Comparative Contractual Remedies

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This article compares the remedies used for breach of contract in Anglo-Australian Common Law and in French law. It examines the different emphasis placed by the two legal systems on these remedies, and concludes that the contractual remedies in the Common Law have developed largely in response to economic considerations, whereas those in French law have developed largely in response to moral considerations. The article also examines the historical antecedents of the two systems to explain why this is so.

IN this article the remedies which are used in Anglo-Australian Common Law in response to contractual breach will be compared to the remedies used in the French Civil Law. In both the Common Law and French law the same three basic remedies are available for breach of contract, viz, damages, specific performance and termination. In French law there is the additional temporary remedy of withholding performance. Although the contractual remedies in the two systems are essentially the same, the ways in which these remedies are applied in the two systems vary considerably.

In the Common Law there is a definite hierarchy with regard to the remedies. The remedy of damages is undoubtedly the most important. In the great majority of cases of breach of contract a plaintiff will be awarded damages, which will be the only remedy available to him. Specific performance is considered to be an exceptional remedy, and will only be awarded, at the judge's discretion, when damages are inadequate. Termination for breach is a remedy which can be exercised only in certain circumstances.

In French law, on the other hand, the remedies for breach are ranked in a different order of importance from those in the Common Law. Article 1184 of the French

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Civil Code, which sets out the remedies in French law, appears to place specific performance and termination on a higher footing than damages, in that it permits a creditor[1] to claim either specific performance, where this is still possible, or termination, in all circumstances. The article puts damages in a secondary role by stating that if the creditor seeks termination he may also claim damages.

This difference in approach can be explained to a large degree by the very different historical development of the two systems. The legal rules of a particular legal system, as Pierre Legrand points out, are never simply rules, but rather 'encode experiences' and are 'the outward manifestation of an implicit structure of attitude and reference'.[2] The 'structure of attitude and reference' which underpins the rules relating to breach of contract in French law has developed largely on the basis of moral considerations, whereas the 'structure of attitude and reference' which underpins the rules in the Common Law has developed largely on the basis of economic considerations.

Moreover, in order to understand why the approach to contractual remedies can differ to such a degree in the Common Law and French law it is first necessary to understand how those remedies work within the wider context of the legal system as a whole. As Harris and Tallon note, 'the study of a particular legal situation cannot be conducted in isolation from its institutional context'.[3] This article will therefore first examine the historical development of the Common Law and French law as a whole, and then consider the historical development of contract law within the two systems, with a view to providing a basis for understanding the context within which contractual remedies developed within each system. It will then examine the historical development of the respective contractual remedies themselves and compare their present state of development, indicating how the approach to contractual remedies is governed to a larger degree by moral considerations in French law and by economic considerations in the Common Law. The remedies will be discussed in the order that they are set out in Article 1184. Specific performance will therefore be dealt with first, termination second, and damages third. The French remedy of withholding performance will then also be addressed. This article will not deal with exemption clauses, agreed damages or penalty clauses. It will also only look at remedies with regard to synallagmatic contracts within the private law, and will not deal with unilateral contracts or with administrative contracts used in French public law. These are two types of French contract which have no counterpart in the Common Law.[4]

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1. The term 'creditor' is used in French law to indicate the person to whom an obligation is owed, and the term 'debtor' to the person who owes the obligation. These two terms will be used in this article when referring to the contracting parties in the Civil Law context. In the Common Law context, the parties will be referred to as the 'plaintiff' and the 'defendant'.
2. P Legrand 'European Legal Systems Are Not Converging' (1996) 45 ICLQ 45, 56, 57.
3. D Harris & D Tallon (eds), *Contract Law Today: Anglo-French Comparisons* (Oxford: Clarendon Press, 1989) 391.
4. Contract law has a much wider ambit in French law than it does in the Common Law. Thus agreements which create only duties on one party and only rights in the other party are recognised

THE HISTORICAL BACKGROUND OF FRENCH CIVIL LAW

French law belongs to the 'family of laws' known in English as Civil Law.[5] This family of laws includes most, if not all, of the legal systems of continental Europe. The primary distinguishing feature of the Civil Law is that it originated to a very large degree in Roman law. In France this is particularly so with regard to contractual matters, where Roman law has exercised by far the most important influence in the formation of French contract law.[6]

Roman law was the most highly developed system of law in the ancient world, and reached its zenith in what is known as the 'classical period', between 117 AD and 235 AD. In 528 AD, Justinian, the Emperor of Byzantium, organised a compilation of Roman law sources.[7] This compilation was completed in 534 AD and became known as the *Corpus Juris Civilis*.[8] It was comprised of four parts, viz, the Digest, the Institutes, the Code and the Novels. The Digest and the Institutes were the most important parts in the development of the Civil Law. The Digest contained excerpts from the writings of the most prominent Roman jurists of the classical period, and the Institutes was a textbook which contained a succinct summary of Roman law. The *Corpus Juris* was almost entirely private law. Roman law was a formulary system, by which a litigant had to bring his case under a particular form of action. Roman law never developed general rules or abstract legal concepts. The writings of the jurists contained in the Digest focused mainly on the solving of problems arising in individual cases.

France, or Gaul as it was then known, was conquered by the Romans in the 1st century BC. Roman law was introduced into Gaul and became well-established,

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in French law as binding contracts, and are referred to as 'unilateral contracts' (art 1103, Code Civil). Such agreements are not legally binding contracts in the Common Law because of the absence of consideration flowing from one of the two parties to the agreement. Only when a contract is under seal in the Common Law can there be an absence of consideration. A 'unilateral contract' in the Common Law is unlike a 'unilateral contract' in French law because in the Common Law such a contract is 'a promise in return for an act',which means that there is consideration on both sides. Such a contract would be considered a synallagmatic contract in French law: see B Nicholas, *The French Law of Contract* (Oxford: Clarendon Press, 2nd edn, 1992) 39. An administrative contract is a special type of contract which is utilised when the executive contracts with a private party. This type of contract grants rights to the executive which are not available to the private party. This inequality between the parties is justified on the basis that the public interest outweighs the private interest.

5. When the term 'Civil Law' is used in this article it shall mean French Civil Law.
6. PDV Marsh, *Comparative Contract Law: England, France* (Aldershot: Gower 1994) 1.
7. In 330AD the capital of the Roman Empire was moved from Rome to Constantinople. In 364 AD the Empire was divided for administrative purposes into two halves, the Western Empire, with its capital in Rome, and the Eastern Empire, with its capital in Constantinople. The Western Roman Empire fell to barbarian invaders in 476 AD. The eastern half, which became known as the Byzantine Empire, continued until 1453, when Constantinople was conquered by the Ottoman Turks.
8. Referred to hereafter as the '*Corpus Juris*'.

particularly in the southern regions.[9] Although Roman law became increasingly vulgarised during the long perod of decline of the Western Roman Empire before its final collapse in 476 AD, Roman law continued after the fall of the Western Empire to be the law which governed the non-Germanic peoples of southern France, albeit in a much simplified form.[10]

In the north of France, on the other hand, as a result of the Frankish invasion and the establishment of a Frankish kingdom, Roman law was completely displaced by Germanic customary laws. These customary laws varied from place to place. According to one estimate, at the time of the French Revolution there were some sixty differing customary laws of major importance (*coutumes générales*) throughout the north, and at least three hundred differing customary laws of lesser importance (*coutumes locales*).[11]

France was thus divided into two quite different legal territories. The dividing line between these two territories was the Loire River. In the two-fifths of France south of the Loire a debased Roman law was in effect, and this part of France was known for legal purposes as the *pays du droit écrit.* In the northern three-fifths of France customary law governed. This part of the country was known as the *pays du droit coutumier.*[12] The area governed by customary law was further fragmented because different customs governed from one region to another.

The *Corpus Juris* remained unknown in Western Europe until the 11th century when a copy was discovered in Pisa. The *Corpus Juris* contained a much more sophisticated Roman law than the debased Roman law then in effect in southern France and other parts of Western Europe, and consequently its discovery initiated an eager and intense study of the superior Roman law contained in it. This in turn led to the establishment of law faculties first in northern Italy and then elsewhere throughout Western Europe. Throughout the Middle Ages and the Early Modern Period legal scholars constantly refined, generalised, and systematised the material contained in the *Corpus Juris*. Their efforts transformed Roman law from a system based on specific and limited legal categories and the resolution of individual cases into a coherent system of general rules and abstract legal concepts. The legal system which emerged came to be known as the *jus commune* and formed the basis for modern Civil Law. Roman law became influential even in the *pays de droit coutumier*. Although Roman law did not displace the customary laws of northern France, it was adopted whenever those laws could not adequately regulate the subject matter in question. This occurred, for example, in the area of the law of contractual obligations, where Roman law completely replaced the rudimentary customary laws. In other areas Roman law was used to supplement gaps in the

9. Marsh, above n 6, 3.
10. K Zweigert & H Kötz, *Introduction to Comparative Law* (translated by T Weir) (Oxford: Clarendon Press, 3rd edn, 1998) 75.
11. Ibid 77.
12. Ibid 75.

customary laws. Moreover, the principles of legal reasoning derived from Roman law were used to explain and interpret the customary laws.[13]

A number of French legal scholars contributed significantly to the transformation of the Roman law of the *Corpus Juris* into the *jus commune* in the 17th and 18th centuries. Amongst these scholars were two whose influence on the development of French private law was immense, viz, Jean Domat (1625–1696) and Robert Joseph Pothier (1699–1772). Domat was the preeminent French jurist of the 17th century, and Pothier of the 18th century. Domat had studied both law and geometry in his youth, and he liked to refer to himself as a 'scientist of the law'. He resolved to reorganise the rules of Roman law on a geometric basis, and proceeded to do so in his monumental work *Les Loix civiles dans leur ordre naturel*, published in 1689. Domat was the first jurist not to expound Roman law as it was set out in the *Corpus Juris*. Instead, he reorganised Roman law into a concise and rational system, discarding those laws which were obsolete or superfluous, and establishing an entirely new perspective for what remained. His work contributed enormously to the transformation of the traditional and unstructured Roman law into the logical and systemmatic system of the *jus commune.*

In the 18th century the contribution of Domat to the creation of the *jus commune* was continued by Pothier. Pothier held the office of hereditary magistrate in Orleans and was a professor of law at the University of Orleans. He possessed a vast knowledge both of Roman and customary law, and he resolved as a young man to reorganise both of these legal systems into a more rational and usable order.[14] He had great organisational skill and tremendous energy, and his output was prodigious. Pothier's first major work was entitled *Pandectae justinianeae in novem ordinem digestae*,[15] which was published in three volumes between 1748 and 1752. This work addressed the Roman law contained in the Digest. Pothier maintained the traditional titles of the Digest, but rearranged the material in each of the traditional titles so that it read much more coherently and logically.[16] His next major work dealt with customary law, and in 1760 he published the *Coutumes d'Orléans*.[17] In this book he not only examined the customary laws of Orleans, but compared those laws to all of the other major customary laws in the North, and thereby distilled the common legal principles contained in them.

In 1761, Pothier published his most famous and influential work, the *Traité des Obligations*. This book was based almost entirely on the Roman law of obligations, which, as has been seen, was the law in effect both in the *pays du droit écrit* and in

13. Ibid 75, 76; Marsh, above n 6, 4–5.
14. P Stein, *Roman Law in European History* (Cambridge: CUP, 1999) 114.
15. 'Pandects of Justinian in a New Order'
16. OF Robinson, TD Fergus & WM Gordon, *European Legal History* (London: Butterworths, 2nd edn, 1994) 256; Stein, above n 14, 114.
17. Pothier had previously coauthored a book entitled *Introduction à la coutume d'Orléans*, which had been published in 1740.

the *pays du droit coutumier.* In this book Pothier elaborated the general principles of the law of obligations. His *Traité des Obligations* was translated into a number of languages, including English, and in the 19th century it became one of the most influential books in Europe.[18] Pothier then published a series of treatises, dealing with the various specific contracts, marriage and marital relationships, and ownership and possession.[19] In his voluminous output Pothier clarified and simplified virtually the entire mass of French law, both Roman and customary in origin, and produced in his treatises a systematised statement of these laws.[20]

The works of Domat and Pothier reflected a growing desire throughout France for a unified legal system. The division between Roman law in the South and customary law in the North, and the further diversification of customary law in the North from region to region, had over time become less and less acceptable.[21] The existence of so many different laws within a single country created many problems. There were serious problems, for example, with regard to business transactions, and consequently the commercial classes began to exert pressure for the law to be unified. There were also political considerations. The monarch and his legal counsellors favoured unification because this would increase centralisation and consolidate royal power. The philosophical and legal trends of the 17th and 18th centuries also favoured unification. The classical spirit of the times emphasised the universal rather than the particular, and the Cartesian current of thought then in vogue stressed rationalism rather than tradition.[22]

Codification, it was thought, would be the most effective way of creating a single and unified legal system throughout the country. It would also be the means whereby the centuries of scholarship in Roman law could be consolidated into a coherent and rationally structured legal system, set down in a clear and simple manner.[23] By 'codification' was meant 'the introduction of legislation covering comprehensively the whole of a specific area of law'.[24] When codification occurred, the Code would become the authoritative and exclusive source of legal rules for all matters which were addressed by it. Thus, all legal problems which arose with regard to the subject matter codified had in theory to find their solution from the

18. Stein, above n 14, 115.
19. Robinson, Fergus & Gordon, above n 16, 256.
20. P Viollet, *Histoire du Droit Civil Français* (Allemagne: Scientia Verlag Aalen, 1966) (réimpression de la 3ème édition du '*Précis de l'Histoire du Droit Français'* Paris, 1905) 255.
21. Voltaire was scathing in his criticism of France's fragmented legal system: 'Is it not an absurd and terrible thing that what is true in one village is false in another? What kind of barbarism is it that citizens must live under different laws? … When you travel in this kingdom; you change legal systems as often as you change horses': *Oeuvres de Voltaire* VII (1838) Dialogues 5, quoted in Zweigert & Kötz, above n 10, 80.
22. J Carbonnier, *Droit Civil: Introduction* (Paris: Presses Universitaires de France, 26th edn, 1999) 124.
23. R David & JEC Brierley *Major Legal Systems in the World Today* (London: Stevens & Sons, 3rd edn, 1985) 64.
24. Marsh, above n 6, 8.

law set out in the Code. Although in practice this has not always been possible, it nevertheless remains as a basic principle.[25]

The French Revolution provided the radical impetus necessary for the reform of French law to occur. The Constitution of 1791 explicitly called for the preparation of a civil code.[26] Several attempts were then made to produce a code, but the various drafts presented to the Constituent Assembly were all rejected. It was only after Napoleon came to power in 1799 that real progress on codification was made. Napoleon wanted to be remembered as a lawgiver, and consequently he brought his authority and energy to bear on the production of a civil code. He appointed a Commission of four experienced practitioners to draft the code. Two members of the Commission represented the *droit coutumier* and two the *droit écrit*. Napoleon himself participated in approximately half of the sessions of the Commission. The Commissioners produced a draft in a surprisingly short period of time, and the *Code civil des Français* was enacted on 31 March 1804.

The articles of the Code were drawn both from Roman law and customary law. The Commissioners thought of themselves as putting this prior law through the 'sieve of reason', retaining or rejecting it according to rational principles.[27] In the event of a divergence between the two systems the Commissioners adopted the law which they believed to be 'closer to reason and the law of nature'.[28]

The Code was divided into three books, and its 2,281 articles were written in clear and simple language. It addressed the central aspects of private law, viz, the law of persons and the family, the law of property and succession, and the law of obligations. All prior law on the subject matter addressed by the Code was abrogated by Article 7 of the *Loi du 30 ventôse An XII* (21 March 1804*)*, so that the Code became the sole and exclusive source of law.[29]

The conceptual framework of the Code was predicated on Roman law, and the rules of Roman law predominated in the law of property and the law of obligations, particularly contractual obligations.[30] In drafting the code, the Commissioners relied heavily on the work of Pothier, and, to a lesser extent, on that of Domat.[31]

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25. Ibid 8.
26. Robinson, Fergus & Gordon, above n 16, 256, 257.
27. MA Glendon, MW Gordon & C Osakwe, *Comparative Legal Traditions* (St Paul: West Publishing Co, 2nd edn, 1994) 54.
28. Robinson, Fergus & Gordon, above n 16, 258.
29. Article 7 of the *Loi du 30 ventôse* remains in force to this day. It reads as follows: *A compter du jour où ces lois sont exécutoires, les lois romaines, les ordonnances, les coutumes générales ou locales, les statuts, les règlements, cessent d'avoir force de loi générale ou particulière dans les matières qui sont l'objet desdites lois composant le présent code.* (From the day when these laws go into force, Roman law, ordinances, general or local customs, statutes and regulations shall cease to have the force of general or special law in those matters which are the subject matter of the said laws composing the present Code.)
30. Nicholas, above n 4, 3.
31. Stein, above n 14, 114; Viollet, above n 20, 258; Zweigert & Kötz, above n 10, 87–8; Carbonnier, above n 22, 128. Dupin asserts that as much as three-quarters of the *Code civil* was based upon

Although the *Code civil* has been considerably amended since its publication in 1804, it continues to be the law in force with regard to the subject matter which it addresses. Certain parts of the Code, such as the laws relating to marriage and divorce, have been almost completely rewritten. Other parts, however, such as the law of obligations, have remained relatively unchanged since 1804. Following the publication of the *Code civil* in 1804, four other codes were subsequently produced. These dealt with civil procedure, commercial law, criminal law and criminal procedure.[32]

The *Corpus Juris* had declared, both on the first page of the Institutes and in the Digest, that the law was composed of two fundamental and separate parts, viz, private law and public law. This division of the law into these two separate parts was accepted as axiomatic by the jurists of the Medieval and Early Modern Periods. This fundamental division of the law was justified on the basis that a different approach must be adopted in private law as compared to public law. In private law the interests of private individuals must be treated equally, and the law consequently fashioned to ensure that this occurs. In public law, on the other hand, the public interest must outweigh that of the private individual, and thus the law must be fashioned on this basis.[33]

During the French Revolution these notions were implemented so as to ensure that the judiciary would not interfere with the functioning of the administration. Article 13 of the *loi* of 16-24 August 1790 declared as follows:

> The judicial functions are distinct from the administrative functions and shall always remain separate from them: the judges shall not, on pain of forfeiture, interfere in any way whatsoever with the activities of the administrative bodies, nor summon before them administrators as a result of their activities.[34]

As a result, the private law courts have no jurisdiction over the executive, and a separate system of courts, the administrative law courts, has been set up from within the executive itself, to adjudicate on matters of administrative law. In the French context, administrative law does not simply refer to judicial review of administrative action. It also includes substantive administrative law, which covers all acts which the executive may engage in. Consequently, there are in France two substantive bodies of law, one which regulates the affairs of private individuals,

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the treatises of Pothier: M Dupin (ed), *Oeuvres de Pothier Tome Premier: Dissertation* (Paris: Pichon-Béchet, Successeur de Béchet Ainé, Libraire, 1827) cxiv.

32. *Code de Procédure Civile* (1807), *Code de Commerce* (1808), *Code Pénale* (1811) and *Code d'Instruction Criminelle* (1811), respectively.
33. JH Merryman, *The Civil Law Tradition* (Stanford: SUP, 1985) 92, 93; David & Brierley, above n 23, 81.
34. *Les fonctions judiciaires sont distinctes et demeureront toujours séparées des fonctions administratives. Les juges ne pourront, à peine de forfaiture, troubler, en quelque manière que ce soit, les opérations des corps administratifs, ni citer devant eux les administrateurs pour raison de leurs fonctions.* Article 13 remains in force to this day.

and another which regulates the affairs of the executive and its agencies. There is thus, for example, a substantive private law which regulates contractual matters between private individuals, and there is also a substantive administrative law which regulates contractual matters which involve the executive and its agencies. These two substantive laws will not necessarily reflect the same legal principles, given the different orientiation of private law and administrative law.[35]

THE HISTORICAL DEVELOPMENT OF THE COMMON LAW

The early Common Law developed in a very different manner from French law. The early Common Law was a system which was administered by the Royal Courts, which were set up in the 12th century. This law of the Royal Courts became known as the Common Law, because it was common to the entire country.[36] Although there was some influence by Roman law on the early Common Law, it was relatively slight.[37] In essence the Common Law was quite distinct from the legal systems developing on the Continent. It was indigenous to England and did not draw its inspiration from Roman law.

The Royal Courts operated through a strict procedural system, which was known as the writ system. Under this system the necessary first step for a litigant who sought to have his case heard in one of the Royal Courts was to obtain a writ from the Chancellor. The Chancellor in the Middle Ages was a cleric of considerable importance, usually holding the rank of bishop, or even that of archbishop. He acted as the personal confessor of the king. He was also the head of the Office of the Chancery, which administered the royal judicial system. When a litigant applied for a writ, the Chancery would determine whether the facts as stated by the applicant fell within the jurisdiction of the Royal Courts, and if it found that they did, a writ would then be issued in the name of the king. The writ briefly set out the facts of the case as stated by the plaintiff and ordered the defendant to appear before the Royal Court to answer the allegations set out against him by the plaintiff. At first, Chancery issued writs on a more or less ad hoc basis, and when new fact situations arose which did not fit any of the existing writs Chancery simply issued a new writ to cover the new situation. But over time, as the same issues arose again and again, the writs eventually became standardised in their wording.[38]

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35. B Rudden, *A Sourcebook on French Law* (Oxford: Clarendon Press, 3rd edn, 1991) 119, 120.
36. It should be noted that the Royal Courts were not the only courts which exercised jurisdiction in mediaeval England. Seigneurial authority, i.e. the authority possessed by feudal lords, included the right of the lord to exercise jurisdiction over his vassals. This resulted in the establishment of a separate system of baronial and manorial courts, which dealt, *inter alia*, with minor criminal matters, contracts and torts: see JH Baker, *An Introduction to English Legal History* (London: Butterworths, 4th edn, 2002) 8–9. There were also the Courts of the Shires, Hundreds and Counties, the Ecclesiastical Courts, and the Courts of the Law Merchant, amongst others: Baker, 13; KM Teeven, *A History of the Anglo-American Common Law of Contract* (New York: Greenwood Press, 1990) 2–4.
37. Zweigert & Kötz, above n 10, 181.
38. Ibid 184.

By the end of the 13th century Chancery would only grant writs which conformed to the established forms of action set out in the Register of Writs.[39]

The choice of writ was crucial, because the writ 'governed the whole course of litigation from beginning to end'.[40] Each writ embodied a separate 'form of action,' which set out a particular procedure and method of trial. These procedures differed from writ to writ depending on the nature of the facts addressed by the particular writ. It was therefore essential for a plaintiff to choose the writ which best matched the facts of his particular case. If the plaintiff chose the wrong writ, or if he did not exactly follow the procedure set out in the writ which he had chosen, his case would be dismissed upon the objection of the defendant. Mastery of the procedural aspects of the law was thus necessarily the most important concern of the early English practitioners. The catch phrase 'remedies precede rights' originated from this orientation, as did the phrase 'where there is no remedy there is no wrong'.[41]

If the court decided that the plaintiff had chosen the correct writ, and if the plaintiff successfully followed the procedure outlined in the writ, his case would then be decided on its merits. But it was not the judge who made this decision. This was done by the jury. By the late 14th century the jury had come to perform the role which it still serves today, viz, that it was collectively to try sworn evidence in court.[42] The jury performed this function both with regard to criminal and civil trials. In civil trials the jury was also charged with determining the appropriate measure of damages to which a successful plaintiff was entitled. It was therefore the jury which decided the case. If the jury believed the plaintiff, he would win his case; if it did not, he would lose. The jury, however, did not reveal its reasons for deciding one way or another, as its deliberations were secret.[43]

The function of the judge was to decide whether or not the plaintiff's case fell within the proper boundaries of the writ chosen, because if it did not, the court was without jurisdiction.[44] In determining this issue, the judge would make a decision after hearing the arguments of the lawyers, who 'pleaded to issue', that is, they argued about whether the case at hand came within the ambit of the writ chosen, and, if it did, what questions of fact were appropriate to be put to the jury.[45] Over

39. By the mid-13th century the English barons had become concerned about the growing jurisdiction of the Royal Courts, which was occurring at the expense of their own baronial courts. They succeeded in pressuring Henry III to restrict the issuance of new writs by Chancery, in return for a grant of additional funds which Henry needed to pursue his continental wars. This arrangement was embodied in the Provisions of Oxford of 1258. In spite of this statute new writs did subsequently continue to be issued by Chancery. But by the end of the 13th century the practice of Chancery had changed and new writs were no longer issued: Teeven, above n 36, 5.
40. Baker, above n 36, 56.
41. HP Glenn, *Legal Traditions of the World* (Oxford: OUP, 2nd edn, 2004) 228.
42. Baker, above n 36, 75. For a discussion of the early role of the jury in the Common Law, see Baker, 75–6.
43. Glenn, above n 41, 228, 230, 236.
44. Ibid 229.
45. Ibid.

time this process generated a detailed elaboration of those elements which were necessary to bring an action within the ambit of particular writs, and this came to constitute the substantive part of the Common Law.

By the 14th century the forms of action provided for in the Common Law were increasingly unable to respond effectively to new problems which arose in a changing society. The available writs either did not provide legal recourse for certain problems, or else provided a remedy which was not satisfactory. Litigants who were disappointed at Common Law began to appeal to the Crown to exercise its prerogative for redress, on the basis that morality and good conscience required royal intervention when the King's courts could not provide such redress. These petitions were referred to the Chancellor. The Chancellor examined such petitions in an increasingly judicial manner, and began to follow a procedure which was entirely different from that of the Common Law. This procedure was inspired by canon law. It did not involve a jury and was based on written pleadings.[46] As a result, an alternative court system developed, known as the Court of Chancery, and the law developed by the Court of Chancery came to be known as Equity. Equity provided remedies in situations where no remedy was available at Common Law, or where the remedy provided was not adequate. At first the Chancellor sat as the sole judge of the Court of Chancery, but from 1730 there was a second judge, the Master of the Rolls.[47]

Equity presupposed the existence of the Common Law, and simply built upon the existing structure of the Common Law. Thus, in the words of the equitable maxim, 'Equity follows the Law'. This meant that resort to the Common Law was considered to be the first and ordinary recourse for a plaintiff, and resort to Equity would only occur in exceptional cases. This in turn meant that the remedies provided by the Common Law were considered to be the normal remedies which a plaintiff should seek, and that any alternative remedy provided for by Equity would be an exceptional remedy, provided only when there was no remedy at Common Law or when the remedy available at Common Law was inadequate.[48]

The petitions of litigants disappointed at Common Law were made to the King on the basis of morality and good conscience, and consequently the decisions in Equity were made primarily on moral considerations and the test of unconscionability.[49] This, however, eventually led to the accusation that there was no consistency or certainty in those decisions, because Equity, as the 17th century barrister John Selden asserted, varied with the length of the Chancellor's foot.[50] In response, the

46. Ibid 255.
47. Zweigert & Kötz, above n 10, 188.
48. EA Farnsworth, *Contracts* (Boston: Little, Brown & Co, 1982) 820–1.
49. The Chancellor, it will be remembered, was a cleric of high standing, the confessor of the king and thus 'the king's conscience'.
50. 'Tis all one, as if they should make his foot the standard for the measure we call a Chancellor's foot; what an uncertain measure this would be! One Chancellor has a long foot, another a short

Court of Chancery began to develop a number of general principles which were to provide guidance when the test of unconscionability was applied. When the first book on Equity was published in 1727, its author, R Francis, organised his subject matter around 14 general principles of Equity.[51] These principles became an integral part of the way in which Equity operated, and over time developed into rules. Moreover, the Court of Chancery adopted the rule of precedent, so that decisions in Equity became as binding as those at Common Law.[52] By the early 19th century the test of unconscionability had come to be regulated in an established and predictable manner.[53]

In the 19th century the Common Law was reformed in a number of important ways. These reforms resulted in a significant transformation in the way in which the legal system operated. The first major reform occurred in 1832 and 1833. This reform effected the abolition of the majority of the forms of action, as distinct procedures. All Common Law actions would henceforth be commenced by a uniform writ, and the form of action was simply to be written on the writ in the space provided. In 1852 it became unnecessary even to state the form of action, and it thereafter became possible to join different causes of action in the same writ.[54] A further major reform occurred in 1873-1875 with the enactment of the Judicature Acts, which came into effect in 1875.[55] By virtue of these Acts, the separate Common Law courts and the Court of Chancery were abolished, and in their place a single Supreme Court of Judicature was created, consisting of the High Court of Justice and the Court of Appeal. This new court was empowered to apply both the rules of the Common Law and the rules of Equity. As a result, the two parts of the English legal system, the Common Law *stricto sensu* and Equity, were 'fused' into a single system of law, so that both the rules of the Common Law and the rules of Equity would be applied in a case before the court.[56] The Judicature Acts also eliminated the final vestiges of the forms of action, and further simplified the writ of summons, so that the plaintiff had simply to state the facts upon which he relied for his cause of action.[57]

Another dramatic change which occurred during the 19th century involved the decline of the civil jury. In 1854, the Common Law Procedure Act[58] permitted a

foot, a third an indifferent foot; 'tis the same thing in the Chancellor's conscience': J Selden, *Table Talk*, as quoted in *Gee v Pritchard* (1818) 36 ER 670, 679.

51. Baker, above n 36, 111. The book was entitled '*Maxims of Equity*'.
52. Baker, ibid 110.
53. Upon his retirement in 1818, the Chancellor, Lord Eldon, declared that nothing would give him greater pain 'than the recollection that I had done anything to justify the reproach that the equity of this court varies like the chancellor's foot': *Gee v Pritchard*, above n 50, 674.
54. Baker, above n 36, 67–8: Uniformity of Process Act 1832, 2 & 3 Will IV, c 39; Real Property Limitation Act 1833, 3 & 4 Will IV, c 27, s 36; Common Law Procedure Act 1852, 15 & 16 Vict, c 76, ss 2, 3, 41.
55. (1873) 36 & 37 Vict c 125; (1874) 37 & 38 Vict c 83; (1875) 38 & 39 Vict, c 77.
56. Zweigert & Kötz, above n 10, 199.
57. FW Maitland, *The Forms of Action at Common Law (*Cambridge: CUP, 1948) 81.
58. (1854) 17 & 18 Vict c 125.

judge, by consent of the parties, to try the facts in lieu of a jury. By the end of the century approximately half of all civil trials were being tried by judge alone.[59] During the First World War the right to a civil trial by jury was temporarily suspended, and this further eroded recourse to the civil jury. Since 1933 civil juries have only been permitted, apart from defamation and several other matters, by leave of the court, and this has proved increasingly difficult to obtain.[60]

GENERAL CHARACTERISTICS OF THE TWO SYSTEMS

As a result of these very different historical developments, there have been, and continue to be, fundamental differences between the Common Law and French law. In the Civil Law there has traditionally been a preexisting source of legal authority where the legal rules and principles are to be found. In the early Civil Law this source of authority was the *Corpus Juris.* When the *Code civil* was enacted in 1804, it was the Code which then became the authoritative and exclusive source of legal rules for all matters which it addressed. The legal scholars who formulated the *jus commune* from the *Corpus Juris*, and who then prepared the way for the *Code civil*, worked primarily in an academic context, and engaged in a process of interpretation. As a result, the Civil Law is an academically oriented system of law. It is a pre-existing and complete system, in which logically coherent principles and legal rules regulate and resolve whatever legal problems may arise.[61] The Civil Law, as Nicholas points out, is quintessentially 'a law of the book'.[62]

The Common Law, on the other hand, by virtue of the forms of action, is 'a law of the case, created by the courts'.[63] It is primarily a practitioner oriented system, which addresses in a pragmatic fashion the resolution of individual disputes as they arise. Whereas in the Civil Law the law precedes the facts, in the Common Law the facts precede the law. Rules are created as and when required to solve the disputes which come before the courts. The Common Law is thus 'in a state of continuous creation and by its nature is never complete'.[64]

Both the Civil Law and the Common Law are characterised by a fundamental division which runs through the legal system. In the Civil Law the fundamental division is between private law and administrative law. As a result of this division there are two substantive bodies of law, private law and administrative law. These two bodies of substantive law are each dealt with by a separate court system, one of which deals solely with private law matters, and which has at its apex the *Cour de cassation*, and the other which deals solely with administrative law matters,

59. Baker, above n 36, 92.
60. See *Ward v James* (1965) 1 All ER 563; *Williams v. Beesly* (1973) 3 All ER 144: Baker, ibid 92.
61. Nicholas, above n 4, 4.
62. Ibid.
63. Ibid.
64. Ibid.

and has at its apex the *Conseil d'Etat*.[65] This division results in a matter being dealt with either wholly by the private law courts or wholly by the administrative law courts. There is rarely any overlap. The characterisation of a matter as private or public will therefore determine which substantive body of law applies and in which court system the matter will be heard.[66]

The fundamental division in the Common Law is between the Common Law *stricto sensu* and Equity. Although the two parts of the law were 'fused' by the Judicature Acts of 1873-1875, this fusion occurred only with regard to procedure, so that the two parts of the law could both be applied in a single court to resolve a case. But the substantive principles and rules of the Common Law and Equity were not fused by the Judicature Acts, and those principles and rules continue to represent two separate parts of the legal system.

The fundamental divisions in the Civil Law and the Common Law thus produce different consequences with regard to the way in which each system deals with a legal matter. In French law the division of the legal system into private and administrative law has the effect of creating two separate and discrete parts, each of which is complete within itself. A legal matter will thus be handled entirely by one or the other of the two parts of the system depending on its characterisation. In the Common Law, on the other hand, the dichotomy of Common Law and Equity does not divide the legal system into two separate and discrete parts. Although it remains necessary to know the different principles and rules of the Common Law and Equity, the two parts of the law together create a single whole, and must together be applied to legal problems in order to arrive at a solution.

THE INFLUENCE OF CHRISTIANITY ON THE TWO LEGAL SYSTEMS

Christianity became the official religion of the Roman Empire in 380 AD and thereafter gradually spread throughout Western Europe, until it had become the religion of almost the entire population. During the Middle Ages the Church was the dominant force in Europe, and Christianity exercised a pervasive influence on European society and culture. There was no public institution in the Middle Ages which could rival the Church for size or organisation, and there was certainly none which could command the intellectual resources which it had at its disposal.[67] The Church had its own law, known as canon law, and its own separate system of

65. It should be noted that criminal law, although public law, is handled by the private law courts.
66. The Common Law also distinguishes between private law and public law, but this distinction is of no great importance. There is still no real difference in the Common Law between the law which is applicable to private individuals and that which is applicable to the executive. The same courts administer the same law when dealing both with private and with public matters: Nicholas, above n 4, 23; PG Stein, 'Roman Law, Common Law and Civil Law' (1992) 66 Tulane L Rev 1591, 1595.
67. F Wieacker, *A History of Private Law in Europe* (translated by T Weir) (Oxford: Clarendon Press, 1995) 47.

eccesiastical courts. Canon law regulated the internal affairs of the Church, and extended to many aspects of the lives of ordinary persons, including marriage and matrimonial causes, family law, succession to personal property, and certain criminal matters.[68]

Canon law exerted an enormous influence on the development of continental Civil Law in the Middle Ages, so much so that the development of the Civil Law during this period can only be understood by taking proper account of that influence.[69] The principles and rules of canon law influenced the development of the Civil Law in both direct and indirect ways, and it was often said during this period that neither legal system could be understood without the other.[70] In the medieval universities Roman law and canon law were studied together, and at graduation the degree *Juris Utriusque Doctor* was conferred.[71] The jurisdiction of the ecclesiastical courts often overlapped with that of secular law courts, and it was not uncommon to find ecclesiastical courts exercising jurisdiction over matters which would normally fall within the domain of the Civil Law courts.[72]

In the 16th century the influence of canon law on the Civil Law began to wane. However, Christian concepts continued thereafter to exert a powerful influence on the development of the Civil Law through the concept of Natural Law. The theory of Natural Law had originally been developed as a Christian doctrine by Thomas Aquinas in the 13th century. Aquinas taught that God had created an immutable and universal law, known as Natural Law. Because God had endowed all humanity with reason, this divine law was universally known to humanity simply by way of rational thought. Human laws could therefore be made to conform to Natural Law, and such laws would only be valid insofar as they did so.[73]

The doctrine of Natural Law came into prominence in the 17th and 18th centuries, during the Enlightenment. Enlightenment thinkers believed that only by the use of reason could authority be properly established, and problems solved in all fields of endeavour. In the legal context, this meant that the principles and rules of law were to be formulated and tested on the basis of reason. Natural Law thus also came to be known as the Law of Reason, and the theory of Natural Law dominated the thinking of continental jurists in the 17th and 18th centuries.

There were various schools of thought within the Natural Law movement. Some of the proponents of Natural Law sought to dissociate it from its Christian origins,

68. Merryman, above n 33, 11.
69. Wieacker, above n 67, 47.
70. *Jus canonicum et civile sunt adeo connexa, ut unum sine altero non intellegi potest*: ibid 54.
71. 'Doctor in both laws': Merryman, above n 33, 11.
72. Ibid.
73. Robinson, Fergus & Gordon, above n 16, 210. A Protestant version of the doctrine of Natural Law was put forward by John Calvin in the 16th century. Calvin began by asserting the sovereignty of God, which included the power to make law. This divine law could be known by humanity both by reference to the Bible, and by the exercise of reason.

and to rely exclusively on reason without any reference to a Christian justification. But many advocates of Natural Law continued to adhere to the Christian doctrine of Natural Law. In the French context, this was true of the two most prominent jurists of the 17th and 18th centuries, Domat and Pothier. Both Domat and Pothier were proponents of the doctrine of Natural Law, and believed that its ultimate justification was to be found in God Himself. When Domat wrote *Les loix civiles dans leur ordre naturel* his aim was to reorder the rules of Roman law into a logical system which would reflect the rational, immutable and universal principles of justice. Domat believed that these principles of justice were given by God:

> The rules of the law of nature are those which God himself has established, and which he communicates to mankind by the light of reason. These are the laws which have in them a justice that cannot be changed, which is the same at all times and in all places; and whether they are set down in writing or not, no human authority can abolish them, or make any alteration in them.[74]

Pothier was of the same mind. Pothier had an extensive knowledge of canon law, and in writing his monumental *oeuvre* he was constantly motivated, according to Dupin, 'by the desire to subordinate to the laws of eternal justice all of the obligations to which humanity was subject'.[75] An example of Pothier's underlying Christian motivation can be seen in his *Traité du Contrat de Vente*, where he justifies certain exceptions to the general right of a creditor to demand specific performance for the non-delivery of certain things 'on the basis of the second great commandment, which obliges us to love our neighbour as ourselves'.[76]

Christianity also played an influential role in the Common Law. This can be seen from the statement of Best CJ in the case of *Bird v Holbrook*,[77] in which he declared:

> It has been argued that the law does not compel every line of conduct which humanity or religion may require; but there is no act which Christianity forbids, that the law will not reach: if it were otherwise, Christianity would not be, as it has always been held to be, part of the law of England.[78]

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74. J Domat, *The Civil Law in its Natural Order* (translated by W Strahan) (Boston: Little & Brown, 1850) vol 1, 109, 110.
75. Dupin, above n 31, cii, cv.
76. M Dupin (ed), *Oeuvres de Pothier Traité de Contrat de Vente*, Tome Deuxième (Paris: Bechet Ainé, Librairie, 1824) 30. The Biblical text Pothier was referring to comes from Matthew 22:35–40: 'Then one of them, which was a lawyer, asked him a question, tempting him, and saying, Master, which is the great commandment in the law? Jesus said unto him, Thou shalt love the Lord thy God with all thy heart, and with all thy soul, and with all thy mind. This is the first and great commandment. And the second is like unto it, Thou shalt love thy neighbour as thyself. On these two commandments hang all the law and the prophets.' See also Mark 12:28-34 and Luke 10:25-37.
77. (1828) 130 ER 911.
78. Ibid 641, 916. This was also the view in New South Wales. In *R v Darling* (1884) 5 NSWR 405, 411, Martin CJ declared: 'I do not know that it is necessary to make the remark, but an opinion has been expressed that the Christian religion in any of its forms is not recognised by the law of

But although Christianity may have been held to be a part of the law of England, and although it undoubtedly exercised a considerable influence on judges and jurymen in a general sense, the Common Law was not influenced in the same way as French law by canon law. There were a number of reasons for this. During the Middle Ages ecclesiastical courts operated in England as elsewhere in Europe, exercising canon law jurisdiction over various matters. But the jurisdiction of the ecclesiastical law courts did not overlap with that of the Common Law courts in the same way as occurred in France. The procedure of the Common Law, based on the forms of action, was totally different from that of canon law, which was based on written submissions and did not involve a jury. This difference in procedure acted as a barrier between the two systems.[79] Moreover, English practitioners of the Common Law, unlike their homologues on the Continent, did not study law in a university context. They therefore did not possess a knowledge of the canon law as did their Civil Law counterparts.[80]

Canon law, however, did exert a pronounced influence on the development of Equity. The English Chancellors were well versed in canon law.[81] The Chancellors adopted a procedure for the Court of Chancery which emulated canon law procedure, in that it was based on written submissions with the judge himself rendering a decision on the merits. The Chancellor applied principles of Christian morality in making his decisions. Contemporary Equity still continues to posit the test of unconscionability, demonstrating thereby its theological origins, in contrast to the Common Law, which posits the test of the reasonable man.[82] But as Equity was only a supplementary part of the English legal system, to which resort could only be had when the Common Law did not provide an adequate remedy, the legal system as a whole during the Middle Ages was consequently less influenced by canon law and by Christian principles in comparison to the Civil Law.[83]

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this country. No greater mistake can be made. It has been frequently and correctly stated both in England and here that Christiantiy is part of the common law, that our laws are based upon its principles, and that our common law can be traced back to those principles, which run through the whole course of our Statute law as well. I speak of Christianity in its broadest sense when I say that Christianity is part of the common law of England, and part of the law of this colony.'

79. However, Helmholz makes a convincing case that the Common Law writ of assumpsit was considerably influenced by the ecclesiastical court action of *fidei laesio*, whereby suit could be brought before the Ecclesiastical Court for breach of a sworn promise. See RH Helmholz 'Assumpsit and *Fidei Laesio*' (1975) 91 LQR 406.
80. Robinson, Fergus & Gordon, above n 16, 140.
81. It should be remembered that every English Chancellor until 1529 was either a bishop or an archbishop. The first non-cleric to occupy the position was Sir Thomas More.
82. G Lindsay, *Contract Nutshell* (Sydney: Lawbook Co, 5th edn, 2004) 187.
83. After his appointment as Chancellor in 1529, Sir Thomas More invited the Common Law judges to dinner, where he told them that the Common Law was too 'rigorous' and urged them 'to mitigate and reform the rigour of the law'. This the judges refused to do. They did not want to render decisions on the facts, and insisted on leaving such decision-making to the jury. It was therefore the jury which mitigated the rigour of the Common Law according to its own notions of what was harsh or unfair. But the juries gave no reasons for their decisions: Baker, above n 36, 107.

The rise of Natural Law in the 17th and 18th centuries also had very little impact on the English legal system.[84] The division of the law into Common Law and Equity, and the writ based procedure used in the Common Law, meant that the legal system remained unreceptive to notions of logical systemmatisation based on human reasoning, whether that reasoning was derived from Christian or secular origins.

THE HISTORICAL DEVELOPMENT OF CONTRACT LAW IN FRANCE

The law of contractual obligations in the Civil Law was formulated almost entirely from Roman law. The Romans, however, had never developed a general law of contract. Instead, they utilised a number of specific contractual forms, such as sale, hire, loan, stipulation and so on.[85] There was also a residual form for those agreements which did not fall within any of the specific categories. These discrete contractual forms all shared the common requirement that there be agreement between the parties, but apart from this each of the contractual types had its own specialised procedure which had to be followed by the parties in order to give validity to that particular transaction. The simple fact that there had been agreement between the parties did not create a binding legal contract between them unless the agreement also conformed to the specific requirements of that particular contract type.[86]

This Roman law of particular types of contracts was converted into a general law of contract by the jurists of the Middle Ages and the Early Modern Period. The canonists played a significant role in this transformation. Contracting parties in the Middle Ages often took an oath to reinforce the terms of their contracts. When they did so, the ecclesiastical courts obtained jurisdiction over the contract. This occurred because when a person breached a contractual term upon which he had given an oath, he did not under canon law simply breach a legal undertaking; he also committed a grievous sin which put his faith in jeopardy. Such sinners were therefore ordered by the ecclesiastical court to perform their sworn promise, in order to expiate their sin. The court would make such orders whatever the nature of the particular contract in question, and whether or not its particular requirements had been satisfied. [87] The influence of the canonists was also brought to bear on contractual undertakings where no oath was attached. Although the ecclesiastical courts did not exercise jurisdiction over such contracts, the canonists asserted that when a person had freely entered into such a contract, and then did not perform his contractual promise, this also amounted to a sin, because it was a form of lying, which was prohibited by Scripture. Such contracts should therefore also

84. Wieacker, above n 67, 220, 221.
85. G Samuel & J Rinkes, *Law of Obligations and Legal Remedies* (London: Cavendish Publishing, 1996) 6.
86. P Stein, *Legal Institutions* (London: Butterworths, 1984) 199.
87. Stein, above n 14, 199.

be performed, according to the canonists.[88] In this way the canonists were able to extend the notion of 'good faith' to all types of contracts, whereas in Roman law 'good faith' had been restricted to certain types of contract.[89] By insisting that a contracting party was bound to perform his contractual promises, whatever the nature of the contract, the canonists fatally undermined the formal aspects of the specific Roman contracts, and thereby created the conditions necessary for the emergence of a generalised theory of binding contract, based on consent.[90]

By the 16th century continental jurists had recognised that all contracts could be validly formed simply by consent. This theory of consensualism was thereafter promoted by the School of Natural Law.[91] Both Domat and Pothier adopted the concept of consensualism as the basis for defining all contracts. Domat defined a covenant as follows:

> Covenants are engagements made by the mutual consent of two or more persons, who make a law among themselves to perform what they promise to one another.[92]

Pothier defined a covenant as 'the consent of two or more persons to create between them some agreement, or to dissolve a previous agreement, or to modify it'.[93] These definitions of contract, based on consensualism, were incorporated into the *Code civil* in Article 1134, which reads as follows:

> Agreements lawfully entered into have the force of law for those who have made them. They cannot be revoked except by mutual consent, or for reasons which the law authorises. They must be performed in good faith.[94]

The acceptance of consensualism as the foundation of French contract law is but one example of the emergence of a general law of contract out of the specific contract types of Roman law which occurred in the transformation process. As a result the *Code civil* contains a general law of contract, which applies universally to all types and varieties of contract.[95] But the *Code civil* also retains the specific contract types of Roman law with some modifications, which are dealt with separately in specific provisions of the Code. There are thus sections of the Code which address the contract of sale, the contract of hire, and so on. These specific contract types must conform to the general law of contract set out in the Code,

88. Deuteronomy 23:23, for example, declared, *inter alia*, as follows: 'That which is gone out of thy lips thou shalt keep and perform': M Fabre-Magnon, *Les Obligations* (Paris: Presses Universitaires de France, 2004) 41.
89. Stein, above n 14, 199.
90. Fabre-Magnon, above n 88, 41.
91. Samuel & Rinkes, above n 85, 6.
92. Domat, above n 74, 159.
93. Dupin, above n 31, 4.
94. *Les conventions légalement formées tiennent lieu de loi à ceux qui les ont faites. Elles ne peuvent être révoquées que de leur consentement mutuel, ou pour les causes que la loi autorise. Elles doivent être exécutées de bonne foi.*
95. The general law of contract is set out in the *Code civil* in articles 1101–1369.

but are then also governed by the additional articles which specifically relate to them.

The division of French law into two substantive bodies of law, viz, private law and administrative law, has resulted in the creation of a special type of contract, known as an administrative contract, which is utilised when the executive contracts with a private party. This type of contract grants special rights to the executive which are not available to the private party, and which are justified on the basis that the public interest outweighs the private interest. There is no counterpart to this type of contract in the Common Law, where the same law applies to all contracts, both private and public. This article will therefore not consider administrative contracts.

THE HISTORICAL DEVELOPMENT OF CONTRACT LAW IN ENGLAND

The Civil Law historically has placed a much greater emphasis on the role of contracts in the legal system than has the Common Law. The importance, indeed the centrality, of contracts in the Civil Law can be seen, for example, by the declaration made by Grotius that 'the mother of the Civil Law is the obligation which one imposes upon himself by his own consent'.[96] Contract law thus developed into a sophisticated area of the law much earlier in French law than it did in the Common Law.

Throughout the Middle Ages and the Early Modern period contract law in the Common Law remained undeveloped, and the law of contract itself was generally considered to be no more than an adjunct to the law of property. No textbook was written on the subject until 1790, and that first book, Powell's *Essay upon the Law of Contracts and Agreements*, simply addressed matters involving land transactions and marriage settlements, for the most part.[97]

There was no general law of contract in the early Common Law. Because the Common Law was based on forms of action, the only agreements which could be legally enforced were those which came within the ambit of one or other of the available writs. In order to proceed on a contractual matter, it was therefore necessary to find an appropriate writ. The first writs which dealt with contractual matters were the writs of covenant, debt and detinue. The writ of covenant was limited to those agreements which had been made in a deed under seal. Informal contracts were not enforceable by the writ of covenant.[98] The writ of debt was also limited in scope. It applied only to those situations where the plaintiff alleged that the defendant owed him a liquidated sum of money or a specific quantity of fungibles. When the plaintiff proceeded by way of debt, the defendant was entitled

96. Grotius '*De Jure belli ac pacis*' (1625), cited in Fabre-Magnon, above n 88, 42, n 1.
97. PS Atiyah, *The Rise and Fall of the Freedom of Contract* (Oxford: Clarendon Press, 1979) 360.
98. For a detailed discussion of the writ of covenant, see Baker, above n 36, 318–21.

to choose trial either by jury or by another procedure known as 'wager of law', which over time became archaic and obsolete.[99] The third available writ was that of detinue, whereby the plaintiff could claim the delivery of a specific chattel owned by him which was wrongly detained by the defendant.[100] Apart from the situations covered by these three writs, contracts could not be enforced in the Royal Courts.

In the 14th century another form of action, viz, that of trespass, began to be used in a contractual context.[101] The writ of trespass was originally designed to address matters which were tortious in nature, and which therefore involved misfeasance. The writ was utilised in a contractual context when a defendant undertook to perform some service for the plaintiff and then caused damage to the plaintiff in performing that undertaking.[102] When used in this context, the writ came to be known in Latin as '*assumpsit*', ie, 'he undertook'. The writ of assumpsit considerably extended the jurisdiction of the Royal Courts over contractual matters. However, an action in assumpsit could at first only be brought when there had been misfeasance on the part of the defendant. The writ was not available when there had been non-feasance, that is, when the defendant had not performed at all. In such circumstances the plaintiff could only sue if the contract was under seal, by way of covenant.[103] However, in the 16th century, the writ of assumpsit was reinterpreted to include situations of non-feasance. In the case of *Pykeryng v Thurgood*,[104] Spelman J definitively declared that the writ of assumpsit could be used both in cases of misfeasance and non-feasance.[105] In 1602, in the case of *Slade v Morley* (*Slade's Case)*,[106] the ambit of assumpsit was further extended to permit a plaintiff to use assumpsit rather than debt to recover a liquidated sum of money. This allowed a plaintiff to avoid the archaic procedure of wager of law. An action in assumpsit for a liquidated sum of money was referred to as *indebitatus assumpsit*. Collateral assumpsit was the action which dealt with other breaches of contract, apart from warranties.[107]

99. For a detailed discussion of the writ of debt, see Baker, above n 36, 321–6. Of particular interest is Baker's discussion of the action in debt on a contractual penal bond. Such bonds were extremely popular during the 16th century, and were instrumental in hindering the development of consensual contracts in the Common Law: ibid 324.
100. Ibid 321.
101. Trespass had originally been used with regard to actions in which the Crown had a special interest, but a later version of the action, known as 'trespass on the case', allowed private individuals to undertake an action for wrongs they had suffered: JW Carter, E Peden & GJ Tolhurst, *Contract Law in Australia* (Sydney: LexisNexis Butterworths, 5th edn, 2007) 5.
102. The first reported case in which trespass was utilised in this manner was *Bukton v Tounesende (The Humber Ferry Case)* (1348) B & M 358. In this case the defendant ferryman had agreed to ferry the plaintiff's horse across the Humber River, but so overloaded his ferry that the horse fell overboard and was drowned: Baker, above n 36, 330.
103. Another avenue of recourse would be to pursue an action in Equity: Baker, ibid 333–5.
104. (1533) Spelman J's MS Reports, 93 YB Sel Soc 4: MP Furmston, *Cheshire, Fifoot and Furmston's Law of Contract* (Oxford: OUP, 15th edn, 2007) (hereafter cited as 'Cheshire') 5.
105. Cheshire, ibid 6.
106. (1602) 76 ER 1074.
107. DJ Ibbetson, *A Historical Introduction to the Law of Obligations (*Oxford: OUP, 1999) 132.

A warranty was a statement made by the defendant in which he guaranteed the quality of his goods. A warranty was not considered to be a term of the contract because it was not a promise made by the defendant but rather a statement of fact about the nature of his goods. If this statement of fact turned out not to be true, the plaintiff could bring an action not for breach of a contractual term but rather in trespass for deceit. The defendant had by his deceit caused the plaintiff to enter into a bad bargain, for which he was entitled to be compensated by damages.[108]

There were thus various types of action, all of which had originated in trespass on the case, by which a plaintiff could bring an action in cases relating to contractual matters. If the defendant had made a warranty which turned out not to be true, the plaintiff could sue him in deceit and recover damages. If the defendant had breached a term of the contract, the plaintiff could sue in collateral assumpsit and recover damages. If the defendant failed to pay a liquidated sum of money the plaintiff could sue to recover that sum of money by *indebitatus assumpsit*. Finally, if the defendant's breach had gone to the root of the contract, the plaintiff could terminate the contract and bring an action in *indebitatus assumpsit* for any sums of money which he had already paid to the defendant.[109]

The various forms of action ensured that there could not be any development towards a unified law of contract. Moreover, in spite of the diverse procedures of the various forms of action English contract law as a whole remained undeveloped. At the beginning of the 19th century many aspects of contract law which are today taken for granted did not then exist. Concepts such as offer and acceptance, mistake, frustration, and the test for remoteness of damages were still unknown.[110] But this situation changed dramatically during the 19th century, and the law of contract rapidly developed into a sophisticated area of the law.

There were a number of reasons for the transformation of contract law during this period. One of the most important was the impact on England of the Industrial Revolution, which occurred between 1770 and 1870.[111] The enormous economic and social transformation which occurred during this period necessitated correspondingly large changes in the law. This was particularly true in the area of

108. Baker, above n 36, 331–3.
109. Ibbetson, above n 107, 223.
110. Baker, above n 36, 350–1; AWB Simpson 'Innovation in Nineteenth Century Contract Law' (1975) 91 LQR 247, 258–262, 265–77. By the 18th century most contract cases were governed by the writ of assumpsit. But detailed contract rules did not develop in such cases because the defendant usually pleaded 'non assumpsit'. This meant that the merits of the case then became a question of fact to be decided by the jury: Baker, above n 36, 351.
111. In 1770 total manufactures in the UK were valued at £30 million; by 1871 this had increased to £348 million. In 1801 the population was some 10.6 million people; by 1861 it had grown to 23.2 million. Between 1801 and 1861 the gross national product of the UK increased from £10.7 million to £668.0 million, and by 1870 British export trade was more than four times greater than that of the US, and was larger than the combined export trade of France, Germany and Italy: Atiyah, above n 97, 224; R Danzig, '*Hadley v Baxendale*: A Study in the Industrialisation of the Law' (1975) 4 J Legal Studies 249, 259.

contract law. Commercial activity increased exponentially, and the law of contract was forced to develop in response to the tremendous increase in commercial litigation. It was thus commercial practice which above all else influenced the growth of contract law in the Common Law at this time. Commercial transactions, as Harris and Tallon point out, were 'treated by judges as the paradigm of contract'.[112]

The legal reforms which occurred in the 19th century also had an important impact on the law of contract. The abolition of the forms of action and the fusion of the Common Law and Equity within a single court structure meant that a general law of contract could now develop in a way which had not previously been possible. This development was facilitated by the proliferation of doctrinal works which made their appearance during this period. Up until the 19th century there had been very little effort to elaborate the principles of contract law in doctrinal work. But during the 19th century this changed, and a plethora of writers produced numerous treatises on the subject. The economic pressures for legal change, the reforms to the legal system, and the work of the doctrinal writers produced what has come to be known as 'classical contract law,' which is essentially the form of contract law which exists today in England and Australia.[113]

A review of the historical backgrounds of the Common Law and French law has been necessary as a prelude to understanding the different approach of the two legal systems to contractual remedies. The contractual remedies themselves will now be examined. This article will address the contractual remedies in the order in which they have been set out in Article 1184.[114] Specific performance will therefore be dealt with first.

SPECIFIC PERFORMANCE: THE COMMON LAW APPROACH

When a plaintiff has suffered breach of contract, specific performance is the remedy which most nearly puts him back into the position in which he otherwise would have been had the contract been performed. This is because a court, when it has resort to this remedy, orders the defendant to perform his original contractual obligation. The plaintiff thus receives what he actually contracted for, rather than a compensatory amount in damages.

112. Harris & Tallon, above n 3, 385.
113. Cheshire, above n 104, 13, 14. Juries seldom participated in actions involving contractual matters after 1854, once the pleading of equitable defences at Common Law was permitted by the Common Law Procedure Act 1854, in ss 83–86. Judges considered that this type of case would be too complicated for juries and should therefore be decided by judges alone: Ibbetson, above n 107, 221, n. 8. In this regard see *Luce v Izod* (1856)
114. As was mentioned above pp 300–1, Article 1184 of the *Code civil* enumerates the contractual remedies available to a creditor in the following order: specific performance, termination and damages. A fourth remedy, viz, that of withholding performance, is also available in French law, but is not referred to in Article 1184.

The Common Law and French law have adopted very different approaches to the remedy of specific performance. In the Common Law the remedy is considered to be an exceptional one, which is discretionary in nature. It is not a remedy which is usually sought by a plaintiff, nor is it frequently awarded by the court. In French law, on the other hand, specific performance is not an exceptional remedy, and may always be sought by a creditor who has suffered a contractual breach, provided that the debtor is still capable of performance, and apart from those cases where third party rights are involved or where the contract is of a highly personal nature. Specific performance in the French context is in fact considered to be the first and foremost remedy of an aggrieved creditor, and it is a remedy which a court is obliged to award if the creditor demands it.

In the Common Law the primary remedy for breach of contract has traditionally been, and continues to be, that of damages. The writs which dealt with contractual matters, and in particular the writ of *assumpsit*, prescribed an award of damages as the only remedy available to a plaintiff.[115] This award would take the form of an order from the court that the defendant pay the plaintiff a specific amount of money. The award of damages was a substitutionary one, which 'imposed a new obligation on the defendant for breach of the old'.[116]

In the 15th century, when a breach of contract did not come within the ambit of the writs of covenent, debt or detinue, the Common Law was unable to provide a remedy. Plaintiffs in such cases therefore had recourse to the Court of Chancery, which began to intervene more and more in cases of breach of simple contracts to provide equitable relief. But when the Common Law developed the action in *assumpsit* in the 16th century, thereby creating a remedy for the breach of simple contracts at Common Law, recourse to Equity for such breaches became unnecessary, in most cases.[117] The development of the action in *assumpsit*, did not, however, exclude subsequent interventions by Equity. This was because plaintiffs in the 16th century still continued to resort to the Court of Chancery, on the basis that an award of damages at Common Law did not adequately compensate them for the loss which they had incurred.

Equity possessed two supplementary remedies which were of particular interest to aggrieved plaintiffs, viz, specific performance and the injunction. When the Court of Chancery issued a decree of specific performance the defendant was required to perform his actual contractual obligations. Analogous to specific performance was the grant of an injunction. An injunction could be either prohibitory or mandatory in nature. When the defendant had promised not to do something, the Court could issue a prohibitory injunction, ordering the defendant to refrain from doing what

115. In the early Common Law specific performance was sometimes granted under the writ of covenant, although the usual remedy subsequently came to be that of damages: Baker, above n 36, 58.
116. Farnsworth, above n 48, 819.
117. C Szladits, 'The Concept of Specific Performance in Civil Law' (1955) 4 American J Comp Law 208, 209.

he had promised not to do.[118] When the defendant had done something contrary to his contractual obligations, the Court could issue a mandatory injunction, which would order him 'to undo what he had already done in breach of the contract'.[119]

Because Equity's role was to provide supplementary remedies to plaintiffs only when there was no remedy available at Common Law, or when the remedy provided by the Common Law was manifestly unsatisfactory, resort to the Common Law was considered to be the first and ordinary recourse for a plaintiff. This in turn meant that the remedy of damages provided by the Common Law was considered to be the normal remedy for breach of contract. A plaintiff could only have recourse to the equitable remedies of specific performance or injunction when damages would not adequately compensate him for his loss. [120] A plaintiff was therefore entitled to resort to Equity only in exceptional cases, and the equitable remedies of specific performance and injunction would be awarded only when required by the circumstances of a particular case to ensure that justice was done.[121]

The earliest cases in which the Court of Chancery granted a decree of specific performance involved contracts for the sale of land.[122] Real property in 16th century England was by far the most important source of wealth, and remained so until the 19th century, when, as a result of the Industrial Revolution, other forms of wealth became equally important.[123] Each parcel of land was considered to be unique and irreplaceable, possessing specific and particular attributes, which could never be exactly reproduced or duplicated in any other individual parcel of land. As a result, an award of damages for breach of a contract for the sale of land was seen to be a wholly inadequate compensation, and the Court of Chancery habitually awarded specific performance in such circumstances, so that the specific parcel of land itself was conveyed to the plaintiff.[124]

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118. Cheshire, above n 104, 800.
119. Ibid 801. The remedies which Equity provided were originally remedies *in personam*, in which coercive measures were taken against the person of the defendant if he did not comply with an order of the court, so that he could, for example, be jailed for contempt. The Common Law, on the other hand, acted *in rem*; that is, it took measures against the property of the defendant: Farnsworth, above n 48, 820; Szladits, above n 117, 211.
120. 'This court does not profess to decree a specific performance of contracts of every description. It is only where the legal remedy is inadequate or defective that it becomes necessary for courts of equity to interfere…': *Flint v Brandon* (1803) 32 ER 314, 315 (Sir William Grant, Master of the Rolls).
121. See *Wilson v Northampton and Banbury Junction Ply Co* (1874) 9 Ch App 279, 284 (Lord Selborne) who declared that the Court would 'give specific performance instead of damages, only when it can by that means do more perfect and complete justice'. To similar effect is the statement of Lord Upjohn in *Beswick v Beswick* (1968) AC 58, 102: 'Equity will grant specific performance when damages are inadequate to meet the justice of the case.' Note that Lord Upjohn's statement was cited with approval by Mason CJ and Wilson J in *Trident General Insurance Co Ltd v McNiece Bros Pty Ltd* (1988) 165 CLR 107, 119. For an earlier English case to the same effect, see *Adderley v Dixon* (1824) 57 ER 239, 240–1 (Sir John Leach V-C).
122. Szladits, above n 117, 209.
123. Baker, above n 36, 379.
124. Szladits, above n 117, 209–10.

On the other hand, a decree of specific performance would not usually be granted when the contract involved chattel goods, because in most cases the plaintiff could purchase replacement goods in the marketplace with the award of damages which he would receive at Common Law. But when the chattel goods in question were of a unique character, specific performance would be granted. As in the case of land, an award of damages was not considered to be an adequate remedy in such cases because there was no readily available substitute.[125] Heirlooms, works of art, antiques, title deeds, intellectual property and writings of special value were amongst the chattel goods so characterised.[126]

The ambit of specific performance was therefore circumscribed by the fact that it was a supplementary remedy, granted only when damages would be inadequate in the circumstances of the case. It was further circumscribed by the fact that it was discretionary in nature, and would therefore only be granted if the judge considered it to be appropriate. This discretionary aspect of specific performance applies even in cases involving the sale of land or chattels of a unique or special character. Whereas Common Law damages are awarded to a successful plaintiff as a matter of right, specific performance, as a supplementary equitable remedy, will only be granted if this would result in 'a more perfect and complete justice' between the parties.[127] But if, in all the circumstances of the case, a grant of specific performance were to defeat the ends of justice, then the judge would not make that grant, and the plaintiff would have to be satisfied with damages.[128]

The discretion which a judge exercises in determining whether or not to grant specific performance is governed by a number of equitable considerations. Specific performance may be refused, for example, if it would cause unfairness or undue hardship to the defendant. It may also be refused if the plaintiff has engaged in unfair conduct. If the remedy is not mutually available to both parties, it will ordinarily be refused. This is likewise the case where performance of the

125. Marsh, above n 6, 310.
126. W Covell & K Lupton, *Principles of Remedies* (Sydney: LexisNexis Butterworths, 3rd edn, 2005) 211; Szladits, above n 117, 210. Although specific performance was ordinarily only considered as an appropriate remedy with respect to land or chattels of a unique character, it was not limited to such situations. The principle underlying the award of specific performance was that it would be granted to a plaintiff when damages were inadequate to satisfy the demands of justice. It was thus within the power of a Court of Chancery to find that the demands of justice would not be satisfied by an award of damages in situations other than those indicated above. See, in this regard, the statement of Gleeson CJ, Gummow, Kirby, Callinan and Heydon JJ, in *Zhu v Treasurer of the State of New South Wales* (2004) 211 ALR 159, 193, in which the court stated that in examining the categories in which specific performance would normally be awarded, there could well be exceptions based on the general principle that 'damages are inadequate if they cannot satisfy the demands of justice, and that justice to a promisee might well require that a promisor perform the promise save for exceptional cases like promises to render a personal service' (quoting Windeyer J in *Coulls v Bagot's Executor and Trustee Co Ltd* (1968) 119 CLR 460, 503.)
127. *Wilson v Northampton and Banbury Junction*, above n 121, 284 (Lord Selborne).
128. Cheshire, above n 104, 799.

contract would require extensive supervision by the court.[129] Moreover, contracts for personal service will not be enforced, on the basis that the court will not coerce a defendant to perform a personal service against his will. Jessel MR pointed out in 1880 that the Court of Chancery had never granted specific performance for such contracts:

> The courts have never dreamt of enforcing agreements strictly personal in their nature, whether they are agreements of hiring and service, being the common relation of master and servant, or whether they are agreements for the purpose of pleasure, or for the purpose of scientific pursuits, or for the purpose of charity or philanthropy.[130]

Equity could not compel a defendant to perform a personal service. But it could order a defendant not to do something which was contrary to the terms of his contract. This was done by means of a prohibitory injunction. The case of *Lumley v Wagner*[131] illustrates both points. A contract was concluded between the opera singer Joanna Wagner and Benjamin Lumley, the proprietor of Her Majesty's Theatre, London. Wagner agreed to sing at Lumley's theatre for a period of three months, and not to sing elsewhere without Lumley's written authority. Wagner, however, breached her contract with Lumley, and began to sing at the Royal Italian Theatre in London, during the contractual period. Lumley sought an injunction to prevent her from doing this. The court granted the injunction, and the grant was upheld on appeal. The Chancellor declared as follows:

> It is true that I have not the means of compelling her to sing, but she has no cause of complaint if I compel her to abstain from the commission of an act which she has bound herself not to do, and thus possibly cause her to fulfil her engagement.[132]

The court can also grant a mandatory injunction, which has the effect of compelling the defendant to undo some act which he had done contrary to the terms of his contract. In this regard the court granted a mandatory injunction to compel a defendant to demolish a building which he had built contrary to the terms of his contractual undertakings.[133]

Injunctions both prohibitory and mandatory, like specific performance, will be granted only if the plaintiff can demonstrate that damages would be inadequate in the particular circumstances of the case. The court must also take into account the

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129. Farnsworth, above n 48, 821, 822; Marsh, above n 6, 311.
130. *Rigby v Connol* (1880) 14 Ch D 482, 487.
131. (1852) 42 ER 687 (Ch). For an Australian case where a prohibitory injunction was granted in similar circumstances, see *Warner Bros Pictures Inc v Ingolia* [1965] NSWR 988.
132. Ibid 693.
133. *Lord Manners v Johnson* (1875) 1 Ch D 673; *Jackson v Normanby Brick Co* (1899) 1 Ch 438. See also *Charrington v Simons & Co Ltd* (1970) 2 All ER 257, where the defendant was ordered to remove a road which he had constructed because what he had done was not in accordance with the terms of the contract. For an Australian case, see *Burns Philp Trust Co Pty v Kwikasair Freightlines Ltd* (1963) 80 WN (NSW) 801.

various equitable considerations discussed above in determining whether it should exercise its discretion to grant an injunction. Moreover, a mandatory injunction will only be granted if the plaintiff would obtain an appreciable benefit without inflicting material detriment on the defendant.[134]

It can thus be seen that in the Common Law damages are the ordinary remedy for breach of contract, and the equitable remedies of specific performance and injunction are considered to be exceptional remedies, to be granted only in certain limited types of situations.

SPECIFIC PERFORMANCE: THE FRENCH APPROACH

In French law the approach to specific performance is entirely different. Specific performance in French law is considered to be not only an ordinary, but in fact the principal remedy which the creditor is entitled to seek, provided, as Article 1184 specifies, that 'it is still possible'.

The explanation for this different approach, as has been seen above, can be traced to the influence of the canonists during the formative period of French law. According to canon law, when a person contracted to perform a particular undertaking, that person incurred not only a legal obligation but a moral one as well, in that he was bound in conscience to keep his word. If he did not do so, the role of the law was to ensure that he did. [135] The duty of the debtor to perform his contractual obligations, and the responsibility of the law to ensure that he do so by means of an order for specific performance, find expression in contemporary French law in Article 1184. That Article provides that, with regard to synallagmatic contracts, the 'party in whose favour the contractual undertaking has not been performed has the choice either of forcing the other to perform the agreement, when that is possible, or of claiming termination with damages'.[136] In French law the creditor thus has the option of seeking specific performance from the debtor, whenever this is still possible. In other words, specific performance by the debtor of his contractual obligations is understood to be the starting point for an aggrieved creditor. The object of the creditor's action is to obtain, as much as possible, the actual performance of the obligation for which the debtor had originally contracted. This of course assumes that the debtor is still capable of

134. *Charrington v Simons & Co Ltd* (1970) 2 All ER 257, 261 (Buckley J).
135. By making specific performance the principal remedy for breach of contract, the canonists transformed the remedy available for breach of contract. In classical Roman law the only remedy for breach of the nominate contracts had been that of damages: JP Dawson 'Specific Performance in France and Germany' (1959) 57 Michigan L Rev 495, 496. In the Empire period judges would permit specific performance whenever they considered that it was necessary to do justice between the contracting parties (p 500).
136. *La partie envers laquelle l'engagement n'a point été exécuté, a le choix ou de forcer l'autre à l'exécution de la convention lorsqu'elle est possible, ou d'en demander la résolution avec dommages et intérêts.*

performing what was contracted for and that the creditor still wants to have the contract performed.[137]

The French language equivalent of the term 'specific performance' is *exécution en nature.* This literally means 'performance in kind' and is a concept which is wider in scope than specific performance. It includes the subsidiary concept of *exécution forcée*, which means 'enforced performance,' whereby the debtor is constrained by court order to perform his contractual obligation. *Exécution forcée* would be understood as the equivalent of specific performance in the Common Law. However, *exécution en nature,* or performance in kind, is not limited to enforced performance, because performance in kind may also be obtained by indirect means.[138] This indirect means of ensuring performance occurs when a third party performs the contractual obligation of the debtor, at the debtor's expense. In the Common Law this procedure is considered to come within the purview of damages – specific performance only covers those situations where the defaulting party must himself perform his contractual undertakings. But in French law this procedure is understood to be an alternate means of ensuring performance. It is known as *'l'exécution du contrat par un tiers aux dépens du débiteur'*.[139] Nicholas translates the term as 'surrogate performance'.[140]

The ambit of *exécution en nature* is also wider than that of specific performance in yet another aspect, viz, with regard to an unfulfilled contractual obligation to pay a fixed sum of money. The failure to pay a fixed sum of money in the Common Law was originally addressed by the writ of debt, and is now resolved in the modern Common Law by an order to pay the amount due. This is in contrast to French law, where an unfulfilled contractual obligation to pay a fixed sum of money is considered to come within the ambit of *exécution en nature.* In this context performance in kind is understood to occur when a creditor, having obtained a court order with regard to the fixed sum of money owing to him, is then entitled, through the intervention of a court official known as a *huissier*, to have the goods of the debtor seized and sold in order to obtain the price which is owing to him under the terms of the contract.[141] The end result is the same in the two systems, since a bailiff will perform the same function in the Common Law with regard to a recalcitrant defendant, but the understanding of what occurs in order to arrive at that result is completely different.

French law divides contractual obligations into three categories, viz, those of giving, those of doing, and those of not doing. This classification flows from the fact that contracts themselves are grouped into these same three broad categories,

137. Fabre-Magnon, above n 88, 557–8.
138. Harris & Tallon, above n 3, 266.
139. Fabre-Magnon, above n 88, 561.
140. Nicholas, above n 4, 218.
141. G Hubrecht, *Droit Civil* (Paris: Sirey, 15th edn, 1993) 131; Zweigert & Kötz, above n 10, 471.

viz, contracts of giving, of doing, and of not doing, by virtue of Article 1101.[142] The Roman jurists had originally classified contracts into two categories, viz, those of giving and those of doing, although they did not consider this distinction to be of any great significance. This twofold categorisation of contracts was adopted by the legal scholars of the Middle Ages, and it subsequently became threefold. Unlike their Roman law forebears, the legal scholars of the Middle Ages did consider these categories to be significant, particularly with regard to the proper ambit of an order for performance in kind in cases of breach of contract.[143]

With regard to contracts of giving, there was general agreement amongst legal scholars that when the thing in question was a specific item, an order for performance in kind was appropriate when the debtor failed to deliver the thing, if it was a movable, and when he failed to put the creditor into possession, if it was an immovable.[144] By the 17th century this principle was well established, as Domat's comments on the matter indicate:

> It never depends on the seller to elude the effect of the sale, by his failing to make delivery of the thing; and he may be always forced to deliver it, if it is possible, provided that the buyer performs his part of the contract.[145]

Pothier was of the same opinion:

> [I]n the case of a refusal by a vendor to deliver the thing sold which he has in his possession, the judge can authorise the purchaser to seize and remove the thing, if the thing in question is a movable, or to put the purchaser in possession, if the thing is an immovable, and to have the vendor expelled by means of an officer if he refuses to leave.[146]

In contemporary French law performance in kind inevitably flows from a debtor's failure to comply with the provisions of Article 1138. Article 1138 provides that the transfer of ownership in a thing occurs once the item of property and the price have been agreed upon by the parties, even though the property in question has not yet been delivered or the price paid. It is at this point, viz, the point of designation of the property and agreement as to its price, that the creditor becomes the owner

142. Article 1101 reads as follows: *'Le contrat est une convention par laquelle une ou plusieurs personnes s'obligent envers une ou plusieurs autres, à donner, à faire ou à ne pas faire quelque chose.'* (The contract is a convention by which one or several persons undertake with one or several other persons, to give, to do or not to do some thing.) 'Giving,' in the context of Article 1101, means the transfer of ownership of a 'thing' or the creation of a real right over it.
143. Dawson, above n 135, 501–2.
144. All 'things' (ie, all property) must be characterised, by virtue of Article 516, as being either immovable or movable. These two categories of property correspond generally to the Common Law categories of real and personal property, respectively
145. Domat, above n 74, vol 1, 206.
146. Dupin, above n 76, 29. See also Dupin, above n 31, 79; M Dupin (ed), *Oeuvres de Pothier Tome Troisième: Traité du Contrat de Louage* (Paris: Pichon-Béchet, Successeur de Béchet Ainé, Libraire, 1827) 260.

of the property, even though it may not yet have been delivered.[147] The effect of Article 1138, therefore, is that ownership of a thing, when specifically designated, passes by virtue of the agreement itself. Consequently, performance in kind with regard to contractual obligations of giving can only involve the actual delivery of the thing when this does not occur. In this regard contemporary French law follows the position taken by Pothier, and concludes that the creditor is entitled to a *saisie-revendication*, or 'judicial seizure,' when the property in question is a movable, and expulsion of the debtor, when the property is an immovable.[148]

It can thus be seen that in French law, with regard to contractual obligations to give, where the property has been designated and the price agreed, the creditor will always be entitled to seek performance in kind from the debtor, apart from situations involving third parties. As Dawson points out, this 'is a large percentage of the potentially enforceable promises, and its importance should not be minimised'.[149]

The appropriateness of an order for performance in kind was much more problematic, however, when the contract was one of doing. During the Middle Ages there was considerable debate amongst legal scholars as to whether contractual obligations of doing should be specifically enforced. At issue was whether an order to compel a debtor actually to do something which he had promised to do amounted to a type of servitude, which was contrary to public policy.[150]

Bartolus de Saxoferrato, the renowned 14th century jurist, was much exercised by this question. Bartolus was one of the foremost jurists of his era, and his writings greatly influenced the thinking of subsequent generations of legal scholars, to the extent that there was even a Latin expression which declared that no one could be a good jurist unless he was a follower of Bartolus.[151] Bartolus tentatively concluded that performance in kind should not be ordered when the contract was one of doing because of the issue of personal servitude, although he noted that there were many instances in which an order for performance in kind would not amount to servitude. Thereafter, and in spite of the reservations of Bartolus, there developed

147. Article 1138 reads as follows: *L'obligation de livrer la chose est parfaite par le seul consentement des parties contractantes. Elle rend le créancier propriétaire et met la chose à ses risques dès l'instant où elle a dû être livrée, encore que la tradition n'en ait point été faite, à moins que le débiteur ne soit en demeure de la livrer; auquel cas la chose reste aux risques de ce dernier*. (The obligation to deliver the thing is perfected by the simple consent of the contracting parties. It makes the creditor the owner and puts the thing at his risk from the moment when it should have been delivered, even if delivery has not been made, unless the debtor is not in a position to deliver, in which case the thing remains at the risk of the debtor.)
148. Nicholas, above n 4, 217. Article 1138, however, does not apply when the contract is one which involves generic things rather than specific things. If generic goods are not designated and not delivered, the contract is considered to be one of doing, viz, of delivering the generic goods, rather than of giving, i.e. transferring title. For discussion on the non-delivery of generic goods with respect to contracts of doing, see below p 334.
149. Dawson, above n 135, 524.
150. Ibid 504.
151. *Nemo bonus iurista nisi bartolista.*

a maxim that no one could be compelled to perform a specific act (*Nemo praecise cogi potest ad factum*).[152]

The issue of whether to order performance in kind for the breach of a contract of doing was resolved in France not by actually addressing the issue itself, but rather by basing the decision on whether an oath had been taken by the debtor to perform his contractual obligations. If an oath had been taken by the debtor, then the judge would order the debtor to perform his obligations.[153] But if no oath had been taken, the judge would follow the maxim *nemo praecise cogi potest ad factum* and would order only that the debtor pay damages. With contracts of giving, on the other hand, the existence or otherwise of an oath made no difference in the judge's decision: the debtor was always obliged to deliver a specifically designated thing to the creditor. [154]

Pothier noted that the maxim *nemo potest praecise cogi ad factum* could only apply to contracts of doing:

> We said that the maxim applied only to obligations having as objects some physical act on the part of the person of the debtor to which he could not be compelled without exercising constraint upon his person and his liberty. Such obligations would arise, for example, in an agreement to enter my service, or to go somewhere on my business.[155]

With regard to such contracts, Pothier asserted that an award of damages was the only remedy available in case of breach. In this regard he declared as follows:

> When someone has undertaken to do some thing, this obligation does not permit the creditor to force the debtor to do specifically what he has contracted to do, but rather only gives him the right to have the debtor condemned to pay damages, for not having fulfilled his obligation.
>
> The obligation to pay damages includes all cases where there has been a breach of an obligation to do something, because *nemo potest praecise cogi ad factum.* [156]

This also applied to contracts of not doing, unless the thing done which should not have been done was capable of being destroyed:

> When one has undertaken not to do something, the right which the breach of this obligation gives to the creditor is that of suing the debtor for damages.
>
> If the thing which the debtor has undertaken not to do, and which he has done contrary to his obligation, is something which can be destroyed, the creditor can then also seek the destruction of the thing.[157]

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152. Dawson, above n 135, 505–6.
153. As has been seen above, in this regard the French courts followed the lead taken by the canon law courts, in considering a sworn promise (by which the promisor pledged his 'faith'; ie, his hope of salvation) as being specifically enforceable: Farnsworth, above n 48, 13.
154. Dawson, above n 135, 508.
155. Dupin, above n 76, 260.
156. Dupin, above n 31, 79.
157. Ibid.

During the process of codification, Napoleon brought considerable pressure to bear on the Commissioners to produce the *Code civil* within strict deadlines. The Commissioners, responding to this pressure, drafted articles on the appropriate remedies for breach of contract which closely reflected Pothier's writings. Pothier's insistence on damages as the only remedy for breach of an obligation of doing no doubt also impressed the Commissioners, who would have appreciated his emphasis on individual liberty, as well as 'the libertarian repugnance to compulsion directed against the person,' which was so clearly evident in his statements.[158] As a result they saw no reason to expand on his statements. Pothier's assertion that only damages could be claimed when the contractual obligation was one of doing or of not doing was thus set out in Article 1142 virtually word for word:

> Every obligation to do or not to do resolves itself into damages in case of non-performance by the debtor.[159]

Article 1143 provided the exception adverted to by Pothier, with regard to contracts of not doing when the thing done contrary to the contract was capable of being destroyed. It reads as follows

> Nevertheless, the creditor has the right to request that that which had been done contrary to the contract, be destroyed; and he can be authorised to have it destroyed at the expense of the debtor, without prejudice to a claim for damages if such should be appropriate.[160]

Article 1144 provided for 'surrogate performance'. In spite of the general prohibition implicit in Article 1142 which prevents a creditor from forcing a debtor to perform his obligation of doing, Article 1144 enables the creditor, should he so desire, to have the debtor's obligation to do performed by another, at the debtor's expense.[161] Article 1144 reads as follows:

> The creditor can also be authorised, in case of non-performance, to have the obligation performed himself at the expense of the debtor. The debtor can be ordered to pay in advance the sums necessary for this to occur.[162]

By virtue of Article 1144, the creditor is entitled to obtain the services of some third party to perform the obligation which the debtor had undertaken to do. It should be emphasised that Article 1144 did not thereby grant the creditor a form

158. Nicholas, above n 4, 216.
159. *Toute obligation de faire ou de ne pas faire se résout en dommages et intérêts, en cas d'inexécution de la part du débiteur.*
160. *Néanmoins le créancier a le droit de demander que ce qui aurait été fait par contravention à l'engagement, soit détruit; et il peut se faire autoriser à le détruire aux dépens du débiteur, sans préjudice des dommages et intérets s'il y a lieu.*
161. Fabre-Magnon, above n 88, 561.
162. *Le créancier peut aussi, en cas d'inexécution, être autorisé à faire exécuter lui-même l'obligation aux dépens du débiteur. Celui-ci peut être condamné à faire l'avance des sommes nécessaires à cette exécution.* (NB: The second sentence of this article was added by amendment on 9 Jul 1991 and became law on 1 Jan 1993.)

of self-help. Should a creditor wish to proceed pursuant to Article 1144, he must first obtain a court order authorising him to do so.[163]

The declaration in Article 1184 that the 'party in whose favour the contractual undertaking has not been performed has the choice either of forcing the other to perform the agreement, where that is possible, or of claiming termination with damages' appears on its face to grant a creditor the right to seek performance in kind for the breach of any contractual obligation, whatever the nature of that obligation. But the wording of Article 1142 contradicts this, by declaring that when a contractual obligation is one of doing or of not doing the only remedy available to a creditor is that of damages, thereby limiting the ambit of performance in kind to contractual obligations of giving only. This would be a serious limitation on the general principle set out in Article 1184. A reading of Articles 1143 and 1144, however, makes it clear that this cannot be the case, because the limitation set out in Article 1142 is itself severely modified by the exceptions which are set out in Articles 1143 and 1144.

Article 1143 declares that with regard to contracts of not doing, when the debtor has contravened his obligation and done something which he was contractually obliged to refrain from doing, the creditor may seek performance in kind by having the thing which should not have been done destroyed. In the case of *Jalaguier e.a. c Société Immobilière Le Rabelais*[164] the creditor, relying on Article 1143, sought the demolition of the upper floors of a newly erected building which exceeded the limitations agreed to by the parties. Whilst finding that the debtor had indeed violated the terms of the contract, the *Cour d'appel de Montpellier* decided not to order the demolition of the offending floors in order to safeguard the interests of third parties who had taken up residence in the said floors, and instead awarded the creditor damages. On appeal, the *Cour de cassation* reversed this decision, finding that it had violated Article 1143 in considering the interests of third parties rather than the rights of the contracting parties. As the creditor had an ongoing interest in the destruction of the offending floors and as his request was not impossible to perform, the *Cour de cassation* held that the offending floors should be demolished. The court noted that the innocent party was exercising a right under Article 1143. Subsequent decisions by the *Cour de cassation* have reinforced this interpretation.[165] However, there have also been decisions in which the courts have not applied Article 1143 with such rigour, relying on the concepts of abuse of right and good faith to moderate its impact.[166] The interpretation given by the *Cour de*

163. Nicholas, above n 4, 217.

164. Cass civ 17.12.1963, JCP 1964 II 13609, Gaz Pal 1964.1.158. The case is reproduced in part in Rudden, above n 35, 505–6.

165. Nicholas, above n 4, 218. See also A Bénabent, *Droit Civil: Les Obligations* (Montchrestien, 7th edn, 1999) 234.

166. Bénabent, ibid 235. Article 1134(3) states that contracts 'must be performed in good faith'. (*Elles doivent être exécutées de bonne foi.*) The concept of abuse of right derives from the notion that the exercise of a right may cease to be legitimate and instead actually become a wrong when its exercise has no other purpose but to cause injury to another: Carbonnier, above n 22, 352.

cassation to Article 1143 indicates that many contractual obligations of not doing will come within its ambit rather than that of Article 1142, so that performance in kind will be permitted in many such situations.

The relationship between Articles 1142 and 1144 must also be examined. Article 1144 grants the creditor the right to obtain 'surrogate performance' at the expense of the debtor. This right enables the creditor to have the contractual obligation of doing to which he was entitled actually performed, albeit by a third party rather than by the debtor. Moreover, Article 1144 not only applies to contractual obligations of doing as commonly understood, but also extends to the delivery of generic goods. As indicated above, when the contract is one which involves generic things rather than specific things, Article 1138 does not apply. The transfer of ownership of things which are generic occurs only when the generic goods are actually delivered to the purchaser, or when they are designated, in which case Article 1138 then does apply.[167] If generic goods are not designated and not delivered, the contract is considered to be one of doing, viz, of delivering the generic goods, rather than of giving, i.e. transferring title. In such situations the creditor is entitled, by virtue of Article 1144, to obtain a judgment permitting him to obtain the goods in question from a third party at the debtor's expense. This process is considered in French law, by virtue of the concept of 'surrogate performance', to come within the ambit of performance in kind, whereas in the Common Law it is considered to be simply an award of damages. 'The French view of the matter,' as Treitel points out, 'seems to be based on the result of the process from the point of view of the creditor, in that he gets (at least very nearly) the thing he bargained for,' whereas the Common Law view 'is based on the process as it affects the debtor, who is not actually obliged to do anything … except to pay money'.[168] Article 1144 thus also provides a very considerable scope to a creditor to obtain performance in kind, as the concept is understood in French law, with regard to contractual obligations of doing when there has been a breach by the debtor.

Given that Articles 1143 and 1144 permit performance in kind in many situations involving contractual obligation of doing or of not doing, it is evident that Article 1142, although drafted as a general rule, actually governs only a very limited number of situations involving contractual obligations of doing and not doing. This anomaly, according to Dawson, is due, on the one hand, to the haste of the Commissioners in drafting these provisions of the Code, and, on the other, to the inadequacy of Pothier's analysis with regard to the principle of *nemo potest praecise cogi ad factum.* Under pressure from Napoleon to meet strict deadlines, the Commissioners did not critically evaluate Pothier's analysis but simply adopted his dicta without discussion or debate as to their merit or implications.[169] Pothier, however, had not given adequate consideration to the complexities associated with

167. Hubrecht, above n 141, 89.
168. GH Treitel, *Remedies for Breach of Contract* (Oxford: Clarendon Press, 1988) 179.
169. Dawson, above n 135, 510.

the appropriate remedy for the breach of contractual obligations of doing and of not doing.

Pothier's great merit as a jurist lay in his ability to take various fragmented and diverse strands of Roman and customary law which made up French law in the 18th century, and to produce from them synthethised and straightforward statements of legal principle. It was this ability which made his work so appealing to the Commissioners, and which enabled them, in large measure, to draft the articles of the *Code civil* in such record time. However, Pothier sometimes failed to address difficult issues in a satisfactory manner, or oversimplified them unjustifiably. Whereas Bartolus had agonised over his conclusion that performance in kind should not be applied to contractual obligations of doing and of not doing, and had noted many instances where an exception to his conclusion would be possible, Pothier had simply eliminated the possibility of performance in kind with regard to such contractual obligations on the basis of the maxim *nemo potest praecise cogi ad factum*, without even considering any of the complicating exceptions raised by Bartolus.[170]

Pothier did not examine the underlying *raison d'être* for the prohibition of *nemo potest praecise cogi ad factum.* The rationale for the maxim lies in the fact that one cannot compel a debtor to perform an obligation which is strictly personal in nature. Thus, for example, a creditor cannot compel a portrait painter with whom he has contracted to paint a portrait if he subsequently refuses to do so.[171] Apart from such strictly personalised obligations, however, there are many contractual obligations of doing which do not involve the performance of contractual obligations of a strictly personal nature, and which therefore should be capable of performance in kind, as permitted by Article 1184.

By the mid-19th century most French jurists had adopted a restrictive interpretation of Article 1142, arguing that its provisions should apply only when the obligation was of a highly personalised nature, but that in cases where the contract of doing was essentially 'impersonal' in nature, performance in kind was an appropriate remedy.[172] The *Cour de cassation* definitively adopted this interpretation in the

170. Ibid 509–10.

171. In this regard the classic case of a contract involving an obligation of a personal nature is *Eden c Whistler* Cass Civ 14.3.1900, S 1900.1.489; Rudden, above n 35, 502. James McNeil Whistler had completed a portrait of the wife of Sir William Eden, which he had shown to Eden, and which had met with Eden's approval. Eden had tendered payment for the painting, and Whistler had the portrait shown at an exhibition, referring to it as '*mon petit chef'd'oeuvre'*. Whistler, however, then refused to deliver the painting to Eden, after a falling out between them. Eden sued for delivery, and Whistler in response painted in the face of another woman over that of Lady Eden. The court found Whistler liable to Eden in damages, but refused to order delivery, on the basis that the the painting of a portrait 'constituted a contract of a special nature, by virtue of which ownership in the painting is not acquired by the party who ordered it until the artist has put it into his hands and he has approved it; until that moment the painter remains the master of his work'.

172. Dawson, above n 135, 524.

1953 decision of *Epoux Ailloud c. consorts Plissonnier*.[173] The debtor in this case had been ordered by the lower court to return certain movable items which belonged to the Plissonniers, but was unable to do so. He offered to pay damages to the Plissoniers, but was instead ordered by the court to deliver items of the same nature and value. The debtor appealed to the *Cour de cassation* on the basis that the order of the lower court contravened Article 1142. The *Cour de cassation*, however, upheld the order of the lower court, declaring that Article 1142 should be applied only to 'cases of non-performance of a personal obligation of doing or not doing'.[174]

It can therefore be seen that with regard to contracts of doing and of not doing, performance in kind is in most cases an appropriate remedy which the court will grant. The court will apply the limitation set out in Article 1142 and not require the debtor to perform only when the obligation of doing is of its essence one of personal creativity on the part of the debtor, or when the enforcement of an obligation of not doing would involve an infringement of the personal liberty of the debtor.[175] Thus, even though Article 1142 reads as though it were a general rule, it is in fact limited to a very narrow range of cases, and is an exception to the general rule set out in Article 1184, by which a creditor is basically entitled to seek performance in kind with regard to all three types of contractual obligations, if this is still possible.[176]

SPECIFIC PERFORMANCE: COMPARATIVE ANALYSIS

The Common Law approach to the remedy of specific performance is thus very different from the French law approach. In the Common Law damages are considered to be the primary and normal remedy for breach of contract, and specific performance is considered to be an extraordinary remedy. In the Civil Law, on the other hand, performance in kind is considered to be the primary and normal remedy, which a creditor is always entitled to seek, if it is still possible, except in a limited number of cases.

As an extraordinary remedy specific performance in the Common Law has traditionally been limited to those situations where damages would not be an adequate or satisfactory remedy, and is generally available only with respect to a narrow range of specific things, such as land and items of personal property which are unique in character.[177] But in most cases when a breach of contract occurs the

173. Cass civ 20.1.1953, JCP 1953 II 7677 (P Esmein); Rudden, above n 35, 504.
174. *'Mais attendu que ce texte ne peut trouver son application qu'au cas d'inexécution d'une obligation personnelle de faire ou de ne pas faire.'*
175. Nicholas, above n 4, 219; Dawson, above n 135, 524.
176. This does not mean, however, that creditors usually seek performance in kind, because, as Nicholas points out, damages are, in most cases, 'both more expeditious and more certain': Nicholas, above n 4, 220.
177. The instances in which specific performance will be granted cannot, however, be definitvely categorised, as the courts have consistently refused to fix such categories. In this regard

only available remedy for a plaintiff remains that of damages. This is in marked contrast to French law, where performance in kind may be sought, if it is still possible, for any and all items, whether immovable or movable in nature, and without regard to their intrinsic character. Performance in kind will apply even to generic items in French law, by virtue of the concept of surrogate performance, provided for by Article 1144. It is thus possible for a creditor to obtain the transfer of all items for which he has contracted by means of performance in kind, whereas a plaintiff in the Common Law ordinarily only has the possibility of obtaining a specific parcel of land or of some item of personal property which is unique in character, and can only do so at the discretion of the judge.

Those situations in which a plaintiff at Common Law may have recourse to prohibitory and mandatory injunctions are also much narrower than in French law. In the Common Law an injunction cannot ordinarily be obtained to force a defendant to perform his contractual obligations. In such circumstances a plaintiff must be satisfied with damages. A prohibitory injunction can only be used to prevent a defendant from doing that which is contrary to his obligation; a plaintiff cannot ordinarily force the defendant to perform the obligation itself. In French law, in contrast, a creditor can seek to have the debtor perform his contractual obligation of doing in most circumstances, and will only be prohibited from doing so when the obligation of doing is one of a highly personal nature.

Those situations where something has been done contrary to a contractual obligation not to do and the innocent party then seeks to have the thing done destroyed are governed in the Common Law by the mandatory injunction and in the Civil Law by Article 1143. A mandatory injunction will only be granted when the plaintiff would obtain an appreciable benefit without inflicting material detriment on the defendant. As a result it is only when the plaintiff can satisfy this very rigorous test that destruction will be ordered. In contrast, the *Cour de cassation* has interpreted Article 1143 so as to allow a creditor to obtain an order for destruction where he has an ongoing interest and the destruction was not impossible to perform. Although the Court may decide not to order the destruction on the basis of abuse of right or lack of good faith on the part of the creditor, the right of the creditor to seek destruction under Article 1143 is still much wider than that of a plaintiff in a similar situation in the Common Law.[178]

Windeyer J declared in the case of *Coulls v Bagot's Executor and Trustee Co. Ltd.* (1967) 119 CLR 460, 503, as follows: 'There is no reason today for limiting by particular categories, rather than by general principle, the cases in which orders for specific performance will be made.' Thus specific perfrormance has been ordered, *inter alia*, to enforce the interest of a third party beneficiary (*Beswick v Beswick* (1967) 2 All ER 1179) and to enforce a mortgage agreement for the loan of money where the award of damages would not be an adequate remedy in the circumstances (*Wight v Haverdan Pty Ltd* (1984) 2 NSWLR 280).

178. Bénabent, above n 165, 235.

TERMINATION: THE COMMON LAW APPROACH

The Common Law and the Civil Law have adopted significantly different approaches to the remedy of specific performance. This is also true with regard to termination for breach. In French law, the two primary remedies which a creditor may seek in the event of a breach of contract, by virtue of Article 1184, are performance in kind or termination. Damages under Article 1184 are considered to be a supplementary remedy, used in conjunction either with performance in kind or with termination. In the Common Law, on the other hand, a plaintiff can terminate the contract when a breach occurs only in certain specified circumstances. In the Common Law, the primary remedy for a plaintiff in the event of breach of contract is damages, not termination.

It is necessary first to consider the different terminology used in the two systems. In French law, termination is referred to as *'résolution'*, or 'resolution' in English. This term comes from the wording of Article 1184, which refers to a *'condition résolutoire'*, i.e. a resolutory condition. In the Common Law, various terms have been used to refer to termination. The term 'rescission' has often been used as though it meant the same thing as termination. However, this is not the case. The term 'rescission' should only be used in those situations where there is a vitiating factor during the formation of the contract.[179] In such circumstances, the contract will be retrospectively cancelled *ab initio*.[180] A contract is not cancelled *ab initio*, however, when it is terminated for breach. In this case the contract is only terminated from the point in time that the innocent party elects to end it, and this election does not affect the rights and obligations of the contracting parties up to that point.[181] Both the House of Lords and the High Court have indicated that the term 'rescission' should not be used in such circumstances.[182] There are now two alternative ways of describing the process whereby a contract is brought to an end for breach. These two terms are 'discharge for breach' and 'termination'. In this article 'termination' will be used.

In the Common Law, when there has been a breach of contract, the plaintiff is entitled to damages as of right. This is the primary remedy in the Common Law for breach. However, in two specific situations, the plaintiff will also be entitled, if he so desires, to terminate the contract. If he does so elect, the termination will be in addition to the plaintiff's right to seek damages. The two situations in which a plaintiff may elect to terminate arise when there has been either a fundamental breach or when there has been repudiation. When either of these two situations occurs, the plaintiff may treat the contract as having been terminated. It is at the discretion of the plaintiff whether to do so, and he need not seek the permission of the court.

179. Covell & Lupton, above n 126, 154.
180. Cheshire, above n 104, 691.
181. Ibid 691.
182. *Johnson v Agnew* (1979) 1 All ER 883, 889–90 (Lord Wilberforce); *McDonald v Dennys Lascelles Ltd* (1933) 48 CLR 457, 476–7 (Dixon J).

Fundamental breach occurs when a plaintiff has been 'substantially deprived of the whole of the benefit which it was the intention of the parties that he should receive'.[183] It is not relevant that the defendant desired to perform his part of the contract, if he was unable to do so. Whether the plaintiff has in fact been deprived of the whole of the benefit depended traditionally on whether the term of the contract which had been breached was a condition or a warranty. A plaintiff could terminate a contract only when a condition of the contract had been breached. When a warranty had been breached the contract remained in effect and the plaintiff could only sue for damages.

In the Common Law of the mediaeval and early modern eras, a warranty was given when one of the parties in the bargaining process guaranteed the quality of his goods. If the goods subsequently proved not to be of the attested quality, the plaintiff was entitled to sue, but did not do so in contract, but rather in a tortious action for deceit, on the basis that the warranty was not considered to be a contractual promise which the defendant had breached, but rather a factual assertion as to the present quality of the goods which was not true. The warranty was simply a collateral guarantee, rather than a term of the contract itself.[184] It was only when the defendant breached an actual term of the contract that the plaintiff would sue on a contractual basis, by bringing an action in assumpsit for damages. As a result, plaintiffs were often required to bring two separate actions, one for breach of warranty and another for breach of contract, even though both had often occurred in the same case. This cumbersome process was remedied in the mid-18th century, when breach of warranty began to be dealt with by the action in assumpsit, so that a breach of warranty could be brought in the same writ as a breach of contract. It was at this time that the term 'warranty' began to be used not only for collateral guarantees, but also for those terms of the contract itself, the breach of which gave rise to an action in damages. As a result, any breach which gave rise to damages pursuant to an action in assumpsit came to be known as a breach of warranty.[185] In such cases the contract remained valid, because the breach was usually not serious enough to destroy the overall utility of the contract for the

183. Marsh, above n 6, 311. See the statement of Diplock LJ to this effect in the case of *Hongkong Fir Shipping Co Ltd v Kawasaki Kisen Kaisha Ltd* (1962) 2 QB 26, 66. There are differing interpretations with regard to the ambit of the term 'fundamental breach'. In *Suisse Atlantique Société d'Armement Maritime SA v NV Rotterdamsche Kolen Centrale* (1967) 1 AC 361, 397 Lord Reid employed the term to mean any contractual breach which entitles the innocent party to terminate the contract. This definition of fundamental breach has been used by Cheshire et al. in their analysis of termination. However, Carter et al criticise this broad usage of the term, and declare that it should be used in a much more narrow sense, 'to describe the type of breach which must be established where the promisee is relying on the breach of an intermediate term': Carter, Peden & Tolhurst, above n 101, 677. The author will use the term in its broad interpretation, as this use conceptually embraces within a single category all of those various situations, other than repudiation, in which the innocent party has been substantially deprived of the whole of the benefit which it was the intention of the parties that he should receive, and is therefore entitled to terminate the contract.

184. Baker, above n 36, 356.

185. Ibbetson, above n 107, 223.

plaintiff, and damages would recompense him adequately for the shortcomings in the defendant's performance.

If, however, the defendant's breach was so serious that it destroyed the contract's utility for the plaintiff, the plaintiff was entitled to terminate the contract and to sue the defendant for any money which the plaintiff had already paid out, in an action in indebitatus assumpsit for money had and received. But the action in indebitatus assumpsit was possible only when the contract had been brought to an end. It could not proceed if the contract was still on foot. It was, therefore, necessary to know which contractual breaches were so serious that they would entitle the plaintiff to terminate the contract. Rules to determine when this was so began to be formulated in the latter half of the 18th century.[186] Those terms which, when breached, legitimately entitled the plaintiff to terminate the contract were terms which were considered to be fundamental to the ongoing existence of the contract. These fundamental terms were considered to be conditional promises, and came to be known as conditions, 'because their fulfilment was a condition of the other party's liability'.[187]

Contractual terms in the Common Law were thus classified as conditions and warranties. Conditions were the most important terms, and their breach entitled the plaintiff to terminate the contract. Warranties were the less important terms, and their breach only entitled the plaintiff to sue for damages, while the contract itself remained ongoing. An important consequence of this division of contractual terms into two categories was that Common Law contracts 'ceased to be regarded as single and indivisible, and came to be seen as bundles of stipulations on both sides, with varying degrees of importance'.[188]

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186. Ibid 223. See, for example, the comments of Lord Mansfield CJ in *Boone v Eyre* (1777) 126 ER 160, 160, in which he declared that a term which went to the whole of the consideration was central to the contract and would entitle the plaintiff to terminate upon breach, but that the plaintiff would not be allowed to avoid the contract 'where a breach may be paid for in damages'. In the case of *Wallis, Son & Wells v Pratt & Haynes* (1910) 2 KB 1003, 1012, Fletcher Moulton LJ put forward the test of essentiality as the basis upon which to construe whether a contractual term was a condition or a warranty. His Lordship declared: 'But from a very early period of our law it has been recognised that such obligations are not all of equal importance. There are some which go so directly to the substance of the contract or, in other words, are so essential to its very nature that their non-performance may fairly be considered by the other party as a substantial failure to perform the contract at all.' The test of essentiality was first introduced in the Australian context by Jordan CJ in the 1938 case of *Tramways Advertising Pty Ltd v Luna Park (NSW) Ltd* [1938] SRNSW 632, 641: 'The test of essentiality is whether it appears from the general nature of the contract considered as a whole, or from some particular term or terms, that the promise is of such importance to the promisee that he would not have entered into the contract unless he had been assured of a strict or substantial performance of the promise, as the case may be, and that this ought to have been apparent to the promisor.' Diplock LJ explained the historical development of the distinction between conditions and warranties in *Hongkong Fir Shipping Co Ltd v Kawasaki Kisen Kaisha Ltd*, above n 183, 67–8.
187. Baker, above n 36, 356.
188. Ibid 356.

Throughout the 19th century considerable effort was devoted to developing rules of interpretation by which the terms of a contract could be identified as either conditions or warranties.[189] It was also possible for the parties themselves to identify in the contract the terms which were to be considered as conditions and those to be considered as warranties. They would do this by actually declaring that a particular term was a condition, or by so phrasing a term that it must by necessary implication be construed as a condition.[190] Whether or not a contracting party could terminate a contract for breach was therefore based simply on the way in which the term was classified, either from the wording of the contract itself or upon the way the court construed the term.

However, over time it became increasingly apparent that the terms of complex contracts often could not be easily categorised by using this mechanical approach. The breach of a term declared to be a condition might in fact have relatively minor consequences for the ongoing performance of the contract, whereas the breach of a term classified as a warranty might have serious consequences. As a result, the Court of Appeal laid down a new test in 1962, in the case of *Hongkong Fir Shipping Co Ltd v Kawasaki Kisen Kaisha Ltd*.[191] Diplock LJ noted that it was not possible to classify all terms of a contract as being either conditions or warranties.[192] Some terms in a contract were necessarily conditions, because their breach would deprive the plaintiff of 'substantially the whole of the benefit he expected from the contract'.[193] Other terms were necessarily warranties, because their breach would not so deprive the plaintiff. However, many terms in a contract could not be classified as either conditions or warranties, because it was unclear what the consequences of their breach would be. When such terms were breached, it was necessary to look to the effects of the breach, in order to determine whether or not the plaintiff had been deprived of substantially the whole benefit which it was the intention of the parties that he should receive.[194] This third category of terms came to be known as 'intermediate' or 'innominate' terms.

189. Ibbetson, above n 107, 224. The Sale of Goods Act 1893 (WA), in s 11(1)(b), affirmed that the terms of contracts of sale consisted of conditions and warranties, and that the breach of the former 'may give rise to a right to treat the contract as repudiated', whereas the breach of the latter 'may give rise to a claim for damages but not to a right to reject the goods and treat the contract as repudiated' The Act did not, however, define conditions and warranties, apart from declaring in s 62 that a warranty is 'collateral to the main purpose of the contract'.
190. The clause 'time is of the essence,' for example, would be construed by necessary implication as a condition: Marsh, above n 6, 311. In some instances Parliament defined a particular term as a condition, or indicated that a term is not a condition. An example of this can be seen in the Sale of Goods Act 1979 (UK). Section 14(2) of the Act specifies that where the seller sells goods in the course of a business, it is an implied condition 'that the goods supplied are of merchantable quality'. Section 19(2) of the Sale of Goods Act 1923 (NSW) makes the same provision.
191. Above n 183.
192. Ibid 69.
193. Ibid 69.
194. Ibid 72.

A fundamental breach will therefore occur in one of two situations, viz, when a term which is a condition of the contract has been breached, or when an intermediate term has been breached the consequences of which are so serious that they deprive the plaintiff of substantially the whole of the benefit for which he had bargained. This means that both the classification of the term and the effects of the breach are to be considered in determining whether the innocent contracting party is entitled to terminate. Lord Denning MR declared in the 1976 case of *Cehave NV v Bremer Handelsgesellschaft mbH*.[195] that in deciding whether the right to terminate had arisen, the court had to apply a twofold test:

> First, see whether the stipulation, on its true construction, is a condition strictly so called, that is, a stipulation such that, for any breach of it, the other party is entitled to treat himself as discharged. Second, if it is not such a condition, then look to the extent of the actual breach which has taken place. If it is such as to go to the root of the contract, the other party is entitled to treat himself as discharged: but, otherwise, not.[196]

As a result, an innocent party can terminate when a condition has been breached, or when the effects of the breach are so serious that they are fundamental to the nature of the contract. This, however, begs the question of what is fundamental. The classic definition was laid down by Lord Ellenborough in 1810. In the case of *Davidson v Gwynne*,[197] he declared that a breach would enable the innocent party to terminate the contract only when it 'goes to the whole root and consideration of it'.[198] This expression of going 'to the root of the contract' has been utilised many times since 1810, and has become, according to Cheshire, a favourite of judges when describing fundamental breach.[199] Lord Upjohn LJ used a variation of this formula when he declared in *Hongkong Fir Shipping Co Ltd v Kawasaki Kisen Kaisha Ltd*.[200] that the breach must go 'so much to the root of the contract that it makes further commercial performance of the contract impossible'.[201] Diplock LJ in the same case expressed the view that termination was justified when the breach deprived 'the party who has further undertakings still to perform of substantially the whole benefit which it was the intention of the parties as expressed in the contract that he should obtain as the consideration for performing those undertakings'.[202]

In addition to fundamental breach a plaintiff is also entitled to terminate the contract on the basis of repudiation. Repudiation occurs when one of the contracting parties indicates, either explicitly or implicitly, that he no longer intends to be bound by the terms of the contract and will not fulfil his contractual obligations. The

195. [1976] 1 QB 44.
196. Ibid 60.
197. (1810) 104 ER 149.
198. Ibid 152.
199. Cheshire, above n 104, 687.
200. Above n 183.
201. Ibid 64.
202. Ibid 66.

defaulting party may give such an indication by being unready, unwilling or unable to perform the contract. When the defaulting party cannot or will not perform his contractual obligations, the innocent party is entitled to elect to terminate the contract.[203]

Repudiation may occur at the same time that the defendant fails to perform a contractual obligation which has come due. There is thus an overlap between the concept of repudiation, on the one hand, and the breach of a term which entitles the plaintiff to terminate the contract, on the other. Repudiation, however, differs from fundamental breach in that it focuses on 'the readiness and willingness of the promisor to perform contractual obligations'.[204] As a result, although a breach of a warranty would not of itself entitle an innocent party to terminate the contract, such a breach may indicate that the party in breach is unable, unready or unwilling to perform his contractual obligations, and thereby amount to a repudiation, entitling the innocent party to terminate the contract.[205]

Repudiation may also occur before performance is due or complete if a contracting party indicates, either expressly or by necessary implication from his conduct, that he will not perform his contractual obligations. This type of repudiation is known as anticipatory breach. The concept of anticipatory breach was first formulated in 1853, in the case of *Hochster v De la Tour.*[206] The defendant had contracted with the plaintiff on 12 April to employ him as a courier during his travels in Europe, for a period of three months, commencing on 1 June. But on 11 May the defendant changed his mind and informed the plaintiff that he would not be requiring his services. The plaintiff sued for damages on 22 May. Counsel for the defendant argued that the suit was premature, given that the breach had not yet actually occurred. The court disagreed, and found in favour of the plaintiff. Lord Campbell noted that 'where there is a contract to do an act on a future day, there is a relation constituted between the parties in the meantime by the contract, and that they impliedly promise that in the meantime neither will do any thing to the prejudice of the other inconsistent with that relation'.[207] He then went on to declare that it was 'more consonant with principle' to preclude the defendant 'from saying that he had not broken the contract when he declared that he entirely renounced it' than to force the plaintiff in such circumstances to wait until the actual time for performance came due.[208]

The reasoning of Lord Campbell was subsequently reinforced by Cockburn CJ, in the case of *Frost v Knight*.[209] Cockburn CJ declared that what had been breached

203. DW Greig & JLR Davis, *The Law of Contract* (Sydney: Law Book Co, 1987) 1246.
204. Carter, Peden & Tolhurst, above n 101, 690.
205. Ibid 695.
206. (1853) 118 ER 922. The phrase 'anticipatory breach' is elliptical, because the breach itself cannot be anticipatory. What is actually meant is 'breach by anticipatory repudiation': Farnsworth, above n 48, 627.
207. *Hochster v De la Tour*, ibid 926.
208. Ibid 690, 926.
209. (1872) LR 7 Exch 111.

by the defendant's repudiation was not a future promise of performance but rather a currently existing implied promise that both parties would keep open the contract:

> The promisee has an inchoate right to the performance of the bargain, which becomes complete when the time for performance has arrived. In the meantime he has a right to have the contract kept open as a subsisting and effective contract.[210]

It is the defendant's breach of this implied promise to keep open the contract which entitles the plaintiff to terminate the contract, since the breach of this current implied term destroys the plaintiff's expectation of future performance by the defendant.

When fundamental breach or repudiation occurs, the innocent party is entitled to terminate the contract, but need not do so. The innocent party has the option of keeping the contract open and insisting upon performance by the party in default.[211] The innocent party is himself entitled to decide whether to terminate or to keep the contract on foot, and need not seek an order of the court. Should the innocent party decide to terminate the contract, the contract comes to an end at that point in time.[212] This means that the innocent party is released from any further obligations under the contract and may sue for damages for the complete loss which he has suffered by virtue of the defaulting party's fundamental breach or repudiation.[213] The party in default is also released from any further obligations under the contract upon termination, although he will be liable for any losses incurred by the innocent party as a result of his repudiation. When the innocent party decides to terminate the contract, damages are assessed at the date of the breach, and aim to place the innocent party in the same position as if the contract had been prerformed. The assessment of such damages includes those contractual obligations of the party in breach which would have come due after the election to terminate.[214]

The innocent party may, on the other hand, elect to keep the contract open and insist on performance by the party in default. Should the innocent party elect to keep the contract open, it will remain open until such time as the defaulting party's obligation actually does come due. If the defaulting party does not perform his contractual obligation at this point in time the innocent party may elect to keep the contract open or to terminate. The innocent party is thus enabled to take

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210. Ibid 114.
211. This option was formulated by Lord Campbell: '[I[t seems reasonable to allow an option to the injured party, either to sue immediately, or to wait till the time when the act was to be done, still holding it as prospectively binding for the exercsise of this option, which may be advantageous to the innocent party, and cannot be prejudicial to the wrongdoer': *Hochster v De La Tour,* above n 206, 927.
212. Carter, Peden & Tolhurst, above n 101, 701, 702.
213. Either party can sue for any accrued right to payment in relation to performance before termination.
214. Cheshire, above n 104, 693.

advantage of a fluctuating market to obtain the best result for himself as a result of the defaulting party's breach. Moreover, should the innocent party elect to keep the contract open, he is not required to mitigate his losses until such time as he terminates the contract. However, if the innocent party keeps the contract open, he does so for the benefit of both parties, which means that the party in breach may take advantage of supervening circumstances to exculpate himself from liability.[215]

TERMINATION: THE FRENCH APPROACH

At this point the French law of termination, or 'resolution' as it is properly known, will be considered. The wording of Article 1184 indicates that it is possible, in principle, for a creditor to seek resolution in any circumstances where there has been a breach. Article 1184 reads as follows:

> A resolutive condition is always implied in synallagmatic contracts to provide for the case where one of the parties does not fulfil his undertaking.
>
> In this case the contract is not resolved by operation of law. The party in whose favour the undertaking has not been performed has the choice either of forcing the other to perform the agreement, where that is possible, or of claiming resolution with damages.
>
> Resolution must be claimed by action at law and further time for performance may be granted to the defendant depending on the circumstances.[216]

The first paragraph of Article 1184 indicates that resolution is not simply a contractual remedy for the creditor in cases of contractual breach by the debtor, but is also available in cases where the debtor has been unable to fulfil his obligations because of *force majeure*.[217] The discussion of Article 1184 in this article will, however, be restricted to those cases where the debtor is at fault for the failure to perform his contractual obligation.

Roman law did not provide for a general remedy in resolution for contractual breach. But there was one type of contract in Roman law, viz, the innominate contract, which did permit a creditor who had delivered some thing to the debtor to get that thing back if the debtor did not fulfil his contractual obligation. The rationale for this was that it would be an unjust enrichment not to allow him to do

215. Ibid 689.
216. *La condition résolutoire est toujours sous-entendue dans les contrats synallagmatiques, pour le cas où l'une des deux parties ne satisfera point à son engagement. Dans ce cas, le contrat n'est point résolu de plein droit. La partie envers laquelle l'engagement n'a point été exécuté, a le choix ou de forcé l'autre à l'exécution de la convention lorsqu'elle est possible, ou d'en demander la résolution avec dommages et intérêts. La résolution doit être demandée en justice, et il peut être accordé au défendeur un delai selon les circonstances.*
217. *Force majeure* is approximately the equivalent of frustration in the Common Law.

so.[218] In the Middle Ages the canonists argued that this remedy should apply to all synallagmatic contracts, and that it should enable a creditor not only to get back something which he had already delivered to a debtor, but to bring the contract itself to an end, in the event of non-performance by the debtor. The underlying reason for so doing was that nothing was due to a person who did not keep his own obligations. Faith need not be kept with one who breaks faith.[219] This principle subsequently became a part of the civil law of obligations in the 16th century, largely as a result of the influence of Charles Dumoulin.[220] Pothier discussed resolution without reference either to to any Roman law text or to the canon law. He maintained that where a resolutory condition was not an express term of a synallagmatic contract, it should be implied as a condition into the contract.[221] In 1804, the Commissioners incorporated this declaration into Article 1184 of the *Code civil.*

The canonist origins of the resolution explain why Article 1184 requires a court order before resolution can be effected, and also why the court has been granted a considerable discretion in determining the appropriate remedy when presented with a request for resolution.[222] Resolution was a moral sanction exercised by the court on a party who had committed a morally wrongful act. The discretion which the court possessed in determining the appropriate response enabled it to consider not only the moral wrongdoing of the party in breach, but also the conduct of the party seeking the order of resolution.[223] Thus the court is entitled to reject the creditor's demand for resolution on the basis that he is acting in bad faith. This might occur, for example, if the creditor sought to make use of the debtor's breach in order to rid himself of a bad bargain.[224]

Article 1184 permits a creditor to seek resolution whenever the debtor breaches his contractual obligations, whether the breach is one of non-performance or of defective performance.[225] There is no distinction between different types of terms, and no legal criteria for determining when a particular breach will justify resolution.[226] There is also no equivalent in French law to the concept of anticipatory breach. Thus, even though the debtor has indicated that he will not perform his contractual obligations when they come due, the creditor must nevertheless wait

218. HL Mazeaud & J Mazeaud, *Leçons de Droit Civil* (Tome Deuxième Paris: Editions Montchrestien, 1966) 915.
219. *Frangenti fidem, fides non est servanda.*
220. Mazeaud & Mazeaud, above n 218, 915.
221. Dupin, above n 31, 406.
222. Both Domat and Pothier emphasised that a court order must be obtained before resolution could be obtained, and that the court retained a discretion to determine whether resolution was the appropriate remedy in the circumstances: Domat, above n 74, vol. 1, 196; Dupin, ibid 406. In this regard their declarations simply reflect the position of the canonists.
223. Marsh, above n 6, 323.
224. Ibid 322–3.
225. Fabre-Magnon, above n 88, 563.
226. Nicholas, above n 4, 241.

until the time that those obligations actually do come due and are not performed before he can seek an order for resolution.[227]

Although a creditor is entitled to seek resolution whenever any term of the contract has been breached, he cannot himself bring the contract to an end, but must always seek an order from the court to do so, in the absence of an express clause in the contract. It is the court, rather than the innocent party, which ultimately decides whether resolution is the appropriate remedy in the circumstances.[228] Thus it is the court which determines whether the breach of a particular term is sufficiently serious to warrant resolution.

The court not only has a discretion under Article 1184 to decide whether or not to grant an order for resolution, but may also at its discretion vary the conditions of the contract, in light of the debtor's breach, as it thinks appropriate. When there has been total non-performance by the debtor the court will usually grant resolution. But before ordering the contract to be resolved, the court may also grant a delay to the debtor, in order to give him more time to perform.[229]

When the non-performance of the debtor has been only partial in nature, the court must determine whether the breach was sufficiently serious to warrant resolution, or whether an award of damages will adequately compensate the creditor. In this regard the court will determine whether there is 'proportionality' between the breach and an order for resolution.[230] As a result, the court may decide not to grant resolution to the creditor, but rather simply to award damages and to keep the contract on foot. In doing so, it will first determine whether the creditor would have contracted with the debtor had he foreseen that the debtor would breach his obligation.[231] But it will also look at all of the circumstances of the case, and in particular at the conduct of the parties, as well as the economic consequences of its decision. In taking these factors into account the court attempts to achieve a balance between the respective interests of the parties.[232] The discretion of the court extends to the making of an order which only partially resolves the contract, and which orders damages to be paid in conjunction with this partial resolution. The court, as Nicholas points out, may thus 'in effect set the contract aside on terms'.[233]

When the court makes an order for resolution, the contract becomes null and of no effect. The nullity is retroactive in nature. This means that the 'contracting

227. Harris & Tallon, above n 3, 294.
228. Nicholas, above n 4, 241.
229. Ibid 242.
230. Fabre-Magnon, above n 88, 563.
231. Nicholas, above n 4, 243. This test is specifically set out in Articles 1636 and 1638 of the *Code civil*.
232. Nicholas, ibid.
233. Ibid.

parties must therefore restore to each other what they have already delivered'.[234] However, when the contract in question is successive or continuous in nature, such as a contract of renting, the resolution will not be retroactive. In such contracts the effects produced before the resolution are maintained.[235]

The fact that resolution usually takes effect retroactively in French law means that when goods have passed to the debtor they may be recovered by the creditor, provided that they have not already been sold. In the Common Law, on the other hand, a plaintiff who has already delivered goods to the defendant cannot recover those goods, because the contract only comes to an end at the moment of termination. In such a situation the plaintiff must be satisfied with damages.[236]

TERMINATION: COMPARATIVE ANALYSIS

The French law of resolution thus differs from the Common Law of termination in a number of significant ways. The two systems take a fundamentally different approach to the classification of contractual terms. In the Common Law a distinction is made as to the relative importance of the various terms of the contract, whereas this does not occur in French law. In French law a creditor may in principle seek the resolution of the contract for the breach of any contractual term, whereas in the Common Law termination is permitted only when there has been a breach of a condition or an innominate term when the breach amounts to a fundamental breach, or when there has been repudiation. The classification of contractual terms in the Common Law enables both contracting parties to know in advance, with a fair degree of certainty, those circumstances in which the innocent party will be entitled to terminate the contract. Moreover, when such a breach has occurred, the innocent party need not seek the authorisation of the court to terminate, but rather may himself terminate the contract. It is the innocent party in the Common Law who initiates termination.

The situation is entirely different in French law. Although a creditor may in principle seek the resolution of the contract upon the breach of any term, he himself cannot effect the resolution, but must rather seek an order of the court to do so, and it is then in the court's discretion to decide whether it will grant the order of resolution or not. It is the court, rather than the innocent party, which ultimately decides, in the light of all the circumstances surrounding the case, whether the breach is of sufficient gravity to warrant such an order, and to determine what measure of damages are appropriate, either as a supplement to the resolution, or, should the order not be granted, in lieu of resolution. The requirement of a court order for resolution can only be dispensed with in those situations where the parties have included a clause in their contract permitting for resolution in specified circumstances without resort to court action.

234. Hubrecht, above n 141, 129.
235. Ibid 129.
236. Harris & Tallon, above n 3, 295.

The role of the court is thus very different in the two systems. In the Common Law, the court is basically limited to determining, after the fact, whether the innocent party was justified in terminating the contract, and will do so only when the offending party challenges the legitimacy of the termination. If the court finds that termination was not justified, it can only award damages to the defaulting party for the wrongful termination by the other party. In French law, on the other hand, the court has a much more prominent role to play. It is the court which decides whether or not to make the order for resolution, and it exercises a discretion unknown in the Common Law, which includes the power to grant the party in breach time to remedy the breach and of authorising a partial termination which has the effect of altering the respective obligations of the parties.[237]

The requirement in French law that the court must decide whether or not resolution is the appropriate remedy in the circumstances of the case is based on the principle that 'no one can do justice for himself'.[238] This principle of course also applies in the Common Law. But whereas French law applies the principle to situations in which a debtor has breached his contractual obligations, the Common Law derogates from the principle and permits an innocent party to act on his own to terminate a contract when fundamental breach or repudiation has occurred. In such situations the offending party is entitled to contest the legitimacy of the innocent party's actions in court. But in the Common Law any challenge to the legitimacy of the termination occurs after the event, whereas in French law resolution itself cannot occur until the court declares it to be the appropriate remedy. The two systems thus reflect a very different orientation towards the remedy of termination.

DAMAGES: THE FRENCH APPROACH

Damages are the primary remedy in the Common Law for breach of contract, whereas in French law this is not the case.[239] Nevertheless, the rules governing damages were formulated in French law by the 17th century, and those rules were then incorporated into the *Code civil* in 1804. The Common Law, in contrast, did not formulate its rules for damages until the mid-19th century. Therefore the rules relating to damages will be considered first in French law, and will then be considered in the Common Law.

Performance in kind is considered in French law to be the first recourse for a creditor who has suffered breach of contract. In the alternative the creditor is entitled to seek resolution. But in those situations where the court does not grant resolution, or where it is not possible to obtain performance in kind, French law

237. Marsh, above n 6, 323–4.
238. '*Nul ne peut se faire justice à soi-même*'. In this regard see J Béguin, 'Rapport sur l'adage "Nul ne peut se faire justice à soi-même" en droit français' (1966) 18 Travaux de l'Association Henri Capitant 41.
239. Although, as has been seen above, most creditors will in practice seek an award in damages.

provides for damages. Articles 1146 to 1152 of the *Code civil* set out the rules which govern awards of damages.

Damages will be payable by the debtor whenever the creditor has suffered a loss as a result of the non-performance by the debtor of his contractual obligations.[240] This non-performance may be either total or partial in nature, as indicated by Article 1147, which reads as follows:

> The debtor is required, should the occasion arise, to pay damages and interest, whether by reason of the non-performance of the obligation, or whether by reason of the lateness of the performance, in all cases when he cannot justify his non-performance by reference to an external cause which cannot be imputed to him, even if there was no bad faith on his part.[241]

It is clear from the wording of this article that claims for damages may occur in two situations where loss has occurred, viz, when the loss to the creditor arises by virtue of late performance, and when the loss to the creditor arises by virtue of the non-performance. In the first case the damages which may be claimed are referred to as *dommages-intérêts moratoires*, i.e. damages due to lateness. In the second case they are referred to as *dommages-intérêts compensatoires*, i.e. compensatory damages. In both cases the debtor will be able to avoid having to pay damages only if he can show that the non-performance or late performance of his obligation was due to *force majeure*, which is the French equivalent of frustration. This is dealt with by Article 1148.[242]

Damages are often referred to amongst French jurists as "*exécution en équivalent*."[243] This phrase literally means "equivalent performance", but it may also be translated as "substitute performance".[244] The phrase neatly illustrates the underlying purpose of damages in French law, which is to put the creditor into the same position that he would have been in had the contract been performed. In order to put the creditor into this position, a court can award damages to the creditor as the creditor's primary recourse, which is granted in lieu of performance in kind, or it may award damages as a supplementary measure, in combination

240. A defaulting debtor must first be put on notice (*mise en demeure*) in French law before the creditor can undertake an action against him (Art 1139). Thus Article 1146 specifies that a creditor cannot proceed against a defaulting debtor with regard to a claim for damages until after the debtor has been put on notice by means of a *mise en demeure*.

241. *Le débiteur est condamné, s'il y a lieu, au payement de dommages et intérêts, soit à raison de l'inexécution de l'obligation, soit à raison du retard dans l'exécution, toutes les fois qu'il ne justifie pas que l'inexécution provient d'une cause étrangère qui ne peut lui être imputée, encore qu'il n'y ait aucune mauvaise foi de sa part.*

242. *Il n'y a lieu à aucuns dommages et intérêts lorsque, par suite d'une force majeure ou d'un cas fortuit, le débiteur a été empêché de donner ou de faire ce à quoi il était obligé, ou a fait ce qui lui était interdit.* (There is no right to damages when, as a result of *force majeure*, the debtor has been prevented from giving or from doing what he was obligated to give or to do, or has done what he was prohibited from doing.)

243. Hubrecht, above n 141, 133.

244. Harris & Tallon, above n 3, 273.

with either performance in kind or resolution. In either case the purpose behind the award granted by the court is to ensure that the 'damages constitute a substitute for performance,' so that the creditor receives 'full compensation for the loss resulting from the breach of contract'.[245]

Full compensation traditionally involves two types of damages, viz, the actual loss incurred by the creditor and the profit, or 'gain', of which he has been deprived. These two categories of loss were originally formulated at Roman law, and they are still often referred to by their Latin terms, *damnum emergens* and *lucrum cessans*, respectively.[246] These two categories were accepted by French jurists as the basis upon which to measure damages for breach of contract. Domat declared:

> It is necessary, likewise, to distinguish damages under another view, into two other kinds. One is of those which consist in an effective loss, and a diminution that one suffers of his present estate. And the other kind is of those which deprive one of some profit to be made.[247]

Pothier made the same point in his *Traité des Obligations*:

> The term 'damages' refers to the loss which a person has incurred, and the gain of which he has been deprived.[248]

Article 1149 reproduces Pothier's statement virtually word for word:

> The damages due to the creditor are, in general, the loss which he has incurred and the gain of which he has been deprived, except with regard to the exceptions and modifications hereafter.[249]

The 'actual loss' represents the loss which the creditor has suffered as a result of the non-performance by the debtor of his contractual obligations, and the 'lost gain' represents the profits which the creditor would have obtained had the debtor performed his obligations as required under the contract.[250] However, a court need only arrive at a global sum when determining the amount of damages, and is not required to state what amount of the total damages awarded falls within each of the two categories of actual loss and lost profits.[251]

The criteria for determining causation and remoteness of damage are set out in Articles 1150 and 1151. Causation is established by the element of directness

245. Ibid 274.
246. Ibid.
247. Domat, above n 74, 772.
248. Dupin, above n 31, 80.
249. *Les dommages et intérêts dus au créancier sont, en général, de la perte qu'il a faite et du gain dont il a été privé, sauf les exceptions et modifications ci-après.*
250. Fabre-Magnon, above n 88, 580; C Larroumet, *Droit Civil: Les Obligations, Le Contrat* Tome III (Paris: Economica, 5th edn, 2003) 714–15.
251. Harris & Tallon, above n 3, 274.

and remoteness by foreseeability. These two elements have been of longstanding provenance in French law. The element of foreseeablity had first been formulated in the 16th century by Charles Dumoulin (1500–1566). There existed an apparently arbitrary rule in Roman law that a creditor could only claim in damages up to twice the value of the subject matter for breach of contract. This was the *ad duplum* rule, which had been enacted in a constitution of Justinian promulgated in 531 AD.[252] Dumoulin sought to rationalise this rule by postulating that a debtor could only be expected to foresee damages resulting from his breach up to this amount. He then went on to declare that damages should be recoverable to the extent that they were foreseeable.[253]

This limitation, and that of directness, were subsequently developed both by Domat and Pothier. With regard to the element of foreseeability Domat wrote as follows:

> The profit or loss, which is to be computed as part of the damages of the buyer, ought to be restrained to that which may be imputed to the delay and which is a natural and ordinary consequence of it, and which it was easy to foresee… But we ought not to extend the damages to consequences that are remote, and altogether unforeseen.[254]

Domat addressed the element of directness as follows:

> It appears from the rules explained in the third and fourth articles, that the damages and losses of which reparation may be demanded are of two sorts. One is of the losses which are in such a manner a consequence of the act of the person from whom reparation is demanded, that it is evident they ought to be imputed to him, as proceeding from no other cause. And the other sort, those losses which are only remote consequences of the said act, and which proceed from other causes.[255]

It was only the first category of damages, Domat declared, which should be recoverable by the creditor. On the other hand, 'a consequence so remote from that fact and so visibly owing to another cause … ought not to be imputed' to the debtor'.[256]

Pothier was of the same mind. He wrote as follows, with regard to foreseeability:

> When the debtor has not committed fraud, and is simply at fault for not performing his obligation, either because he has rashly engaged to perform something which it was not in his power to fulfil, or because he has afterwards imprudently disabled

252. JM Perillo, 'Robert J Pothier's Influence on the Common Law of Contract' (2005) 11 Texas Wesleyan L Rev 267, 275; W Barnes, '*Hadley v Baxendale* and Other Common Law Borrowings from the Civil Law' (2005) 11 Texas Wesleyan L Rev 627, 636
253. Barnes, ibid 636.
254. Domat, above n 74, vol 1, 205.
255. Ibid vol 1, 771.
256. Ibid 772.

> himself from performing his engagements; the debtor is only liable for those damages which the creditor would suffer as a result of the non-performance of the obligation which could be foreseen at the time the contract was entered into.[257]

With regard to directness, Pothier wrote:

> Ordinarily the parties are understood to have foreseen the damages which the creditor would suffer as a result of the non-performance of the obligation which relate only to the thing itself which was the object, and not to those damages which the non-performance of the obligation has caused to his other goods.[258]

In other words, when there is no direct causal link between the breach and the loss, the debtor should not be held responsible for the loss.[259]

These passages provided the basis for Articles 1150 and 1151, which address the elements of foreseeability and directness, respectively. Article 1150 reads as follows:

> The debtor is responsible for the damages which were foreseen or which could have been foreseen at the time the contract was entered into, when the non-performance of the obligation has not been the result of fraud.[260]

Article 1151 reads as follows:

> Even in the case where the non-performance of the contract is the result of the fraud of the debtor, the damage with regard to the loss incurred by the creditor and the gain of which he has been deprived can only include that which is the immediate and direct result of the non-performance of the contract.[261]

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257. Dupin, above n 31, 80.
258. Ibid.
259. Pothier illustrated how a creditor may incur loss which is not the direct result of the debtor's breach with his famous example of the infected cow. If a vendor fraudulently sells a cow which is infected with a contagious disease to a farmer who is not aware of the infection, the vendor will be liable in damages for all direct loss which the farmer incurs as a result. The vendor will therefore be liable for the death of the other cattle of the farmer, which would be a direct result of their having come into contract with the infected cow. However, should the farmer then be unable to cultivate his land, and thus be unable to pay his debts, and consequently suffer the loss of his farm, such losses are not the direct result of the vendor's action and so are not recoverable. Such loss, Pothier concludes, 'is a very distant and very indirect consequence of the fraud, and there is not the necessary connection, because although the loss of the animals which the fraud has caused may have influenced the dislocation in his financial affairs, there may also have been other causes': Dupin, above n 31, 86–7. Domat had previously used the example of the infected cow to illustrate the consequences of direct damage. But Pothier expanded the example to include further loss to the farmer in order to illustrate loss which was not direct. See Domat, above n 74, vol 1, 774.
260. *Le débiteur n'est tenu que des dommages et intérêts qui ont été prévus ou qu'on a pu prévoir lors du contrat, lorsque ce n'est point par son dol que l'obligation n'est point exécutée.*
261. *Dans le cas même où l'inexécution de la convention résulte du dol du débiteur, les dommages et intérêts ne doivent comprendre à l'égard de la perte éprouvée par le créancier et du gain dont il a été privé, que ce qui est une suite immédiate et directe de l'inexécution de la convention.*

Article 1151 limits the damage which the creditor can claim to that which is the direct result of the debtor's breach because it is this element of directness which provides the causal link between the debtor's breach and the creditor's loss.[262] The creditor is precluded from claiming damages which are not the direct consequence of his breach, even when that breach is the result of the debtor's fraud. This requirement of directness is then qualified by the element of foreseeability, which is set out in Article 1150. The limitation of foreseeability relates only to those situations which do not involve fraud on the part of the debtor. As Article 1151 indicates, where the debtor has engaged in fraud, he will be responsible for damage caused by his actions whether foreseeable or not, although he will still only be responsible for that damage which was direct.[263] But where there has been no fraud on the part of the debtor, the extent of the damage for which he will be responsible will be limited to that which was both direct and foreseeable.[264] The reason for this is that when entering into a contract each of the two contracting parties will evaluate the risks which they are assuming in making the contract. It is in the light of this foreknowledge that a defaulting debtor should then be held liable for the damage which his non-performance causes to the creditor.[265]

Whether something was foreseeable or not is to be determined on an objective basis, using the standard of the reasonable man,[266] rather than on the subjective basis of what damage the debtor himself actually foresaw as resulting from his breach of contract. This means that the debtor is responsible for the damage which would have been foreseen by a reasonable man whether the debtor himself actually foresaw the damage or not.[267] Article 1150 itself gives credence to this interpretation, as the French text refers to the damage which 'one' could have foreseen rather than the damage which 'he' could have foreseen.[268]

The *Cour de cassation* originally held that the foreseeable damage which a reasonable man in the position of the debtor would have foreseen related only to the type of damage incurred. However, since 1924, the *Cour de cassation* has held that foreseeability applies both to the type and to the extent of the damage

262. Nicholas, above n 4, 228.
263. Fraud includes '*faute lourde*' or 'gross negligence': see Fabre-Magnon, above n 88, 584. The inclusion of *faute lourde* within the category of fraud had been a part of French law even before codification. Pothier, for example, referred to a French law of the *Ancien Régime* which equated the two on the basis of 'the enormity' of *faute lourde*: Dupin, above n 31, 72–3.
264. The reason for treating debtors who have committed fraud differently from those who have not is that fraudulent debtors should not be allowed to benefit from the limitation of foreseeability: Harris & Tallon, above n 3, 276.
265. Harris & Tallon, ibid 275. As Tallon points out, this rule 'can also be related to the obligation of good faith, enunciated in Article 1134(3), which imposes a burden on each party to inform the other of the risks involved in the contract': Ibid, Article 1134(3) reads as follows: *Elles doivent être exécutées de bonne foi.* (They [ie, contracts] must be performed in good faith.)
266. Known in French as *'le bon père de famille'*.
267. Marsh, above n 6, 328, Nicholas, above n 4, 231,
268. *Le débiteur n'est tenu que des dommages et intérêts qui ont été prévus ou qu'on a pu prévoir lors du contrat, lorsque ce n'est point par son dol que l'obligation n'est point exécutée.*

incurred by the creditor.[269] The general principle is that '[i]f items are of special value then this must be declared at the time of the contract to the person to whom they are entrusted'.[270] In requiring both the type and the extent of the damages to be foreseeable, the *Cour de cassation* has more accurately interpreted 'the policy behind the requirement of foreseeability in Article 1150, viz, that a contracting party must be able to form an idea of the extent of the undertaking into which he is entering'.[271]

The requirements of directness and foreseeability therefore play different roles with regard to a claim for damages. The creditor must first establish that the loss which he incurred was the direct and immediate result of the debtor's breach. This provides the necessary causal link. But once the element of directness has been established, the direct loss which the creditor can claim is limited to that which was also foreseeable. Direct loss which was not foreseeable by the debtor cannot be claimed by the creditor, when the debtor has not engaged in fraud.[272]

No article of the *Code civil* specifically requires the creditor to mitigate his damages, and the *Cour de cassation* has not interpreted any article to admit the principle of mitigation.[273] In French law the creditor need not take any action to respond to the debtor's breach. As Larroumet points out, the creditor should not be considered as blameworthy for not having acted to mitigate his damages when the loss which occurred was not due to his behaviour.[274] As the aim of damages in French law is to compensate the creditor for the loss which he he suffered as a result of the debtor's breach, it is only when the creditor attempts to increase his damages by incurring losses which were avoidable that the court will intervene.[275] The absence of any provision dealing with mitigation is yet another indication that in French law contractual breach is considered to be primarily 'a form of moral wrongdoing'.[276]

DAMAGES: THE COMMON LAW APPROACH

Whereas French contract law was extremely well developed by 1804 when the *Code civil* was first published, English contract law in contrast was still astonishingly undeveloped. As has already been seen, the law of contract only began to develop in the latter half of the 18th century and throughout the 19th century with the onset

269. Civ 7.7.1924, S 1925.1.321, note Lescot, D. 1927,1.119. In this case the owner of goods which were lost in transit was only able to recover the value of the goods as declared at the time of the contract for customs purposes, which was 475 francs, and not the amount which he claimed was the true value, viz, 16,685 francs.
270. Marsh, above n 6, 328.
271. Nicholas, above n 4, 231.
272. Harris & Tallon, above n 3, 277.
273. Fabre-Magnon, above n 88, 603.
274. Larroumet, above n 250, 853.
275. Nicholas, above n 4, 231; Harris & Tallon, above n 3, 293.
276. Harris & Tallon, ibid 293.

of the Industrial Revolution. The enormous economic and social transformations effected by the Industial Revolution called for corresponding changes in the law, and in particular contract law. The first significant changes in contract law occurred as a result of decisions made by Lord Mansfield, who was attempting to formulate more precise rules of commercial law in response to pressure from London merchants.[277] In formulating these new rules Lord Mansfield consulted with the merchants themselves. He also took note of commercial practice elsewhere in Europe, and encouraged others, both judges and advocates, to do likewise.[278] As a result, there was much reference, both in argument before the courts and in the judgments themselves, to sources other than case law. Reference to this additional source material was considered necessary at the time because the existing precedents did not and could not by their nature provide the general principles which were being sought in order to develop English contract law into a more sophisticated body of law. One of the most influential 'outside' sources relied upon in this period was Pothier's *Traité d'Obligations.* Pothier's treatise had been translated into English in 1806, and was readily available to judges and practitioners. Its appeal lay in the fact that it set out in simple and straightforward language general principles of contract law.[279]

One of the areas where the Common Law remained almost entirely unformulated was with regard to contractual damages. There were some rudimentary legal rules relating to the award of damages, but as it was the jury which awarded damages, and as the jury was not required to give reasons for its award, there was considerable variation in the awards granted, and there was no way of ascertaining what factors the jury had actually taken into account in making its award.[280] Although judges did on occasion advise juries on assessment, they were loathe to challenge jury assessments. Before the 19th century there were almost no reported decisions dealing with assessment of damages for breach of contract.[281]

The practice of allowing juries an almost completely unregulated discretion in determining damages slowly began to change in the latter half of the 18th century, as a result of increasing pressures from merchants, who argued that clear and definite rules were required which would regulate with certainty and predictability what damages a contracting party would be liable for should he breach his contract. A general principle regulating the basis on which damage awards were to be made

277. Baker, above n 36, 351.
278. Ibid 351.
279. Atiyah, above n 97, 399; Baker, above n 36, 353.
280. Atiyah, above n 97, 149.
281. AWB Simpson, 'The Horwitz Theory and the History of Contracts' (1979) 46 Uni Chicago L Rev 533, 550. See also GT Washington, 'Damages in Contract at Common Law' (1932) 48 LQR 90, 90; Atiyah, ibid 149. Thus, for example, in the 4th edition of J Chitty's *A Practical Treatise on the Law of Contracts*, which was published in 1850, the author stated that when 'the parties have not furnished the criterion of damages by stipulating a liquidated sum to be paid as such, it is, in general, entirely the province of the jury to assess the amount, with reference to all the circumstances of the case' (768): cited in Greig & Davis, above n 203, 1373.

for breach of contract was eventually formulated in 1848, in the case of *Robinson v Harman*.[282] Parke B declared:

> The rule of common law is, that where a party sustains a loss by reason of a breach of contract, he is, so far as money can do it, to be placed in the same situation, with respect to damages, as if the contract had been performed.[283]

This principle is also the basis of the French law of damages. By virtue of Article 1149, the creditor is put into the position he would have been in had the contract been performed, by assessing the damages which he has incurred under two heads, viz, the actual loss incurred by the creditor and the profit which he has lost. The Common Law, in contrast, did not definitively categorise the heads of damage recoverable for breach of contract until well into the 20th century. It was not until 1936 that Lon L Fuller and William R Perdue, in their watershed article 'The Reliance Interest in Contract Damages',[284] formulated the three categories of damage by which damages should be assessed, viz, the expectation interest, the reliance interest, and the restitution interest.[285] The categorisation of damages under these heads subsequently became the accepted way of analysing damages throughout the Common Law world.

The expectation interest is the measure of damages which are required to put the plaintiff into the position he would have been in had the contract been properly performed by the defendant. It therefore takes into account the profit which would have accrued to the plaintiff from the contract, calculated at the time when performance was due from the defendant.[286] The reliance interest constitutes those expenses which a plaintiff has incurred to his detriment under the contract. The restitution interest restores to the plaintiff those benefits which the defendant has received from the plaintiff as a result of the plaintiff performing his obligations under the contract,[287] and can thus be included as a component part of the measure of damages based on the reliance interest.[288] Both the reliance and restitution interests are usually subsumed under the expectation interest because the reliance and restitution interests will often be a necessary cost to the plaintiff in obtaining his expectation interest. A plaintiff will therefore sue for reliance interest damages or restitution interest damages only in those situations where he cannot prove with sufficient certainty that he has suffered expectation interest damages.[289] Thus, although the general principle is that a plaintiff is to be put into the same position

282. (1848) 154 ER 363.
283. Ibid 365.
284. LL Fuller & WR Perdue 'The Reliance Interest in Contract Damages' (1936) 46 Yale LJ 52.
285. Ibid 54.
286. Harris & Tallon, above n 3, 247; Farnsworth, above n 48, 813.
287. Harris & Tallon, ibid 248; Farnsworth, ibid, 814.
288. Harris & Tallon, ibid 248.
289. Farnsworth, above n 48, 888. The relationship between the expectation interest and the reliance and restitution interests is canvassed very thoroughly by Mason CJ and Dawson J in their joint judgment in *Commonwealth of Australia v Amann Aviation Pty Ltd* (1991) 174 CLR 64, 80–6.

that he would have been in had the contract been performed, this will only occur when the plaintiff sues for expectation loss. If the plaintiff sues only for reliance loss or restitution loss, he is to be put into the same position as if he had never entered into the contract.[290]

The principle set out in *Robinson v Harman* laid down the underlying purpose which was to be served by an award of damages. But it did not provide any guidelines with regard to the extent of the damage which could be claimed by the plaintiff. Several attempts to do so had variously declared that losses were recoverable which flowed 'naturally', 'immediately', or 'necessarily' from 'the breach of the contract itself'.[291] These formulations, however, proved unsatisfactory, and consequently the extent of the losses which a plaintiff could claim in damages remained unclear. Juries continued to make widely divergent awards of damages, and some of these awards were characterised as being 'outrageous and excessive' in nature.[292] By mid-19th century this unfettered exercise of jury discretion was no longer acceptable. In order to be able to evaluate with precision the risk he was undertaking before entering into a contract, a contracting party needed to know in advance the amount of damages he would be liable for in the event of breach, and thereby take the necessary measures to insure against such damages. Some sort of rule was therefore required by which damages could be calculated in a manner which would limit claims to that which was within the 'bounds of the normal', and which would ensure that the amount recoverable in the event of a breach was both certain and predictable.[293]

This rule was formulated in 1854, in the case of *Hadley v Baxendale*.[294] Alderson B, writing the judgment of the Court of Exchequer, declared as follows:

> Where two parties have made a contract which one of them has broken, the damages which the other party ought to receive in respect of such breach of contract should be such as may fairly and reasonably be considered either arising naturally, i.e., according to the usual course of things, from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties, at the time they made the contract, as the probable result of the breach of it.[295]

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290. See D Friedmann, 'The Performance Interest in Contract Damages' (1995) 111 LQR 628 for a critique of the expectation and reliance interests set out by Fuller & Perdue, above n 284. Friedmann asserts that the notion of a 'performance interest' would be a more appropriate way to analyse what damages are due to a plaintiff when there has been breach of contract.
291. See *Boorman v Nash* (1829) 109 ER 54, 57 (Lord Tenterden CJ), stating that the damages 'necessarily resulted from the defendant's breach'; *Walton v Fothergill* (1835) 173 ER 174, 175–6 (Lord Tindal CJ), who declared that recoverable damages should be calculated on 'the necessary and natural consequences', and then stated that recoverable damages should be 'the necessary and immediate consequence'. See also AWB Simpson, 'Innovation in Nineteenth Century Contract Law' (1975) 91 LQR 247, 274.
292. Farnsworth, above n 48, 873.
293. Danzig, above n 111, 277.
294. (1854) 156 ER 145.
295. Ibid 151.

Alderson B further declared that this rule should thereafter be stated explicitly to the jury in order to provide it with the necessary directions in estimating damages.[296]

The rule in *Hadley v Baxendale* was actually two rules, generally referred to as the two 'limbs' of *Hadley v Baxendale*. The first rule was that damages could be recovered by the plaintiff when the loss which he incurred would 'fairly and reasonably be considered [as] arising naturally, ie, according to the usual course of things, from such breach of contract itself'.[297] The first rule applied in those situations where the loss which occurred was such as any reasonable person would have realised would result from the breach.[298] The second rule addressed those situations in which loss occurred which did not arise naturally. Under the second rule, such special or unusual loss could not be recovered unless it was 'such as may reasonably be supposed to have been in the contemplation of both parties, at the time they made the contract as the probable result of the breach of it'.[299] By limiting the recovery of damages to that which was within the contemplation of the contracting parties, either because the loss would naturally occur as a result of the breach, or because there were special circumstances which were known in advance by the parties, the court laid down a rule which acted as a control device on the assessment of damages by the jury, thereby making that assessment much more certain and more predictable.[300]

Although Alderson B did not refer in his judgment to any French sources, counsel for both the plaintiff and the defendant made reference to passages from Theodore Sedgwick's *A Treatise on the Measure of Damages*.[301] Sedgwick's treatise relied heavily on the writings of Pothier. He also made reference to Domat, and the passage of Sedgwick cited in argument by the defendant was based on Domat, rather than Pothier.[302] In the course of oral argument by counsel for the plaintiff Parke B referred specifically to Articles 1149, 1150 and 1151:

> The sensible rule appears to be that which has been laid down in France, and which is declared in their code – Code Civil, liv. iii. tit. iii. ss. 1149, 1150, 1151, and which is thus translated in Sedgwick (page 67): 'The damages due to the creditor consist in general of the loss that he has sustained, and the profit which he has been prevented from acquiring, subject to the modifications hereinafter contained. The debtor is only liable for the damages foreseen, or which might have been foreseen, at the time of the execution of the contract, when it is not owing to his fraud that the agreement has been violated. Even in the case of non-performance of the contract, resulting from the fraud of the debtor, the damages only comprise so much of the loss sustained by the creditor, and so much of the profits which he has

296. Ibid 150.
297. Ibid 151.
298. Marsh, above n 6, 314.
299. Above n 294, 151.
300. Farnsworth, above n 48, 874–5; Danzig, above n 111, 277.
301. *Hadley v Baxendale*, above n 294, 147, 149.
302. Ibid 149.

> been prevented from acquiring, as directly and immediately results from the non-performance of the contract'.[303]

It can thus be seen that the contemplation test formulated in *Hadley v Baxendale* was in large measure inspired by Article 1150, as well as the writings of Domat and Pothier upon which Article 1150 was based, and further that, like Article 1150, the contemplation test had as its underlying rationale the desire to set out a rule which would establish a certain and predictable method for calculating in advance the damage for which a contracting party would be liable in the event that he breached his contract. It would then be on this basis that a party negotiating a contract would evaluate the risks when deciding whether or not to enter that contract.

In 1949, Asquith LJ reformulated the rule in *Hadley v Baxendale* in the case of *Victoria Laundry (Windsor) Ld v Newman Industries Ld*.[304] His Lordship restated the rule as follows:

> In cases of breach of contract the aggrieved party is only entitled to recover such part of the loss actually resulting as was at the time reasonably foreseeable as liable to result from the breach. What was at that time so foreseeable depends on the knowledge then possessed by the parties, or at all events by the party who later commits the breach.[305]

As a result of this reformulation, what some authors had referred to as the 'two rules' in *Hadley v Baxendale* now became one. The rule as formulated in *Victoria Laundries* established that there are two types of knowledge, imputed and actual.[306] 'Everyone, as a reasonable person,' Asquith LJ declared, 'is taken to know the "ordinary course of things" and consequently what loss is liable to result from a breach of contract in that ordinary course'.[307] But in addition to this imputed knowledge, there is the knowledge which 'a contract-breaker … actually possesses, of special circumstances outside the "ordinary course of things", of such a kind that a breach in those special circumstances would be liable to cause more loss'.[308]

Alderson B had declared in *Hadley v Baxendale* that the damage recoverable had to be in the contemplation 'of both parties'.[309] But in *Victoria Laundry* Asquith LJ limited the requisite contemplation necessary for recovery to that of the party who breached the contract, stating that the loss recoverable depends upon the knowledge possessed, in the final analysis, by the party 'who later commits the

303. Ibid 147, 148.
304. (1949) 2 KB 528.
305. Ibid 539.
306. Ibid 539.
307. Ibid 539.
308. Ibid 539.
309. Above n 294, 151.

breach'.[310] Moreover, Asquith LJ continued, the standard required, both with regard to the imputed and to the actual knowledge possessed by the party breaching the contract, should be an objective one. 'It suffices,' his Lordship declared, 'that, if he had considered the question, he would as a reasonable man have concluded that the loss in question was liable to result'.[311]

Asquith LJ had restated the two rules of *Hadley v Baxendale* in terms of foreseeability. This wording basically mirrored the wording of Article 1150, which had largely provided the inspiration for the contemplation test in the first place. However, in the 1969 case of *Czarnikow Ltd v Koufos*,[312] the House of Lords made it clear that foreseeability was not the basis of the contemplation test. Lord Reid declared that the use of the term 'reasonably foreseeable' by Asquith LJ went 'beyond the older authorities and in so far as it does so I do not agree with it'.[313] Lord Reid then continued by stating that to 'bring in reasonable foreseeability appears to me to be confusing measure of damages in contract with measure of damages in tort.[314] In reviewing the judgment of Alderson B, Lord Reid noted that Alderson B was 'not distinguishing between results which were foreseeable or unforeseeable, but between results which were likely because they would happen in the great majority of cases, and results which were unlikely because they would only happen in a small minority of cases'.[315] Lord Reid then declared that Alderson B 'clearly meant that a result which will happen in the great majority of cases should fairly and reasonably be regarded as having been in the contemplation of the parties, but that a result which, though foreseeable as a substantial possibility, would only happen in a small minority of cases should not be regarded as having been in their contemplation'.[316] This led Lord Reid to define the contemplation test as follows:

> The crucial question is whether, on the information available to the defendant when the contract was made, he should, or the reasonable man in his position would, have realised that such loss was sufficiently likely to result from the breach of contract to make it proper to hold that the loss flowed naturally from the breach or that loss of that kind should have been within his contemplation.[317]

Lord Reid then differentiated the test of foreseeability and provided an explanation for the difference between the two tests:

> The modern rule of tort is quite different and it imposes a much wider liability. The defendant will be liable for any type of damage which is reasonably foreseeeable as liable to happen even in the most unusual case, unless the risk is so small that

310. Above n 304, 539.
311. Ibid 540.
312. (1969) 1 AC 350.
313. Ibid 389.
314. Ibid. All of the Law Lords sitting in this case agreed with Lord Reid that the contemplation test and the test of foreseeability were two separate and distinct tests.
315. *Czarnikow v Koufos*, above n 312, 384.
316. Ibid.
317. Ibid 385.

> a reasonable man would in the whole circumstances feel justified in neglecting it. And there is good reason for the difference. In contract, if one party wishes to protect himself against a risk which to the other party would appear unusual, he can direct the other party's attention to it before the contract is made, and I need not stop to consider in what circumstances the other party will then be held to have accepted responsibility in that event. But in tort there is no opportunity for the injured party to protect himself in that way, and the tortfeasor cannot reasonably complain if he has to pay for some very unusual but nevertheless foreseeable damage which results from his wrongdoing.[318]

The definition of the contemplation test as set out by Lord Reid in *Czarnikow Ltd v Koufos* was noted with approval by a majority of the High Court in the 1986 case of *Burns v MAN Automotive (Aust) Pty Ltd*,[319] and has thereafter been cited as authority in a number of Australian cases.[320] It therefore now represents the law in Australia as well as England.

During the 19th century another important feature of the Common Law which developed was that of mitigation of loss. By virtue of the notion of mitigation a plaintiff will be precluded from claiming damages for loss to the extent that he could have minimised that loss by taking appropriate action.[321] Although a rudimentary notion of mitigation had been a part of the Common Law since 1677,[322] it only became a significant element in the calculation of damages from the latter half of the 18th century.[323] Its growing significance was a result of the dramatic increase in commerce during the Industrial Revolution, which made the issue of fluctuating market prices an important consideration in determining the appropriate amount of damages. Atiyah speculates that the issue of mitigation may have been a factor which the jury began to consider in the late 18th century as a part of its discretion in determining damages, and that sometime afterwards this hardened into a factor which the jury was bound to take into consideration when awarding damages.[324] By 1872, in the case of *Frost v Knight*,[325] Cockburn CJ declared that mitigation was a necessary element in the calculation of damages:

> By acting on such a notice of the intention of the promisor, and taking timely measures, the promisee may in many cases avert, or at all events materially lessen, the injurious effects which would otherwise flow from the non-fulfilment of the

318. Ibid 385–6.
319. (1986) 161 CLR 653, 667 (Wilson, Deane & Dawson JJ).
320. See *Alexander v Cambridge Credit Corporation Ltd* (1987) 9 NSWLR 310, 364–6 (McHugh JA); *Kenny & Good Pty Ltd v MGICA (1992) Ltd* (1999) 199 CLR 413, 416 (McHugh J); *National Australia Bank Ltd v Nemur Varity Pty Ltd* (2002) 4 VR 252 (CA), 270 (Batt JA).
321. Greig & Davis, above n 203, 1388; Farnsworth, above n 48, 858.
322. *Vertue v Bird* (1677) 84 ER 1000. The court found that the defendant, who had contracted with the plaintiff for the delivery of corn, was not liable for the plaintiff's horses having died as a result of exposure to the sun while the plaintiff vainly awaited the arrival of the defendant to take delivery of the corn, on the basis that the plaintiff could have moved his horses out of the sun.
323. Teeven, above n 36, 193.
324. Atiyah, above n 97, 425.
325. (1872) LR 7 Ex 111.

> contract; and in assessing the damages for breach of performance, a jury will of course take into account whatever the plaintiff has done, or had had the means of doing, and, as a prudent man, ought in reason to have done, whereby his loss has been, or would have been, diminished.[326]

The 'duty' to mitigate incumbent on the plaintiff is, however, somewhat of a misnomer, because if the plaintiff fails to mitigate he does not thereby incur any liability to the defendant. The only consequence which flows from a plaintiff's failure to mitigate is that the amount which he can recover in damages is reduced.[327] Moreover, mitigation is only relevant if the defendant pleads that the palintiff failed to mitigate. Otherwise, it is ignored.

DAMAGES: COMPARATIVE ANALYSIS

Clearly there are significant differences between the Common Law and French law with regard to damages. This is so even though the Common Law has borrowed an aspect of its law of damages from French law. The difference between the two systems begins with the way in which French law and the Common law classify damages. In French law, by virtue of Article 1149, damages are classified into the two categories of actual loss and lost gain. Although Parke B had referred to these two categories in *Hadley v Baxendale* when quoting Sedgwick's translation of Article 1149,[328] the Common Law subsequently did not adopt these categories. Instead, the Common Law ultimately adopted the categories of reliance loss, restitution loss and expectation loss, which had been put forward by Fuller and Perdue.[329] Although it might appear at first glance that actual loss equates to reliance loss and lost profit to expectation loss, such a comparision oversimplifies the role which the respective categories perform within each system. This was emphasised by Fuller and Perdue:

> It should not be supposed that the distinction here taken between the reliance and expectative interest coincides with that sometimes taken between 'losses caused' (*damnum emergens*) and 'gains prevented' (*lucrum cessans*). In the first place, though reliance ordinarily results in 'losses' of an affirmative nature (expenditure of labor and money) it is also true that opportunities for gain may be foregone in reliance on a promise. Hence the reliance interest must be interpreted as at least potentially covering 'gains prevented' as well as 'losses caused'.... On the other hand, it is not possible to make the expectation interest entirely synonymous with 'gains prevented'. The disappointment of an expectancy often entails losses of a positive character.[330]

326. Ibid 115.
327. Treitel, above n 168, 179.
328. Above n 294, 147.
329. Fuller & Perdue, above n 284, 52.
330. Ibid 55–6.

Nicholas illustrates this lack of exact correspondence between the respective categories by reference to two examples. In the first example a seller fails to deliver goods to a buyer under a contract of purchase, so that the buyer must then purchase replacement goods elsewhere. The difference between the price the buyer agreed to pay under the contract and the cost he incurs to replace those goods is categorised in French law as an actual loss, because the buyer has actually incurred this loss as a result of the seller's breach. In the Common Law, on the other hand, such loss is categorised as an expectation loss, because 'damages of that amount are necessary to put the buyer in the position in which he would have been if the contract had been fulfilled'.[331]

In the second example, a singer contracts to perform in a concert, but then fails to appear, resulting in the concert being cancelled. In this case the innocent party can sue for damages under the heads both of actual loss and lost gain. The actual loss comprises the expenses which the innocent party incurred in preparation for the concert and the lost gain comprises his lost profits. In this instance the actual loss is the equivalent of a reliance loss in the Common Law.[332]

There is a further difference which flows from the different categorisation of damages in the two systems. In French law damages are referred to as *exécution en équivalent*. This means 'equivalent performance' and reflects the French emphasis on granting performance in kind to the creditor whenever it is still possible. When it is not possible, or when the creditor does not seek performance in kind, the principle in French law is that the damages awarded to the creditor ensure that he receives the equivalent of performance in kind. Both categories of damage in Article 1149 are designed to ensure that this occurs. [333]

Although the Common Law also posits that an award of damages should put a plaintiff in the same position he would have been in had the contract been performed, this will only occur when the plaintiff can claim expectation damages. If the plaintiff cannot claim such damages, then the award of damages based solely on the reliance loss will not put him into the same position he would have been in had the contract been performed, but rather will put him into the position he would have been in had he not made the contract. French law, on the other hand, 'is based on the single notion that damages constitute a substitute for performance, that is, full compensation for the loss resulting from the breach of contract'.[334]

In French law causation and remoteness are set out in two discrete articles. The element of directness set out in Article 1151 provides the necessary causal link between the debtor's breach and the creditor's loss. Only damage which is a direct result of the breach of contract is recoverable by the creditor. The element

331. Nicholas, above n 4, 226–7.
332. Ibid 227. See also Treitel, above n 168, 84–5.
333. Harris & Tallon, above n 3, 274.
334. Ibid 274.

of directness is therefore the sine qua non for recovery. Once causation has been established, resort is then had to the test of foreseeability, as set out in Article 1150, so that the recoverable damage is then further restricted to that direct damage which was foreseeable.

Unlike French law, the Common Law does not use directness as the means of determining causation, and the basis for establishing causation remains nebulous in the Common Law. Although causation is invariably acknowledged to be a necessary element in establishing the relationship between the defendant's breach and the plaintiff's loss, there are actually very few cases in which it is discussed as a separate issue. Those few cases which have addressed causation have done so in the context of situations where there has been an intervening act or event which may have had the effect of breaking the chain of causation.[335] In the United States, it has even been asserted that foreseeability should be the test of causation.[336] This is not so in England and Australia, where the concepts of causation and remoteness have been kept separate. Lord Wright observed that causation does not 'depend on remoteness or immediacy in time'.[337] Bingham J pointed out that causation and remoteness were two 'quite different concepts'.[338] However, Bingham J then went on to note that 'some of the relevant considerations are the same'.[339] Unfortunately his Honour did not elaborate on the relevant considerations which were the same. In *March v E&M Stramare Pty Ltd*,[340] Deane J stated that causation should be determined 'as a matter of ordinary common sense and experience'.[341] In both systems damage for breach of contract is therefore recoverable if there is a causal link. In French law the causal link is that of directness. In the Common Law it is less clear what constitutes the necessary causal link, as there is no equivalent test of directness.

The Common Law contemplation test for determining remoteness of damage, which was first articulated in *Hadley v Baxendale*,[342] was much influenced by Article 1150 of the *Code civil*, as well as its antecedents in the writings of Domat and Pothier. The test for remoteness set out Article 1150 enabled a party entering into a contract to know in advance with relative certainty what damages he would be liable for should he breach the contract. In *Hadley v Baxendale*, Alderson B formulated the contemplation test in order to enable a contracting party in the Common Law context likewise to know in advance what damages he would be liable for should he breach his contract. The test set out in Article 1150 is one of

335. Greig & Davis, above n 203, 1367–8.
336. JM Perillo, *Corbin on Contracts* (San Francisco: Lexis Nexis, 2005) vol 11: Damages, 82.
337. *Monarch SS Co Ltd v kA/B Karlshamns Oljefabriker* (1949) AC 196, 228. See also *Alexander v Cambridge Credit Corp*, above n 320, 315, 350–1.
338. *Stinnes Interoil GmbH v A. Halcoussis & Co. (The Yanxilas No. 2)* (1984) 1 Lloyd's Rep 676, 681, 682.
339. Ibid.
340. (1991) 171 CLR 506.
341. Ibid 522.
342. Above n 294.

foreseeability.[343] But *in Czarnikow Ltd v Koufos*[344] the House of Lords stated that the test of foreseeability must be limited to tort law, and that the contemplation test used to determine remoteness of damage in contract law was a different and more narrow test. It is unclear whether the distinction thus drawn in the Common Law between the test of foreseeability in tort law and the contemplation test in contract law makes for any substantive difference in approach between the Common Law and French law in determining remoteness of damage for breach of contract, because unlike the Common Law, French law does not determine liability in tort law[345] on the basis of foreseeability.[346] It is therefore not necessary in French law to distinguish when a party 'foreesees' or otherwise 'contemplates' potential damage in a contractual context and when he 'foresees' it in a delictual (ie, tortious) context.[347]

The Common Law and French law also take fundamentally different approaches to mitigation. Mitigation becomes a part of the assessment of damages in the Common Law if a defendant pleads a failure to mitigate by the plaintiff. A plaintiff must therefore take appropriate steps to mitigate his loss. If he does not do so the loss which would otherwise have been reduced through his mitigation cannot be claimed. In French law, on the other hand, there is no article in the Code requiring a creditor to mitigate his damages and damages are not reduced with reference to any notion corresponding to the Common Law's requirement of mitigation. French law is concerned only that a creditor not increase the damages for losses which were avoidable, rather than that he reduce those losses.[348]

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343. 'The debtor is only liable for the damages foreseen, or which might have been foreseen, at the time of the execution of the contract *(Le débiteur n'est tenu que des dommages et intérêts qui ont été prévus ou qu'on a pu prévoir lors du contrat.)*
344. (1969) 1 AC 350.
345. Known in French law as the law of delict (*la responsabilité civile délictuelle*).
346. Fabre-Magnan, above n 88, 766–7. In French law a duty of care is owed to all, whereas in the Common Law it is owed only to one's neighbour, so that the question of foreseeability becomes relevant in determining who is a tortfeasor's neighbour and what damage a tortfeasor should have foreseen with regard to his neighbour. In the Common Law the duty of care thus performs the role of a control device, whereas in French law this role is performed by causation: Fabre-Magnon, above n 88, 727–50. Moreover, unlike the Common Law a creditor in French law cannot sue both in contract and in delict in the same action, by virtue of the principle of *non-cumul*.
347. Some Common Law judges have questioned whether the two tests of foreseeability and contemplation amount to a distinction without a difference. In *H Parsons (Livestock) Ltd v Uttley Ingham & Co* (1978) QB 791, 802 (CA) Lord Denning MR declared that he found it difficult 'to draw a distinction between what a man "contemplates" and what he "foresees": I soon begin to get out of my depth. I cannot swim in this sea of semantic exercise.' In *Commonwealth v Amman Aviation Pty Ltd* (1991) 174 CLR 64, 116, Deane J declared that the different rules governing tort and contract were 'of diminishing significance for most purposes,' and noted in particular 'the gradual assimilation of the tests of "within the contemplation of the parties" (in contract) and "reasonably foreseeable" (in tort)'.
348. Harris & Tallon, above n 3, 293.

THE FRENCH REMEDY OF WITHHOLDING PERFORMANCE

In French law a creditor, unlike his Anglo-Saxon homologue, cannot himself terminate a contract for breach, but must instead pursue such a claim in court. It is the court which then determines whether termination is the appropriate remedy. This prohibition against self-help is embodied in the French maxim '*Nul ne peut se faire justice à soi-même*'.[349] There is, however, an exception to this general principle of non self-help, which originated in mediaeval Roman law, and which is thus still known by its Latin term of '*exceptio non adimpleti contractus'*. The French equivalent is *'exception d'inexécution'*. The Latin term means 'defence of unperformed contract' and the French term 'exception for non-performance'. As Nicholas points out, the 'term is misleading in either language, since the word *exceptio* suggests a defence to an action, whereas an essential characteristic of this remedy is that the party exercising it need not go to court'.[350]

A creditor is entitled, by virtue of this exception, to withhold performance when the debtor has not performed as required under the terms of the contract. The remedy is only available in situations where the contractual obligations of the creditor and the debtor are concurrent. It is designed to bring pressure to bear on a debtor who has not yet performed his obligations by withholding from him the benefits which he would otherwise receive from the creditor under the contract. Thus, for example, a seller may refuse delivery of goods if the buyer has not paid the price.[351]

Both Domat and Pothier had adverted to this temporary remedy in their writings. Domat declared:

> If the buyer does not pay at the time appointed, and the seller has not as yet delivered the goods, he may keep them by way of pledge until he be paid.[352]

This was also the position of Pothier:

> He [ie, the buyer] must offer in payment the entire amount that he owes: if he offers only a part, he is not in a position to request the delivery of the thing which has been sold to him, and not even a part of the thing; the seller has the right to retain it, as a type of pledge, as a guarantee of payment for the entire price which is due to him.[353]

The specific situation of a seller withholding delivery of the goods when the buyer had not paid the full price, which Domat and Pothier had referred to, was set out

349. 'No one can obtain justice by himself'.
350. Nicholas, above n 4, 213.
351. Fabre-Magnon, above n 88, 555; Nicholas, ibid 213.
352. Domat, above n 74, vol 1, 209.
353. Dupin, above n 31, 26.

in Articles 1612 and 1613 of the *Code civil*.[354] There are several other instances in the *Code* where the exception is also specifically provided for.[355] Although there is no article in the *Code* which declares withholding to be a general principle, the *Cour de cassation* has interpreted the specific references contained in the Code in a manner which does generalise withholding of performance and thereby makes it applicable to all synallagmatic contracts.[356]

The justification for this generalisation is based on the requirement of '*cause*', or 'cause' in English.[357] In French law, by virtue of Article 1108, one of the essential requirements of a valid contract is 'a licit cause in the obligation'.[358] The concept of cause for one party assuming his contractual obligations derives from the obligations of the other party. As Nicholas says, 'each obligation is the cause of the other'.[359] It is the doctrine of cause which makes contractual obligations in French law interdependent. As a result, if one party fails to perform his obligations, the other party is relieved from performing his obligations, by virtue of the doctrine of cause.[360] In other words, the innocent party can withhold performance as long as the party in breach does not perform. There must, however, be an equilibrium between the breach and the performance withheld.[361]

It needs to be emphasised that the remedy of withholding is temporary in nature, and cannot therefore be a definitive response to the debtor's breach of contract. The obligations of the innocent party subsist even when the offending party has not performed. The innocent party must remain ready to perform, and must do so when the other party performs his obligations. Withholding is thus not a true remedy for breach, but rather only a temporary expedient by which the innocent party can exert pressure in an attempt to force the offending party to perform. But if the offending party will not perform, the innocent party must apply to the

354. Article 1612: *'Le vendeur n'est tenu de délivrer la chose, si l'acheteur n'en paye pas le prix, et que le vendeur ne lui ait pas accordé un délai pour le payement.'* (The seller is not required to deliver the thing, if the buyer has not paid the price, unless the seller has granted him a delay in payment.) Article 1613: *'Il ne sera pas non plus obligé à la délivrance, quand même il aurait accordé un délai pour le payement, si, depuis la vente, l'acheteur est tombé en faillite ou en état de déconfiture, en sorte que le vendeur se trouve en danger imminent de perdre le prix; à moins que l'acheteur ne lui donne caution de payer au terme.'* (The seller is also not required to deliver, even if he has granted a delay in payment, if, since the sale, the buyer has become bankrupt or is under a juridical arrangement, so that the seller is in imminent danger of losing the price, unless the buyer has given him security to pay at the time limit.)

355. See eg Arts 1653, 1704 & 1948.

356. Fabre-Magnon, above n 88, 556.

357. Larroumet, above n 250, 790.

358. *Quatre conditions sont essentielles pour la validité d'une convention: le consentement de la partie qui s'oblige; sa capacité de contracter; un objet certain qui forme la matière de l'engagement; une cause licite dans l'obligation.* (Four conditions are essential for the validity of an agreement: the consent of the party who binds himself; his capacity to contract; a definite object which forms the subject-matter of the agreement; and a lawful cause in the obligation.)

359. Nicholas, above n 4, 214.

360. Ibid 214.

361. Béguin, above n 238, 54.

court for an order of resolution should he wish to bring the contract to an end. The value of withholding lies in the fact that it permits the innocent party to resort to it without first obtaining a court order.[362] It therefore constitutes a derogation from the maxim *'Nul ne peut se faire justice à soi-même'*.

In the Common Law there is no general equivalent to the French remedy of withholding performance. Those situations in which the remedy of withholding would apply in French law are generally handled in the Common Law by the rules relating to termination. The difference in approach in the two systems may be explained by reference to the different way contractual terms are dealt with in the two systems. In French law, by virtue of the doctrine of cause, the obligations of the creditor and the debtor are made interdependent, so that failure to perform an interdependent obligation by one party naturally relieves the other party, albeit temporarily, from the requirement of performance. The Common Law, on the other hand, by virtue of the classification of terms into conditions and warranties, has adopted a different approach. As has been seen above, an important consequence of this division of contractual terms into the two categories of conditions and warranties has meant that in the Common Law the respective obligations of the plaintiff and the defendant are independent of each other to a much greater degree, and there is not the same correspondence between obligations as exists in French law. When a defendant has breached an important term, viz, a condition or an intermediate term which is fundamental, the plaintiff is entitled to terminate the contract, rather than simply suspend his own performance. He can, moreover, do so by himself and need not seek a court order. The breach of those terms which are less important, viz, the warranties, only permit him to claim for damages, in the context of an ongoing contract. When the terms are independent, the failure of the defendant to fulfil his obligations does not relieve the plaintiff of his duty to perform under the contract. This is exemplified in the 1937 case of *Taylor v Webb*.[363] In this case the court held that the contractual obligation of the landlord to repair and the obligation of the tenant to pay rent were independent terms, and therefore the failure of the tenant to pay the rent did not relieve the landlord of his duty to repair. In a 1951 French case with very similar facts, the opposite result obtained, on the basis of withholding performance.[364]

Contractual terms in the Common Law may also be interdependent. If they are interdependent, the performance of one obligation will be the condition precedent for the performance of the second obligation, or the two obligations will be concurrent.[365] When the obligations are interdependent the failure of the defendant to perform will justify the plaintiff in withholding performance whilst the default continues, although it will not necessarily give him the right to terminate.[366]

362. Marsh, above n 6, 325.
363. (1937) 2 KB 283.
364. *Cass civ* (26 November 1951) GP 52.I.72.
365. Marsh, above n 6, 325.
366. Ibid 326.

This will occur, for example, when the purchaser of goods has not paid for those goods, and the vendor remains in possession. In these circumstances the vendor is not entitled to terminate, because section 10(1) of the Sale of Goods Act 1979 (UK) stipulates that 'time of payment is not of the essence of the contract, unless otherwise specifically provided'. However, as long as the purchaser does not tender payment the vendor may retain possession of the goods.[367] But in spite of individual applications of the withholding of performance, there is no general right in the Common Law to withhold performance if the other party has not performed.

CONCLUSION

Although the remedies for breach of contract are basically the same in both the Common Law and French law, there are significant differences in the importance and emphasis which the two systems attach to these remedies, with the result that breach of contract is dealt with in significantly different ways in the two systems. French law emphasises the right of a creditor to obtain performance in kind, and considers this remedy as the only one which 'can provide complete satisfaction for the creditor'.[368] Thus French law permits a creditor to make a claim in performance in kind for breach in most circumstances. In the Common Law, on the other hand, damages are the only remedy available to a plaintiff in a majority of cases. There is thus a fundamental difference in approach to the principal remedy for breach in the two systems.

This fundamental difference derives in large measure, as has been seen throughout this article, from the very different historical developments of the two systems. Thus the fact that the Common Law was a writ-based system, and that the writs only provided for damages as a remedy, meant that damages necessarily became the primary remedy in the Common Law. Moreover, even though damages were the primary remedy in the Common Law, no established rules on the award of damages developed in the Common Law until the mid-19th century, because in the Common Law it was the jury which awarded damages, and the jury gave no reasons for its finding. The division of the English legal system into two parts, viz, Common Law and Equity, has also greatly affected the development of contractual remedies, and accounts for the fact that specific performance became an exceptional remedy, and remains so to this day.

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367. Ibid. The Sale of Goods Act also provides, in s 39(1) for the statutory remedy of the unpaid seller's lien, and, in s 39(2), that where property has not passed to the buyer, the unpaid seller has a right of withholding delivery. These two subsections are comparable to withholding of performance, which is set out in Articles 1612 and 1613 of the *Code civil*. Section 10(1) is reproduced in The Sale of Goods Act 1923 (NSW) in s 15(1), and subss 39(1) and 39(2) at ss 42 and 43.
368. Harris & Tallon, above n 3, 289.

The historical development of French law has likewise influenced the development of contractual remedies in French law, but in a way which has seen the development of performance in kind as the primary remedy for breach of contract. In France the canonists played a predominant role in the development of a generalised law of contract, and they ensured that performance in kind became the primary remedy in this generalised law of contract. This was later reinforced by the proponents of the Natural Law School, for whom the keeping of a contract was considered to be a natural obligation. But neither canon law nor Natural Law exercised much influence on the development of the Common Law, and so did not contribute to the formulation of contractual remedies.

In the Common Law the development of contractual remedies was influenced primarily by economic considerations. The law of contract was only formulated into a sophisticated part of the Common Law during the Industrial Revolution, and in response to it. Contract law during this period developed largely through commercial cases, in which economic considerations and fluctuating market conditions were paramount considerations. The French law of contract, in contrast, had been formulated and codified prior to industrialisation.

It can thus broadly be said that the contractual remedies of French law are characterised to a greater extent by moral considerations, and those of the Common Law by economic considerations. This can be seen in many aspects of the respective laws of contractual remedies in the two systems. Whereas French law gives priority to performance in kind on the moral basis that undertakings should be honoured, specific performance in the Common Law is an exceptional remedy which is only granted when damages cannot adequately compensate the plaintiff, that is, when specific performance is required because there is some unusual element to that particular contract which cannot be measured and resolved solely on an economic basis.

In the Common Law an award of damages is the primary remedy. This remedy is perceived basically in economic terms, being the price which the defendant must pay in order to breach his contractual obligations. In French law, on the other hand, an award of damages is based to a much greater degree on moral considerations. This difference in emphasis can be seen in various aspects of the respective laws relating to awards of damages. Thus the Common Law duty to mitigate takes market factors into account in determining the damages to which the plaintiff is entitled. But in French law there is no duty to mitigate. The debtor is considered in French law to have committed a moral wrong by breaching his contract, and it is therefore incumbent on him simply to compensate the creditor for the loss which has occurred as a result of the debtor's breach. Even the Common Law contemplation test , which was borrowed from French law, was introduced basically for economic reasons, so that contracting parties would be able to calculate with precision the damages they would be required to pay should they not be able to perform their contractual obligations, thereby enabling them to take the measures

necessary to insure against such damages. While this is also true in French law, French law nevertheless continues to insist on the primacy of performance in kind, which requires that the debtor actually honour his contractual undertakings.

The different approaches of the Common Law and of French law to termination also illustrate the emphasis which French law places on moral considerations and the Common Law on economic considerations. The moral emphasis of French law can be seen from the process which must take place to obtain resolution. It is the court which assesses the appropriate remedy for a contractual breach after considering the conduct of both parties and the consequences which may flow both from the breach itself and from the remedy which the court grants. In the Common Law, on the other hand, emphasis is placed on economic considerations. The fact that the initiative for actually terminating a contract in the event of a breach lies not with the court, but rather with the party who has suffered the breach, conduces to greater economic efficiency, because the innocent party can thereby reorganise his affairs quickly and expeditiously, without having to wait for a court decision. The innocent party's French homologue, on the other hand, can only submit an application for resolution to the court, and must then wait for the court to come to a decision, which may not be rendered for some considerable time.[369]

Thus, although the contractual remedies are essentially the same in both the Common Law and French law, French law justifies their role and emphasises their respective importance on the basis of moral considerations, whereas the Common Law does so essentially on the basis of economic considerations. As has been seen throughout this article, this very different approach to contractual remedies is the result of the different historical development of the Common Law and French law. Legal rules, as Legrand rightly assserts, are more than simply rules. Such rules do indeed 'encode experiences'[370] and therefore can remain fundamentally different even when they seem on the surface to be more or less the same.

369. Harris & Tallon, above n 3, 294.
370. Legrand, above n 2, 56–7.

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