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A COMMON LAWYER'S PERSPECTIVE ON CONTRACT LAW CODES

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Legal 'codes' are usually associated with civilian, as opposed to common law, systems of law. As a result, discussions of 'codification' fail to address concerns and issues particular to common law systems jurisdictions. This is the more surprising when the very word of codification was coined two hundred years ago by a distinguished English philosopher and legal commentator and there is a rich history of codification projects in common law jurisdictions. This article presents a common lawyer's perspective on contract codes. First it seeks to stabilize and define the concept of codification and then develops a critique of codification which draws broadly upon both current economic arguments and lessons from the past. It concludes by suggesting some preconditions that should be satisfied before any codification, such as the codification of the law of contract proposed by the Jersey Law Commission, should be enacted.

1 The exact point in time when the process we now know as codification began in England is uncertain. It has been suggested that it was when a piece of legislation was enacted in the reign of Canute of Denmark (1017–1035).¹ Others would begin the story much later in the 18th century with the work of the utilitarian philosopher Jeremy Bentham who is credited with actually coining the term “codification”. Putting etymology aside, Canute is perhaps a good starting point for his legendary reputation as the King who stemmed waves of Viking attacks on England's shores but who was however unable to halt the sea's advance. The analogy of Canute's inability to stop the tide is apt because the momentum towards legal codification has long been thought to be similarly unstoppable. In his inaugural address to the Glasgow Juridical Society in 1873 entitled “The Codification of the Law” Joseph Dixon said²—

“In this country the demand for codification originated with Bentham and ... has continued to be urged with so much pertinacity and effect, that probably, at the present time, it may be regarded as a settled point that some scheme for Codification ... will be attempted, and any practical consideration of the matter must now perhaps be directed rather towards the best possible method and plan of codifying, than to answering ... the question whether codification should be attempted at all”.

2 More recently Sir Roy Goode has said that he “regard[s] the case for a commercial code as unanswerable”.³ Rupert Cross was more reserved when in 1961 he commented that it was “difficult to believe that the codification of English law will not become a live

¹ See Wolf *Gesetzgebung in Europa 1100–1500* (1996) referred to by Weiss “The Enchantment of Codification in the Common-Law World” (2000) 25 *Yale J Int'l Law* 436, nn 80 and 153.

² Dixon *The Codification of the Law* (1873), p 1.

³ “The Codification of Commercial Law” (1988) 14 *Monash UL Rev* 135, p 140.

issue within the next 50 years or so”.⁴ Rupert Cross’s prediction was fulfilled rapidly by the Law Commission whose eponymous establishing statute declared that it was the duty of the Law Commission to review the law “with a view to its systematic development and reform, including in particular the codification of such law ...”⁵ The newly appointed Law Commission submitted to the Lord Chancellor its First Programme including proposals for the codification of the law of contract, the law of landlord and tenant and, eventually, family law.⁶ Mr Harvey McGregor⁷ was commissioned to prepare a draft code. The resultant drafts contained some radical proposals for reform and were considered by a working party including Mr Guenter Treitel.⁸ Controversially it has been suggested that the Law Commission’s codification project reflected “naïveté ... as to the mechanics of codification”⁹ by the first team of Law Commissioners. What is undisputed is that the work on codification of the whole of the law of contract was abandoned by the Law Commission who instead concentrated upon particular topics within contract that they saw as most in need of reform. The “McGregor Code” was never published by the Law Commission. The failure of the Law Commission’s contract codification project was caused by differences between the Scottish and English Law Commissions, some reflecting increasing demands for devolved powers in Scotland which resulted in the former’s withdrawal from the joint initiative in 1971. The whole episode has been described as “the least successful part of [the Law Commission’s] work”.¹⁰ This is perhaps why Rupert Cross decided to omit the chapter entitled “The Question of Codification” from subsequent issues of his book on *Precedent in English Law*.¹¹ The aim of codification of contract was never abandoned formally by the Law Commission but was soon acknowledged to be “moribund”.¹²

3 All evidence of this last systematic attempt to codify the law of contract in England and Wales would have been lost to the public were it not for the private publication in 1993¹³ of the McGregor Code, with additions and commentary, the significance of its publication being compared by its publisher to the moon landing and fall of the Berlin Wall.¹⁴ A group called the Academy of European Private Lawyers, headed by Professor Gandolfi, which was responsible for the publication of the McGregor Code drew heavily upon it to produce its own Code of Contract Law.¹⁵ Professor Gandolfi leads one of a number of European groups which are working upon projects which seek to codify a European law of contract

⁴ Cross *Precedent in English Law* (1961) p 197, while noting at p 199 that “it is not a live issue in this country at the present moment”.

⁵ Law Commission Act 1965 s 3(1).

⁶ Law Commission No. 1, p 3.

⁷ Now Harvey McGregor, QC.

⁸ Now Sir Guenter Treitel, formerly Vinerian Professor of English Law, Oxford.

⁹ Farrar “Law Reform Now—A Comparative View” (1976) 25 ICLQ 214, p 219.

¹⁰ *Ibid*, p 218.

¹¹ Published in 1968, 1972 and 1997.

¹² North “Problems of Codification in a Common Law System” (1982) 46 *Rabels Zeitschrift Fur Ausländisches Und Internationales Privatrecht* [RabelZ] 490, p 494.

¹³ Gandolfi Harvey McGregor, *Contract Code Drawn Up on Behalf of the English Law Commission* (1993).

¹⁴ *Ibid*, *Prefazione* p v.

¹⁵ Gandolfi (ed) *Code Européen des Contrats—Avant-projet* (2001).

or the law of contract in Europe (there may be a difference).¹⁶ These groups have been irreverently referred to in the title of an article as “those magnificent men in their unifying machines”.¹⁷ If I may strain a metaphor, other “test pilots” for these machines include Professor Christian von Bar who heads the Study Group on a European Civil Code which co-ordinates the activities of a number of other study groups¹⁸ focusing upon different aspects of the law of property and obligations. This grouping is in many respects the successor of the Commission on European Contract Law,¹⁹ led by Ole Lando which was responsible for the production of the *Principles of European Contract Law*, published in 3 phases between 1995 and 2003.

4 The work of these groups led to the Draft Common Frame of Reference which was published in 2009 and covers principles, definitions and model rules of civil law, including the law of contract.²⁰ In November 2009 the European Parliament backed the idea of an optional European Contract Law, *i.e.* an extra system of contract law which if selected by the parties, particularly for international transactions would replace the otherwise applicable system of contract law.²¹ A new Expert Group was constituted to transform the DCFR into “a simple, user friendly, workable” instrument to further the interests of consumers and business. In July 2010,²² the European Commission began a public consultation to assist the Expert Group in its work by issuing a Green Paper on Policy Options for progress towards a European Contract law for Consumers and Businesses (The Green Paper).²³ The Green Paper sought views upon “What should be the legal nature of the instrument of European Contract Law”²⁴ and suggested seven potential options across a spectrum of optionality, ranging from the mere publication of the results of the Expert Group to Regulation establishing a European Contract Law. Strong hints

¹⁶ The former may be understood to refer to the work of the Academy of European Private Lawyers above and the Study Group on a European Civil Code and its antecedents, discussed below, which aim to produce a new set of pan-European contract principles; the latter to the work of the Acquis Group which seeks to discover the underlying principles and bases of existing European Law. For the Acquis group see further Twigg-Flesner *The Europeanisation of Contract Law* (2008) pp 15 and 153–155

¹⁷ “The 2004 Communication on European Contract Law: Those Magnificent Men in their Unifying Machines” (2005) 30 *European Law Review* 724.

¹⁸ For accounts of the different groupings involved see Beale “The European Civil Code Movements and the European Union’s Common Frame of Reference” (2006) 6 *Legal Information Management* 4; Twigg-Flesner *The Europeanisation of Contract Law* (2008) pp 12–19 and 148–156; and Basedow “Transjurisdictional Codification” (2009) 83 *Tulane LRev* 973, 979–981.

¹⁹ This group was itself constituted as a break-away association from Unidroit, the International Institute for the Unification of Private Law.

²⁰ Von Bar & Schulte Nolke (eds) *Principles, Definitions and Model Rules of European Private Law, Draft Common Frame of Reference* (2009).

²¹ Compare earlier resolutions in favour of a Code which endorse a “less optional” approach, *e.g.* European Parliament resolutions 26 May 1989, OJ 1989 C158, p 400, paras 14h–14j and parliamentary resolutions called for, and 6 May 1994, OJ 1994, C205, p 518, referred to in Professor von Bar’s paper n 6.

²² It will run to 31 January 2011. The UK Ministry of Justice has requested responses by 26 November. See www.justice.gov.uk/consultations/call-for-evidence-180810.htm.

²³ Brussels 1 July 2010 COM(2010)348 final. See <http://eur-lex.europa.eu/LexUriServ.do?uri=COM:2010:0348:FIN:en:PDF>.

²⁴ The apparent assumption in the way that the question is posed that some form of instrument is necessary is discussed later in this paper in the section entitled “The Advantages and Possibilities of Codification”, sub-section “Economic Advantage”.

from many “inside” sources suggest that attention is now focusing upon the intermediary proposals such as the optional instrument of European Contract Law.²⁵ The public consultation closed on 31 January 2011 and so we await the promised publication of the views of respondents to the Green Paper.

5 The new European impetus towards a pan-European law of contract has provoked passionate debate. Opponents have echoed the sentiments, but often absent the style, of Ralph Waldo Emerson writing in 1841 who deprecated the pursuit of uniformity in the eloquent declaration that—

“A foolish consistency is the hobgoblin of little minds, adored by little statesmen and philosophers and divines.”²⁶

6 In a completely different context (discussing concurrent liabilities in contract and tort), though perhaps with equal style, Lord Goff more recently warned against what he described as “the temptation of elegance” in the law.²⁷ Lord Goff who in an important contribution to the codification debate acknowledged the “remarkable work” of Professor von Bar said that he “... did not see the European initiative for the harmonisation of national laws proceeding at any great pace”.²⁸ This prediction from 1997 well summarises the present position described in a recent conference paper by Professor Von Bar²⁹ “the discussion is no longer about the *harmonisation* of laws ... [i]t is about the creation of an additional legal system”. This paper also refers to the heated discussions that talk of a European Code can initiate. A few examples will suffice;³⁰ European codification has been described as “... not necessary and hardly attainable”³¹ and “dangerous”.³²

7 While codification is more readily identified with the civil, as opposed to the common law,³³ the common lawyer’s perspective on codification is an important, perhaps neglected, perspective. The scale of common law influence must not be ignored. The common law has been said to be shared by one third of the population of the world.³⁴ In this paper I develop a common lawyer’s perspective upon the pursuit of consistency and

²⁵ JURI, the powerful European Parliament legal affairs committee, currently supports option (iv) under which an optional European Contract Law would be drafted.

²⁶ Emerson “Self reliance” in *Self-Reliance and other Essays* (1841).

²⁷ In *Henderson v Merrett Syndicates* [1994] 3 WLR 761, p 781 (examining the negligence of Managing Agents in managing the risks to which Lloyd’s Names were exposed).

²⁸ Goff “The Future of the Common Law” (1997) 46 ICLQ 745, p 748.

²⁹ “From the Idea of a European Civil Code to the Optional Instrument for European Contract Law”, para 5, conference paper delivered at *Contract Law of the Channel Islands at the Crossroads*, 15 October 2010.

³⁰ For others, see Legrand “Against a European Civil Code” (1997) n 60 MLR 44; and Eidenmuller, Faust, Grigoleit, Jansen, Wagner & Zimmermann “The Common Frame of Reference for European Private Law—Policy Choices and Codification Problems” [2008] OJLS 659.

³¹ Hartkamp “Modernisation and Harmonisation of Contract Law: Objectives, Methods and Scope” [2003] Uniform Law Review 81, p 85.

³² Burrows “Legislative Reform of Remedies for Breach of Contract: The English Perspective” (1997) *Edinburgh Law Review* 155, p 156.

³³ For a criticism of this crude characterisation see *infra*.

³⁴ Goff “The Future of the Common Law” (1997) 46 ICLQ 745, p 745.

elegance in the form of a codification of the law of contract which perspective draws broadly upon the definition of codification, current economic arguments and lessons from the past to offer an insight as to why Joseph Dixon's prediction has not been fulfilled and to suggest the preconditions that should be satisfied before any state fulfils it and thereby captures the benefits which I also describe that codification can offer. The topic of codification is a huge one so even more particularly my comments will focus upon the proposal of the Jersey Law Commission that codification should be effected based upon "the incorporation of English law by statute".³⁵ The reasons given in support of this conclusion included the speed of implementation, the lack of any negative impact upon those considering doing business in Jersey, and the mistaken perception of Islanders that the law of contract in Jersey is based upon the English common law. In a Report that followed the earlier Consultation Paper, it was recommended that the Indian Contract Act of 1872 be used "as a model" incorporating the unique aspects of Jersey law which justified retention.³⁶

What is codification?

8 This is perhaps a more difficult question than it seems. The origin of the term is interesting for two reasons: first it was coined by an Englishman and, second, less than 200 years ago. The originator was the utilitarian philosopher Jeremy Bentham (1748–1832) who it has been said "... emerged as the most important advocate of codification, not only in England but throughout the world".³⁷ The etymology of the word "codification" is a conjunction of "codex" with the latin verb "facere" (to do). The word was first used by Bentham in a letter to Tsar Alexander I written in 1815.³⁸ The date is also interesting because at that time the antecedents of the major continental codes were already in existence: in Prussia in 1794, in France in 1804, and in Austria in 1811. Bentham also created another term to describe codifying legislation "pannomion". As a descriptor, "pannomionification", like many of Bentham's other inventions, never caught on but "codification" did.

9 Common lawyers, like codifiers, often start with a definition. So here are some definitions of codification—

³⁵ Jersey Law Commission *Consultation Paper No 5 The Jersey Law of Contract* (October 2002) Part III 13(iv).

³⁶ Jersey Law Commission *Consultation Topic Report No 10 The Jersey Law of Contract* (February 2004) Part IV 7.

³⁷ Weiss "The Enchantment of Codification in the Common-Law World" (2000) 25 *Yale J Int'l Law* 436, p 475. The article by Weiss provides an excellent and detailed historical analysis of codification in common law jurisdictions.

³⁸ See Conway (ed) 8 *Jeremy Bentham, The Correspondence of Jeremy Bentham* (1988), p 468. See, further, Holdsworth *History of English Law* vol 11, p 316, and Ilbert *Legislative Methods and Forms* (1901) p 122.

Joseph Dixon: “the systematic reconstruction or rearrangement on scientific principles and according to a scientific method, and the authoritative republication, of any body of law.”³⁹

Roy Goode: “[a] code provides an integrated corpus of ... law of which the various branches are linked by common concepts, a coherent philosophy and a consistent terminology ...”⁴⁰

English Law Commission: “useful reduction of scattered enactments and judgements on a particular topic to coherent expression within a single formulation subject to any changes necessary as a result of review.”⁴¹

Lord Scarman: “enacted law which ... may cover the whole legal field or only part ... intended ... to supersede all previous law ... and ... where appropriate, it will contain provisions modifying and reforming existing law.”⁴²

10 Implicit and explicit in these definitions are a number of features that might be said to characterise a codification, including:⁴³

Authority—A code must in some way be enacted implying, in most jurisdictions, legislative enactment. Such enactment may not, and others would argue *must not*, take the form of the usual legislative enactment in the UK characterised by non-purposeful, detailed drafting by a non-subject specialist.⁴⁴ Without such authoritative enactment any so-called code more closely resembles a treatise.⁴⁵

Completeness—comprising: exclusiveness *i.e.* a single source, no *lacunae* and maximum comprehensiveness.

11 The authority and completeness of any code will dictate the extent to which the previous law is regarded as relevant to the interpretation of the new code. Experience suggests that there is a fine line here. Too ready a reference to the pre-existing law will rob the codification of its systematic quality. In India, the Indian Contract Act 1872 sought to replace the English *nemo dat* rule with a general protection for innocent purchasers. Yet even the version enacted was too radical for the Indian judiciary who by unsustainable interpretation gave it an effect equivalent to the pre-existing law they previously routinely

³⁹ Dixon *The Codification of the Law* (1873) p 1.

⁴⁰ Goode “The Codification of Commercial Law” (1988) 14 Monash U L Rev 135, p 138.

⁴¹ Law Commission, Seventh Programme of Law Reform 18 (in context of a “criminal code”).

⁴² Scarman *A Code of English Law* (1966) p 5.

⁴³ Weiss “The Enchantment of Codification in the Common-Law World” (2000) 25 Yale J Int’l Law 436, p 454.

⁴⁴ Interestingly McGregor, QC told me that the first attempt of Parliamentary draftsmen to reduce the first part of “his” code to a statutory enactment produced an “unrecognisable” product (telephone conversation with the author in 2010).

⁴⁵ See below discussion of reform. Cooper has argued that the Scot’s great treatises were in some senses a substitute for codification. See (1950) 63 Harv L Rev 468, p 472.

applied.⁴⁶ It has been noted that the Indian Contract Act as implemented was perhaps subverted in this way. However, arguably the most successful⁴⁷ codification in England and Wales, the 1893 Sale of Goods Act, achieved the most efficacious balance here. The code drafted by Sir MacKenzie Chalmers effectively reduced the 1000 plus pages of the then-extant Benjamin's Sale of Goods to an Act of 60 or so sections, but was not so inflexible as to preclude the later judicial recognition of the innominate term after the *Hong Kong Fir* case.⁴⁸ Jeremy Bentham recognised that codification could not provide a rule for all future cases but emphasised the importance of general anticipation, flexible rules, general concepts⁴⁹ and principles, and clear method with which "we go before events, instead of following them."⁵⁰

System—in the sense of order and hierarchy

12 The idea of hierarchy is closely related to that of completeness and gap-filling discussed above. There will typically be a hierarchy of interpretational norms. First the language of the Code must be applied. If silent on the relevant question its underlying purposes and policies must be relied on. A typical (but hypothetical⁵¹) provision directing this approach might be:

Questions concerning matters governed by this Code which are not expressly resolved by its specific provisions shall be settled in accordance with the general principles on which it is based.

Reform—referring to improvement in the pre-existing law

13 A Code may or may not contain perceived improvements upon the existing law. Dame Mary Arden, when Chairman of the Law Commission of England and Wales, said—⁵²

"It is often thought that a code has to be a piece of substantially new law but there is no reason why that need be so."

No less a parliamentary authority than William Gladstone⁵³ urged the eschewal of all reform upon Chalmers to secure acceptance of his codifying proposals⁵⁴—

⁴⁶ Stokes *Anglo-Indian Codes* 1887, vol 1, p 534; and Diamond "Codification of the Law of Contract" (1968) 31 MLR 361, p 377.

⁴⁷ Compare Goode "The Codification of Commercial Law" (1988) 14 Monash U L Rev 135, pp 135–136 who describes pejoratively such codes as detailed, narrow and non-exclusive.

⁴⁸ *Hongkong Fir Shipping Co Ltd v Kawasaki Kisen Kaisha Ltd* [1962] 2 QB 26 (CA).

⁴⁹ Teubner has argued that a lack of conceptualisation in its earlier history retarded any impetus to codification, *Kodifikatrion und Rechtsreform in England* (1974) p 59.

⁵⁰ Bentham *A General View of a Complete Code of Laws* (1802) p 210.

⁵¹ For an actual example see Vienna Convention on Contracts for the International Sale of Goods, art 7(2).

⁵² Arden "Time for an English Commercial Code?" (1997) 56 Camb LJ 516, p 518. Others dispute this position e.g. Tallon "Codification and Consolidation of the Law at the Present Time" 14 Israel L Rev 1, p 3.

⁵³ See Lord Halsbury, LC Introduction to the First Edition *Halsbury's Laws of England*.

“A codifying bill should in the first instance reproduce the existing law with all its defects and anomalies ...”

14 In his *Lectures on Jurisprudence* John Austin introduced a useful distinction between “innovation in substance” and “innovation in form”. In short while every material reform will involve a formal one it is not true that every formal reform necessitates a material one.⁵⁵ This distinction was important historically and should inform any strategy that seeks to gain support of a proposed codification. Closer attention to the distinction in the past might have demonstrated that codification was not necessarily linked to radical Benthamite reform for which English society and the legal profession were not yet ready.⁵⁶ The strategy urged by Gladstone is as relevant today as it was two centuries ago. This is perhaps acknowledged in Professor von Bar’s paper where he refers to the fact that the current Green Paper on a European Contract Code included an option to draft a European instrument to replace national laws “... only put on the list in order for it to be turned down at crunch decision making time”.⁵⁷ It is perhaps significant that a Code that does not contain excessive reforms begins to resemble a legal treatise, a legal presentation with which common lawyers are comfortable.⁵⁸ The difference of course remains that a Code will often have legislative authority. However the contract codes for Europe offered by the two main contract groups—the Lando Principles of European Contract Law and the Gandolfi Code of Contract Law—certainly had no authoritative status before their incorporation in the Draft Common Frame of Reference.

15 A further useful concept with regard to whether a proposed code should contain any element of law reform is to recognise that there exists a continuum of stronger (*i.e.* with much reform) or weaker (*i.e.* with little or no reform) approaches to codification, and that historical reflection does not identify any particular threshold point on that continuum which alone justified the title of a Code.⁵⁹

National legal unification—Codification often signalled and facilitated a political aim of unity where there were previously heterogeneous legal sources or perhaps subservience to a higher legal authority. The former was the case with the nineteenth century codifications of Indian Law which brought together parts of

⁵⁴ Chalmers “An Experiment in Codification” (1886) 2 LQR 125, p 132.

⁵⁵ John Austin *Lectures on jurisprudence or the Philosophy of Law*, 4th ed (1879), pp 679 and 1021.

⁵⁶ Weiss “The Enchantment of Codification in the Common-Law World” (2000) 25 Yale J Int’l Law 436, p 481 quoting Van Caenegem *An Historical Introduction to Private Law* (1988, Johnson translation 1992) p 13 “The difference between the English and the European approach is to be explained ... by suspicion amongst the English ruling classes of all codification, which tended to be associated with the ideas of radical or even revolutionary reform”.

⁵⁷ Von Bar “From the idea of a European Civil Code to the Optional Instrument for European Contract Law”, para 3a, conference paper delivered at *Contract Law of the Channel Islands at the Crossroads*, 15th October 2010.

⁵⁸ Simpson “The Rise and the Fall of the Legal Treatise; Legal Principles and the Form of Legal Literature” (1981) 48 U Chi L Rev 632.

⁵⁹ See further Weiss “The Enchantment of Codification in the Common-Law World” (2000) 25 Yale J Int’l Law 436, pp 469–470.

English Law already received in India with numerous reforms and so displaced a variety of different laws including those with Hindu and Islamic elements.

Simplicity—many attempts at codification aim at simplification. This is a particular aim of codification in common law jurisdictions where the reaction to the difficulty experienced sometimes in simply ascertaining the law was well described by Aubrey Diamond: “voices have been raised in protest against the tons of verbal pulp that must be squeezed to produce an ounce of pure judicial law”.⁶⁰ I am sure that my students would agree.

16 I will now discuss first the advantages and possibilities of codification and then the disadvantages and problems of codification. Much has been written on these general themes. My intention and brief is only to highlight those that seem important to a common lawyer and which might have particular resonance for the Jersey project.

The advantages and possibilities of codification

Simplification (including the effects of predictability and accessibility)

17 First codification may effect a simplification of the law.⁶¹ This should improve its clarity and accessibility and so increase, respectively, the predictability of outcome of legal disputes and reduce the costs expended to achieve that result.⁶² Collecting the law in a single place will free litigators from reference to what has been described as “the miasmatic stew of the case law”⁶³ and instead they can apprise themselves of their legal position by reference to a single document. In a fascinating and unique survey, Professor Aubrey Diamond analysed reported court decisions in areas like sale of goods which are regulated by existing but non-general⁶⁴ codes and those where no code pertains. The survey concluded that case citation in cases decided in contractual areas which have been codified is about one third less than that which pertains in other contractual disputes that fall outside the existing limited codifications but which might be expected to be included within a general codification of the law of contract.⁶⁵

18 It has sometimes been asserted that codification involves the replacement of finely grained and focused specific rules with generalised discretions which, contrary to the discussion in the preceding paragraph, leads to unpredictable outcomes.⁶⁶ Again there is

⁶⁰ “Codification of the Law of Contract” (1968) 31 MLR 361.

⁶¹ See, generally, Stone “A Primer on Codification” (1955) 20 Tulane L Rev 303, pp 307–308.

⁶² Goode “The Codification of Commercial Law” (1988) 14 Monash U L Rev 135, pp 136–137; and Arden “Time for an English Commercial Code?” (1997) 56 Camb LJ 516, pp 532–533.

⁶³ Arden, *ibid*, p 531.

⁶⁴ What Arden refers to as “the less comprehensive codes”, *ibid*, p 517.

⁶⁵ Diamond “Codification of the Law of Contract” (1968) 31 MLR 361, p 367, *i.e.* respectively 12.9 and 17.3 authorities per case.

⁶⁶ Von Mehren “Some Reflections on Codification and Case Law in the Twenty First Century” (1998) 31 Davis L Rev 659, p 667. For further debate see Collins “Transaction Costs and Subsidiarity in European Contract Law” in Grundmann and Stuyck (eds) *An Academic Green Paper on European*

a paucity of empirical data with regard to such a claim. However two Australian academics⁶⁷ conducted three experiments involving 1800 law and non-law students who were asked to resolve disputes by application of the given common law principles, the Unidroit Principles of International Commercial Contracts⁶⁸ and an Australian Contract Code drafted for the Law Reform Commission of Victoria. The survey found that decisions applying detailed rules were no more predictable than those based upon broad principles overall, though the latter were substantially more predictable in “easy” cases. However, the survey concluded that broad principles were more likely to result in “just” outcomes, were more accessible and also less costly.⁶⁹

19 The simplification of the law would now be universally applauded. It is interesting to note that this was not always so. Coke explained the reason for his use of French in a way that does not perhaps accord well with more modern values⁷⁰—

“It was not thought fit nor convenient, to publish either those or any of the statutes enacted in those days in the vulgar tongue, lest the unlearned by bare reading without right understanding might suck out errors, and trusting to their conceit, might endamage themselves, and sometimes fall in to destruction.”

Assists law reform

20 Law reform has already been encountered as a possible indicium of codification. However whatever the extent of law reform incorporated into the Code at promulgation it has been urged that the codified statement of the law itself encourages future review. Professor Diamond has said that “The real case for codification ... is that it facilitates law reform”.⁷¹ The content of the law can be improved when the Code is created and subsequently when it is revised. The most conservative of reformers, Chalmers, was well aware of this. He knew that it is always easier to amend an Act than to alter the common law. As he pithily put it: “[l]egislation ... is cheaper than litigation”.⁷²

Ease of export

21 Lord Goff suggested that we should envy the ease with which a country such as France is able to export its law through the transfer of the *Code Napoléon* and how easily it is kept updated by replicating abroad any amendments in France.⁷³ The greatest experiment in codification engaged in by England was the establishment from 1859–1882

Contract Law 2002, p 269; and Smits (ed) *The Need for a European Contract Law: Empirical and Legal Perspectives*, especially the final chapter and summary by the editor.

⁶⁷ Ellinghaus and Wright “The Common Law of Contracts; Are Broad Principles Better than Detailed Rules? An Empirical Investigation” [2005] *Tex Wesleyan L Rev* 399.

⁶⁸ A model code published by the International Institute for the Unification of Private Law in 1994.

⁶⁹ Ellinghaus and Wright “The Common Law of Contracts; Are Broad Principles Better than Detailed Rules? An Empirical Investigation” [2005] *Tex Wesleyan L Rev* 399, p 420.

⁷⁰ 3 *Co Rep* xl (1826 ed).

⁷¹ Diamond “Codification of the Law of Contract” (1968) 31 *MLR* 361, p 372.

⁷² Chalmers *Sales of Goods Act* (1894) Introduction to First Edition.

⁷³ Goff “The Future of the Common Law” (1997) 46 *ICLQ* 745, pp 748, 751.

of the Indian Codes dealing with civil procedure, criminal law, succession, trusts and the transfer of property as well, of course, as the law of contract. An important point to emerge from subsequent analysis of this period is that there is an inverse relationship between the pluralistic and democratic characteristics of a political system and the ease with which codification can be achieved.⁷⁴

Extension of political influence

22 The export of a Code may be associated with an extension of political influence when that export is to a different polity. The Vienna Convention on International Sales of Goods has created an almost worldwide standard for business to business contracts with 74 nation signatories extending the influence of the UN Commission on International Trade Law. Similarly the International Institute for the Unification of Private Laws (Unidroit) has through its Principles of International Contracts created standards that have served as models for codification throughout the world. For instance the Organisation for the Harmonisation of Business Law in Africa known by its French acronym OHADA⁷⁵ (Organisation pour l'Harmonisation du Droit des Affaires en Afrique) has adopted a Uniform Act on Contract. Interestingly for the present topic, despite OHADA's success in increasing investment and trade, the view has been expressed that the dominance of the French language in OHADA may discourage some inward investment.⁷⁶ The Unidroit Principles and the Principles of European Contract Law also influenced the Uniform Contract Law of the People's Republic of China which took effect in 1999. This law seeks to apply Western legal concepts to all contractual dealings where previously different regimes applied to, *inter alia*, dealings with foreigners as opposed to purely domestic arrangements.⁷⁷ The transition to a market economy in Russia has similarly been both affected and effected by external codes.⁷⁸

Resolving conflicting laws in a federal state

23 The main impetus for the Uniform Commercial Code in the United States was perhaps the pre-existing conflicting laws in a federal jurisdiction.⁷⁹ Writing in 1997, Lord Goff was able to say that this was "a problem from which we do not suffer".⁸⁰ To describe the European Union as a federal state would commence a debate we would not have time to

⁷⁴ Weiss "The Enchantment of Codification in the Common-Law World" (2000) 25 Yale J Int'l Law 436, p 485.

⁷⁵ Benin, Burkina Faso, Cameroon, Central African Republic, Chad, Comoros Is, Congo, Côte d'Ivoire, Equatorial Guinea, Gabon, Guinea, Guinea-Bissau, Mali, Niger, Senegal and Togo. DR Congo's accession is underway.

⁷⁶ Enonchong "The Harmonisation of Business Law in Africa: Is Article 42 of the OHADA Treaty a Problem?" (2007) 51 Journal of African Law 95.

⁷⁷ Jiang "Drafting the Uniform Contract Law in China" (1996) 10 Colum Jnl Asian L 245; and Gregory "Uniform Contract Act of the People's Republic of China: First Comparative Look" (2000) 12 Florida Jnl Int'l L 467.

⁷⁸ For an overview, see Vilkova "Harmonisation of Contract law in Russia: Some Brief Reflections" (2003) 8 Uniform Law Review 119.

⁷⁹ Goff "The Future of the Common Law" (1997) 46 ICLQ 745, p 750.

⁸⁰ *Ibid.*

finish. It is sufficient here to extend a metaphor used earlier.⁸¹ The greater the popular association between any contract codification proposals and progress towards a federal Europe, the greater the turbulence that will be encountered by the pilot and passengers of that particular “unifying machine”.

Economic advantage

24 Much debate around the proposal Draft Common Frame of Reference centres on the highly disputed economic advantage that proponents suggest a European Code on Contract will confer. It is my view that these important claims are the least well investigated and substantiated strands in the argument for a European Code. More concerning perhaps is the message that there is simply no need to prove these advantages because the necessity and mandate for such a Code are the inevitable corollaries of the United Kingdom’s membership of the EU and its concomitant commitment to a single market.

25 The recent Green Paper from the European Commission on a European Contract Law begins with open, permissive language. Differences between national contract laws—

“*may* entail additional transaction costs ... [d]ivergences in contract law rules *may* require businesses to adapt ... national laws are rarely available in other European languages ... market actors need to take advice from a lawyer.”
(emphasis added)⁸²

but appears rapidly to change to a more prescriptive tone: “An instrument of European Contract Law should respond to the problems of diverging contract laws”.⁸³ The single statistic selected for report in the text of the Green Paper to support the view that there are serious impediments to trade between businesses and consumers located in different EU states is that for 61% of cross-border e-commerce offers, consumers were not able to place an order mainly because businesses refused to serve the consumer’s country.⁸⁴ This is supported by reference to two “Eurobarometer” surveys which are telephone-based surveys commissioned by the European Commission to assess public attitudes on different issues.⁸⁵ In a poll that asked EU citizens who hypothetically had purchased goods abroad by what principles they would prefer a dispute to be settled, 57% expressed a preference for “harmonised” EU law.⁸⁶ Other surveys are more equivocal and difficult to interpret.

⁸¹ See text accompanying n 17 above.

⁸² <http://eur-lex.europa.eu/LexUriServ.do?uri=COM:2010:0348:FIN:en:PDF> section 1.

⁸³ *Ibid*, section 4

⁸⁴ *Ibid*, para 3.1 referring to Communication from the Commission on Cross-Border Business to Consumer e-Commerce in the EU COM(2009) 557,22.10.2009.

⁸⁵ Special EUROBAROMETER 292 (2008) and Flash EUROBAROMETER 278 (2009).

⁸⁶ 54% in the UK. Interestingly the UK recorded the highest percentage, 23%, who expressed a preference for the national law of their contractual partner.

26 A survey by Clifford Chance of 175 businesses in eight EU countries⁸⁷ confirmed the view that there are obstacles to cross-border trade in the EU (66% agreement) but there was a huge divergence between nationals as to whether the EU had reduced such obstacles in the past. In Hungary 88%, but in the UK only 34%, of those interviewed thought it had. There was a strong consensus (over 80%) that an EU contract law might help for the future but only if it is optional. Crucially 83% said that it was important to be able to choose the governing law and English law was recorded as the most frequently utilised system at 26%.

27 Rigour in analysis is called for here. The economic arguments posited must be supported by empirical data. It is suggested that it has not yet been demonstrated convincingly that “the implementation of a European Code leads, inevitably, to a reduction in transaction costs”.⁸⁸ There is sometimes a suspicion that transaction costs are specified retrospectively to justify a policy choice that is preferred for other undisclosed reasons.⁸⁹ The ability to measure the economic advantages which are said to justify a European Contract Code is clearly key. However, despite the best efforts and vast resources of the EU, many commentators have concluded that this is simply an impossible task.⁹⁰ One commentator has written that the strongest counter argument to the view that international unification of contract law is necessary to facilitate cross-jurisdictional trade is simply the existence of the world’s largest national market, the United States, itself comprising more than 50 separate jurisdictions.⁹¹

⁸⁷ Clifford Chance Survey in European Contract Law (2005).

⁸⁸ Kallweit “Towards a European Contract Law: For a Prosperous Future of International Trade” (2004) 35 Wellington L Rev 269, p 283. A similar easy reliance upon assertion is perhaps apparent in some of the English language discussions that preceded the Uniform Contract Act in China “China’s market economic policy is the driving force behind the drafting of the UCL [Uniform Contract Law]. A contract law that is applicable to all areas will better serve the homogeneous market prescribed by the policy” (Jiang “Drafting the Uniform Contract Law in China” (1996) 10 Colum Jnl Asian L 245, p 246).

⁸⁹ Twigg-Flesner *The Europeanisation of Contract Law* (2008), pp 30–31 refers to the necessity to find an existing provision (*i.e.* the maintenance of the internal market) upon which consumer policy could “piggy back”.

⁹⁰ Smits (ed) *The Need for a European Contract Law: Empirical and Legal Perspectives* especially the final chapter and summary by the editor and Twigg-Flesner *The Europeanisation of Contract Law* (2008), p 31 “This bold assertion ... would clearly not withstand scrutiny ... evidence in support of these assertions remained slender”.

⁹¹ Hartkamp “Modernisation and Harmonisation of Contract Law: Objectives, Methods and Scope” [2003] Uniform Law Review 81, p 82.

The disadvantages and problems of codification

Incompatibility of the common and civil law

28 In the context of codification in England and Wales it is sometimes objected that fundamental differences between the civilian and common law systems render codification as practised in the former, inappropriate for the latter. This idea of incompatibility can be examined at a theoretical as well as a practical level. There are clearly structural differences between the two systems. The principles of continental civil law are enshrined in codes and expressed as general principles and concepts rather than as detailed rules. These codes are regarded as comprehensive and not affected by prior law. The task of a civilian judge is to apply deductive reasoning to move from the generalised statement in the code to the resolution of the dispute before her. In contract the common law consists of myriad decisions of the courts applied in conformity with *stare decisis* from which the judge inductively draws broader principles. Like any caricature this depiction exaggerates the features of its subject. The civilian judge must of course refer to prior decisions especially where the Code is “thin” and the common law systems, as we have seen, already contain limited codifications in the form of key statutes such as the Sale of Goods Acts. In truth there has been a relentless and ongoing convergence between the two great legal traditions since the Norman Conquest that caused one distinguished legal historian⁹² to write an article with the title “Common Law and Civil Law: An Obsolete Distinction” without even the need for a question mark at the end!

29 A particular methodology in comparative law provides reassurance that the assertions above about convergence and exaggerated caricatures are correct at a practical level. This involves taking factual situations and asking how the problem would be resolved in each system.⁹³ The so called “Trento” project has applied this technique to areas of contract law and confirmed that the actual terms upon which a legal dispute is resolved do not differ greatly between jurisdictions.⁹⁴

30 The most forceful critic of the idea of convergence between civilian and common law traditions, Pierre Legrand, argues that, notwithstanding the similar solutions that each system might prescribe, there exist deep cultural differences which make codification

⁹² Gordley in *Common law und civil law; eine überholte Unterscheidung* 1 ZEUP (1993) 498. See also Kallweit “Towards a European Contract Law: For a Prosperous Future of International Trade” (2004) 35 Wellington L Rev 269, p 289; Omar “Lessons from the French Experience: The Possibility of Codification of Commercial Law in the United Kingdom” (2007) International Company and Commercial Law Review 235, p 236; and Hartkamp “Modernisation and Harmonisation of Contract Law: Objectives, Methods and Scope” (2003) 8 Uniform Law Rev 81.

⁹³ For an early example see Schlesinger (ed) *Formation of Contracts: A Case Study of the common Core of Legal Systems* (1968).

⁹⁴ Whittaker & Zimmermann *Good Faith in European Contract Law* (2000); Gordley *Enforceability of Promises in European Contract Law* (2001); and Sefton-Green’s *Mistake, Fraud and Duties to Inform in European Contract Law* (2005).

inappropriate.⁹⁵ Others reply that common legal origins⁹⁶ in the past and the identification of shared values and starting points⁹⁷ render the project of codification achievable.

31 That the real world outcomes do not differ between the systems and that a practical synthesis is possible may be much less shocking to a Jersey than to an English lawyer given the formal basis of Jersey law with Norman French roots but which does not hesitate where appropriate to refer to the laws of other jurisdictions, especially those of England and Wales.⁹⁸

Loss of professional services

32 A particular concern for the UK has been the effect that a European Code might have upon the valuable invisible exports of the country. The Commercial Court in London has been described as “the only truly commercial court in the world” with London pre-eminent as “the principal financial and commercial centre in the world”.⁹⁹ A survey commissioned by the Lord Chancellor in 2000 (the Cap Gemini Report) found that by the end of the millennium UK legal services attracted about £800m in invisible earnings, the UK, and London in particular, is a huge centre for legal services: gross fee earnings of all firms were anticipated to be £9.5bn in 2000 and at that time four of the 12 largest law firms in the world were based in London.¹⁰⁰ The General Bar Council of England and Wales concluded that the UK risked undermining a very significant stream of invisible export revenue if a mandatory scheme of harmonised European Law were introduced.¹⁰¹ A similar view was reached in a joint report by the Law Society of the UK and Eversheds, the fifth largest law firm in the world by size.¹⁰² It is anticipated that the evidence submitted by the Bar Council and the Law Society in response to the European Commission Green Paper will repeat and amplify these concerns. The Commission has undertaken to publish this evidence.¹⁰³

33 This “preference” for UK law was of course confirmed by the Clifford Chance survey already referred to where English law was recorded as the most commonly utilised national jurisdiction. The Cap Gemini Report asked international businesses why they might choose a particular system. Interestingly the key factor here was consistency of

⁹⁵ For typical statements see Legrand “Against a European Civil Code” (1997) 60 Mod Law Rev 44; and “European Legal Systems are not Converging” (1996) 45 ICLQ 52.

⁹⁶ Zimmermann “Roman Law and the Harmonisation of Private Law in Europe” in Hartkamp, Hesselink, Honndius, Joustra, Du Perron & Veldman (eds) *Towards a European Civil Code* (3rd ed, 2004).

⁹⁷ Collins *The European Civil Code; The Way Forward* (2008), pp 178–181.

⁹⁸ See further the discussion in Jersey Law Commission *Consultation Paper No 5 The Jersey Law of Contract* (October 2002) Part I–II, paras 1–10, especially para 10.

⁹⁹ Goff “The Future of the Common Law” (1997) 46 ICLQ 745, p 750.

¹⁰⁰ Cap Gemini Ernst & Young *Commercial Court Feasibility Study* prepared for the Lord Chancellor’s Department and issued in February 2001 at respectively pp 14, and 15.

¹⁰¹ Communication on European Contract Law A Position Paper on behalf of the Law reform Committee of the General bar Council of England and Wales.

¹⁰² See account in Battersby “No Need for an Overall Harmonisation” ERA Forum 2002, p 101.

¹⁰³ See discussion above in text following n 22.

decision making, which was preferred even over familiarity with the system. Taken in the context of the choice that confronts Jersey, as opposed to the UK, the proposal of the Jersey Law Commission for a Common Law based code would appear to be a win-win option combining both the benefits of clarity and predictability which a Code may offer with the familiarity and perceived business friendliness of the common law principles.

Professional conspiracy

34 If common law codification theory owes much to Jeremy Bentham its practice owes as much to an American, David Dudley Field (1805–1880).¹⁰⁴ Field, who has been described as “the greatest codifier since Bentham”,¹⁰⁵ had travelled in Europe for 14 months and was convinced of the value of codification. After much lobbying a code commission including Field as a member was appointed in New York. A Civil Procedure Code was drafted and enacted. However his ambition was a substantive rather than procedural civil code. A second code commission was established led by Field which drafted three codes: a Penal Code, a Political Code and a Civil Code. Field was personally responsible for drawing up the latter two. The Civil Code had four subdivisions including the law of obligations and consisted of over 2000 sections. In 1865, nine reports later, he was content with the work. The political impetus for codification was dissipated by the American Civil War from 1861–1865. Nonetheless, in 1881 the Penal Code was enacted. The most important Code, the Civil Code, passed the House of Assembly four times and both houses twice. On each occasion it had passed both Houses, the governors were persuaded by the Bar which had consistently opposed the project to withhold their signatures. Indeed the City of New York’s Bar Association employed James Carter to write a pamphlet attacking the proposal.¹⁰⁶ Field of course replied.¹⁰⁷ However when subsequently the Code was put before the legislature two more times the Carter-led opponents prevailed. Since New York was the leading state in the United States this failure has had repercussions for all subsequent attempts at codification in North America.¹⁰⁸ Notwithstanding the lack of success in the east, in western states the codification movement gained some traction, the most significant being the Civil Code in California which was enacted in 1873 and revised the following year. Field’s brother was in fact a leading light in the Commissions that drafted the codes. Explanations that have been put forward to account for the different west and east coast experiences include the nascent nature of the west coast jurisdictions which were not encumbered by an established common law tradition¹⁰⁹ and the desire to assert an identity through a common law based codification that distinguished the state

¹⁰⁴ See also pp 507–509 for a chronology of Field’s work.

¹⁰⁵ Gregory “Bentham and the Codifiers” (1900) 13 Harv Law Rev 344, p 356 quoted by Weiss “The Enchantment of Codification in the Common-Law World” (2000) 25 Yale J Int’l Law 436, n 347.

¹⁰⁶ Carter *The Proposed Codification of our Common Law: A Paper Prepared at the Request of the Committee of the Bar Association of the City of New York Appointed to Oppose the Measure* (1884).

¹⁰⁷ Field *A Short Response to a Long Discourse: An Answer to Mr David Dudley Field to Mr James C Carter’s Pamphlet on the Proposed Codification of our Common Law* (1884).

¹⁰⁸ Weiss “The Enchantment of Codification in the Common-Law World” (2000) 25 Yale J Int’l Law 436, p 511.

¹⁰⁹ See generally Friedmann *A History of American Law* (1985), 406–407

from its former civil law juridical basis.¹¹⁰ Another explanation, more relevant to this discussion, emphasises “the different position with respect to the bar”.¹¹¹ In California the Bar was less conservative and entrenched than in New York and indeed did not oppose the codification.

35 Although more noble explanations have been offered for Field’s failure in New York, the conservatism and self interest of the New York Bar is acknowledged as “an important, if not the most important, obstacle to codification of the common law in nineteenth-century New York”.¹¹² It would be hard to believe that any modern professional body would now act in such a way. Nonetheless the Cap Gemini Report¹¹³ commissioned by the Lord Chancellor emphasises the opacity of the common law and its unresponsiveness to consumer demand which was considered “inimicable to the Lord Chancellor’s wider civil justice objectives” and likely to produce market conditions which “tend to exploit special knowledge’, permit practitioners to “charge highly” and “create barriers to new service providers”. In other words there exists today in England and Wales, as much as in nineteenth century New York, an environment that *could* be exploited by a self interested legal profession to their advantage and to the detriment of consumers. The important lesson here is that any codification proposal should command the support of the legal profession and that that support should conform to the broader needs of the community it serves.

The thin end of the wedge

36 It has been noted that there exists some commercial support in the UK for a European codifying measure that was based upon the principle of opting in. Such a measure may be the thin end of a wedge in two different senses. First, it might be thought that such optionality is only “camouflage” for a mandatory instrument.¹¹⁴ Secondly, the Code might be implemented in a way that permits or encourages interpretative application of a kind that was not apparent *ex ante* and which is antithetical to common law principles. The proposed Draft Common Frame of Reference has been described as containing a “reservoir of indeterminate terminology ... not exhausted with good faith, fair dealing and reasonableness” with the “result [that] the judge is presented with a relatively low threshold for interfering with the terms that the parties have agreed upon”.¹¹⁵ Such a result would be contrary to the general common law approach to party autonomy. However,

¹¹⁰ California was originally a Spanish possession which became part of the Republic of Mexico before its annexation in 1848 by the United States.

¹¹¹ Weiss “The Enchantment of Codification in the Common-Law World” (2000) 25 Yale J Int’l Law 436, p 513.

¹¹² *Ibid*, p 510. See, further, Cook *The American Codification Movement: A Study of Antebellum Legal Reform* (1981), p 206.

¹¹³ Cap Gemini Ernst & Young *Commercial Court Feasibility Study* (February 2001).

¹¹⁴ “European Contract Law: Quo Vadis?” (editorial comments) (2005) 42 Common Market Law Review 1, p 3; and Kenny “The 2003 Action Plan on European Contract Law: Is the Commission Running Wild” (2003) 28 European Law Review 538, p 550.

¹¹⁵ Eidenmuller, Faust, Grigoleit, Jansen, Wagner and Zimmerman “The Common Frame of Reference for European Private Law—Policy Choices and Codification Problems” (2008) Ox Jnl Leg Stud 659, at respectively pp 675 and 679.

fortunately, the possibility of codification as proposed in Jersey would not appear to be subject to these concerns.

Conclusions

37 From the perspective of a common lawyer, Jersey appears to have an excellent opportunity to codify its law of contract without the suspicion that accompanies such suggestions in the UK. Nonetheless reflection upon the common law experience of codification would suggest three pieces of advice:

1. Close attention should be given to the extent that it is wished to reform as opposed to merely restate the actual operating principles of the Jersey law of contract.
2. If economic advantage is a driver for reform this should be fully investigated and so far as possible proven; it must not rest on assertion.
3. Legal practitioners must be engaged in the project and their support must be aligned with the broader societal needs.

38 Some years have now passed since the recommendations of the Jersey Law Commission on this subject. It would however be sensible to heed the warning of Judge Benjamin Cardozo in 1921 when addressing the New York Bar association who remarked that codification is a slow and tiresome process but which if hurried can be truly destructive. The UK experience with the proposed European Civil Code fulfils Cardozo's analysis; with care Jersey's should not.

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