. 940/S/12 (A.H. 1432 "2011"), 776.

[850] See section 5.3.6.2.2.1. The Position of Saudi Law on Charging Interest on Overdue Sums, 192.

[851] See section 5.3.2.1. The Seller's Right to Claim the Price of the Goods in English Law, 162.

In Saudi law, in each case, the Seller has the right to claim for the price of the goods, if the Buyer fails to pay the purchase price under a Contract of Sale. This is because the effect of the Contract of Sale in Saudi law is to transfer the property in the goods from the Seller to the Buyer, once the Contract has been concluded.[852]

Nevertheless, in the event of the Seller having the right to claim for the price of the goods, English and Saudi law have different approaches, namely in the scope of the claim before the Saudi courts. For instance, the Seller only has the right to the price of the goods, but not the right to interest on overdue sums (statutory interest), because this leads to *Riba*.[853] However, in English law, if the Seller has the right to sue for the price of the goods, he will also have the right to claim for the late payment of commercial debts, namely 'special damages'.[854]

5.3.3. The Seller's Right to Sue the Buyer for Damages Due to Non-acceptance:

In English and Saudi law, where the Buyer wrongfully neglects or refuses to accept the goods and pay the price for them, the Seller may have the right to claim for the price of the goods or damages for non-acceptance. Having analysed how the Seller can sue the Buyer for the price of the goods under English and Saudi law,[855] it is now appropriate to analyse the Seller's right to sue the Buyer for damages for non-acceptance under both the above-mentioned regimes.

5.3.3.1. The Seller's Right to Sue the Buyer for Non-acceptance in English Law:

In English law, where the property in the goods has not been transferred from the Seller to the Buyer and the latter wrongfully neglects or refuses to accept and pay for the goods, the Seller may take action for damages due to non-acceptance, according to section 50(1) of the 1979

[852] See section 3.2.5.2. Transfer of Property in Saudi Law, 71.
[853] See section 5.3.6.2.2.1. The Position of Saudi Law on Charging Interest on Overdue Sums, 192.
[854] In English law, statutory interest may be payable under the Late Payment of Commercial Debts (Interest) Act 1998, which contains specific provisions for calculating the date from which statutory interest starts (see section 5.3.6.2.1. The Seller's Right to Claim for Special Damages in English Law, 189).
[855] See section 5.3.2. The Seller's Right to Recover the Price of the Goods, 162.

Act.[856] Therefore, in English law, if the Seller cannot sue the Buyer for the price of the goods pursuant to section 49(2) of the 1979 Act, section 50(1) provides for situations, where the Seller can sue the Buyer for damages for non-acceptance, in the event of the Buyer wilfully refusing to accept the goods and pay the price for them.[857] Thus, the fundamental purpose of section 50(1) of the 1979 Act is to restore the Seller to the position that he would have been in, if no loss had been incurred to him as a result of the Buyer failing to accept the goods.

As in English law, the property in the goods may be transferred from the Seller to the Buyer, before the goods have actually been delivered to the latter.[858] If the property in the goods has transferred to the Buyer, but the Buyer has refused to accept the goods, the Seller will have the right to sue the Buyer for the price of the goods under section 49(1) of the 1979 Act. In the second situation, where the property in the goods has not been transferred to the Buyer, the Seller will only be entitled to damages for non-acceptance under section 50(1) of the 1979 Act. Nevertheless, the Seller may have the right to sue the Buyer for the price of the goods under section 49(2), if the price is payable on a specific day, irrespective of the actual time of delivery.[859]

Under this discussion, where the property in the goods has transferred to the Buyer and he refuses to accept the goods and pay the price for them, the Seller has the right to claim for this price under section 49(1), or to damages for non-acceptance under section 50(1) of the 1979 Act. Therefore, it is preferable for the Seller to claim for the price of the goods, because the value of such a claim is likely to be higher than the value of a claim for damages for non-

[856] The Sale of Goods Act 1979, s. 50(1) provides that "Where the buyer wrongfully neglects or refuses to accept and pay for the goods, the seller may maintain an action against him for damages for non-acceptance".
[857] If the Seller does not fall within section 49(2) of the Sale of Goods Act 1979, where the price of the goods is not payable on a certain day, then he may fall under section 50(1) of the above Act, which means a claim for damages for non-acceptance (see *Workman* [N 836]).
[858] See section 3.2.5.1. Transfer of Property in English Law, 66.
[859] See section 5.3.2.1. The Seller's Right to Claim the Price of the Goods in English Law, 162.

acceptance.[860] Furthermore, the Seller will not need to mitigate his loss with a claim for the price of the goods, pursuant to section 49, which he must do to claim damages for non-acceptance under section 50(1).[861]

To summarise, the Seller will have rights against the Buyer, where the Buyer wrongfully neglects or refuses to accept and pay for goods. This is based on the Seller's right to the price of the goods under section 49 of the 1979 Act, or the right to damages for non-acceptance under section 50 of same, as explained above.

5.3.3.2. The Seller's Right to Sue the Buyer for Damages for Non-acceptance in Saudi Law:

In Saudi law, where the Buyer wrongfully neglects or refuses to accept the goods, then the Seller has the right to claim for damages for non-acceptance, or to claim the price of the goods.[862] However, as mentioned above, it is preferable for the Seller to claim the price of the goods.[863]

For these reasons, it is most common in the Saudi courts for the Seller to claim for the price of the goods, if the Buyer wrongfully neglects or refuses to accept them. In support of this, there are many cases of the Seller claiming for the price of the goods in the archives of the Saudi courts, such as Case No. 96/D/32/1.[864] Here, the Buyer was liable to take possession of the goods from the Seller under a Contract of Sale, but did not do so at the time agreed in the Contract. Moreover, the Buyer refused to pay the price of the goods and so the Seller claimed

[860] In English law, the general method for measuring damages is the available market, as submitted under section 50(3) of the Sale of Goods Act 1979. This section provides that the measure of damages is the difference in value between the price in the Contract and the market price. Thus, the Seller has the right to claim for this value (see *Glencore Energy UK Ltd v Cirrus Oil Services Ltd* [2014] EWHC 87).

[861] See section 5.3.6.1.1. The Seller's Right to Claim for General Damages in English Law, 185.

[862] As discussed in Saudi law, the Contract of Sale is a direct cause of the transfer of the property in the goods from the Seller to the Buyer (see section 3.2.5.2. Transfer of Property in Saudi Law, 71).

[863] It is better for the Seller to sue the Buyer for the price of the goods, because the value of such a claim is likely to be higher than the value of a claim for damages for non-acceptance. Moreover, the Seller will not then need to mitigate his loss with a claim for the price of the goods, which would be necessary if he claimed for damages for non-acceptance.

[864] 96/D/32/1 (N 572).

for this price, with the Court subsequently obliging the Buyer to pay it and take delivery of the goods from the Seller.[865] In these circumstances, the Court did not adjudicate on the basis of whether the property in the goods had been transferred to the Buyer; it looked at the Buyer having wrongfully neglected to take possession of the goods from the Seller. Therefore, it decided that the Seller had the right to claim the price of the goods.

To summarise, if the Buyer wrongfully neglects or refuses to accept and pay for the goods, under both regimes, the Seller could be entitled to claim the price of the goods or damages for non-acceptance. In English law, when the Seller does not have the right to claim for the price under section 49 of the 1979 Act,[866] he will instead have the right to claim for damages for non-acceptance under section 50 of the 1979 Act. The basis of section 50(1) is that the Seller will be restored to the same position as where no loss had been caused to him as a result of the Buyer failing to accept the goods.[867] In Saudi law, since the effect of the Contract of Sale is the immediate transfer of the property in goods from a Seller to a Buyer, the Seller can claim the price of the goods or damages for non-acceptance in any case where the Buyer refuses to accept the goods.[868] Consequently, the approach to the effect of the Contract in transferring the property in the goods from the Seller to the Buyer differs between the two regimes.

In English law, the parties to a Contract of Sale can agree on when the property in goods will pass to the Buyer. The obvious purpose of this is to secure the Seller as far as possible against the risk of non-payment, in the event of the Buyer becoming insolvent after taking possession of the goods.[869] Furthermore, in English law, goods that are in existence, but not

[865] The Court also decided that the Seller had the right to claim for the price in Case No. 35/3/448 (N 572) 2322 (see section 4.3.4.1.2. The Buyer's Obligation to Accept Delivery of the Goods in Saudi Law, 111).
[866] See section 5.3.2.1. The Seller's Right to Claim the Price of the Goods in English Law, 162.
[867] See section 5.3.3.1. The Seller's Right to Sue the Buyer for Non-acceptance in English Law, 167.
[868] In Saudi Law, where the Buyer refuses or neglects to pay the price of the goods, then the Seller may exercise any of his entitlements to sue him for the price of the goods or for damages for non-acceptance (see section 5.3.2.2. The Seller's Right to Recover the Price of the Goods in Saudi Law, 165; section 5.3.3.2. The Seller's Right to Sue the Buyer for Damages for Non-acceptance in Saudi Law, 169).
[869] See section 3.2.5.1. Transfer of Property in English Law, 66. Moreover, Saudi law provides security for the Seller against the risk of non-payment, if the Buyer becomes insolvent. Nevertheless, this is under the *Murabahah* (cost plus) Contract,

yet owned by the Seller may lawfully be the subject of a Contract of Sale,[870] namely as an agreement to sell.[871] Nevertheless, in such circumstances, the property in the goods will not be transferred to the Buyer, because the Seller cannot pass the property.[872] Unlike English law, in Saudi law, the effect of the Contract of Sale is to transfer the property of the goods from the Seller to the Buyer immediately.[873] Therefore, the Seller has the right to claim for the price of the goods, if the Buyer wrongfully neglects or refuses to accept and pay for them, and it would be preferable for him to claim for this price.[874]

5.3.4. The Seller's Right to Cure Defective Performance:

The cure for defective performance by the Seller may consist of replacing goods in the event of a wrong delivery, or carrying out repairs, if the quality of the goods is defective and the delivery period has not ended.[875] The question arises here of whether the Seller has the right to cure his defective performance under both English and Saudi law. To rephrase the above, what is the effect of the Buyer rejecting defective goods under English and Saudi law?[876] This section analyses an approach to the Seller's right to cure defective performance in both the above regimes.

5.3.4.1. The Seller's Right to Cure Defective Performance in English Law:

Under English law, in a commercial Contract for the Sale of Goods, the Seller does not have

which is not a Sales Contract. Additionally, in the case where the goods are not yet owned by the Seller, they could be the subject matter of a *Salam* or *Istisna* Contract and these are not Sales Contracts either (see section 3.2.5.2. Transfer of Property in Saudi Law, 71; section 3.2.3.4. The Classification of Goods, 63).

[870] See section 3.2.3.3. The Seller's Ownership of the Goods. 61.

[871] Bridge (N 29), 55.

[872] See section 3.2.3.4. The Classification of Goods, 63.

[873] See section 3.2.5.2. Transfer of Property in Saudi Law, 71.

[874] This is because the value of such a claim is likely to be higher than the value of a claim for damages for non-acceptance. Moreover, the Seller will not need to mitigate his loss with a claim for the price of the goods, which would be necessary in a claim for damages for non-acceptance. Nevertheless, the approach to the effect of the Contract in transferring the property in the goods from the Seller to the Buyer differs between the two regimes. Therefore, the Seller's right to claim the price of the goods or damages for non-acceptance also differs (see section 3.2.5. The Transfer of Property in Goods from the Seller to the Buyer, 66).

[875] Under English and Saudi law, the time of delivery is the essence of the Contract in a commercial Contract (see section 4.3.3.1.2. The Seller's Obligation with Regard to 'Time of Delivery', 88).

[876] See section 6.2.1.3. The Effect of Rejecting Defective Delivery, 212.

the right to cure defective performance. In the 1979 Act, for example, there is no provision to this effect and this approach is consistent with Common Law, where there is no such presumption.[877] Furthermore, the Law Commission has confirmed that this right of the Seller is unsuitable for commercial Contracts, as the parties to these transactions require swift termination rights.[878] The Commission further has stated that cure may be of great value in consumer transactions, which are generally simple, but could cause a multitude of problems in commercial transactions, where a large sum of money is involved, or where the interests of multiple parties must be taken into account. Moreover, if the law is preparing to accept this, it should be detailed in a special code, which may still leave room for problems.[879] Therefore, English law takes a more pragmatic approach,[880] as in practice, the Buyer will prefer to acquire the goods as soon as possible and is unlikely to wait for the Seller to exercise his right and offer a cure.[881] Furthermore, the Seller's right to cure defective performance creates tension in the Buyer's right to terminate the Contract,[882] due to "the desire for certainty in commercial affairs."[883]

As a consequence, numerous academic writers have found that the Seller does not have the right to cure defective performance in English law. For instance, McKendrick argues that the Seller does not have such a right, since the right to reject the goods terminates the Contract in English law.[884] Furthermore, Dobson notes that the Buyer's right to treat the Contract as

[877] Charles V. McPhillips, 'Buying and selling overseas: Dealing with contracts in a foreign world' (2004) 13(3) ABA Business Law Section, 10-13.
[878] Law Commission (N 87), paras 4.52-4.56; see also Lachmi Singh, *The United Nations Convention on Contracts for the International Sale of Goods 1980 (CISG), An Examination of the Buyer's Remedy of Avoidance under the CISG: How is the Remedy Interpreted, Exercised and What Are the Consequences of Avoidance?* (PhD thesis, University of the West of England 2015), 268-270.
[879] Law Commission (N 87), para 4-53; see also W.C.H. Ervine, 'Cure and retender revisited' (2006) Journal of Business Law, 812.
[880] Atiyah (N 166), 26.
[881] Kourosh Khandani, 'Does the CISG, compared to English law, put too much emphasis on promoting performance of the contract despite a breach by the seller?' (2013) The University of Manchester, School of Law Student Journal, 129.
[882] Jonathan Yovel, *Comparison between Provisions of the CISG (Seller's Right to Remedy Failure to Perform: Article 48) and the Counterpart Provisions of the PECL (Articles 8:104 and 9:303)* (Institute of International Commercial Law 2005). <https://www.cisg.law.pace.edu/cisg/biblio/yovel48.html> accessed 13 June 2017.
[883] Solène Rowan, *Remedies for Breach of Contract: A Comparative Analysis of the Protection of Performance* (Oxford University Press 2012), 77.
[884] Ewan McKendrick and Roy Goode, *Goode on Commercial Law* (4th edn, Penguin 2010), 374.

repudiated arises in the same circumstances as his right to reject the goods.[885] Bridge also supports that in the English Sale of Goods Act, the Seller does not have the right to cure defective performance,[886] given that the Buyer's right to reject the goods includes his right to terminate the Contract.[887] In accepting this approach, English law does not give the Seller any second chances, if the delivery is defective on the first occasion.

Nevertheless, this is not as clear-cut as it first appears, since there is some academic commentary to argue that the Seller has the right to cure defective performance, although this would need to be limited to the time of delivery.[888] As already stated, the English courts have recognised the right to cure defective performance to a limited scope extent, provided that the delivery period has not ended.[889] This was highlighted in the case of *Borrowman Phillips & Co v Free & Hollis,*[890] where the Buyer rejected the goods on the ground that the shipping documents were not tendered with them. The Seller then tendered the cargo once more within the time limit indicated in the Contract. Under these circumstances, the Buyer refused to accept the goods, on the ground that they were not bound to accept the cargo. The Court consequently found that the Seller could cure defective performance, provided that the Contract had not been terminated and sufficient time remained to do so. In the above-mentioned case, the Buyer was bound to accept the Seller's cargo and the Seller had the right to recover any loss sustained through the Buyer's refusal to accept the goods. Nevertheless, this is not without ambiguity,[891]

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[885] Paul Dobson, *Sale of Goods and Consumer Credit* (6th edn, Sweet & Maxwell London 2000), 216; Bradgate (N 834), 128.
[886] Bridge (N 29), 575.
[887] *Benjamin's Sale of Goods* (N 25), para 17-093. Nevertheless, Bridge and others state that the English Sale of Goods Act is not explicit in its treatment of termination and rejection and their effect upon the rights and duties of the Seller and Buyer. He also argues that the link between termination and rejection is left obscure; see Bridge (N 29), 533.
[888] See section 6.2.1.3.1. The Effect of Rejecting the Goods in English Law, 212.
[889] Vanessa Mak, 'The Seller's Right to Cure Defective Performance - A Reappraisal' [2007] Lloyd's Maritime and Commercial Law Quarterly 409.
[890] *Borrowman Phillips & Co v Free & Hollis* [1878] 4 QBD 500.
[891] "The judgments are not as clear as they might be, but it seems that the seller has merely offered to tender a cargo, and the offer never become binding because it was not accepted by the buyer. It is not clear from the judgments as a whole whether this was because the seller initial offer was tentative or whether it could only have become binding if it had been accepted by the buyer… a number of authorities would allow the seller in this case to make a second tender. Because of the uncertainty generated by the first defective tender, the seller may have to move expeditiously to make a second tender prior to the expiry of a delivery period"; see Bridge (N 29), 578.

especially as it was decided before the modern practice of issuing a notice of appropriation had been developed. This notice is given to Buyers by Sellers and is usually open to the correction of errors occurring in transmission.[892]

Aside from the above, where the Contract of Sale of Goods in English law is in the course of business, the time of delivery will be the essence of the Contract, unless otherwise agreed.[893] Here, early delivery is indicated under the heading of time being of the essence to a Contract,[894] as in *Bowes v Shand*.[895] Therefore, since the time of delivery is of the essence, a failure to conform to the contractual time breaches a condition of the Contract, thus giving the Buyer the right to reject the goods and terminate the Contract,[896] irrespective of whether the delivery is early or delayed.[897]

In sum, it may be noted that in English law, where the Buyer has the right to reject the goods, the Contract is consequently terminated. This means that the rejection of the goods and termination of the Contract comprise one remedy for the Buyer under English law. As a consequence, the Buyer has the right to reject the goods and terminate the Contract without granting the Seller the right to cure defective performance. Therefore, the English courts adopt a more pragmatic approach, as damages can be of more practical use, given that the parties to commercial Contracts require swift termination rights, as opposed to being left unsure of whether the Seller will perform his obligations and deliver the goods.[898] In accepting this approach, it is probable that the Buyer will wish to acquire the goods as soon as possible and is

[892] Nevertheless, in the case of *Shamsher Jute Mills Ltd v Sethia*, the Court noted that where the Seller fails to tender the required documents, the Buyer is entitled to reject the goods and repudiate the Contract of Sale (see *Shamsher Jute Mills Ltd v Sethia* [1987] 1 Lloyd's Rep 388, 393; *Davy Offshore Ltd v Emerald Field Contracting Ltd* [1992] 2 Lloyd's Rep 142, 155).
[893] See section 4.3.3.1.2.1. 'Time of Delivery' in English Law, 88.
[894] Schwenzer (N 5), para 47, 65.
[895] *Bowes* (N 27).
[896] See section 6.2.1.3.1. The Effect of Rejecting the Goods in English Law, 212.
[897] Schwenzer (N 5), para 47, 65.
[898] The desire for certainty in commercial affairs.

unlikely to want to wait for the Seller to exercise his right and offer a cure.[899] Furthermore, English law has seen that the Seller's right to cure defective performance usually brings with it extra costs, which could be evaded through the simpler procedure of the Buyer exercising his right to terminate the contractual claim for damages. This is because there is seldom an objective standard for determining whether a suggested cure should be acceptable to a Buyer. Bearing this in mind, the Seller may not be successful in offering a cure, posing the risk of further necessary court intervention. Therefore, the cost of supervising performance is an important factor for not granting the right to a cure in English law,[900] whereby the Seller's right to a cure may lead to litigation rather than a remedy.

However, there is nothing to stop the Seller and Buyer from agreeing to cure defective goods, according to section 35(6)(a) of the 1979 Act.[901] Under this section, both the Seller and Buyer are encouraged to attempt to repair the goods, instead of deciding to terminate the Contract. However, this interpretation depends entirely on the fact of the parties having agreed as such from the beginning. Nevertheless, there may be specific reasons standing in the way of successful attempts at a cure under the 1979 Act. Firstly, it is not known whether there should be an agreement over the period within which goods are to be repaired. Secondly, it is not known, should such a term exist, whether the Buyer must accept the repaired goods, instead of terminating the Contract. In any case, the Buyer is likely to accept such a choice, if he retains his right to termination.[902]

In the literature, some academic commentaries advance the possibility of a cure in English law. For example, Bridge notes that the cure for defective performance, particularly in the case

[899] Khandani (N 881), 114.
[900] Nevertheless, this argument is not based on the essence of the law, but rather on economics; see Anthony T. Kronman, 'Specific Performance' (1978) 45 University of Chicago Law Review 351, 373; see also Rowan (N 883), 29.
[901] The Sale of Goods Act 1979, s. 35(6)(a) provides that "The buyer is not by virtue of this section deemed to have accepted the goods merely because — (a) he asks for, or agrees to, their repair by or under an arrangement with the seller".
[902] Vanessa Mak, *Performance-oriented Remedies in European Sale of Goods Law* (Oxford and Portland 2009), 176-177; see also Ervine (N 879), 812.

of bespoke goods, can play a major role in avoiding the economic waste that would be incurred by terminating a Contract.[903] Furthermore, Mak states that "practical considerations as well as contract principles give ground for a more favourable approach to the right to cure",[904] since termination of the Contract may lead to losses for the Seller and Buyer.[905] Moreover, when the Seller himself offers a cure, it should be assumed that this will be done in a manner that is in accordance with the Contract, whereby no interference by the court is required.[906]

Ultimately, therefore, in English law, the Seller does not have right to cure defective performance. This approach is consistent with Common Law, where there is no such presumption. The English courts have in fact tended to see damages as the most appropriate option and thus an approach that takes as its guideline the achievement of the most beneficial result, when the cost of a cure would be higher than the value of the benefit. Consequently, English law has seen that the Seller's right to cure defective performance usually brings extra costs, which could be avoided through the simpler procedure of the Buyer legitimately terminating the Contract and claiming for damages.

5.3.4.2. The Seller's Right to Cure Defective Performance in Saudi Law:

Saudi law adopts a different approach from English law, in that the Seller has the right to cure defective performance by replacing or repairing goods in the event of defective delivery. However, a number of conditions must first be met, such as the time of performance not having expired and no harm being caused to the Buyer.[907]

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[903] Michael Bridge, 'A Law for International Sale' (2007) 37 Hong Kong Law Journal, 29.
[904] Mak (N 889), 411.
[905] Mak's view is that "Termination of a contract upon breach may cause losses for both parties: the buyer may incur extra costs if the defective performance forces him to go out into the market and make a cover purchase, while the seller, upon termination by the buyer, may lose any benefit expected from the performance of the buyer's obligations (e.g. payment of the price) and may have incurred expenditure which is wasted now that he does not have a second chance to perform". See Mak (N 902), 150.
[906] Ibid.
[907] Al-Sanhūrī (N 48), 603-605.

In the event of a defective delivery of goods by the Seller, the Buyer has the right to reject the goods, but the Seller may have the right to cure defective performance, subject to a number of conditions, as indicated above. By accepting this approach, the rejection of the goods and termination of the Contract are two different remedies available to the Buyer in Saudi law.[908] Therefore, the Buyer may have the right to reject the goods, but not to terminate the Contract, until the Seller loses his right to cure defective performance.

Irrespective of the above, the question arises here of why Saudi law gives the Seller the right to cure defective performance. In fact, this right of the Seller is based on priority being given to adherence to the performance and safeguarding of the Contract.[909] It necessitates granting the Seller the right to cure defective performance, subject to the above-mentioned conditions. Therefore, the Saudi courts, when presented with the Seller's right to cure defective performance, will examine whether the time of performance has expired. If so, the Buyer will have the right to terminate the Contract, since the time of performance is deemed to be the essence of the Contract, unless otherwise agreed.[910]

The Saudi courts will also decide on the Seller's right to cure defective performance based on the principle of no harm or harassment (*al Darar wa-la Dirar*) in Islamic Commercial Law.[911] Thus, the Seller will lose the right to cure defective performance, if this causes undue damage to the Buyer. The principle of harm (*al Darar wa-la Dirar*) stipulates that curing the goods must not harm the Buyer and may therefore only be exercised, if it does not cause the Buyer unreasonable inconvenience. Here, Saudi law makes clear provision for ascertaining the Buyer's right to terminate the Contract.[912] Indeed, the Seller cannot deprive the Buyer of his right to avoid the Contract by curing the defect, if the time of performing the Contract has

[908] See section 6.2.1.3.2. The Effect of Rejecting the Goods in Saudi Law, 213.
[909] Alfadli (N 703), 104.
[910] See section 4.3.3.1.2.2. 'Time of Delivery' in Saudi Law, 92.
[911] See section 2.3.4.4. The Principle of No Harm or Harassment (*al Darar wa-la Dirar*), 45.
[912] See section 6.2.3.2. The Buyer's Right to Terminate the Contract in Saudi Law, 228.

expired or if the cure will cause undue damage to the Buyer.

In support of the position adopted by the Saudi courts, where the Seller has the right to cure the goods, Case No. 479/S/3[913] illustrates how the Buyer purchased laser machines from the Seller and found them to be defective. He then claimed for a termination of the Contract and a refund of the money paid for the goods. In this instance, the Court did not accept the Buyer's claim, deciding instead that the Seller must cure defective performance, since this would not cause undue damage to the Buyer.

Likewise, in Case No. 428/S/3,[914] where the Buyer purchased electrical equipment and found it to be defective, he rejected the goods and sought to terminate the Contract before the courts. The Court accepted the Buyer's right to reject the goods, but rejected his claim to terminate the Contract; deciding instead for the Seller's right to cure defective performance.

Furthermore, it may be noted that in the Saudi courts, the Seller's right to cure defective performance not only overrides the Buyer's right to terminate the Contract, it may also nullify the Buyer's right to compensation for damages. This is further clarified in Case No. 227/T/3,[915] where the Seller delivered defective goods to the Buyer and the latter sold them to a sub-buyer. In this case, the first Buyer claimed for damages, but the Court decided that the Buyer had lost his right to claim for damages, based on the fact that although the Seller had delivered defective goods, he still had the right to cure them. Therefore, the Buyer should have sued for this remedy instead, but it was nevertheless impossible in this case, as the Buyer had sold the goods.

Regardless of the above, the reasoning behind the decision of the Court in Case No. 227/T/3, is not as clear as might be expected, because in a commercial Contract of Sale, the Buyer tends to sell the goods on to a sub-buyer and a swift solution I required. However, the

[913] Judicial Blogs, Contract of Sale, Vol. 3 (A. H. 1431 "2010"), 1261.
[914] Ibid, Vol. 2 (A. H. 1432 "2011"), 649.
[915] Ibid, Vol. 2 (A. H. 1429 "2008"), 570.

Court did not decide for damage compensation in this instance, because the Buyer had not suffered any damage by reselling the goods to a sub-buyer. Saudi law requires the existence of damage, in order for the notion of compensation for such damage to be accepted. Therefore, if the Buyer has not suffered any damage, the Seller is not obliged to pay compensation,[916] as decided in Case No. 447/S/7.[917]

In conclusion, there is a different approach to the Seller's right to cure defective performance under English and Saudi law. In English law, the Seller does not have this right, because it would threaten to deprive the Buyer of his right to avoid the Contract through the Seller curing the defect. Furthermore, the Law Commission has confirmed that the Seller's right to cure defective performance is unsuitable for commercial Contracts of Sale, as the contracting parties require swift termination rights in their transaction. Therefore, English law adopts a more pragmatic approach, as damages can be more helpful on a practical level. This is because parties to commercial Contracts require swift termination rights, rather than leaving them uncertain of whether the Seller will fulfil his obligations and deliver the goods. Furthermore, the curing of defective performance usually carries with it extra costs, which may be evaded through a simpler procedure involving monetary damages.[918] The question arises here, in the case of bespoke goods expressly manufactured for the Buyer, of whether a cure for defective performance can contribute significantly to the avoidance of economic waste and whether termination of the Contract can lead to losses for the Seller and Buyer.[919] Therefore, there is nothing to stop the Seller and Buyer coming to an agreement over a cure, according to section 35(6)(a) of the 1979 Act.

[916] See section 6.2.4.2.2. Indirect Damage in Saudi Law, 242.
[917] Judicial Blogs, Contract of Sale, Vol. 2 (A. H. 1432 "2011"), 839.
[918] See section 5.3.4.1. The Seller's Right to Cure Defective Performance in English Law, 171.
[919] Mak's view is that "Termination of a contract upon breach may cause losses for both parties: the buyer may incur extra costs if the defective performance forces him to go out into the market and make a cover purchase, while the seller, upon termination by the buyer, may lose any benefit expected from the performance of the buyer's obligations (e.g. payment of the price) and may have incurred expenditure which is wasted now that he does not have a second chance to perform". See Mak (N 902), 150.

In contrast, Saudi law gives the Seller the right to cure defective performance, subject to a number of conditions being met, consisting of the period of performance not having expired and the avoidance of harm to the Buyer. In fact, the Saudi courts cannot rely on this unique right to the detriment of the Buyer. However, they do prioritise adherence to and safeguarding the Contract, which necessitates giving the Seller the right to cure defective performance, subject to the above-mentioned conditions.[920]

The outcome of this comparison is that in English law; the remedy of rejection is very powerful, which means terminating the Contract for the Sale of Goods without giving the Seller right to cure defective performance. English law has strong arguments to deal with this approach. Nevertheless, in English law, there is nothing to stop the Seller and Buyer coming to an agreement over a cure.

5.3.5. The Seller's Right to Terminate the Contract for the Sale of Goods:

In English and Saudi law, the Seller's right to terminate the Contract for the Sale of Goods means ending the Contract before it has been executed in full. This means that before the Seller performs all his contractual obligations, the duty to do so ceases to exist, such as the Seller's obligation to deliver the goods to the Buyer. As a consequence, the effect of terminating the Contract for the Sale of Goods is to discharge the Seller from his unperformed obligations under the Contract. Irrespective of this, it does not affect the liabilities of the Buyer for breach of the Contract. Under these circumstances, the Seller has the right to claim for damages, where the Buyer has wrongfully failed to fulfil his contractual obligations. That said, in both regimes, the termination of a Contract for the Sale of Goods almost always involves the Buyer restoring the property in the goods to the Seller, in the case where this property has already been transferred from the Seller to the Buyer. In this section, the Seller's right to terminate the Contract for the

[920] See section 2.3.4.4. The Principle of No Harm or Harassment (*al Darar wa-la Dirar*), 45.

Sale of Goods under English and Saudi law will be analysed in more detail, although not every case of termination.

5.3.5.1. The Seller's Right to Terminate the Contract for the Sale of Goods in English Law:

In English law, the Seller has the right to terminate a Contract for a breach of its conditions by the Buyer. This would indicate a breach of any expressed or implied conditions by the Buyer, as imposed by the 1979 Act or by the Contract itself, entitling the Seller to terminate the Contract.[921] Section 11(3) provides that where the Buyer breaches any condition stipulated by the 1979 Act or a Contract, the Seller has the right to treat the Contract as repudiated.[922] For example, where the Buyer has an obligation to give notice of the probable readiness of a vessel to the Seller, and the time of notice is the essence of the Contract, as in *Bunge Corporation v Tradax SA*,[923] the court has seen that the Seller has the right to terminate the Contract.[924]

It should be noted here that the time of payment is not the essence of a Contract of Sale in English law, unless otherwise agreed, pursuant to section 10(1) of the 1979 Act.[925] Thus, a late payment by a Buyer will not breach a condition that gives the Seller the right to terminate the Contract. Indeed, under English law, late payment gives the Seller the right to claim interest for the late payment of commercial debts,[926] but not the right to terminate the Contract.[927]

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[921] See section 5.2. Breach of the Contract for the Sale of Goods, 137.

[922] The Sale of Goods Act 1979, s. 11(3) provides that "a stipulation in a contract of sale is a condition, the breach of which may give rise to a right to treat the contract as repudiated". Furthermore, under section 37(2) of the above Act, the Seller also has the right to terminate the Contract, if the Buyer neglects to take delivery. Here, this section provides that "Nothing… affects the rights of the seller where the neglect or refusal of the buyer to take delivery amounts to a repudiation of the contract".

[923] *Bunge* (N 476).

[924] In this case, the Buyer was obliged to give at least 15 days' notice of the probable readiness of the vessel, namely 'by 12th of June' and this term was stated as a condition. However, the Buyer did not give notice until 17th of June. Therefore, the Sellers treated this as a termination of the Contract and claimed damages. Under this circumstance, the Court gave the Seller the right to terminate the Contract. The House of Lords held that time was essential in commercial Contracts for the Sale of Goods, for the performance of many other contractual obligations.

[925] The Sale of Goods Act 1979, s. 10(1) provides that "Unless a different intention appears from the terms of the contract, stipulations as to time of payment are not of the essence of a contract of sale".

[926] In English law, statutory interest may be payable under the Late Payment of Commercial Debts (Interest) Act 1998, which contains specific provisions for calculating the date from which statutory interest starts.

[927] Andrew Burrows, *English Private Law: Oxford Principles of English Law* (3rd edn, Oxford University Press 2013), 688; see also section 4.3.4.2.2.1. Time of Payment in English Law, 114.

Conversely, when the time of payment is the essence of the Contract and the Buyer refuses to make such a payment, the Seller may have the right to terminate the Contract.[928] Finally, the termination of a Contract for the Sale of Goods in English law always involves the Buyer restoring the property in the goods to the Seller, where this property has already been transferred from the Seller to the Buyer.[929] Moreover, where the Seller has the right to terminate the Contract for the Sale of Goods, he has the right to claim for damages.[930]

5.3.5.2. The Seller's Right to Terminate the Contract for the Sale of Goods in Saudi Law:

In the same way as English law, Saudi law provides that where the Buyer breaches any condition of the Contract of Sale, the Seller has the right to terminate the Contract. Here, there are express and implied conditions imposed by Saudi law and the Contract, as agreed by the contracting parties.[931] Moreover, in Saudi law, the effect of this is to discharge the Seller from his unperformed contractual obligations, whereby he will also have the right to claim for damages.

Furthermore, as in English law, the time of payment is not considered to be the essence of the Contract, unless otherwise agreed.[932] However, Saudi law differs from English law, in that late payment does not give the Seller the right to claim for the late payment of commercial debts, because Islamic Commercial Law does not permit such a request, given that it leads to *Riba*.[933]

It should be noted that Saudi law bases the termination of a Contract for the Sale of Goods

[928] See case of *Portaria* (N 591); see also section 4.3.4.2.2.1. Time of Payment in English Law, 114.
[929] *Atiyah and Adams' Sale of Goods (N 35)*, 404.
[930] See section 5.3.6.1.1. The Seller's Right to Claim for General Damages in English Law, 185; see also section 5.3.6.2.1. The Seller's Right to Claim for Special Damages in English Law, 189.
[931] See section 5.2. Breach of the Contract for the Sale of Goods, 137.
[932] See section 4.3.4.2.2.2. Time of Payment in Saudi Law, 116.
[933] See section 5.3.6.2.2.1. The Position of Saudi Law on Charging Interest for Overdue Sums, 192.

on the option of the 'contract meeting place'[934] (*Khiyar al-majlis*).[935] This is an option that gives the Seller an immediate right to terminate the Contract, whereby the Buyer cannot claim for damages. Under this option, the Seller has the right to rescind the Contract by choosing not to proceed with it, so long as the Seller has not left the contract meeting place. Moreover, the courts are not involved in this termination process.[936]

To summarise, the Seller's right to terminate the Contract for the Sale of Goods exists in both English and Saudi law, whenever the Buyer breaches a condition. In both regimes, a condition is a fundamental stipulation of the Contract, indispensable to its purpose. Therefore, the breach of a condition goes to the root of the agreement[937] and a breach of any expressed or implied conditions by the Buyer, as imposed by law on the Sale of Goods or specifically by the Contract, will entitle the Seller to terminate the Contract. In both regimes, where the Seller has the right to terminate the Contract, the effect is to discharge the Seller from his unperformed obligations thereunder and he has the right to claim for damages. Moreover, the termination of a Contract for the Sale of Goods almost always involves the restoration of the property in the goods from the Buyer to the Seller, where these have already been transferred from the Seller to the Buyer.

However, it should be noted that in both English and Saudi law, the time of payment is not automatically the essence of the Contract, but can be contractually agreed as such. Despite

[934] When the Contract of Sale of Goods is formed face-to-face.

[935] The option of *Khiyar al-Majlis* consists of the right of both parties to rescind or choose not to proceed with a Contract of Sale, provided that they have not left the 'meeting place'. The basic rule relating to *Khiyar al-Majlis* suggests that in the Islamic Sales Contract, the Seller and Buyer have the option (right) to terminate the Contract or confirm the deal, as long as they remain in the 'contract meeting place'. This meeting is deemed to be at an end, once one or both parties leave the contract meeting place, indicating that the *Khiyar al-Majlis* has been terminated. As a consequence, it can be seen that when a Seller sends an offer to a Buyer by post, there is no *Khiyar al-Majlis* option, precisely because the parties to the Contract do not sit down together.

[936] This option is derived from the Prophet Mohammad's (PBUH) declaration that "The two parties to a sale have the option [to rescind it] as long as they have not parted"; Kahn (N 189), *Hadith* No. 322. This is also the case in the *Hanafi* School, according to the Ottoman Courts Manual, '*majalla al ahkam al adaliyyah',* where Art 182 provided that "Both parties possess an option during the meeting at the place of sale, after the offer has been made, up to the termination of the meeting".

[937] See section 5.2. Breach of the Contract for the Sale of Goods, 137.

this, English law differs from Saudi law, in that it entitles the Seller to claim interest on the late payment of commercial debts. Islamic Commercial Law (and therefore Saudi law) prohibits this, given that it equates to *Riba*.

Finally, the nature of the Contract of Sale in Saudi law is comprised of stages that differ from those of English law, in terms of the mechanics of forming the Contract. To reason this out, a Seller is likely to be given various options, before the Contract becomes legally binding, such as the option of the 'contract meeting place', whereby either party has the right to rescind the Contract or choose not to proceed with it within the period of the *Khiyar al-Majlis*. Under this option, there is no breach of Contract and so no remedy is required. However, in English law, this option is unknown.

5.3.6. The Seller's Right to Compensation for Damages:

In English and Saudi law, where the Buyer has wrongfully failed to perform his contractual obligations under a Contract for the Sale of Goods, the Contract will be deemed to have been breached by the Buyer and so the Seller will have the right to claim for damages. However, the topic of damages is a vast subject in itself and the purpose of this section is merely to analyse how the Seller could claim for damages under English and Saudi law, thus referring to the scope of the damage.

Generally speaking, damage claims can take any one of two forms: general or special. Moreover, their function under the Contract of Sale is to satisfy the Seller's expectation of interest by awarding a monetary sum that puts him in the same financial position that he would have been in, had the Buyer performed his obligations under the Contract.[938] However, it must also be considered that the Buyer will not have to bear responsibility for the almost limitless

[938] Michael Bridge, 'Markets and Damages in Sale of Goods Cases' (2016) 132 Law Quarterly Review, 404.

consequences of breaches of Contract.[939] It is rather the Seller's duty to mitigate the loss applicable to claims for damages.[940] It should also be noted that the function of claiming for damages is to compensate for losses incurred through a breach of Contract. This means that the avowed aim of awards for damages is not to punish or even deter the Buyer. Consequently, under English and Saudi law, the sums payable under a liquidated damages clause are not recoverable in the case where they exceed the loss incurred by the breach of Contract.[941] This section consequently explores the significance of 'general' and 'special' damages and the recoverable loss that the Seller can claim for under English and Saudi law.

5.3.6.1. The Seller's Right to Claim for General Damages:

5.3.6.1.1. The Seller's Right to Claim for General Damages in English Law:

In English law, general damages are damages arising naturally as a result of a Buyer breaching a Contract of Sale. Thus, there is a clear link between the Buyer's breach and the Seller's damage. To determine the extent of damage liability in English law, the English courts have been guided by principles set out in Baron Alderson's judgment of *Hadley v Baxendale* in 1854,[942] with these rules now being incorporated into the 1979 Act, sections 50 and 54.[943] Using general damages in the Contract for the Sale of Goods in English law as an example, if the Buyer wrongfully fails to accept the goods and the Seller cannot claim for the price under

[939] See section 5.3.6.2. The Seller's Right to Claim for Special Damages, 189.
[940] See section 5.3.6.1. The Seller's Right to Claim for General Damages, 185.
[941] For English law, see *Bunge SA v Nidera BV* [2015] 2 Lloyd's Rep 469; Bridge (N 938), 404. In the same way, Saudi law requires the existence of damage for the notion of compensating such damage to be accepted. Thus, compensation based on a contractual compensation clause shall not be due in the case where the defendant has proven that the claimant has not incurred any damage. Pursuant to the rule, under Case No. 447/S/7, the claimant claimed compensation for damages of $2,000,000.00, based on the contractual compensation clause, because the defendant had breached the Contract. However, the claimant did not prove the existence of these damages. Under such circumstances, the Court decided to reject the claimant's request for compensation for damages, since he had not proven the damages, even though there was a contractual compensation clause (see Case No. 447/S/7, 179).
[942] [1854] 9 Ex 341, 354.
[943] It was said that these principles give effect to the presumed intention of the parties; see *Benjamin's Sale of Goods* (N 25), paras 16-031; Beale, Chitty on Contracts (N 84), paras 26-122 and 123.

section 49 of the 1979 Act,[944] the Seller may bring an action against him for damages. The Seller's normal remedy in most circumstances is in fact an action for damages incurred through non-acceptance, pursuant to section 50 of the 1979 Act.[945] The general rule for assessing damages for non-acceptance is contained within section 50(2) of the above Act:[946] "the measure of damages is the estimated loss directly and naturally resulting, in the ordinary course of events, from the buyer's breach of contract."[947]

In English law, the general method of measuring the extent of damages is the available market, as submitted under section 50(3) of the 1979 Act.[948] This section provides that the measure of damages is the difference in value between the Contract price and the market price. Thus, the Seller has the right to claim for this value. Therefore, in English law, the Seller claiming for damages for non-acceptance under section 50 of the 1979 Act must mitigate the loss, such as by reselling the goods at the market price and as a result, the Buyer will not have to bear responsibility for the almost limitless consequences of a breach of Contract. In fact, it is rather the Seller's duty to mitigate the loss that applies to the claim for damages.[949] Furthermore, in the case where the Seller resells the goods at a price that is higher than the price specified in the Contract,[950] claims for damages for non-acceptance might be reduced, so that

[944] Under English law, if the property in the goods has transferred to the Buyer, then the Seller has the right to the price of the goods, pursuant to section 49(1) of the Sale of Goods Act 1979; see section 5.3.2.1. The Seller's Right to Claim the Price of the Goods in English Law, 162.

[945] In English law, where the Seller cannot claim for the price of the goods under section 49 of the Sale of Goods Act 1979, then he has the right to sue the Buyer for damages for non-acceptance under section 50 of the above Act. Under this circumstance, the measure of damages will be the difference in value between the price in the Contract and the price of resale; see section 5.3.3.1. The Seller's Right to Sue the Buyer for Non-acceptance in English Law, 167.

[946] In the Sale of Goods Act 1979, the basic principle for the remoteness of damage, in language derived from the leading case of *Hadley v Baxendale,* provides that "Where two parties have made a contract which one of them has broken, the damages which the other party ought to receive in respect of such breach of contract should be such as may fairly and reasonably be considered either as arising naturally, i.e. according to the usual course of things, from such breach of contract itself, or 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" (see *Hadley* [N 942]).

[947] The Sale of Goods Act 1979, s. 50(2).

[948] The Sale of Goods Act 1979, s. 50(3) provides that "Where there is an available market for the goods in question is prima facie to be ascertained by the difference between the contract price and the market or current price at the time or times when the goods ought to have been accepted or (if no time was fixed for acceptance) at the time of the refusal to accept".

[949] The Buyer must also mitigate his loss. The mitigation of damage means that the claimant cannot claim for losses which he could have avoided by taking reasonable steps (see Beale, Chitty on Contracts (N 84) [N 85], para 26-002).

[950] See section 5.3.1.5.2.1. Where the Goods Have Been Resold by the Unpaid Seller, Who is Entitled to Profit under English and Saudi Law?, 161.

the Seller only recovers the actual loss.[951]

It should nevertheless be noted that the market rule of assessment for damages is also available to the Seller, if he has the right to terminate the Contract[952] on the grounds of the Buyer failing to perform his contractual obligations. This may mean that the Buyer has repudiated the Contract, even if he has not rejected the goods, or if the goods have not been delivered.[953]

To summarise the above, in the case of a Buyer breaching a Contract under English law, the Seller has the right to claim for general damages. These arise naturally through the Buyer breaching a Contract of Sale, and link the Buyer's breach and the Seller's damage. Nevertheless, it is not incumbent on the Buyer to bear responsibility for the countless effects of a breach of Contract; instead, it is for the Seller to mitigate any losses that apply to a claim for damages.

5.3.6.1.2. The Seller's Right to Claim for Direct Damages in Saudi Law:

In Saudi law, direct damage is damage arising as a natural consequence of a Buyer's breach of a Contract for the Sale of Goods, as in the case if a Buyer wrongfully refusing to accept the goods. In Saudi law, the Buyer is obliged to accept the goods in accordance with the terms of the Contract.[954] If the Buyer fails to do so, then the Seller has the right to claim for the direct damage incurred to him as a result of the Buyer failing to fulfil his obligations.

Similar to English law, the Seller who claims for damages on grounds of non-acceptance

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[951] Bridge (N 938), 405-410.

[952] See section 5.3.5.1. The Seller's Right to Terminate the Contract of Sale of Goods in English Law, 181.

[953] In English law, where the Seller has the right to terminate the Contract, he has the right to claim damages. For example, where the Buyer has an obligation to give notice of probable readiness of a vessel and this is the essence of the Contract, such as in *Bunge Corporation v Tradax SA*, with the Buyer failing to give notice, the Seller may subsequently terminate the Contract and claim for damages. In the above case, the Court gave the Seller the right to terminate the Contract and claim for damages (see *Bunge* [N476]).

[954] In fact, where the Seller has fulfilled all the terms and conditions mentioned in the Contract of Sale, the Buyer is obliged to accept the goods; see section 4.3.4.1.2. The Buyer's Obligation to Accept Delivery of the Goods in Saudi Law, 111; section 5.3.3.2. The Seller's Right to Sue the Buyer for Damages for Non-acceptance in Saudi Law, 169.

under Saudi law should mitigate the loss by reselling the goods at the market price, in order to recover any losses – these being defined by the difference between a low resale price and the price in the Contract. Nevertheless, it should be noted that in Saudi law, the Seller can claim for the price of the goods or for damages incurred through non-acceptance, where the Buyer fails to accept the goods or to take possession of them. The most popular option is to claim for the price, because the value of such a claim is likely to be higher than the value of a claim for damages due to non-acceptance, and the Seller will not need to mitigate his loss.[955]

To summarise, the Seller has an equal right to claim for general damages in English and Saudi law. General damage is damage arising naturally and as a consequence of a breach of the Contract for the Sale of Goods by the Buyer. Therefore, there is a clear link between the Buyer's breach and the Seller's damage. Furthermore, in both English and Saudi law, the Seller claiming damages for non-acceptance must mitigate the loss, such as by reselling the goods at the market price. Nevertheless, English and Saudi law adopt different approaches to the Seller's right to claim for the price or for damages arising through non-acceptance.[956]

In English law, wherever the Seller cannot claim for the price under section 49 of the 1979 Act, the normal remedy in most circumstances is an action for damages incurred through non-acceptance, under section 50 of the 1979 Act.[957] Nevertheless, in Saudi law, if the Buyer fails to accept the goods, then the Seller can claim for their price or for damages, and the most popular option is to claim for the price.[958]

The second form of damage recognised under English and Saudi law constitutes 'special' damage (consequential or incidental loss), arising through non-performance, as clarified below.

[955] See section 5.3.2.2. The Seller's Right to Recover the Price of the Goods in Saudi Law, 165; see also Case No. 455/S/3, 166; Case No. 826/S/7 (N 849), 724; Case No. 174/S/3 (N 849), 1201; Case No. 229/S/7 (N 849), 55; Case No. 940/S/12 (No. 849), 776.
[956] See section 5.3.2. The Seller's Right to Recover the Price of the Goods, 162.
[957] See section 5.3.3.1. The Seller's Right to Sue the Buyer for Non-acceptance in English Law, 167.
[958] See section 5.3.2.2. The Seller's Right to Recover the Price of the Goods in Saudi Law, 165; section 5.3.3.2. The Seller's Right to Sue the Buyer for Damages for Non-acceptance in Saudi Law, 169.

5.3.6.2. The Seller's Right to Claim for Special Damages:

The second form of damage is referred to as 'special' damage, namely consequential (or incidental) loss arising from the Buyer breaching his contractual obligations. It has already been established earlier that the Seller has the right to claim for general damages.[959] However, there is yet another important issue to be analysed and this is the Seller's right to claim for special damages, where there is a breach of the Contract.

5.3.6.2.1. The Seller's Right to Claim for Special Damages in English Law:

English law has enacted several provisions for the Seller's right to claim for damages against the Buyer. The scope of compensation for damages, whether general or special, is designed to return the Seller to the position he was in prior to the alleged injury. In English law, special damages are damages substantiated as a result of special circumstances surrounding and confusing the contracting process. Thus, the Seller may claim for special damages in addition to general damages. Therefore, the Seller's right to claim for special damages is aimed at covering most of the losses that are not compensated for through the award of general damages.[960] This is specified in the 1979 Act under section 54,[961] pursuant to the second rule laid down in *Hadley v Baxendale*,[962] where damages were awarded in special circumstances, contemplated by the parties at the time of entering into the Contract.[963]

In an example of special damages in English law, the Seller has the right to claim for any loss occasioned by a Buyer neglecting to take delivery of the goods when the Seller requests

[959] See section 5.3.6.1. The Seller's Right to Claim for General Damages, 185.
[960] *Atiyah and Adams' Sale of Goods (N 35)*, 422.
[961] The Sale of Goods Act 1979, s. 54 provides that "Nothing in this Act affects the right of the buyer or the seller to recover interest or special damages in any case where by law interest or special damages may be recoverable, or to recover money paid where the consideration for the payment of it has failed".
[962] *Hadley* (N 942).
[963] Ibid; see also *Benjamin's Sale of Goods* (N 25), para 16-031; Beale, Chitty on Contracts (N 84), paras 26-122 and 123.

him to do so, in accordance with section 37(1) of the Act.[964] On the possibility of a claim for losses occasioned by failing to take delivery of the goods, section 37(1) of the Act cites the Buyer's liability for refusing to do so. The remedy is therefore for losses incurred to the Seller, because the Buyer has failed to take delivery of the goods, although the Seller is ready and requests him to do so. In such a situation, the Seller has the right to claim for any losses he has suffered due to the Buyer's actions, such as damages to cover the cost of care and custody of the goods, or any further losses. For example, when the goods have become corrupted or contaminated and have tainted other goods that are not being sold under the Contract, the Seller will have the right to claim for such damage.[965] Another example, in the case where the Seller has the right to sue for the price of the goods, he will have the right to claim for the late payment of commercial debts or 'special damages'. As in English law, statutory interest may be payable under the Late Payment of Commercial Debts (Interest) Act 1998, which contains specific provisions for the calculation of the date on which statutory interest starts.

5.3.6.2.2. The Seller's Right to Compensation for Special Damages in Saudi Law:

As in English law, Saudi law provides the Seller with the right to claim for special damages, in addition to the Seller's right to claim for general damages. The scope of compensation for special damages is designed to return the Seller to the position he was in prior to the alleged damage and to cover most of the losses incurred, where these are not covered by general damages. This is equally intended to restore the Seller to a similar position to the one he would have been in, if the Buyer had fulfilled his obligation.

In a claim for special damages in Saudi law, one example would be a Buyer refusing to

[964] The Sale of Goods Act 1979, s. 37(1) provides that "when the seller is ready and willing to deliver the goods, and requests the buyer to take delivery, and the buyer does not within a reasonable time after such request take delivery of the goods, he is liable to the seller for any loss occasioned by his neglect or refusal to take delivery, and also for a reasonable charge for the care and custody of the goods".

[965] *Atiyah and Adams' Sale of Goods (N 35)*, 422.

pay the price of the goods and the Seller being entitled to claim for special damages for non-payment, even though he has the right to the price of the goods. This rule is based on a declaration made by the Prophet Muhammad (peace be upon him), whereby "damage must be removed". By adopting this approach, when the Seller suffers damage due to the Buyer's failure to pay the price of the goods – for example, lawyers' fees – special damages may be incurred.

In the archives of the Saudi courts, an abundance of judicial indications may easily be found, addressing the Seller's right to claim for special damages, namely lawyers' fees. This can be seen in Case No. 228/T/3,[966] where the Buyer refused to pay the full price of the goods, resulting in the Seller claiming for the price of the goods and the lawyer's fee. The Court decided that the Buyer should pay the price of the goods, in addition to 5% as the lawyer's fee. In other words, there was compensation for special damages in this case.

Nevertheless, the Saudi courts have a restrictive approach to awarding damages for lawyers' fees, even though Islamic Commercial Law is both clear and sweeping enough to include all damages. For example, in Case No. 258/T/3,[967] the Court judged that the Seller should merely obtain the value of the goods and decided not to award compensation for the lawyer, because the judiciary is available for everyone free of charge in the Saudi context and in the above instance, the parties to the dispute were not obliged to hire a lawyer. This was also decided in Case Nos. 564/S/7[968] and 218/S/3,[969] where the Court did not agree to the Seller receiving compensation for lawyers' fees, because the parties to the dispute were not obliged to hire one. It is therefore clearly illustrated that Islamic Commercial Law has sufficient clarity and scope to include all damages, even for lawyers' fees. Furthermore, it should be noted that the Saudi courts do not give the Seller the right to charge interest on overdue sums (statutory

[966] Judicial Blogs, Contract of Sale, Vol. 2 (A. H. 1427 "2006"), 2351.
[967] Ibid, Vol. 2 (A. H. 1428 "2007"), 490.
[968] Ibid, Vol. 3 (A. H. 1430 "2009"), 654.
[969] Ibid, Vol. 3 (A. H. 1431 "2010"), 1453.

interest), because Islamic Commercial Law does not permit such a request, on the ground that it leads to *Riba*.[970] For more precise detail on this point, the Saudi legal position on charging interest on overdue sums is analysed below.

5.3.6.2.2.1. The Position of Saudi Law on Charging Interest on Overdue Sums:

In Saudi law, when a Buyer wrongfully neglects or refuses to pay for goods, the Seller only has the right to the price of those goods,[971] rather than the right to interest on overdue sums (statutory interest). This is due to Islamic Commercial Law's prohibition of *Riba* in the Contract of Sale.[972] In this regard, the Council of Senior Saudi Scholars, as well as many Islamic Schools of Jurisprudence, do not permit damages to be paid for delayed payment of the price of goods.[973] This is reflected in decisions of the Saudi courts,[974] such as Case No. 155/T/3,[975] where the Buyer refused to pay the price of the goods and the Seller claimed for this price, as well as for interest on the overdue sums ('statutory interest'). However, the Court decided that the Buyer only needed to pay the price of the goods, without the interest, as this is prohibited as *Riba* under Islamic Commercial Law. Furthermore, the Saudi courts do not recognise contractual compensation clauses for delayed payment of the price of goods, as these are equally likely to constitute some form of interest. Therefore, any agreement based on obtaining interest against the use of a sum of money, or delaying the fulfilment thereof, shall be void. This is because any Contract involved with the payment of interest is prohibited under Saudi law and as a result, cannot be enforced.

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[970] In Saudi law, the Seller does not have the right to claim for interest on overdue sums (statutory interest) (see section 5.3.6.2.2.1. The Position of Saudi Law on Charging Interest for Overdue Sums, 192).
[971] See section 5.3.2.2. The Seller's Right to Recover the Price of the Goods in Saudi Law, 165.
[972] Al-Tusi (N 230), 288. See also section 2.3.4.1. Islamic Commercial Law and Its Effect on the Contract of Sale, 40.
[973] The Council of Senior Scholars of Saudi, Decree No. 35020/185; the International Islamic *Fiqh* Academy related to the Organization of the Islamic Conference in Jeddah made declarations on this, expressing that "the increase of debts may not be required upon delay", Decree Nos. (89/2/95) 109(3/12); 65 (3/7).
[974] Zweigert (N 51), 305.
[975] Judicial Blogs, Contract of Sale, Vol. 2 (A. H. 1429 "2008"), 619.

In support of such a legal stance, Case No. 506/T/3[976] may be referred to, where the Court decided to oblige the Buyer to pay the price of the goods, without any additional charges being levied as compensation for late payment. In the above instance, the parties agreed that each would pay additional fees, if they delayed fulfilling their obligations. However, this condition constitutes usury *(Riba)*, or statutory interest, which is prohibited under Islamic Commercial Law.[977] What is more, the Saudi courts have gone further in the sense of refraining from applying the judgments of arbitrators, if any interest is requested on overdue sums. According to Case No. 137/T/4,[978] for example, the arbitrators decided to entitle the Seller to the price of the goods, in addition to interest on overdue sums at "4% per year". However, the Seller claimed for the price of the goods, without the interest on overdue sums, while the Buyer brought a complaint against the Seller's claim on the ground that it was contrary to the principles of the Saudi courts, in respect of *Riba.* However, the Court rejected this claim brought by the Buyer, since the Seller did not claim for interest on overdue sums, but rather solely for the price of the goods.

To summarise, the Seller's right to claim for special damages reflects a similar approach in English and Saudi law, namely that the Seller has the right to compensation for most of the losses that are not covered by general damages. In both regimes, the scope of compensation for special damages is aimed at returning the Seller to the position he was in prior to the alleged injury. Nevertheless, it should be noted that the nature and scope of compensation for special damages in Saudi law is more limited than in English law, such as where the Seller under English law has the right to claim compensation for the late payment of commercial debts

[976] 506/T/3 (N 234), 2460.

[977] Also, in Case No. 211/S/3, the Court decided that the Buyer should pay the price of the goods, without any additional charges being levied as compensation for late payment. In this case, the Buyer paid part of the price of the goods, valid at the time the Contract was formed. The Contract included a compensation clause for delayed payment, namely 10% of the price. The Buyer refused to pay the full price of the goods under this circumstance, while the Seller claimed for the price of the goods with compensation clauses for delayed payment. However, the Court decided to oblige the Buyer to pay only the price of the goods, without the compensation for delayed payment (see Case No. 211/S/3 [N 234], 1465).

[978] Judicial Blogs, Contract of Sale, Vol. 2 (A. H. 1427 "2006"), 2080.

(statutory interest). However, as mentioned earlier, Saudi law does not grant the Seller this right, because Islamic Commercial Law does not permit requests that lead to usury. Consequently, a general statement may be made about the scope of compensation for special damages in Saudi law proceedings, which is more limited than it is in English law. As a consequence, the value of compensation for damages under English law is likely to be higher than it is under Saudi law.

5.4. Conclusion:

In English and Saudi law, there are several provisions under which the Seller has the right to seek remedies against the Buyer, if the latter fails to perform his obligations under the Contract for the Sale of Goods. The two legal systems provide the unpaid Seller with certain rights in respect of the goods themselves; analogous to a form of security for payment of their price. Here, both regimes grant the Seller rights over the goods where he remains unpaid, namely the right to lien,[979] the right to stoppage of the goods in transit (possessory lien over the goods),[980] and the right to resell the goods. Furthermore, under both English and Saudi law, the Seller has the right to the price, the right to damages (including for non-acceptance), and the right to terminate the Contract. Moreover, the Seller has the right to cure defective performance in Saudi law, but this is not the case in English law.[981]

Although these two regimes share some similarities regarding these remedies, the details of the rules governing them vary considerably, such as whether or not the effect of the Seller reselling the goods represents a termination of the original Contract, with the Seller being permitted to retain any profit made through the resale. In English law, the Seller can terminate the Contract of Sale of Goods by himself, as the English courts are not involved in the

[979] See section 5.3.1.3. The Unpaid Seller's Right to Lien over the Goods, 143.
[980] See section 5.3.1.4. The Seller's Right to Stoppage of the Goods in Transit, 150.
[981] See section 5.3.4. The Seller's Right to Cure Defective Performance, 171.

termination process. Therefore, in English law, the Seller has the right to retain any profit made through the resale.[982] In contrast, this does not happen in Saudi law, because the Saudi court is involved in the termination process.[983] Therefore, in Saudi law, the Seller first needs to go to court to terminate the Contract, if he wishes to retain any profit made through the resale.[984]

Within the Seller's right to the price of the goods, if the Buyer wrongfully neglects or refuses to accept and pay for goods, both regimes give the Seller the right to sue the Buyer for that price.[985] However, the two legal systems display different approaches, with the Seller either having the right to the price of the goods, or the right to damages for non-acceptance. In English law, if the Seller does not have the right to claim for the price under section 49 of the 1979 Act, he will instead have the right to claim for damages for non-acceptance under the Act's section 50.[986] Meanwhile, in Saudi law, the Seller has the right in each case to claim for the price of the goods, should the Buyer fail to pay the purchase price under a Contract of Sale. This is because the effect of the Contract of Sale in Saudi law is to transfer the property in the goods from the Seller to the Buyer, on conclusion of the Contract.[987]

Nevertheless, in the event of a Seller having the right to claim for the price of goods, English and Saudi law have different approaches with regard to the scope of the claim. For example, in English law, if the Buyer fails to pay the price of the goods at the time agreed in the Contract, the Seller will subsequently have the right to claim for interest on overdue sums (statutory interest). Conversely, in Saudi law, the Seller only has the right to the price of the goods, excluding interest; otherwise, this would lead to usury, which is prohibited under Islamic

[982] See section 5.3.1.5.1. The Seller's Right to Resell the Goods in English Law, 155; see *R V Ward* (N 32).
[983] See section 5.3.1.5.2. The Seller's Right to Resell the Goods in Saudi Law, 159.
[984] See section 5.3.1.5.2.1. Where the Goods Have Been Resold by the Unpaid Seller, Who is Entitled to Profit under English and Saudi Law?, 161.
[985] See section 5.3.2. The Seller's Right to Recover the Price of the Goods.162
[986] See section 5.3.3.1. The Seller's Right to Sue the Buyer for Non-acceptance in English Law. 167
[987] It should be noted here that it is preferable for the Seller to claim the price of the goods, because the value of such a claim is likely to be higher than the value of a claim for damages due to non-acceptance. Furthermore, the Seller will not need to mitigate his loss with a claim for the price of the goods, which would be necessary in a claim for damages resulting from non-acceptance.

Commercial Law.[988] Consequently, in English law, the Seller has a greater entitlement to compensation for damages, compared to Saudi law, due to the Islamic prohibition of usury[989] and so the value of compensation for damages under English law is likely to be higher than it would be under Saudi law.

Aside from the value of the compensation, the key difference between English and Saudi law is that the Seller reserves the right to cure defective performance under Saudi law. This is not provided for in English law, because English law has seen that this right may deprive the Buyer of his right to terminate the Contract.[990] Furthermore, it may be noted in English law that the Seller's right to cure defective performance is considered unsuitable for a commercial Contract, as this type of transaction is likely to require swift termination rights.[991] As a result, the rejection of the goods and termination of the Contract comprise a single remedy for the Buyer in English law, because, the English courts are not involved in the termination process. Therefore, when the Buyer has the right to reject the goods, he also has the right to terminate the Contract, without giving the Seller the right to cure defective performance.[992] Thus, English law adopts a more pragmatic approach, as damages are of more practical help in such instances. This is because the parties to commercial Contracts require swift termination rights, rather than being left in a state of uncertainty as to whether the Seller will perform his contractual duty and deliver the goods. Furthermore, curing defective performance usually bears additional costs that can be avoided through the simpler procedure of awarding monetary damages. That said,

[988] See section 5.3.6.2.2.1. The Position of Saudi Law on Charging Interest for Overdue Sums, 192; section 2.3.4.1. Islamic Commercial Law and Its Effect on the Contract of Sale, 40.

[989] As result, it is far more common for an express time of payment to be indicated as the essence of the Contract by the Seller in a Contract of Sale. To support this, in the archives of the Saudi courts, there are many cases of the Seller claiming to terminate a Contract, because the Buyer refused to pay the price of the goods, as in Case No. 159/T/3, 118.

[990] Numerous scholars have been of the view that the Seller does not have the right to cure defective performance, while others have disagreed on this point and held that the Seller has the right to cure defective performance. However, if this remedy exists, it must be limited to the delivery period; citing the English courts that have recognised the limited scope of this right to cure defective performance, providing that the time of delivery has not ended (see section 5.3.4.1. The Seller's Right to Cure Defective Performance in English Law, 171).

[991] See section 5.3.4.1. The Seller's Right to Cure Defective Performance in English Law, 171.

[992] In English law, where the Buyer has right to reject the goods, he also has right to terminate the Contract (see section 6.2.1.3.1. The Effect of Rejecting the Goods in English Law, 212.

in English law, there is nothing to stop the Seller and Buyer coming to an agreement over a cure under section 35(6)(a) of the 1979 Act.

With the exception of the above, Saudi law gives the Seller the right to cure defective performance, subject to a number of conditions being met. These conditions consist of the time of performance not having expired and no harm being caused to the Buyer.[993] Therefore, defective performance must be cured at the time of delivery set out in the Contract.[994] Furthermore, it must not cause the Buyer unreasonable inconvenience. This means that the availability of the Seller's right to cure defective performance and of the Buyer's right to terminate the Contract need to be weighed up against each other by the courts, in light of the principle of harm (*al Darar wa-la Dirar*).[995] In fact, the Saudi courts are not to rely on this unique right to the detriment of the Buyer.

As a result, in Saudi law, the Buyer cannot simply reject goods and terminate a Contract of Sale. Thus, the rejection of the goods is one remedy available to the Buyer, while terminating the Contract of Sale is another.[996] Moreover, the Saudi courts are involved in the termination process. Therefore, the Seller's right to cure the goods may stop the Buyer's right to terminate the Contract in Saudi law.[997] This is because Saudi law makes it a priority to adhere to and safeguard the Contract, which necessitates giving the Seller the right to cure defective performance, subject to a number of conditions being met.

Ultimately, it could be said that each legal system has its own individual character

[993] See section 5.3.4.2. The Seller's Right to Cure Defective Performance in Saudi Law, 176.
[994] This means that the Seller's right to cure defective performance must be exercised within the time of delivery stated in the Contract, because the time of delivery is essential to the Contract (see section 4.3.3.1.2.2. Time of Delivery in Saudi Law, 92).
[995] By this principle, when there is the possibility that the Seller will suffer more harm or harassment, if the Buyer is allowed to terminate the Contract, then he (the Seller) will have the right to cure the goods. On the other hand, if there is the possibility that the Buyer will suffer more harm or harassment, if the Seller is allowed to cure the defects in the goods, then the Buyer will be given the right to terminate the Contract (see section 2.3.4.4. The Principle of No Harm or Harassment (*al Darar wa-la Dirar*), 45).
[996] See section 6.2.1.3.2. The Effect of Rejecting the Goods in Saudi Law, 213.
[997] See Case No. 479/S/3, 178; Case No. 428/S/3, 178; Case No. 227/T/3, 178.

regarding the Seller's right to cure defective performance. In Saudi law, the Seller reserves this right, which is not available under English law. In fact, English law has tended to favour damages as the most appropriate option for the parties to a commercial Contract of Sale, since they generally need a swift solution. Therefore, English law adopts a more pragmatic approach, since in practice, the Buyer will wish to acquire the goods as soon as possible and is unlikely to favour waiting for the Seller to exercise his right and offer a cure. In contrast, Saudi law prioritises adherence to and safeguarding the Contract (as far as possible, maintaining the life of the Contract). Therefore, the Seller has a conditional right to cure defective performance. In sum, English law confers a relatively broad right to terminate the Contract, while Saudi law is aimed at preserving it.

Chapter 6: The Buyer's Remedies for a Breach of the Contract for the Sale of Goods

6.1. Introduction:

There are several remedies that the Buyer can avail himself of, if a Seller breaches a commercial Contract for the Sale of Goods under English or Saudi law. Having analysed the Seller's rights in Chapter 5, in cases of breach of the Contract by the Buyer, it is now appropriate to examine the remedies available to the Buyer under both the above-mentioned regimes, where the Seller is in breach.

The primary aim of this chapter is to analyse the Buyer's remedies under English and Saudi law. In so doing, the underlying reasons why the two legal systems favour certain remedies will also be examined. Also determined will be any differences in the underlying legal principles that affect the *de facto* results for the Buyer. It is demonstrated that there are certain key differences between the approaches adopted in English and Saudi law, with respect to the breach of certain contractual terms and the associated remedies. The differences revolve around the Buyer's right to specific performance, which is a right of the Buyer under English law. However, it may not compel the willingness of a Seller to perform the Contract. Conversely, Saudi law would as far as possible uphold the binding nature of a Contract, irrespective of a Seller's manifest unwillingness to perform it. Therefore, Saudi law may compel the willingness of a Seller to perform a Contract of Sale.[998]

Another difference between English and Saudi law is the effect of the Buyer rejecting the goods. In English law, termination accompanies an exercise of the right to reject the goods, but this is not the case under Saudi law,[999] where rejection and termination rights are detached,

[998] See section 6.2.2. The Buyer's Right to Specific Performance, 214.
[999] See section 6.2.1.3. The Effect of Rejecting Defective Delivery, 212.

so as to afford the Seller an opportunity to cure defective performance.[1000] Therefore, in this chapter, any differences that may affect the *de facto* results for the Buyer are determined. Towards this end, the Buyer's remedies will be examined, where he is not a consumer. They consist of the right to reject the goods; the right to specific performance; the right to terminate the Contract, and the right to claim damages (general or special damages). These are explained in more detail below.

6.2. The Buyer's Remedies:

6.2.1. The Buyer's Right to Reject the Goods:

The Buyer's right to reject defective goods is accepted under both English and Saudi law. In each of these regimes, the goods must be free from any defect, even if they are sold without any stipulation towards this end. As a result, English and Saudi law give the Buyer the right to reject defective goods. Nevertheless, certain terms must be met, before the Seller is held liable for any defect found. Furthermore, not every breach will give the Buyer this right. In both legal regimes, there is a distinction between a breach that is not slight, which will consequently entitle the Buyer to reject the goods, and a breach that is slight, thus affording the right to claim for damages.[1001] Furthermore, the effect of rejecting defective delivery differs under English and Saudi law.[1002]

Therefore, in order to clarify the Buyer's right to reject defective goods in English and Saudi law, this section will be broken down into three distinct areas: the Buyer's right to reject goods for a breach of quality, the Buyer's right to reject goods for a breach of quantity, and the effect of the Buyer rejecting defective delivery.

[1000] See section 5.3.4. The Seller's Right to Cure Defective Performance, 171.
[1001] See section 5.2. Breach of the Contract for the Sale of Goods, 137.
[1002] See section 6.2.1.3. The Effect of Rejecting Defective Delivery, 212.

6.2.1.1. The Buyer's Right to Reject Goods for a Breach of Terms of Quality:

6.2.1.1.1. The Buyer's Right to Reject the Goods for a Breach of Terms of Quality in English Law:

Under the 1979 Act, when a Seller breaches conditions governing the quality of goods, the Buyer may have the right to reject them, as under section 15A (where the Buyer is not dealing as a consumer). In subsection (1)(a) of the aforementioned section, the Buyer has the right to reject the goods, if the Seller breaches conditions governing their quality, pursuant to sections 13, 14 and 15 of the 1979 Act.[1003] Nevertheless, if the breach is slight, it may be treated as a breach of warranty; entitling the Buyer to claim for damages under section 15(A)(1)(b) of the 1979 Act.[1004] As a consequence, the Buyer no longer has the right under the 1979 Act to reject the goods if the breach is slight,[1005] provided that he is not a consumer. This amendment is implemented by limiting the right to reject the goods for a breach of the Contract, where the Buyer is not dealing as a consumer.[1006]

According to section 15A, subsection (1)(a) of the 1979 Act, the Buyer has the right to reject the goods in the event of a Seller breaching a term implied by sections 13, 14 and 15 of the 1979 Act[1007] and providing that the breach is not slight.[1008] In this context, it must be assumed that the provisions of sections 13, 14 and 15 should be analysed, wherefrom basic rules may be devised for deciding the terms of quality for the goods.

Under section 13(1) of the Act, if the goods are being sold by description, there is a

[1003] The Sale of Goods Act 1979, s. 15A(1)(a) provides that "Where in the case of a contract of sale (a) the buyer would, apart from this subsection, have the right to reject goods by reason of a breach on the part of the seller of a term implied by sections 13, 14 or 15 above".; see Beale, Chitty on Contracts (N 84), paras 44-438.
[1004] Ibid, s. 15A(1)(b) provides for when "the breach is so slight that it would be unreasonable for him to reject them', whereby 'the breach is not to be treated as a breach of condition but may be treated as a breach of warranty".
[1005] Beale, Chitty on Contracts (N 84), paras 44-070.
[1006] *Atiyah and Adams' Sale of Goods (N 35)*, 436.
[1007] Sale of Goods Act 1979, s. 15A, part (1)(a) *Benjamin's Sale of Goods* (N 25), para 17-093.
[1008] Ibid, s. 15A(1)(b) provides for when "the breach is so slight that it would be unreasonable for him to reject them".

condition that they must correspond to that description.[1009] However, this section does not deal with quality or fitness for purpose. Therefore, the goods may be of satisfactory quality, but fail to correspond to their description. In this situation, the Buyer has the right to reject the goods, since there is evidence to support a breach by the Seller of a term implied by section 13 of the Act.[1010]

To illustrate the above point, it was noted in the case of *Arcos v Ranaason*[1011] that there was nothing wrong with the quality of the wood and that it could still be used for the intended purpose of making barrels. The Court nevertheless held that the Seller had breached the Contract, since the wood was not as described, even though it was of satisfactory quality. Therefore, English law provides a very strict interpretation of section 13(1), whereby even a minor departure from the contractual description will entitle the Buyer to reject the goods. This is despite the goods being of satisfactory quality and fit for the purpose for which they were bought, within the meaning of section 14(2) of the 1979 Act.[1012] Consequently, any breach of this section will give the Buyer the right to reject the goods.[1013]

Section 14(2) of the Act pertains to implied terms for the quality or fitness of the goods. It stipulates that the goods sold must be of satisfactory quality and fit for purpose, where they are being sold in the course of business.[1014] Satisfactory quality is a condition imposed on the goods, along with their durability, safety, appearance and fitness for purpose.[1015] Nevertheless, the 1979 Act provides certain limitations to the application of section 14(2). Consequently,

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[1009] Sale of Goods Act 1979,, s. 13(1) provides that "Where there is a contract for the sale of goods by description, there is an implied that the goods will correspond with the description".
[1010] Ibid, s. 13.
[1011] *Arcos* (N 553).
[1012] Law Commission (N 444), para 21; *Atiyah and Adams' Sale of Goods (N 35)*, 132-133.
[1013] See Where Goods Are Sold by Description, 107.
[1014] The Sale of Goods Act 1979, s. 14(2) provides: "Where the seller sells goods in the course of a business, there is an implied term that the goods supplied under the contract are of satisfactory quality." Nevertheless, the liability for a breach of this obligation can be excluded under section 55 of the 1979 Act, where the Buyer is not a consumer, but only if this is deemed to be reasonable under the Unfair Contract Terms Act 1977 (see section 2.2.2.2. The Unfair Contract Terms Act 1977, 22).
[1015] Ibid, s. 14(2A, 2B); see section 4.3.3.1.4.1. 'Quality of the Goods' in English Law, 96.

section 15A of the 1979 Act must be read in conjunction with subsection 14(2C)(a) of same. The latter provides that the Seller has an implied duty to disclose any defects in the goods to the Buyer, prior to concluding the Contract. Thus, any public statement by the Seller concerning the effect of the goods will protect him through subsection 14(2C)(a) of the 1979 Act, pertaining to satisfactory quality.[1016]

In the leading case of *Bartlett v Sidney Marcus Ltd*,[1017] Lords Denning, Danckwerts and Salmon stipulated that *"*The seller had brought the defect to the attention of the buyer and therefore the buyer could not assert any rights under section 14 by virtue of section 14 (2C)*"*.[1018] Section 15A of the 1979 Act must also be read in conjunction with subsection 14(2C)(b), above, which provides that where the Buyer examines the goods in a way that should reveal the defect, but fails to do so, he will have no grounds on which to claim that the quality of the goods is unsatisfactory.[1019] This is because English law distinguishes between two potential situations: first, the Buyer examining goods before the Contract is concluded, but not taking sufficient pains to reveal the defect, and second, the Buyer being sufficiently diligent to examine the goods, where there is a defect that is not easily ascertained. Between these two situations, the former should not place the Buyer in a better position than the latter. [1020]

Moreover, under subsection 15(2)(a) of the 1979 Act, what is imposed to ensure the quality of the goods is extended to goods bought on the basis of a sample, whereby there is an implied term that the bulk of the goods will correspond to the quality of the sample.[1021] Nevertheless, under subsection 14(2C)(c) of the 1979 Act, if the unsatisfactory quality of the

[1016] Sale of Goods Act 1979, s. 14(2C)(a).
[1017] *Bartlett* (N 504).
[1018] Ibid.
[1019] It should be noted that before the Contract of Sale is made, the Buyer is not obliged to examine the goods. However, where the Buyer examines the goods, in an examination that ought to reveal the defect, but fails to do so, he will not be able to complain that the quality of the goods is unsatisfactory, according to section 14(2C)(b).
[1020] Law Commission (N 444), para 47.
[1021] The Sale of Goods Act 1979, s. 15(2)(a) provides that "In the case of a contract for sale by sample there is an implied term, (a) that the bulk will correspond with the sample in quality".

goods becomes apparent on conducting a reasonable examination of the sample,[1022] the Buyer cannot bring a complaint that the quality of the goods is unsatisfactory and will not have the right to reject the goods. This exclusion is presumably grounded on the assumption that a sample will be examined in the case of a sale by sample, although the Buyer may choose not to do so. Under these circumstances, it is inappropriate that the Buyer omitting to examine the sample should be in a better position than the Buyer who is diligent enough to examine the sample, but fails to discover a defect that is not easy to find.[1023]

Meanwhile, the Buyer has the right to reject goods, if they have been delivered unfit for the particular purpose for which they were purchased, even if they are of satisfactory quality. In accordance with section 14(3) of the 1979 Act, it is provided that regardless of the specific purpose for which the goods may have been bought, there is an implied term that the goods should be fit for that purpose ('fitness for purpose').[1024] Thus, where the Buyer has disclosed to the Seller his intended use for the goods, the goods should be reasonably suitable, regardless of the nature of that purpose. Consequently, section 14(3) applies when the Buyer has disclosed his purpose for the goods to the Seller, even though this purpose may differ from what would usually be expected of goods of that type. However, it should be noted that it is very difficult for the Buyer to prove that goods are unfit for the purpose for which they were purchased, especially in matters requiring expert technical evidence.[1025]

In a summary of section 15A of the 1979 Act, if the Seller breaches the terms implied by sections 13, 14 and 15 of the above Act and this breach is not slight, the Buyer will have the

[1022] Sale of Goods Act 1979, S. 14(2C)(c) provides that "in the case of a contract for sale by sample, which would have been apparent on a reasonable examination of the sample".
[1023] Sales Law Review *Group* (N 138), 165-167.
[1024] The Sale of Goods Act 1979, s. 14(3) provides that for "any particular purpose for which the goods are being bought, it is implied that the goods supplied under the contract are reasonably fit for that purpose, whether or not that is a purpose for which such goods are commonly supplied, except where the circumstances show that the buyer does not rely, or that it is unreasonable for him to rely, on the skill or judgment of the seller or credit-broker".
[1025] Diane Rowland and Elizabeth MacDonald, *Information Technology* (Taylor & Francis Ltd. 2005), 177; see also Benjamin K. Leisinger, *Fundamental Breach Considering Non-Conformity of the Goods (Contributions on International Commercial Law)* (European Law Publishers 2007), 14-15.

right to reject the goods. Nevertheless, under subsection 15A(1)(b) of the 1979 Act, if the Buyer is not dealing as a consumer, he will no longer have the right to reject the goods, provided that the Seller's breach is slight.[1026] Moreover, section 15A of the 1979 Act must be read in conjunction with its subsections 14(2C)(a), (b) and (c).

6.2.1.1.2. The Buyer's Right to Reject the Goods for a Breach of Terms of Quality in Saudi Law:

Under Saudi law, goods must be free of any defects, even if they are sold without such an explicit stipulation.[1027] As such, Islamic Commercial law declares that if there are any defects in the goods, the Buyer has the right to reject them.[1028] Therefore, according to the Contract for the Sale of Goods under Saudi law, when a Seller fails to ensure the quality of the goods and this is a condition, the Buyer may have the right to reject the goods. In addition, the goods must be fit for the purpose for which they were sold. This may be specified in the Contract itself, or when both parties agree upon the basic purpose of the Contract, namely what they seek to gain from it.[1029] By adopting this approach, in the event that such a purpose has not been achieved, then the Buyer has the right to reject the goods.

However, this is not the case with every type of breach of this nature, as Saudi law does in fact differentiate between slight and more extensive breaches of such a condition. This either gives the Buyer the right to reject the goods, or the right to claim for damages.[1030] In the same way as in English law, Saudi law provides certain limitations over the application of the

[1026] When the breach is slight, then the Buyer has the right to compensation for damages. Thus, the breach is not to be treated as a breach of a condition which entitles the Buyer to reject the goods, but it may be treated as a breach of warranty that gives the Buyer the right to compensation for damages. See section 61(1) of the Sale of Goods Act 1979, which provides that "'warranty' (as regards England and Wales and Northern Ireland) means an agreement over goods that form the subject of a Contract of Sale, but which are 'collateral to the main purpose of such Contract, the breach of which gives rise to a claim for damages, but not to a right to reject the goods and treat the contract as repudiated".

[1027] See section 4.3.3.1.4.2. 'Quality of the Goods' in Saudi Law, 102.

[1028] See section 5.2.2. Breach of the Contract for the Sale of Goods in Saudi Law, 138. This is similar to the position adopted in the *Hanafi* School; see Arts 353 and 354 of *al-majallah al-ahkam al-adliyyah* (The Ottoman Courts Manual [*Hanafi*]).

[1029] Abd El Aal (N 527), 142.

[1030] See section 5.2.2. Breach of the Contract for the Sale of Goods in Saudi Law, 138; see also Al-Sanhūrī (N 48), 563.

Buyer's right to reject the goods, such as the defect being latent. Therefore, if the Buyer has examined the goods and the defect has been apparent, or if the Seller has informed the Buyer of the defect in the goods, then the Buyer cannot reject the goods.[1031]

To support the above, many cases of the Buyer rejecting goods may be found in the archives of the Saudi courts, where the Seller has breached the terms of quality concerning the goods. In Case No. 154/T/3,[1032] the Buyer rejected the goods and refused to make the payment, because the Seller had breached the terms of quality for the goods, but the Buyer had decided to conduct an examination without a signature. Therefore, the Court sentenced him to pay the full price of the goods, since he had failed to prove that the Seller had breached the conditions for quality. This was because the attached report did not bear any signature and could not be used to argue the case. It is therefore clear that if the Buyer can prove that the Seller has breached the terms for the quality of the goods and submitted corresponding proof, the court may decide in favour of the Buyer rejecting the goods.[1033]

To summarise, the Buyer has the right to reject the goods, when the Seller breaches the terms of quality under English and Saudi law. Nevertheless, in both regimes, if the breach is slight, then it may be treated as a breach of warranty, giving the Buyer the right to claim for damages. Furthermore, there are specific terms that need to be met, before the Seller is held liable for any defect found. For example, any public statement by the Seller on the effect of the goods will protect him, as their quality will be held to be satisfactory. Moreover, where the Buyer has examined the goods in such a way that the examination ought to have revealed the defect, but the Buyer has failed to detect it, then he cannot complain about the quality of the

[1031] See Case No. 52/T/3, 103.
[1032] Judicial Blogs, Contract of Sale, Vol. 2 (A. H. 1428 "2007"), 416.
[1033] Nevertheless, it should be noted that in Saudi law, when the Buyer has the right to reject the goods, then the Seller may instead have the right to cure the goods. In Saudi law, the rejection of the goods is one remedy available to the Buyer, and terminating the Contract of Sale is another. As a result, the Buyer has the right to reject the goods, but not to terminate the Contract, until the Seller loses his right to cure defective performance; see section 5.3.4.2. The Seller's Right to Cure Defective Performance in Saudi Law, 176; section 6.2.1.3.2. The Effect of Rejecting the Goods in Saudi Law, 213; see also Case No. 479/S/3, 178; Case No. 428/S/3, 178; Case No. 227/T/3, 178.

goods being unsatisfactory. Finally, in both regimes, the goods must be fit for the purpose for which they were sold. If this is not the case, then the Buyer has the right to reject them.

6.2.1.2. The Buyer's Right to Reject the Goods for Breach of Terms of Quantity:

6.2.1.2.1. The Buyer's Right to Reject the Goods for Breach of Terms of Quantity in English Law:

In English law, while the Seller is delivering the goods to the Buyer, there are provisions for the quantity of goods that must be satisfied. For instance, section 30 of the 1979 Act addresses the problem of the wrong quantity being delivered.[1034] The 1979 Act distinguishes between two situations: the Seller delivering less than the contracted quantity of goods, and the Seller delivering more than the contracted quantity. By way of a remedy for the Buyer, English law also distinguishes between slight and significant breaches of conditions of quantity.

For instance, in English law, section 30(1) of the 1979 Act submits that if the Seller delivers less than the contracted quantity of goods, the Buyer has the option of rejecting them. However, if he accepts them, he must pay the price for the part actually delivered.[1035] In this section, the Buyer has two options: first, to reject the goods, and if he has paid for them, to exercise his right to recover the price. The second option is to accept the quantity of goods delivered and pay for them at the contracted rate. Moreover, if he has paid the price of the goods, he has the right to recover the price for the quantity that remains undelivered. Nevertheless, it should be noted that in English law, the Seller cannot protect himself from the consequences of an incomplete delivery by promising a completed delivery in due course; this is because, in the 1979 Act, the Buyer is not bound to accept delivery by instalments,[1036] unless

[1034] The Sale of Goods Act 1979, s. 30.
[1035] Ibid, s. 30(1) provides that "Where the seller delivers to the buyer a quantity of goods less than he contracted to sell, the buyer may reject them, but if the buyer accepts the goods so delivered he must pay for them at the contract rate".
[1036] Ibid, s. 31(1) provides that "Unless otherwise agreed, the buyer of goods is not bound to accept delivery by instalments".

otherwise agreed.

Meanwhile, in the case where the Seller delivers an excess quantity of goods, sections 30(2) and (3) of the 1979 Act submit that the Buyer may either reject the whole delivery, or accept the goods included in the Contract and reject the rest.[1037] Section 30(3) of the Act provides that where the Seller delivers an excess of goods and the Buyer accepts the delivery in its entirety, he must pay for the extra goods at the contracted rate.[1038] Under sections 30(2) and (3), the Buyer has three options: first, to reject the whole delivery; second, to accept the goods included in the Contract and reject the rest, and third, to accept the whole delivery and pay for the excess at the contracted rate. Nevertheless, in section 30(3), there are theoretical difficulties in deciding when the Buyer can accept excess goods delivered by the Seller and this is not clarified in the wording. However, neither does it appear to be of serious practical importance.[1039]

It should be noted here that sections 30(1) and (2) of the 1979 Act must be read in conjunction with section 30(2A) of same. This section distinguishes between a slight and significant excess in the delivery of goods. It provides that a Buyer who is not a consumer cannot reject the goods, if the quantity missing or the surplus is slight.[1040] Consequently, under section 30(2A) of the 1979 Act, when the Buyer is not dealing as a consumer, he no longer has the right to reject the goods, where the Seller delivers a smaller or greater quantity of goods than the Buyer has contracted for, provided that the shortfall or excess is slight,[1041] as held in

[1037] The Sale of Goods Act 1979, s. 30(2) provides that "Where the seller delivers to the buyer a quantity of goods larger than he contracted to sell, the buyer may accept the goods included in the contract and reject the rest, or he may reject the whole".

[1038] Ibid, s. 30(3) provides that "Where the seller delivers to the buyer a quantity of goods larger than he contracted to sell and the buyer accepts the whole of the goods so delivered he must pay for them at the contract rate".

[1039] Law Commission, (N 87), para 6, 32; *Atiyah and Adams' Sale of Goods (N 35)*, 113.

[1040] The Sale of Goods Act 1979, s. 30(2A) provides that "A buyer may not (a) where the seller delivers a quantity of goods less than he contracted to sell, reject the goods under subsection (1) above, or (b) where the seller delivers a quantity of goods larger than he contracted to sell, reject the whole under subsection (2) above, if the shortfall or, as the case may be, excess is so slight that it would be unreasonable for him to do so"; see *Benjamin's Sale of Goods* (N 25), para 8-050.

[1041] Eric Baskind, Greg Osborne and Lee Roach, *Commercial Law* (2nd edn, Oxford University Press 2016), 323.

the case of *Shipton Anderson & Co v Weil Bros & Co.*[1042]

Finally, as discussed earlier, where the goods are sold by description, there is an implied term that they must correspond to the description: 'conformity with description.'[1043] In the leading case of *Re Moore & Landauer*,[1044] where the Buyer bought 3,100 cans of peaches, the Contract described the tins as being packed in cases of 30. The Seller did indeed deliver 3,100 tins of peaches, but packed in cases of 24. Here, the Court found that the Seller had breached the Contract, because the goods were not as described, even though they were of the same quantity.

To summarise the above, under English law, where the Seller delivers to the Buyer a significantly lower quantity of goods than was agreed in the Contract, the Buyer has the right to reject the goods.[1045] However, if the difference is slight, the Buyer cannot legitimately reject the goods, but has the right to claim for damages.[1046] Conversely, where the Seller delivers a quantity of goods to the Buyer, in excess of what was agreed under the Contract, the Buyer has three options. First, the whole delivery may be rejected,[1047] but if the surplus is slight, then this will not be possible.[1048] The second option is to accept the goods stipulated in the Contract and reject the rest,[1049] while the third option is to accept the entire delivery of goods and pay for the surplus at the contracted rate.[1050]

[1042] [1912] 1 K.B. 574. In this case, the court has seen that "The quantity in excess was so trifling and the sellers had not claimed the price thereof, the sellers had substantially performed the contract and the buyers were not entitled to reject the cargo under s. 30, sub-s. 2, of the Sale of Goods Act 1893, which provides that (where the seller delivers to the buyer a quantity of goods larger than he contracted to sell, the buyer... may reject the whole)".
[1043] As under section 13(1) of the Sale of Goods Act 1979, in the event where the goods are sold by description, there is a condition that the goods must correspond to that description. This section provides that "Where there is a contract for the sale of goods by description, there is an implied that the goods will correspond with the description".
[1044] *Re Moore* (N 555).
[1045] The Sale of Goods Act 1979, s. 30(1).
[1046] Ibid, s. 30(2A)(a).
[1047] Ibid, s. 30(2).
[1048] Ibid, s. 30(2A)(b).
[1049] Ibid, s. 30(2).
[1050] Ibid, s. 30(3).

6.2.1.2.2. The Buyer's Right to Reject the Goods for Breach of Terms of Quantity in Saudi Law:

Under the Contract of Sale in Saudi law, the obligation of the Seller to deliver the goods to the Buyer will include compliance with the quantity agreed in the Contract. Otherwise, the Seller will be in breach of the Contract, giving the Buyer the right to reject the goods, provided that the breach is not slight.[1051]

In the same way as English law, Saudi law states that when the Seller has delivered to the Buyer a smaller quantity of goods than was agreed under the Contract and this difference is not slight, the Buyer has the right to either reject the goods or accept them and claim for damages. Furthermore, in Saudi law, the Buyer has the right to reject goods, if they are supplied in instalments by the Seller, unless otherwise agreed.[1052] In contrast, where the Seller has delivered a quantity of goods that significantly exceeds the quantity specified in the Contract, then the Buyer may either reject the whole delivery or accept the quantity contracted for and reject the rest. Equally, the Buyer may accept all the goods so delivered, but must pay for the surplus.[1053] Consequently, in Saudi law, not all breaches concerning the quantity of goods delivered will give the Buyer the right to reject the goods; it will depend on whether or not the breach is slight.[1054]

In the case where the Seller has delivered a quantity of goods that exceeds the contracted quantity and the Buyer has accepted the entire delivery, the latter must then pay for the extra quantity of goods. The question here concerns the price to be paid by the Buyer: the contractual price or the market price at the time of delivery.

[1051] Al-Sanhūrī (N 48), 559-563.
[1052] Ibid, 571.
[1053] Ibid, 573.
[1054] Ibid, 563.

Under Islamic Commercial Law, the principle of 'no harm or harassment' (*al Darar wa-la Dirar*),[1055] as already mentioned previously, forbids harm being perpetrated by either party in respect of the other, as well as harm being reciprocated[1056] By adopting this approach, the Seller and Buyer must be in an equal position as regards their right to the price of the goods, which means that the market price of the excess goods must be paid. This would place the Seller and Buyer in the same position with regard to price, regardless of whether there has been an increase or decrease.

Therefore, when the Seller has delivered a quantity of goods that exceeds the quantity contracted for and the Buyer has accepted the entire delivery, the latter must pay for the extra quantity of goods at the market price, current at the time of delivery. Under this approach, the Seller and Buyer are in an equal position, because where the price of the goods has increased, the Buyer will still have the right to accept the goods specified in the Contract of Sale and to reject the rest. If he accepts the whole delivery, then the Seller will have the right to the market price. Conversely, where the price of the goods has dropped, it could be interesting for the Buyer to accept the whole delivery, if he pays for the surplus at the market price current at the time of delivery. Moreover, it could be equally in the interests of the Seller for the Buyer to accept the whole delivery, rather than rejecting the goods, despite the fall in the price of the goods.

To summarise, concerning the Buyer's right to reject the goods when the Seller breaches the terms governing quantity under English and Saudi law, both regimes grant that right to the Buyer. Nevertheless, if there is only a slight breach, the Buyer will have the right to damages, but not the right to reject the goods.

[1055] See section 2.3.4.4. The Principle of No Harm or Harassment (*al Darar wa-la Dirar*), 45.
[1056] The basic origin of this is traced back to declarations made by the Prophet Muhammad (PBUH): "There should be neither harming (*darar*) nor reciprocating harm (*dirar*)"; see Kahn (N 189), *Hadith* No. 2341.

English and Saudi law have a different approach, where the Seller has delivered a quantity of goods that exceeds the quantity stated in the Contract, and the Buyer has accepted the entire delivery. In English law, the Buyer would pay for the excess at the contracted rate, whereas in Saudi law, the Buyer would pay for the excess at the market price, current at the time of delivering the goods. With the Saudi approach, the Seller and Buyer are in an equal position, regardless of whether the price of the goods has increased or fallen, or whether this change has had a dramatic effect, especially on a market-sensitive commodity such as oil.

6.2.1.3. The Effect of Rejecting Defective Delivery:

In English and Saudi law, the question arises over whether or not the Contract is terminated, when the Buyer has the right to reject the goods. The next section will analyse an approach that deals with the effect of the Buyer rejecting defective goods under the above-mentioned legal regimes.

6.2.1.3.1. The Effect of Rejecting the Goods in English Law:

The 1979 Act gives the Buyer the right to reject the goods, pursuant to subsection 15A(1)(a) and section 30 of the 1979 Act, where the breach is not slight.[1057] Moreover, under section 11(3) of the above Act, the Buyer is entitled to treat the Contract as repudiated, if the Seller breaches a condition, since *"*a stipulation in a contract of sale is a condition, the breach of which may give rise to a right to treat the contract as repudiated*"*.[1058] Therefore, this is effective where the Seller violates terms of a Contract that are considered as contractual conditions.[1059]

As a result, where the Seller breaches a condition, the Buyer has the right to treat the Contract as repudiated; this will include the Buyer's right to reject the goods, whether the

[1057] The Sale of Goods Act 1979, s. 15A(1)(a) and s. 30.
[1058] Ibid, s. 11(3).
[1059] The Buyer's right to terminate the Contract of Sale of Goods in English law will be examined in section 6.2.3.1. The Buyer's Right to Terminate the Contract in English Law, 226.

property in the goods has been transferred to him or not.[1060] In the leading case of *Ficom SA v Sociedad Cadex Ltd,*[1061] the Court found that the Buyer was entitled to terminate the Contract and reject the goods. As a consequence, in English law, when the Buyer has the right to reject the goods, the Contract is terminated. Hence, the Buyer's right to reject the goods and his right to terminate the Contract of Sale represent a single remedy under English law. This is because the Seller does not have the right to cure defective performance under the 1979 Act.[1062]

In sum, under English law, where the Buyer has the right to reject the goods, the Contract is subsequently terminated. This means that the rejection of the goods and termination of the Contract is a single remedy for the Buyer, with the Seller having no right to cure defective performance.

6.2.1.3.2. The Effect of Rejecting the Goods in Saudi Law:

Unlike in English law, under the Contract of Sale of Goods in Saudi law, the Buyer's right to reject defective goods is separate from his right to terminate the Contract.[1063] This is because Saudi law gives the Seller the right to cure defective performance, subject to a number of terms being met, namely the time of performance not having expired and no harm being caused to the Buyer.[1064]

Consequently, in Saudi law, when the Buyer has the right to reject the goods, the Seller may instead have the right to cure defective delivery. Thus, as emphasised earlier, under the Contract of Sale in Saudi law, the rejection of the goods is one remedy available for the Buyer, and terminating the Contract of Sale is another.[1065] As a result, the Buyer has the right to reject

[1060] *Benjamin's Sale of Goods* (N 25), para 17-093.
[1061] [1980] 2 Lloyd's Rep. 118.
[1062] Numerous scholars have adopted this view, while others have seen that rejecting the goods does not mean terminating the Contract, since the Seller has the right to cure defective performance. However, if this occurs, it must be limited to the delivery period, see section 5.3.4.1. The Seller's Right to Cure Defective Performance in English Law, 171.
[1063] As according to Case No. 428/S/3, 178 .
[1064] See section 5.3.4.2. The Seller's Right to Cure Defective Performance in Saudi Law, 176.
[1065] Jamila Hussain, *Islam: Its Law and Society* (3rd edn, The Federation Press 2011), 211.

the goods, but not to terminate the Contract, until the Seller loses his right to cure his defective performance.

Saudi law gives the Seller the right to cure defective performance, as priority is given to adhering to performance and safeguarding the Contract. This necessitates giving the Seller the right to cure defective performance, where the time of performance has not expired and without causing harm to the Buyer, as in Case Nos. 479/S/3[1066] and 428/S/3.[1067] Therefore, where the Buyer has the right to reject the goods, he may not have the right to terminate the Contract, unless the Seller first loses his right to cure the defect in the goods.

To summarise, the effect of rejecting defective goods in English law consist of a very powerful remedy, which terminates the Contract, without the involvement of the courts in that process. A consequence, in English law, if the Buyer does not have the right to reject the goods, the value of the Seller's compensation for damages is likely to be higher. However, unlike English law, the Buyer's right to reject defective goods is separate from his right to terminate the Contract under Saudi law, and the court is involved a stage of the termination. As a result, when the Buyer has the right to reject defective goods, the Seller may have the right to cure defective performance, provided that a number of terms are met.

6.2.2. The Buyer's Right to Specific Performance:

The Buyer's right to performance, as specified under a Contract, requires the Seller to adhere to that Contract by order of the courts. This is an alternative to awarding damages and represents one of the main differences between Common and Civil Law. According to Schwenzer, one of the essential differences between Common and Civil Law is the remedy of specific performance that is available to the Buyer. Common Law has traditionally been considered hostile to specific

[1066] 479/S/3, 178.
[1067] 428/S/3, 178.

performance, whereas in Civil Law, it has been seen as a basic remedy available to the Buyer.[1068] In Saudi law, however, specific performance is a primary remedy available to the Buyer, where a Seller breaches a Contract for the Sale of Goods. Therefore, it seems that there is a considerable difference between these two legal systems regarding this remedy, given that English law adopts a more pragmatic approach,[1069] while Saudi law applies a principle linked to the binding force of the contract.[1070] With respect to the Seller's right to cure defective performance and the Buyer's right to specific performance, they have the same root but take different forms,[1071] according to the contrasting approaches adopted in the above-mentioned regimes.[1072]

The following section will analyse the Buyer's right to require contractual performance, looking at the reasons why Saudi law adopts the approach of awarding the Buyer the right to specific performance, rather than damages. It will also clarify why English law awards damages, rather than the right to specific performance. The purpose of this section is to examine the reasons for these differing approaches and whether or not they have an effect on the *de facto* results for the Buyer.

6.2.2.1. The Buyer's Right to Specific Performance in English Law:

In English law, the Buyer has the right to ask the courts for the Contract to be performed as written, pursuant to section 52 of the 1979 Act.[1073] This section actually contains the Buyer's

[1068] Schwenzer (N 5), 565-566
[1069] "English law prefers the practical and pragmatic to the theoretical and rational. Principles are necessarily more general, more abstract, than precedents"; see Atiyah (N 166), 26.
[1070] See section 2.3.4.3. The Principle of the Contract's Obliging Force: The 'Binding Force of the Contract', 43.
[1071] Khandani (N 881), 114.
[1072] See section 5.3.4. The Seller's Right to Cure Defective Performance, 171.
[1073] Specific performance gives the Buyer rights analogous to the Seller's rights against the goods and it "entitles the Buyer to the actual goods themselves. If the Buyer has paid in advance and the Seller has become insolvent, the effect of an order for specific performance will thus be to enable the Buyer to take the goods out of the insolvent Seller's estate in priority over other creditors, even if at the time of the Seller's insolvency, the property in the goods had not passed to the Buyer"; see *Benjamin's Sale of Goods* (N 25), paras 19-229.

right to require the Seller to perform a Contract, by order of a court.[1074] Section 52(1) provides that the courts are granted the power to compel the Seller to perform a Contract for the Sale of Goods, where he has failed to do so and where such an order is considered as an order for specific performance,[1075] which is an alternative to awarding damages.[1076] Nevertheless, the court must find that the specific performance is appropriate, or else the Buyer will have the right to damages.[1077] The Buyer also has the right to claim for specific performance, when the property in the goods has passed to him under section 3 of the Torts Act 1977.[1078] Nevertheless, the court has discretion over whether or not to make such an order.[1079]

In fact, specific performance is a rare remedy in English law and this approach is consistent with Common Law.[1080] Therefore, Common Law courts have not specifically enforced the remedy and the general rule has been limited to granting damages:[1081] "This precedence is based on a historical fact that the Courts of Equity would issue an order of specific performance only where the remedy available at common law was inadequate."[1082] Furthermore, disobedience of a specific performance order is classed as contempt of court and the sanctions imposed as a result are somewhat harsh.[1083] Thus, the remedy should only be

[1074] Section 52 applies, whether or not the property in the goods has passed to the Buyer (see *Re Wait* [1927] 1 Ch. 606, 617, per Lord Hanworth MR; see also *James Jones & Sons v. Earl of Tankerville* [1909] 2 Ch. 440, 445).

[1075] The Sale of Goods Act 1979, s. 52(1) provides that "In any action for breach of contract to deliver specific or ascertained goods the court may, if it thinks fit, on the plaintiff's application, by its judgment or decree direct that the contract shall be performed specifically, without giving the defendant the option of retaining the goods on payment of damages".

[1076] *Atiyah and Adams' Sale of Goods (N 35)*, 465.

[1077] Bridge (N 29), 629. The Buyer's right to claim to damages for non-delivery will be analysed in full in section 6.2.4.1.1.2. The Buyer's Right to Damages for Non-delivery, 236.

[1078] The Torts (Interference with Goods) Act 1977, s. 3.

[1079] *Benjamin's Sale of Goods* (N 25), para 17-097.

[1080] Bridge (N 953), 34.

[1081] Khandani (N 881), 101. Fry stated: "namely, that money is a measure of every loss [and] that money is an equivalent to everything." Therefore, where money enables the Buyer to acquire a satisfactory replacement in the marketplace, his expectations are deemed to be fulfilled (see Rowan [N 883], 35).

[1082] Khandani (N 881), 108. Such as in the sale of land, because the law adopts the view that the Buyer cannot, on the Seller's breach, obtain a satisfactory substitute. However, specific performance of certain types of contract may be refused, even if damages are an inadequate remedy, namely in the case of contracts involving personal service, such as employment contracts, with the rationale of preventing involuntary servitude. This was given legislative recognition by section 236 of the Trade Union and Labour Relations (Consolidation) Act 1992 (see Beale, Chitty on Contracts (N 84) , paras 27-007, 27-024; see also Rowan [N 883], 28).

[1083] Lord Hoffmann in the leading case of *Co-operative*, described punishment for contempt as "a powerful weapon; so powerful" (see *Co-operative Insurance Society Ltd v Argyll Stores (Holdings) Ltd* [1998] AC 1 (HL), 12).

awarded with caution.[1084] As a consequence, it is not the policy of English law to force the Seller to perform his contractual obligations; rather, it is the policy of English law to force him to accept the consequences of a breach of Contract.[1085]

Regarding section 52(1) of the 1979 Act, it is evident that the Buyer's right to claim for specific performance is limited to the delivery of specific or ascertained goods,[1086] according to the discretion of the court.[1087] Specific performance must be seen as a fitting remedy for the aggrieved Buyer, but the court is not bound to grant such an order as a matter of course.[1088] Thus, it will only be awarded if the Buyer can convince the court that compensation for damages is insufficient,[1089] whereas specific performance should rather be ordered. This could entail, for example, the Buyer being unable to purchase the same goods elsewhere,[1090] whereby compensation for damages would be inadequate,[1091] given that the goods are unique, irreplaceable, or unavailable on the market.[1092] Such as in case of *Nutbrown v Thornton,*[1093] Nevertheless, in the case where a Buyer is able to purchase the same goods elsewhere, the court may not award specific enforcement of the Contract, since an award of compensation for

[1084] It can be punished by imprisonment (see Shael Herman, 'Specific Performance: A Comparative Analysis Part 1' (2003) 7(1) Edinburgh Law Review. 18-19; Treitel [N 700], 63). Nevertheless, in a commercial Contract, where the defaulting party is a corporation, the punitive role of the court is limited to money, since the imprisonment of a corporation is impossible.

[1085] "It is not the policy of the law to compel adherence to contracts, but only to require each party to choose between performing in accordance with the contract and compensating the other party for injury resulting from a failure to perform" (see Richard A. Posner, *Economic Analysis of Law* (9th edn, Wolters Kluwer Law & Business 2014), 55.

[1086] Where the goods are 'unascertained goods', the court cannot grant specific performance under section 52 of the Sale of Goods Act 1979, such as in case of *Re Wait*, where the Court held that specific performance could not be granted, since the goods were not acknowledged as specific or ascertained (*Re Wait* [N 1074]). However, in the case of *Sky,* the Court granted an order for specific performance (see *Sky Petroleum Ltd v. VIP Petroleum Ltd*, [1974] 1 W.L.R. 576).

[1087] Mak (N 902), 81.

[1088] Khandani (N 881), 102.

[1089] In the leading case of *Re Wait,* Lord Atkin L.J. noted that "courts of equity did not decree specific performance in contracts for the sale of commodities which could be ordinarily obtained in the market where damages were a sufficient remedy" (see *Re Wait* [N 1074], 360).

[1090] Khandani (N 881), 107.

[1091] "In a number of other situations, damages are considered to be an inadequate remedy because of the difficulty of quantifying them"; see Beale, Chitty on Contracts (N 84), para 27-008.

[1092] Bridge (N 29), 631.

[1093] [1805] 10 Ves 159. In this case, the Buyer entered into a Contract to purchase machinery, whereby the Seller breached the Contract by refusing to deliver the machines stipulated in the Contract. However, as the Seller was the only manufacturer of this type of machinery, the Buyer sought specific performance of the Contract. This was allowed by the Court, given that damages would have been inadequate to compensate the Buyer, because he would have been unable to purchase the machines elsewhere.

damages would be adequate for the Buyer,[1094] as in the leading case of *Cohen v Roche*.[1095]

Irrespective of the above, it should be noted that section 52 of the 1979 Act does not express the condition that the Buyer must be unable to purchase the same goods elsewhere, in order to claim for specific performance, although the English courts have tended to exercise this for years;[1096]

Therefore, specific performance is a rarely awarded as a remedy under the English Contract for the Sale of Goods,[1097] because English law adopts a more pragmatic approach. Here, it is generally seen that damages are an adequate option for the Buyer,[1098] because he can then acquire the goods he needs as soon as possible and is unlikely to want to wait for the Seller to deliver them.[1099] Nevertheless, the Buyer may be able to obtain goods promptly, such as in the case of *Societé des Industries Métallurgiques S.A. v Bronx Engineering Co Ltd,*[1100] where the Buyers would have needed 9-12 months to obtain similar goods from an alternative source. However, the Court did not award specific performance and the loss suffered by the Buyers was covered by an increased award of damages.[1101]

Another argument in favour of English law's position on refusing to award specific performance is that it could conflict with the Buyer's duty to mitigate damages. For example, the Buyer may need to purchase the goods elsewhere to mitigate his loss,[1102] where these goods

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[1094] Mak (N 902), 83.

[1095] [1927] 1 KB 169. Here, the Buyer owned a furniture shop and entered into an agreement to purchase a quantity of white chairs to sell there. However, the Seller breached the Contract by refusing to deliver the chairs. Therefore, the Buyer sought specific performance, consisting of delivery of said chairs. The Court decided that the Buyer could be adequately compensated by an award of damages. Therefore, the claim for specific performance was rejected, since the goods under the Contract were "ordinary articles of commerce and of no special value or interest", thus available for purchase elsewhere.

[1096] See the case of *Nutbrown* (N 1093). See also *Cohen* (N 1095); *Whiteley Ltd v Hilt* [1918] 2 KB 808, 819.

[1097] Lord Hoffmann in the leading case of *Co-operative* stated that "Specific performance is traditionally regarded in English law as an exceptional remedy" (see *Co-operative* [N 1083], 11-12).

[1098] See section 6.2.4.1.1.2. The Buyer's Right to Damages for Non-delivery, 236.

[1099] Guenter H. Treitel, *The Law of Coniract* (11th edn, Sweet & Maxwell Ltd. 2003), 1020.

[1100] [1975] 1 Lloyd's Rep. 465.

[1101] McKendrick (N 884), 393; see also *Atiyah and Adams' Sale of Goods (N 35)*, 466.

[1102] The duty to mitigate will usually blunt a demand for specific performance or render it pointless (see Herman [N 1084], 20).

are available on the market and failure to do so would mean damages becoming irrecoverable.[1103] Therefore, if the Buyer insists on obtaining the goods, it could make sense for him to mitigate his losses by looking for an alternative. However, in a claim for specific performance, the Buyer will not look for an alternative.[1104]

As a result, the English courts have in fact tended to see damages as the most appropriate option for the Buyer[1105] and it is this approach that takes as its guideline the achievement of the most economically beneficial result,[1106] such as when the cost of performance will be higher in value than the benefit to the Buyer.[1107] The English courts have seen that *"*specific performance usually carries with it extra costs that may be evaded by the simpler procedure of monetary damages*"*.[1108] Furthermore, an order for specific performance also carries with it a risk that further court intervention might be necessary.[1109] Therefore, the cost of supervising performance is an important factor for the rare granting of specific performance in the English courts,[1110] prevalently guided by economic efficiency standards.

As a result, it is clear that the English courts sense that the award of damages is quicker and easier to execute than specific performance. Moreover, its execution is likely to cause less hardship to the Seller. Therefore, specific performance may be refused, if it causes severe hardship to the Seller, or where the transaction is of a grossly unfair nature. These limits are of

[1103] See section 6.2.4.1.1.2. The Buyer's Right to Damages for Non-delivery, 236.
[1104] Beale, Chitty on Contracts (N 84), para 27-005.
[1105] However, English law takes the view that in the purchase of a particular piece of real estate, specific performance is available to the purchaser, rather than damages; see Beale, Chitty on Contracts (N 84), para 27-007.
[1106] Mak (N 902), 77.
[1107] Specific performance may be denied if the cost of performance for the Seller is wholly out of proportion to the benefit that performance would confer on the Buyer. Such as in the leading case of *Tito v Waddell* (No 2) [1977] Ch 106, the prohibitive cost of performance, together with the absence of any material benefit to the claimant. Similarly, in *Co-operative v Argyll*, Lord Hoffmann "contrasted the likely financial risks to the tenant attendant upon being ordered to keep open a retail business with the less onerous consequences for the landlord of the contract being broken". Consequently, English law is prevalently guided by economic efficiency standards (see *Co-operative* [N 1083]; *Rowan* [N 883], 31).
[1108] Kronman (N 900), 373.
[1109] Such as in the leading case of *Co-operative*, "as the specific performance was likely to have been expensive in terms of cost to the parties and judicial resources" (see *Co-operative* (N 1083); see Steven Shavell, 'Specific Performance versus Damages for Breach of Contract: An Economic Analysis' (2006) 84(4) Texas Law Review, 845;see also *Rowan* [N 883], 30; Treitel [N 1099], 1033).
[1110] Treitel (N 1099), 1033; see also Herman (N 1084), 18.

particular interest when viewed against the general absence of good faith in the performance of the Contract for the Sale of Goods in English law. [1111]

Nevertheless, the question arises here - where there is an express stipulation in the Contract for the Sale of Goods that excludes the discretion of the court to award specific performance - of whether the relief is enforceable. To answer this question, the leading case of *Warner Bros Pictures Inc v Nelson*[1112] may be examined, where the Court found that the discretion of the court cannot be fettered. In this case, Lord Stocker LJ states that if

> [the] submission that the court is bound by the terms of the contract and therefore has no discretion to exercise is correct, the function of the court would be reduced to that of a rubber stamp. In my opinion, this could not be and is not the situation.[1113]

In light of the above, the English courts favour practical and strong remedies, even if this means that they are less interested in rights or principles.[1114] Here, for example, if a Buyer has the right to specific performance, the court will nevertheless tend to look at remedies based upon the speed and ease of their execution. Thus, the English courts adopt a pragmatic approach, with the Buyer claiming for specific performance, rather than applying theory or abstract principles.[1115]

In sum, it is clear that under English law, the Buyer does not have extensive rights to specific performance. Rather, in the English courts, specific performance is only granted where damage compensation would be insufficient.[1116] Consequently, as discussed above, specific

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[1111] Treitel (N 700), 65-66.
[1112] [1993] BCLC 442 (CA); see also, Rowan [N 883], 212).
[1113] *Warner [N 1112]*. 451
[1114] Atiyah (N 166), 21.
[1115] Ibid, 34.
[1116] It should be noted that for an English court to order the specific enforcement of a Contract, it will consider a number of factors, such as the undue hardship likely to be inflicted on the Seller, impossibility, unfairness and frustration. Moreover, English law adopts the general approach of classifying 'frustration' according to Lord Ratcliffe's statement that "Frustration occurs whenever the law recognizes that without default of either party a contractual obligation has become incapable of being performed because the circumstances in which performance is called for would render it a thing radically different from that which was undertaken by the contract" (see *Davis* [N 170]; Nwafor [N 170], 18-19).

performance is not the Buyer's remedy in every case, but is at the equitable discretion of the court.[1117] The English courts have in fact tended to see damages as the most appropriate option for the Buyer; adopting this more pragmatic approach to enable the Buyer to obtain the goods as soon as possible, instead of having to wait for the Seller to deliver them. In such cases, the Buyer would be more likely to attempt to terminate the Contract and claim for damages. As a consequence, although the Buyer does not have extensive rights to specific performance, in English law, there are strong arguments in favour of dealing with damages, as mentioned above. [1118]

6.2.2.2. The Buyer's Right to Specific Performance in Saudi Law:

Unlike English law, Saudi law provides wider rights to specific performance for the Buyer and to ensure that the Seller fulfils his obligations under the Contract. This right is an equitable coercive remedy, through which the Saudi courts require the Seller to fulfil his obligations according to the terms of the Contract, wherever possible.

Generally, the Buyer may apply to the Saudi courts for specific performance, where the Seller fails to fulfil any of his obligations under a Contract of Sale, based on the principle of the binding force of the Contract.[1119] This means that the Contract must be performed and the parties must fulfil their obligations.[1120] In contrast to English law, all contracts are binding

[1117] Nevertheless, the question arises here, where there is an express stipulation in the Contract for the Sale of Goods that excludes the discretion of the court to award specific performance, of whether the relief is enforceable. To answer this question, the leading case of *Warner* may be examined, where the Court found that the discretion of the court cannot be fettered. In this case, Lord Stocker LJ stated that "[the] submission that the court is bound by the terms of the contract and therefore has no discretion to exercise is correct, the function of the court would be reduced to that of a rubber stamp. In my opinion, this could not be and is not the situation" (see *Warner* [N 1112], 451; see also, Rowan [N 883], 212).

[1118] The Buyer's right to damages is subject to the duty of mitigation of loss. That is, the Buyer may need to purchase the goods elsewhere to mitigate his loss, where they are available on the market (see section 6.2.4.1.1.2. The Buyer's Right to Damages for Non-delivery, 236).

[1119] It should be noted that recognition of the principle of the binding force of contracts in Saudi law does not mean that contracts will always be enforced; however, it must be a criterion for the Contract's legitimacy to be properly met. The most common example here is when the Contract is unlawful (see section 2.3.4.3. The Principle of the Contract's Obliging Force: The 'Binding Force of the Contract', 43; Foster [N 222], 5).

[1120] The principle of the binding force of the Contract is accepted in English law. However, care must be taken in interpreting what is meant by this (see section 2.2.5.2. The Principle of the Binding Force of the Contract, 28 (see also P.S. Atiyah and Stephen A. Smith, *An Introduction to the Law of Contract* (5th edn, Oxford University Press 2006), 37).

under Saudi law, except those involving personal services[1121] or prohibited by Islamic law, such as contracts giving rise to *Riba* (usury).[1122] However, the question here is why the Saudi courts need to give effect to the Buyer's application for specific performance. Furthermore, when this occurs, what rationale justifies this rule?

The basic origin of the Saudi courts giving effect to the Buyer's application for specific performance is the Holy Qur'an, namely *Sūrat l-māidah* 5:1, which prescribes that the parties to a contract must fulfil their contractual obligations: "O you who have believed, fulfil [all] contracts."[1123] This verse orders the contracting parties to fulfil their general obligations and many *Hadith* of the Prophet Muhammad (peace be upon him) result in the necessity for contractual obligations to be respected until performance is achieved. Consequently, the Saudi courts place a heavy premium on adherence to contractual terms and to what has been agreed.

Another argument to support the reasons for the Saudi courts giving effect to the Buyer's right to specific performance is the essence of a contract being its performance, and that fact that it is made in order to be performed.[1124] Therefore, a claim for damages resulting from a party's failure to perform a contract is not the same as a claim for specific performance. Furthermore, specific performance reinforces transactional certainty, because an award of specific performance will give the Buyer what he has actually contracted for, whereas a claim for damages will only give him money.[1125] Nevertheless, the Saudi courts, before compelling a Seller to perform a Contract, consider several factors, such as the principle of no harm or harassment,[1126] namely any "undue hardship that may be inflicted on the seller", impossibility,

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[1121] In the same way as in English law, the specific performance of certain types of contract is refused in Saudi law, namely in the case of contracts involving personal service, such as employment contracts. The Saudi Labor Law 2005, Art 76 provides that "If the party terminating the contract does not observe the period provided for in Article (75) of this Law, such party shall be required to pay the other party compensation".

[1122] See section 2.3.4.1. Islamic Commercial Law and Its Effect on the Contract of Sale, 40; see also Case Nos. 361/S/3, 275/S/3 and 695/S/3, 117.

[1123] The Holy Qur'an {*sūrat l-māidah* 5:1}(يَا أَيُّهَا الَّذِينَ آمَنُوا أَوْفُوا بِالْعُقُودِ)

[1124] Rowan (N 883), 2-3.

[1125] Nevertheless, the money is an equivalent to everything and a measure of every loss.

[1126] See section 2.3.4.4. The Principle of No Harm or Harassment (*al Darar wa-la Dirar*), 45.

and frustration.[1127]

In light of the above, it is not incumbent on the Buyer to convince the court that the award of damages is insufficient remedy for a breach, but it is rather the Seller who must convince the court that specific performance will cause him harm. Consequently, in Saudi law, specific performance is the primary remedy for the Buyer and not damages, and this is regardless of whether or not the Buyer is effortlessly capable of obtaining the goods from another source.[1128]

Case No. 49/S/3[1129] supports such a legal stance, whereby specific performance is a primary remedy for the Buyer in the Saudi courts. In the above case, the Buyer bought air conditioners from the Seller. However, the latter sold them and then sent them to a second Buyer. The first Buyer claimed for specific performance, with the Court accepting the claim and deciding that the Seller should perform his obligation. In this case, the Court did not ask the Buyer to claim for damages, based on his ability to buy the goods from another source. However, the Court decided that the Seller should purchase the goods from another source and perform his contractual obligations, given that this was possible and would not be harmful to him, since he could purchase the air conditioners elsewhere.

To summarise, the Buyer's right to specific performance under English and Saudi law involves the courts compelling the Seller to perform the Contract for the Sale of Goods. However, in English law, the Buyer does not have extensive rights to specific performance. These will rather depend on the Buyer being able to convince the court that damages will be

[1127] In Saudi law, in the case where circumstances render the performance of a Contract of Sale impossible, frustration will occur as an exception to non-performance. The term 'frustration' is actually used to indicate a situation where the contracting party, via unanticipated situations beyond his control, has found that the performance of contractual obligations is either impossible, or comprised of an unforeseen burden in the way of extra work or expense. Frustration in Saudi law would actually be identified in cases thought to involve *force majeure*. Under these circumstances, where the delivery of the goods is impossible, the Saudi courts cannot require the Seller to fulfil his obligations. This may be the principal means of substitution in circumstances terminating the Contract of Sale (see Coulson, Noel, 'Commercial Law in the Gulf States: The Islamic Legal Tradition' (1985) 44(03) The Cambridge Law Journal, 503-504).

[1128] When the court obliges the Seller to fulfil his obligations, it applies the principle of no harm or harassment (*al Darar wa-la Dirar*) (see section 2.3.4.4. The Principle of No Harm or Harassment (*al Darar wa-la Dirar*), 45).

[1129] Judicial Blogs, Contract of Sale, Vol. 3 (A. H. 1431 "2010"), 1321; see also Case No. 1417/T/27 (N 342), 241.

an insufficient remedy and as such, the court should order specific performance.[1130] Thus, as discussed above, specific performance is not a right of the Buyer in every case, but is at the discretion of the court.[1131]

The English courts have established that damages are the most appropriate award for the Buyer, where he is able to purchase the same goods elsewhere; potentially because the goods can thus be acquired at the earliest possible opportunity, without having to wait for the Seller to deliver them.[1132] The Buyer will consequently attempt to terminate the Contract and claim for damages.[1133] However, this does not mean that damages are an adequate remedy in every case. Therefore, the decision over the adequate remedy for the Buyer, whether claiming for damages or specific performance, remains at the equitable discretion of the court.[1134]

In contrast, Saudi law provides clear principles for the Buyer's right to specific performance and to ensure that the Seller fulfils his obligations under the Contract. This right is an equitable coercive remedy, through which the Saudi courts require the Seller to fulfil his obligations according to the terms of the Contract, where possible.[1135] By adopting the approach of the 'binding force of the Contract',[1136] when a Seller breaches his obligations under a Contract of Sale, the Saudi courts may oblige him to fulfil them,[1137] without it being incumbent on the Buyer to convince the court that damages offer insufficient remedy for the breach. Instead, it is the Seller who must convince the court that specific performance will

[1130] The Sale of Goods Act 1979, s. 52.
[1131] See section 6.2.2.1. The Buyer's Right to Specific Performance in English Law, 215.
[1132] Treitel (N 1099), 1020. However, section 52 of the 1979 Act does not express the condition of the Buyer being unable to purchase the same goods elsewhere, although the English courts have exercised this in many cases for years (see *Nutbrown* [N 1093]; see also *Cohen* [N 1095]; *Whiteley* [N 1096]).
[1133] However, the Buyer's right to compensation for damages is subject to the duty of mitigation of loss. That is, the Buyer may need to purchase the goods elsewhere to mitigate his loss, where they are available on the market (see section 6.2.4.1. The Buyer's Right to Damages in English Law 233).
[1134] Bridge (N 29), 631, with regard to the second limitation to the award of specific performance for the Buyer.
[1135] See section 6.2.2.2. The Buyer's Right to Specific Performance in Saudi Law, 221.
[1136] See section 2.3.4.3. The Principle of the Contract's Obliging Force: 'Binding Force of the Contract', 43; see also Foster (N 222), 5.
[1137] Naturally, for the principle of the binding force of the contract to be recognised, the criteria for the Contract's legitimacy must be properly met.

cause him harm. Consequently, specific performance is the primary remedy for the Buyer in Saudi law and not damages, regardless of whether the Buyer can easily obtain the goods from another source.[1138]

The outcome of this comparison is that the Saudi approach emphasises performance of the Contract, with the Seller remedying the breach by fulfilling his contractual obligations, while the English approach leans towards terminating the Contract, where the Buyer buys the goods elsewhere to mitigate his damages. One could therefore assume that in English law, the Buyer is the one who must fulfil his own needs, after the court awards him damages. However, this might not be an appropriate remedy, especially when the Buyer cannot quickly obtain the necessary goods, as in the case of *Societé des Industries Métallurgiques S.A. v Bronx Engineering Co Ltd*.[1139] In contrast, this would not happen under Saudi law, as the court would enforce the Contract, without the need to look at other sources of the goods. Nevertheless, English law has strong arguments in support of awarding damages, as explained earlier.

Therefore, it is evident from the above that the two legal systems have their own individual character. For example, the English courts can grant or reject claims for performance after considering several questions. In contrast, once the Buyer claims for specific performance in a Saudi tribunal, the tribunal will be more or less bound to acquiesce to the Buyer's choice. The Saudi court would then make rather narrow and objectively verifiable inquiries. As a result, under Saudi law, the Buyer can claim for specific performance with little risk of the tribunal refusing the request. Saudi law therefore seems to regard the Buyer and not the court as best placed to discern its own interests. Consequently, if the Buyer claims for specific performance and it is a possibility, then the Seller should not be able to override the Buyer's preference.

[1138] In support of such a legal stance, see Case No. 49/S/3, 223.
[1139] *Societé* (N 1100).

6.2.3. The Buyer's Right to Terminate the Contract:

In both English and Saudi law, if a Seller breaches any condition of a Contract for the Sale of Goods, then the Buyer has the right to terminate the Contract. This right will lead to the demise of the Contract, whereby the Buyer's duties under it will cease to exist and the Seller will have no right to impose such obligations. Nevertheless, there are other rights and obligations that will remain enforceable, notwithstanding a judgment to terminate a Contract. For example, there is the Buyer's obligation to take steps that are appropriate and reasonable to guarantee the protection of the goods from damage, until their return to the Seller. The Buyer's right to terminate a Contract for the Sale of Goods under English and Saudi law will be examined in the following sections.

6.2.3.1. The Buyer's Right to Terminate the Contract in English Law:

In English law, the Buyer has the right to terminate a Contract and claim for damages. This is primarily exercised when a Seller breaches the conditions of a Contract. Therefore, when a Seller has repudiated his obligations under a Contract, or commits a fundamental breach of a Contract, the Buyer may choose to treat the Contract as repudiated, with section 11(3) of the 1979 Act giving the Buyer this right, where the Seller breaches a contractual condition.

The first part of the above section provides that where "a stipulation in a contract of sale is a condition", a breach of it "may give rise to a right to treat the contract as repudiated". [1140] Thus, where the Seller breaches a condition, the Buyer has the right to treat the Contract as repudiated.[1141] Nevertheless, where the Seller breaches warranty, the Buyer will have the right to claim for damages.[1142] Under the second part of section 11(3), the Buyer has such a right to

[1140] The Sale of Goods Act 1979, s. 11(3).
[1141] See section 5.2.1. Breach the Contract of the Sale of Goods in English Law, 137.
[1142] Furthermore, the Buyer may treat the breach of the condition as a breach of warranty, according to section 11(2) of the Sale of Goods Act 1979, which provides that "Where a contract of sale is subject to a condition to be fulfilled by the seller, the buyer may waive the condition, or may elect to treat the breach of the condition as a breach of warranty and not as a ground for treating the contract as repudiated".

claim for damages, but no right to reject the goods or to treat the Contract as repudiated.[1143] Twigg-Flesner sees that *"*the Buyer has the right to termination of contract when the seller's breach of contract goes to the root of the agreement, either because it is a breach of the condition or because of the nature and consequences of the breach of an innominate*"*.[1144]

Under English law, the Buyer has the right to reject the goods, as declared by the 1979 Act, but he also has the right to terminate the Contract. The question here is whether the Buyer's right to reject the goods is separate from the right to terminate the Contract of Sale. Moreover, are the circumstances affording the Buyer the right to reject the goods the same as those surrounding the right to terminate the Contract of Sale? As mentioned earlier,[1145] the 1979 Act is not explicit in its treatment of termination and rejection; the effect of termination and rejection and the link between them is rather left obscure.[1146] However, it can be seen that in English law, the Buyer's right to reject the goods includes his right to terminate the Contract.[1147]

To summarise, under English law, the Buyer is entitled to terminate the Contract when the Seller has repudiated his obligations under it, committed a fundamental breach of the Contract, or breached a contractual condition, as declared in the 1979 Act. Nevertheless, English law is not explicit in its treatment of termination and rejection, or the effect of these and the link between them under the 1979 Act, even if it would appear in practice that the Buyer's right to reject the goods automatically terminates the Contract.

[1143] The second part of section 11(3) of the Sale of Goods Act 1979, provides that "warranty, the breach of which may give rise to a claim for damages but not to a right to reject the goods and treat the contract as repudiated" (see also section 5.2.1. Breach the Contract of the Sale of Goods in English Law, 137).

[1144] *Atiyah and Adams' Sale of Goods (N 35)*, 497.

[1145] See section 6.2.1.3.1. The Effect of Rejecting the Goods in English Law, 212.

[1146] Bridge (N 29), 533.

[1147] Bridge has seen that in English law, the Buyer's right to reject the goods includes his right to terminate the Contract; see *Benjamin's Sale of Goods* (N 25), para 17-093. However, by contrast, there are some scholars who have seen that rejecting the goods does not mean terminating the Contract (see section 6.2.1.3.1. The Effect of Rejecting the Goods in English Law, 212).

6.2.3.2. The Buyer's Right to Terminate the Contract in Saudi Law:

In the same way as English law, when a Seller breaches a contractual condition under Saudi law, the Buyer has the right to terminate the Contract, but if the Seller breaches warranty, then the Buyer has the right to compensation for damages.[1148]

Saudi law makes clear provision for ascertaining the Buyer's right to terminate the Contract, if the Seller breaches a condition of the Contract and this is determined as "a fundamental breach"; most commonly when the Seller breaches a condition of the time of delivery[1149] and this is a substantial breach, giving the Buyer the right to terminate the Contract. This means that the Seller's obligation to deliver the goods to the Buyer at the contracted time is of the essence under the Contract. In the archives of the Saudi courts, many judicial indications may easily be found, which address the Buyer's right to terminate the Contract, if the Seller breaches a condition of the time of delivery; see, for example, Case Nos. 344/S/3[1150] and 405/S/3.[1151] Moreover, Saudi law gives the Buyer the right to terminate the Contract according to the defect option (*Khayar al-aib*),[1152] which is when the goods have a defect, subject to a number of terms, as clarified below.

6.2.3.2.1. The Buyer's Right to Terminate the Contract According to the Defect Option (Khayar al-Aib):

Under the Contract for the Sale of Goods in Saudi law, the goods must be free of any defects, even if they are sold without any such stipulation. As a result, Saudi law gives the Buyer the

[1148] See section 5.2.2. Breach of the Contract for the Sale of Goods in Saudi Law, 138.
[1149] Under the Contract of Sale in Saudi law, the time of delivery is essential to the Contract, unless otherwise agreed (see section 4.3.3.1.2.2. 'Time of Delivery' in Saudi Law, 92).
[1150] 344/S/3,92 .
[1151] 405/S/3 (N 482), 1409.
[1152] Furthermore, Saudi law bases the termination of a Contract of Sale of Goods on the complex option of the Contract meeting place (*Khiyar al-majlis*). This option gives the Buyer an immediate right to terminate the Contract, without the Seller being able to claim for damages. Under this option, the Buyer has the right to rescind the Contract and choose not to proceed with it, so long as he has not left the Contract meeting place.

right to terminate the Contract, if there are any defects in the goods, pursuant to the defect option, *Khayar al-aib*. Nevertheless, there are certain stipulations that must be met, before the Seller is held liable for any defect found.

First, the defect should not be slight, but rather designated as a substantial defect. To support this, in Case No. 479/S/3,[1153] the Buyer purchased laser machines and found them to be defective, subsequently claiming to terminate the Contract. In this case, the Court found the defect in the laser machines to be very slight and therefore rejected the Buyer's claim to terminate the Contract, but ordered the Seller to cure defective performance instead.[1154]

Secondly, the defect should have existed at the time of delivery of the goods to the Buyer by the Seller. If not, then the Buyer will not be entitled to terminate the Contract.[1155] In Case No. 218/S/3,[1156] where the Buyer refused to pay the full price of the goods, because they were defective, and the Seller claimed the price, the Buyer responded with a claim to terminate the Contract on the grounds of the goods being defective. However, the Buyer failed to prove to the Court that the goods were already defective before delivery. As a result, the Court sentenced him to pay the full price of the goods. Thus, if a Buyer can prove to the court that the goods were defective before delivery, the court may decide in the Buyer's favour to terminate the Contract.

Thirdly, for the Buyer to have the right to terminate a Contract, it is not enough for the defect to have already existed and not be slight, it must also be latent. Therefore, if the Buyer has examined the goods and the defect has been apparent, this option will not apply.[1157] Neither

[1153] 479/S/3, 178.
[1154] As mentioned earlier, in Saudi law, the Seller's right to cure defective performance may stop the Buyer's right to terminate the Contract (see section 5.3.4.2. The Seller's Right to Cure Defective Performance in Saudi Law, 176).
[1155] Al-Sanhūrī (N 48), 722. This is similar to the position adopted in the *Hanafi* School, in the Ottoman Courts Manual, '*al-majallah al-ahkam al- adliyyah*', where Art 339 provides that "A defect of long standing is a fault which existed while the thing sold was in the possession of the Seller".
[1156] 218/S/3, 191.
[1157] This option does not apply, if the Seller informs the Buyer of the defect in the goods, or when the Buyer has examined the goods and the defect has been apparent (see section 4.3.3.1.4.2. Quality of the Goods in Saudi Law, 102).

will it apply, if the Seller has informed the Buyer of the defect in the goods. Consequently, if the defect is apparent, or if the Seller has informed the Buyer of the defect,[1158] the latter will not be held liable, since an apparent defect was known to the Buyer, who did not object. This constitutes evidence that the Buyer approved the goods with the defect. However, the question arises over the criteria for determining whether or not a defect is apparent.

The answer to this lies in whether a reasonable person would find the defect through reasonable effort. If not, then the defect cannot be deemed to be apparent. Otherwise, certain assumptions could be made, such as the existence of proof that the Seller affirmed to the Buyer that the goods were free from defects. Alternatively, the Seller may have resorted to fraudulent conduct in hiding a defect from the Buyer.[1159]

In Case No. 52/T/3,[1160] for example, where the Buyer checked and then bought second-hand buses, but later sought to terminate the Contract, because the buses were defective, the Court decided to reject the Buyer's request, on the ground that the Buyer had examined the goods with due diligence and the defect was apparent. Therefore, it was decided that the Buyer had accepted the goods with their defect.[1161]

All of the aforementioned stipulations must be met, before the Buyer has the right to terminate a Contract under *Khayar al-Aib*, as there are many easily accessible judicial indications in the archives of the Saudi courts, which address the Buyer's right to terminate a Contract based on this option. By way of illustration, in Case No. 840/S/3,[1162] when a Seller

[1158] This is also the case in the *Hanafi* School, in the Ottoman Courts Manual, '*al-majallah al-ahkam al-adliyyah*', whereby Art 341 provides that "If the Seller declares at the time of sale that there is a defect in the thing sold, and the Buyer accepts the thing sold with the defect, he has no option on account of such defect".
[1159] Al-Sanhūrī (N 48), 727.
[1160] 52/T/3, 103.
[1161] This was also found in Case No. 332/S/3, when the Seller proved to the Court that the Buyer had known that the goods were defective at the time of entering into the Contract. In this situation, the Court decided to reject the Buyer's request to terminate the Contract, because he had known the goods were defective since the formation of the Contract (see 332/S/3, 103 . This is similar to the position adopted in the *Hanafi* School in '*al-majallah al-ahkam al-adliyyah'*, where its Art 343 provides that "If a Buyer buys property, including all defects, he (the Buyer) cannot make any claim on account of any defect found therein".
[1162] Judicial Blogs, Contract of Sale, Vol. 3 (A. H. 1431 "2010"), 1276.

delivered defective goods, the Buyer claimed to terminate the Contract. In this case, the Court decided to accept the Buyer's request to terminate the Contract of Sale on the ground of a defect in the goods. Furthermore, in Case No. 873/S/12,[1163] where the Buyer bought electronic equipment and found it to be defective, thus claiming to terminate the Contract, the Court decided to accept the Buyer's request and the Contract was terminated on the ground of a defect in the goods.

To summarise, the Buyer has the right to terminate a Contract for the Sale of Goods under both English and Saudi law, if the Seller has failed to meet his contractual obligations or commits a fundamental breach of the Contract.[1164] Furthermore, Saudi law grants the Buyer the right to terminate a Contract based on *Khiyar al-aib,* when the goods have a defect and subject to several specific terms.[1165] Nevertheless, in English law, the Buyer's right to reject the goods and terminate the Contract comprises a single remedy, although the 1979 Act is not explicit in its treatment of termination and rejection, [1166] either in their effect or connection with each other.[1167]

As a consequence, it may also be noted that in English law, the Buyer's right to reject the goods includes his right to terminate the Contract;[1168] while in Saudi law, the Buyer's right to reject the goods is one remedy and his right to terminate the Contract is another. Therefore, in cases where the Buyer is entitled to reject the goods, he may not have the right to terminate the Contract, given that the Seller must first lose his right to cure the goods.[1169] Consequently, English law adopts a broader view than Saudi law and addresses numerous issues. Finally, in

[1163] Judicial Blogs, Contract of Sale, Vol. 2 (A. H. 1432 "2011"), 525.
[1164] See section 6.2.3. The Buyer's Right to Terminate the Contract, 226.
[1165] See section 6.2.3.2.1. The Buyer's Right to Terminate the Contract According to the Defect Option (*Khayar al-Aib*), 228.
[1166] Section 6.2.1.3.1. The Effect of Rejecting the Goods in English Law, 212.
[1167] Bridge (N 29), 576-577.
[1168] Bridge's view is that in English law, the Buyer's right to reject the goods includes his right to terminate the Contract (see *Benjamin's Sale of Goods* (N 25), paras 17-093). However, in contrast, there are some scholars who have seen that rejecting the goods does not mean terminating the Contract (see section 6.2.1.3.1. The Effect of Rejecting the Goods in English Law, 212; section 6.2.3.1. The Buyer's Right to Terminate the Contract in English Law, 226).
[1169] See section 5.3.4.2. The Seller's Right to Cure Defective Performance in Saudi Law, 176.

both regimes, if the Buyer has the right to terminate a Contract for the Sale of Goods, he will be entitled to compensation for damages, which will be examined in the following sections.

6.2.4. The Buyer's Right to Damages:

The Buyer has the right to compensation for damages, where the Seller breaches a Contract for the Sale of Goods. These may either be general or special damages: "direct or indirect damages." This right is accepted under both English and Saudi law and its aim is to put the Buyer in the position he would have been in, if the Contract for the Sale of Goods had been performed correctly.

Thus, under English and Saudi law, the function of claiming for damages is to compensate for any loss incurred by a breach of the Contract, which means compensation for the damage suffered by the Buyer. Therefore, the avowed aim of awards for damages is not to punish or deter the Seller. Consequently, the sums payable under a liquidated damages clause are not recoverable, in the case where the sum payable under it has exceeded the actual loss caused by a breach of the Contract.[1170]

Furthermore, the Seller will not have to bear responsibility for the almost endless consequences of breaches of the Contract, but the Buyer has the duty to mitigate any loss that applies to claims for damages. Compensation for damages is a vast subject, but the purpose of the two parts of this section is to analyse how the Buyer could claim for damages under English and Saudi law, respectively.

[1170] For English law, see *Bunge* (N 941); see also Bridge (N 938), 404. In the same way, Saudi law requires the existence of damage for the notion of compensating such damage to be accepted. Thus, compensation based on a contractual compensation clause shall not be due in the case where the defendant has proven that the claimant has not incurred any damage. Pursuant to this rule, in Case No. 447/S/7, the claimant claimed damage compensation of $2,000,000.00, according to the Contract's compensation clause, because the defendant had breached the Contract. However, the claimant failed to prove the existence of damage. Under these circumstances, the Court decided to reject the claimant's request for compensation for damages, since he was unable to prove that any damage existed, even though there was a contractual compensation clause (see Case No. 447/S/7, 179).

6.2.4.1. The Buyer's Right to Damages in English Law:

Since 1854, in order to determine the extent of liability for damages under English law, the English courts have been guided by the principles set out in Baron Alderson's judgment in the case of *Hadley v Baxendale*.[1171] Here, any damages that might have been recoverable were broken down into two distinct areas. The first, general damages, flowed naturally from the contractual breach, while the second, special damages, was substantiated as a result of special circumstances surrounding the case, according to the contemplation of the parties at the time of concluding the Contract. This means that special damages occur under exceptional conditions.

Consequently, in English law, these rules on damages are now incorporated into the 1979 Act in sections 51[1172] and 53[1173] for general damages, and in section 54[1174] for special damages – the latter covering most losses that are not compensated for by general damages, but which the Buyer may be entitled to.[1175] Nevertheless, in English law, the Buyer cannot recover any losses that he could have avoided by taking reasonable steps: "Mitigation of the damage."[1176] Furthermore, as mentioned above,[1177] the function of claiming for damages under English law is to compensate for losses caused by a breach of the Contract, which means compensation for any damage suffered by the Buyer. Consequently, it does not serve to 'punish' the Seller. Therefore, the sums payable under a liquidated damages clause are not recoverable in the case where the sum payable under it exceeds the actual loss incurred by a breach of the Contract under English law.[1178]

[1171] *Hadley* (N 942).
[1172] See section 6.2.4.1.1.2. The Buyer's Right to Damages for Non-delivery, 236.
[1173] See section 6.2.4.1.1.1. The Buyer's Right to Damages for Defective Goods, 234.
[1174] See section 6.2.4.1.2. Special Damages, 237.
[1175] See *Benjamin's Sale of Goods* (N 25), para 16-031; Beale, Chitty on Contracts (N 84), paras 26-122, 26-123.
[1176] Hibbert (N 76), para 13.
[1177] See section 6.2.4. The Buyer's Right to Damages, 232.
[1178] See *Bunge* (N 941); see also Bridge (N 938), 404.

6.2.4.1.1. General Damages:

As mentioned above, general damages arise naturally from the Seller breaching a Contract for the Sale of Goods, as set out by Baron Alderson in *Hadley v Baxendale*: "losses arising naturally, according to the normal course of things from the breach of contract."[1179] Section 53(1) of the 1979 Act provides that the Buyer's remedy where the Seller breaches warranty is compensation for damages. This also means that where the Seller breaches a contractual condition and the Buyer elects to treat this as a breach of warranty, the Buyer also has the right to compensation for damages,[1180] while section 53 of the 1979 Act gives the Buyer this right on the ground of defective performance and in section 51(1), specifically for any damages incurred through non-delivery.[1181] These rights of the Buyer to claim damages are outlined below.

6.2.4.1.1.1. The Buyer's Right to Damages for Defective Performance:

In English law, where there is defective performance on the part of the Seller, the Buyer has the right to compensation for damages, if this defective performance represents a breach of warranty, but not of a condition. For example, in the first part of section 53(1) of the 1979 Act, a situation is established, if defective goods are supplied by the Seller to the Buyer and there is a breach of warranty. Under these circumstances, the Buyer will not be entitled to reject the goods, but rather to claim damages from the Seller, calculated as per the general principles for calculating damages. [1182]

In the second part of section 53(1), it is set out that where the Seller breaches a condition

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[1179] *Hadley* (N 942).

[1180] The Sale of Goods Act 1979, s. 53(1) provides that "Where there is a breach of warranty by the seller, or where the buyer elects (or is compelled) to treat any breach of a condition on the part of the seller as a breach of warranty, the buyer is not by reason only of such breach of warranty entitled to reject the goods; but he may (a) set up against the seller the breach of warranty in diminution or extinction of the price, or (b) maintain an action against the seller for damages for the breach of warranty".

[1181] Ibid, s. 51(1) provides that "Where the seller wrongfully neglects or refuses to deliver the goods to the buyer, the buyer may maintain an action against the seller for damages for non-delivery".

[1182] Ibid, s. 53(1).

of the Contract and the Buyer elects or is compelled to treat this breach as a breach of warranty, the Buyer will not have the right to reject the goods, but must claim compensation for damages.[1183] Consequently, when the Seller breaches a condition of the Contract and the Buyer accepts the goods, the ensuing right to compensation for damages comes under the 1979 Act. Section 53(2) of the 1979 Act consequently lays down how these damages are measured when there is a breach of warranty,[1184] while section 53(3) of the 1979 Act specifies how damages are calculated when there is a breach of warranty concerning quality.[1185]

Consequently, section 53(2) must be read with section 53(3), as the latter specifies how damages are calculated when there is a breach of warranty; whereby the loss calculated must be the difference between the cost of the goods at the time of delivery and the cost that would have been incurred, if the warranty had been resolved.[1186] Under the above sections for determining the extent of the Seller's liability to compensate the Buyer for damages, the claim related to the difference in the value of the goods signifies the physical damage suffered by the Buyer.[1187] A monetary award along these lines would, for example, give the Buyer the difference in value between conforming and non-conforming goods.[1188]

Under these circumstances, the Buyer has the right to claim the difference in the value of the goods, but not for consequential loss (a claim for general damages, this being the loss occurring naturally and directly in the ordinary course of events). However, the Buyer is

[1183] The Sale of Goods Act 1979, s. 53(1) provides that "…where the buyer elects (or is compelled) to treat any breach of a condition on the part of the seller as a breach of warranty, the buyer is not by reason only of such breach of warranty entitled to reject the goods; but he may (a) set up against the seller the breach of warranty in diminution or extinction of the price, or (b) maintain an action against the seller for damages for the breach of warranty".

[1184] Ibid, s. 53(2) provides that "The measure of damages for breach of warranty is the estimated loss directly and naturally resulting, in the ordinary course of events, from the breach of warranty".

[1185] Ibid, s. 53(3) provides that "In the case of breach of warranty of quality such loss is prima facie the difference between the value of the goods at the time of delivery to the buyer and the value they would have had if they had fulfilled the warranty".

[1186] Ibid, s. 53(3).

[1187] G.H. Treitel, 'Damages for breach of warranty of quality' (1997) 113 Law Quarterly Review 190; see also Aymen Masa'deh, *Compensatory Damages for Breach of Warranty of Quality: An Analysis of the Recoverability and Quantification of Compensatory Damages under the Sale of Goods Act, the American Uniform Commercial Code and the United Nations Convention on the International Sale of Goods* (PhD thesis, University of Bristol School of Law 2000), 187.

[1188] Bridge (N 938), 404.

entitled to compensation for any such loss incurred for breach of the Contract by the Seller. According to section 54 of the Act,[1189] sections 53(2) and 53(3) do not hamper the Buyer's right to claim special damages, wherever these arise.[1190]

6.2.4.1.1.2. The Buyer's Right to Damages for Non-delivery:

If the Seller fails to deliver the goods to the Buyer, then the Buyer has the right to damages for non-delivery. In section 51(1) of the 1979 Act, the situation is dealt with by the Buyer being able to claim a remedy in the form of damages resulting from the Seller failing to meet his obligation to supply the goods to the Buyer;[1191] whether or not the property in the goods has been transferred to the latter.[1192] Furthermore, in section 51(2) of the 1979 Act, it is specified how these damages are measured, when the goods have not been delivered as agreed. The Buyer is consequently entitled to compensation for any loss incurred by a breach of the Contract by the Seller, while *"*The measure of damages is the estimated loss directly and naturally resulting, in the ordinary course of events, from the seller's breach of contract*"*.[1193]

Moreover, any damages for non-delivery that are awarded to the Buyer shall be calculated under the general rules of measures for damages. This means the difference between the price mentioned in the Contract and the price at the time of delivering the goods. According to section 51(3) of the above Act, it is submitted that when there is a ready market for the goods, the damages are calculated according to the difference between the market price (at the time of delivery of the goods) and the contracted price.[1194] Nevertheless, the Buyer should

[1189] The Sale of Goods Act 1979, s. 54.
[1190] See section 6.2.4.1.2. Special Damages, 237; see also *Penarth Dock Engineering Co v Pounds* [1963] 1 Lloyd's Rep. 359.
[1191] The Sale of Goods Act 1979, s. 51(1) provides that "Where the seller wrongfully neglects or refuses to deliver the goods to the buyer, the buyer may maintain an action against the seller for damages for non-delivery".
[1192] *Atiyah and Adams' Sale of Goods (N 35)*, 468.
[1193] The Sale of Goods Act 1979, s. 51(2).
[1194] Ibid, s. 51(3) provides that where there is an available market for the goods in question, "the measure of damages is prima facie to be ascertained by the difference between the contract price and the market or current price of the goods at the time or times when they ought to have been delivered or (if no time was fixed) at the time of the refusal to deliver". For example, if a Buyer purchases 1,000 TVs from a Seller at a price of £500.00 per unit at the time of forming the Contract of Sale, but this price increases to £550.00 per unit, the Seller will be in breach of the Contract by failing to deliver the goods and the Buyer may be entitled to compensation for damages, based on the 'difference between the price mentioned in the contract

attempt to mitigate the damage. Under this rule, when the Seller breaches a Contract for the Sale of Goods through non-delivery, the Buyer should purchase substitute goods available on the market if and as soon as possible. If the Buyer fails to do so, then he will be unable to recover damages for any extra loss suffered as a result of a later rise in the price of the goods.[1195]

What is described above constitutes general damages, but the Buyer also has the right to special damages. A corresponding rule laid down in section 54 of the 1979 Act[1196] further provides that sections 51 and 53 will not hamper the Buyer's right to claim special damages, whenever these arise. The Buyer's right to claim compensation for special damages is described in detail below.

6.2.4.1.2. Special Damages:

Where the Buyer has sought general damages, such as for non-delivery or for the delivery of defective goods, this will not prevent him from claiming special damages, if he has suffered further injury. The Buyer's right to claim compensation for special damages covers most losses that are not compensated for under general damages, provided that a number of conditions are met. These are specified in section 54 of the 1979 Act.[1197]

Special damages are damages that are substantiated as a result of specific circumstances surrounding and confusing the contracting process. This means that special damages occur under exceptional conditions. Indeed, in the case where the Seller is aware of special circumstances at the time of entering into a Contract, the Buyer has the right to compensation

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and the price at the time of delivering the goods. General damages in this example would equal £50,000, which is the difference between the contractual price and the market price (£550 - £500 = £50, then £50 x 1,000 = £50,000). If the Buyer has paid the price of the goods, then he will have the right to a refund of the money paid plus £50,000".

[1195] Hibbert (N 76), para 13; see also Rowan (N 883), 144.

[1196] The Sale of Goods Act 1979, s. 54.

[1197] Ibid, s. 54 provides that "Nothing in this Act affects the right of the buyer or the seller to recover interest or special damages in any case where by law interest or special damages may be recoverable, or to recover money paid where the consideration for the payment of it has failed".

for special damages, in addition to compensation for general damages.[1198] Concerning the right to special damages, the English courts have been guided by the second rule laid down in *Hadley v Baxendale*,[1199] whereby damages were awarded under special circumstances, as contemplated by the parties at the time of concluding the Contract. Consequently, special damages refer to special circumstances that are known or supposedly known to the Seller, when the Contract is concluded. Under these circumstances, the Buyer has the right to compensation.

In *Hadley v Baxendale,*[1200] the Court saw that if any special circumstances existed and were actually communicated to the Seller, then the Buyer could recover any damages that would ordinarily follow from a breach of the Contract under the special circumstances indicated therein.[1201] Consequently, in certain circumstances, the Buyer can obtain compensation for any wasted or reasonable expense, resulting from the Seller's breach of the Contract for the Sale of Goods.

There is a very broad range of foreseeable loss,[1202] which is recoverable, subject to a number of conditions being met.[1203] Therefore, not all special damages that flow from a breach of the Contract for the Sale of Goods are necessarily recoverable. In *Hadley v Baxendale,* where it was decided that damages, which are not naturally incurred in the course of implementing the Contract, are exceptional damages surrounded by special conditions. If reasonable and contemplated by the Seller at the time of concluding the Contract for the Sale of Goods, they

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[1198] L.A. Rutherford, I.A. Todd and M.G. Woodley, *Introduction to Law* (2nd edn, Sweet & Maxwell 1987), 156.

[1199] *Hadley* (N 942).

[1200] In *Hadley v Baxendale*, the crankshaft broke in the Buyer's mill. The Buyer engaged the services of the Seller to deliver another, declaring that it needed to be sent immediately, whereby the Seller promised to deliver it the next day. However, the Seller delivered the crankshaft seven days later, but was unaware that the Buyer's mill was unworkable without a new shaft. The Buyer claimed for damages to cover the resulting loss of profits and payment of wages, since the Seller's negligence caused the mill to be inoperable for an additional five days. The Seller argued that the damages sought were too remote. In this case, the Court submitted that the Seller was liable to pay only such damages that were not too remote in character. Moreover, it was stated that the Seller could not have anticipated at the time of entering into the Contract that the Buyer would suffer losses on account of goods not being supplied and that such losses were not direct or proximate.

[1201] "If the special circumstances under which the contract was actually made where 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" (see *Hadley* [N 942]).

[1202] Such as damages for loss of profit.

[1203] Hibbert (N 76), para 16.

may be recovered by the Buyer.[1204]

Loss of profit is in fact a common example of special damages. Therefore, where the Seller fails to deliver the goods, but knows that the Buyer will resell them, the latter can claim for loss of profit, given that the Seller was aware of the special circumstances at the time of entering into the Contract.[1205] Here, the Buyer has the right to compensation for special damages, namely a loss of profit in the above case.[1206] Nevertheless, there are a number of conditions that must be met in a claim for loss of profit, which must be decided on a case-by-case basis.

To summarise, the Buyer's right to claim for damages under sections 51[1207] and 53[1208] of the 1979 Act do not hamper his right to claim for special damages, wherever these arise.[1209] Section 54 of the 1979 Act provides that the Buyer can claim for special damages, if he has suffered further damage and provided that a number of conditions are met. This covers most losses that are not compensated for by general damages. The aim of any damage compensation, however, is to put the Buyer in the position that he would have been in, if the Contract for the Sale of Goods had been properly executed. Nevertheless, the Seller is not to be held responsible for the endless repercussions of a breach of the Contract; rather, the Buyer has a duty to mitigate the loss applicable to the claim for damages.

[1204] In *Hadley v Baxendale*, it was held as follows: "Where two parties have made a contract which one of them has broken, the damages which the other party ought to receive in respect of such breach of contract should be such as may fairly and reasonably be considered either arising naturally, i.e. according to the usual course of things, from such breach of contract itself, or 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" (see *Hadley* [N 942]).

[1205] "Where, at the time of making the contract, the seller knew, or ought reasonably to have contemplated, that the buyer intended to use the goods to produce a profit, and that a breach of the seller's undertaking as to description or quality of the goods would impede that profit-making, the buyer may recover damages for his loss of profits caused by the breach"; see *Benjamin's Sale of Goods* (N 25), para 17-065.

[1206] As an example of the above, a Buyer may purchase 1000 televisions, each worth £500, with the intention of reselling them for £550 each. In this example, when the Seller breaches the Contract by failing to deliver the goods, the Buyer may be entitled to compensation for special damages. Special damages in this example would equal £50,000, which is the amount of profit (550 - 500 = 50; 50 x 1,000 = 50,000) to be gained by the Buyer through reselling the goods.

[1207] See section 6.2.4.1.1.2. The Buyer's Right to Damages for Non-delivery, 236.

[1208] See section 6.2.4.1.1.1. The Buyer's Right to Damages for Defective Goods, 234.

[1209] See section 6.2.4.1.2. Special Damages, 237.

6.2.4.2. The Buyer's Right to Damages in Saudi Law:

In Saudi law, if a Seller breaches a Contract for the Sale of Goods, the Buyer will have the right to compensation for damages. Saudi law provides for direct damages, meaning general damages, and indirect damages, namely special damages. Damages are generally aimed at repairing any injury to the Buyer as a result of a breach of obligations. Nevertheless, not all damages will give the Buyer the right to compensation; there must be a causal connection between the breach and the damage, with the Buyer being unable to avoid this by exerting reasonable effort. Therefore, any breach that does not effectively contribute to damage will not be compensated under Saudi law.[1210]

In Saudi law, the contractual compensation clauses stated in a Contract for the Sale of Goods are considered valid.[1211] Nevertheless, in the same way as English law, a contractual compensation clause under Saudi law must not be financially threatening or deviate very far from the appropriate legal rules.[1212] In addition, compensation based on a contractual compensation clause shall not be due in the case where the Seller has proven that the Buyer has not suffered any damage.[1213]

Consequently, the Saudi courts require the existence of damage, in order for the notion of damage compensation to be accepted. Therefore, if the Buyer has not suffered any damage, the Seller is not obliged to pay compensation.[1214] Pursuant to this rule, in Case No. 447/S/7,[1215] the Buyer claimed compensation for damages pursuant to the Contract's compensation clause, because the Seller had breached the Contract. However, the Buyer could not prove the

[1210] Abdullah Al-Ghamdi, 'Damages under Saudi law and Shari'ah' (n.d.) <http://www.advocatedaily.com/damages-under-saudi-law-and-shariah.html> accessed 04 January 2018.
[1211] A contractual compensation clause is aimed at estimating an amount of compensation and stating it in the original Contract or in a later agreement. This will be before the damage is realised, in order to motivate the contracting parties to fulfil their obligations.
[1212] Bhala (N 729), 486-487.
[1213] Al-Ghamdi (N 1210).
[1214] Al-Sanhūrī (N 48), 763.
[1215] 447/S/7, 179.

existence of any damage. Under such circumstances, the Court decided to reject the Buyer's request, since he had failed to prove the existence of any damage, despite the contractual compensation clause.

In contrast, where a contractual compensation clause has been fulfilled, the Court must decide on the amount of compensation to award: whether more and less than what is stipulated in the Contract. If the value of the contractual compensation is equal to the value of the damage affecting the Buyer, the court shall decide on the contractual compensation clause with no amendment. Therefore, the court may amend the value of the contractual compensation, according to the damage incurred to the Buyer.

To support such a legal stance, Case No. 285/S/7[1216] may be cited. Here, the Buyer claimed compensation for damages under a contractual compensation clause, since the Seller was in breach of the Contract. In this case, the Court found that the Contract's compensation clause exceeded the damages incurred and consequently determined a fair value of compensation instead. Therefore, in Saudi law, when the contractual compensation exceeds the damage incurred, the courts must accurately estimate the extent of the damage affecting the Buyer, in order to determine a fair value of compensation. The Buyer's right to claim for direct and indirect damages will now be examined in the following sections.

6.2.4.2.1. Direct Damage:

Direct damage is damage arising as a natural consequence of a breach by the Seller of a Contract for the Sale of Goods. It includes the losses suffered by the Buyer and must be the direct result of a breach of the Contract by the Seller, in order to be compensable.[1217] Compensation is then calculated according to the extent of the direct damage incurred to the Buyer. As such, direct

[1216] Judicial Blogs, Contract of Sale, Vol. 2 (A. H. 1432 "2011"), 999.
[1217] Bhala (N 729), 486-487.

damage is realised by the Buyer and is the responsibility of the Seller, since it is the latter who has breached the Contract.

In Saudi law, damage shall be considered as a natural result, if the Buyer is unable to avoid it through reasonable effort.[1218] An example of this would be the Seller failing to deliver the goods to the Buyer, with the Buyer subsequently being entitled to damage. Consequently, direct damage is calculated according to the difference between the price of the goods in the Contract and the market price. [1219]

However, the Buyer's right to compensation for direct damages will not hamper his right to compensation for indirect damage, should this be relevant. Saudi law affords the Buyer the right to compensation for indirect damage, if he has suffered further damage in the form of losses that are not compensated for under direct damages. Consequently, the Buyer's right to compensation for indirect damage will be explained below.

6.2.4.2.2. Indirect Damage:

Similar to English law, the Buyer has the right to compensation for indirect damage under Saudi law. This is in addition to the Buyer's right to claim for direct damages. The scope of compensation for indirect damage is designed to return the Buyer to the position that he was in prior to the alleged damage and is meant to cover most of the losses that are not covered by direct damages. Nevertheless, the Buyer cannot claim compensation for any damage that he could have avoided by applying reasonable measures.[1220]

Compensation for indirect damage will include any losses suffered by the Buyer. These

[1218] Mansour Alhaidary, *Measuring Compensation from Credit Reporting Damage: A Comparison of Islamic, Saudi, and American Law in Light of Credit Information Reporting Acts* (Thesis for the Degree of Doctor of Law, University of Kansas School of Law 2012), 179.
[1219] Angelo L. Rosa, 'Harmonising Shari'a Compliant Contractual Remedies with California Law' (2005) 6 UC Davis School of Law Business Law Journal. 5.
[1220] Al-Sanhūrī (N 48), 603-605.

indirect damages must also be the result of a breach of the Contract of Sale by the Seller, in order to be compensable.[1221] This will be the extent of the indirect damage incurred by the Buyer, as a result of the Seller's breach of his obligations. Nevertheless, not all indirect damage will entitle the Buyer to compensation; there must be a causal connection between the breach and the damage, as outlined earlier. Moreover, the Buyer must be unable to avoid this damage through reasonable effort.[1222]

Nevertheless, unlike the English courts, the nature and scope of compensation for indirect damages by the Buyer are more limited before the Saudi courts. This is because Saudi law does not compensate for the loss of any profit when the Buyer wishes to resell the goods. Case No. 530/S/7[1223] supports this legal stance, with the Buyer claiming for loss of profit.[1224] However, the Court rejected this claim and decided Case Nos. 1435/1/219[1225] and 34/1/319[1226] in a similar way, namely by rejected the claim.[1227] Furthermore, in some cases, the Saudi courts have decided against awarding compensation for lawyer's fees, as in Case No. 564/S/7.[1228] Consequently, the scope of compensation for damages is more limited in Saudi law than it is in English law.

However, Islamic Commercial Law permits the Buyer who has suffered injury to claim compensation for any damage, as a result of the Seller refusing to fulfil his obligations under

[1221] Bhala (N 729), 486-487.

[1222] The Buyer must bear the burden of proof as regards the type and extent of the damage. However, it should be noted that when the Seller breaches the Contract, he may still have the right to cure the goods; see Case No. 227/T/3, 178; section 5.3.4.2. The Seller's Right to Cure Defective Performance in Saudi Law, 176.

[1223] Judicial Blogs, Contract of Sale, Vol. 2 (A. H. 1432 "2011"), 1021.

[1224] 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. 268-70.

[1225] Judicial Blogs, Contract of Sale, Vol. 2 (A. H. 1435 "2014"), 207.

[1226] In those cases, the court decided that reselling the goods by the Buyer is potential; as indirect damage only merits compensation once it has happened. By adopting this approach, potential damage may not be compensated for unless it is realised. See Judicial Blogs, Contract of Sale, Vol. 2 (A. H. 1435 "2014"), 1134. See also, cases Nos 893/S/6 (A. H. 1430 "2009") and 1654/1/Q (A. H. 1428 "2007"), 617.

[1227] In this case, the Court decided that the Buyer could potentially resell the goods, as indirect damage only merits compensation once it has happened. By adopting this approach, potential damage may not be compensated for unless it is realised. The same was decided in Case No. 1435/1/219 243; Case No. 34/1/319 243.

[1228] 564/S/7, 191. Nevertheless, there are instances where judges have decided otherwise, such as in Case No. 228/T/3, 191, where the Court decided to compensate for lawyers' fees. The same was decided in Case No. 392/S/3, (N 216).

the Contract for the Sale of Goods. This rule is based on a declaration by the Prophet Muhammad (peace be upon him) that "damage must be removed". By adopting this approach, when the Buyer suffers damage due to the Seller's misconduct and breach of the Contract, the Buyer may have the right to compensation for any damage incurred, such as loss of profit through the Seller's failure to deliver the goods.

To summarise, the Buyer's right to compensation for damages under English and Saudi law consists of the right to compensation for general and special damages: "direct or indirect damages." The aim of compensation for damages is to put the Buyer in the same position that he would have been in, if the Contract for the Sale of Goods had been performed properly. Therefore, in both the above-mentioned regimes, a claim for damages functions as compensation for any loss caused to the Buyer by a breach of the Contract. Nevertheless, in neither regime will the Seller be obliged to bear the full weight of all the potential consequences of a breach. It is rather the duty of the Buyer to mitigate any loss applicable to claims for damages.

Nevertheless, it should be noted that the nature and scope of compensation for special damages in Saudi law is more limited than it is in English law, such as where the Buyer has the right to claim for a loss of profit in the English courts. However, a Saudi court would not grant the Buyer this right,[1229] even though Islamic Commercial Law has the capacity to include all damages, albeit decided on a case-by-case basis. In light of the above, the value of compensation for damages under English law is likely to be higher than under Saudi law.

6.3. Conclusion:

Where a Seller breaches the Contract for the Sale of Goods, a Buyer who is not a consumer can

[1229] See Case No. 530/S/7, 243.

avail himself of numerous remedies in English and Saudi law. Even though the two legal systems share certain similarities concerning the Buyer's rights, each varies considerably in other areas, such as in the Buyer's right to specific performance, which is an alternative to claiming for damages. This is one of the main differences between English and Saudi law.[1230] Furthermore, in certain cases, English and Saudi law provide the same remedy, but with different effects; for example, in the effect of the Buyer's right to reject defective goods.[1231]

As mentioned above, specific performance being awarded as the primary remedy for the Buyer, where the Seller breaches a Contract for the Sale of Goods, represents a major difference between English and Saudi law.[1232] In Saudi law, it is seen as a basic remedy available to the Buyer,[1233] whereas English law tends not to adopt this approach and has traditionally been considered hostile to specific performance. However, under section 52 of the 1979 Act, if the courts see fit, they may impose upon the Seller an obligation to undertake the specific performance of a Contract. If the court thinks otherwise, then the Buyer will have the right to claim for damages. Under these circumstances, the order for specific performance is at the discretion of the court, according to whether or not it considers a claim for damages to be more appropriate.

Thus, in the English courts, claims for damages are usually considered to be the most appropriate option for the Buyer, if he is able to purchase the same goods elsewhere and needs to do so as soon as possible. For this reason, the Buyer is unlikely to wait for the Seller to deliver the goods and will attempt to terminate the Contract and claim for damages instead.[1234] The English courts have exercised this principle for years,[1235] even though section 52 of the

[1230] See section 6.2.2. The Buyer's Right to Specific Performance, 214.
[1231] See section 6.2.1.3. The Effect of Rejecting Defective Delivery, 212.
[1232] With respect to the Seller's right to cure defective performance and the Buyer's right to specific performance, these have the same root but take different forms in English and Saudi law, where different approaches are adopted (see section 5.3.4. The Seller's Right to Cure Defective Performance, 171; section 6.2.2. The Buyer's Right to Specific Performance, 214).
[1233] See section 6.2.2.2. The Buyer's Right to Specific Performance in Saudi Law, 221.
[1234] See section 6.2.2.1. The Buyer's Right to Specific Performance in English Law, 215.
[1235] See *Nutbrown* (N 1093); see also *Cohen* (N 1095); *Whiteley* (N 1096).

1979 Act does not explicitly state the condition that the Buyer must be unable to purchase the same goods elsewhere, in order to be entitled to claim for specific performance. Consequently, specific performance is not the Buyer's remedy in every case, but is at the equitable discretion of the court.

Another argument in favour of English law's position on an award of damages is that specific performance usually incurs extra costs, which may be avoided through the simpler procedure of claiming for damages, especially as an order for specific performance also bears the risk that further court intervention might be necessary. Therefore, the cost of supervising performance is an important factor in the rare occasions where specific performance is granted in the English courts, predominantly guided by standards of economic efficiency.

Nevertheless, the question arises here, where there is an express stipulation in the Contract for the Sale of Goods that excludes the discretion of the court to award specific performance, of whether the relief is enforceable. To answer this question, the leading case of *Warner Bros Pictures Inc v Nelson*[1236] may be examined, where the Court found that the discretion of the court cannot be restricted. Here, as mentioned earlier, Lord Stocker LJ pointed out that if the Court's power to exercise discretion was limited purely to the terms of a Contract, the proceedings would merely serve to 'rubber stamp' that Contract, but in his opinion, "this could not be and is not the situation".[1237]

Therefore, specific performance is rarely awarded as a remedy in English law, and this is consistent with Common Law. As a result, English law is more pragmatic; avoiding specific performance on the grounds that it often implies further costs, which can be avoided by simply claiming for damages. Furthermore, the awarding of specific performance can conflict with the

[1236] *Warner* [N 1112].; see also, Rowan [N 883], 212).
[1237] Ibid, 451

Buyer's duty to mitigate damages. This means that if the Buyer insists on obtaining the goods, it could make more sense for him to mitigate his losses by seeking an alternative. However, in a claim for specific performance, the Buyer will not look for an alternative. Consequently, the English courts favour practical remedies and generally regard the award of damages as the most appropriate option for the Buyer, since it will enable him to obtain such goods at the earliest possible opportunity, instead of having to wait for the Seller to deliver them.

In contrast, specific performance is a primary remedy for the Buyer in Saudi law, rather than compensation for damages. Saudi law has seen that if the essence of a Contract is performance, the purpose of entering into that Contract will be its performance, and so a claim for damages, due to a failure to perform the Contract, will not be the same as specific performance. Furthermore, specific performance reinforces transactional certainty, because such an award will give the Buyer precisely what he has contracted for, whereas a claim for damages will only provide money. Consequently, the Saudi courts usually consider specific performance to be the most appropriate option for the Buyer, when seeking a remedy under the Contract of Sale. Underlying this right is the 'principle of the Contract's obliging force', meaning that the Contract must be performed, and its obligations satisfied; thereby establishing the fulfilment of specific and contractually agreed obligations.[1238] However, there is no consideration given before the Saudi courts to whether the Buyer can easily obtain the goods elsewhere. Neither does the burden fall upon the Buyer to convince the court that compensation for damages will not be adequate for remedying the breach. Instead, it is for the Seller to convince the court that specific performance will be to his detriment.

In brief, both legal regimes entitle the Buyer to apply for specific performance, although the courts must investigate the situation arising from each case, in order to determine whether

[1238] See section 6.2.2.2. The Buyer's Right to Specific Performance in Saudi Law, 221; section 2.3.4.3. The Principle of the Contract's Obliging Force: The 'Binding Force of the Contract', 43.

or not the Buyer's request is reasonable and should be granted. Consequently, under English law, specific performance should not be granted, unless the circumstances so warrant; whereas Saudi law provides the reverse principle, with specific performance being granted in all cases, unless the circumstances suggest otherwise. Thus, in English law, the Buyer does not have extensive rights to specific performance, although there are strong arguments for dealing with damages in this regime, as mentioned above.

Regarding the Buyer's right to reject defective goods, both the above regimes stipulate that the breach should not be slight, subject to a number of conditions.[1239] However, the effect of the Buyer's right to reject the goods differs between the two regimes. In English law, when the Buyer has the right to reject the goods, he also has the right to terminate the Contract, constituting a single remedy,[1240] with no right of the Seller to cure defective performance.[1241] As a result, the remedy of rejecting the goods is very powerful in English law, meaning that it usually terminates a Contract for the Sale of Goods. Therefore, if the Buyer does not have the right to reject the goods, the value of the Seller's compensation for damages is likely to be higher.

Conversely, the Buyer's right to reject defective goods is distinct from his right to terminate the Contract under Saudi law,[1242] because Saudi law gives the Seller the right to cure defective performance,[1243] subject to a number of conditions.[1244] Consequently, in cases where a Buyer has the right to reject the goods, he may not have the right to terminate the Contract,

[1239] See section 6.2.1. The Buyer's Right to Reject the Goods, 200.
[1240] See section 6.2.1.3.1. The Effect of Rejecting the Goods in English Law, 212.
[1241] Numerous scholars have been of the view that the Seller does not have the right to cure defective performance, while others have disagreed on this point and held that the Seller has the right to cure defective performance. However, if this remedy exists, it must be limited to the delivery period; citing the English courts that have recognised the limited scope of this right to cure defective performance, providing that the time of delivery has not ended (see section 5.3.4.1. The Seller's Right to Cure Defective Performance in English Law, 171).
[1242] As according to Case No. 428/S/3, 178.
[1243] Saudi law gives the Seller the right to cure defective performance, because it prioritises adherence to the performance and safeguarding of the Contract. This necessitates giving the Seller the right to cure defective performance, where the time of performance has not expired, and without causing harm to the Buyer.
[1244] See section 5.3.4.2. The Seller's Right to Cure Defective Performance in Saudi Law, 176.

until the Seller first loses his right to cure the goods. Therefore, English law does in fact adopt a more comprehensive view of the Buyer's right to terminate the Contract, compared to Saudi law.[1245]

A further difference in approach between English and Saudi law may be seen where the Seller delivers a quantity of goods that exceeds the quantity stated in the Contract, with the Buyer accepting the entire delivery. In this case, the latter must then pay for the extra quantity of goods. The question here concerns the price to be paid by the Buyer, whereby English and Saudi law adopt a different stance. For instance, in English law, the Buyer must pay for the extra quantity of goods at the contracted rate;[1246] while in Saudi law, the principle of 'no harm or harassment' (*al Darar wa-la Dirar*) has been examined by Islamic jurisprudence, meaning that there should be neither harm nor the reciprocation of harm from either party.[1247] By adopting this approach, the Seller and Buyer must be equally placed in relation to their right to the price of the goods; requiring that the market price of the excess goods be paid, regardless of whether there has been an increase or decrease in that price.[1248]

Consequently, where there are substantial fluctuations in market price, especially for a market-sensitive commodity such as oil, a price increase will mean that the Buyer still has the right to accept the contracted goods and reject the rest. If he accepts the entire delivery of the goods, the Seller will have the right to the market price. In contrast, where the price of the goods has dropped, the Buyer may be interested in accepting the entire delivery, thus paying for the excess goods at the market price. Moreover, the Seller may be interested in the Buyer accepting the whole delivery, rather than rejecting the goods, even where the price of the goods

[1245] See section 6.2.1.3. The Effect of Rejecting Defective Delivery, 212; see also section 6.2.3.1. The Buyer's Right to Terminate the Contract in English Law, 226.
[1246] See section 30 (3) of the Sale of Goods Act 1979; section 6.2.1.2.1. The Buyer's Right to Reject the Goods for Breach of Terms of Quantity in English Law, 207.
[1247] See section 2.3.4.4. The Principle of No Harm or Harassment (*al Darar wa-la Dirar*), 45.
[1248] See section 6.2.1.2.2. The Buyer's Rights in a Breach of the Quantity of the Goods in Saudi Law, 210-211.

has dropped.

Regarding the Buyer's right to compensation for damages following a breach of the Contract for the Sale of Goods by the Seller, both regimes provide remedies for the Buyer. Nevertheless, it should be noted that the nature and scope of compensation for special damages in Saudi law is more limited than in English law. This especially evident where the Buyer has the right to claim compensation before the English courts, in order to cover a loss of profit. The Saudi courts do not grant the Buyer this right,[1249] despite Islamic law being equipped to include all damages. Instead, compensation for loss of profit is decided on a case-by-case basis. In light of the above, the scope of compensation for damages is more limited in Saudi law than in English law.[1250] Consequently, the value of compensation for damages under English law is likely to be higher.

[1249] See Case No. 530/S/7, 243.

[1250] Such as in Case No. 564/S/7,191, where the Saudi courts did not award compensation for the lawyer's fees. Nevertheless, there are instances of judges deciding otherwise, such as in Case No. 228/T/3, 191, where compensation for lawyers' fees was awarded by the Court. The same was decided in Case No. 392/S/3 (N 216).

Chapter 7: Conclusion:

7.1. Introduction:

The aim of this research is to conduct a comparative analysis between the English Sale of Goods Act 1979 and the Contract of the Sale of Goods in Saudi law, with regard to the provision of remedies for the Seller and Buyer, where a non-consumer Contract has been breached. The idea is basically to explore the problems arising in a breach of the commercial Contract for the Sale of Goods and ascertain how the two legal systems have been resolved practically. English and Saudi law differ in terms of their legal concepts, rules and procedures, but the solutions remain the same in their objective; namely, to return the innocent party to the position he would have been in, if the Contract had not been breached. Consequently, this study does not claim that the remedies available in one of these legal territories are superior to those of the other, or that they should be followed by the other. Such a perspective would be unrealistic and futile. Instead, this study has focused on the underlying reasons for the differences between the two regimes and ascertained whether there are any differences between them that might affect the *de facto* results for the Seller and Buyer.

There are many areas where English and Saudi law diverge. These differences mainly arise due to variations in the inception of these laws; their foundations and background; their origins, and the methodology adopted. First and foremost, the difference between them lies in their openness to secularity, given that the Sale of Goods Act, 1979 is much more secular in nature, due to its basic premise of segregating the Church and State.[1251] In contrast, the Contract of Sale in Saudi Law is based on Islamic Commercial Law, with a separate rationale for secularism.[1252] Consequently, these two prominent regimes differ in the level of their

[1251] See section 2.2.1. Sale of Goods Act 1979. 18.
[1252] This is the basic concept underpinning Islamic legal philosophy; see section 2.3.4.1. Islamic Commercial Law and its effect on the Contract of Sale, 40; see also Art 7 of the Basic Law of Governance in Saudi Arabia.

flexibility. Saudi law, being religious, offers less flexibility to its adherents, even where these are rulers or governments, in terms of being able to override what is stipulated in the Qur'an and *Sunnah*.[1253] An example of this is the prohibition of usury in the Contract for the Sale of Goods, which becomes invalid if it enters into *Riba.* Once the Contract becomes invalid, no remedies will be available to the contracting parties in the event of a breach of that Contract.[1254] However, this prohibition does not exist in English law, meaning that remedies are provided for the innocent party, where a Contract of Sale of Goods is breached.[1255]

Apart from philosophical differences, however, the two legal systems differ with regard to the goods that can form the subject matter of a Contract, because English and Saudi law have a different approach to the classification of goods, namely whether they already exist or are anticipated to exist as future goods. In English law, these goods can be existing or future. Nevertheless, under section 5(3) of the 1979 Act, if the subject matter of a Contract constitutes future goods, then the Contract will be considered as an agreement to sell, rather than as a Contract of Sale. In contrast, under Saudi law, the goods must exist at the time of concluding the Contract,[1256] but if they do not and they could potentially be received in future, the Contract will be called *Salam* or *Istisna,* meaning 'manufacture' in Saudi law. In terms of ownership of the goods, in both regimes, the Seller must own the goods that form the subject matter of a Contract of Sale. Nevertheless, according to the 1979 Act, goods that are already in existence, but not yet owned by the Seller, constitute future goods and these may be the subject matter of an agreement to sell, but not of a Contract of Sale. In consequence, it is clear that English and Saudi law stipulate the ownership of goods as a precondition of a valid Contract of Sale.

[1253] This is the basic concept underpinning Islamic legal philosophy; see section 2.3.4.1. Islamic Commercial Law and its effect on the Contract of Sale, 40; see also Art 7 of the Basic Law of Governance in Saudi Arabia.
[1254] Such as when the subject matter of the Contract of sale is gold and the time of delivery and payment are not the concurrent condition; then the Contract will be invalid, because of entering into usury; see section 4.3.4.2.2.2. Time of Payment in Saudi law, 116; see also Case Nos. 361/S/3, 275/S/3 and 695/S/3, 117.
[1255] See section 2.2.1. Sale of Goods Act 1979. 18.
[1256] See section 3.2.3.4. The Classification of Goods, 63; section 3.2.3. The Goods Constituting the Subject Matter of a Contract of Sale. 54.

However, in the case of future goods, the two regimes differ in their approach.[1257]

Regarding the obligations imposed by English and Saudi law, Saudi law places more legal obligations on the Seller and Buyer, such as the requirement to perform the Contract of Sale in good faith.[1258] However, good faith is highly controversial in the context of English law, whereby the 1979 Act has not recognised an implicit duty binding the Seller and Buyer to perform the Contract in good faith. Therefore, if the parties to a Contract of Sale wish to impose good faith on contractual performance, they must do so expressly, in specific areas of the Contract and according to its context. Nevertheless, this should not be understood as English law recognising bad faith and neither should it be assumed from this that the contracting parties are encouraged to deal in bad faith, but it is rather due to the fact that bad faith is dealt with thoroughly using other devices, like misrepresentation.[1259]

Aside from what is mentioned above, there are a number of other visible differences between the two regimes, concerning remedies for a breach of the Contract for the Sale of Goods. Thus, the main purpose of this thesis is to analyse the remedies available to the Seller and Buyer under this Contract in the regimes under study, if a party violates any contractual obligations. Consequently, it may be concluded here that it is especially important to consider the underlying reasons for any differences between the two legal systems, which might affect the *de facto* results for the Seller and Buyer in this regard.

The key difference between the two legal systems is that the Seller has the right to cure defective performance under Saudi law, which is not provided for in English law. In English law, the Buyer's right to reject the goods is very powerful, thereby terminating the Contract, with the Seller having no recourse to a cure. In contrast, the Buyer's right to reject defective

[1257] See section 3.2.3.3. The Seller's Ownership of the Goods. 61.
[1258] See section 4.4.3. The Position of Saudi Law on Good Faith in the Performance of the Contract for the Sale of Goods. 131.
[1259] See section 4.4.2. The Position of English Law on Good Faith in the Performance of the Contract for the Sale of Goods. 124.

goods is distinct from his right to terminate the Contract under Saudi law, and the Seller has the right to cure the goods.[1260] Consequently, English law confers a relatively broad right to terminate the Contract, while Saudi law is mainly concerned with preserving it.

Aside from the various approaches to the Seller's right to cure defective performance, English and Saudi law also adopt a different approach to the Buyer's right to demand contractual performance. In English law, specific performance is rarely awarded as a remedy and this is consistent with Common Law.[1261] In contrast, Saudi law provides clear principles for the Buyer's right to specific performance and for ensuring that the Seller fulfils his contractual obligations.

The next question that arises concerns the reasons why English law confers a relatively broad right to terminate the Contract of Sale of Goods, whereas Saudi law does everything to preserve it. Therefore, the underlying reasons for differences between the two legal systems is of particular importance here, as well as looking at how the *de facto* results for the Seller and Buyer are potentially affected in this area.

7.2. The Seller's Right to Cure Defective Performance:

The Seller's right to cure defective performance is a point of difference between English and Saudi law. In English law, the Seller does not have the automatic right to cure defective performance,[1262] as it is deemed to be unsuitable for commercial Contracts, which usually require swift termination rights for the parties involved. In practice, the Buyer is likely to want to acquire the goods as soon as possible and will therefore be unwilling to wait for the Seller to exercise his right to offer a cure. Furthermore, English law has observed that this is seldom an objective standard for determining whether a suggested cure will be acceptable to a Buyer.

[1260] See section 6.2.1.3. The Effect of Rejecting Defective Delivery. 212
[1261] Bridge (N 953), 34.
[1262] This approach is consistent with Common Law, where there is no such presumption.

Bearing this in mind, the Seller may not be successful in offering a cure, posing the risk of further court intervention. Therefore, the cost of supervising performance is an important factor in refusing to grant the right to a cure in English law, whereby the Seller's right to a cure may lead to litigation rather than a remedy.[1263] Therefore, English law adopts a more pragmatic approach.

Another argument in favour of English law's position on awarding the Seller the right to cure defective performance, namely the frequent refusal of such an award, is based on the fact that it could deprive the Buyer of his right to avoid the Contract. As a result, in English law, where the Buyer has the right to reject the goods, he may also terminate the Contract, without the court being involved in the termination. In other words, in English law, where the Buyer has the right to reject the goods, the Contract is subsequently terminated. This means that the rejection of the goods and termination of the Contract constitute a single remedy for the Buyer, with the Seller having no right to cure defective performance. Consequently, English law confers on the Buyer a relatively broad right to terminate the Contract, whereby he can proceed to terminate the Contract of Sale of Goods without the court, simply by rejecting the defective goods, with no need to involve the court in its termination.

In accepting this approach, English law does not give the Seller any second chances, if the delivery is defective on the first occasion.[1264] As a result, in English law, the rejection of the goods and termination of the Contract constitute a single remedy for the Buyer and the court is not involved in this termination process. Consequently, the remedy of rejecting the goods under English law is very powerful, whereby it is likely to terminate the Contract,

[1263] Kronman, (N 900), 373, see also Rowan (N 883), 29.

[1264] Numerous scholars have been of the view that the Seller does not have the right to cure defective performance, while others have disagreed on this point and held that the Seller has the right to cure defective performance. However, if this remedy exists, it must be limited to the delivery period; citing the English courts that have recognised the limited scope of this right to cure defective performance, providing that the time of delivery has not ended (see section 5.3.4.1. The Seller's Right to Cure Defective Performance in English Law). 171.

without giving the Seller the right to cure the defect in the goods. However, there is nothing to stop the Seller or Buyer from agreeing to cure the defect in the goods, according to section 35(6)(a) of the 1979 Act.[1265] Under this section, both the Seller and Buyer are encouraged to attempt to repair the goods, instead of deciding to terminate the Contract. However, this interpretation will depend entirely on whether the parties have agreed as such from the beginning.

Nevertheless, with the exception of all of the above, in Saudi law, the Seller has the right to cure defective performance, according to a number of conditions being met.[1266] Saudi law prioritises adherence to and preservation of the Contract, which necessitates giving the Seller the right to cure defective performance.[1267] Consequently, under this regimes, the rejection of the goods and termination of the Contract constitute two different remedies for the Buyer.[1268] Thus, the Buyer may have the right to reject the goods, but not to terminate the Contract, until the Seller loses his right to cure defective performance. As a result, under Saudi law, the court is involved in the process of terminating the Contract.

Consequently, Saudi law adopts an approach that is similar to that of English law, in that the Seller has the right to cure defective performance by replacing or repairing the goods in the event of a defective delivery. However, a number of conditions must first be met, which are the time of performance still being valid and no harm having been caused to the Buyer. Indeed, the Seller cannot deprive the Buyer of his right to avoid the Contract by curing the defect, if

[1265] The Sale of Goods Act 1979, S. 35(6)(a) provides that *"*The buyer is not by virtue of this section deemed to have accepted the goods merely because — (a) he asks for, or agrees to, their repair by or under an arrangement with the seller.*"*

[1266] Namely the time of performance not having expired and the absence of any harm being caused to the Buyer. This means that the Seller's right to cure defective performance must be within the time of delivery stated in the Contract, because the time of delivery is essential to the Contract; see also section 4.3.3.1.2.2. Time of Delivery in Saudi law. 92.

[1267] Such as case No. 479/S/3, 178; Case No. 428/S/3, 178; Case No. 227/T/3, 178.

[1268] The Seller's right to cure defective performance and the effect of rejecting the goods have the same root, but the two regimes mentioned above have adopted a different approach to this matter. For instance, in Saudi law, when the Buyer has the right to reject the goods, the Seller may have the right to cure defective performance (see section 5.3.4.2. The Seller's Right to Cure Defective Performance in Saudi law, 176; section 6.2.1.3.1. The Effect of Rejecting the Goods in English Law. 212.) 183. See also Case Nos. 428/S/3, 178 and 479/S/3, 178, where the Court decided that the Seller should cure defective performance.

the time of performing the Contract has expired, or if the cure will cause undue damage to the Buyer.

The question arises here of why English law does not give the Seller the right to cure defective performance, and why Saudi law does. In fact, the approach in English law is to grant swift termination rights for the parties involved. Therefore, English law adopts a more pragmatic approach, as terminating a Contract of Sale of Goods can be a more practical remedy, given that the parties to commercial Contracts usually require swift termination rights, as opposed to being left unsure of whether the Seller will perform his obligations by delivering the contractual goods. In contrast, Saudi law priorities the performance and safeguarding of the Contract; it necessitates granting the Seller the right to cure defective performance, rather than terminating the Contract for the Sale of Goods.

It is evident from the above that the two legal systems have their own individual character, regarding the Seller's right to cure defective performance. Here, English law confers a relatively broad right to terminate the Contract, as mentioned above, and Saudi law aims to preserve it. Nevertheless, the parties to a Contract may have their own interest in preserving the Contract, since its termination could lead them to suffer loss. Therefore, in English law, there is nothing to stop the Seller and Buyer from agreeing to cure defective goods, according to section 35(6)(a) of the 1979 Act.

7.3. The Buyer's Right to Specific Performance:

The Buyer's right to specific performance as an alternative to an award of damages is represented as one of the main differences between English and Saudi law. English law has traditionally been considered hostile to specific performance, whereas Saudi law has been seen as a basic remedy available to the Buyer.

In English law, specific performance is a rare remedy. Therefore, the English courts have not specifically enforced the remedy and the general rule has rather been limited to awarding damages.[1269] The reasons why this approach has been adopted in English law, rather than granting the Buyer the right to specific performance, is because the English courts have deemed compensation for damages to be an adequate option for the Buyer, because he can then acquire the required goods as soon as possible. The acquisition of the goods at the earliest possible opportunity usually means purchasing the same goods elsewhere. For this reason, the Buyer is unlikely to want to wait for the Seller to deliver the goods and will consequently seek to terminate the Contract and purchase the goods elsewhere, claiming for damages instead, as in *Cohen v Roche*.[1270] Consequently, English law seeks to ensure that the Buyer gains the economic benefit for which he has contracted. As long as he receives this advantage, it does not matter whether the Seller performs the Contract or pays damages.[1271]

Another argument in favour of English law's position on the awarding of specific performance is that such an award could conflict with the Buyer's duty to mitigate damages.[1272] In a case where the Seller breaches a Contract by failing to deliver the goods, the Buyer may need to purchase the goods elsewhere to mitigate his loss,[1273] if the goods are available on the market and a failure to do so would mean damages becoming irrecoverable.[1274] As a consequence, if the Buyer insists on obtaining the goods, it may make sense for him to mitigate his losses by looking for an alternative. However, in the case where the Buyer claims for

[1269] However, under section 52 of the 1979 Act and section 3 of the Torts Act 1977, if the court sees specific performance as fitting, it may impose upon the Seller an obligation to undertake the specific performance of a Contract. If the court thinks otherwise, then the Buyer has the right to claim for damages. Under these circumstances, the order for specific performance is at the discretion of the court, according to whether it considers it more appropriate than a claim for damages (see section 6.2.2.1. The Buyer's Right to Specific Performance in English Law), 215.

[1270] *Cohen* (N 1095).

[1271] See Rowan (N 883), 53.

[1272] The Buyer's right to damages is subject to the duty of mitigation of loss. That is, the Buyer may need to purchase the goods elsewhere to mitigate his loss, where they are available on the market (see section 6.2.4.1.1.2. The Buyer's Right to Damages for Non-delivery, 236).

[1273] The duty to mitigate will usually blunt a demand for specific performance or render it pointless. See Herman (N 1084). 20.

[1274] See section 6.2.4.1.1.2. The Buyer's Right to Damages for Non-delivery. 236.

specific performance, he will not look for an alternative.[1275] Furthermore, another argument is that specific performance usually carries with it extra cost, which may be avoided through the simpler procedure of awarding damages,[1276] given that an order for specific performance can also present the need for further court intervention. Therefore, the cost of supervising performance is an important factor in the rare cases where specific performance is granted in the English courts, prevalently guided by standards of economic efficiency. As a result, the English courts have tended to see damages as the most appropriate option for the Buyer and it is this approach that takes as its guideline the achievement of the most economically beneficial result, such as when the cost of performance is likely to exceed the value of the benefit to the Buyer.

Nevertheless, the question arises here of whether the relief is enforceable, where there is an express stipulation in the Contract for the Sale of Goods that excludes the discretion of the court to award specific performance. To answer this question, the leading case of *Warner Bros Pictures Inc v Nelson*[1277] may be examined, where the Court found that the discretion of the court could not be restricted.

In sum, it is clear that under English law, the Buyer does not have extensive rights to specific performance. Rather, in the English courts, specific performance is only granted where damage compensation would be inadequate, such as where the Buyer cannot purchase the same goods elsewhere, as in the case of *Nutbrown v Thornton*.[1278] Consequently, as indicated earlier, specific performance is not the Buyer's remedy in every case, but is at the equitable discretion

[1275] Beale, Chitty on Contracts (N 84), para 27-005.
[1276] Kronman (N 900), 373.
[1277] *Warner [N 1112]*.; see also, Rowan [N 883], 212).
h court to order the specific enforcement of a Contract, it will consider a number of factors, such as the undue hardship likely to be inflicted on the Seller, impossibility, unfairness and frustration. Moreover, English law adopts the general approach of classifying 'frustration' according to Lord Ratcliffe's statement that "Frustration occurs whenever the law recognizes that without default of either party a contractual obligation has become incapable of being performed because the circumstances in which performance is called for would render it a thing radically different from that which was undertaken by the contract" (see *Davis* [N 170]; Nwafor [N 170], 18-19).

of the court. In fact, the English courts have tended to view the award of damages as the most appropriate option for the Buyer, as a more pragmatic remedy, allowing the Buyer to obtain the necessary goods as soon as possible, instead of having to wait for the Seller to deliver them. In such cases, it follows that the Buyer is likely to wish to terminate the Contract and claim for damages. As a consequence, in English law, the Buyer does not have extensive rights to specific performance, but English law has other robust means of dealing with damages, as mentioned above.

Unlike English law, Saudi law provides wider rights to specific performance for the Buyer and for ensuring that the Seller fulfils his obligations under the Contract. This right is an equitable coercive remedy, through which the Saudi courts require the Seller to fulfil his obligations according to the terms of the Contract, wherever possible.[1279] Consequently, in Saudi law, specific performance is a primary remedy for the Buyer, as opposed to compensation for damages. This is because it is seen in Saudi law that the essence of a contract is performance; a contract is entered into for the purpose of performing it. Therefore, a claim for damages in the event of a failure to perform a contract differs from a claim for specific performance. Furthermore, specific performance reinforces transactional certainty, since the award of specific performance will give the Buyer what he has actually contracted for, whereas a claim for damages will merely give him the value of the goods in money. Based on this, the Saudi courts state that specific performance is the most appropriate option for the Buyer, when seeking a remedy under the Contract of Sale. Underlying this right is the 'principle of the contract's obliging force',[1280] which means that the contract must be performed and the obligations under it fulfilled, with a view to establishing the performance of the specific obligations that are agreed in the contract.

[1279] See section 6.2.2.2. The Buyer's Right to Specific Performance in Saudi law. 221.
[1280] See section 2.3.4.3. The Principle of the Contract's Obliging Force "binding force of the Contract." 43.

However, before compelling the Seller to perform the Contract correctly, the Saudi courts must consider several factors, such as the principle of no harm or harassment, impossibility, or frustration.[1281] Unlike the English courts, the Saudi courts do not impose a burden on the Buyer to convince the court that an award of compensation for damages is insufficient for remedying a breach; it is rather the Seller who must convince the court that specific performance will cause him harm.

In light of the above, under Saudi law, it is specific performance and not compensation for damages that constitutes a primary remedy for the Buyer. This is regardless of whether or not the Buyer is effortlessly capable of obtaining the goods from another source. Therefore, under Saudi law, the Seller will remedy any breach by fulfilling his contractual obligations[1282] and this will imply purchasing the goods elsewhere, as in Case No. 49/S/3[1283] and Case No. 1417/T/27.[1284] Meanwhile, in English law, the Buyer may purchase the goods elsewhere to mitigate his damages. However, this might not always be an appropriate remedy, if the Buyer cannot obtain the goods promptly. as in the case of *Societé des Industries Métallurgiques S.A. v Bronx Engineering Co Ltd.*[1285] This does not happen under Saudi law, as the courts enforce the Contract, without the need to source the goods elsewhere. Nevertheless, it should be borne in mind that English law has strong arguments in favour of the award of damages.

In sum, it is evident from the above that the two legal systems have their own individual character, whereby the English courts grant or reject claims for specific performance of the Contract after considering several questions: 'Are the goods unique?' and 'Would damages suffice to repair the harm?' In contrast, once the Buyer claims for specific performance before

[1281] See section 2.3.4.4. The Principle of No Harm or Harassment (*al Darar wa-la Dirar*), 45. Moreover, an English court awarding specific enforcement of the Contract will consider several factors, such as the undue hardship that may be inflicted on the Seller; an impossibility; unfairness, or frustration; see *Davis* (N 170).
[1282] See Case No. 49/S/3, 223.
[1283] Judicial Blogs, Contract of Sale, Vol. 3 (A. H. 1431 "2010"), 1321.
[1284] Judicial Blogs, Contract of Sale, Vol. 2 "1996" 236). 241
[1285] *Societé* (N 1100).

a Saudi tribunal, the court will be more or less bound to acquiesce to the Buyer's choice based on rather narrow and objectively verifiable inquiries, such as 'Has specific performance of the Contract become impossible?' and 'Is the Seller still capable of performing the Contract?' This means that in Saudi law, the Buyer can claim for specific performance with little risk of the tribunal refusing the request.[1286] Under these circumstances, Saudi law seeks to ensure to preserve the Contract and its execution, so that the Seller fulfils his obligations under the Contract. Meanwhile, English law seeks to ensure that the Buyer obtains the economic benefit for which he has contracted. As long as he receives this advantage, it does not matter whether the Seller performs the Contract in a specific manner or pays damages.

7.4. Concluding Remarks:

Where a commercial Contract of Sale of Goods has been breached, both English and Saudi law provide remedies for the aggrieved party. The function of these remedies is to put the aggrieved party in the position he would have been in, if the Contract had been correctly performed. Nevertheless, the two legal systems explored in this study do not necessarily structure their remedies in the same way. Therefore, what have been analysed here are the diverse ways in which these regimes address such a breach and the reasons underpinning their different approaches, as well as looking at whether or not the particular approach adopted makes any difference to the outcomes for the contracting party.

From these research findings, the key differences between English and Saudi law have been concluded, with regard to deciding whether to preserve or terminate the commercial Contract of Sale of Goods. English law has seen that the parties to a commercial transaction will usually require swift termination rights. Hence, preserving the Contract of Sale of Goods will usually lead to extra costs, due to the likelihood of further court intervention being

[1286] See section 6.2.2. The Buyer's Right to Specific Performance. 214.

required. As a result, it implies litigation, rather than a remedy. Therefore, the approach in English law represents an attempt to avoid court intervention through the simpler procedure of an aggrieved party legitimately terminating the Contract and claiming for damages. Therefore, the cost of supervising the performance of the Contract is an important factor in the orientation of English law towards terminating rather than maintaining the commercial Contract of Sale of Goods. Therefore, English law does not automatically give the Seller the right to cure the goods, because this would reduce the potency of the Buyer's right to terminate the Contract; rendering this remedy unsuitable for most commercial transactions, where swift termination rights may be necessary.[1287]

In contrast, Saudi law generally grants the Seller the right to cure defective performance, as priority is given to performing and safeguarding the Contract. This necessitates giving the Seller the right to cure defective performance. In fact, the primary justification for upholding this right is to preserve the Contract. Therefore, unlike English law, the Saudi Contract of Sale of Goods distinguishes between the Buyer's right to reject defective goods and his right to terminate the Contract. Thus, as emphasised earlier, under the Contract of Sale in Saudi law, the rejection of the goods is one remedy available to the Buyer, and the termination of the Contract of Sale is another. As a result, the Buyer has the right to reject the goods, but not to terminate the Contract, until the Seller loses his right to cure his defective performance.

The different approaches adopted under the two regimes, concerning the Seller's right to cure defective performance, are therefore based on distinct principles and justifications, whereby English law provides a single remedy, which consists of terminating the Contract and rejecting the goods. Meanwhile, Saudi law provides these as two separate remedies for the Buyer.[1288] Nevertheless, a more complex question arises in the case of custom-made goods –

[1287] See section 7.2.. The Seller's Right to Cure Defective Performance, 254.
[1288] See section 6.2.1.3. The Effect of Rejecting Defective Delivery. 212

or goods that have been specifically manufactured for the Buyer to order – where curing the goods will play a central role in the avoidance of economic waste, should a Buyer reject the goods. Despite this, in general terms, English law considers the potential of such an approach to diminish the Buyer's entitlement to terminate the Contract. For this reason, it is regarded as an unsuitable remedy in most commercial transactions, where swift termination rights may be necessary. That said, English law will not prevent a Seller and Buyer from agreeing to cure defective goods, according to section 35(6)(a) of the 1979 Act.

With respect to the Buyer's right to specific performance, where the Seller breaches the obligations agreed under a Contract, English and Saudi law provide different primary remedies for the Buyer: specific performance, or a claim for damages. Specific performance is a rare remedy in English law. This argument is based on a claim for damages being the most appropriate option for a Buyer, if he is able to purchase the same goods elsewhere, because this is likely to take less time than waiting for the Seller to deliver the goods. Moreover, it is a remedy that will not conflict with the Buyer's duty to mitigate damages. Therefore, in English law, a Buyer will generally attempt to terminate a Contract of Sale and claim for damages. In contrast, Saudi law provides clear principles governing the Buyer's right to specific performance and the Seller's obligation to perform the Contract, based on the principle of the binding force of the Contract. Therefore, in Saudi law, specific performance is the primary remedy for the Buyer, rather than a claim for damages.

The approaches adopted under English and Saudi law consequently lead to different solutions, whereby the Contract is terminated in English law, with the Buyer seeking an alternative source of the goods. In contrast, under Saudi law, the Contract is preserved and leads to the Seller seeking an alternative source of the goods, in order to fulfil his contractual obligations. This is in accordance with the aim in Saudi law to keep the Contract intact, while the English approach is intended to release the Buyer, so that the goods can be obtained at the

earliest possible opportunity. Nevertheless, a more complex question arises in the case of a Buyer being unable to obtain the goods promptly, but where a claim for damages might not be an appropriate remedy.[1289]

To summarise, it could be said that each legal system has its own individual character, regarding remedies for a breach of the commercial Contract of the Sale of Goods. The comparative analysis conducted in this thesis demonstrates both the common ground and differences between English and Saudi law. The methodology adopted here highlights these similarities and contrasting areas to investigate why the two legal systems have adopted their individual approaches in favour of certain remedies. As such, the underlying reasons for these approaches have been explored, especially in relation to their impact on the *de facto* outcomes for the Seller and Buyer. As a result, the remedies available under English and Saudi law for a breach of the commercial Contract of Sale have been examined in depth to present strong justification for each of these prominent regimes; highlighting their merits and indicating possible room for development.

In sum, the range and complexity of the reasons underlying the divide between English and Saudi law are not amenable to neat simplification. The approach in English law is pragmatic and founded upon notions of commercial efficiency and utilitarianism, which aims to release the contracting parties to terminate the Contract and claim for damages. As a consequence, English law has seen that the parties to a commercial transaction require swift termination rights. However, this differs from Saudi law, where priority is given instead to the performance and safeguarding of the Contract. Saudi law has seen that upholding the Contract of Sale, particularly in the case of bespoke goods for the Buyer, can play a major role in avoiding any economic waste that could be incurred by terminating the Contract. Furthermore,

[1289] As in the case of Societé, see (N 1100).

the termination of a Contract can lead to losses for the Seller and Buyer. In light of the above, Saudi law gives more weight to performing and preserving the Contract.

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