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A Common Lawyer's Perspective on Contract Codes

Roger Halson¹

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).² 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 said:³

'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'.

More recently Sir Roy Goode has said that he 'regard[s] the case for a commercial code as unanswerable'⁴. 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 issue within the next 50 years or so'.⁵ 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...'⁶ 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.⁷ Mr Harvey

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² See Armin 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.

³ Joseph Anthony Dixon *The Codification of the Law* (1873) p 1

⁴ 'The Codification of Commercial Law' (1988) 14 *Monash U L Rev* 135 p 140.

⁵ Rupert Cross *Precedent in English Law* (1961) p197 while noting at p 199 that 'it is not a live issue in this country at the present moment'.

⁶ Law Commission Act 1965 S3(1).

⁷ Law Com No 1 p3.

McGregor⁸ 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 Treitel⁹. Controversially it has been suggested that the Law Commission's codification project reflected 'naïveté... as to the mechanics of codification'¹⁰ 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'.¹¹ 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*.¹² The aim of codification of contract was never abandoned formally by the Law Commission but was soon acknowledged to be 'moribund'.¹³

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 1993¹⁴ 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.¹⁵ A group called the Academy of European Private Lawyers, headed by Professor Gandolfi, who were responsible for the publication of the McGregor Code drew heavily upon it to produce their own Code of Contract Law.¹⁶ Professor Gandolfi leads one of a number of European groups who are working upon projects which seek to codify a European law of contract or the law of contract in Europe (there may be a difference¹⁷). These groups have been irreverently referred to in the title of an article as 'those magnificent men in their unifying machines'¹⁸ If I may

⁸ Now Harvey McGregor QC

⁹ Now Sir Guenter Treitel, formerly Vinerian Professor of English Law, Oxford.

¹⁰ Farrar 'Law Reform Now – A Comparative View' (1976) 25 ICLQ 214 p 219.

¹¹ Ibid p 218.

¹² Published in 1968, 1972 and 1997.

¹³ North 'Problems of Codification in a Common Law System' (1982) 46 *Rabels Zeitschrift Fur Ausländisches Und Internationales Privatrecht* [RabelZ] 490 p494.

¹⁴ Gandolfi *Harvey McGregor, Contract Code Drawn Up on Behalf of the English Law Commission* (1993).

¹⁵ Ibid *Prefazione v.*

¹⁶ Gandolfi ed *Code European des Contracts – Avant-projet* (2001).

¹⁷ 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

¹⁸ 'The 2004 Communication on European Contract Law: those magnificent men in their unifying machines' (2005) 30 *European Law Review* 724.

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 groups¹⁹ 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 Law²⁰, 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.

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.²¹ In November 2009 the European Parliament backed the idea of an optional European Contract Law, ie 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.²² 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 2010²³ 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).²⁴ The Green paper sought views upon 'What should be the legal nature of the instrument of European Contract Law'²⁵ and suggested 7 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 from many 'inside' sources suggest that attention is now focussing upon the intermediary proposals such as the optional instrument of European Contract Law.²⁶ The public consultation closed on 31st January 2011 and so we await the promised publication of the views of respondents to the Green Paper.

¹⁹ 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) pp12-19 and 148-156 and Basedow 'Transjurisdictional Codification' (2009) 83 *Tulane LRev* 973, 979-981.

²⁰ This group was itself constituted as a break away association from Unidroit, the International Institute for the Unification of Private Law.

²¹ Von Bar, Clive, and Schulte Nolke (eds) *Principles, Definitions and Model Rules of European Private Law, draft Common Frame of Reference* (2009).

²² cf earlier resolutions in favour of a Code which endorse a 'less optional' approach. Eg European Parliament resolutions 26 May 1989, OJ 1989 C158, p 400 para 14h-j and parliamentary resolutions had called for and 6 May 1994, OJ 1994, C205, p 518 referred to in Professor von Bar's paper n 6.

²³ It will run to 31st January 2011. The UK Ministry of Justice has requested responses by 26.11.2010. See www.justice.gov.uk/consultations/call-for-evidence-180810.htm

²⁴ Brussels 1.7.2010 COM(2010)348 final. See <http://eur-lex.europa.eu/LexUriServ.do?uri=COM:2010:0348:FIN:en:PDF>

²⁵ The apparent assumption in the way that the question is posed that some form of instrument is necessary is discussed later. See 'The Advantages and Possibilities of Codification... Economic Advantage'.

²⁶ JURI, the powerful European Parliament legal affairs committee currently supports option (iv) under which an optional European Contract Law would be drafted.

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’²⁷

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.²⁸ 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’.²⁹ This prediction from 1997 well summarises the present position described in a recent conference paper by Professor Von Bar³⁰ ‘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 few³¹ examples will suffice; European codification has been described as ‘...not necessary and hardly attainable’³² and ‘dangerous’,³³

While codification is more readily identified with the civil, as opposed to the common, law³⁴ 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.³⁵ In this paper I develop a Common Lawyer’s perspective upon the pursuit of consistency and 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

²⁷ Ralph Waldo Emerson ‘Self reliance’ in *Self-Reliance and other Essays* (1841).

²⁸ In *Henderson v Merrett Syndicates* [1994] 3 WLR 761 at 781 (examining the negligence of Managing Agents in managing the risks to which Lloyd’s Names were exposed).

²⁹ Goff ‘The Future of the Common Law’ (1997) 46 ICLQ 745 p 748.

³⁰ ‘From the Idea of a European Civil Code to the Optional Instrument for European Contract Law’ para 5 delivered at ‘Contract Law of the Channel Islands at the Crossroads’ 15th October 2010.

³¹ For others see Legrand ‘Against a European Civil Code’ (1997) n60 MLR 44 and Eidenmuller, Faust, Grigoleit, Jansen, Wagner and Zimmermann ‘The Common Frame of Reference for European Private Law – Policy Choices and Codification Problems’ [2008] OJLS 659.

³² Hartkamp ‘Modernisation and Harmonisation of Contract Law: Objectives, Methods and Scope’ [2003] Uniform Law Review 81, p 85.

³³ Andrew Burrows ‘Legislative reform of remedies for breach of contract: the English perspective’ (1997) *Edinburgh Law Review* 155, p156.

³⁴ For a criticism of this crude characterisation see *infra*

³⁵ Goff ‘The Future of the Common Law’ (1997) 46 ICLQ 745 p 745.

Commission that codification should be effected based upon ‘the incorporation of English law by statute’.³⁶ 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.³⁷

What is codification?

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’.³⁸ 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 1 written in 1815.³⁹ 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.

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

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.’⁴⁰

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...’⁴¹

³⁶ Jersey Law Commission *Consultation Paper No 5 The Jersey Law of Contract* (October 2002) Part III 13 (iv).

³⁷ Jersey Law Commission *Consultation Topic Report No 10 The Jersey Law of Contract* (February 2004) Part IV 7.

³⁸ Weiss ‘The Enchantment of Codification in the Common-Law World’ (2000) 25 *Yale J Int’l Law* 436, 475. The article by Weiss provides an excellent and detailed historical analysis of codification in common law jurisdictions.

³⁹ See Conway ed *8 Jeremy Bentham, The Correspondence of Jeremy Bentham* (1988) 468. See further Holdsworth *History of English Law* Vol 11, p 316 and Courtney Ilbert *Legislative Methods and Forms* (1901) p 122.

⁴⁰ Joseph Anthony Dixon *The Codification of the Law* (1873) p 1

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.’⁴²

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’⁴³.

Implicit and explicit in these definitions are a number of features that might be said to characterise a codification including⁴⁴:

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.⁴⁵ Without such authoritative enactment any so called code more closely resembles a treatise.⁴⁶

Completeness – comprising: exclusiveness ie a single source, no lacunae and maximum comprehensiveness.

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 applied.⁴⁷ It has been noted that the Indian Contract Act as implemented was perhaps subverted in this way. However arguably the most successful⁴⁸ 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*

⁴¹ Goode ‘The Codification of Commercial Law’ (1988) 14 Monash U L Rev 135 p 138.

⁴² Law Commission, Seventh Programme of Law Reform 18 (in context of a ‘criminal code’).

⁴³ Scarman *A Code of English Law* 1966 p 5

⁴⁴ Weiss ‘The Enchantment of Codification in the Common-Law World’ (2000) 25 Yale J Int’l Law 436, 454.

⁴⁵ Interestingly Harvey 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.

⁴⁶ 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.

⁴⁷ Whitley Stokes *Anglo-Indian Codes* 1887 Vol 1 p534 and Diamond ‘Codification of the Law of Contract’ (1968) 31 MLR 361 p 377.

⁴⁸ cf Goode ‘The Codification of Commercial Law’ (1988) 14 Monash U L Rev 135 pp 135-6 who describes pejoratively such codes as detailed, narrow and non-exclusive..

Fir case.⁴⁹ Jeremy Bentham recognised that codification could not provide a rule for all future cases but emphasised the importance of general anticipation, flexible rules, general concepts⁵⁰ and principles and clear method with which ‘we go before events, instead of following them.’⁵¹

System – in the sense of order and hierarchy

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 hypothetical⁵²) 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.

A Code may or may not contain perceived improvements upon the existing law. Dame Mary Arden when Chairman of the Law Com of England and Wales said;⁵³

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 Gladstone⁵⁴ urged the eschewal of all reform upon Chalmers to secure acceptance of his codifying proposals.⁵⁵

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

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.⁵⁶ 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

⁴⁹ *Hongkong Fir Shipping Co Ltd v Kawasaki Kisen Kaisha Ltd* [1962] 2 QB 26 (CA).

⁵⁰ Teubner has argued that a lack of conceptualisation in its earlier history retarded any impetus to codification *Kodifikatrion Und Rechtsreform in England* (1974) p59.

⁵¹ Bentham *A General View of a Complete Code of Laws* 1802 p 210.

⁵² For an actual example see Vienna Convention on Contracts for the International Sale of Goods Art 7(2).

⁵³ Arden ‘Time for an English Commercial Code?’ (1997) 56 Camb LJ 516 p518. Others dispute this position eg Tallon ‘Codification and Consolidation of the Law at the Present Time’ 14 Israel L Rev 1 p3.

⁵⁴ See Lord Halsbury LC Introduction to the First Edition *Halsbury’s Laws of England*.

⁵⁵ Chalmers ‘An Experiment in Codification’ (1886) 2 LQR 125 p 132.

⁵⁶ John Austin *Lectures on jurisprudence or the Philosophy of Law* 4th ed 1879 pp679 and 1021.

linked to radical Benthamite reform for which English society and the legal profession were not yet ready.⁵⁷ 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'.⁵⁸ 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.⁵⁹ 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.

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, ie with much reform, and weaker, ie with little or no law 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.⁶⁰

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 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'.⁶¹ I am sure that my students would agree.

⁵⁷ Weiss 'The Enchantment of Codification in the Common-Law World' (2000) 25 Yale J Int'l Law 436, 481 quoting Van Caenegem *An Historical Introduction to Private Law* (1988, Johnson translation 1992) p13 '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'.

⁵⁸ 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.

⁵⁹ 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.

⁶⁰ See further Weiss 'The Enchantment of Codification in the Common-Law World' (2000) 25 Yale J Int'l Law 436 pp 469-470.

⁶¹ 'Codification of the Law of Contract' (1968) 31 MLR 361.

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)- First codification may effect a simplification of the law.⁶² 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.⁶³ 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’⁶⁴ and instead they can apprise themselves of their legal position by reference to a single document. In a fascinating and unique survey Prof Aubrey Diamond analysed reported court decisions in areas like sale of goods which are regulated by existing but non-general⁶⁵ 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.⁶⁶

It has sometimes been asserted that codification involves the replacement of finely grained and focussed specific rules with generalised discretions which, contrary to the discussion in the preceding paragraph, leads to unpredictable outcomes.⁶⁷ Again there is a paucity of empirical data with regard to such a claim. However two Australian academics⁶⁸ conducted 3 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 Contracts⁶⁹ 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

⁶² See generally Stone ‘A Primer on Codification’ (1955) 20 Tulane L Rev 303, pp307-8.

⁶³ Goode ‘The Codification of Commercial Law’ (1988) 14 Monash U L Rev 135 pp 136-7 and Arden ‘Time for an English Commercial Code?’ (1997) 56 Camb LJ 516 pp 532-3.

⁶⁴ Arden, *ibid* at p531.

⁶⁵ What Arden refers to as ‘the less comprehensive codes’ *ibid* p 517.

⁶⁶ Diamond ‘Codification of the Law of Contract’ (1968) 31 MLR 361 p367 ie respectively 12.9 and 17.3 authorities per case.

⁶⁷ Von Mehren ‘Some Reflections on Codification and Case Law in the Twenty First Century’ (1998) 31 Davis L Rev 659 p667. For further debate see Collins ‘Transaction Costs and Subsidiarity in European Contract Law’ in Grundmann and Stuyck eds *An Academic Green Paper on European Contract Law 2002* p269 and Smits ed *The Need for a European Contract Law: Empirical and Legal Perspectives* especially the final chapter and summary by the editor.

⁶⁸ Ellinghaus and Wright ‘The Common Law of Contracts; Are Broad Principles Better than Detailed Rules? An Empirical Investigation’ [2005] Tex Wesleyan L Rev 399.

⁶⁹ A model code published by the International Institute for the Unification of Private Law in 1994.

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.⁷⁰

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 values:⁷¹

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-Law reform has already been encountered as a possible indicia of codification. However whatever the extent of law reform incorporated in to the Code at promulgation it has been urged that the codified statement of the law itself encourages future review. Prof Diamond has said that 'The real case for codification... is that it facilitates law reform'.⁷² 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'.⁷³

Ease of Export- Lord Goff suggested that we should envy the ease with which a country such as France is able to export their law through the transfer of the Code Napoleon and how easily it is kept updated by replicating abroad any amendments in France.⁷⁴ The greatest experiment in codification engaged in by England was the establishment from 1859-1882 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.⁷⁵

Extension of Political Influence-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

⁷⁰ Ellinghaus and Wright 'The Common Law of Contracts; Are Broad Principles Better than Detailed Rules? An Empirical Investigation' [2005] Tex Wesleyan L Rev 399 p420.

⁷¹ 3 Co Rep xl (1826 ed)

⁷² Diamond 'Codification of the Law of Contract' (1968) 31 MLR 361 p372.

⁷³ Chalmers *Sales of Goods Act* (1894) Introduction to First Edition.

⁷⁴ Goff 'The Future of the Common Law' (1997) 46 ICLQ 745 p 748 p751.

⁷⁵ Weiss 'The Enchantment of Codification in the Common-Law World' (2000) 25 Yale J Int'l Law 436 p485.

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 Law's (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 OHADA⁷⁶ (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 investment⁷⁷. 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.⁷⁸ The transition to a market economy in Russia has similarly been both affected and effected by external codes.⁷⁹

Resolving Conflicting Laws in a Federal State The main impetus for the Uniform Commercial Code in the United States was perhaps the pre-existing conflicting laws in a federal jurisdiction.⁸⁰ Writing in 1997 Lord Goff was able to say that this was '...a problem from which we do not suffer'.⁸¹ To describe the European Union as a federal state would commence a debate we would not have time to finish. It is sufficient here to extend a metaphor used earlier.⁸² The greater the popular association between any contract codification proposals and profess towards a federal Europe the greater the turbulence that will be encountered by the pilot and passengers of that particular 'unifying machine'.

Economic Advantage 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

⁷⁶ Benin, Burkina-Faso, Cameroon, Central African Rep, Chad, Comoros, Congo, Cote d'Ivoire, Equatorial Guinea, Gabon, Guinea, Guinea-Bissau, Mali, Niger, Senegal and Togo. The Democratic Rep of Congo's accession is underway.

⁷⁷ Enonchong 'The Harmonisation of Business Law in Africa: Is Article 42 of the OHADA Treaty a Problem?' (2007) 51 Journal of African Law 95.

⁷⁸ 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.

⁷⁹ For an overview see Vilkova 'Harmonisation of Contract law in Russia: some Brief Reflections' (2003) 8 Uniform Law Review 119.

⁸⁰ Goff 'The Future of the Common Law' (1997) 46 ICLQ 745 p 750.

⁸¹ Ibid.

⁸² See text accompanying n18 above.

Code are the inevitable corollaries of the United Kingdom's membership of the EU and its concomitant commitment to a single market.

The recent Green Paper from the European Commission on a European Contract Law begins with open 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)⁸³ 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'*⁸⁴. 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.⁸⁵ 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.⁸⁶ In a poll that asked EU citizens who hypothetically had purchased goods abroad what principles they would prefer a dispute to be settled 57% expressed a preference for 'harmonised' EU law.⁸⁷ Other surveys are more equivocal and difficult to interpret.

A survey by Clifford Chance of 175 businesses in 8 EU countries⁸⁸ 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%.

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'.⁸⁹ There is sometimes a suspicion that transaction

⁸³ <http://eur-lex.europa.eu/LexUriServ.do?uri=COM:2010:0348:FIN:en:PDF> section 1.

⁸⁴ Ibid section 4

⁸⁵ 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.

⁸⁶ Special EUROBAROMETER 292 (2008) and Flash EUROBAROMETER 278 (2009).

⁸⁷ 54% in the UK. Interestingly the UK recorded the highest percentage 23% who expressed a preference for the national law of their contractual partner.

⁸⁸ Clifford Chance Survey in European Contract Law (2005).

⁸⁹ Kallweit 'Towards a European Contract Law: For a Prosperous Future of International Trade' (2004) 35 Wellington L Rev 269 p283. 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

costs are specified retrospectively to justify a policy choice that is preferred for other undisclosed reasons.⁹⁰ 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.⁹¹ 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.⁹²

The disadvantages and problems of codification

Incompatibility of the Common and Civil Law 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 practiced in the former, inappropriate for the latter. This idea of incompatibility can be examined at a theoretical, as well as at 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 historian⁹³

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 p246.

⁹⁰ Twigg-Flesner *The Europeanisation of Contract Law* (2008) pp30-1 refers to the necessity to find an existing provision (ie the maintenance of the internal market) upon which consumer policy could 'piggy back'.

⁹¹ 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'.

⁹² Hartkamp 'Modernisation and Harmonisation of Contract Law: Objectives, methods and Scope' [2003] Uniform Law Review 81, p 82.

⁹³ Gordley in *Common law und civil law; eine ubberholte 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 p289, Omar 'Lessons from the French experience: the possibility of codification of commercial law in the United Kingdom' (2007) International Company and Commercial

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!

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.⁹⁴ 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.⁹⁵

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 inappropriate.⁹⁶ Others reply that common legal origins⁹⁷ in the past and the identification of shared values and starting points⁹⁸ render the project of codification achievable.

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 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.⁹⁹

Loss of professional services 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'.¹⁰⁰ 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 4 of the 12 largest Law Firms in the world were

Law Review 235 p236 and Hartkamp 'Modernisation and Harmonisation of Contract Law: Objectives, Methods and Scope' (2003) 8 Uniform Law Rev 81

⁹⁴ For an early example see Schlesinger ed *Formation of Contracts: A Case Study of the common Core of Legal Systems* (1968).

⁹⁵ Whittaker and 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).

⁹⁶ 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.

⁹⁷ Zimmermann 'Roman law and the harmonisation of private law in Europe' in Hartkamp, Hesselink, Honnindus, Joustra, Du Perron and Veldman eds *Towards a European Civil Code* (3rd ed 2004).

⁹⁸ Collins *The European Civil Code; The Way Forward* (2008) 178-181.

⁹⁹ 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..

¹⁰⁰ Goff 'The Future of the Common Law' (1997) 46 ICLQ 745 p 750.

based in London.¹⁰¹ 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.¹⁰² 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.¹⁰³ 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 have undertaken to publish this evidence.¹⁰⁴

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 decision making which was preferred to even 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 If common law codification theory owes much to Jeremy Bentham its practice owes as much to an American David Dudley Field (1805-80).¹⁰⁵ Field who has been described as 'the greatest codifier since Bentham'¹⁰⁶ 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 3 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 1861-5. 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

¹⁰¹ Cap Gemini Ernst and Young *Commercial Court Feasibility Study* prepared for the Lord Chancellor's Department and issued in February 2001 at respectively pp14,14 and 15.

¹⁰² Communication on European Contract Law A Position Paper on behalf of the Law reform Committee of the General bar Council of England and Wales.

¹⁰³ See account in Battersby 'No Need for an Overall Harmonisation' ERA Forum 2002 101.

¹⁰⁴ See discussion above in text following n 23.

¹⁰⁵ . See also pp 507-9 for a chronology of Field's work.

¹⁰⁶ 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.

attacking the proposal.¹⁰⁷ Field of course replied.¹⁰⁸ 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.¹⁰⁹ 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 tradition¹¹⁰ and the desire to assert an identity through a common law based codification that distinguished the state from its former civil law juridical basis.¹¹¹ Another explanation, more relevant to this discussion, emphasises 'the different position with respect to the bar'.¹¹² In California the Bar was less conservative and entrenched than in New York and indeed did not oppose the codification.

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'.¹¹³ It would be hard to believe that any modern professional body would now act in such a way. Nonetheless the Cap Gemini Report¹¹⁴ 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.

¹⁰⁷ 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).

¹⁰⁸ 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)

¹⁰⁹ Weiss 'The Enchantment of Codification in the Common-Law World' (2000) 25 *Yale J Int'l Law* 436 p 511.

¹¹⁰ See generally Friedmann *A History of American Law* (1985) 406-7

¹¹¹ California was originally a Spanish possession which became part of the Republic of Mexico before its annexation in 1848 by the United States.

¹¹² Weiss 'The Enchantment of Codification in the Common-Law World' (2000) 25 *Yale J Int'l Law* 436 p 513.

¹¹³ *Ibid* p 510. See further Cook *The American Codification Movement: A Study of Antebellum Legal Reform* (1981) p 206.

¹¹⁴ Cap Gemini Ernst and Young *Commercial Court Feasibility Study* (February 2001)

The thin end of the wedge It has been noted that there exists some commercial support in the UK support 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.¹¹⁵ Second 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’.¹¹⁶ Such a result would be contrary to the general common law approach to party autonomy. However, fortunately, the possibility of codification as proposed in Jersey would not appear to be subject to these concerns.

Conclusions

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.

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.

¹¹⁵ ‘European Contract Law: quo vadis?’ (editorial comments) (2005) 42 *Common Market Law Review* 1,3 and Kenny ‘The 2003 Action Plan on European Contract Law: is the Commission Running wild’ (2003) 28 *European Law Review* 538 p550.

¹¹⁶ 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.