Introduction

'Comparative law does not help. Continental lawyers have the same problems, but their answers are hidden by obscurity or absence of reasoning'.[1] These are the extra-judicial observations of Lord Hoffmann in the context of the law of tort.

It is indubitably correct to say that the common law and continental legal systems have the same problems. The suggestion that comparative law does not help is, with respect, entirely incorrect. Comparative law facilitates an understanding of how different jurisdictions may converge or diverge in their approaches to common issues. As such, it is a source of lessons and solutions. Whilst the approach of a foreign court may appear obscure, this is often because of jurisdictional dissimilarities. Explaining such dissimilarities and the underlying reasoning of courts in different legal systems is one of the challenges of the comparative lawyer.

This monograph aims to bring the advantages of comparative study to bear on remedies for breach of contract. By drawing comparisons with French law, it seeks to shed light on the remedial regime for breach of contract in England. It endeavours to achieve a new understanding of the protection afforded by English law remedies to contractual performance.

A Contractual Performance

The term 'performance' is susceptible to different meanings in different contexts. Before the objectives and scope of this monograph can be introduced in any greater detail, its intended meaning in the present context must therefore be explained and understood. It will be used here to refer to the process by which a contractual promise is fulfilled or in other words, the execution of the contract.

At the very heart of this monograph will be consideration of the 'performance interest'. This expression is a relatively recent addition to the academic and judicial lexicon. It originates in Friedmann's article, 'The Performance Interest in Contract Damages',[2] where the following description is proffered:

> The essence of a contract is performance. Contracts are made in order to be performed. This is usually the one and only ground for their formation. Ordinarily, a person enters into a contract because he is interested in getting that which the other party has to offer and because he places a higher value on the other party's performance than on the cost and

[1] L Hoffmann, 'Foreword' in R Stevens, *Torts and Rights* (OUP: Oxford, 2007).

[2] (1995) 111 LQR 628 criticizing L Fuller and W Perdue, 'The Reliance Interest in Damages' (1936–1937) 46 Yale LJ 52 and 373.

trouble he will incur to obtain it. This interest in getting the promised performance . . . is the only pure contractual interest.[3]

The 'performance interest' therefore refers to the interest of the promisee in obtaining the performance to which he is entitled under the contract.[4] It is his interest in having the contract duly performed.

A premise of Friedmann's article is that although 'performance interest' and the more familiar 'expectation interest'[5] may be synonymous, the former is a more accurate characterization of the entitlement of the injured promisee. The word 'expectation' has connotations of a prospect which is unsupported by a legal right. It does not accurately portray the enforceability of the promise that gives rise to the interest.[6] However, 'performance interest' and 'expectation interest' are increasingly used interchangeably in academic literature[7] and case law.[8]

Some commentators have attributed a narrower meaning to the 'performance interest', drawing a distinction with what they consider to be another contractual interest, the 'compensation interest'.[9] This is the interest of the promisee in being rendered harmless against losses caused by breach or, differently put, in not being left worse off. Proponents of the existence of a 'compensation interest' suggest that the 'performance interest' should be confined to the interest in securing the contracted-for performance. It must be kept distinct from the right to compensation for any loss resulting from the breach.

This monograph will adopt the wider definition of 'performance interest', which includes both the interest of the promisee in receiving the benefit to which he is contractually entitled, and also his interest in being compensated for loss caused by breach. No distinction will be drawn between the performance and compensation interests. This mirrors the approach of the English courts that remedies which compel performance and/or compensate loss are protective of one global interest, no regard being paid to semantic distinctions.

[3] Friedmann (n 2 above) 629.

[4] For a similar definition in the case law, see *Alfred McAlpine Construction Ltd v Panatown Ltd* [2001] AC 518 (HL) 577 (Lord Browne-Wilkinson).

[5] Fuller and Perdue (n 2 above), in which the aim of the expectation interest was defined as being 'to put the plaintiff in as good a position as he would have occupied had the defendant performed his promise'.

[6] Friedmann (n 2 above) 634–5.

[7] eg A Burrows, *Remedies for Torts and Breach of Contract* (3rd edn, OUP: Oxford, 2004) 210; E McKendrick, *Contract Law—Text, Cases, and Materials* (4th edn, OUP: Oxford, 2010) 827; J O'Sullivan, 'Reflections on the Role of Restitutionary Damages to Protect Contractual Expectations' in D Johnston and R Zimmermann (eds), *Unjustified Enrichment: Key Issues in Comparative Perspective* (CUP: Cambridge, 2002) 327, 334.

[8] eg *Alfred McAlpine Construction Ltd v Panatown Ltd* [2001] AC 518 (HL) 546 (Lord Goff); *Earl's Terrace Properties Ltd v Nilsson Design Ltd* [2004] EWHC 136 (QB) [76]–[78] (HHJ Thornton QC).

[9] C Webb, 'Performance and Compensation: An Analysis of Contract Damages and Contractual Obligation' (2006) OJLS 41. Along the same lines, see B Coote, 'Contract Damages, *Ruxley* and the Performance Interest' [1997] CLJ 537, where the performance interest is differentiated from the 'wider expectation interest', which also covers consequential loss.

B The Protection of Contractual Performance

The performance interest has been the subject of much discussion amongst practitioners and academic commentators in England. There has been concern in several quarters about the efficacy of the country's remedial system in protecting the interest. McKendrick has argued that the 'commitment of English contract law to the protection of the performance interest is not wholehearted'[10] and that English courts 'place little value upon [a] party's promise to perform his obligations under the contract'.[11] A similar point has been made by Atiyah, for whom the force of contractual remedies in England is 'very mild'[12] and of 'extreme weakness'.[13] He has stated that under English law, 'large numbers of contracts are regularly breached for which promisees are unable to obtain any damages at all'.[14] Other voices noting the limited protection of the performance interest include those of O'Sullivan, who comments that 'the "performance interest" tends not to be accorded sufficient weight in the English remedial system',[15] and Webb, who refers to 'the courts' seeming disinclination fully to protect the claimant's performance interest'.[16]

Academic concern at the degree of protection afforded by English law to the performance interest has not gone unnoticed in the case law. As Lord Millett remarked in *Alfred McAlpine Construction Ltd v Panatown Ltd*,[17] 'there has for some time been a growing consensus among academic writers that English law adopts an unduly narrow approach to the concept of loss, and that it ought to recognise that the performance of a contractual obligation may have an economic value of its own . . . '.[18] Lord Millett concurred in this disquiet, stating that 'if the failure of English law to award substantial damages in proper cases defeats the parties' expectations and leads to injustice, the fault [lies] in the unduly narrow way in which the courts have approached the concept of loss.'[19]

Another example of judicial concern at the level of protection of the performance interest in England can be found in the speech of Lord Bridge in *Ruxley Electronics and Construction Ltd v Forsyth*.[20] He observed that the law relating to damages for breach of contract normally proceeds 'on the assumption that each contracting party's interest in the bargain was purely commercial and that the loss resulting from a breach of contract is measurable in purely economic terms. But this assumption may not always be appropriate.'[21]

Against the background of this discussion, this monograph will assess the commitment in English law to the performance interest. It will do so by surveying contractual remedies in England, and the extent to which these remedies require contracting parties to abide by their promises to perform. The rationales underlying

[10] E McKendrick, 'Breach of Contract and the Meaning of Loss' (1999) 52 CLP 37, 49.
[11] E McKendrick, 'Promises to Perform—How Valuable?' (1992) 5 JCL 6, 13.
[12] P S Atiyah, *An Introduction to the Law of Contract* (5th edn, Clarendon Press: Oxford, 1995) 416.
[13] ibid 419.
[14] P S Atiyah, 'The Liberal Theory of Contract' in *Essays on Contract* (Clarendon Press: Oxford, 1988) 121, 124.
[15] O'Sullivan (n 7 above) 334.
[16] Webb (n 9 above) 51.
[17] [2001] AC 518 (HL).
[18] ibid 587 (Lord Millett).
[19] ibid 581 (Lord Millett).
[20] [1996] AC 344 (HL).
[21] ibid 353 (Lord Bridge).

the remedies will be subjected to critical analysis. Consideration will also be given to how, should there be a desire in England to improve the protection of the performance interest, this could be achieved.

The purpose of this monograph is not to explore the philosophical underpinnings of the performance interest. Nor does it seek to engage in the debate between theorists as to the principles that should underlie contractual obligations and remedies for breach of contract. Questions such as why performance is deserving of protection and the extent to which there should be such protection will not be considered. They have already been analysed extensively in academic literature.[22]

Although exploration of the philosophical underpinnings of the performance interest is outside the scope of this monograph, certain theories of contract law will nonetheless be touched upon as part of the discussion of particular remedies. The most notable are efficiency theories. Their basic premise is that contract law is an instrument for promoting the overall welfare of society through efficient behaviour. Behaviour is efficient if it benefits some without harming others. An important concept of efficiency is 'Pareto optimality', a position from which it is impossible to make one more individual better off without making somebody else worse off.[23] Another is the 'Kaldor-Hicks compensatory principle'. This posits that a benefit to one individual increases the welfare of society, even if there is an attendant loss to somebody else, so long as the benefited party can fully compensate the disadvantaged party and still remain better off than before.[24]

In the context of remedies law, proponents of efficiency theories believe that breach of contract should be encouraged where the benefit will exceed any potential compensatory liability. This is described as the 'efficient breach' theory. If, following the conclusion of an agreement, the promisor finds a better opportunity for the use of his resources, he should be allowed to escape from his obligation to perform subject to the full compensation of the promisee. Having pursued a more profitable activity elsewhere, he will be 'better off', whilst the promisee has lost nothing. To breach a contract equates to making a rational economic choice.

Efficiency theories have grown in prominence in recent years and exert influence on academic thinking about remedies. As an alternative to the traditional and orthodox right-based analysis that contracts create individual rights and duties to which social welfare is irrelevant,[25] they appear in many modern analyses. It is for these reasons that they are mentioned on a number of occasions.

C Remedies under Consideration

In this monograph, 'remedy' is used to denote the relief that is available to a party in response to a breach of contract by his counterparty. The remedies that will

[22] For an introduction to contract theory, see S Smith, *Contract Theory* (OUP: Oxford, 2004).

[23] V Pareto, *Manual of Political Economy* (Kelley: New York NY, 1971).

[24] N Kaldor, 'Welfare Propositions of Economics and Inter-Personal Comparisons of Utility' (1938) 49 Econ J 549, 550; J Hicks, 'The Foundations of Welfare Economics' (1939) 49 Econ J 696.

[25] Smith (n 22 above).

be explored include the award of an agreed sum, specific performance, injunctive relief, termination, compensatory damages, gain-based monetary awards, and punitive damages.

The award of an agreed sum, specific performance, injunctive relief, compensatory damages, gain-based monetary awards, and punitive damages are all remedies which protect the performance interest. They do so with differing levels of directness and to varying degrees. Termination, on the other hand, does not provide the promisee with any of his bargained-for performance. It actually renders the contract incapable of performance. In terms of outcome, and at least when seen in isolation, it can therefore be regarded as the antithesis of performance.

Described in this way, termination might seem out of place in a monograph that is concerned with performance. However, it deserves attention because the inverse relationship between termination and performance itself is instructive. In many cases, the greater the restrictions on the injured promisee's right to terminate, the stronger will be the commitment of the regime to the survival of the contract and to ensuring that performance is achieved. Conversely, the easier it is for him to exit from a contract, the less would seem to be the willingness to uphold contractual relations.

Analysis of termination also affords an opportunity to consider performance of the contract from an entirely different angle. The focus in the case law and literature is generally on the performance interest of the beneficiary of the promise, namely the promisee. It would be wrong, however, to assume that he is the only party to have an interest in performance. The promisor, as the party making the promise, may have his own 'interest in performing'. In many cases, he will have such an interest even when in default. Indeed, it will be whilst he is in default and faced with the prospect of the injured promisee seeking to terminate that his interest in performing is likely to have greatest relevance. As part of the discussion of termination and as a departure from the focus elsewhere in the book upon the injured promisee's performance interest, it is therefore instructive to consider this interest. Particular attention will be given to the extent to which the defaulting promisor can insist on performing his part of the bargain, whether by requiring a second chance to perform or otherwise resisting termination.

D Comparative Considerations

The three themes of this monograph, namely the protection in England of the performance interest, the reasons underlying the protection, and how the protection might be improved, will all be approached through comparative analysis of French law. There is good reason for the choice of France as the jurisdiction of comparison. Most notably, it provides significant scope for informative contrast. French remedies for breach of contract are notoriously protective of the performance interest, going far beyond their English equivalents. Whilst some commentators have sought to argue that the differences between the English and French remedial systems are more apparent than real, this monograph will submit that, both in theory

and in practice, the differences are profound. The reasons for the differences will be explored.

As well as demonstrating that the protection of the performance interest in England is relatively weak, comparative analysis of French contractual remedies will serve to debunk a number of justifications commonly advanced in England for restricting the availability of certain remedies. It will also inspire the suggestion of more performance-orientated solutions, albeit signalling a warning in those areas where the French approach has negative features or is not readily adaptable to the framework of English law.

The purpose of this monograph is not to argue that the protection of the performance interest in French law is better than, or should be followed by, English law. Any such approach would be unrealistic and futile. Unfamiliar doctrines and ideas can seldom be imported from one system to another so easily. Instead, the focus of the monograph is upon analysing English remedies for breach of contract by comparison with French law. It draws conclusions and makes suggestion which, without the benefit of comparative analysis, might not otherwise be apparent.

The comparative methodology followed in the monograph is one of 'functionality'.[26] Since legal systems that face similar problems do not necessarily structure their solutions in the same ways, and may also adopt different terminology, comparative questions have been considered in functional terms. The emphasis is on the function that the law under comparison aims to fulfil, whether it be the protection of the performance interest through compulsion, compensation, deterrence, or punishment. Little significance is attributed to jurisdiction-specific concepts. It is, therefore, of no consequence that the notion of 'performance interest' does not appear in the French legal vocabulary.

Few publications have attempted a comprehensive and detailed analysis of contractual remedies in England and France. The most renowned in England is Treitel's *Remedies for Breach of Contract*, published in 1988.[27] It presents a comparative account of contractual remedies, in particular specific remedies, compensation, the refusal to perform, and termination. The focus is on English, French, and German law. In France, the main work on the topic is Laithier's *Étude comparative des sanctions de l'inexécution du contrat*, published in 2004.[28] On the premise that economic efficiency features prominently in Anglo-American remedies, Laithier considers whether the same concept could be used in French law to establish a hierarchy of remedies. The principal focus of the study is on specific performance, compensation, restitution, and termination.

The comparative analysis that will follow is distinguishable from the works of Treitel and Laithier, most notably because the angle taken, the protection of the

[26] K Zweigert and H Kötz, *An Introduction to Comparative Law* (3rd edn, Clarendon Press: Oxford, 1998) 34. See the criticism of functionalism in R Michaels, 'The Functional Method of Comparative Law' in M Reimann and R Zimmermann (eds), *The Oxford Handbook of Comparative Law* (OUP: Oxford, 2006) 339.

[27] G Treitel, *Remedies for Breach of Contract: A Comparative Account* (Clarendon Press: Oxford, 1988).

[28] Y-M Laithier, *Etude comparative des sanctions de l'inexécution du contrat* (LGDJ: Paris, 2004).

performance interest, is both specific to this monograph and topical. Significant attention is devoted to the recent evolution of the protection of the performance interest in England. French case law is also explored in detail under the same light. A further separating feature is that the remedies analysed differ significantly. Remedial devices not previously considered from a comparative perspective, namely punitive damages and remedies agreed *inter partes*, are discussed at length.

This monograph also benefits from the recent publication of two reform projects[29] relating to the French law of contract.[30] They are the 'Proposals for Reform of the Law of Obligations and the Law of Prescription' prepared under the direction of Catala[31] and the 'Project of Reform of the Law of Contract' of the Ministry of Justice.[32] The first project, commonly referred to as the 'Catala proposals' (*l'avant-projet Catala*), is considered by many to be the most ambitious attempt at reforming the core areas of French private law since 1804.[33] It was drafted mainly by academics and aims to revise the articles of the French Civil Code relating to the law of contract, civil liability, unjustified enrichment, and prescription.[34] In some respects it affirms, and in others departs from, the existing code.[35]

The Catala proposals were written against the background of the bicentenary of the Civil Code. Whilst the Code is remarkable for its longevity, it is perceived by many French lawyers to be outdated and declining in influence abroad.[36] This perception is most acute in relation to the section on the law of obligations, which has barely changed since its enactment. The Catala proposals seek to modernize the Civil Code into a body of rules that is more attractive and exportable internationally.[37]

Since publication in September 2005 and with their subsequent translation into four different languages, the Catala proposals have generated much interest,

[29] See also another set of reform proposals that was presented to the Ministry of Justice in December 2008 by a Working Group led by Terré and the Senatorial Report 'Responsabilité civile: des évolutions nécessaires', Rapp. Sénat No 558, 2008–2009 presented in July 2010. These proposals are less well known, at least internationally, and have given rise to less discussion than those of Catala and the Ministry of Justice. They will not be discussed in this monograph.

[30] Note that the first project, the 'Proposals for Reform of the Law of Obligations and the Law of Prescription' is wider in scope than the second project, namely the 'Project of Reform of the Law of Contract'. The latter focuses on the law of contract exclusively, whereas the former considers other areas of the law of obligations, as well as the law of prescription.

[31] *Avant-Projet de Réforme du Droit des Obligations (Art 1101 à 1386 du Code Civil) et du Droit de la Prescription (Art 2234 à 2281 du Code Civil)* under the direction of P Catala, 22 Sept 2005 (Documentation Française: Paris, 2006). It has been translated from French into English by J Cartwright and S Whittaker: <http://www.justice.gouv.fr/art_pix/rapportcatatla0905-anglais.pdf> accessed 4 August 2011.

[32] Ministère de la Justice, *Projet de réforme du droit des contrats*, July 2008. The draft is available online at <http://www.dimitri-houtcieff.fr/files/projet_droit_des_contrats_blog8_2_.pdf> accessed 4 August 2011.

[33] S Vogenauer, 'The *Avant-projet de réforme*: An Overview' in J Cartwright, S Whittaker, and S Vogenauer (eds), *Reforming the French Law of Obligations, Comparative Reflections on the Avant-Projet de Réforme du Droit des Obligations et de la Prescription* (Hart Publishing: Oxford, 2009) 3.

[34] Title III of Book III of the Civil Code on Contracts and Conventional Obligations.

[35] Cartwright and Whittaker (tr) (n 31 above) 9–14.

[36] Vogenauer (n 33 above) 4.

[37] P Catala, 'General Presentation of the Reform Proposal', J Cartwright and S Whittaker (tr) (n 31 above).

both domestically and internationally. Academic comment and analysis has been extensive, including in a number of colloquia.[38] The proposals have been cited in court.[39] They have also given rise to major reports by the *Cour de cassation*,[40] the Paris Chamber of Commerce and Industry,[41] and the National Bar Council.[42] The reports were broadly supportive of the reforms and their purpose but suggested numerous amendments.[43]

The second project, the 'Project of Reform of the Law of Contract',[44] was published in 2008 and might be characterized as rival to the Catala proposals. It was drafted by a small working group comprising four judges and an academic lawyer. Being supported by the Ministry of Justice, it has become known as the 'Ministry of Justice project' (*Projet de la Chancellerie*).

The Ministry of Justice project has similar objectives to the Catala proposals, namely to render the Code more intelligible, accessible, and exportable.[45] It adopts and develops many of the same ideas, albeit going further on certain key aspects of the law of contract.[46] It also has a more comparative and international outlook. In some respects, it would bring French law closer to the laws of other European jurisdictions.

The response to the Ministry of Justice project has been mainly domestic and very mixed. By way of example, several academic lawyers have vehemently criticized its innovations and style.[47] The Chamber of Commerce and the National Bar Council have both published reports that are broadly supportive but contain proposals for amendment.[48]

[38] eg J Cartwright, S Whittaker, and S Vogenauer (eds), *Reforming the French Law of Obligations, Comparative Reflections on the Avant-Projet de Réforme du Droit des Obligations et de la Prescription* (Hart Publishing: Oxford, 2009).

[39] Vogenauer (n 33 above) 16.

[40] Cour de cassation, *Rapport du groupe de travail de la Cour de cassation sur l'avant-projet de réforme du droit des obligations et de la prescription* (2007) <http://www.courdecassation.fr/br_institution_br_br_1/autres_publications_discours_2039/discours_2202/groupe_travail_10699.html> accessed 4 August 2011.

[41] Chambre de Commerce et d'Industrie de Paris, *Pour une réforme du droit des contrats et de la prescription conforme aux besoins de la vie des affaires* (2006) <http://www.etudes.ccip.fr/telecharger?lien=sites%2Fwww.etudes.ccip.fr%2Ffiles%2Fupload%2Fprises-position%2Freforme-droit-des-contrats-kli0610.pdf> accessed 4 August 2011.

[42] Conseil National des Barreaux, *Projet de rapport du groupe de travail chargé d'étudier l'avant-projet de réforme du droit des obligations et du droit de la prescription* (2006).

[43] Vogenauer (n 33 above) 16.

[44] Ministère de la Justice, *Projet de réforme du droit des contrats*, July 2008 <http://www.dimitri-houtcieff.fr/files/projet_droit_des_contrats_blog8_2_.pdf> accessed 4 August 2011.

[45] D Mazeaud, 'Observations conclusives' RDC 2006.177, 179; P Catala, 'La Genèse et le dessein du projet' RDC 2006.11, 17.

[46] See for example arts 15–18 (codifying '*principes directeurs*' such as freedom of contract, *pacta sunt servanda*, and good faith), arts 49, 85–87 (abolishing the notion of '*cause*'), or art 136 on the consequences of supervening events.

[47] The *Revue des Contrats* organized a major colloquium on the Ministry of Justice project. The proceedings were published at RDC 2009.265 ff.

[48] *Projet de réforme du droit des contrats*, Lettre du conseil National des Barreaux no 59 (2008); Chambre de Commerce et d'Industrie de Paris, *Vers un droit des contrats modernisé et mieux adapté à la vie des affaires: Réaction de la CCIP à la consultation de la Chancellerie de juillet 2008* (2008); Vogenauer (n 33 above) 19.

Seemingly in order to take account of these and other comments, a new version of the Ministry of Justice project was drafted in 2009. Quite mysteriously, this new version was not extensively disseminated. The mystery is compounded by the relative dearth of articles reporting on the amendments. From the little information that has filtered through, it seems that the 2009 draft simplifies and makes a number of structural and substantive changes to the original text.[49]

Despite arousing interest, at the time of writing (August 2011) neither the Catala proposals nor the Ministry of Justice project has yet been implemented.[50] Moreover, it seems unlikely that either will be adopted in the near future. This is due in part to a lack of political enthusiasm for turning the projects into law.[51] Recent changes of government have undoubtedly slowed the process. The presidential election in 2012 is likely to cause still further delay.

Although the Catala proposals and the Ministry of Justice project appear to be some distance from the statute book, this monograph will nevertheless make reference to them. Lack of implementation should not be equated with a lack of significance. Both projects offer an excellent insight into the current state of French private law and its possible future direction.

E Reform at European Level

Proposals for reform are not only domestic. There are moves afoot towards a form of contract law harmonization or unification within the European Union. This reflects growing keenness on the part of the European institutions to develop a programme of European contract law that would go beyond the protection of consumers.[52] Any such programme is likely to apply in England and in France, both countries being EU Member States.

Although no Europe-wide contract law regime has hitherto been established, interest in the development of such a regime has been gathering pace for nearly two decades. An early example is an initiative entitled the 'Principles of European Contract Law'. First published in 1995, it was intended to serve as a set of general rules of contract law in the European Union. Another is the principles of the Acquis Group,[53] formulated on the basis of the *acquis communautaire*, in particular treaties, regulations and directives as interpreted by the courts.

The driving force behind the most recent and undoubtedly the most ambitious initiative is the European Commission. In its 2001 communication,[54] the

[49] J Ghestin, JCP 2009.I.138.

[50] Reform of the law of prescription has taken place through the *Loi no 2008-561 du 17 juin 2008 portant réforme de la prescription en matière civile*.

[51] Vogenauer (n 33 above) 17.

[52] L Miller, *The Emergence of EU Contract Law: Exploring Europeanization* (OUP: Oxford, 2011) Chap 4.

[53] The principles can be accessed online: <http://www.acquis-group.org/> accessed 4 August 2011.

[54] Commission 'Communication from the Commission to the Council and the European Parliament on European Contract Law' COM (2001) 398 final. For a summary of its evolution, see Miller (n 52 above).

Commission began a debate on the future of European contract law. It questioned whether differences between national contract laws hindered the operation of the internal market and sought views as to the way forward. Various options were mooted, ranging from doing nothing to adopting a new instrument at EU level.

In further communications,[55] the Commission has focused on, amongst other things,[56] developing a 'Common Frame of Reference' ('CFR') to establish 'common principles and terminology in the area of European contract law'.[57] An 'academic' Draft Common Frame of Reference ('DCFR') was published in 2008.[58] The DCFR is mainly composed of model rules that relate to general and special types of contract as well as other areas of private law. An example is unjust enrichment.[59] Considered as a preliminary document only, it is currently being scrutinized by the political institutions of the European Union. It is expected to be used as the basis for a 'political' CFR, meaning a document to be agreed between Member State representatives at a political level.[60]

A question of key importance is what purpose any CFR might serve. It was initially characterized as a 'toolbox' for the European institutions when making future legislation. The objective was to achieve greater consistency in the *acquis*.[61] Of late, the CFR's intended role seems to have shifted to that of an optional instrument, which contracting parties might choose to govern their relationship. In 2010, the Commission indicated in a Green Paper that it favours this latter function.[62] In doing so, it stressed that the instrument would operate alongside rather than replace the domestic contract laws of Member States.

[55] Commission, 'Communication from the Commission to the European Parliament and the Council, 'A More Coherent European Contract Law, an Action Plan' COM (2003) 68 final. See also Commission, 'European Contract Law and the revision of the Acquis: the Way Forward' COM (2004) 651 final ('The Way Forward').

[56] The Commission also focused on the review of the Consumer Acquis, see Commission, 'European Contract Law and the Revision of the Acquis: the Way Forward' COM (2004) 651 final, 3ff. This led to the publication of a Green Paper in 2007, and a proposal in 2008 for a 'framework directive' covering four directives and requiring full harmonization. See COM (2008) 614.

[57] Commission 'Communication from the Commission to the European Parliament and the Council, A more Coherent European Contract Law, an Action Plan' COM (2003) 68 final, para 4.1.1.

[58] A revised version with comments and notes was published in *Principles, Definitions and Model Rules of European Private Law—Draft Common Frame of Reference (DCFR)*, C Von Bar and E Clive (eds), Volume I (OUP: Oxford, 2010). For various reports published in England commenting on the DCFR, see European Union Committee—Twelfth Report 'European Contract Law: the Draft Common Frame of Reference' available at <http://www.publications.parliament.uk/pa/ld200809/ldselect/ldeucom/95/9502.htm> accessed 4 August 2011; S Whittaker, 'The "Draft Common Frame of Reference": An Assessment', report commissioned by the Ministry of Justice, United Kingdom (Nov 2008) available at <http://www.justice.gov.uk/publications/docs/Draft_Common_Frame_of_Reference__an_assessment.pdf> accessed 4 August 2011.

[59] See Volume IV, Book VII of the DCFR.

[60] Miller (n 52 above).

[61] The Way Forward (n 55 above) 3; H Beale, 'The Future of the Common Frame of Reference' (2007) 3 ERCL 257.

[62] Commission Green Paper on 'Policy Options for Progress towards a European Contract Law for Consumers and Businesses' COM (2010) 348, 7 ff.

Most recently, the Commission has instructed a group of experts to reformulate the DCFR into a text that might serve as such an optional instrument.[63] At the time of writing, this 'Expert Group' has just published a 'Feasibility Study', which includes text that could apply to business-to-consumer and business-to-business contracts. It would cover sale contracts and service contracts associated with sales. The document is now the subject of consultation.

There are still many uncertainties as to what the future may hold for European contract law. This monograph being an Anglo-French comparison of contract remedies, these uncertainties and the likely form of any eventual European instrument are outside of its scope. However, reference will be made to discrete aspects of the remedies currently proposed in the DCFR, with particular focus upon the extent to which English law and French law are consistent with them. As well as being a topical example of a model law,[64] the DCFR can be expected to serve as a point of reference for reflection on the development of national laws amongst lawmakers, academics, and practitioners for many years to come.

F The Monograph in Outline

1 The structure of the monograph

This monograph is divided into three parts. Part I is entitled 'The Specific Enforcement and the Discharge of Primary Obligations', and consists of two chapters. The first chapter considers remedies that uphold and enforce primary obligations to perform, namely the award of an agreed sum, specific performance, and injunctive relief. These remedies will be referred to generically as 'specific remedies'. The second chapter is concerned with the remedy that discharges primary obligations, namely termination. Part II is entitled 'The Secondary Obligation to Pay Damages'. Consisting of a single chapter, it focuses on compensatory damages, a remedy that arises from a great many breaches of primary obligations, whether or not they lead to the termination of the contract.

By using this structure, the monograph follows the division drawn by English lawyers between primary obligations and secondary obligations. This originates from a number of decisions of Lord Diplock.[65] The most well-known is his speech in *Photo Production Ltd v Securicor Ltd*,[66] in which he said:

[63] Commission 'Green Paper' (n 62 above), p 4; Synthesis of the Fourth Meeting, 1–2 September 2010, CFR Report available at <http://ec.europa.eu/justice/contract/files/fourth-meeting_en.pdf> accessed 4 August 2011: 'the chair reaffirmed the mandate of the group to work exclusively on the assumption of an optional instrument, while emphasising that no political decision concerning the options of the Green Paper, including whether to propose such an instrument has been taken'. By the time of the proof stage of this monograph, the Commission had published a proposal for a Regulation on a Common European Sales Law (COM (2011) 635 final) [hereafter 'CESL'] available at <http://ec.europa.eu/justice/contract/files/Common_Sales_Law/regulation-sales-law-en.pdf> accessed 20 October 2011.

[64] The DCFR will be the only model law considered in the monograph. Other uniformization projects such as the 'Principles of European Contract Law' or the UNIDROIT Principles are outside its scope. They will be referred to only in passing and without critical analysis.

[65] The source of this distinction can be tracked to Pothier: see P Birks, 'Rights, Wrongs, and Remedies' (2000) OJLS 1 and B Rudden, 'Correspondence' (1990) OJLS 288.

[66] [1980] AC 827 (HL).

[A] contract is the source of primary legal obligations upon each party to it to procure whatever he has promised will be done is done… Every failure to perform a primary obligation is a breach of contract. The secondary obligation on the part of the contract breaker to which it gives rise by implication of the common law is to pay monetary compensation to the other party for the loss sustained by him in consequence of the breach.[67]

This division has been cited in many subsequent cases and also in seminal works on contract law.[68] It has been described by some as 'central to the law of contractual relationships'.[69] Its adoption is intended to give the monograph a structure which will appear logical and familiar to the English lawyer. In addition, it reflects the fact that, although comparative, the monograph is written very much from a common law perspective.

Having examined primary and secondary obligations in Parts I and II respectively, the monograph turns in Part III to less familiar terrain. Entitled 'Enhancing the Protection of the Performance Interest', it moves away from remedies that already exist in English law. It looks towards remedial devices which do not yet play a role in English law but which, if there should be a desire to enhance the protection of the performance interest, may do so in the future. The first chapter in this Part considers punitive damages and the following chapter examines agreed remedies.

2 The arguments of the monograph in outline

This monograph will submit that the protection afforded to the performance interest in England is equivocal. Nowhere is this more apparent than in the context of the specific remedies that are considered in Chapter 1. These remedies can, in principle, be deployed to compel the defaulting promisor to perform his contractual obligations. In theory at least they have the potential to protect the performance interest comprehensively. However, specific remedies are by no means always available. In fact, certain key specific remedies are very much the exception rather than the rule. This contrasts markedly with France, where specific remedies are available as of right. The approach of English law will be critically assessed having regard to the divergence between England and France. Possible means of increasing the availability of specific remedies that are congruous with the historical and commercial roots of English law will be explored.

The discussion of termination in Chapter 2 will reinforce the argument that the protection in English law of performance is equivocal. It will be shown that English law confers a relatively wide right to terminate on the injured promisee. In so doing, it facilitates his exit from his contractual obligations and enhances his ability to find alternative performance elsewhere. The ability to dissolve the

[67] *Photo Production Ltd v Securicor Ltd* [1980] AC 827 (HL) 848.

[68] The distinction is adopted in eg E Peel, *Treitel on the Law of Contract* (12th edn, Sweet & Maxwell: London, 2007), H Beale (ed), *Chitty on Contracts* (30th edn, Sweet & Maxwell: London, 2008).

[69] D Campbell, R Halson, and D Harris, *Remedies in Contract and Tort* (2nd edn, CUP: Cambridge, 2005) 7.

contract is much more fettered in France, where there is a clear desire to give the defaulting promisor a second chance and to uphold contractual relationships at all costs.

Another manifestation of the limited protection afforded by English law to the performance interest is evident in the rules relating to compensatory damages, which are addressed in Chapter 3. Emphasis will be placed on damages which cure breach being subject to a requirement of reasonableness, the narrow availability of damages for non-pecuniary loss, and the principle of loss mitigation. None of these restrictions apply in France, where compensatory relief is directed towards the full protection of the performance interest.

Notwithstanding these restrictions, there has been a degree of acknowledgement in recent English authorities that the protection afforded to the performance interest by compensatory damages can be deficient. This acknowledgement has translated into a more flexible approach to breach of contract, including the creation of exceptions to the general principle that non-pecuniary loss does not sound in damages, the suggestion that loss may comprehend defeated expectations, and the introduction of gain-based monetary awards. It will be submitted that these steps, although tentative, may signal the beginnings of a move towards more comprehensive protection of the performance interest.

In view of the willingness lately exhibited by English courts to reinforce the protection of the performance interest, Chapter 4 sees the focus of the monograph turn to how English law remedies for breach of contract may evolve in the future. Momentum has been growing in academic circles in favour of the introduction of punitive damages as a remedy for breach of contract. The far-reaching and potentially incoherent consequences that may attend such a development will be considered by reference to recent developments in France, where the introduction of punitive damages is also under contemplation.

Chapter 5 continues the theme of possible future developments in English law by suggesting a further means of enhancing the protection of the performance interest, namely the recognition and enforcement of remedies agreed *inter partes*. This solution would uphold the fundamental principle of freedom of contract and allow contracting parties to prescribe solutions tailored to their own idiosyncratic circumstances where the default regime of remedies is perceived to be inadequate. Drawing upon the preceding review of English law remedies for breach of contract, consideration will be given to contractual terms which provide for remedies such as specific relief, cost of cure damages, gain-based awards, and punitive damages.