

**The English Common Law and French Civil  
Code : A Dialogic Analysis of private Law  
and Interpretational Variances  
(special study on the law of contract and tort)**

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## 1.0 Introduction

For some, English law has, since the dawn of colonialism, been a popular choice for commercial transactions in part because it is considered sufficiently certain in many respects. Yet, for others, the French Civil Code represents codified objectivity that the common law lacks. For many, however, given the advent of globalization, it is beyond semantics. What is more, there is more than a trace of convergence between the two in areas of contract and tort law.

This paper pays tribute to the body of laws that have informed and enriched international commerce. Specifically, the value of this paper is its identification of an emerging convergence between the common law and the French civil code both of which dominate global trade in subtle but palpable nuances.

Our focus is private law (the law of contract and tort). We will explore the English Common Law provisions in relation to the French legal system and attempt to infuse the findings with international interpretations to find both the points of commonalities and disparities. Furthermore, we will seek to expound upon the issue of performance as an integral component of contractual relationships and a reflection of societal and religious values.

We conclude that the disparities between the jurisdictions notwithstanding, there are areas of convergence in addition to the presence of commonalities that demonstrate shared heritage. To be sure, convergence is far from a merge. What is clear, however, is that neither strays too far from the ties that bind. They both demonstrate

their Justinian underpinnings and a yearning for stability and clarity by a world caught up in the frenzy of commercial transactions.

This paper attempts to further our understanding of the relationship between the jurisdictions thus clearing the cobwebs of ignorance that tends to confuse international contract negotiations when considering a blend of laws with seemingly divergent heritage.

We mine the English Common Law archives to discover the foundation upon which the submissions advanced here are anchored. Then, we analyze the position of the French Civil Code and its influence on international treaties. We discover an emerging straddle that embraces the two systems on the global scale thus highlighting not just the distant common threads of the European legal corpus but, also, the efficacy of amalgamating, in some form, two of the modern world's farthest reaching legal systems.

Ultimately, it is a tacit acknowledgment of the far-reaching impact of Common Law on international commercial jurisprudence. However, the French legal system which forms the backdrop for other Common Law countries and from which springs many notable legal thoughts, is investigated to contrast and compare its position in contemporary understanding and application of obligations in private law.

This research plan takes us through a legal intellectual odyssey replete with the prevaricating judicial dicta of the common law through the enactments of the French Civil Code to international treaties where we find a melding of both traditions in a world hungry both for departures as much as legal certainties.

### 1.1 The Philosophical Foundations

If we proceed by the light of reason, it is argued that man's fallibility is the foundation upon for our posited laws and the catalyst that energizes dynamism and social equanimity. By extension, it is submitted that the trust deficit inherent in human transactions and acts underpins the need for legal prescriptions. Concurrently, while recognizing this phenomenon, we are also confronted by another reality – the need for social cohesion and the need to behavioral and transaction control. Both make for a peaceful co-existence.

Thus, the philosophical concept of law creation is not only a mirror of nature's dispositional control, it is also a natural extension and a necessary symbol of humanity's complex contradictions organizational genius.

To be sure, a person that inhabits, in isolation, an island, need have no posited laws (at least, not by reference to a third party) although he may be ruled both by instinct and the need for survival. Yet, even in this solitude, he must interact with his environment and although a semblance of social reason may be absent, yet must he obey the laws of nature and the laws he must introduce to regulate himself and his interaction with his environment. While the former may be dominant and the latter, perfunctory, both explode with an amazing force the moment he is confronted by other beings or the arena of social competition. There, his social skills are tested and there, he must learn to acquiesce, dominate, negotiate or surrender totally.

Given that everyman is deeply committed to himself and selfishness is innate, we can thus assume that in the absence of posited laws or some degree of coercion,<sup>(1)</sup> no man can be trusted to negotiate with or even accommodate his brother except in his manifest best interest<sup>(2)</sup> and no man can devolve the preservation of his life to another. This is the social foundation of the law of self-defense which seeks to invest everyman with the ownership for defending and preserving the integrity of his person and property.

Law, then, as touching its social justice value, is the command of the sovereign<sup>(3)</sup> in that it seeks to ensure a departure from the

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- (1) That coercion need not be a formal law as such. Customs, family consciousness and that almost inalienable subservience to a sense of duty or moral compass all play a role in this phenomenon. Such nuances, one argues, are the bedrock of laws as posited. Indeed, the debate concerning the legitimacy of international law is anchored on the question whether coercion is a necessary instrument of obedience. See Sandra Raponi, *Is Coercion Necessary for Law? The Role of Coercion in International and Domestic Law*, 8 Wash. U. Jur. Rev. 35 (2015). Available at: [http://openscholarship.wustl.edu/law\\_jurisprudence/vol8/iss1/2](http://openscholarship.wustl.edu/law_jurisprudence/vol8/iss1/2)
- (2) This self-interest does not negate altruism. However, it is argued here that even altruism is steeped in and based on self-gratification. The only reason we take or abstain from taking any action is because of what we get out of it. See generally, Hudson, Hud, 1994, *Kant's Compatibilism*, Ithica: Cornell University Press. Hudson, argues that all acts are causally determined, but a free act is one that can be described as determined by irreducibly mental causes, and in particular by the causality of reason. This reason, we identify as originating in the self for the self.
- (3) With respect to H.L. Hart in his rejection of Austin, See *The Concept of Law* (Hart 1961) the question of the egalitarian mindset that views law as existing for its own sake is both romantic and unfeasible. In the absence of sanction in one form or another, law loses its teeth and becomes little more than an

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siege mentality and thus, the vigilante fallout by using or threatening some sort of force. As touching its utilitarian value, it is a facilitator enabled not so much by the sanctions of state as by the acquiescence of the governed for the singular purpose of economic and social prosperity. Either way, sanction or coercion is present.

Each community, to the extent that its collective social foundations and values allow, develop a semi-legal arrangement acquiesced to by the people as a means of regulating its activity and securing the desired cohesion necessary for peaceful existence and the suppression of vexations. What works in one community may not work in another unless such issues are germane to them and a nexus exists between them. These semi-legal arrangements, in time, develop into structured commands of the sovereign as societies become more complex.

The breath of influence of one's societal norms over another is a testimony to a complex and often turbulent interaction of those societies and, one dares say, competing might in most cases.

Of course, it would be disingenuous to hold that any one system of laws is preferable to the others. In truth, over the course of history, people across the world have developed their own unique

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adornment to be ignored or adored as desired. Thomas Hobbes, John Locke, and Immanuel Kant argue that a lawful condition in which rights can be secured requires a supreme sovereign with centralized legislative power that makes law, a centralized adjudicative power that interprets and applies the law to particular cases, and a centralized coercive power that enforces the law through sanctions. Raponi, ibid.

legal systems<sup>(1)</sup> to solve their specific issues. In time, however, due to the overarching spread of colonialism and efficacious economic integration, these systems have coalesced around the now dominant two – Common law and Civil law. Most countries on earth subscribe to one or the other although there are a few that have an amalgam of both or even, several other systems that embrace both customary and religious proclivities.

In England, the Common Law developed piece-meal as communities with similar values managed their affairs in concert with others and allowed matters to be decided based on accepted and acceptable norms. In time, a system developed that sought to apply previous decisions to similar cases. Thus, the doctrine of precedents<sup>(2)</sup> developed which held that decisions of higher courts, made in a similar case, should be binding in subsequent cases.<sup>(3)</sup> This became the Common Law system as applied by the judges of the English realm.

- (1) There are "as many legal systems as there are national states". See, R Zimmermann "Savigny's Legacy Legal History, Comparative Law, and the Emergence of a European Legal Science" LQR 580 (1996) 112, 576-605
- (2) According to the Oxford English Dictionary (2013) stare decisis is "The legal principle of determining points in litigation according to precedent".
- (3) Stare decisis is regarded as binding by the courts which can even decide to modify it. See The House of Lords (Practice Statement) which declared that it considered itself no longer formally bound by its own precedents and announced its intention "to depart from a previous decision when it appears right to do so." [1966] 1 WLR 1234, thus abandoning the previous rule under which courts were bound by their own prior decisions and echoing Frederick Pollock in First Book of Jurisprudence, 6th ed.

This Common Law system, by definition, is a product of legal evolution and judge-made law characterized by its aversion to prescription. Should the government wish to establish protection for a specific right, it would usually enact legislation to do so thus removing it from the ambit of the Common Law.

Civil arrangements such as contracts, under Common Law, have few provisions implied into them and the parties are at liberty to negotiate as they please. This means that parties must ensure the contract document adequately and correctly reflects all the terms that govern the relationship.

Civil law<sup>(1)</sup> has its origins in Roman law, as codified in the *Corpus Iuris Civilis* of Justinian.<sup>(2)</sup> The main feature of civil law is

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(1) The term "civil law" has two meanings: in its narrow meaning it designates the law related to the areas covered by the civil codes. Its broader meaning concerns the legal systems based on codes in contrast to the common law system

(2) The *Corpus Juris Civilis* is the name given to a four-part compilation of Roman law prepared between 528 and 534 A.D. by a commission appointed by Emperor Justinian and headed by the jurist Tribonian. The *Corpus* includes the Code (a compilation of Roman imperial decrees issued prior to Justinian's time and still in force, arranged systematically according to subject-matter); the Digest (or Pandects) (fragments of classical texts of Roman law by well-known Roman authors such as Ulpian and Paul, composed from the 1st to the 4th centuries A.D., arranged in 50 books subdivided into titles); the Institutes (a coherent, explanatory text serving as an introduction to the Digest, based on a similar and earlier work by the jurist Gaius); and the Novellae (Novels) (a compilation of new imperial decrees issued by Justinian himself). See A.N. Yiannopoulos, *Louisiana Civil Law System Coursebook*. Part i, 9-10 (Claitor's Pub. Div., 1977)

that it is contained in civil codes<sup>(1)</sup> and is characterized by its prescriptive nature. The codes have been described as a "systematic, authoritative and guiding statute of broad coverage, breathing the spirit of reform and marking a new start in the legal life of an entire nation."<sup>(2)</sup> The last authority is the legislature whose laws are binding on all allowing limited scope for judge-made law in all courts.<sup>(3)</sup>

Under the civil law, contracting parties enjoy less freedom with regards to the terms. Thus, the codices cast a large shadow over the relationship by implying provisions into a contract some of which the parties cannot oust and may not want.

These two systems of law have pervaded the world in no uncertain terms. They both display characteristics that have solidified their respective positions amongst those who subscribe to them. For all their idiosyncrasies, they both continue to evolve along the lines of both judicial and statutory mandates thus maintaining their relative independence and attachment to governmental and judicial activism.

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(1) There is, usually, a written constitution based on specific codes (e.g., civil code, codes covering corporate law, administrative law, tax law and constitutional law) enshrining basic rights and duties; administrative law is, however, generally, less codified and administrative court judges tend to behave more like common law judges. See <http://ppp.worldbank.org/public-private-partnership/legislation-regulation/framework-assessment/legal-systems/common-vs-civil-law>.

(2) R B Schlesinger et al, *Comparative Law* (Mineola, New York, 1998).

(3) In reality, judges have shown a tendency to follow previous judicial decisions and constitutional and administrative courts can nullify laws and regulations and their decisions in such cases are binding for all.

In our journey, a brief dalliance juxtaposing the two systems may be worthwhile if only to chart the course and set a bridge to our eventual destination.

Summary differences between Civil Law and Common Law legal systems<sup>(1)</sup>

Feature	Common Law	Civil Law
Written constitution	Not always	Always
Judicial decisions	Binding	Not binding on 3rd parties; however, administrative and constitutional court decisions on laws and regulations binding on all
Writings of legal scholars	Little influence	Significant influence in some civil law jurisdictions
Freedom of contract	Extensive – only a few provisions implied by law into contractual relationship	More limited – a number of provisions implied by law into contractual relationship
Court system applicable to PPP projects	In most cases, contractual relationship is subject to private law and courts that deal with these issues	Most PPP arrangements (e.g. concessions) are seen as relating to a public service and subject to public administrative law administered by administrative courts

(1) Sources - World Bank Toolkit (2006) - Approaches to Private Participation in Water Services, presentation to IFC on Some Differences between Civil Law and Common Law in a "nutshell" - Gide Loyrette Nouel 2007

The Common Law system continues to thrive in the erstwhile British colonies or protectorates. These include the United States, Canada, Australia, New Zealand and the Commonwealth nations.

The Civil law system arose from continental Europe and is the system of laws in countries that are typically former French, Dutch, German, Spanish or Portuguese colonies or protectorates. Amongst these are much of Central and South America. Most of the Central and Eastern European and East Asian countries also embrace a civil law structure.

Most civil codes were adopted in the nineteenth and twentieth centuries: French Code Civil, 1804, Austrian Burgerliches Gesetzbuch, 1811, German Burgerliches Gesetzbuch, 1896, Japanese Minpo, 1896, Swiss Zivilgesetzbuch, 1907, Italian Codice Civile, 1942.<sup>(1)</sup>

An abiding feature of the Common Law is that generally speaking, anything that is not expressly prohibited by law is permitted in a body of law that is largely unwritten, in most cases and must be discovered as opposed to reached for.

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(1) See J H Merryman, *The Civil Law Tradition: An Introduction to the Legal Systems of Western Europe and Latin America* (2nd ed Stanford University Press, 1985); M A Glendon et al, *Comparative Legal Traditions* (West Publishing Co, 1994).

By contrast, Civil Law is highly systematized and structured and relies on declarations of broad, general principles, often ignoring the details.<sup>(1)</sup> One of its essential characteristics is that the courts must apply and interpret the codified law to the facts of a given case. The code thus regulates all cases likely to occur in reality. The courts are required to apply some of the general principles in cases falling outside the code to fill the lacuna or void thus left.<sup>(2)</sup> Some of these systems also embrace elements of a third legal system such as customary laws.<sup>(3)</sup>

- (1) The Private Law Dictionary at 62, defines "civil law" as follows: "Law whose origin and inspiration are largely drawn from Roman law." The definition proceeds to incorporate the following quotation from Paul-Andrd Crdpeau. "Foreword" to the Report on the Quebec Civil Code, vol. 1, Draft Civil Code xxvii-xxviii (Ifditeur officiel du Quebec, 1978): The Civil Law is not simply a collection of rules drawn from Roman, ecclesiastical or customary law, and handed down to us in a solidified form. The Civil Law, as it was so aptly described by Professor Rend David "consists essentially of a 'style': it is a particular mode of conception, expression and application of the law, and transcends legislative policies that change with the times in the various periods of the history of a people."
- (2) See, for example, the French Code Civile art 4 which provides that "if a controversy cannot be decided by a precise provision, consideration is given to provisions that regulate similar cases or analogous matters; if the case still remains in doubt, it is decided according to the general principles of the legal order of the State."
- (3) Civil law is divided into two streams: the codified Roman law (as seen in the French Civil Code of 1804 in Continental Europe, Quebec and Louisiana, USA and uncodified Roman law (as seen in Scotland and South Africa). See Zimmerman, *ibid*.

### 2.1 Obligations in Legal Terms

All the jurisdictions surveyed for this paper suggest a predilection for the terms ‘obligations’ or ‘duty’ in contractual relationships and civil proceedings. This is for good reason. The words appear to embody a universal legal threshold and are, relatively, easily understood if one resists the temptation to engage in semantics. However, on a closer inspection, the terms fail the test of clarity.

There is, nonetheless, a universally legally acceptable argument for the terms as used in the context of legal literature, to convey the meaning of a recognized threshold of acceptable behavior for the purposes of effecting the wishes of parties to a contract or upholding and safeguarding societal requirements. It is in this context that the terms will be used and interchangeably, throughout this paper without regard to their English, French or Arabic parlance. There is, however, in the context of our journey, a penchant to stick with the word ‘obligation’ for the simple reason that it is, perhaps, closer to our legal principles, on balance.

The development of the law of obligations across the Common Law world has been, and continues to be, a story of unity and divergence. Its common origins continue to exert a powerful stabilising influence, propelled by a methodology that places heavy weight on the historical foundations of legal principles. Divergence is, however, produced by numerous factors, including national and

international human rights instruments, local statutory regimes, civil law influences, regional harmonisation, local circumstances and values and different political and legal cultures.<sup>(1)</sup>

### International View

The Principles of International Commercial Contracts (PICC) as set out by UNIDROIT describes the general rules for international commercial contracts that shall be applied when the parties have agreed that their contract be governed by them, may be applied when the parties have agreed that their contract be governed by general principles of law, the *lex mercatoria* or the like. They may also be applied when the parties have not chosen any law to govern their contract and may be used to interpret or supplement international uniform law instruments. They may also be used to interpret or supplement domestic law and serve as a model for national and international legislators.<sup>(2)</sup>

The PICC makes the assumption, that the concept of “international” contracts should be given the broadest possible interpretation so as ultimately to exclude only those situations where no international element at all is involved, i.e. where all the relevant

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(1) See The Common Law of Obligations Divergence and Unity Eds: Andrew Robertson, Michael Tilbury Media of The Common Law of Obligations 28-01-2016 Edition:1st at: <http://www.bloomsbury.com>

(2) Art. 1.6(2) UNIDROIT Principles, 2010

elements of the contract in question are connected with one country only. In other words, there is a limitation to or an express ousting of private litigation.<sup>(1)</sup> Yet, the PICC holds that there is nothing to prevent private persons from agreeing to apply the Principles to a purely domestic contract. Any such agreement would however be subject to the mandatory rules of the domestic law governing the contract.<sup>(2)</sup> With regards to private law of obligations, however, the PICC seeks to create a safe distance by limiting its scope to international commercial contracts. It is submitted that the principles enunciated and re-iterated in the PICC, while being restricted to the arena of international commercial contracts, are instructive, in several respects, to private law under national or domestic jurisdictions. In other words, international agreements reflect the traditions of private law and convey certain sentiments that are applicable there. Furthermore, both traditions of common and civil laws find prominent presence in several countries in spite of the latter's proven choice of legal system.<sup>(3)</sup>

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(1) The idea is rather that of excluding from the scope of the Principles so-called "consumer transactions" which are within the various legal systems being increasingly subjected to special rules, mostly of a mandatory character, aimed at protecting the consumer, i.e. a party who enters into the contract otherwise than in the course of its trade or profession.

(2) Ibid at page 2 of the preamble.

(3) The term "mixed", which we have chosen over other terms such as "hybrid" or "composite", should not be construed restrictively, as certain authors have done. See <http://www.juriglobe.ca/eng/sys-juri/class-poli/sys-mixtes.php>. See

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## 2.2 English Common Law

In Hayak and the Common Law, Harnowy, observes that English Common Law holds a superiority over statute law in framing a free society and that like much (of) medieval law, reflected the underlying notion that law was not so much created as uncovered and that its principles were identical to the fundamental canons of justice upon which all free societies rest.<sup>(1)</sup>

This exposition of Hayak's treatise appears to lay down a principle that has governed the judges of England in their judicial activism. They have always maintained that the judges discover the law rather than make it. Indeed, per Harnomy, it was this view of law that predominated in England until the 15th and 16th centuries, when, for the first time, the European nation states sought to use legislation to effect specific policies.<sup>(2)</sup>

He goes on to argue that until the discovery of Aristotle's Politics in the thirteenth century and the reception of Justinian's code in the fifteenth, Western Europe passed through...[an] epoch of nearly a thousand years when law was... regarded as something

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also, AMIN, S.H., *Middle East Legal Systems*, Glasgow, Royston, 1985 for a comprehensive list of world legal systems.

(1) See F. A. H AYEK AND THE COMMON LAW in Ronald Hamowy Cato Journal, Vol. 23, No. 2 (Fall 2003).

(2) *ibid*

given independently of human will, something to be discovered, not made and when the conception that law could be deliberately made or altered seemed almost sacrilegious. Thus, the reason why England, unlike the continental European countries, did not develop a highly centralized absolute monarchy in the 16<sup>th</sup> and 17<sup>th</sup> centuries was its distinctive system of legal rules and procedures. The argument is persuasive when set against the battles fought between the monarchy and the people of England at various times culminating in the Magna Carters of 1215 and 1225.<sup>(1)</sup>

“What prevented such development...was the deeply entrenched tradition of a Common Law that was not conceived as the product of anyone’s will but rather as a barrier to all power, including that of the king”<sup>(2)</sup>— a tradition which Sir Edward Coke was to defend against King James I and his Chancellor, Sir Francis Bacon and which Sir Matthew Hale brilliantly restated at the end of the seventeenth century in opposition to Thomas Hobbes.”<sup>(3)</sup>

The significance of this observation is instructive as a fundamental lynchpin of freedom of association and contracts. This

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(1) These have, in turn, spurred other great charters including the US Bill of Rights of 1791, Universal Declaration of Human Rights (1948) and the European Convention on Human Rights (1950) plus many others. See <https://www.bl.uk/magna-carta/articles/magna-carta-an-introduction>

(2) *Infra*. See also “The Origins of the Rule of Law” (Hayek 1960:162 – 75) and “The Changing Concept of Law” (Hayek 1973:72 – 93).

(3) *Ibid*.

freedom is recognized under international legal principles of modern parlance. Indeed, the hitherto referenced PICC states, at Article 1.1 thus: “The parties are free to enter into a contract and to determine its content.”<sup>(1)</sup>

It is argued here that the Principles of International Commercial Contracts, for all its protestations and attempts at textual and jurisdictional neutrality, adopts the foundations of Common Law in its articles, even as it revels in semantics. This is not to argue that the PICC contain no traces of civil law<sup>(2)</sup> but to state an obvious fact concerning the reaches of Common Law in international commercial transactions.

One of the more robust catalysts for a reformation of the French Contract law is the *Doing Business Reports*<sup>(3)</sup> that criticized the effectiveness of the French legal system in comparison with the Common Law systems. The Doing Business Report of the World Bank ranked France well below other nations in terms of the

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- (1) The principle of freedom of contract is of paramount importance in the context of international trade. The right of business people to decide freely to whom they will offer their goods or services and by whom they wish to be supplied, as well as the possibility for them freely to agree on the terms of individual transactions, are the cornerstones of an open, market-oriented and competitive international economic order.
- (2) In fact, it is observed that the PICC contains strands from many legal jurisdictions but is at pains to remain unbiased in its pronouncements.
- (3) The *Doing Business Reports* began in 2003. They can be viewed (2004 onwards) online at <<http://goo.gl/iJ4TQg>

evaluation of its legal system and judiciary order. Of course, it does not deny the value of the French legal system. It merely argues that the application of civil codes to a fluid and dynamic international legal arena may stifle legal innovation when needed most.

### 2.3.1 Contract as a Voluntary Assumption of Obligations

Under the legal jurisdiction of England and Wales, both contract and tort, aspects of private law developed and are largely governed by the Common Law. In general terms, a contract is a legally binding agreement between two consenting parties who may or may not be mutually acquainted but whose execution of the terms of the agreement is interpreted by the courts to be evidence of their intention to be bound together for whatever reason. Thus, a contract is an agreement that gives rise to obligations which the law will recognize and enforce. At Common Law, there are three ingredients necessary to create a contract:

- (i) There must be an agreement between the parties detailing who does what
- (ii) There must be an intention expressed or implied, to be bound in a contract and
- (iii) There must be price or cost from one party to the other for the performance.

In the event of a dispute, the law will look for the presence of all three elements to find a valid contract and thus, the existence of

obligations to perform. Fundamentally, however, Common Law concerns itself with the principle of assent between the parties to find a binding contract.

Thus, English law generally<sup>(1)</sup> gives effect to the contractual relationship between parties. There is limited scope for terms to be implied or for public policy or other principles to overwrite what has been agreed. Thus, contracts, by their very nature, are market driven in that they are based on societal norms and values as opposed to government prescription per se. Yet, as we see in recent developments on 'good faith'<sup>(2)</sup>, English Common Law is and has remained flexible thus allowing it to develop and embrace the dynamics of economic, societal and social changes. This penchant for flexibility safeguards the Common Law's ability to innovate legal frontiers in a rapidly changing world. It also keeps the Common Law busy and some might argue, relevant.<sup>(3)</sup>

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(1) Unless the contract is for an illegal or immoral act or involves a minor.

(2) See *Berkeley Community Villages Ltd and another v Pullen and others*, where the court held that an obligation to act in "utmost good faith" required the parties to "observe reasonable commercial standards of fair dealing in accordance with their actions which related to the Agreement". By contrast, in *Gold Group Properties Ltd v BDW Trading Ltd*, the court held that such an obligation would not "require either party to give up freely negotiated financial advantage clearly embedded in the contract". See also UNIDROIT Principles of International Commercial Contracts.

(3) See the contrasting rulings in *Yam Seng Pte Ltd v International Trade Corporation Ltd* [2013] EWHC 111 QB and *Mid Essex Hospital Services NHS Trust v Compass Group UK & Ireland Ltd (trading as Medirest)* [2013] EWCA Civ 200, 15 March 2013

### A Consideration and Causa

Whereas consideration is a main ingredient of a binding contract at Common Law, in contrast, under civil law, a contract does not exist in the absence of a lawful cause (*causa*).<sup>(1)</sup> Cause, which is different from consideration, is the inducement to a contract and is the binding agent in a contract. Its presence means a party need not obtain a benefit from a contract.<sup>(2)</sup>

### Third Party Benefits

In exploring the difference between consideration and cause, we discover that Common Law does not recognize contracts favoring a third party beneficiary. The argument is that only a person who has given consideration and is, thus, a party to the contract, may enforce a contract.<sup>(3)</sup> This doctrine, known as “privity of contract”<sup>(4)</sup> applied to exclude a third party from exercising any rights under that

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(1) Article 1131 of the French Civil Code provides that "an agreement without cause or one based on a false or an illicit cause cannot have any effect."

(2) C Larroumet, "Detrimental Reliance and Promissory Estoppel as the Cause of Contracts in Louisiana and Comparative Law" (1986) 60 Tul L Rev 1209.

(3) *Dunlop Pneumatic Tyre Co v Selfridge & Co* [1915] UKHL 1; [1915] AC 847, 853.

(4) "The doctrine of privity means that a contract cannot, as a general rule, confer rights or impose obligations. See *Dunlop Tyre Co v Selfridge* [1915] AC 847 arising under it on any person except the parties to it.

contract for lack of consideration.<sup>(1)</sup> The doctrine effectively prevents terms imposing obligations or benefits in favor of third parties.

Common Law developed the doctrine primarily because the system concerns itself with rights to sue under a contract as opposed to the derivation of rights under it. The doctrine was not without its detractors as it caused considerable challenges in litigation. The English courts had to adopt some exceptions<sup>(2)</sup> to it but these did very little to defuse the confusion inherent in it. “The rule that no one except a party to a contract can be made liable under it is generally regarded as just and sensible. But the rule that no one except a party to a contract can enforce it may cause inconvenience where it prevents the person most interested in enforcing the contract from doing so. The many exceptions to the doctrine make it tolerable in practice, but they have provoked the question whether it would not be better further to modify the doctrine or to abolish it altogether”.<sup>(3)</sup>

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(1) Tweddle v Atkinson (1861) 1 B&S 393

(2) Shanklin Pier v Detel Products [1951] 2 KB 854, Scruttons Ltd v Midland Silicones Ltd [1962] AC 446, New Zealand Shipping v Satterthwaite (The Eurymedon) [1975] AC 154, Les Affreteurs Reunis v Leopold Walford [1919] AC 801, Tulk v Moxhay (1848) 2 Ph 774,

(3) GH Treitel, The Law of Contract, 9th ed, 1995, p588

Finally, several Common Law countries moved to address this by legislating for contracts for the benefit of third parties.<sup>(1)</sup> Not to be outdone, the British Government enacted its own legislation reforming the Common Law rule in the form of Contracts (Rights of Third Parties) Act 1999 thus abandoning the doctrine.<sup>(2)</sup> This Act introduced contracts in favor of third parties into English law thus paving the way for the enforcement of performance and duties by a third party.<sup>(3)</sup> This was the culmination of many years of law reform proposals that started in 1937.<sup>(4)</sup> It did not, however, kill the doctrine

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- (1) For instance, New Zealand has the Contracts (Privity) Act 1982. Contracts for the benefit of third parties are also accepted in the USA; see Eisenberg "Third Party Beneficiaries" 92 Colum L R 1258 (1992).
  - (2) M Dean "Removing a Blot on the Landscape - The Reform of the Doctrine of Privity" (2000) JBL 143.
  - (3) a third party may in his own right enforce a term of a contract if: (a) the contract expressly provides that he may, or (b) the term purports to confer a benefit on him (except where on a proper construction of the contract it appears that the parties did not intend the term to be enforceable by the third party). Contracts (Rights of Third Parties) Act 1999.
  - (4) The Law Reform Committee of the Law Commission of England & Wales first made initial legislative reform proposals in 1937 (Cmnd. 5449). Further proposals were presented for discussion by the Law Commission in 1991 (Paper No 121, 1991). In July 1996, the Law Commission published proposals in "Privity of Contract; Contracts for the Benefit of Third Parties" (Cmnd. 3329; Law Com No 242). This proposal recommended that the law expressly provide for third parties to be able to enforce contracts (including taking advantage of exclusion/limitation clauses) in certain circumstances.

of privity of contract<sup>(1)</sup> because, as the court observed, imposing a duty on a party without his knowledge would be tantamount to an infringement.

### 2.3.2 Privity of Contract Under the French Civil Code.

The section of the Civil Code on the law of contract was amended and restructured in its entirety with the revised section coming into force on 1 October 2016.<sup>(2)</sup>

The French Civil Code is a historical document whose legal weight has sustained its wake for since 1804 and which has been the main private law instrument in France.

As observed, the French Civil Code enjoys a global influence given its colonial past. Since many international businesses have commercial interests in France, its contract law jurisprudence plays an important role in commercial ventures. Besides, this, with its

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(1) 'It would be an unwarranted infringement of a third party's liberty if contracting parties were able, as a matter of course, to impose burdens on a third party without his or her consent. Our proposed reforms do not, therefore, seek to change the 'burden' aspect of the Privity doctrine or the exceptions to it': Law Commission Report No 242, Contracts for the Benefit of Third Parties (<http://www.lawcom.gov.uk/docs/lc242.pdf>)

(2) Ordonnance no 2016-131 du 10 février 2016 portant réforme du droit des contrats, du régime général et de la preuve des obligations, JORF no 0035 of 11 February 2016. The Ordonnance was translated by John Cartwright, Bénédicte Fauvarque-Cosson, and Simon Whittaker: [http://www.textes.justice.gouv.fr/art\\_pix/THE-LAW-OFCONTRACT-2-5-16.pdf](http://www.textes.justice.gouv.fr/art_pix/THE-LAW-OFCONTRACT-2-5-16.pdf).

reforms comes a decisive moment for Francophile nations whose laws are based on the French system. jurisdictions that have used the Code as a model or a source of inspiration to forge their own laws.

However, one of the startling issues with the French Civil Code prior to its 2016 reform is the palpable absence of third party rights. Under the code, a contract that sought to benefit a third party would be invalid (*alteri stipulari nemo potest*). Thus, neither the third party nor the other contacting parties could acquire a right from it.<sup>(1)</sup> Like some of its continental neighbors, the French system considered this invalidity as the norm.<sup>(2)</sup> As such, such a contract was only upheld in a few closely defined and exceptional cases: first, if the promisee has a pecuniary interest in the promisor's performance to the beneficiary,<sup>(3)</sup> and, secondly, for a specific type of contract, such as a gift made subject to a limit on the use to which the gift is to be put (*donatio sub modo*).<sup>(4)</sup>

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(1) cf R Zimmermann, *The Law of Obligations: Roman Foundations of the Civilian Tradition* (1996) 34-45; H Kötz, 'Rights of Third Parties: Third Party Beneficiaries and Assignment' in A von Mehren (ed), *International Encyclopedia of Comparative Law, vol VII: Contracts in General*, ch 13 (1992) paras 4-13; HKK/Vogenauer §§ 328-335 paras 5-56.

(2) Art 1119 French Cc.

(3) See the first sentence of Art 1121 French Cc; 1411(1) Italian Cc.

(4) See the first sentence of Art 1121 French Cc. Civilian systems regard gifts as contracts.

Under the aforementioned PICC, there is a significant departure and this is consistent with the common law position. No such ‘*numerus clausus*’ of agreements can be validly made for the benefit of third parties: in principle, all types of commercial contracts can be concluded as contracts in favour of a third party. In adopting this approach, Art 5.2.1(1) is in step with the gradual abandonment of the maxim *alteri stipulari nemo potest* in civilian systems from the late 19th century onwards. Today these systems recognize the general validity of contracts in favour of third parties for all types of contracts regardless of a particular pecuniary interest on the part of the promisee either by way of explicit legislation<sup>(1)</sup> or, as in France and Italy, by judicial practice deviating from the relevant provisions in the Civil codes.<sup>(2)</sup>

A ‘contract for the benefit of a third party’<sup>(3)</sup> is an agreement between two parties that one of them shall confer a benefit on a third person and that the third shall acquire an original and independent right of action against the party who promised to confer the

(1) Art 112(2) Swiss OR; § 328(1) German Cc: ‘A contract may stipulate performance for the third party...’. Art 72(1) AEPL Code.

(2) For France Cass civ 16 January 1888, DP 1888.1.77; Cass req 30 April 1888, DP 1888.1.291. For Italy Cass 24 October 1956, n 3869, Giust civ Mass 1956, 1318. See now also Art 1171 APRDO with an explanatory note stating that the ‘point of this leading provision is to make available the possibility of a stipulation for the benefit of a third party as a matter of principle’.

(3) See, eg, Law Commission, Privity of Contract: Contracts for the Benefit of Third Parties (Law Com No 242, 1996).

benefit.<sup>(1)</sup> In contrast to English law, under the French Civil Code<sup>(2)</sup> such an undertaking is absent. Or not allowed.

### 2.3.3 Negligence as a Tort

The law of tort deals with civil wrongs which is mostly dominated by the concept of negligence. Negligence, specifically and tort law, are largely, the creation of judicial activism and expanded in recent times (throughout the 19<sup>th</sup> and 20<sup>th</sup> Centuries) to cope with the pressures of a modern need to safeguard protected rights of the citizen.<sup>(3)</sup> This lends credence to the concept here expounded of the utilitarian value of law in the private sector. Essentially, it is to right a wrong thus, negating an unhelpful outcome or one that adversely impacts the sovereign's peace.

Tortious liability arises from a non-contractual relationship between the parties. In tort, familiarity between the parties is not required although it may be present neither is a contract required. However, this lack of a contractual relationship raises the question, *ab initio*, as to whether any relationship exists between the parties. If one party appears to be liable to the other and negligence to discharge that liability can be established, despite the absence of a

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(1) Art 5.2.1 paras 21-25, Commentary on the UNIDROIT Principles of International Commercial Contracts (PICC) (Oxford University Press)

(2) See Art 1120 French Cc.).

(3) Deakin, Johnston and Markesinis Markesinis and Deakin's Tort Law, Oxford University Press, 5th edition, 2003 p74.

contractual relationship, we then have grounds for the doctrine of duty of care.<sup>(1)</sup> Indeed, as has been observed, “the law of tort is concerned with (Common Law) wrongs, other than breach of a binding promise” (which is the proper subject matter of contract law).<sup>(2)</sup>

To establish fault, tort law requires the presence of three essential elements:<sup>(3)</sup>

- (i) A legal duty to act in a specific manner must exist.
- (ii) It must be shown that the duty in question was breached resulting in a harm
- (iii) A direct proximity must be shown to exist between the harm or injury suffered and the actions or omissions of the defending party.

The possible fourth element is that the harm or loss caused must be one protected by operation of the law. In other words, the

(1) *Caparo Industries plc v Dickman* (1990) which established the three criteria for the finding of a duty of care: the harm must be reasonably foreseeable, there must be proximity between the claimant and the defendant and it must be just, fair and reasonable to impose a duty of care on the defendant. See also, *Hedley Byrne & Co Ltd v Heller and Partners* (1963).

(2) A. Burrows, “Dividing the Law of Obligations”, in A. Burrows, *Understanding the Law of Obligations* (Oxford: Hart Publishing, 1998), 1 at 5. Whether such a neat division can be maintained is questioned in S.M. Waddams, *Dimensions of Private Law* (Cambridge University Press, 2003), Chapter 8

(3) *Donoghue v Stevenson*, [1932] AC 562

breach must be against a right protected or guaranteed by posited law.

In holding for a general duty of care, the Law Lords vacated a previous dictum which saw that liability for careless act was only to be found in a select number of prescribed situations. They held that there was a duty to “...take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbor...[i.e.] persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or omissions which are called into question”<sup>(1)</sup>

The term “*tort*” traces its etymology to the Latin term “*torquere*”. This means “twisted or wrong.” Under English Common law, there was no place for a separate legal action in tort. The law, instead, provided two central limbs of redress to aggrieved parties: Direct injuries came under the tort of trespass and indirect injuries came under actions "on the case." However, in keeping with its sense of emergence, the Common Law gradually evolved to recognize other civil actions.

Under negligence, once a duty of care is established, it is, by operation of law, taken for granted that the nature of the obligation

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(1) Ibid, p580

is not a matter for consensus between the parties.<sup>(1)</sup> In other words, the civil law, to all intents and purposes, is concerned with preserving social norms and values. These values fall outside the ambit of state operations thus precluding criminal sanctions but are still sufficiently significant and relevant to the preservation of peace thus requiring compensation of the injured party and the deterrence of the wrongdoer or *tortfeasor*:<sup>(2)</sup> Tort thus seeks to restore the injured party to the position he would have been had the injury not occurred. No relationship is required. Contract law, by contrast, operates to compel a party to an agreement to discharge his duty to the other non-offending party in a two-way relationship.

Thus, tort law can be seen as corrective<sup>(3)</sup> in its operation. That is to say that it seeks to restore an injured party to his former position before the loss or breach as earlier articulated. This is because tort, as a matter of default, is not condemnatory in its pronouncements given that liability can be established even when a tortfeasor did not behave in a blameworthy manner.

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(1) Blyth v Birmingham Water Works (1856).

(2) e.g. Dobson (Litigation Guardian of) v. Dobson, [1999] S.C.J. No. 41, [1999] 2 S.C.R. 753, 214 N.B.R. (2d) 201 174 D.L.R. (4th) 1 at para. 48 (S.C.C.).

(3) This is, altogether, not a very helpful term since, in some cases, correction or restoration, is a misnomer and the damage caused or done can never be truly repaired.

Furthermore, tort allows a third party to discharge the obligations of a tortfeasor thus treating the breach as a debt of repayment even when the injured party has not consented or is ignorant of this third party intervention. This is a marked departure from the approach of English courts until 1999 when the, by statutory provision, was updated to recognize the right of third parties to act upon terms in a contract.

In any event, tort makes provision for the management of liability by the purchase of insurance to bear the brunt of a breach by commission or omission.<sup>(1)</sup>

As far as negligence is concerned, we see that the nature of the obligation is not agreed between the parties but is a function of legal imposition. In this sense, a road user will owe a duty of care to other road users and a product manufacturer will owe a duty of care to the final consumers. Once a duty of care is established, the standard of judgment is that of the reasonable man.<sup>(2)</sup> In professional situations, the operating standard is that of the reasonable professional acting as though he held the skills and abilities in question. This includes amateurs and learners.

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(1) Gardner, John, 2001, "Obligations and Outcomes in the Law of Torts", in Peter Cane and John Gardner (eds.), *Relating to Responsibility: Essays for Tony Honoré*, Oxford: Hart Publishing.

(2) *Blyth v Birmingham Water Works* (1856).

#### **2.4 The French: Fault and Relief**

Since the original Civil Code of 1804, tortious liability has been founded on the principle of fault giving rise to a relief. Under this Napoleonic Code, “Any act whatever of man, which causes damage to another, obliges the one by whose fault it occurred, to compensate it”.<sup>(1)</sup>

Note that intention is not a necessary ingredient of the fault. In other words, fault may be imputed to a negligent actor even in the absence of any intentions, on his part, to cause harm.

Essentially, under article 1383, “Everyone is liable for the damage he causes not only by his intentional act, but also by his negligent conduct or by his imprudence”.

In this context, there is very little difference between the English Common Law and the French Civil Code. What there is, however, is pointed and quite succinct.

##### **2.4.1 The Nuances of the Law of Contract**

French contract law has been able to stay up and keep up to date with the many changes in society, thanks to the judicial

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(1) Article 1382

interpretation of the various articles of the French civil code and the generality of its articles.<sup>(1)</sup>

The French Commercial Code, as revised in October 2016, is noteworthy for its strict requirements for the process of negotiations prior to the creation of a binding contract. Indeed, the code goes further to require documentary evidence of such negotiations to safeguard the integrity of the contract and not relegate it to a standard form contract.

Thus, under the French legal system, it should be understood that in commercial relationships, a contract does not have to be limited to its written provisions.<sup>(2)</sup> This puts it at variance with the Common Law where the contract is generally taken to the definitive statement of the agreement between the parties. The obligations of the parties in such a relationship, under French law, could go well beyond what was reduced to writing. For all the textual pronouncements of the French civil law, it is clear, by the provisions of the code that the written contract requires more to support or prove its evolution and that notice is taken of this process even

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(1) There have been many previous attempts to reform French contract law but its principles, forged in 1804, have escaped unscathed, except for certain transpositions of European directives. See Alexis Downe, THE REFORM OF FRENCH CONTRACT LAW: A CRITICAL OVERVIEW, Revista da Faculdade de Direito - UFPR, Curitiba, vol. 61, n. 1, jan./abr. 2016, p. 43 – 68

(2) Decisions of the French courts sanctioning non-negotiated contracts: French Supreme Court 27 May 2015, n° 14-11387, 3 March 2015, n° 13-27525

though it lies outside the contractual instrument. French law<sup>(1)</sup> provides that the general terms and conditions of sale are the basis of commercial negotiations. Thus, negotiations cannot be ousted in favor of the buyers' terms and conditions. In fact, in some cases, the civil code stipulates annual negotiations.<sup>(2)</sup>

This provides a point of convergence with the English Common Law in that it recognizes, and stipulates freedom and assent in commercial negotiations. This convergence relates solely to the recognition of the freedom of the parties to negotiate. However, thus far and, seemingly, no further. Nonetheless, as we see with the latest reform of the French law of Contracts, the contract is no longer defined as an act producing obligations but as “a concordance of wills of two or more persons with a view to creating legal consequences.”<sup>(3)</sup> Article 1.102 of the Commercial Code is thus, a recognition of the freedom of contracts.

Under French law, Parties to a contract must request the other contracting party's general terms and conditions, thus allowing them to go beyond these provisions and enter negotiations.

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(1) Article L. 441-6 of the French Commercial Code

(2) Articles L. 441-7, *ibid*

(3) Taken from the English translation of the *reform project* at: <http://goo.gl/0zukei>

Failure to do so risks creating a standard form contract coming under a specific legal oversight.<sup>(1)</sup> In the event ambiguities, standard form are interpreted against the drafting party.<sup>(2)</sup>

Furthermore, terms in standard form contracts, cannot impose significant imbalance in the rights and obligations of the parties. Such a creation would render an interpretation that the contract is not written<sup>(3)</sup> Even in such a case, the significant imbalance must not broach the main subject matter of the contract or the adequacy of the price. Per the French Commercial Code, it's characterization could constitute a tort<sup>(4)</sup> which give rise to administrative sanctions.

Obligations of the parties to a contract are thus imposed, at least, partially, by specific statutory provisions of the French Civil Code. Yet, unlike the Common law, the French law is decidedly protectionist in its application. For instance, for instance, under the new French Civil Code the provision of hardship, introduced as part of the recent legislative reform operates to mitigate potential damage to a contracting party due to circumstances unforeseeable at the time of the contract, such that performance proves excessively onerous for

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(1) Per the 2016 revised Civil Code, Article 1110 states that “a standard form contract is one whose general conditions are determined in advance by one of the parties without negotiation”.

(2) Article 1190, *ibid*.

(3) Article 1171, *ibid*

(4) Article L.442-6 I 2

that. Integral in this application is a lack of acceptance of the risk of such a change. The hardship clause allows the impacted party to request negotiations de novo.

Should the parties fail to reach a new position, the courts may, at the request of one of the parties, revise the contract or make it voidable from a certain date and subject to such conditions as the court shall determine. Thus, it becomes clear that to avoid such judicial interventions, parties to a contract are advised to anticipate hardship scenarios by drafting acceptance of risk clauses or by adapting their contract.

One may indeed be forgiven for seeing the French system as bureaucratic and interfering in both scope and application. Unlike the Common Law that prefers voluntary terms in contracts by allowing the parties to negotiate their own terms, the French system is replete with codices that regulate commercial contractual relations including aforementioned French Commercial Code, the French Civil Code and the French Labor Code etc.. The broader aim of the French Commercial Code is to restore a more balanced and equitable agreement, on the basis of the negotiated terms, in cases where an imbalance is discovered. It does this through the mechanism of state intervention in determining what is equitable.

Furthermore, the French Labor Code imposes a duty of “vigilance” under which “any contractor entering into a contract for the performance of work, the provision of services or the

performance of a business transaction must make sure that the other contracting party complies with its obligations as employer, particularly its obligations related to the declaration and payment of social-related contributions.<sup>(1)</sup> Violations of this provision may lead to criminal sanctions etc.<sup>(2)</sup>

Finally, in further moves to reform the French law on contracts and make it more attractive to the international commercial world, the French abolishes the cause as a condition of validity of the contract. “Indeed article 1,128 of the *ordonnance* states that a contract must satisfy three conditions in order to be valid; the consent of the parties, who in turn must have had the capacity to conclude the contract and the contract must have a licit and certain content.”<sup>(3)</sup>

#### 2.4.2 Tort Law

Where the English Common Law of tort was created to restore and prevent, the French tort law was designed to discourage socially undesirable behavior. Again, like its English counterpart, it too has evolved that today, “the law of civil liability not only allows the courts to uphold against those who would disregard the rights

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(1) Articles L. 8222-1 and sub.

(2) Articles L.8222-2 of the French Labor Code, L.242-1-2 French Social Security Code [16] Articles L.8224-1 to L.8224-6 of the French Labor Code

(3) Alexis Downe, *infra*

already acknowledged to exist, but also contributes to the emergence and protection of rights as yet inchoate and unrecognized It thus constitutes a method of complementing and improving the legal system and bringing it up to date.”<sup>(1)</sup>

Civil liability, under French law, falls under private law – tort and contract – a derivative of the principle of non-cumul des responsabilites<sup>(2)</sup> or principle of non-concurrence of actions. Briefly, this makes a distinction between tortious and contractual liabilities arguing that they are distinct from each other albeit, complimentary in some respects.

By way of expounding, whereas a contractual liability would impose sanctions for non-performance, tortious liabilities give rise to sanctions for a breach of rules of behavior as imposed by statutory provisions, regulations or case law. However, this distinction is not universally accepted and differences both of opinion and approach remain in certain areas.<sup>(3)</sup>

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(1) G. Viney. W.Van Gerven, J.Lever, P.Larouche Cases, Materials and Text on National, Supranational and International Tort Law, Hart Publishing 2000.

(2) Civ 1ere 6 Avril 1927

(3) French law often does not make a clear distinction between contract (Articles 1146 ff C.civ) and tort rules, especially for medical liability." G. Viney. W. Van Gerven, J.Lever, P.Larouche, Cases, Materials and Text on National, Supranational and International Tort Law, Hart Publishing 2000, ibid at p 57.

In the ensuing discussions, we shall see areas of convergence and divergence with the English Common Law in their respective approaches to tortious liability.

Article 1382 of the French Civil Code provides the general rule that “any act of man, which causes damages to another shall oblige the person by whose fault it occurred to repair it.”<sup>(1)</sup>

Under Article 1383 “One shall be liable not only by reason of one’s acts, but also by reason of one’s imprudence or negligence.”<sup>(2)</sup> This is derived from the writing of Domat and Grotius<sup>(3)</sup> holding, in 1689 thus:

“All losses and damage which may occur by the act of any person, whether by imprudence, carelessness, ignorance of what should have been known, or other similar faults, slight as they may be,

must be repaired by him whose imprudence or other fault has caused them. For it is a tort that he has done, even though he had no intention to harm. Thus, anyone who imprudently plays ball in a

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(1) Art 1382 C.civ: ‘Tout fait quelconque de l’homme, qui cause à autrui un dommage, oblige celui par la faute uquel il est arrive, à le réparer’.

(2) Art 1383 C.civ: ‘Chacun est responsable du dommage qu’il a causé non seulement par son fait, mais encore par sa négligence ou par son imprudence’.

(3) See A. VON MEHREN & J. GORDLEY, at 590-96; K. ZWEIGERT & H. Kdrz, at 283-84.

place where there could be danger for the passer-by and in fact injures someone is liable for the harm he causes.<sup>(1)</sup>

This is consistent with the Common Law position of finding liability by acts of omission and commission and brings both legal systems, however divergent in several respects, to a common foundation and approach.

Article 1382 echoes the English position for the finding of liability when it stipulates three limbs for:

1. There must be a fault
2. There must be a resulting damage from the fault
3. There must be a causal link between the two

The one that asserts, must prove all three limbs to succeed at the bar. As observed, a fault may be due to the commission or omission act in a given set of circumstances.

Under the French system, fault which is a subjective matter which can be expressed as an error of conduct determined by reference to the standard of a reasonable man, as a failure to behave as a *bonus pater familias* or a “*bon pere de famille*.”

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(1) 2 J. DOMAT, LES LOIS CIVILES DANS LEUR ORDRE NATUREL tit. 8, n0. 4 (1689). See André Tunc, A codified Law of Tort - The French Experience, 39 La. L. Rev. (1979).

French law, like the English Common Law, does not require intention or cognition of conduct to establish a tortious liability and no requirement for a duty of care towards the plaintiff. It is enough that three prescribed limbs be satisfied.

The subjective approach to fault finding in tort under French law provides much latitude in the discovery of liability in many cases.

Conversely, where the Common Law recognizes certain protected rights, the French law does no such thing.<sup>(1)</sup> Under the provisions of Article 1382 and 1383, it is clear that as a matter of legal principle, all rights and interests are protected. This is a huge point of divergence with the Common Laws of England. The matter only needs to be stated to be fully appreciated. Such a wide scope would greatly impact public policy and probably lead to all sorts of issues not least of which is the matter of limitations of claims and fraud.

This, aside from the challenges inherent in defining the scope of certain rights. What, indeed, should be the scope of a right and interest and whose definition should it be?

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(1) Genevieve Viney, W. Van Gerven, J.Lever, P.Larouche, Cases, Materials, and Text on National, Supranational and International Tort Law, Hart Publishing 2000, infra

As if in response, the French, however, have adopted measures to protect plaintiffs through the construction of the notion of “loss of an opportunity” or “loss of a chance” (*perte d’une chance*).

This is applicable when the damage caused consists in the loss of an opportunity to obtain an advantage or to avoid a loss to the victim. In the 1965 case, the courts held that the opportunity must be real and serious and not only hypothetical.<sup>(1)</sup>

Although the areas of divergence between the French civil law and the English Common Law systems exist with regards to tortious liability, in some cases, this divergence is more stylistic and semantic argument and methodology more so than in their legal norms. It is observed that, for the most part, they both have the same objective and often arrive there via divergent reasoning. Nonetheless, significant differences exist and in the matter at hand with regards to opportunities, English law takes a different approach.

### 3.0 A Nascent Amalgam

For all the intellectual and, in some cases, practical distance we impose between the Common Law and Civil Law jurisdictions, it turns out that, on a closer analysis, not only do we find traces of common heritage, we also find areas of agreement between them. Granted, they come from different approaches with ideas and

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(1) Cass. Civ. 2e, 1st. April 1965, Bull. Civ. II, n°336, p230

suggestions designed to address a given set of challenges. In modern times, we see some form of convergence in the western legal heritage between both systems.<sup>(1)</sup>

This author submits that the existence of the PICC guidelines and the terms of most international agreements executed globally suggest that, certainly, in the area of international contact law, in spite of semantic and procedural differences, that there is some measurable momentum pulling both systems together.<sup>(2)</sup>

The existence of such international legal instruments which scrupulously eschew the elevation of one system over the other while adopting language that would assuage the nationalistic pride of each is testament to the idea of convergence. In other words, international commerce and the blurring of national commercial boundaries combined with comparative law efforts force the point. In the final analysis, we find that this coming together is more spontaneous than constructed<sup>(3)</sup> and arises out of a necessity to make progress in the face of artificial barriers to commerce.

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(1) See Gordley, J., *The Philosophical Origins of Modern Contract* (Oxford: Clarendon Press, 1991), p 1

(2) Gordley, *ibid.*

(3) This is a reference to “harmonization, which implies a deliberate and negotiated process aimed at producing a legislative or other conventional act, convergence constitutes a natural, or unconscious, common development of legal institutions through mutual interest. See Carol Harlow, “Voices of Difference in a Plural Community” (2002) 50 Am J Comp L 339, 342

This “marriage”, where differences are ironed out into sameness, proves efficacious when one considers the modern international contractual arena replete with the uncertainties of globalization and the challenges inherent in negotiations across language and cultural barriers.

The ‘sameness’ alluded to above is inherent in Common Law specifically and underpins the embrace of concepts from other legal jurisdictions to create this “natural hybrid” of a legal jurisdiction that nods in both or several jurisdictions at once yet, manages to remain distinct albeit with the visage of one or the other. It is, thus, a natural disposition, as the English found, of communities, in this case, international constituencies, that find themselves dealing with similar or novel challenges developing solutions using similar legal techniques.<sup>(1)</sup> Indeed, In England, the Inns of Court planted the first seeds of the process of integration between Common Law and Civil Law in the early sixteenth century.<sup>(2)</sup> In the modern context, such attempts are not only enabled by technology, they are also spurred by similar interests.<sup>(3)</sup>

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(1) It is interesting that de novo legal developments are often mirror images, with some slight variations, of existing and, often, well established, norms from other jurisdictions.

(2) See Schadbach, K., “The Benefits of Comparative Law: A Continental European View” (1998) 16 B U Int’l L J 331

(3) For a stimulating argument dealing with restitution in commercial contracts, see Stevens, D. and Neyers, J.W., “What’s Wrong with Restitution?” (1999) 37

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While Common Law may be eulogized by those with a disposition for its allure as I have done hitherto above, some international jurists have suggested that “US law “represents a deliberate rejection of Common Law principle, with preference being given to more affirmative ideas clearly derived from civil law”.<sup>(1)</sup>

To be sure, the United States was undoubtedly greatly influenced by civil law sources in the nineteenth century, especially by German scholars, whose influence molded the shape of US Common Law.<sup>(2)</sup> Indeed, the laws of the United States are highly codified and any casual observer can be referred to a compendium of US laws for the most part as codified in a constitution.

The comparison does not end there. Legislation in the United States has also been influenced by civil law.<sup>(3)</sup> Furthermore, it has been argued, and with good reason, that US courts often interpret legislation by resorting to civilian methodologies under a civil law

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Alberta L Rev 221. See also Merryman, J.H., “On the Convergence (and the Divergence) of the Civil Law and the Common Law” (1987) 17 Stanford J of Int L 357

(1) Glenn, P.H., *Legal Traditions of the World* (New York: Oxford University Press, 2000), p 226.

(2) Glenn, *ibid*, p.230

(3) Frank, J., “Influence of Civil Law in Common Law” (1956) *Pennsylvania Law Review* 1

philosophy.<sup>(1)</sup> Such arguments cite adhesion contracts as one such example.<sup>(2)</sup> In these contracts such as those favored by digital monopolies like Google, Apple, Microsoft etc, adhesion is civil law in origin where parties to a contract are not presumed to have equal bargaining powers. Under the Common Law version of this, the term is “unilateral contract, which, again, negates equal bargaining power.”<sup>(3)</sup> In both cases, the weaker party, in this case, the consumer of services, must behave in a prescribed non-negotiated way to compel the stronger party (provider) to fulfil the contract. Even then, he still holds the four aces, so to speak.

As if to highlight the earlier point of the dominance of the creative consciousness and influence of the Common Law, legal developments, even when derived, however marginally, from Civil

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(1) Stone, H.F., “The Common Law in the United States” (1936) 50 Harv L Rev 13.

(2) An adhesion contract is a standardised contract drafted by only one party where the other party’s only choice is to adhere to it or reject it. “The weaker party, in need of the goods or services, is frequently not in a position to shop around for better terms, either because the author of the standard contract has a monopoly (natural or artificial) or because all competitors use the same clauses. His contractual intention is but a subjection more or less voluntary to terms dictated by the stronger party, terms whose consequences are often understood in a vague way, if at all.” Kessler, Friedrich “Contracts of Adhesion – Some Thoughts About Freedom of Contract” (1943) 43 Colum L Rev 629, 632. See also, Frank above at p.1 where he argues that “Specifically, in contract law the whole concept of adhesion contracts was directly taken from France, especially from Salleilles, a nineteenth-century French jurist.

(3) Kessler, Friedrich, *ibid*, above. Also, see Glenn (above), p 230

Law origins, are re-exported back to the Civil law jurisdiction in “decanted Common Law form”.<sup>(1)</sup>

Indeed, we observe that substantial legal areas such as the regulation of securities, commercial papers and even constitutional law have been extrapolated from the United States, with a Common Law heritage to several civil law countries.<sup>(2)</sup>

#### 4.0 Conclusion

This paper draws the conclusion that the Common Law remains dominant in an Anglophile world. Such a conclusion is not without merit. Much merit, in fact. Furthermore, to conclude that both systems are moving closer together by reference to technology and international relations is palpable. There will always be adherents to one or the other and this is typically human. However, as observed earlier with regards to law being the command of the sovereign, we find here two constituent sovereigns – the sovereignty of peace and that of commercial efficacy. Within them lie the both the coercion and the facilitative nature of law. Both make convergence, however slow, inevitable.

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(1) See Glenn at p 230. The US also exports these phenomena to Canada and England and thus these countries are also shaping their common law structure

(2) Henkin, L., “Constitutionalism and Human Rights” in Louis Henkin (ed), Constitutionalism and Rights (1990) 392–395

In this brave new world that harks back not only to history but also to the singular issue of cohesion and economic advantage, it is quite clear, by reference to case law and legislation, that legal reform in this context must be constructed to address and serve the interest of the sovereign law and utilitarian values to adopt a flexible position that is capable of bending both ways at once.

We see this in the PICC and international commercial jurisprudence. We see this in the borrowing, by certain jurisdictions, the 'persuasive' dicta from other systems. We certainly see this in technology contracts as mentioned above and in international commerce.

This takes us back to the philosophical argument that opened this treatise as to the efficacy of law. The sovereign now speaks with one voice albeit different tones and because the ultimate goal of commercial interaction is profit and economic development, we will continue to move closer to each other even if that movement is delineated by national boundaries and cultures.

The French Civil Code was revised and updated in 2016 after 200 years. Common law evolves constantly as cases are litigated. This disparity in evolution makes reason stare. The approach of Common Law catapults it to the forefront of national and international commercial jurisprudence. It is a tribute to the Civil Code that 200 years on, it is still able to infuse relevance into itself. That relevance

is closely aligned with the flexibility of the Common Law and its ability to embrace extant legal reasoning.

Perhaps, the last word on the matter belongs to Rent David: the Civil Law "consists essentially of a 'style': it is a particular mode of conception, expression and application of the law, and transcends legislative policies that change with the times in the various periods of the history of a people."<sup>(1)</sup> That summation lends credence not only to the clarion call for a more rapid evolution, it also highlights the identified convergence between the foundations of the two jurisdictions.

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