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Is There a Duty to Mitigate Damages in Civil Law? Should We Introduce Such a Duty? The Case of Qatar

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Abstract

In common law, the non-breaching party of a contract should mitigate damages or risk a reduction in recovery for the breach. The party must take measures to reduce the loss arising from the breach by making a cover purchase, reselling the goods, or taking other actions. The breaching party may claim a reduction in the damages that would be awarded to the injured party up to the amount in which reasonable mitigation measures would have reduced the loss or injury to the injured party. Unlike in common law countries, some civil law countries do not contain a general duty to mitigate damages upon the non-breaching party. However, the concept of damage mitigation has gradually expanded beyond its original sphere of influence. The questions to be answered in this article are as follows: Why is there no duty to mitigate damages in civil law? Should we introduce such a duty?

Keywords

mitigation – comparative law – law and economics – Qatar Civil Code (QCC) – civil law

1 Introduction

The principal aim of this article is to provide a coherent and justifiable account of the mitigation doctrine. The focus will be the necessity to introduce such a doctrine to the Qatari Civil Code (QCC). This doctrine supports the expectation

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remedy by requiring promisees to respond to a breach by taking steps to minimize their costs, and thus the promisor's damages, from the promisor's failure to trade.[1] Thus, the existence of a duty to mitigate imposed upon the non-breaching party ensures the breaching party that compensable damages will not significantly escalate above the damages calculated at the time of the breach. Without such an obligation, damages due to the non-breaching party would be both greater and more uncertain.[2]

Moreover, the party not in breach has more control over some aspects of the loss, and when damages are mitigated after the breach, it could be preferable to award a smaller amount to improve the non-breaching party's incentives to control those losses efficiently.[3] This paper presents an economic and logic model to explain the need to change the law. Let this paper preface its analysis by clarifying its views on the proper resolution of this question as a matter of policy.

How do we assess non-breaching position after a breach? In French law and most Civil law jurisdictions, it has often been remarked that the compensatory principle requires that damages should not put the claimant in a better position than if the breach had not occurred. However, the compensatory principle does not tell us how the claimant's position should be assessed. On the other hand, common law limits the injured party to damages by the doctrine of mitigation of damages, which imposes on an injured party the need to exercise reasonable diligence and ordinary care to minimize damages after an injury has been inflicted.[4] In sum, a person who causes injury to another takes the plaintiff as he or she finds him or her at the time of the injury; after that time, the victim has an affirmative duty to make reasonable effort to mitigate damages.[5]

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1 D. Markovits and A. Schwartz, '(In)Efficient Breach of Contract (April 4, 2016)', in: F. Parisi (ed), *Oxford Handbook of Law and Economics* (Oxford: Oxford University Press, 2017), (Forthcoming); Yale Law & Economics Research Paper No. 539, at 6–7.

2 R. J. Scalise, 'Why no 'Efficient Breach' in the Civil Law? A Comparative Assessment of the Doctrine of Efficient Breach of Contract', *American Journal of Comparative Law* 55(4) (2007) 721–766. doi: 10.1093/ajcl/55.4.721, at 745.

3 R. Craswell, 'When is a Willful Breach "Willful"? The Link Between Definitions and Damages', *Michigan Law Review* 107 (2009) 1501 at 1513.

4 *Toce Oil Co.* v. *Great Southern Oil & Gas Co.*, 491 So. 2d 166, 1091–92 (La. Ct. App. 1986).

5 *Back* v. *Wade*, 607 So. 2d 927, 935 (La. Ct. App. 1992) (citing Aisole v. Dean, 574 So. 2d 1248, 1253–54 (La. 1991))., the Louisiana Court of Appeal for the Second Circuit found that '[a] lthough [a person who causes injury to another] takes the plaintiff as he finds him at the time of the injury, after that time the victim has an affirmative duty to make every reasonable effort to mitigate damages.' In that case, the victim of an accident neglected to obey his physician's orders to put no weight on his injured leg and instead went about his day-to-day activity of running his business: 'Because his work required considerable manual labour, the injury to the ankle did not heal properly and led to further complications localized in his leg

Thus, a party in breach can raise the failure to mitigate doctrine only as a defence to reduce his or her liability for damages and not as an affirmative claim to protect his or her contract rights.[6]

This paper seeks to answer the questions as it pertains to acts of breach by the claimant. Accordingly, this paper is arranged in sections as follows. Section 2 of this article explains the obligation to mitigate damages. This obligation of the aggrieved party to prevent further loss from occurring by undertaking reasonable measures can be found in most legal systems. Although Qatar has adopted a code similar to that in civil law countries, it still has complex roots as an Islamic country and circumstances, particularly economic circumstances. Therefore, section 3 describes the historical and economic background of the Qatari legal system.

Section 4 addresses the mitigation of damages in civil law countries. Unlike American law, some civil laws do not contain a general duty to mitigate damages upon the non-breaching party, but some do impose this duty. Section 4 shows that some civil law countries have introduced the mitigation doctrine to their codes, while France has rejected the doctrine. The movement by some civil law countries was a logical response to international treaties and actual practice. Most importantly, such moves were a response to economic justifications. Section 5 explains the economic rationale of the obligation to mitigate. Section 6 examines the duty of mitigation and discusses whether it exists in Islamic law, as Qatar legal system has deep roots in Islamic law. Finally, section 7 concludes the paper and offers recommendations.

In sum, the present article begins by reconsidering the mitigation doctrine in relation to its expansion outside common law boundaries. Thus, its transition emphasizes the gradual manner in which the mitigation of damages transformed into a fundamental principle of customary international law. Following this path, we further analyse the normative content of this principle in several interconnected and overlapping areas of international law and domestic civil laws. Furthermore, this paper focuses on Qatari law and the possibility of introducing the mitigation doctrine to the QCC. Moreover, this paper assesses the economic aspects of damage mitigation in the event of a breach and explains the trend among states towards establishing such a duty. The aim is to suggest that adopting a duty to mitigate damages for a contractual obligation is consistent with the goal of economic efficiency.

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and eventually in his back.' The court held that the trial court had not abused its discretion in limiting the damages that the victim was allowed to recover.'

6 C. J. Goetz and R. E. Scott, 'The Mitigation Principle: Toward a General Theory of Contractual Obligation', *Virginia Law Review* 69 (1983) 967. doi: 10.2307/1072737, at 975.

2 What Is the Obligation to Mitigate?

The primary objective of a contract, an instrument of free bargaining between parties, is to avoid litigation and establish a set of compliance rules.[7] In the economic model, the parties enter contracts to maximize the gains from trade in every future contingency.[8] However, any breach of contract leads to damages. The measure of compensation that a claimant is entitled to recover is the loss naturally flowing from the legal wrong. In common law, this measure of damage is offset by a duty to mitigate. The duty required plaintiffs to minimize losses suffered by taking all reasonable steps to mitigate the loss consequent to the breach.[9] Thus, simply because a defendant breaches a contract does not mean that a plaintiff is entitled to recover endless compensation for their conduct.[10] In other words, unsuccessful litigants are not required to compensate a successful claimant where the claimant has sat back and allowed damages to rack up or to pay sums that are too remote in the law to recover.

Under the mitigation of damages doctrine, the aggrieved party should take reasonable steps, where possible, to avoid additional injury or loss. The failure of the aggrieved party to take protective measures after suffering an injury or loss can reduce the plaintiff's recovery.[11] For instance, a seller of goods fails to deliver; the buyer is not entitled to sit back on a rising market or wait until a contract for onward supply has fallen through and then claim the loss from the defendant. Instead, they must approach the market with reasonable speed and buy equivalent goods. A claimant that gives the impression that it is more concerned with enhancing a claim than mitigating a loss should expect deductions in its damages.[12] Mitigation behaviours are basically 1) conducting a replacement transaction, 2) purchasing parts that replace the damaged pieces from another provider, 3) paying the transport and storage costs of goods that

7 A. Bansal and M. Dutta, 'Mitigation of Losses under Contracts Law (June 20, 2012)'. doi: 10.2139/ssrn.2087974, at 1.

8 S. A. Baker, and K. D. Krawiec, 'Incomplete Contracts in a Complete Contract World', *Florida State University Law Review*, Forthcoming; UNC Legal Studies Research Paper No. 899160 at 730–731.

9 Markovits and Schwartz, '(In)Efficient Breach of Contract' (n 1) 1.

10 *Ibid*, at 2.

11 *Ibid*.

12 'Mitigation of Loss: What is Reasonable? The In-House Lawyer Magazine (February 2009)'. http://www.edwardswildman.com/files/News/4ea1ebde-9c2a-48d4-b08786e84a779c54/Presentation/NewsAttachment/560c5b8c-6fbc-4784-ae2d87f379cf4885/Mitigation%20of%20loss%20-%20what%20is%20reasonable%20-%20February%202009%20%20EAPD%20article.pdf.

the buyer did not receive, 4) protecting or preserving the goods, and 5) terminating early for future fundamental breach of contract.

The defendant has the burden of proving that the claimant has failed in its duty to reasonably mitigate loss, while the plaintiff has the burden of proving the breach of contract. What precisely the claimant is required to do with respect to mitigation is an issue of fact. The courts require reasonable steps to be taken to limit the losses that are incurred (and to avoid incurring unnecessary expenditure to remedy the breach).[13] In other words, the duty to mitigate damages is limited by reasonableness, as the plaintiff is not required to mitigate losses that arise from a breach assuming that by reducing losses, the plaintiff should undertake expensive operations according to the particular circumstances.[14] Reasonable measures are fact-based matters that depend on the uses as well as the practices established between the parties and what would have been the behaviour of a similar person in the same position and same circumstances taking such measures.[15]

A claimant does not need to take unusual steps outside the ordinary course of business or even incur unnecessary costs. For example, goods are traded: if the seller is injured by no acceptance, he or she must as soon as possible resell the goods at the then-available market price; if the buyer is the victim of breach, he or she must similarly buy in substitute goods.[16] Ordinarily, it will be reasonable for the claimant to go into the market on the date of the breach to buy or sell (as appropriate) the property subject to the wrong.[17] Damages are assessed as if the claimant had acted reasonably and according to the available market rule. Their factual loss at any other time is irrelevant.[18] The reasonable costs of mitigation are recoverable from the defendant.[19]

Thus, the doctrine of mitigation is governed by three rules: 1) The plaintiff cannot recover the loss consequent upon the defendant's default if the plaintiff could have avoided the loss by taking reasonable steps. 2) If the plaintiff avoids or mitigates the loss, he or she cannot recover even if he or she takes steps beyond what was reasonably expected. 3) Where the plaintiff suffers loss or incurs expense by taking reasonable steps to mitigate the loss resulting from

13 Bansal and Dutta, 'Mitigation of Losses' (n 7) 3.

14 J. Oviedo-Albán, 'Mitigation of Damages for Breach of Contract for the International Sale of Goods', *Vniversitas* 137 (2018). doi: 10.11144/Javeriana.vj137.mdbc, at 5.

15 *Ibid*, at 6.

16 A. D. Dyson, Recovery for avoided loss: towards a new account of mitigation (July 19, 2012). Oxford Student Legal Studies Paper No. 07/2012. doi: 10.2139/ssrn.2158730, at 13.

17 *Ibid*, at 14.

18 *Ibid*, at 16.

19 Bansal and Dutta, 'Mitigation of Losses' (n 7) 3–4.

the defendant's default, he or she may recover further loss or expense from the defendant. Nonetheless, the plaintiff can recover expenses or further loss incurred by him or her in taking reasonable efforts to mitigate his or her loss resulting from the breach, even when the mitigation steps were unsuccessful or led to greater loss.[20] Moreover, a claimant does not need to act with perfect knowledge or ideal wisdom. However, the law will protect against wanton, needless or careless conduct.[21]

In sum, the aggrieved party cannot merely do nothing while the losses resulting from the breach accumulate and then expect to be entitled to recover the losses that he/she could avoid. Instead, one is generally required to undertake all reasonable measures in the circumstances to mitigate the loss resulting from the breach.[22] Most legal systems have this obligation of the aggrieved party to prevent further loss from occurring by undertaking appropriate measures. Courts and arbitration tribunals commonly assume that the duty to mitigate is part of general trade usage without specifying its sources or explicit normative content.[23] Moreover, mitigation of damages is consistent with the recognized international law of commercial contracts. Therefore, could we introduce such a doctrine to the QCC?

3 QCC Sources

Qatar follows the civil law jurisdiction following the Egyptian civil law system, which follows the French one.[24] Similar to the French Civil Code, the QCC is vast; it contains 1188 articles. Although Qatar has adopted a code similar to those in civil law countries, it still has complex roots, such as its incorporation by reference to Islamic law[25] or the common law applied to foreigners during British colonialism. Moreover, there is a more recent effect of Anglo-American influence on global legal thought happening in Qatar. First, another court system is parallel to but distinct from the Qatari courts. This is called the QFC Civil

20 *Ibid*, at 6.

21 *Ibid*, at 11.

22 P. Riznik, 'Some Aspects of Loss Mitigation in International Sale of Goods', *Vindobona Journal of International Commercial Law and Arbitration* 14 (2010) 267–282, at 268.

23 *Ibid*. The arbitrators only referred to damage mitigation as a general principle of law; please see also H. Ciurtin, 'A Hermeneutical Perspective Upon the 'Mitigation of Damages' Principle: the Metamorphosis of a Concept in International Law', *Transnational Dispute Management* 12(6) (2015) 1–19 at 5–6.

24 *See* F. Belknan, *Contract Theory in the Amended French Civil Code and in Qatari Civil Code: A Comparative Study*, International Review of Law, 2 (2020) Vol. 9 11-61.

25 Art. 2 of QCC.

and Commercial Court.[26] The court's procedures are similar to those found in common law systems.[27] The benefits of the QFC include familiarity to foreign investors with respect to its laws and regulations, which are written in English, are based on common law jurisdictions, and are overseen by both an independent regulatory body and an independent judiciary.[28]

Second, cross-border trade is increasing globally. The practical importance of national boundaries is slowly diminishing, and distances are no longer a difficulty in global mobility. The rise of global commerce is causing businesses and business entities to expand into other jurisdictions.[29] The increase in international trade is likely increasing the number of cross-border lawsuits. Legal systems have to deal with norms or concepts unfamiliar to the substantive law of the forum.[30] For example, Qatar imports most of what it needs from the rest of the world, such as food, cars, and building material. In 2019, Qatar's imports totalled $29 billion, making it the largest importer globally relative to its population, which ranked 139th in the world. From 2012 to 2019, its imports increased at an annualized rate of 73%, from $16.8 B in 2012 to $29 B in 2019. Moreover, Qatar is the largest exporter of natural gas globally, and it exports oil as well. In 2019, Qatar exports totalled 72.9 billion, making it the 43rd largest exporter in the world. Therefore, international trade treaties must be looked at carefully when applying legal norms.[31]

In sum, any new legal ideas or norms to be introduced in the Qatari legal system must scrutinize Islamic law, economic needs, international norms, and, of course, civil law. In the end, the QCC bears a remarkable resemblance to the French Civil Code, and the legislators are those who enact laws, not the courts. This is important to understand the French thinking about the duty to mitigate damages. As far as terminology is concerned, no expression comparable to 'mitigation of damages' has been coined or is currently employed in

26 Hon. G. Lebovits and D. Miller, *Litigating in the Qatar International Court* (A publication of the International Section of the New York State Bar Association, (Spring 2015) Vol. 28, No. 1, at 54.

27 *Ibid.*

28 Z. Sharar and A. M. Khulaifi, 'The COURTS in Qatar Financial Centre and Dubai International Financial Centre: A Comparative Analysis (August 30, 2016)', *Hong Kong Law Journal* 46(2) (2016) 529–555 at 529.

29 C. Vanleenhove, 'A Normative Framework for the Enforcement of U.S. Punitive Damages in the European Union: Transforming the Traditional '¡No Pasarán!' (February 10, 2017)', *Vermont Law Review* 41 (2016) 347–403 at 349.

30 *Ibid*, at 401.

31 All numbers are taken from https://data.wto.org/.

French doctrine and jurisprudence.[32] Despite the absence of a direct reference to the mitigation of damages, it is quite clear that the French classical writers did not doubt that a party aggrieved by a wrong of another was expected, at least, to attempt to prevent the expansion of damages he or she had sustained. Otherwise, the party would be denied recovery for a failure to do so.[33]

4 Civil Law Countries and Mitigation Doctrine

The French classical commentators and jurists did not doubt that the injured party is required to mitigate its loss. In the first comprehensive commentary on the Code Napoleon, Toullier offered the example of a wine merchant who had contracted for carts and horses to haul his crop and who, owing to the supplier's failure to perform, was ultimately forced into bankruptcy when a storm destroyed his crop. Toullier concluded that the wine merchant's total loss was not a direct result of the other party's failure to perform but rather resulted from his negligence in not securing other means of hauling his crop.[34] This reference to negligence seems to be a clear indication that Toullier was thinking in terms of an aggrieved party's duty to prevent, or to minimize, the damaging consequences of the other party's wrongful act.[35] Moreover, tracing history, the statute's antecedent in the 1800 French Projet du Gouvernement contained additional language regarding wages. Thus, the wages that a dismissed labourer was likely to earn elsewhere during the unexpired term of a contract should be deducted from the wages that he or she was entitled to recover.[36]

However, in two seminal judgments of 19 June 2003, the French Supreme Court explicitly rejected introducing a general principle of mitigation in the French tort law, thereby departing from the solutions reached in common law legal systems.[37] Instead, French law focuses exclusively on the victim's interests to the detriment of those of the party in breach of duty.[38] However, French law

32 A. Michaud, 'Mitigation of Damage in the Context of Remedies for Breach of Contract', *Revue Generale de Droit* 15(2) (1984) 293–340 at 311 (describing the policy of mitigation as a rule of avoidable consequences rather than contributory negligence).

33 S. Litvinoff, 'Damages, Mitigation, and Good Faith', *Tulane Law Review* 73 (1999) 1161 at 1166.

34 *Ibid*, at 1167.

35 *Ibid*.

36 *Ibid*, at 1182–1183.

37 S. Le Pautremat, 'Mitigation of Damage: A French perspective', *International and Comparative Law Quarterly* 55(1) (2006) 205–218. doi: 10.1093/iclq/lei072, at 205.

38 *Ibid*.

shares the preoccupation of common law countries with achieving an acceptable level of compensation.[39] The point at which the two jurisdictions diverge relates to whether the victim of the breach should be under a positive duty to mitigate his or her loss. Notwithstanding early conceptual support from eminent French legal theorists,[40] there is no general provision in the French Civil Code requiring a claimant to mitigate his or her loss.[41]

In fact, since the codification of the Civil Code, the mitigation principle has made only occasional appearances in discrete areas of French law, such as in leasing, insurance, and the international sale of goods.[42] At a practical level, it was perhaps inevitable that despite the silence of the Civil Code, French courts would be faced with disputes in which the defendant invoked a claimant's failure to mitigate as a defence to a claim for damages.[43] Thus, notions of mitigation did indeed surface intermittently before 2003, although French lawyers have never thought in terms of the common law's duty to mitigate.[44]

For instance, in several personal injury cases, the injured party's refusal of medical treatment or a minor operation capable of improving his or her condition at minimal risk has been held to be a fault, with the quantum of any award in his or her favour reduced accordingly.[45] In a notable case, the Versailles Court of Appeal invoked the doctrine of remoteness, with the same objective. This doctrine holds that a trader who had been supplied with defective products should have limited the loss resulted from the breach by finding an alternative intermediate solution. Any damage resulting from his or her failure in this regard was held to be unforeseeable by the parties when the contract was executed and consequently irrecoverable.[46] At all events, any potential for the evolution of case law rationalized as supportive of an unarticulated duty to mitigate in French law was ended by the two decisions of the Cour de Cassation on 19 June 2003.[47]

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39 *Ibid.*

40 *Ibid*, at 206, Solene gave an example of an early conceptual support from eminent French legal theorists such as Domat, and Pothier.

41 *Ibid.*

42 Art. 1760 of the Civil Code. 10, Art. L172-23 of the Insurance Code, and articles 75 and 77 of the United Nations Convention on Contracts for the International Sale of Goods (1980), into force in France since 1988.

43 Le Pautremat, 'Mitigation of Damage' (n 37) 206.

44 *Ibid.*

45 *Ibid*, at 207.

46 Court of Appeal of Versailles (26 Nov 1986) Gaz Pal 1987, 2, som.

47 Le Pautremat, 'Mitigation of Damage' (n 37) 207.

The 20th century saw the French tort law evolve in favour of the victim.[48] The defendant's interests have been relegated to such an extent that the relationship of victim and tortfeasor has become more imbalanced.[49] Although the two decisions are unambiguous that the victim has no duty to mitigate his or her damage in the French tort law, the question is whether the principle can be extended to French contract law.[50] The compensations of loss in the French law of torts and contracts shares many similarities.

The principle of full compensation dominates French contract law as much as the tort law equivalents.[51] However, having been expressly decided by reference to Art. 1382,[52] the decisions of 19 June 2003 are central to the French law of obligations. As this principle is central to the foregoing findings, the Cour de Cassation will likely reach an identical solution in contract law when the occasion arises. One difficulty with the decisions of the Cour de Cassation of 19 June 2003 is that they set French law apart from the approaches of other European countries, conventions regulating international trade, and international principles of contract law.[53]

The mitigation of damage principle has been included in the Principles of European Contract Law prepared by the Commission on European Contract Law[54] and UNIDROIT.[55] The trend across Europe is to develop common principles of European contract law to strengthen cross-border trade and the single European market. Although the UNIDROIT principles and those of the European Contract Law have no compulsory authority, they are suggestive of the likely content of a European Code if such a text was to come into

48 *Ibid*, at 210.

49 *ibid*.

50 *Ibid*, at 210–211.

51 Art. 1231–2 of the Civil Code provides that in general, damages due to the creditor are for the loss that he or she has incurred or the gain of which he or she has been deprived, with the following exceptions and qualifications.

52 Art. 1240 of the Civil Code provides that 'any human action whatsoever which causes harm to another creates an obligation in the person by whose fault it occurred to make reparation for it'.

53 Le Pautremat, 'Mitigation of Damage' (n 37) 211–212.

54 Article 9.505 of the Principles of European Contract Law states as follows: '1. The non-performing party is not liable for loss suffered by the aggrieved party to the extent that the aggrieved party could have reduced the loss by taking reasonable steps. 2. The aggrieved party is entitled to recover any expenses reasonably incurred in attempting to reduce the loss.'

55 Art. 77 of UNDER UNITED NATION CONVENTION ON THE INTERNATIONAL SALE OF GOODS, 1980 (THE CONVENTION, OR CISG), The United Nations Convention on Contracts for the International Sale of Goods, which, to date, has been implemented by 94 countries.

existence.[56] For example, the duty to mitigate losses is present under UNIDROIT in Art. 77, which reads as follows: 'A party who relies on a breach of contract must take such measures as are reasonable in the circumstances to mitigate the loss, including loss of profit, resulting from the breach. If he fails to take such measures, the party in breach may claim a reduction in the damages in the amount by which the loss should have been mitigated.'[57] It seems illogical that different rules apply depending on whether a contract for the sale of goods falls within the scope of the United Nations Convention on Contracts for the International Sale of Goods or is purely domestic in nature.[58]

Moreover, in other civil law jurisdictions, the civil code has addressed the mitigation of damages expressly,[59] for example, in Art. 44 of the Swiss Code of Obligations[60], 1227-1 of the Italian Civil Code, 6:101 of the Dutch Civil Code, 1479 of the Civil Code of Québec, and §254-2 of the German Civil Code.[61] There have been further developments in Latin American law when the inclusion of mitigation of damages in several codes. Examples include Articles 1327 in the Peruvian Civil Code of 1984; 348 in the Bolivian Civil Code; and 1074 of the Colombian Code of Commerce. Recently, the Argentine Civil and Commercial Code, created in August 2015, included the duty to avoid causing unfair damage and to take reasonable measures to prevent or reduce the extent of loss.[62]

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56 Le Pautremat, 'Mitigation of Damage' (n 37) 211–212.

57 Bansal and Dutta, 'Mitigation of Losses' (n 7) 6.

58 Le Pautremat, 'Mitigation of Damage' (n 37) 215.

59 Oviedo-Albán, 'Mitigation of Damages' (n 14) 12.

60 The Swiss Code of Obligations allows a court to reduce the recovery granted to a party who, through his or her own action, has increased the damage that he or she sustained because of the fault of another; see CODE DES OBLIGATIONS art: 44 (Switz.), translated in SWISS-AMERICAN CHAMBER OF COMMERCE, SWISS CONTRACT LAW (2d ed. 1984).

61 Thus, one article of the German Civil Code provides that if any fault of the injured party has contributed to causing the damage sued upon, then the obligation to compensate the injured party and the extent of the compensation to be made depend upon the circumstances, especially upon how far the injury has been caused predominantly by one or the other party. This applies also even if the fault of the injured party consisted only in an omission to call the attention of the debtor to the danger of unusually high damage which the debtor neither knew nor should have known or in an omission to avert or mitigate the damage. The German Civil Code addresses mitigation of damages from the vantage point of causation but does not hesitate in classifying the fault with the victim's omission to avert or mitigate the damages he or she sustained. See § 254 BORGOWCHES GEEMTBUCH (CIVIL CODE) (F.R.G.), translated in THE GERMAN CIVIL CODE (Simon L. Goren trans., rev. ed. 1994) (emphasis added).

62 Article 1710 of the Civil and Commercial Code provides that every person has the duty, insofar as it depends on him or her, to a) avoid causing unjustified harm; (b) take, in good faith and in accordance with the circumstances, reasonable measures to prevent damage or to reduce its extent (if such measures prevent or reduce the extent of damages for which a third party would be liable, the person has the right to be reimbursed for the

Furthermore, the Louisiana law of obligations[63] currently leaves no room for the doubts arising in US law and, in the French doctrine, it provides as a rule that an obligee must take reasonable steps to mitigate the damage caused by the obligor's failure to perform.[64] The Louisiana Civil Code explicitly prescribes that '[g]ood faith shall govern the conduct of the obligor and the obligee in whatever pertains to the obligation.'[65] The Louisiana Civil Code expressly qualifies as reasonable the efforts that an aggrieved obligee is required to make to mitigate his or her damage. As interpreted by the Louisiana jurisprudence, the standard of diligence to measure an obligee's efforts is that of a reasonably prudent person acting in the same circumstances.[66] The reasonable care required from such a person to avoid or reduce his or her loss depends on the circumstances of the particular case.[67]

Such circumstances might include the time at which such care should have been exercised, the person's knowledge of difficulty resulting from the breach, the opportunity that he or she had to make efforts to mitigate, and the magnitude of the expense that would have been required to avoid or reduce loss. On the other hand, when a comparatively small expenditure can avoid further or additional loss, the injured person must make such efforts. In some circumstances, moreover, bringing legal action, such as seeking an injunction by an obligee for the obligor to desist from increasing the loss occasioned by his or her failure to perform, maybe a reasonable effort that an obligee is required to make.[68] A distinction can be drawn, at least theoretically, between an obligee whose damage has been increased because he or she failed to make reasonable efforts to mitigate it and an obligee whose injury has been increased because of his or her own imprudent acts in the aftermath of the obligor's failure to perform.[69]

Similarly, Art. 263/2 of the QCC states that compensation includes the creditor's damages and loss of profit, provided that this is a natural result of the obligor's failure or delay to perform the obligation. The damages are considered a natural consequence if the creditor cannot avoid them through reasonable

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value of the expenses incurred in accordance with the rules of unjust enrichment); and c) not worsen the damage if it has already occurred.

63 Louisiana's treatment of the mitigation doctrine is an interesting case because it reflects the unique hybrid of civil and common law traditions that exist in Louisiana law.

64 LA. CIV. CODE ANN. art. 2002 (West 1987).

65 *Ibid*. Art. 1759

66 See *Unverzagt v. Young Builders, Inc.*, 215 So. 2d 823, 826 (1968).

67 Litvinoff, 'Damages, Mitigation, and Good Faith' (n 33) 1187.

68 See LA. CIV. CODE ANN. Art.2002. (n 64)

69 Litvinoff, 'Damages, Mitigation, and Good Faith' (n 33) 1187.

effort. Meaning that an injured party may not recover damages for loss that he could have reasonably avoided. The injured party must take reasonable efforts to mitigate his harms.[70] However, looking at the Qatari Cassation court's verdicts from 2005–2019, the mitigation defence or duty was not raised in any case before the high court. One reason could be that the article is not detailed as in other countries or in international conventions.

Another reason could be traced to the French Civil Code. As stated earlier, there is an absence of a direct reference to mitigation of damages in the French Civil Code. Instead, the French allude to mitigation duty as direct damage, compensable loss, and even victim's duty.[71] No wonder many Arabic obligation books followed the same method, and without direct reference to mitigation duty.[72] However, those expressions would seem to indicate that the matter of mitigation of damages is dealt with in French law and the Arabic world in the contexts of compensation.

In order to produce a coherent account of the law, the law must provide a coherent and justifiable account of the mitigation principle. Therefore, a recommendation to amend Art. 263/2 in a way that courts will not struggle in interpreting the article. Moreover, any recommendation to improve the current article shall follow similar methods of the international transactions conventions. Again, Qatar is a small country and has trade relations with most of the world. The mitigation of damages is understood in both the legal theory and the case of law as one of the principles upon which the CISG is based. There is also an economic element that attempts to disincentivise passive behaviours, which aggravate damages that would otherwise have been avoided.[73]

5 Economics vs. Law

The underlying rationale for the duty of mitigation is that the law is intended to prevent and compensate for individual loss and injustice and preserve and protect the economic welfare and prosperity of the whole community.[74] This

70 J. Mahjoub and T. Rashid, 'Effects of obligations' (2019–2020) 59–61.
71 Litvinoff, 'Damages, Mitigation, and Good Faith' (n 33) 1166.
72 *See* for example *Ibid*, A. Nejedah, 'Source of obligation' (2004–2005) 381-381, A. Al-Sanhouri in "Al Waseet Explaining the New Civil Code (2) General Theory of Obligation', 3rd Edition, (Al-Halbi legal publication, 2011) 1097–1100.
73 Oviedo-Albán, 'Mitigation of Damages' (n 14) 3–4.
74 C. T. McCormick, *Handbook on the Law of Damages* (St. Paul, Minnesota: West Publishing Company, 1935) 127.

aim makes it essential that the rules for awarding reparation for wrongs effectively discourage even those victimized from passively suffering an economic loss that could have been prevented through reasonable efforts or refrain from action that could increase the loss.[75] In the context of contract law, loss mitigation ensures that the concept of economic efficiency, which is of great importance in commercial relationships, is not overlooked when contracts break down. If one accepts that the law should protect and conserve the economic welfare and prosperity of the whole community and reduce social costs, a legal system should discourage any activities that could be economically wasteful.[76]

Accordingly, mitigation is desirable in the breach state to salvage some value from the injured party, avoid social costs, and obtain returns.[77] Those reasons seem to have their roots in a policy of maximization of business activity or in a policy that favours and promotes the means of maintaining the economic machinery, thus minimizing disturbance.[78] The common law is remarkably attuned to the need to protect finite resources. In sum, the common law of remedies seems to have been greatly influenced by the need to keep the economic machine running with the least possible disturbance, and the principle of mitigation of damage is a notion that seems to work well in commerce.[79]

In the Anglo-American legal culture, such a signifier has raised – and still raises – an automatic belief that both parties still have obligations, even though one is breaching the rules and the other suffers from this misconduct. A utilitarian-economic perspective upon the law – one that strongly influenced the formation of the common law – allows the imposition of a duty to maintain the envisioned level of efficiency for a given transaction. Therefore, the assumed duty to mitigate losses does not primarily refer to minimizing the harm that one party suffers – although this is regularly an implicit consequence – but rather to preserving the integrity and utility of the transactional system per se.[80] Moreover, without mitigation, the legal system would have allowed an unnecessary loss in the economic circuit – the complete and aggravated initial damage and the obligation to fully compensate it – thus blocking increased amounts of capital that could generate other incomes.[81] In fact, many international trade conventions, principles, and practices supported mitigation

75 See *Ibid*.

76 R. H. Coase, 'The Problem of Social Cost' *Journal of Law and Economics* 3(1) (1960) 1–44. doi: 10.1086/466560.

77 T. J. Miceli, C. F. Sirmans and G. K. Turnbull, 'Lease Defaults and the Efficient Mitigation of Damages' *Economics Working Papers 200907* (2009) at 9

78 See F.H. LAWSON, Remedies OF ENGLISH LAW 67 (2d ed. 1980).

79 Le Pautremat, 'Mitigation of damage' (n 37) 215.

80 Ciurtin, 'A Hermeneutical Perspective' (n 23) 4.

81 *Ibid*.

to offer a reliable provision that can practically be invoked to minimize 'economic waste' in contractual relations.[82]

Remedies are an area of vital interest to parties of international sales contracts.[83] Most of these international sales contracts have attempted to bridge the gap between civil law and common law systems to develop international commercial law in relation to contracts.[84] Therefore, judges, lawyers, and practitioners should familiarize themselves with the provisions and their proper application and understand why not new legal ideas are not integrated into domestic laws. This incorporation will strengthen the state's economy because applying international norms would obviate the choice of an unfamiliar law when contracting with foreign companies. Moreover, it would facilitate a better understanding of contractual rights and duties, given that foreign legal rules are currently unknown to such parties or challenging to identify.

Thus, the circumstances of international trade – a domain in dire need of damage-limiting mechanisms – represented an entirely dissimilar legal universe embroidered with unfamiliar semantic fields and philosophical tenets.[85] The UN Convention on Contracts for the International Sale of Goods – and two codified uniform principles concerning contract law, i.e., the UNIDROIT Principles of International Commercial Contracts and the Principles of European Contract Law –share a common evolution in their similar heritage and recognition and practical applications of the duty of mitigation. Moreover, a series of ICC[86] arbitral awards have acknowledged it as embodying the general principles of international commercial practice to accept mitigation as a duty.[87]

Many ICC Awards from the same period explicitly recognized loss mitigation as part of the general principles of law, emphasizing that it is up to the injured party to take all necessary measures not to increase the injury.[88] Thus,

82 *Ibid*, at 14.

83 C. Piché, 'The Convention on Contracts for the International Sale of Goods and the Uniform Commercial Code Remedies in Light of Remedial Principles Recognized under U.S. Law: Are the Remedies of Granting Additional Time to Defaulting Party and of Reduction of Price Fair and Efficient Ones?', *North Carolina Journal of International Law and Commercial Regulation* 28(3) (2003) 519 at 519.

84 G. Bell, 'New Challenges for the Uniformisation of Laws: How CISG is Challenged by "Asian Values" and Islamic Law', in: I. Schwenzer and L. Spagnolo (eds), *Towards Uniformity: The 2nd Annual MaaSchlechtriem CISG Conference* (The Hague: Eleven International Publishing, 2010) 11–12.

85 Ciurtin, 'A Hermeneutical Perspective' (n 23) 4.

86 International Chamber of Commerce.

87 Ciurtin, 'A Hermeneutical Perspective' (n 23) 8–9.

88 *Ibid*, at 10.

in an ICC Award from 1972, the arbitrator found that the aggrieved party was entitled to recover the suffered damages only to the extent that it had acted in any possible way to limit the losses resulting from the breach.[89]

Another ICC Award from 1974 acknowledged the reduction of damages owed because the claimant had not tried to sell its goods to other buyers, even though – due to its position and structure – it could have successfully done so. The passive contemplation of increasing losses thus became an effective exception raised by the defendant, who was not compelled to pay for unmitigated damages.[90] In another case, the claimant – even though it had incurred losses due to the conduct of its contractual partner – failed to accept an offer that could have reduced its damages. It simply turned instead to buy the non-delivered product from a more expensive source; thus, the arbitrators considered only part of the losses to be recoverable.[91]

In sum, every tribunal that is called upon to decide a dispute has to consider the general notion that the aggrieved party has to take all possible steps to minimize his or her loss. In fact, it is common that a party wants to shift all the responsibility for certain damages to the other party. At the same time, the evidence reveals that it would have been possible for that party to minimize the damages if the party had acted without delay when it learned of the damage.[92] Consequently, since the 1970s, there have been fervent debates about the scope and limitations of a damage mitigation mechanism, which was programmed to be included in the convention. It was not only the doctrinal differences between common law and civil law theorists that made the discussions complicated but also the competing schools of international law and the divergent interests of the states represented.[93]

6 Duty to Mitigate in Islamic Law

As previously mentioned, Qatar is an active economic player in the international arenas for many states, and its legal system has a shallow civil law tradition with the profound influence of Islamic law. In fact, Art. 1 of the Qatar constitution provides that 'Qatar is an Arab State, sovereign and independent.

89 ICC Case No. 2103 (Award, 1972), 1974 Journal du Droit International 902.

90 CC Case No. 2142 (Award, 1974) in: P. Sanders (ed), *Yearbook: Commercial Arbitration, 1976–* (Vol. I, Kluwer Law International 1976) 132.

91 ICC Case No. 2478 (Award, 1974) in Pieter Sanders (ed), Yearbook: Commercial Arbitration, 1978 (Vol. III, Kluwer Law International 1978) 222–223.

92 ICC Case No. 2404 (Award, 1975), 1976 Journal du Droit International 995 f.; see also the commentary of Yves Derains of this Award, 1976 Journal du Droit International 996 f.

93 Ciurtin, 'A Hermeneutical Perspective' (n 23) 11–12.

Its religion is Islam, and the Islamic Law is a main source of its legislation'[94] The constitution accurately reflects the hybrid nature of Qatari's legal and political regime: continuity with religious traditions and Islamic law while trying to achieve the state goals of economic modernization. Substantive law in Qatar today is, therefore, a combination of Islamic law, particularly in the area of family law but also interstitially in other areas of laws; has been transplanted and partially modified with European codes; and has adopted positive legislation by the state throughout the 20th and 21st centuries claiming to conform with Islamic law.

The constitution and other laws were also influenced by Islamic law, such as the QCC Art. 1 providing that 'the provisions of this law shall apply to all matters it deals with, and if the court does not find applicable provision, then it has to apply the general principles of Islamic Sharia, then the customary rules, then by natural law principles of fairness.' If the Qatari legislators want to adopt mitigation doctrine, the doctrine must be codified. Nevertheless, before codifying, they must examine the availability or non-contradiction of mitigation obligations in Islamic law heritage. Islam is very much a law-oriented religion; it sets the framework for permissible social, economic, and political systems and then formulates the principles and rules upon which laws and regulations are established.[95] Regarding the duty to mitigate damages in Islamic law, the following question must be addressed: Is the mitigation of damages recognized under Islamic law?

Islamic law is based on two fundamental sources, which are the Holy Qur'an and Sunnah,[96] and along with the secondary sources, *Ijma'a* (consensus)[97] and *Qiyas* (analogical deduction through Ijtihad: individual reasoning).[98] Moreover, Islamic Law is based on particular general objectives or *Maqasid*,[99] a notion

94 'The Permanent Constitution of the State of Qatar.' https://www.almeezan.qa/LawArticles.aspx?LawArticleID=25754&LawId=2284&language=en.

95 I. R. Al-Faruqi and L. L. Al-Faruqi, 'The Cultural Atlas of Islam', *American Journal of Islam and Society* 3(1) (1986) 169–170. doi: 10.35632/ajis.v3i1.2768

96 This is the sayings and the authentic deeds of the Prophet Muhammad.

97 The term refers to the consensus or agreement of Muslim scholars on essential religious issues.

98 It is the process of deductive analogy in which the teachings of the Hadith are compared and contrasted with those of the Qur'an in order to apply a known injunction to a new situation or circumstance and create a new injunction.

99 The term refers to the purposes of Islamic faith. In terms of Shariah, there are five foundational goals (Maqasid al-Shariah). These are the preservation of 1) religion/faith, 2) life, 3) lineage/progeny, 4) intellect, and 5) property/wealth. Maqasid was developed by the 12th century Islamic scholar Al-Ghazali. The most significant development of the Maqasid occurred in the 14th century through the writings of Ibn Taymiyyah. Jurist Imam Abu Ishaq al-Shatibi also wrote on Maqasid. According to him, the legal ends of

that emerged from medieval, classical jurisprudence. It guides legal scholars in determining the law in difficult or vague circumstances. However, it now functions in a reasonably expansive way for experts. Non-specialists increasingly argue that the *Maqasid* must be extended beyond the old concepts to include additional goals such as economic development. As explained in the previous section, mitigation is appropriate in regard to economic development.

Nonetheless, if Qatari legislators want to adopt the mitigation doctrine, the doctrine must be codified, but before codifying, they must examine the availability or non-contradiction of mitigation duty in Islamic law and *Maqasid*. Only a few of the statements in the *Qur'ān* constitute rules of law capable of direct application. Islamic law consists mainly of precepts of proper ethical behaviour that are too generally phrased to have the precision and content needed for legal rules.[100] *Qur'ān* is the primary source of Islamic, and in regard to the secondary sources – *Ijma'a* and *Qiyas* – mitigation of damages is a novel term.

Notably, a quotation from the Prophet Muhammed is worth examining when discussing the duty of mitigation: 'There is no injury nor return injury.'[101] The story of this Hadith was simply that when a palm tree was on the property of two men, they disputed it to the Prophet, and one of them said: Cut it in half between him and me. The Prophet disagreed because of the harm to both sides. It is not permissible for a Muslim to harm his Muslim brother whether he has some kind of benefit in that or not, and this is generally the case for everyone. Moreover, a return injury to counter the injury caused by the other is forbidden, and the injured must mitigate his or her damages not to cause harm to the injurer.[102] While this saying did not concentrate on contractual duties, it did constitute a general duty not to harm or counter harm; one could link the idea to the duty to mitigate.

The answer is not simple. Islamic law is not limited in the area of contracts. Moreover, laws are the products of culture and economic needs.[103] When new

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Islamic law 'are the benefits intended by the law. Thus, one who keeps legal form while squandering its substance does not follow the law.'

100 K. Zweigert and H. Kotz, *Introduction to Comparative Law* (Oxford: Clarendon Press, 1998) (translated from German by Tony Weir) at 305.

101 'Muwatta- Malik Judgements, Book 36, Hadith 31', Retrieved 1 August 2021 https://sunnah.com/search?q=%D9%84%D8%A7+%D8%B6%D8%B1%D8%B1+%D9%88%D9%84%D8%A7+%D8%B6%D8%B1%D8%A7%D8%B1.

102 R. H. Husain, 'The Role of the Plaintiff in Mitigating the Damage in Light of the Civil Liability: A Comparative Study', (Al-Halbi Legal Publishing, 2014) 65–66.

103 M. H. Al-Kaabi, 'Is It Possible to Introduce Efficient Breach Theory to a Civil Law Country? The Case of Qatar', *Arab Law Quarterly* (2020). doi: 10.1163/15730255-BJA10025, at 18

laws are economically beneficial and no one is harmed, they must be adopted. Legal norms anywhere in the world prescribe a legal consequence for realities. Since the Qatari legal system has features similar to any other civil law jurisdiction and Islamic law has no barriers to adopting any economic theory, a mitigation doctrine should be introduced.

7 Conclusion and Recommendations

The duty to mitigate damages in contractual relationships is universally accepted. This duty was not ignored by the French classical writers whose work preceded the Civil Code.[104] Nevertheless, the principle that asserts that duty was not incorporated into the French Civil Code, perhaps because the corresponding doctrine was not sufficiently developed when the French codification movement started. In common law, on the other hand, the principle of mitigation has long had an independent life of its own.[105] Moreover, international arbitration and conventions have recognized this duty. Therefore, one could conclude that the duty to mitigate is a universally accepted principle of contract law requiring that each party exert reasonable efforts to minimize losses whenever intervening events impede contractual objectives. Law and economics logic support the introduction of the doctrine of mitigation. The contract breaker invokes the failure to mitigate as a defence to reduce the damages that he or she is otherwise liable for rather than as an affirmative right of action. Thus, the inability to mitigate disables the injured party from recovering avoidable losses.[106] Standard mitigation rules motivate and optimally reduce losses.

This article proposes to include mitigation as an obligation for the injured party. One must understand first that the doctrine of mitigation confirms this cost-minimizing conception of the mitigation principle, requiring a mitigator to bear the risk of his or her failure to minimize losses. It denies a mitigator recovery for losses that he or she unreasonably failed to avoid.[107] The doctrine imposes on an injured party the need to exercise reasonable diligence and ordinary care in attempting to mitigate damages after an injury has been inflicted.

The proposed modification is to add this article in Book 1, obligation in general, of QCC Art. 263/2. The current article states as follows: 'Indemnity shall

104 Litvinoff, 'Damages, Mitigation, and Good Faith' (n 33) 1166.
105 *Ibid*, at 1194.
106 Goetz and Scott, 'The Mitigation Principle' (n 6) 967.
107 *Ibid*, at 973.

cover damages incurred by the obligee, including loss of profit, provided that such damages or loss of profit are a natural consequence of the obligor's failure or delay to perform the obligation. Damages shall be deemed consequential if they were reasonably foreseeable or within the contemplation of the parties at the time of the conclusion of the contract.' In addition, the new modification is to add the following: 'the injured party is obliged to keep the damages suffered as low as reasonably possible.' In sum, it will be a fundamental principle of contract law that the aggrieved party must take reasonable steps to mitigate its loss after a breach by another party.

However, an over-generalization of that conclusion may run counter to the clear principles of public policy that underlie the theory of stipulated damages, as discussed elsewhere. Clear rules of obligation are potentially incompatible with a sufficiently adaptive set of mitigation responsibilities. Furthermore, the goal of any rulemaking strategy includes minimizing the evasion problems produced by an ambiguous obligation rule and reducing readjustment costs.[108] These clear rules should extend to sales, leases, insurance, and other contracts mentioned in the QCC. For example, the mitigation responsibility for the lessor, when the tenant leaves before the end of the contract, is to look for another tenant. The tenant who abandons the property must be responsible for the rent when the lessor is looking for another tenant.

Likewise, Art. 707/2 of the QCC states as follows: 'The court may reduce the indemnity payable for the profit missed by the contractor if the circumstances make such a reduction fair. In particular, the court shall reduce such indemnity to the extent of the costs saved by the contractor due to the withdrawal from the contract by the other party and the profit made by the contractor by applying such time to other work.' This is a clear mitigation requirement for the contractor in construction contracts.

To understand the application of Art. 707/2, assume further that the contractor builder begins constructing a house but that the owner wrongfully cancels the contract before the contractor has finished construction. If the builder would sue the owner to recover the unpaid portion of the contract price, a court may reduce the amount of compensation that the contractor recovers if he does not avoid additional loss. For example, the builder could use the materials in another job or sell the materials already purchased for the job. The savings or profits that the contractor realizes will be deducted from the loss incurred on the contract in computing the contractor's net recovery in court. Here, the constructor reallocated his or her rights and duties, which became inefficient because of the breach event. Moreover, as the market for

108 *Ibid*, at 994–995.

substitute performances thins, the opportunity cost of an alternative performance increases for both parties, and the bargaining range is correspondingly expanded. As a result, strategies for cost minimization become more varied.[109]

Establishing a general standard of obligation and mitigation responsibilities can minimize any waste cost.[110] The rule that an obligee makes reasonable efforts to mitigate damages is based on a policy of discouraging unnecessary waste. A natural consequence of this general rule is that an obligee, who in the course of making such efforts has incurred expense or suffered additional loss, is allowed to recover such cost or loss from the one who caused the damage.[111] First, however, there must be clear rules to identify the circumstances where mitigation is required by the injured party to deal with the contract breaker. Recognizing that each party's mitigation responsibility is inextricably linked to the performance obligation of his or her contracting partner is the critical step in fitting the mitigation principle into a general theory of contractual obligation.[112] The contract breacher invokes the failure to mitigate as a defence to reduce the damages that he or she is otherwise liable for rather than as an affirmative right of action. Thus, the inability to mitigate disables the injured party from recovering avoidable losses. However, standard mitigation rules provide motivation and optimally reduce losses.

109 *Ibid*, at 984.
110 *Ibid*.
111 Litvinoff, 'Damages, Mitigation, and Good Faith' (n 33) 1189.
112 Goetz and Scott, 'The Mitigation Principle' (n 6) 968.