



# AN ALTERNATIVE APPROACH: PRIVATE LAW IN THE COMMON LAW SYSTEM

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## ABSTRACT

*The Common Law appears to present a sharp contrast to codified systems. The judge-made law seemingly adopts piecemeal solutions that are not always consistent, and that, despite the system of precedent, are subject to revision by the courts. Legislation on contract, tort, and unjust enrichment is also piecemeal or (as with the Sale of Goods Act) only partial. However, it can be argued that the Common Law has developed principles that may be applied unless there is good reason not to do so; that sudden changes are prevented by a process of incremental development and by a close-knit legal profession that shares values; and that the Common Law has flexibility, adopts a pragmatic approach, and accommodates policy concerns in an open fashion. Nevertheless, instances of ‘judicial reform’ of the law exist to enable parties to achieve what they want. This system seems well suited to the ‘commercial’ nature of English law, in particular with its aim to be ‘the law of choice’ for international transactions. However, the legal profession shows no enthusiasm for codification.*

**Keywords:** *Common Law; law of obligations; case law; precedent; law reform.*

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## 1. INTRODUCTION

As a common lawyer, I understand the many advantages of civil codes. They present a largely complete system of private law, one that is usually coherent and logical. Such a law will be accessible to courts and practitioners, who should be provided with ready guidance: in principle, at least, they should be able to deduce the answers to the issue before them from the provisions of the code. The code can be drafted in terms that are understandable to at least some citizens: the Napoleonic Code, for example, has been hailed as ‘*a people’s law*’.<sup>1</sup> Nevertheless, in actual practice, things are not always so clear-cut. Many codes are not complete in the sense that they do not address all the issues of private law that courts have to deal with and therefore have to be supplemented by case law, often grounded on a general clause of the code. Furthermore, inconsistencies may exist. The articles may often be at a level of generality that necessitates extensive judicial interpretation to reach concrete results. In fact, not all codes are drafted in a way that non-lawyers can understand them. Nonetheless, a code can provide a fairly complete picture of at least the main ideas of a jurisdiction’s private law.

Private law in the Common Law systems presents a completely different picture. It is nearly all judge-made. This may be true of the general part of contract law, of tort (civil responsibility), and of unjust enrichment. The law is contained in case law that has developed over hundreds of years.

This system appears to have its own disadvantages, some of which I will introduce in next section of my paper, although later I will argue that at least some of the points are as much strengths as weaknesses.

1 Lobingier, 1918, pp. 131–132.

## 2. SOME CHARACTERISTICS OF THE ENGLISH COMMON LAW

### 2.1. MULTIPLE SETS OF RULES<sup>2</sup>

First, the Common Law has not always been considered a particularly coherent system. Historically, even Royal Justice was administered by several courts – Common Pleas, Exchequer, and King’s (or Queen’s) Bench – all of which purported to apply the Common Law but frequently adopted somewhat different approaches. These differences are now a matter of history – the three Common Law courts were amalgamated in the 19th century, with only the Queen’s Bench surviving simply because the Chief Justice of that court outlived the Chief Justices of the other two courts. However, the effects of the division between the courts of Common Law<sup>3</sup> and the courts of equity continue to prevail. The Chancellor, who administers the courts of equity, developed rules of equity to supplement and sometimes correct the Common Law. A plaintiff who is unable to get an adequate remedy through Common Law might be able to get one by going to the court of Chancery. For example, in Common Law, a party could avoid a contract on the ground that it had been induced by the other party’s fraud, but a party is said to have committed fraud only if they said something that they knew to be untrue, or were reckless about not verifying its likelihood of being false.<sup>4</sup> Equity took a wider view and ultimately accepted that a contract could be set aside for *innocent* (i.e., non-fraudulent) misrepresentation.<sup>5</sup> Since the Judicature Acts, all courts have to apply both systems, and the Supreme Court

2 For a fuller account of the material in this section, see Zweigert, Kötz, 1998, pp. 198–199. The authors provide references for further reading.

3 Note that the phrase ‘Common Law’ is often used in at least two different senses: common law as distinct from, say, civil law, and common law as distinct from equity.

4 *Derry v Peek* (1889) 14 App. Cas. 337.

5 *Redgrave v Hurd* (1881) 20 Ch. D. 1.

of Judicature Act 1873 provides that the rules of Equity will prevail.<sup>6</sup> However, difficulties persist in terms of the differences between the rules of equity and of the Common Law. For example, there is an ongoing debate over whether a contract that was induced by an innocent misrepresentation can be avoided by the misrepresentee giving notice to the misrepresenter, or can only be set aside by a court order.<sup>7</sup> Had our law been codified, these differences would have been easily sorted.

## 2.2. INDUCTION BEFORE DEDUCTION

Second, the process of reasoning that lawyers employ in the Common Law system is different from that in the code system, and the former may seem more complex. It is not a question of deducing the answer from a general principle set out in the code. In the Common Law, the lawyer may have to identify the underlying principle (if there is one...) by looking at all the individual cases, a process of induction from the particular to the general. Only then can the lawyer begin to deduce the answer to the problem from that general principle.

6 s 25(11).

7 In *SK Shipping Europe Plc v Capital VLCC 3 Corp* [2020] EWHC 3448 (Comm) at [240]–[242], Foxton J suggested that, in balancing of a large number of conflicting authorities, a court order is not required for rescission at common law for fraud, but is required for rescission in equity, although if ordered, the rescission will be retrospective to when the misrepresentee gave notice. However, it can be argued that Parliament has adopted the view that rescission for non-fraudulent misrepresentation is effected by notice to the other party, as the wording of s.2(2) of the Misrepresentation Act 1967, ‘if it is claimed ... that the contract ought to be or has been rescinded’, would seem inappropriate were a court order required: see Beale, 2023, paras. 10–131. When the *SK Shipping* case went to the Court of Appeal, the point was left for another case to decide: [2022] EWCA Civ 231, [2022] 2 All E.R. (Comm) 784 at [91]. In *IGE USA Investments Ltd v Revenue and Customs Commissioners*, [2021] EWCA Civ 534, [2021] Ch. 423 at [91] Henderson LJ remarked that, ‘... whether, or to what extent, or in what sense, rescission in equity for fraud is properly to be characterised as a self-help remedy which does not require the intervention of the court ... is a notoriously difficult subject, on which the authorities are in such a state of disarray that, in my judgment, only the Supreme Court can reconcile them.’

### **2.3. PRECEDENTS THAT MAY BE DISTINGUISHABLE**

Third, the Common Law works on a system of precedent, with exceptions that I shall return to later, and courts are bound to follow prior decisions. However, this applies only when the facts of the previous case are the same as the earlier case. If the earlier case can be ‘*distinguished*’, it is not binding. A great debate may arise about whether the facts of the earlier and of the present case are sufficiently similar such that the two cases are indistinguishable, and very often this has to be settled by a court ruling one way or the other.

### **2.4. RELUCTANCE TO ADOPT GENERAL PRINCIPLES**

Fourth, development occurs in slow increments, and the courts are reluctant to decide more than is essential to resolve the particular case before them. They are particularly reluctant to adopt general principles, especially in contract law. As Lord Justice Bingham said when discussing the continental principle of good faith,

*In many civil law systems, and perhaps in most legal systems outside the common law world, the law of obligations recognises and enforces an overriding principle that in making and carrying out contracts parties should act in good faith [...] English law has, characteristically, committed itself to no such overriding principle but has developed piecemeal solutions in response to demonstrated problems of unfairness.<sup>8</sup>*

### **2.5. NO OVERALL REVIEW**

Fifth, perhaps the biggest disadvantage is that private law has never been reviewed as a whole, and oftentimes it appears incoherent in terms of policy. Indeed, a cynic would say that English law has never been put

8 *Interfoto Picture Library Ltd v Stiletto Visual Programmes Ltd* [1989] Q.B. 433, 439.

into logical order since the mediaeval period when the law was set out in Abridgements comprising a list of legal topics in alphabetical order.<sup>9</sup>

## 2.6. INACCESSIBILITY

Last, because so many of the laws have to be derived from the cases, they prove to be largely inaccessible to anyone without a legal training.

# 3. LEGISLATION IN ENGLISH PRIVATE LAW

## 3.1. PIECEMEAL REFORMS

Of course, these statements that I have made can be qualified. Perhaps, the most important point is that English private law now involves a significant amount of legislation. However, in the fields of general contract law, tort, and unjust enrichment the legislation deals only with specific issues where reform was required, for example, to allow contractual rights to be conferred on third parties,<sup>10</sup> to deal with the liability of occupiers of land,<sup>11</sup> and to deal with the effects of when a contract has been *frustrated* because performance has become factually or legally impossible.<sup>12</sup> Moreover, these reforming statutes are still interpreted as if they were intrusions on the Common Law.<sup>13</sup> Statutes only change the law as far as necessary to provide effect to the express wording or implication of the statute. The implication of the statute may now be

9 The best-known example may be *La grande abridgement: collect par le judge tres-reuerend monsieur Anthony Fitzherbert* (1565) (written in the 'law French' still used at the time): see <https://lawlibguides.usc.edu/c.php?g=777451&p=5675046> (accessed: 04 September 2024).

10 Contracts (Rights of Third Parties) Act 1999.

11 See the Occupiers Liability Acts of 1957 and 1984.

12 Law Reform (Frustrated Contracts) Act 1943.

13 See Zweigert, Kötz, pp. 265 et seq.

deduced from its purpose,<sup>14</sup> but it is not possible for an English court to use a statute as the basis for an analogical development of the Common Law.<sup>15</sup>

### 3.2. PARTIAL 'CODIFICATIONS'

It is true that during the 19th century, England adopted a number of what are sometimes termed '*codifications*'. These were attempts to restate areas of law that had become a confusing mass of cases. Thereby, we had the Bills of Exchange Act 1882, Partnership Act 1890, and the Sale of Goods Act 1893. The first two Acts have largely retained their original form; the Sale of Goods Act has been modified several times and was replaced by an updated version in 1979. However, these Acts are not codes in the civil law sense, nor even American-style restatements of the law. They are incomplete and have to be supplemented by the principles of Common Law and Equity<sup>16</sup> and, like the specific statutes mentioned earlier, they are interpreted literally and narrowly. They are not drafted with the aim of being understandable to the non-lawyer.

Nevertheless, this approach changed somewhat during the 20th and 21st centuries. The Supply of Goods and Services Act 1982 was principally aimed at making the law accessible to consumers. It no longer applies to consumers because their rights in terms of when goods, digital content, or services are now set forth in the Consumer Rights Act 2015. The 2015 Act was also supposed to be drafted in a way that it could be understood by non-lawyers, although in my view it is little better than the earlier Acts. Moreover, the Consumer Rights Act is still incomplete.

14 Ibid., pp. 266–267.

15 Compare the way in which the *obligation de renseignement* was developed in French law, partly by analogy to legislative provisions: see Ghestin, 1993, 151 et seq.

16 For example, the Sale of Goods Act 1979 s 62(2) provides that 'The rules of the common law, including the law merchant, except in so far as they are inconsistent with the provisions of legislation including this Act ... apply to contracts for the sale of goods'. The Act says nothing about offer and acceptance or about the grounds on which a sale contract can be set aside, such as misrepresentation or duress.

Where provisions of the Sale of Goods Act were still to apply equally to consumers and other parties, they were not repeated in the Consumer Rights Act, which thus has to be supplemented by the Sale of Goods Act; and both Acts have to be supplemented by the principles of Common Law and Equity.

### 3.3. AN ATTEMPT TO CODIFY CONTRACT LAW

The philosopher Jeremy Bentham called for a proper codification of English law, but nothing came of it.<sup>17</sup> However, there has been an attempt to codify at least the general part of contract law. In 1965, the Law Commissions Act established permanent Law Commissions for England and Wales and for Scotland. One of their early undertakings was a joint project between the two Law Commissions to codify general contract law, and a contract code was drafted by the late Professor Harvey McGregor. However, in 1972 the project was abandoned, partly because the commissioners on each side had irreconcilable views on the substance of the law. For example, on the English side it was accepted that the new law should do away with the old doctrine of consideration, which means that an agreement does not amount to a contract unless it involves an actual or promised exchange: under the new code, the promise of a gift, if the promise was accepted by the donee, is equivalent to a contract. The Scottish law already recognised that a gratuitous promise may create an obligation,<sup>18</sup> but the Scottish commissioner insisted that this could not be a contract; it must be treated separately as a '*pollicitatio*'.<sup>19</sup> However, the biggest problem arose when the English Commission prepared the draft for the legislation. As is traditional in England, this work was done by specialist government lawyers known as Parliamentary Counsel. Parliamentary Counsel traditionally take the approach that the legislation should provide answers to every possible situation.<sup>20</sup>

17 See Zweigert, Kötz, p. 197.

18 The promise now has to be in writing to be enforceable, unless it is made in the context of a business: Requirements of Writing (Scotland) Act 1995, s 1(2)(a)(ii).

19 See Gower, 1973, pp. 257, 264; see also North, 1982, pp. 493–494.

20 See Zweigert, Kötz, p. 267.

As a result, provisions that in McGregor's draft required a couple of short paragraphs were sometimes replaced by several pages of text. As one of the Scottish law commissioners put it to me, the English did not want a code, they wanted a statute. When the project was abandoned, the draft produced by McGregor remained unknown until Professor Gandolfi, who had convened a group to work on a European Contract Code,<sup>21</sup> arranged for it to be published in Italy.<sup>22</sup>

More recently, Professor Sir Roy Goode argued that we should adopt a commercial code,<sup>23</sup> just as was done in the United States; Dame Mary Arden, a former Chair of the Law Commission for England and Wales and until recently a Justice of the Supreme Court, also agrees with this.<sup>24</sup> However, neither the judges nor the practitioners seemed enthusiastic about the project as they believed that the law is perfectly understandable and works well enough as it is. The same belief in the excellence of English sales law seems to underlie the U.K.'s reluctance to adopt the Vienna Convention on the International Sale of Goods. Why adopt a new system of rules when we already have a perfectly good one?

### **3.4. WORKING WITHOUT A CODE: PROBLEMS AND ADVANTAGES**

I need to address two questions to clarify this. First, how do we manage without a code? Second, why is there no real enthusiasm for a code? It is true, as Zweigert and Kötz<sup>25</sup> have pointed out, that there has never been a political need for a code. England and Wales have been a single legal unit since the 16th century, and England has been one since the 12th century if not earlier. The nearest we have had to a revolution – be it the restoration of the monarchy in 1660 or the '*Glorious Revolution*' of 1689, when James II was deposed and was replaced by Mary II and her

21 Prepared by the Academy of European Private Lawyers, see <https://www.eurconcontrats.eu/acd2/> (accessed: 04 September 2024).

22 McGregor, 1993. For the surprise felt when McGregor revealed the text, see the Preface to the Code, p. vi.

23 Goode, 1988, p. 135.

24 Arden, 2015, ch 13.

25 Zweigert, Kötz, p. 181.

husband William or Orange – occurred years before codification became a fashion. Therefore, there has never been the need to adopt a code for political reasons such as to reinforce unification.

However, English law prizes itself for its certainty. Is the Common Law not a recipe for uncertainty?

I will take the questions of how we manage and the problems and possible advantages of a Common Law system together and suggest a number of possible answers. Some of these may suggest that the differences between codified systems and the Common Law are exaggerated, while some of the differences may indicate the strengths of the Common Law rather than its weaknesses.

### 3.5. PRINCIPLES IN THE COMMON LAW SYSTEM

Even in a caselaw system, the courts frequently develop principles, sometimes of considerable width. A well-known example is the general rule of liability in tort (i.e., civil responsibility) for negligence that was laid down in the case of *Donoghue v Stevenson*.<sup>26</sup> The plaintiff was injured when she consumed a part of a bottle of ginger beer (a soft drink) that had been bought for her by a friend, before discovering that the remaining ginger beer contained the decomposed remains of a snail (allegedly – the law was discussed as a preliminary point, and the case was settled before any findings of fact had been made). Previous caselaw suggested that a consumer would have an action against the manufacturer only if the defect had been known to the manufacturer or if the product was inherently dangerous (e.g., a gun);<sup>27</sup> otherwise, the manufacturer was considered to owe a duty only to the party with whom it had a contractual

26 [1932] AC 562. Like a number of other famous tort cases, the case was technically decided on Scots law, but, unlike the law of contract, the law of negligence is the same on both sides of the border.

27 See [1932] AC 562, 569.

relationship.<sup>28</sup> In *Donoghue v Stevenson*, the House of Lords accepted that a consumer who had been harmed by a product that was defective because of negligence on the part of the manufacturer would have an action in tort against the manufacturer. However, the case is now better known for a broader principle stated by Lord Atkin, building on and rationalising the caselaw, the so-called ‘neighbour principle’:

*[...] in English law there must be, and is, some general conception of relations giving rise to a duty of care, of which the particular cases found in the books are but instances. The liability for negligence, whether you style it such or treat it as in other systems as a species of ‘culpa’, is no doubt based upon a general public sentiment of moral wrongdoing for which the offender must pay. But acts or omissions which any moral code would censure cannot in a practical world be treated so as to give a right to every person injured by them to demand relief. In this way rules of law arise which limit the range of complainants and the extent of their remedy. The rule that you are to love your neighbour becomes in law, you must not injure your neighbour; and the lawyer’s question, ‘Who is my neighbour?’ receives a restricted reply. You must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour. Who, then, in law is my neighbour? The answer seems to be – persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or omissions which are called in question.<sup>29</sup>*

Over the years, this principle has been accepted to the extent that there is always a duty to take care to avoid causing personal injury or property damage, unless there is some particular policy reason why there should not be liability in a particular situation.<sup>30</sup> However, as we will see, it has

28 The so-called contract fallacy. Probably the manufacturer had a contract with a wholesaler, or possibly with the retailer. The purchaser would have had an action in contract against the retailer (the owner of a café, who had sold her the ginger beer); but it was not the purchaser who suffered the personal injury.

29 [1932] AC 562, 580.

30 See *Robinson v Chief Constable of West Yorkshire Police* [2018] UKSC 4, [2018] AC 736 at [83].

not been applied when negligence has caused purely economic loss, that is, financial loss not resulting from an injury to the claimant or damage to the claimant's property; in such cases, liability exists only if the defendant had assumed responsibility for the claimant<sup>31</sup> or the parties were in a close relationship of some kind.<sup>32</sup>

General principles have been developed by academic and practitioner authors. Text books have no formal authority in English law, which has no equivalent to the notion of 'doctrine' in French law. For much of the last century, it was uncommon for academic writing and similar secondary sources to be cited in court – indeed, as a student, I was taught that it was not permissible to cite the work of a living author, only that of a dead one, because a living author might change his or her mind. I am glad to say that this has changed, and doctrinal writing is now cited regularly. More importantly, however, the courts have adopted principles that were developed by academic writers. Perhaps the best example in recent times is the courts' adoption of the principles of restitution that were set out in the works of writers such as Goff and Jones<sup>33</sup> and Birks.<sup>34</sup>

### 3.6. PRECEDENT

The doctrine of precedent may seem to be of limited effect when it can be argued that the earlier case involved different facts;<sup>35</sup> nonetheless, the doctrine has the effect of making judge-made laws become much more predictable and manageable. Our Supreme Court (formerly the House of Lords), at one time, held the view that it was bound by its own previous decisions.<sup>36</sup> This changed in 1966,<sup>37</sup> and the Supreme Court has

31 See *Henderson v Merrett Syndicates Ltd* [1995] 2 AC 145.

32 E.g., *Smith v Eric S. Bush* [1990] 1 A.C. 831.

33 See Mitchell, Mitchell, Watterson, 2022.

34 Birks, 1985; Birks, 2005.

35 See above.

36 E.g., *London Tramways Co Ltd v London County Council* [1898] AC 375.

37 See the Practice Statement of 16 July 1966, [1966] 1 WLR 1234.

reversed its own decisions on many occasions,<sup>38</sup> although it normally does so only after a hearing before a greater number of justices than is usual. However, the Court of Appeal is bound by its own decisions unless the decision is inconsistent with a decision of the Supreme Court.<sup>39</sup> High Court judges are not obliged to follow each other's decisions though they commonly do so and, if they disagree with a fellow judge, they would be expected to explain clearly why. Decisions of the county court and lower courts do not set precedents – in that sense, these courts are not '*Courts of Record*' – and are not normally reported.

### **3.7. A SMALL AND COHESIVE GROUP OF HIGHER COURT JUDGES AND ADVOCATES**

England's judiciary is relatively small in number, especially the number of judges who sit in the Courts of Record. The High Court has three divisions. The King's Bench Division, to which most cases focussed on private law obligations will be assigned, has 71 judges; the Chancery Division, which deals primarily with property disputes and company law matters, has 18; and the Family Division has 19. The Court of Appeal has only 40 judges; and the Supreme Court, which, for normal cases sits in panels of 5 Justices, has 12 justices in total. These figures are slightly misleading, in that senior barristers are often brought in to sit as deputy judges, and retired judges are brought back to help out in the High Court and the Court of Appeal; nonetheless, the numbers are quite small. The senior judiciary is also a fairly cohesive body; nearly all

38 A well-known example is *British Railways Board v Herrington* [1972] AC 877, in which the House of Lords, overruling the earlier case of *Robert Addie & Sons (Collieries) Lt. v Dumbreck* [1929] A.C. 358, decided that in some situations, an occupier of land may be liable for injuries sustained by a trespasser on the land. See also the case of *Murphy v Brentwood District Council* [1991] 1 AC 398, discussed below.

39 See *Young v Bristol Aeroplane Co Ltd* [1944] KB 718, 730–731. If the court decides that two of its own decisions conflict, it must decide which to follow; and it can refuse to follow a decision that was '*incuriam*', i.e., made without knowledge of legislation or binding caselaw, which means that the decision must be wrong.

judges on it have been senior practitioners, principally at the Bar, which is itself quite small.

Advocacy in the higher courts is mostly done by barristers. The Bar Standards Board says that it currently regulates 17,357 practising barristers.<sup>40</sup> Since 1990,<sup>41</sup> it has been possible for solicitors to obtain the right to represent their clients in the higher courts,<sup>42</sup> rather than engaging a barrister to do so; according to the Solicitors Regulation Authority, in July 2023, some 4,174 solicitors had Higher Rights of Audience in the civil courts.<sup>43</sup> However, the number of barristers and solicitors who regularly appear in the higher courts is much smaller than these figures might suggest.

This means that the Bench and the Bar form a fairly small group, largely a cohesive group that shares values, understandings of ‘*how things should be done*’, and many social attitudes. Indeed, the Bar has long tried to inculcate cohesiveness among its recruits. Every barrister must belong to an Inn of Court, and all new entrants must both attend training sessions and eat a number of dinners at their Inn – although the number of dinners that is compulsory has gradually been reduced now to ten.

### 3.8. CLOSE RELATIONSHIP BETWEEN BENCH AND BAR

A close working relationship also exists between judges and advocates,<sup>44</sup> reinforced by professional standards. The Bar Standards Board Handbook<sup>45</sup> sets out an advocate’s ‘*core duties*’, the first of which is the duty to

40 <https://www.barstandardsboard.org.uk/for-the-public/about-barristers.html> (accessed: 28 August 2023).

41 Courts and Legal Services Act 1990, s.17.

42 See The Solicitors’ Higher Rights of Audience Regulations 2010.

43 [https://www.sra.org.uk/sra/research-publications/regulated-community-statistics/data/higher\\_rights\\_of\\_audience/](https://www.sra.org.uk/sra/research-publications/regulated-community-statistics/data/higher_rights_of_audience/) (accessed: 04 September 2024).

44 See also Zweigert, Kötz, pp. 192–193.

45 Now in Version 4.6 (December 2020): see <https://www.barstandardsboard.org.uk/the-bsb-handbook.html?part=E3FF76D3-9538-4B97-94C02111664E5709&audience=&csrfToken=D0F1DEC03D5EED1AC759BB11E8539CF1&q=> (accessed: 04 September 2024).

the court; this overrides all the other core duties,<sup>46</sup> even the duty to act in the best interests of each client. The duty to the court includes the duty to ‘take reasonable steps to ensure that the court has before it all relevant decisions and legislative provisions’,<sup>47</sup> including decisions and provisions that are unfavourable to the advocate’s case. I suspect that the close working relationship is strengthened by the fact that advocates appear in person to argue their case. Although a written ‘skeleton’ argument is now required for trials in both the higher courts and appeals,<sup>48</sup> hearings normally involve oral argument over any points of law that arise. The close relationship between judges and advocates almost certainly implies that, in any given case, the lawyers will have a clear sense of the kind of arguments that are likely to be considered carefully by the court, as is the range of likely outcomes. This makes the outcomes more predictable.

### 3.9. INCREMENTAL DEVELOPMENT

The development of the Common Law is also controlled by the strong preference of the courts for incremental development, as opposed to sweeping change. The Supreme Court frequently states its preference for incremental change: as Lord Reed put it in a recent case on the law of negligence,

*where established principles do not provide an answer [...] the characteristic approach of the common law in such situations is to develop incrementally and by analogy with established authority.*<sup>49</sup>

This is of course linked to its preference for ‘particular solutions’ to observed problems, which I noted earlier.

46 Rules C3 and C4.

47 Rule C3.4.

48 Practice Direction 52A, Section V.

49 *Robinson v Chief Constable of West Yorkshire Police* [2018] UKSC 4, [2018] AC 736 at [27]; see likewise Lord Mance at [83].

### 3.10. CERTAINTY AND UNCERTAINTY IN THE LAW

The preference for incremental development could be attributed to the fear that adopting a broad standard will lead to uncertainty. Take for example what Moore-Bick LJ, until his retirement a couple of years ago one of our leading commercial judges, said of a trial judge's attempt to solve a problem by applying a principle of good faith:

*[...] the better course is for the law to develop along established lines rather than to encourage judges to look for what the judge in this case called some 'general organising principle' drawn from cases of disparate kinds [...] There is [...] a real danger that if a general principle of good faith were established it would be invoked as often to undermine as to support the terms in which the parties have reached agreement.<sup>50</sup>*

We need to be careful over what we mean by 'certainty'. It is not as if an English lawyer can always tell what the law is on a particular point. With no clear authority, it may be difficult to tell whether a court can be persuaded to take even an incremental step in order to impose liability, or will refuse to do so. Moreover, courts have been known to reverse direction.

A good example of this, and of the courts rejecting a general principle in favour of incremental change only, is provided by cases on liability in tort for 'pure economic loss' caused by negligence, that is, where the defendant's negligence has caused neither physical injury to the claimant nor any loss or damage to the claimant's property, but caused only financial loss to the claimant.

To provide a brief summary, *Donoghue v Stevenson* involved a negligent act leading to physical injury. The original decision was about the liability of manufacturers for defective products, but the courts gradually came to accept Lord Atkin's 'neighbour principle' as a guideline to be applied in deciding whether there should be a 'duty of care' in novel

50 *MSC Mediterranean Shipping Co SA v Cottonex Anstalt* [2016] EWCA Civ 789, [2016] 2 Lloyd's Rep. 494 at [45].

situations.<sup>51</sup> As I have said earlier, it is now generally the case that a defendant who has acted carelessly and has caused physical injury or property damage directly to a plaintiff will be liable, provided, first, that it was foreseeable that the plaintiff might be injured in the way it occurred, and second, that there is nothing in the relationship between the parties, or in a network of contracts of which they both part,<sup>52</sup> to suggest that the normal duty should not apply. However, where the defendant's negligence was a case of carelessness leading only to financial loss, it had for long been considered that there was no liability in tort; the plaintiff could recover only if it could be shown that the defendant had broken a contract under which he was obliged to use care in giving information.

However, in 1963, the House of Lords held in the case of *Hedley Byrne & Co Ltd v Heller & Partners*<sup>53</sup> that there might be liability in tort for economic loss caused by a negligent misstatement, if a sufficiently close relationship existed between the parties. This remains the case, at least where it can be said that the defendant voluntarily assumed responsibility towards the claimant,<sup>54</sup> and if the defendant gave the incorrect information knowing, at least in general terms, by whom the information would be acted on and for what purpose.<sup>55</sup>

At one time, liability for pure economic loss seemed to be more extensive: in particular, it was thought that there would be liability when a plaintiff bought a house that a defendant had negligently built or allowed to be built in a dangerously defective fashion. In *Dutton v*

51 E.g., in *Home Office v Dorset Yacht Co Ltd* [1970] AC 1004, Lord Reid said that the neighbour principle 'is not to be treated as if it were a statutory definition. It will require qualification in new circumstances. But I think that the time has come when we can and should say that it ought to apply unless there is some justification or valid explanation for its exclusion'.

52 E.g., *Norwich City Council v Harvey* [1989] 1 WLR 828 (CA).

53 [1964] AC 465.

54 See *Henderson v Merrett Syndicates Ltd* [1995] 2 AC 145. There will be no liability if the defendant disclaims responsibility, as in *Hedley Byrne v Heller* itself, although see *Smith v Eric S Bush* [1990] 1 A.C. 831, in which the disclaimer was held to be unreasonable and therefore invalid under Unfair Contract Terms Act 1977, s 2(2).

55 *Caparo Industries plc v Dickman* [1990] 2 AC 605.

*Bognor Regis Urban District Council*,<sup>56</sup> the defendant Council had statutory power to inspect the foundations of houses under construction, but its surveyors negligently failed to stop the house in question being built on inadequate foundations, in contravention of building regulations. The Court of Appeal allowed a subsequent owner of the house to recover the cost of repairing it from the Council. Lord Denning MR and Sachs LJ were prepared to treat the loss as physical damage;<sup>57</sup> they said that the builder should have been equally liable. The third member of the court, Stamp LJ, agreed that the Council was liable but did not agree that the builder was liable: he considered that the complaint against the builder was essentially that the plaintiff had bought an inferior product, which might have been a contractual liability had there been a contract between the parties (there was no contract between them in this case) but not liability in tort for negligence.<sup>58</sup>

The liability of councils in similar circumstances came before the House of Lords in *Anns v Merton London Borough Council*.<sup>59</sup> The House of Lords said that the neighbour principle should apply unless there were ‘considerations which ought to negate, or to reduce or limit the scope of the duty or the class of person to whom it is owed or the damages to which a breach [...] may give rise’,<sup>60</sup> and held that, as the purpose of the statutory powers was to ensure that houses were built in compliance with the building regulations, the Council would be liable for the cost of any repairs necessary to remove any danger to the health and safety of the occupants through non-compliance if negligence on the part of the Council or its employees was proven.

However, during the 1980s, opinion in the House of Lords changed. In a number of cases, liability for economic loss was denied, and it was said that Lord Wilberforce’s two-stage test was not appropriate for such cases. For example, in *Caparo v Dickman*,<sup>61</sup> the House of Lords said that the ‘neighbour principle’, as developed in the *Anns* case, should not apply

56 [1972] 1 QB 373.

57 See [1972] 1 QB 373, 396, 403–404.

58 See [1972] 1 QB 373, 414–415.

59 [1978] AC 728.

60 Lord Wilberforce at [1978] AC 728, 752.

61 [1990] 2 AC 605.

to cases of pure economic loss; the law should develop novel categories of negligence incrementally and by analogy with established categories, rather than by a massive extension of a prima facie duty of care restrained only by indefinable ‘considerations which ought to negate, or to reduce or limit the scope of the duty or the class of person to whom it is owed’.<sup>62</sup> Further, in *Murphy v Brentwood District Council*,<sup>63</sup> the House of Lords overruled its own earlier decision in *Anns*, and held that if the defect had not caused personal injury, neither the local authority nor the builder would be liable in negligence to the houseowner. As Stamp LJ said in *Dutton v Bognor Regis UDC*, the loss their negligence had caused to the homeowner was purely economic – in effect, the homeowner had spent good money on a bad product. This was recoverable only on the basis of contractual liability, but that would require a contract between the relevant parties.

Therefore, even though English law prefers an incremental approach, it cannot always claim to be certain what the law is – incremental steps can lead backwards as well as forward. However, I should add that changes like this are often anticipated within the profession as possible or even likely – doubts about a decision or apparent rule may well be discussed in the Inns of Court, even if they have not appeared in print in case notes or articles.<sup>64</sup>

62 Quoting from the speech of Lord Wilberforce in *Anns v Merton London Borough Council* [1978] A.C. 728, 752.

63 [1991] 1 AC 398.

64 An interesting example is the decision in *Siebe Gorman & Co Ltd v Barclays Bank* [1979] 2 Lloyd’s Rep 142, in which Slade J. held that a bank could take a fixed charge (which would have priority over an insolvent company’s preferential creditors) over a company’s receivables without preventing the company from drawing on the bank account into which the receivables were to be paid. The correctness of this decision was questioned long before the case was overruled in *Re Spectrum Plus* [2005] UKHL 41, [2005] 2 AC 680, in which a very similar arrangement was held to create a floating charge, not a fixed charge, with the result that the preferential creditors had priority over the charge.

### 3.11. CERTAINTY IN TRANSACTIONS: PACTA SUNT SERVANDA

What concerned Moore-Bick LJ in the passage cited earlier was not so much the uncertainty over what the law would be as certainty in a different sense, which applies to contract law more than to tort. His concern was that what the parties have agreed to should not be subject to a general judicial control such as good faith, because it may lead to unpredictable qualifications or even an overriding of what the parties have agreed to. Except in narrow and well-defined circumstances, such as under misrepresentation or duress, the parties should be held to what they agreed on – *pacta sunt servanda*. I think the relative strictness with which English law applies the notion of *pacta sunt servanda* – or, to put it another way, the relatively few situations in which the courts will either add to or qualify what the parties agreed – is an important characteristic of English contract law, one that distinguishes it from many civilian systems; however, although I will mention the point again, essentially, it is a topic for another paper.<sup>65</sup>

### 3.12. PRAGMATISM

English law tends to be pragmatic rather than principled. A good illustration of this, and an interesting comparison to French law, is illustrated by two cases involving swimming pools. In the English case,<sup>66</sup> Forsyth, a tall man, stipulated that his indoor pool should be built to a depth of 7 feet 6 inches (2.28 metres). By mistake, it was built to the standard depth of 6 feet. In English law, specific performance was not

65 I will just note that English law does not give relief on the grounds of mistake, unless either the mistake was induced by a misrepresentation by the other party or a shared mistake by the parties means that they have agreed to something that is impossible; it does not recognise fraud by silence or have duties of disclosure except in few types of contract such as insurance or partnership; it has no doctrine of *laesio enormis*, and only a limited doctrine of unconscionable dealing; further, it does not allow adjustment of a contract for hardship caused by a change of circumstances not amounting to impossibility.

66 *Ruxley Electronics and Construction Ltd v Forsyth* [1996] AC 344.

then available in cases like this,<sup>67</sup> but when the builders brought an action for the price against Forsyth, he made a counter-claim for damages for the cost of increasing the depth of the pool, which would have meant completely reconstructing it, some £21,500. The trial judge held that a depth of 6 feet was perfectly adequate, even for diving off the side of the pool (which was the only diving that would be possible, as there was no space indoors for a diving board), so Forsyth was ordered to pay the contract price and, on the counter-claim, he was awarded only £2,500 for ‘loss of amenity’ – seemingly to compensate Forsyth for any slight and baseless worry that he might hit his head when diving. The Court of Appeal disagreed and increased the damages award to £21,500, on the ground that the damages should enable the plaintiff to get just what he had contracted for, but the House of Lords restored the trial judge’s decision: it would be wholly unreasonable to rebuild the pool when rebuilding it would neither increase its usefulness nor add to its value. By contrast, in the French case, the contract to build a swimming pool stipulated that the pool should have four steps leading down into the water, but it had been built with only three steps. The employer demanded that the steps be rebuilt. The cour d’appel refused to grant this order on the ground that it had not been shown that having only three steps caused any inconvenience. The Cour de Cassation quashed the decision as having no legal basis: (former) art. 1184 of the Code civil provided that where an obligation is not performed, the claimant could require the other party to perform unless the performance was impossible, which was not the case here. Compared to the English decision, the French decision seems to emphasise more on the principle of *pacta*

67 Principally, because in English law specific performance is generally not awarded if ‘damages would be an adequate remedy’. In this case, damages would be adequate because the plaintiff could employ a third party to do the work. It is not clear what the outcome would be in the present scenario. Forsyth was a consumer, and the Consumer Rights Act 2015, s 55 has enabled consumers who have contracted for work that has not been carried out correctly to demand ‘a repeat performance’ that is in conformity with the contract; the court may make an order of specific performance if necessary (s 58). The court should not refuse on the grounds of adequacy of damages, but it is an open question whether the court would refuse an order as a matter of discretion when the reconstruction of the pool would be pointless: see *Chitty on Contracts*, Vol. II, para. 41–620.

*sunt servanda* than on pragmatic considerations such as whether the expenditure is worthwhile.

However, may be pragmatism is becoming more widespread. When the Code civil was reformed in 2016, the new art. 1221 provided that a creditor is not entitled to seek performance in kind ‘if there is a manifest disproportion between its cost to the debtor and its interest to the creditor’.<sup>68</sup>

### **3.13. DETAILED CONSIDERATION OF THE FACTS**

The pragmatic approach involves detailed consideration of the facts of each case. This is obvious from English courts’ judgments, which normally provide a very detailed account of the facts of each case, partly to enable the trial judge to reach a decision and partly to ensure that, if the case goes to appeal, and the Court of Appeal thinks that the trial judge has not applied the correct principle, and that the case should be decided on some other ground, the Court of Appeal will have all the relevant facts and will not have to send the case back for further findings of fact. Detailed findings of fact may seem unnecessary to civilian lawyers; however, they are not only essential in a system of binding precedents but also make for more pragmatic solutions.

### **3.14. OPEN CONSIDERATION OF POLICY**

It is also evident that the pragmatic approach may involve the court considering issues of policy. This might seem worrying. If courts were making decisions not just as a matter of legal principle but with a policy-driven agenda that was unstated, it would tend to make decisions unpredictable. However, compared to many judges in continental Europe, English judges are open about considering policy issues. As Lord Mance said recently:

68 Cf § 275(2) BGB.

*It would be unrealistic to suggest that, when recognising and developing an established category, the courts are not influenced by policy considerations. No one now suggests that the common law has not changed since the Saxon era, merely to be revealed from time to time by an increasingly perceptive judiciary. As Lord Reid said famously [...]: ‘There was a time when it was thought almost indecent to suggest that judges make law – they only declare it [...] But we do not believe in fairy tales any more’;<sup>69</sup> see also Lord Goff’s comments on the declaratory theory of the common law in *Kleinwort Benson Ltd v Lincoln City Council*.<sup>70</sup> The courts are not a Law Commission, but, in recognising the existence of any generalised duty in particular circumstances they are making policy choices, in which considerations such as proximity and fairness, justice and reasonableness must inhere.<sup>71</sup>*

Sometimes these policies are already recognised in the rules of law: for example, the *Ruxley* decision is really just an application of the well-established ‘duty to mitigate’<sup>72</sup> – not a true duty but rather an *Obliegenheit*, a rule that claimants cannot recover damages for losses that they could have avoided by taking reasonable steps. However, on other occasions, the policy considerations are external to private law. Policy is regularly considered when the courts are asked to extend liability beyond the existing position, for example, when it was argued that the police should be liable if they had failed to act on a call for help from a victim of domestic violence, which had led to her being killed before they arrived. One of the arguments for denying liability was as follows:

69 Lord Reid, 1987, p. 180.

70 [1999] 2 AC 349, 377–379.

71 *Robinson v Chief Constable of West Yorkshire Police* [2018] UKSC 4, [2018] AC 736 at [84].

72 The case most frequently cited is *British Westinghouse Electric Co Ltd v Underground Electric Railways* [1912] A.C. 673, although in that case the duty to mitigate itself was not the issue. The plaintiffs had been supplied with turbines that were not as efficient as required by the contract and in response had done more than could reasonably be required of them: they installed turbines of a new design of greater efficiency than the contract called for. The question was whether the resulting savings in running costs should be considered in assessing the damages. The House of Lords held that it should.

*The payment of compensation and the costs of dealing with claims, whether successful or unsuccessful, would have to come either from the police budget, with a corresponding reduction of spending on other services, or from an increased burden on the public or from a combination of the two.*<sup>73</sup>

A similar concern also seems to have influenced the House of Lords when, as explained earlier, it reversed its decision in *Anns v London Borough of Merton*: the effect of holding a local authority liable when its inspector failed to spot that a house was being built with inadequate foundations was to impose on the public the burden of providing compensation for ‘private financial losses’. This was something that the legislature could decide on but not the courts.<sup>74</sup>

Similarly, in considering the level of damages that should be awarded in personal injury cases for pain, suffering, and loss of amenity, the Court of Appeal considered the effect of their decision on insurance premiums and, in medical negligence cases, the cost to the National Health Service.<sup>75</sup> Public policy was also considered when it was decided that a barrister was immune from an action for negligence at the suit of a client with regard to his conduct and management of a cause in court: in particular, the administration of justice required that a barrister should be able to carry out his duty to the court fearlessly and independently, while actions for negligence against barristers would make the retrying of the original actions inevitable and thus prolong litigation, which would be against the public interest.<sup>76</sup>

73 *Michael v Chief Constable of South Wales Police* [2015] UKSC 2, [2015] AC 1732 at [122]. See similarly *Stovin v Wise* [1996] AC 923 (local authority should not be liable for failing to make a road junction safer for motorists).

74 *Murphy v Brentwood District Council* [1991] 1 AC 398, 482.

75 *Heil v Rankin* [2001] QB 272 at [32].

76 *Rondel v Worsley* [1969] 1 AC 191, 227–229.

### 3.15. LAW REFORM

Another possible advantage of the Common Law system is that reforming the law may be easier here than in jurisdictions that have a civil code. There are two aspects to this: legislative reform and judicial reform.

It must be easier to legislate on a particular issue where change is needed if the legislation is limited to a particular topic, as has often been the case in English law.<sup>77</sup>

'Judicial reform', in the sense of a decision introducing a wholly new principle, also happens occasionally. We have had some 'reforming judges', notably Lord Denning, who tried to introduce (1) a 'deserted wife's equity', which would have protected a woman who had been deserted by her husband from being evicted from the family home, oftentimes in the husband's name only, by the bank to which the husband had mortgaged the house;<sup>78</sup> and (2) a doctrine of inequality or bargaining power.<sup>79</sup> Neither was directly successful as both were rejected: by the House of Lords, the deserted wife's equity in *National Provincial Bank v Ainsworth*<sup>80</sup> and the doctrine of inequality of bargaining power in *National Westminster Bank v Morgan*.<sup>81</sup> In the latter case, Lord Scarman took the orthodox position that interference with freedom of contract was a matter for the legislature.<sup>82</sup> The legislature has not seen fit to make further provision for inequality of bargaining power, save for consumer contracts, where the UK had to implement the Directive on Unfair Terms in Consumer Contracts.<sup>83</sup> Ironically, Parliament did introduce legislation to protect

77 See above.

78 See *Bendall v McWhirter* [1952] 2 Q.B. 466. The husband himself could be restrained from evicting his wife by an order made under section 17 of the Married Women's Property Act 1882.

79 *Lloyd's Bank v Bundy* [1975] Q.B. 326, 339.

80 [1965] AC 1175.

81 [1985] AC 686.

82 [1985] AC 686, 708.

83 Directive 93/13 on unfair terms in consumer contracts [1993] OJ L95/21; see Consumer Rights Act 2015, s 62. This protection for consumers has not been affected by Brexit.

deserted wives, which achieved pretty much what Lord Denning had wanted.<sup>84</sup>

### 3.16. JUDICIAL REFORM TO HELP BUSINESS

Interestingly, English judges have been much more ready to change the law when the result of the change would not restrict parties in any way but would enable them to achieve what they want, or enhance business opportunities. An example of the first is that for a long time we needed to enable parties to create contractual rights that could be enforced by third parties – a reform that was recommended as early as in 1937.<sup>85</sup> This was proposed to be implemented by legislation, but when Parliament did not act, Lord Scarman (as we have seen, not an advocate of judicial reform in other contexts) suggested that the House of Lords should itself reform the law by reconsidering the principal decisions that had established the doctrine of privity of contract.<sup>86</sup> Whether this would ever have happened we do not know, because ultimately Parliament passed the Contracts (Rights of Third Parties) Act 1999 – a mere 62 years after reform had first been recommended. However, we have at least two examples wherein the courts did introduce radical changes that were considered business-friendly.

The first example is in relation to penalty clauses. These are invalid in English law, but the test of what amounts to a penalty (as opposed to a valid ‘*liquidated damages*’ clause) was changed dramatically by the decisions of the Supreme Court in two cases heard together, *Cavendish Square Holding BV v Makdessi* and *ParkingEye Ltd v Beavis*.<sup>87</sup>

84 The Matrimonial Homes Act 1967 gave the wife a statutory right of occupation against the husband and, if registered, against third parties; see Family Law Act 1996 Part IV.

85 Law Revision Committee (Sixth Interim Report (Cmd 5449) Section D. Proposed legislation was introduced but was abandoned with the outbreak of World War II, see Beatson, 1992, p. 1.

86 See *Woodar Investment Development Ltd v Wimpey Construction (UK) Ltd* [1980] 1 WLR 277, 300.

87 [2015] UKSC 67, [2016] A.C. 1172.

It was previously believed that an ‘*agreed damages*’ clause (a clause providing that if a party commits a breach of contract it must pay an agreed sum to the other) clause was valid only if the agreed amount was a genuine pre-estimate of the likely loss, or at least not substantially more than the estimated loss – the sum must not be in *terrorem*, that is, designed to pressure the party into performing.<sup>88</sup> However, in *Cavendish Square*, the Supreme Court held that if the other party had a legitimate interest in obtaining performance rather than damages – for example, because damages would not fully compensate it for the losses it would suffer – it is permissible to have a deterrent clause, provided the amount payable is not disproportionate to the payee’s interest in performance.<sup>89</sup>

The second example of judicial reform to help business relates to small or new businesses – although it was a two-stage process and the first stage was, once again, to protect wives. Someone starting a small business usually needs a loan to get going. Potential lenders want security. By the 1980s and 1990s, borrowers in England could often provide this because house prices had increased rapidly, leaving them with a considerable amount of ‘*equity*’ in the home (i.e., the difference between the value of the home and the amount of money, if any, that was outstanding on the mortgage they had used to buy the house in the first place). However, by this time, most homes were jointly in the names of both the husband and the wife; hence, the budding entrepreneur – typically the husband – would have to get his wife’s consent. The wife might be reluctant, and some husbands resorted to abuse of the wife’s trust or emotional manipulation,<sup>90</sup> misrepresentation, or even duress to coerce the wife to agree. If this had happened, the business had not prospered, and the lender had tried to enforce the security, could the wife resist on the ground that her consent had been obtained improperly? The law had appeared to be that the lender would only be affected by the husband’s wrongdoing if the lender knew if it. However, in *Barclay’s*

88 The traditional test was set out most fully in the speech of Lord Dunedin in *Dunlop Pneumatic Tyre Co Ltd v New Garage and Motor Co Ltd* [1915] A.C. 79.

89 [2015] UKSC 67, [2016] A.C. 1172 at [32].

90 These amount to ‘undue influence’, a ground for avoidance of the contract in English law: see *Chitty on Contracts*, ch 11.

*Bank v O'Brien*,<sup>91</sup> the House of Lords held that if the loan was apparently not directly benefitting the wife, the lender would be treated as having ‘constructive notice’ of the husband’s wrongdoing unless it had made enquiries to check that nothing untoward had occurred. It was not clear, however, how the lender could ensure this in practice; and this would mean that lenders were reluctant to accept the only form of security that the entrepreneur could offer. Hence, in a second decision, the House of Lords laid down a clear procedure that the lender should follow in order to avoid being treated as having constructive notice – in essence, to get a letter from a solicitor representing the wife, confirming that the solicitor has been given information by the lender and has advised the wife.<sup>92</sup> This made it possible to rely on offers of the matrimonial home as security, and thus, small businesses were helped again.

### 3.17. THE COMMERCIAL NATURE OF ENGLISH LAW

Why is there this apparent willingness to propose judicial reform when it seems to help businesses by making it easier for them to achieve their ends, be it to confer rights on third parties, to allow what used to be regarded as penalty clauses, or to take reliable security? This may be attributed to the commercial nature of English private law, especially the law of contract. English judges have inherent authority to develop the law as they decide cases that involve new situations; they do not need a general clause to rely on as do judges in a code system. However, they have developed fewer controls over the behaviour of contracting parties and over the terms of contracts than exist in many continental systems. As a result, we can point to a number of key differences between the common law systems of Europe and the laws of, say, France or Germany. English law does not have a doctrine of *culpa in contrahendo* or recognise liability for breaking off negotiations at the last moment. It seldom imposes a duty of disclosure, not even recognising fraud by silence, and it does not give relief when one party has entered a contract

91 [1994] 1 A.C. 180.

92 *Royal Bank of Scotland v Etridge (No.2)* [2001] UKHL 44, [2002] 2 A.C. 773.

under a mistake of fact unless they were misled by information given by the other party. Apart from the rule against penalty clauses mentioned earlier, few controls are observed over the contents of contracts between businesses. English law does not recognise adjustment on the ground that a radical change of circumstances has occurred. It relies on damages rather than specific enforcement, assuming that there will normally be a market in which the aggrieved party can find someone else from whom to obtain goods or services.

Why does English law take this individualistic, market-orientated approach? One reason is that English law is not an academic product. True, academic writing has helped to organise it into recognised rules and principles, but those rules and principles have to be derived from cases, which are mainly decided without much, if any, academic input. Nor is the law seen, as was the Napoleonic Code, as a guide to how businesses or other parties should behave. Its focus is simply on resolving disputes; and at least in contract, this is seen primarily as deciding whether the parties have stuck to their agreement – and, if they have not, making them pay compensation.

This, and the generally commercial character of much of English private law, seems to reflect the cases that come before the law-making, that is, higher courts in England and Wales.<sup>93</sup> At least the contract cases are usually commercial disputes involving large sums of money, most often between parties who either had legal advice when negotiating the contract or who are ‘repeat players’ that make the kind of contract in question on a regular basis and are conversant with the risks. These are not the kind of parties who need the same protection as the little businesses who, I have the distinct impression, appear more frequently in French and German cases.

### **3.18. ENGLISH LAW AS THE LAW OF CHOICE**

The ‘hard-nosed attitude’ of the English judges and English law is probably increased by the desire to attract international businesses to adopt

93 I have developed this argument elsewhere: see Beale, 2010, p. 501.

English law as the governing law, the ‘*law of choice*’<sup>94</sup> (and often at the same time, to opt for both insurance and arbitration in London). English law goes out of its way to attract parties who have no other connection with England; and, rightly or wrongly, it is of the firm belief that international business people want the maximum certainty and the minimum risk in ensuring that what they have agreed will not be enforced. When the Unfair Contract Terms Act 1977 was adopted, a deliberate decision was taken that it should not apply to either international supply contracts or contracts that are subject to English law only because the parties have chosen that law to govern the contract.<sup>95</sup> The Law Commission said:

*The effect of imposing our proposed controls in relation to those contracts might well be to discourage foreign businessmen from agreeing to arbitrate their disputes in England [...]*<sup>96</sup>

### **3.19. PROFESSIONAL CONSERVATISM**

However, hand in hand with the stress on freedom of contract is a characteristic that is frequently frustrating to anyone interested in improving the law, even if the improvement is aimed at making business easier: this is the high level of conservatism in the English legal profession. In my experience, large firms of solicitors are particularly resistant to change. For example, for years we have been trying to introduce a sensible system of registration and priority of security over moveable and intangible property, largely along the lines of art. 9 of the Uniform Commercial Code or the Canadian Personal Property Security Acts, which

94 See Kötz, 2010, p. 1243.

95 See sections 26 and 27.

96 Law Commissions, *Exemption Clauses Second Report* (Law Com No 69, Scot Law Com No 39, 1975), para. 232.

have been widely adopted around the world.<sup>97</sup> The law firms seemed implacably opposed to changes even when the changes would make their clients' lives easier. They preferred to live with what they have. The same attitude appeared when the Common European Sales Law<sup>98</sup> was proposed, and re-appears whenever – as seems to happen every couple of decades – a government department asks whether the UK should adopt the Vienna Convention on the International Sales of Goods.<sup>99</sup> Why? For several reasons. One is simple path dependency – we have always done it this way, and we do not want to change. Another, particularly in relation to the CESL and the CISG, is a fear of losing business to lawyers in other jurisdictions – English firms know more about English law than anyone else, whereas firms from all over Europe might know as much about the CESL, and lawyers from many countries in the world might know as much about the CISG. However, the main reason could be that the law firms have developed ways of working with the existing law and ways of '*working around*' any problem it poses. This, and the banks of precedents that are based on their experience, are an important part of their knowhow, of their intellectual capital. They do not want to lose it.

#### 4. CONCLUSION

The Common Law system may appear less coherent and less principled than a code-based system. A case law system certainly does have its disadvantages. It may not be easy to say what the law is; the law develops piecemeal and is apt to be changed by judicial decision; and, to some minds,

97 Adoption of an art. 9-type system was first proposed by the Report of the Committee on Consumer Credit (1971), Cmnd 4596; then by A. L. Diamond, *A Review of Security Interests in Property* (1989) (written for the Minister of Corporate and Consumer Affairs); and in 2005 by the Law Commission, *Company Security Interests* (Law Com No 296, 2005). A detailed account of the various attempts at reform can be found in Beale et al., 2018, ch. 23.

98 The European Parliament legislative resolution of 26 February 2014 on the proposal for a regulation of the European Parliament and of the Council on a Common European Sales Law (COM(2011)0635 – C7-0329/2011 – 2011/0284(COD)). For an account of the fate of the CESL see Beale, 2016, pp. 431, 459–462.

99 See also Moss, 2005–2006, p. 483.

the results are unprincipled. However, English lawyers defend it as being pragmatic and flexible. Hence, despite not having a code, English law at least muddles on, and arguably it has strengths that codified systems lack. Do not expect England to move to a codified system, even to a code of just contract or commercial law, any time soon!

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