

Artificial Intelligence and Contractual Remedies: Challenges for English Commercial Contract Law

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Abstract

Autonomous artificial intelligence (AI) systems increasingly negotiate, form and perform commercial contracts, acting with a degree of independent judgment that their deployers neither direct in detail nor reliably foresee. Existing scholarship has concentrated on the front end of this phenomenon — whether a contract is formed through an AI agent and to whom its acts are attributed. The remedial consequences of an autonomous breach have received comparatively little attention. This article examines the adequacy of English contractual remedies for loss caused by autonomous AI systems in business-to-business commercial contracts. Employing a doctrinal methodology grounded in case law, statute and contemporary legal literature, it argues that the principal remedial doctrines — the expectation measure, remoteness, causation, mitigation, the quantification of loss, agreed remedies and coercive relief — rest on assumptions of human foreseeability, human causal agency and human control that autonomous systems unsettle. It contends that these doctrines can largely accommodate autonomous breach, but only through a deliberate reorientation toward an assumption-of-responsibility analysis of remoteness and causation, supported by clearer treatment of agreed remedies and by the vindicatory dimension of contractual damages. It concludes that targeted doctrinal adaptation, rather than a bespoke statutory AI-liability regime, offers the most coherent route to certainty, fairness and commercial predictability.

Keywords: artificial intelligence; autonomous agents; contractual remedies; remoteness; damages; assumption of responsibility; English commercial law.

Introduction

It is a commonplace of commercial life that machines now do more than record and transmit the intentions of the humans who deploy them. A new generation of artificial intelligence systems — described, with some imprecision, as "agentic" — no longer merely executes fixed instructions but exercises a form of practical judgment, selecting means and outcomes that its principals did not specify and often could not have predicted.¹ Such systems already negotiate prices, place and accept orders, allocate inventory, execute trades and manage the performance of continuing commercial relationships. Their spread is not speculative, and the regulatory response has moved with it, the European Union having enacted a comprehensive statute for artificial intelligence and

¹For analysis of agentic and algorithmic contracting in the common-law context, see Martin Ebers, Cristina Poncibò and Mimi Zou (eds), *Contracting and Contract Law in the Age of Artificial Intelligence* (Hart 2022).

several jurisdictions having begun to legislate directly for the accountability of autonomous systems.²

The legal literature has responded to this development largely at the point of contract formation. A rich body of scholarship asks whether an autonomous system can make an offer or an acceptance, whether the objective theory of agreement can accommodate a machine that manifests assent without contemporaneous human intention, and to whom the acts of such a system are to be attributed.³⁴⁵ English law has thus far answered these questions by treating the software as a "mere tool" whose outputs are attributed to the human or corporate principal through the ordinary principles of agency and objective interpretation.⁶⁷ Yet a focus on formation leaves a prior practical question comparatively unexamined: once it is accepted that a commercial contract has been made and that an autonomous system has, in breach, caused loss, what remedy does English law provide, and does that remedy operate coherently where the immediate author of the loss is a machine exercising independent judgment?

This article addresses that question. Its central claim is that the English law of contractual remedies is built upon three assumptions that autonomous artificial intelligence unsettles: an assumption of human foreseeability, which fixes the reach of recoverable loss by reference to what the parties contemplated; an assumption of human causal agency, which presupposes that the chain between breach and loss runs through human choices; and an assumption of human control, which underlies the availability of coercive and agreed remedies. Where the operative actor is a non-deterministic system, each assumption is placed under strain at the very point where the law measures and enforces the remedial response. The discharge of contracts by frustration, which raises related but distinct questions, is not pursued here.⁸⁹¹⁰

The argument is deliberately moderate. It is not contended that autonomous AI requires the wholesale reconstruction of contractual remedies, nor that a discrete statutory regime of AI liability is the answer. The claim is that the existing doctrines can accommodate autonomous breach, but only if the courts reorient their analysis: by resolving remoteness through the assumption-of-responsibility approach of the modern authorities; by treating the autonomous act of a deployed system as within, rather than breaking, the chain of causation attributable to its principal; and by recognising the vindicatory dimension of contractual damages as a residual guaran-

²Regulation (EU) 2024/1689 of the European Parliament and of the Council of 13 June 2024 laying down harmonised rules on artificial intelligence (Artificial Intelligence Act) [2024] OJ L1689/1. For the United Kingdom's contrasting approach, see Department for Science, Innovation and Technology, *A Pro-Innovation Approach to AI Regulation* (White Paper, CP 815, 2023).

³eg Lauren Henry Scholz, 'Algorithmic Contracts' (2017) 20 Stan Tech L Rev 128.

⁴Tom Allen and Robin Widdison, 'Can Computers Make Contracts?' (1996) 9 Harv JL & Tech 25.

⁵Shawn Bayern, 'The Implications of Modern Business-Entity Law for the Regulation of Autonomous Systems' (2016) 7 EJRR 297.

⁶On attribution through agency, see *Freeman & Lockyer v Buckhurst Park Properties (Mangal) Ltd* [1964] 2 QB 480 (CA).

⁷and, on the assimilation of automated dealing to the acts of the deploying party, *Thornton v Shoe Lane Parking Ltd* [1971] 2 QB 163 (CA).

⁸The distinct doctrine of frustration, which discharges rather than sounds in damages, lies outside the scope of this article: see *Davis Contractors Ltd v Fareham UDC* [1956] AC 696 (HL).

⁹GH Treitel, *Frustration and Force Majeure* (3rd edn, Sweet & Maxwell 2014).

¹⁰and, on supervening disruption, Ahmad Hussein Alsharqawi and others, 'Red Sea Crisis and the Problem of Frustrated Contracts' (2026) 14(1) Malaysian Journal of Syariah and Law 126.

tee of the performance right. Agreed remedies — liquidated damages, exclusion and limitation clauses, and indemnities — will bear much of the practical weight.

The methodology is doctrinal, proceeding by close analysis of the leading English authorities read against the statutory framework of the Unfair Contract Terms Act 1977 and the emerging regulatory architecture, and informed by contemporary scholarship on contractual remedies and algorithmic contracting.¹¹¹²¹³ The focus is confined to English law; to business-to-business commercial contracts, the consumer regime being left aside; and to remedies for breach, taking the existence of a breach and its attribution as given. "Autonomous" denotes systems that exercise genuine, non-deterministic judgment, as distinct from deterministic automation. Part 2 sets out the remedial framework; Part 3 explains why autonomous systems strain it; Parts 4 to 9 examine remoteness, causation, mitigation, quantification, agreed remedies and coercive relief; Part 10 develops the vindicatory analysis; Part 11 sets out the case for targeted reform; and Part 12 concludes.

The Remedial Framework of English Commercial Contract Law

The performance right and the expectation measure

The organising principle of English contractual remedies is that a party acquires a legal right to performance and, correlatively, assumes an enforceable obligation to perform.¹⁴¹⁵ The primary judicial response to breach is not an order to perform but an award of damages, measured by the object of protecting the innocent party's expectation. The classic statement remains that of Parke B in *Robinson v Harman*: the innocent party is, so far as money can do it, to be placed in the same position as if the contract had been performed.¹⁶¹⁷ This distinguishes contractual from tortious damages, which restore the claimant to the position occupied before the wrong.¹⁸ As Pearce and Halson argue, the primacy of the expectation measure reveals that compensation in contract is a means to an end — the vindication of the right to performance — rather than an end in itself.¹⁹²⁰ That the expectation measure protects a normative rather than a merely factual interest was famously observed by Fuller and Perdue.²¹

¹¹On doctrinal legal method, see generally the treatises relied on throughout: Edwin Peel, *Treitel on the Law of Contract* (15th edn, Sweet & Maxwell 2020).

¹²Hugh Beale (ed), *Chitty on Contracts* (34th edn, Sweet & Maxwell 2021).

¹³Andrew Burrows, *Remedies for Torts, Breach of Contract, and Equitable Wrongs* (4th edn, OUP 2019).

¹⁴On the right to performance as the organising idea of contractual remedies, see Daniel Friedmann, 'The Performance Interest in Contract Damages' (1995) 111 LQR 628.

¹⁵Solène Rowan, *Remedies for Breach of Contract: A Comparative Analysis of the Protection of Performance* (OUP 2012).

¹⁶*Robinson v Harman* (1848) 1 Exch 850, 855 (Parke B).

¹⁷reaffirmed in *Golden Strait Corp v Nippon Yusen Kubishika Kaisha (The Golden Victory)* [2007] UKHL 12, [2007] 2 AC 353.

¹⁸Contrast the tortious measure: *Livingstone v Rawyards Coal Co* (1880) 5 App Cas 25, 39 (Lord Blackburn).

¹⁹David Pearce and Roger Halson, 'Damages for Breach of Contract: Compensation, Restitution, and Vindication' (2008) 28 OJLS 73.

²⁰Charlie Webb, 'Performance and Compensation: An Analysis of Contract Damages and Contractual Obligation' (2006) 26 OJLS 41.

²¹The terminology derives from LL Fuller and WR Perdue, 'The Reliance Interest in Contract Damages' (1936) 46 Yale LJ 52.

The expectation measure is realised through two conventional heads. Normal loss is the loss that every claimant in a like situation would suffer, generally measured by the difference in market value between the performance promised and the performance rendered; consequential loss is loss special to the particular claimant, recoverable only so far as it is not too remote.²² Where expectation loss cannot be established, the reliance measure offers an alternative.^{23,24,25} The distinction matters here because the harms produced by AI systems frequently fall outside the ordinary market measure — an agent that concludes disadvantageous transactions, misprices at scale, or fails to detect a developing loss generates consequential rather than normal loss, and it is upon consequential loss that the limiting doctrines of remoteness and causation bite.

The limiting doctrines: remoteness, causation and mitigation

Three doctrines constrain the recovery of expectation loss. The first is remoteness. Since *Hadley v Baxendale*, recoverable loss has been confined to loss arising naturally from the breach and to loss that, though not arising naturally, was in the reasonable contemplation of both parties at the time of contracting.²⁶ The threshold was refined in *The Heron II*, which required that the loss be a "not unlikely" consequence, a higher standard than the "reasonable foreseeability" test of tort.^{27,28} The proper juristic basis of the rule is much debated.^{29,30,31} More recently, *The Achilles* introduced a further dimension: whether, on a proper construction of the contract and its commercial context, the defendant had assumed responsibility for the type of loss claimed.³² The relationship between the contemplation test and this assumption-of-responsibility approach remains contested.^{33,34,35}

The second doctrine is causation. The claimant must show that the breach was the effective or dominant cause of the loss, not merely the occasion for it.³⁶ A related limitation confines recov-

²²On the distinction between normal and consequential loss, see James Edelman, *McGregor on Damages* (21st edn, Sweet & Maxwell 2021) ch 3.

²³The reliance measure is an alternative where expectation loss cannot be proved: *Anglia Television Ltd v Reed* [1972] 1 QB 60 (CA).

²⁴*CCC Films (London) Ltd v Impact Quadrant Films Ltd* [1985] QB 16.

²⁵*Omak Maritime Ltd v Mamola Challenger Shipping Co (The Mamola Challenger)* [2010] EWHC 2026 (Comm), [2011] 1 Lloyd's Rep 47.

²⁶*Hadley v Baxendale* (1854) 9 Exch 341.

²⁷*Koufos v C Czarnikow Ltd (The Heron II)* [1969] 1 AC 350 (HL).

²⁸*Victoria Laundry (Windsor) Ltd v Newman Industries Ltd* [1949] 2 KB 528 (CA).

²⁹The modern debate is canvassed in Andrew Robertson, 'The Basis of the Remoteness Rule in Contract' (2008) 28 Legal Studies 172.

³⁰Adam Kramer, 'An Agreement-Centred Approach to Remoteness and Contract Damages' in Nili Cohen and Ewan McKendrick (eds), *Comparative Remedies for Breach of Contract* (Hart 2005) 249.

³¹Andrew Tettenborn, 'Hadley v Baxendale Foreseeability: A Principle Beyond Its Sell-by Date?' (2007) 23 JCL 120.

³²*Transfield Shipping Inc v Mercator Shipping Inc (The Achilles)* [2008] UKHL 48, [2009] 1 AC 61.

³³For competing readings, see David McLauchlan, 'Remoteness Re-invented?' (2009) 9 OUCJLJ 109.

³⁴Edwin Peel, 'Remoteness Revisited' (2009) 125 LQR 6.

³⁵John Cartwright, 'Remoteness of Damage in Contract and Tort: A Reconsideration' (1996) 55 CLJ 488.

³⁶*Galoo Ltd v Bright Grahame Murray* [1994] 1 WLR 1360 (CA).

ery to loss falling within the scope of the duty undertaken.³⁷³⁸ Where an event intervenes between breach and loss, the question is whether it constitutes a *novus actus interveniens*; the doctrine is framed around human and natural intervening events, and is silent as to how an autonomous machine's independent act is to be classified. The third doctrine is mitigation: the innocent party cannot recover for loss it could reasonably have avoided, and benefits obtained in reasonable mitigation are brought into account.³⁹⁴⁰

Agreed and coercive remedies

Beyond the default measure, English law permits parties to shape their own remedial regime and, exceptionally, compels performance. Parties may stipulate the sum payable on breach, enforceable unless it offends the penalty rule reformulated in *Cavendish Square Holding BV v Makdessi*.⁴¹⁴² The doctrinal controversies surrounding agreed and gain-based remedies are extensively canvassed in the literature.⁴³ Parties may also exclude or limit liability, subject in commercial contracts to the reasonableness control of the Unfair Contract Terms Act 1977 and to strict construction.⁴⁴⁴⁵ A serious breach may additionally entitle the innocent party to terminate.⁴⁶⁴⁷ Coercive relief remains exceptional; equity has historically declined to compel performance requiring its constant supervision, as reaffirmed in *Co-operative Insurance Society Ltd v Argyll Stores (Holdings) Ltd*.⁴⁸ Each mechanism carries assumptions about a human obligor capable of being deterred, supervised or held to a bargain.

The Autonomy Problem: Why Artificial Intelligence Strains the Framework

English law has long assimilated computerised dealing to the "mere tool" analysis. Where a vending machine, an electronic trading platform or a deterministic algorithm concludes a transaction, its behaviour is the predictable product of rules laid down by its deployer, and attributing its outputs to that deployer does no violence to the concepts of intention and control on which the ordinary rules depend. The Law Commission, in its 2021 advice on smart legal contracts, pro-

³⁷ Compare the 'scope of duty' limitation: *South Australia Asset Management Corp v York Montague Ltd* [1997] AC 191 (HL).

³⁸ *Manchester Building Society v Grant Thornton UK LLP* [2021] UKSC 20, [2022] AC 783.

³⁹ *British Westinghouse Electric and Manufacturing Co Ltd v Underground Electric Railways Co of London Ltd* [1912] AC 673 (HL).

⁴⁰ *Payzu Ltd v Saunders* [1919] 2 KB 581 (CA).

⁴¹ *Cavendish Square Holding BV v Makdessi*.

⁴² *ParkingEye Ltd v Beavis* [2015] UKSC 67, [2016] AC 1172, *refining* *Dunlop Pneumatic Tyre Co Ltd v New Garage and Motor Co Ltd** [1915] AC 79 (HL).

⁴³ See further the essays in Sarah Worthington and Graham Virgo (eds), *Commercial Remedies: Resolving Controversies* (CUP 2017).

⁴⁴ On the reasonableness control, *George Mitchell (Chesterhall) Ltd v Finney Lock Seeds Ltd* [1983] 2 AC 803 (HL).

⁴⁵ On freedom to allocate commercial risk, *Photo Production Ltd v Securicor Transport Ltd* [1980] AC 827 (HL).

⁴⁶ Termination for repudiatory or sufficiently serious breach forms part of the same remedial regime: *Hong Kong Fir Shipping Co Ltd v Kawasaki Kisen Kaisha Ltd* [1962] 2 QB 26 (CA).

⁴⁷ *Bunge Corp v Tradax Export SA* [1981] 1 WLR 711 (HL).

⁴⁸ *Co-operative Insurance Society Ltd v Argyll Stores (Holdings) Ltd* [1998] AC 1 (HL).

ceeded on the footing that existing principles could generally accommodate automated performance, subject to clarification at the margins.⁴⁹⁵⁰

Autonomous systems disturb this settled picture. A system that learns from data and selects strategies not specified in advance may produce outcomes that its designers neither intended nor foresaw, and that could not have been derived from its instructions by any process available to the deployer at the time of contracting.⁵¹ The strain is already visible where courts must attribute states of mind such as knowledge or mistake to conduct executed by a trading program.⁵² Commentators observe that where instructions to an algorithmic agent are open-ended, they may not amount to the objectively manifested intention the law requires, and that the agency framework is an uneasy fit for systems that act independently of contemporaneous human direction.⁵³ The "tool" is beginning to behave less like an instrument and more like an actor.

For the law of remedies, the significance of autonomy lies in three concrete disturbances. First, autonomy attenuates foreseeability: where a system's outputs are, by design, imperfectly predictable, the question of what loss was within the parties' contemplation cannot be answered by reference to the deployer's actual anticipation of the specific outcome. Second, autonomy complicates causation: the independent act of a system that intervenes between a party's breach and the resulting loss invites the argument that the machine's act was a *novus actus* relieving the deployer of responsibility for the very risk that autonomous deployment creates. Third, autonomy strains control: a remedy premised on inducing or supervising performance must reckon with an obligor whose performance is executed by a system that neither responds to deterrence nor lends itself to constant judicial supervision.

It is useful to distinguish several patterns of autonomous breach. The first is the erroneous transaction: an agent concludes a bargain on terms disadvantageous to, or unauthorised by, its principal. The second is the misperformance at scale: an agent applies an erroneous parameter across many transactions before the error is detected. The third is the latent accumulation: an agent generates loss continuously and without immediate visibility, so that the loss matures before any human can respond. The fourth is the hallucinated term or fact: an agent generates plausible but false content on which the counterparty or principal relies. Each engages the limiting doctrines differently.

Remoteness and the Foreseeability of Autonomous Loss

Remoteness is the doctrine most obviously destabilised by autonomy, because it fixes the reach of liability by reference to what was contemplated, and autonomy is defined by the incompleteness of contemplation. Under the second limb of *Hadley*, as refined in *The Heron II*, a loss special to the claimant is recoverable only if it was a not-unlikely consequence within the reasonable

⁴⁹Law Commission, *Smart Legal Contracts: Advice to Government* (2021).

⁵⁰and, earlier, UK Jurisdiction Taskforce, *Legal Statement on Cryptoassets and Smart Contracts* (2019).

⁵¹On the legal uncertainty created by systems producing results no human authorised, see Ebers, Poncibò and Zou (n 1); Scholz (n 3).

⁵²The difficulty is illustrated by the algorithmic-trading dispute in *B2C2 Ltd v Quoine Pte Ltd* [2019] SGHC(I) 03, affd *Quoine Pte Ltd v B2C2 Ltd* [2020] SGCA(I) 02, where the court had to attribute knowledge and mistake to conduct executed by a deterministic trading program.

⁵³See Scholz (n 3); and, on the limits of the agency analogy for autonomous systems, Bayern (n 3).

contemplation of both parties.⁵⁴ A literal application produces an unattractive dilemma. If the enquiry asks whether the parties contemplated the specific outcome the system produced, the answer will frequently be no, precisely because the system was deployed to generate outcomes not specified in advance; autonomous losses would then be systematically irrecoverable, and the party best placed to control the system would bear none of the risk of its independence. If the enquiry is relaxed to ask only whether some loss of the general kind might occur, the limiting function of remoteness is hollowed out.

Neither horn is acceptable, and the escape lies in the reference point of the contemplation enquiry. The relevant question is not whether the parties foresaw the particular output, but whether loss of the *type* in issue was a not-unlikely incident of the manner of performance agreed. A party that contracts to perform through an autonomous system contemplates that the system will act with a degree of independence and will occasionally produce adverse and unpredictable results of a kind characteristic of such systems.⁵⁵ On this analysis, the erroneous transaction and the misperformance at scale are ordinarily within contemplation as types of loss. The unpredictability of the particular outcome does not defeat recovery, any more than the unpredictability of the precise market movement defeated recovery of ordinary market-measure losses in the classic authorities.⁵⁶

The assumption-of-responsibility approach of *The Achilleas* supplies the more principled articulation.⁵⁷ On that approach, the remoteness enquiry is an exercise in construing the parties' allocation of risk: the defendant is liable for loss of a type only if, on a proper reading of the contract in its commercial setting, it may be taken to have assumed responsibility for that type. A deployer who offers to perform through an autonomous system, and who alone controls its configuration, training and operational limits, may readily be taken to have assumed responsibility for the characteristic risks of that mode of performance. The approach thus converts the intractable question "did the parties foresee this output?" into the answerable question "for which category of autonomous risk did each party undertake to answer?"

Two qualifications follow. First, the analysis is sensitive to disclosure: a deployer who conceals the extent of a system's autonomy cannot complain if the assumption of responsibility is construed against it, while a counterparty who demands performance through an experimental system with knowledge of its volatility may be taken to have accepted a wider range of loss.⁵⁸ Second, the analysis reinforces the value of express allocation. Where the parties have specified which categories of autonomous loss lie with which party, the enquiry is answered by the instrument itself — a point of practical importance to which Part 8 returns.

⁵⁴ *Hadley* (n 26); *The Heron II* (n 27).

⁵⁵ This reflects the 'implicit allocation of risk' account defended in Robertson (n 29) and Kramer (n 29).

⁵⁶ As market volatility did not defeat recovery of the ordinary measure: *The Heron II* (n 27); *The Golden Victory* (n 16).

⁵⁷ *The Achilleas* (n 32), especially the assumption-of-responsibility reasoning of Lord Hoffmann; and see Peel (n 33).

⁵⁸ The relevance of what was communicated at formation is the second limb of *Hadley* (n 26); see also *Simpson v London and North Western Railway Co* (1876) 1 QBD 274.

Causation and the Intervening Machine

Causation determines whether a given loss is to be laid at the door of the breach at all. Consider the latent accumulation pattern: a deployer breaches an obligation to supervise, to impose operational limits, or to validate outputs, and an autonomous system, operating within the space left by that breach, generates loss through its own independent action. The contract-breaker may argue that the effective cause was not its omission but the intervening, unforeseeable act of the machine — a *novus actus interveniens* confining its liability to nominal damages.⁵⁹⁶⁰

The argument should generally fail. The intervening-act doctrine relieves a defendant only where the intervening event is truly independent of, and not the very risk created by, the breach. Where a party's breach consists precisely in failing to constrain or supervise an autonomous system, the system's independent action is not an extraneous intervention but the realisation of the risk against which the obligation was directed. To treat the machine's autonomy as breaking the chain would be to allow the deployer to invoke the independence of its own instrument as a shield against liability for failing to control that very independence — a result the law of causation should not countenance.⁶¹ The autonomous act is the occasion through which the breach produces its effect, not a competing dominant cause.

This conclusion is fortified by developments in cognate fields. Legislatures alert to the same evasion have begun to foreclose it directly, and regulators increasingly insist that those who deploy autonomous systems must govern, monitor and answer for what those systems do.⁶² These reflect a converging policy judgment that the deployer should not disclaim the characteristic consequences of deployment by pointing to the system's independence. English causation doctrine can reach the same destination without statutory intervention, by treating the deployed system's act as attributable to the party who put it to work. The position differs where the intervening actor is a third party's system, or where the loss results from a genuinely external event the system merely failed to avert; there the ordinary analysis, and the scope-of-duty limitation, apply unaltered.⁶³

Mitigation at Machine Speed

The duty to mitigate requires the innocent party to take reasonable steps to reduce its loss and denies recovery for loss such steps would have avoided; the standard is undemanding, and the burden of proving a failure to mitigate rests on the contract-breaker.⁶⁴ The party is not obliged to take unreasonable measures, but may not recover avoidable loss.⁶⁵ The doctrine nonetheless embeds a temporal assumption: that the innocent party can perceive the loss as it arises and respond meaningfully. Two of the autonomous patterns disturb this assumption.

⁵⁹On intervening acts, see *Lambert v Lewis* [1982] AC 225 (HL).

⁶⁰*Borealis AB v Geogas Trading SA* [2010] EWHC 2789 (Comm), [2011] 1 Lloyd's Rep 482.

⁶¹*Galoo* (n 36); the breach must be the effective, not merely a 'but for', cause.

⁶²For a recent statutory example precluding reliance on autonomous AI action as a defence to liability (the 'an AI did it' defence), see the 2026 California legislation; and, more broadly, regulatory guidance requiring deployers to govern and monitor autonomous systems, consistent with the deployer-responsibility premise of the Artificial Intelligence Act (n 2).

⁶³The external-event analysis parallels the 'scope of duty' cases (n 37).

⁶⁴*British Westinghouse* (n 39); the standard is reasonableness, not perfection: *Pilkington v Wood* [1953] Ch 770.

⁶⁵The claimant need not take unreasonable steps, but may not recover avoidable loss: *Sotiros Shipping Inc v Sameiet Solholt (The Solholt)* [1983] 1 Lloyd's Rep 605 (CA).

In the misperformance-at-scale and latent-accumulation patterns, a system may generate loss at a velocity and with an opacity that outpace human perception. Whether the innocent party's failure to detect and arrest the loss is a failure to mitigate should be answered in the negative, provided its monitoring arrangements were reasonable: mitigation asks what steps were reasonable once the party knew or ought to have known of the loss, not whether it maintained perfect surveillance.⁶⁶ The reasonableness of monitoring will, however, be judged against evolving commercial and regulatory expectations. A subtler point concerns the party in breach: where the breach lies in the deployer's own failure to build in detection or circuit-breakers, the deployer can hardly complain that the innocent party failed to arrest a loss its own omission rendered undetectable. The practically decisive questions of loss-avoidance will therefore turn less on the general mitigation doctrine than on the allocation of monitoring obligations — and, where the innocent party elects to keep an autonomous arrangement alive, on the limits of that election.⁶⁷

Quantification and the Expectation Interest

Even where loss is neither too remote nor causally severed, its quantification may prove problematic. The general measures of normal loss are the difference in value and, in appropriate cases, the cost of cure. In *Ruxley Electronics and Construction Ltd v Forsyth*, the House of Lords declined to award the cost of rebuilding a pool constructed to a lesser depth than specified, where that cost was wholly disproportionate, and awarded instead a modest sum for loss of amenity.⁶⁸ *Ruxley* establishes that neither diminution in value nor cost of cure exhausts the law's response,⁶⁹⁷⁰ and recognises, in the consumer surplus, that the value of performance may exceed the market measure.⁷¹⁷² The law's willingness to compensate non-pecuniary and amenity interests reinforces the point.⁷³⁷⁴⁷⁵⁷⁶

Autonomous breach engages both points. Where an agent concludes a disadvantageous bargain, the loss may be measurable by ordinary market comparison. But where the value proper performance would have secured is not reducible to a market difference — because the bargain was configured to serve a bespoke objective, or because the harm consists in the disruption of a continuing relationship — the court may be driven to the evaluative, performance-focused award sanctioned in *Ruxley*.⁷⁷⁷⁸ The autonomous setting thus increases the incidence of cases in which

⁶⁶See Michael Bridge, 'Mitigation of Damages in Contract and the Meaning of Avoidable Loss' (1989) 105 LQR 398.

⁶⁷On the innocent party's election, see *White & Carter (Councils) Ltd v McGregor* [1962] AC 413 (HL).

⁶⁸*Ruxley Electronics and Construction Ltd v Forsyth* [1996] AC 344 (HL).

⁶⁹On cost of cure versus diminution in value, see *Radford v De Froberville* [1977] 1 WLR 1262.

⁷⁰and, comparatively, *Tabcorp Holdings Ltd v Bowen Investments Pty Ltd* [2009] HCA 8, (2009) 236 CLR 272.

⁷¹The 'consumer surplus' was theorised in DW Harris, AI Ogus and J Phillips, 'Contract Remedies and the Consumer Surplus' (1979) 95 LQR 581.

⁷²Brian Coote, 'Contract Damages, Ruxley, and the Performance Interest' (1997) 56 CLJ 537.

⁷³On non-pecuniary loss and loss of amenity, see *Farley v Skinner* [2001] UKHL 49, [2002] 2 AC 732.

⁷⁴*Watts v Morrow* [1991] 1 WLR 1421 (CA).

⁷⁵*Jarvis v Swans Tours Ltd* [1973] QB 233 (CA).

⁷⁶*Addis v Gramophone Co Ltd* [1909] AC 488 (HL).

⁷⁷Compare the third-party and relational-loss problems in *Alfred McAlpine Construction Ltd v Panatown Ltd* [2001] 1 AC 518 (HL).

⁷⁸Brian Coote, 'The Performance Interest, Panatown, and the Problem of Loss' (2001) 117 LQR 81.

the conventional measures are inapt. A further difficulty concerns the date and contingency of assessment, where supervening events bear on the counterfactual.⁷⁹

A distinct difficulty concerns proof. The outputs of complex machine-learning systems are frequently difficult to reconstruct and explain, and establishing the counterfactual may require expert evidence of a novel character. English law tolerates a measure of imprecision, particularly where the difficulty of proof is itself the product of the defendant's wrong, and is familiar with valuing a lost chance.⁸⁰⁸¹ But the practical burden will fall heavily in autonomous cases, reinforcing the desirability of contractual mechanisms — audit rights, logging and traceability obligations — that render the system's conduct reconstructable after the event.⁸²

Agreed Remedies and the Allocation of Autonomous Risk

Because the default doctrines resolve autonomous breach only through contestable, fact-sensitive enquiries, commercial parties will rationally seek to displace them, and English law respects their freedom to allocate risk as they see fit. Three mechanisms warrant attention. The first is the liquidated damages clause, which converts the indeterminate question of loss into a fixed and predictable liability, enforceable provided it does not offend the penalty rule.⁸³ The parties' very difficulty in predicting the loss an autonomous system might cause is a reason to respect their agreed pre-estimate.⁸⁴

The second mechanism is the exclusion or limitation clause, subject in commercial contracts to the reasonableness control of the Unfair Contract Terms Act 1977 and to strict construction against the party relying on it.⁸⁵ The reasonableness enquiry — which considers the parties' relative bargaining power, the availability of insurance and the practical difficulty of the task — is well suited to the autonomous context.⁸⁶ A clause leaving the innocent party without meaningful recourse for serious autonomous misperformance, in a relationship of unequal power where the deployer alone could insure against or control the risk, is vulnerable; a mutually negotiated cap between sophisticated parties is not.

The third mechanism is the indemnity, apt where the parties wish to allocate the risk of third-party claims arising from autonomous action, and which sidesteps several default-law difficulties by fixing liability without reference to remoteness or mitigation. The emergence of model contractual clauses for AI systems reflects a market response to these needs, though the standardised allocations they embody require scrutiny, since a clause that purports to allocate risk fairly may in practice shift it onto the party least able to bear it.⁸⁷⁸⁸ That the private-law consequences of AI

⁷⁹On the date of assessment and supervening events, see *The Golden Victory* (n 16).

⁸⁰On the value of a lost chance, see *Chaplin v Hicks* [1911] 2 KB 786 (CA).

⁸¹*Allied Maples Group Ltd v Simmons & Simmons* [1995] 1 WLR 1602 (CA).

⁸²On the toleration of imprecision where the wrong causes the difficulty of proof, see *Chaplin v Hicks* (n 80); Edelman (n 22) ch 10.

⁸³*Cavendish* (n 41); the test is whether the clause protects a legitimate interest and is not exorbitant.

⁸⁴On agreed damages as a risk-allocation device, see Burrows (n 11) ch 10.

⁸⁵Unfair Contract Terms Act 1977 (n <<ucta_scope>>); on strict construction, *Canada Steamship Lines Ltd v The King* [1952] AC 192 (PC); *Photo Production* (n 44).

⁸⁶The reasonableness factors are drawn from sch 2 to the 1977 Act and applied in *George Mitchell* (n 44).

⁸⁷eg the Society for Computers and Law AI Contractual Clauses.

breach have been left largely to existing frameworks, rather than displaced by a bespoke liability instrument, is itself significant.⁸⁹ A caution remains: agreed remedies presuppose that the parties anticipated the category of risk allocated, and the defining feature of autonomy is that some categories will not have been anticipated at all.

Coercive Remedies and the Supervision Objection

Where damages are inadequate, the innocent party may seek specific performance or an injunction. Coercive relief is exceptional: damages are presumed adequate, and equity has traditionally withheld an order requiring its constant supervision, as in *Argyll Stores*.⁹⁰ The autonomous context sharpens this objection. An order that a party perform through an autonomous system would require the court to supervise the conduct of a system whose behaviour is, by hypothesis, imperfectly predictable — an even less tractable undertaking than the supervision of a human course of conduct.^{91,92}

Specific performance will therefore rarely be apt for autonomous breach of a performance obligation, and the innocent party will ordinarily be confined to damages. Injunctive relief may nonetheless have a role, not in compelling autonomous performance but in restraining it: an order restraining a party from deploying a system in a defined manner, or requiring it to disable a system pending correction, is more readily supervised because it demands abstention or a discrete act. The distinction between prohibitory and mandatory relief thus reappears, counselling that the innocent party's coercive remedies will lie chiefly in the restraint of autonomous action rather than in its compulsion.⁹³

Vindication, the Performance Right and Autonomous Breach

The recurring theme of the preceding analysis is that autonomous breach produces, with unusual frequency, loss that the conventional measures cannot capture: loss real to the innocent party but resistant to expression as a diminution in market value, defeated by remoteness or causation, or disproportionate to any cost of cure. It is here that the vindicatory analysis of contractual damages offers a resource.⁹⁴ Its premise is that the object of contractual damages is the vindication of the right to performance, and that in a class of cases the courts award substantial damages although the claimant has suffered no loss in the conventional sense — damages that are neither compensatory nor restitutionary but rights-based.⁹⁵ That impulse is located in authorities such as

⁸⁸ the European Commission's model contractual clauses for the procurement of artificial intelligence.

⁸⁹ cf the (subsequently withdrawn) European Commission, Proposal for a Directive on adapting non-contractual civil liability rules to artificial intelligence (AI Liability Directive) COM(2022) 496 final, which addressed the tortious rather than the contractual dimension.

⁹⁰ *Argyll Stores* (n 48).

⁹¹ Specific performance remains exceptional and discretionary: *Beswick v Beswick* [1968] AC 58 (HL).

⁹² *Sky Petroleum Ltd v VIP Petroleum Ltd* [1974] 1 WLR 576.

⁹³ On the prohibitory/mandatory distinction, see *Doherty v Allman* (1878) 3 App Cas 709 (HL).

⁹⁴ Pearce and Halson (n 19).

⁹⁵ See Friedmann (n 14); Coote (n 71); Webb (n 19); Dori Kimel, *From Promise to Contract: Towards a Liberal Theory of Contract* (Hart 2003).

Ruxley, in the negotiating damages of *Wrotham Park*, and in the account of profits ordered in *Attorney General v Blake*.⁹⁶

The reading has since been refined. In *Morris-Garner v One Step (Support) Ltd*, the Supreme Court restated the basis of negotiating damages, confining them to cases in which the breach deprived the claimant of a valuable asset — typically a right, such as a restrictive covenant or a confidentiality obligation, whose economic value can be measured by the hypothetical fee the claimant might reasonably have charged to release it.⁹⁷ The decision curtails the generality of the principle but does not extinguish its relevance.⁹⁸⁹⁹ Two applications to autonomous breach follow. First, where an autonomous system infringes a defined right of the kind identified in *Morris-Garner* — for example, where an agent, in breach of a confidentiality restriction, exploits protected information — negotiating damages may value the right infringed rather than the loss consequentially suffered. Second, and more broadly, the vindictory conception of the expectation measure justifies the *Ruxley*-type award that Part 7 identified as increasingly necessary: where a system deprives the innocent party of a performance of real value, but diminution in value is nil and cost of cure disproportionate, an award reflecting the value of the performance right vindicates that right without straining the conventional meanings of loss and compensation.¹⁰⁰

It should not be supposed that vindictory or negotiating damages will be the ordinary response to autonomous breach; in the commercial setting, breach is an incident of business ordinarily met by the expectation measure, and the negotiating measure is, after *Morris-Garner*, confined.¹⁰¹ The point is narrower but important: the vindictory dimension supplies a doctrinally grounded answer to the residual cases in which autonomous systems generate value-destroying breaches the market measure cannot reach.

Toward a Coherent Remedial Response

English contractual remedies can accommodate autonomous artificial intelligence, but that accommodation is neither automatic nor cost-free. It depends on the courts making three related choices. The first is the adoption of the assumption-of-responsibility approach to remoteness, which asks not what specific output the parties foresaw but for which category of autonomous risk each party undertook to answer. The second is the treatment of the autonomous act of a deployed system as attributable to its principal for the purposes of causation, rather than as an intervening act that breaks the chain. The third is the recognition of the vindictory dimension of contractual damages as a residual guarantee of the performance right. These choices are evolutionary, not revolutionary: each builds on existing authority.

⁹⁶*Ruxley* (n 68); *Wrotham Park Estate Co Ltd v Parkside Homes Ltd* [1974] 1 WLR 798 (Ch); *Attorney General v Blake* [2001] 1 AC 268 (HL).

⁹⁷*Morris-Garner v One Step (Support) Ltd* [2018] UKSC 20, [2019] AC 649.

⁹⁸On negotiating (or ‘Wrotham Park’) damages, see RJ Sharpe and SM Waddams, ‘Damages for Lost Opportunity to Bargain’ (1982) 2 OJLS 290.

⁹⁹Katy Barnett, *Accounting for Profit for Breach of Contract: Theory and Practice* (Hart 2012).

¹⁰⁰The metaphor of the hollow right reflects the vindictory account in Pearce and Halson (n 19); and see Rowan (n 14).

¹⁰¹Breach in the commercial setting is ordinarily met by the expectation measure: *Photo Production* (n 44); *The Golden Victory* (n 16).

A reformer might ask whether a bespoke statutory regime of AI liability should displace the general law. The better view is that it should not. A specialised statute would risk freezing the law around a rapidly evolving technological configuration, would generate boundary disputes with the general law, and would substitute categorical rules for the flexible, context-sensitive allocation of risk that the common law and the Unfair Contract Terms Act 1977 already provide. The comparative material supports this restraint: the European Union addresses AI chiefly through public-law obligations on providers and deployers, leaving the private-law consequences of breach to existing frameworks, and its recent recalibration illustrates the difficulty of legislating durably for a moving target.¹⁰² Isolated statutory interventions elsewhere address discrete evasions rather than reconstructing the law of remedies.¹⁰³ English private law has repeatedly shown its capacity to absorb new phenomena without wholesale statutory reconstruction.¹⁰⁴

What is required instead is threefold and modest: judicial adoption of the three choices above as autonomous cases reach the courts; the development, by commercial parties and professional bodies, of well-drafted agreed-remedy regimes — liquidated damages, reasonable limitation clauses, indemnities, and audit and logging obligations — that displace the default doctrines in the common run of cases; and, in due course, a considered review by the Law Commission of any residual gaps.¹⁰⁵ This sequencing allows the law to develop incrementally, guided by concrete disputes rather than by speculation about technologies whose commercial forms are still emerging.

Conclusion

The deployment of autonomous artificial intelligence in commercial contracting has been analysed, thus far, largely as a problem of formation. This article has argued that the more pressing and less examined problem lies in the law of remedies. English contractual remedies are built on assumptions of human foreseeability, human causal agency and human control, and each is placed under strain where the operative actor exercises independent judgment and produces outcomes its deployer neither directs nor foresees. Yet the strain is manageable. Remoteness can be resolved through an assumption-of-responsibility analysis; causation can prevent the deployer from disclaiming the risks of autonomy by treating the deployed system's act as its own; mitigation and quantification can be handled by attending to the reasonableness of monitoring and to the vindicatory value of the performance right; agreed remedies can bear much of the practical weight; and the vindicatory dimension of contractual damages can guarantee that the innocent party's right to performance is not hollowed out where conventional loss eludes measurement.

The conclusion is one of qualified confidence. English commercial contract law does not need to be rebuilt to meet the challenge of autonomous systems, but it does need to be reoriented, deliberately and at identifiable points, if it is to allocate the losses those systems cause with the certainty, fairness and predictability that commercial parties are entitled to expect. Whether the

¹⁰² *Artificial Intelligence Act* (n 2); and see the European Commission's Digital Omnibus proposals (2025–2026) recalibrating the timeline for the high-risk provisions.

¹⁰³ See (n 62).

¹⁰⁴ On the capacity of English private law to absorb new digital phenomena without wholesale statutory reconstruction, cf Law Commission, *Digital Assets: Final Report* (Law Com No 412, 2023).

¹⁰⁵ For the view that AI can be accommodated within existing categories, see the Law Commission (n 49); Ebers, Poncibò and Zou (n 1).

courts will make that reorientation, and whether commercial practice and law reform will support it, are questions that the first wave of autonomous-breach litigation — now, on any realistic view, imminent — will begin to answer.

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