

## REFORM OF JERSEY CONTRACT LAW: PRACTICAL PERSPECTIVES

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*This article is a slightly updated version of a dissertation submitted as part of an LL.M. degree in Jersey law awarded by the Institute of Law. It considers the origins of Jersey's law of contract, the need for reform of the law, the possible options for reform and the practical implications of doing so by means of a codification. Some inspiration is taken from other mixed jurisdictions in the Commonwealth that derive their law of contract from the French Code Civil.*

### **Introduction**

1 Jersey's law of contract, like the Island itself, has developed under the distinct influences of its larger neighbours of England and France, jurisdictions that take markedly different approaches when it comes to this area of law. With its origins in Norman customary law and civil law, and yet closely allied with the United Kingdom for over 800 years, it is perhaps unsurprising that Jersey's system of law has both Gallic and Anglo-Saxon influences. In some areas of law, however, the Island has taken an approach that is dominated clearly by one legal system more than the other. In the case of the law of contract, however, and perhaps more than any other part of the law, both systems have reached Jersey's shores and intertwined themselves in such a way that the resulting jurisprudence is truly mixed. This mixing is not necessarily a bad thing because both systems have their merits but it is the uncertainty resulting from a lack of clarity in many areas that creates turbulent waters. The suggestion is that intervention to settle the law is needed for less choppy conditions to prevail. This paper examines first the origins of Jersey's law of contract and the current extent of the uncertainty before considering possible routes for reform, drawing inspiration from other mixed legal systems. In particular it looks at the practicalities of the possible solutions, with particular emphasis on codification and the obstacles that might need to be overcome if this is to steer Jersey contract law through to calmer seas.

**Section 1: Background—origins of Jersey’s law of contract***Customary law origins*

2 Jersey law has its origins in the law applicable to the ancient Duchy of Normandy, united with England when William Duke of Normandy took the English throne in 1066. The Bailiwicks of Jersey and Guernsey remained part of the Duchy of Normandy until 1204 when King John lost his Norman lands and the Channel Islands continued as a Crown possession. Strictly, therefore, the law of Jersey was that applicable in Normandy up to 1204, which was a system of customary law, law based on usage and practice as opposed to a common law system such as that prevailing in England, which grew up from court rulings that are binding on future courts. Norman customary law, deriving from an oral tradition, could be deduced only from repeated practice and usage, the details of which were recorded in various unofficial compilations. The first such redaction was the *Très-ancien Coutumier* of around 1200, and the only one written prior to Jersey’s separation from Normandy. But in practice the *Grand Coutumier de Normandie* which came about some 50 years later and the *Coutume Reformée*, produced in 1583 by royal authority giving it the status of an official redaction, continued to have great influence in Jersey. These various texts along with supplementary materials<sup>1</sup> have been interpreted by various French commentators in past centuries and their works have also been cited in Jersey’s courts along, of course, with Jersey’s own commentators on the position in Jersey.<sup>2</sup> In fact there is no evidence of the *Très-ancien Coutumier* being used in Jersey at the time it was published though the *Grand Coutumier de Normandie* was used locally.<sup>3</sup> Despite the fact that the *Coutume Reformée* included other sources and was promulgated some 379 years after the separation, it was heavily relied on in the Island, partly at least due to the paucity of local authorities.<sup>4</sup> Certainly the Royal Commissioners who examined the civil law and reported in 1861 (the “Civil Commissioners”) regarded it as being part of the local law due to its assimilation over the passage of time.<sup>5</sup>

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<sup>1</sup> The various *styles de procéder and the Glose*, a commentary on the *Grand Coutumier*.

<sup>2</sup> For further details see Jersey Institute of Law, Jersey Legal System and Constitutional Law Study Guide.

<sup>3</sup> Kelleher, “The Sources of Jersey Contract Law” (1999) 3 Jersey Law Rev 1.

<sup>4</sup> Nicolle, *The Origin and Development of Jersey Law: an Outline Guide* 2009 J&GLR, at 26–30.

<sup>5</sup> See *Report of the Civil Commissioners* 1861, at iii. The Privy Council also observed that that it can be looked at as evidence of the old law unless it can

3 Nevertheless, the law in Jersey was free to develop separately from that in Normandy from 1204 and reliance on the ancient law inevitably lessened as local legislation was passed or applied from Westminster. Jersey does not have the same wealth of modern precedent to rely on as does England and Wales, a fact noted by the Chancery Division of the High Court of England and Wales in *Re a Debtor*,<sup>6</sup> a case influential in facilitating the accessibility of Jersey law.<sup>7</sup> It is only from about the 1960s onwards that the Royal Court started to give fully reasoned judgments from which a body of precedent could start to be discerned, following which law reporting began. The judgments, the full body of statute law and the *Jersey & Guernsey Law Review* have been accessible to all since 2004 on what is now the Jerseylaw website.<sup>8</sup> And only since the establishment of the Institute of Law has there been any sort of comprehensive text on Jersey law, access to Norman law previously being restricted to a small collection of ancient texts without a modern text book.<sup>9</sup> However, the position has improved, with scanned copies being available on the Jerseylaw website and the Institute's becoming a repository for relevant texts. Nevertheless, the size of the jurisdiction will always result in a slower growth of precedent and consequent slower expansion in its jurisprudence, though this may be tempered by the advantage of having a smaller corpus of law to digest and the opportunity to make new law to meet evolving circumstances.

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be shown to be of different origin: *La Cloche v La Cloche* (1872) 9 Moo PCCNS 87.

<sup>6</sup> [1981] Ch 384.

<sup>7</sup> *Per* Goulding, J:

“whereas the present state of English law, so far as not codified by statute, is abundantly explained by a wealth of reported and fully reasoned decisions of appellate courts and in a great number of authoritative textbooks, the written materials for the ascertainment of modern Jersey law are comparatively meagre, and textbooks are very few. The reasons for decisions in the Royal Court are often expressed concisely and without lengthy discussion of principle. Accordingly, important parts of the law still reside in the breasts of the judges and legal practitioners of the island, and it is not always possible to find a persuasive answer to a legal problem by mere study of published material.”

<sup>8</sup> [www.jerseylaw.je](http://www.jerseylaw.je)

<sup>9</sup> See Jersey Law Commission consultation paper No 5 (2002), para 12(i).

*Sources of contract law*

4 In relation to the law of contract, customary law in fact said very little, hence the Normans looked to the *ius commune*, a synthesis of law from a number of sources but most importantly Roman law, to fill the gaps, and it is clear from the 17th century local commentators Poingdestre and Le Geyt that Jersey followed suit. The justification was the principles of equity that derive from it. In practice it meant looking to Pothier (1699–1772), a well-known French jurist who wrote on the *Coutume d’Orleans* and on whose writing the *Code Civil* of 1804 drew heavily, and to a lesser extent the French writer Domat (1625–1696). In fact, Pothier has been cited in half of all contract cases before the Royal Court since 1950<sup>10</sup> and has been described as the “surest guide” to the law of contract.<sup>11</sup> His *Traité des Obligations* along with his *Traité du Contrat de Vente* greatly influenced Jersey contract law, so that the principles he stated “we believe to be the principles of our law”.<sup>12</sup> He even influenced that branch of the law in the US and in England, where he inspired Sir Mackenzie Chalmers who drafted the Sale of Goods Act 1893, and where it was said judicially that his status was of next importance to a court decision.<sup>13</sup>

5 The influence of French law on Jersey law has continued for some time. Nicolle states that—

“The continuous grafting of post-separation developments in Norman law onto the Jersey legal system where they took root and flourished was a recognised feature of Jersey’s legal development from an early date”,

and observes that both direct and indirect assimilation over centuries was noted by Le Geyt and the Civil Commissioners.<sup>14</sup> In the 19th century the *Code Civil* was used as the basis for some of Jersey’s legislation, most notably in the fields of succession and immovable property, including the provisions on hypothecs in the *Loi (1880) sur la propriété foncière* which remains in force today. Up to this time, all

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<sup>10</sup> Kelleher, n 3.

<sup>11</sup> *Selby v Romeril* 1996 JLR 210, at 218. The Royal Court had indicated earlier that in certain circumstances the *Code Civil* was more persuasive authority than English law, see *Kwanza Hotels Ltd v Sogeo Co Ltd* 1981 JJ 591; *Fort Regent v Regency Suite* 1990 JLR 228.

<sup>12</sup> *Golder v Société des Magasins Concorde* 1967 JJ 721.

<sup>13</sup> *Per Best, J in Cox v Troy* (1822) 5 B & Ald 474. See also Chalmers’ introduction to his book of the annotated text of the Sale of Goods Act 1893 where he cites both Pothier and the *Code Civil* as part of his inspiration.

<sup>14</sup> Nicolle, n 4, at 47–48.

legal drafting was in French. The Civil Commissioners commented that “the circumstances of the Jersey lawyers receiving their legal education chiefly in France helps to impart a modern French complexion to the jurisprudence of the Island”. During the 20th century, Jersey became predominantly English-speaking, its lawyers went to study at British rather than French universities and most qualified in the UK first. So now the courts look at English authorities in addition to Norman and civil law sources, even though historically English law, stemming from a wholly different legal culture, was of no relevance. Moreover, the Jersey Court of Appeal is composed primarily of English lawyers, as is the Judicial Committee of the Privy Council which is the final court of appeal for Jersey. As will be discussed in more detail below, much of Jersey’s statute law is derived from legislation passed at Westminster and as more of Jersey’s law is governed by statute, so is there less room for the old law to apply. Employment law, landlord and tenant and supply of goods and services are areas where the desire for social reform has led to the importing of English rules. When it comes to plugging the gaps in Jersey’s jurisprudence, these factors have made it all too easy for the legal profession to turn towards England, even in areas where conceptually it would be more logical to turn towards the other side of the Channel. However, though the influence of common law jurisdictions and British culture in particular has been considerable, Jersey is still a long way from becoming an “Anglo-Saxon jurisdiction” and remains very much a mixed jurisdiction.<sup>15</sup> It is this French/English dichotomy that lies at the root of the current problems and the next section examines the main areas of uncertainty.

## Section 2: Current difficulties

### *The English/French dilemma*

6 The real difficulties have come when the courts have needed to expand the law beyond the doctrines expounded in the 17th century and apply the law in more modern times. Should they look to developments in France as the natural successor to Pothier or, now that so much English law applies in Jersey, should the English law of contract plug the gaps? Unfortunately the approach has not been consistent. In *Selby v Romeril*<sup>16</sup> it was held that the four requirements for the creation of a valid contract set out in the *Code Civil* (as they

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<sup>15</sup> See Pallot, “Jersey: Vocabularies of Coûtume and Code”, (2016) 9 *Journal of Civil Law Studies* 437, at 455.

<sup>16</sup> 1996 JLR 210.

were before recent changes<sup>17</sup>), namely consent, capacity, *objet* and *cause* apply in Jersey in preference to the three requirements established by Pothier, on the basis that “our law cannot be set in the aspic of the 18th century”. This approach is not so radical when one takes account of the fact that the *Code Civil* was largely built on earlier law. However the courts have in some cases counselled caution in relying on French texts. In *Public Servs Cttee v Maynard*,<sup>18</sup> the Court of Appeal pointed out that after the Napoleonic codes came into existence French law and Jersey law developed separately, Jersey under the influence of its own statutes, writers and case law. The Royal Court in *In re Esteem Settlement*<sup>19</sup> said the court must always be careful, when relying on modern French law, not to incorporate an aspect that is not the same as that from which Jersey law is derived and the Privy Council in *Snell v Beadle*<sup>20</sup> lent some support to this approach. The same approach was recently endorsed in *Hong Kong Foods v Gibbons* discussed in para 12.

7 In criminal law, tort, trusts and public law, the influence of England on Jersey law is great whilst in land law and the law of succession it is very limited. The law of contract lies somewhere in between, but

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<sup>17</sup> Changes to the *Code Civil* effected by Ordinance 2016–131 came in on 1 October 2016. Of particular interest in Jersey is the abandonment of the concept of *cause* as condition of validity of the contract (art 1170). This concept and that of the *objet* have been replaced by contractual consent. Many of the other changes enshrine certain case law principles such as the codification of the concept of abuse of a state of dependence to gain a manifest excessive advantage (art 1143) (cf the English law on duress) and the requirement of good faith in the formation of contracts (art 1104). There is also a mandatory duty to provide pre-contractual information (art 1112(1)) and a duty of confidentiality (art 1112(2)). Other reforms include the ability for the courts to revise or terminate a contract on grounds of hardship (*imprévision*) (art 1195) not dissimilar to the English doctrine of frustration, the ability to censure clauses in standard form contracts where they create a significant imbalance between the parties (art 1171) the strengthening of the enforceability of unilateral contracts (art 1124) and a further restriction of the grant of specific performance where its cost is unreasonable (art 1221), bringing the law on remedies closer to that of England. For a critique of the reforms see Downe, “The Reform of French Contract Law: A Critical Overview”, 62 *Revista da Faculdade de Direito—UFPR Curitiba* 1 (jan/abr), 43, accessed 9 June 2017.

<sup>18</sup> 1996 JLR 343.

<sup>19</sup> Unreported, 17 January 2002 (reissued 11 March 2002).

<sup>20</sup> [2001] UKPC 5.

perhaps more aligned to the French position when one considers that concepts such as *vice de consentement* (considered below) are part of its jurisprudence. The courts have been critical of reference to *Chitty on Contracts* outside of construction cases<sup>21</sup> and on a number of occasions expressed disappointment that counsel have relied solely on English cases rather than cite French law<sup>22</sup> or even Jersey authorities.<sup>23</sup> However in the recent case of *Minister for Treasury and Resources v Harcourt Development Ltd*,<sup>24</sup> which concerned the issues of good faith and pre-contractual negotiations, the Court of Appeal based its decision substantially on English law and made only fleeting references to relevant Jersey cases. In *Sutton v Insurance Corp of the Channel Islands Ltd*,<sup>25</sup> the Deputy Bailiff observed that it may well be the case that an obligation of good faith on both sides is a common understanding in all contracts governed by Jersey law, similar sentiments also being expressed in *Hard Rock Ltd v HRCKY Ltd*.<sup>26</sup> In the *Harcourt* case, the Court of Appeal allowed the Minister's strike-out application, this being the response to a claim in tort against the Minister for inducing a breach of contract, heads of terms having been signed which included an obligation to act in good faith and with all diligence to negotiate a broader agreement. In allowing the strike-out application, the court must have accepted that there was no tort because there was no valid contract, the rationale being that there was only an agreement to agree and therefore no binding obligation or sufficiently certain *objet* though the rationale was largely based on English authority. More recently in *Haden-Taylor v Canopus*,<sup>27</sup> the Master considered it arguable that an implied term of good faith exists between the parties in relation to performance of obligations under Jersey law of contract. Though no customary law authorities were cited to him he referred to Pothier and art 1134 of the *Code Civil* which had been in place since the inception of the code, considering that it is not unarguable that this provision reflects how Jersey law might develop. A recent change to the *Code* in fact introduces a specific requirement of good faith into pre-contractual negotiations.<sup>28</sup>

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<sup>21</sup> *Incat v Luba* [2010] JRC 0834.

<sup>22</sup> *Eg La Motte Garages Ltd v Morgan* 1989 JLR 312.

<sup>23</sup> *Eg Donnelly v Randalls Vautier Ltd* 1991 JLR 49.

<sup>24</sup> [2014] JCA 179.

<sup>25</sup> [2011] JRC 027.

<sup>26</sup> [2013] JRC 244B.

<sup>27</sup> 2015 (1) JLR 224.

<sup>28</sup> See n 17.

***Consent—the meeting of minds***

8 One of the most fundamental differences between English and French law of contract is that English law adopts an objective approach, taking a view as to what the parties might be considered to have agreed to, whereas French law is much more subjective, looking at what the parties themselves consented to, their subjective intentions. This is often referred to as the meeting of minds of the parties and is another way of expressing consent, which is one of the essential elements of a valid contract in Jersey law. Offer and acceptance is taken as evidence of the meeting of minds.<sup>29</sup> The leading case on consent in the Jersey law of contract is *O'Brien v Marrett*.<sup>30</sup> Citing Pothier and *Selby v Romeril* in support, the Court of Appeal here stated that the Jersey law of contract determines consent by use of the subjective theory of contract. Contrast this with the English approach of analysing what each party might be considered to have agreed to. An objective approach was relied on in *Mobil Sales & Supply Corp v Transoil (Jersey) Ltd*<sup>31</sup> where the Royal Court said the question was not what the parties had in their minds but what reasonable third parties would infer from their words and conduct, but this case was said in *Marrett* to be *per incuriam* in the light of *Selby v Romeril*. When it comes to a display of goods, Jersey has followed the English approach of regarding this as an invitation to treat,<sup>32</sup> which is not the approach taken in France. On the question of whether there needs to be an intention to create legal relations—an English test with no equivalent in French law—the Jersey position was unclear, with an objective test being applied in *Daisy Hill Real Estates Ltd v Rent Control Tribunal*<sup>33</sup> where the court held that no reasonable person would infer that a letter agreeing to provide further and better particulars was intended to create a legally binding contract. However, more recently in *Flynn v Reid*,<sup>34</sup> an agreement between an unmarried couple was held not to amount to a binding contract on the basis that there was no true consent to create a binding agreement. Then in *Home Farm Developments Ltd v Le Sueur*,<sup>35</sup> though it was said that consent was a subjective test; a misunderstanding of the meaning of a

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<sup>29</sup> See for example *Cronin & Luce v Gordon-Bennet* 2003 JLR N [22]; *Bennett v Lincoln* 2005 JLR 125.

<sup>30</sup> [2008] JCA 178.

<sup>31</sup> 1981 JJ 143.

<sup>32</sup> See *Att Gen v Galore Wholesale Ltd* 1983 JJ 67; *Gilbraith v Att Gen* 1992 JLR 190.

<sup>33</sup> 1995 JLR 176.

<sup>34</sup> [2012] JRC 100.

<sup>35</sup> [2015] JCA 242.

contract was not sufficient *erreur obstacle* to prevent the meeting of minds enabling a contract to be formed. Nor would it lead to the contract being declared void, though there may be rectification. *Dicta* in the form of a postscript then cast doubt on the subjective approach, observing that the point wasn't actually argued in *O'Brien v Marrett*, merely assumed to be the case, and that there were "potentially powerful arguments against the adoption of a subjective test".<sup>36</sup> In *I v J*,<sup>37</sup> the Court of Appeal again sidestepped the question of whether consent was to be judged on an objective or subjective basis. The result of these various judicial pronouncements is thus once again to throw the law into a state of uncertainty.

### *Cause*

9 On the question of contractual *cause* there are a number of cases that hold it to be a constituent element of a valid contract, for example in *Selby v Romeril* and *O'Brien v Marrett* considered above. *Cause* is the basis or reason for a contract and the Royal Court has been concerned to point out that it is not the same as consideration, which is not necessary for the formation of a contract in Jersey.<sup>38</sup> The position is however still uncertain when it comes to gratuitous contracts, which in Jersey law, as in French law, are distinguishable from onerous contracts where one party confers an advantage on the other party whilst also gaining something for himself. In the case of gratuitous contracts, the benefit given is purely gratuitous and there is no reciprocal benefit. There are suggestions that such a contract would nevertheless be enforceable in *Osment v Constable of St Helier*<sup>39</sup> and

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<sup>36</sup> A recent article by former Bailiff Sir Philip Bailhache described this as a "puzzling postscript" as (1) the point was not argued in *Marrett* because it was so well established to be beyond argument, the remarks as to the nature of a *convention* in Jersey law were not *obiter* and the cases suggesting an objective test applied lacked legal argument; (2) the subjective theory of contract finds strong support in the customary law and to adopt the English approach could lead to confusion in other aspects of contract law because it would be difficult to mix concepts; and (3) if there is to be an objective test that is a matter for the legislature. He concludes that the Court of Appeal has sown the seeds of more uncertainty and that it would be open to the courts to adopt a more flexible approach than a strict subjective/objective divide without undermining one of the fundamental principles of the Jersey law of contract. See (2016) 20 J&GLR June 160.

<sup>37</sup> [2017] JCA 013.

<sup>38</sup> See *Granite Products Ltd v Renault* 1961 JJ 163 and *Wightman v Cathcart Properties Ltd* 1970 JJ 1433.

<sup>39</sup> 1974 JJ 1.

one might think that it is necessary for the jurisdiction to have a way of enforcing contracts for which there is no consideration. In common law countries the mechanism is to enshrine the promise in a deed but deeds are unknown in Jersey, there being no mechanism for creating a binding unilateral promise or covenant as is the case in England and Wales. That being the case it would then perhaps be unsurprising for the law to provide a different mechanism to create the same possibility by enabling the enforcement of gratuitous promises. But it would be desirable to be sure that for this species of contract the law established that the presence of *cause* was enough.

### *Vices de consentement*

10 Perhaps the greatest area of confusion in the current Jersey law is in relation to *vices de consentement* and the question of setting aside agreements on the grounds of the vitiating of consent. Many of the Jersey cases on *erreur* seem to be allied with the English doctrine of misrepresentation thus suggesting that the contract might be merely voidable. *Dicta* in *O'Brien v Marrett* clarified that it will render a contract nul, though this may be in doubt again following the *Home Farm* case. In *La Motte Garages Ltd v Morgan*,<sup>40</sup> which concerned a mistake on an invoice for the sale of a car, the Royal Court analysed the case in terms of unjust enrichment before considering *erreur*. On the facts it held that a “mutual mistake” had occurred, laying down an objective test, what the reasonable man would have understood was meant. This seems to have been English law reasoning and follows the approach in *Mobil Sales & Supply Corp v Transoil (Jersey) Ltd*, rather than finding that the contract was a nullity, both these cases being disapproved in *Marrett*. In *Griggs v Coutanche*,<sup>41</sup> which concerned a dispute over architects’ fees, much reliance was placed on English law too.

11 Incorporation of the jurisprudence on misrepresentation seems also to have led the doctrine of *erreur* to become muddled with the concept of fraudulent statements (*dol*). In *Scarfe v Walton*,<sup>42</sup> a case about an error induced by misrepresentation, the court considered that the principles enunciated by Domat had “much in common” with Jersey law because they approved the circumstances in which an action in respect of *vice cachés* might be brought rather than considering the issue of *vice de consentement*. In *Kwanza v Sogeo*,<sup>43</sup> the Royal Court

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<sup>40</sup> 1989 JLR 312.

<sup>41</sup> 1975 JJ 219.

<sup>42</sup> 1964 JJ 387.

<sup>43</sup> See n 10.

confusingly appeared to elide the principles of Domat and Pothier concerning the doctrine of *vice de consentement* with the very different English law on misrepresentation. In *Toothill v HSBC Bank plc*,<sup>44</sup> English law was preferred for policy reasons because it related to proceedings brought by a bank for repayment by a customer, the court taking a pragmatic stance because most banks in Jersey are branches of those operating in the UK.

12 In *Steelux Holdings Ltd v Edmonton*<sup>45</sup> the court drew a distinction between English and Jersey law on the question of the effect upon a contract of fraudulent misrepresentation, so that in Jersey, a misrepresentation, whether fraudulent or not, was said to amount to a *vice de consentement* allowing the other party to treat the contract as void. Whereas English law provides a remedy for all types of misrepresentations, not just fraudulent, only fraudulent misrepresentation can amount to *dol* in French law. Then, in *Hong Kong Foods v Gibbons*,<sup>46</sup> the Royal Court referred to *Sutton*<sup>47</sup> as having followed the approach in *Steelux* and having drawn a distinction between Jersey law, in voiding contracts for innocent misrepresentation and French law, which required there also to be an *erreur sur la substance*. *Erreur* in the context of *vices de consentement* refers to a defect of consent that does not prevent a meeting of minds but nevertheless vitiates consent. In French law, it is a major ground for doing so and by virtue of art 1110 of the *Code Civil* applies where the mistake goes to the substance of the contract or the identity of the contractor. But in *Hong Kong Foods* the court thought that it—

“should, so far as consistent with legal principle and precedent, develop the Jersey law of contract so as to be suitable for the requirements of commercial life in the 21st century and to be as easily ascertainable and understandable as possible.”

It thought that to hold that a contract induced by an innocent (*ie* non-fraudulent) misrepresentation is *void ab initio* (nul) would be an undesirable outcome as well as not being required by precedent and thus sought to restore the law to what it was in the misrepresentation cases prior to *Steelux* and *Sutton*—

“This protects the position of *bona fide* third parties and also gives the court and the plaintiff flexibility as to whether rescission and/or damages is the appropriate remedy. [This] can

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<sup>44</sup> 2008 JLR 77.

<sup>45</sup> 2005 JLR 152.

<sup>46</sup> [2017] JRC 050.

<sup>47</sup> See n 25.

be achieved by continuing to regard misrepresentation as a principle of Jersey contract law which stands alone rather than seeking to shoehorn it into the structure of a *vice de consentement* with all the undesirable consequences which may follow.”

13 The court relied on Le Geyt’s drawing of a distinction between void and voidable contracts which was consistent with the writings of Domat, believing greater weight should be placed on those writers than on modern French law. A contract induced by an innocent misrepresentation is merely voidable and if it is desired to bring innocent misrepresentation under the rubric of a *vice de consentement*, Jersey law could hold that whether the contract is void or voidable depends on the nature of the *vice*. With such a fluctuation of views, if ever there is an area of the law that is in need of clarification, it is this.<sup>48</sup>

### **Remedies**

14 When it comes to remedies, the position is also mixed with the cases using both the void/voidable terminology of England, which was also used in the writings of Le Geyt, as well as the French concepts of *nullité absolue* and *nullité relative* even though they are not interchangeable. In fact, in *Deacon v Bower*<sup>49</sup> the court held that for a contract to be void *ab initio* it must have had an inherent defect negating at least one of the conditions required to establish a valid legal relationship. If the validity of a transaction is questioned only because of a subsequent event, it would be merely voidable. This distinction is unique to Jersey law but in *Selby v Romeril* the approach was to follow the French concepts in holding that a contract without *cause* was nul. However subsequent cases, such as the *Hong Kong Foods* case discussed above, have adopted the void/voidable distinction, once again creating uncertainty. In respect of damages and rescission/*resolution*, English authorities prevail<sup>50</sup> but the approach in

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<sup>48</sup> Leeuwenberg, writing before *Hong Kong Foods*, advocates that references to misrepresentation should be replaced by *erreur* (as supplemented where necessary by *dol*) because it is a more straightforward concept. Rather optimistically he thinks the courts can effect this transformation. See (2013) 17 J&GLR 5. One suspects that legislation may in fact be required to settle the matter so clearly.

<sup>49</sup> 1978 JJ 39.

<sup>50</sup> See for example *Café de Lecq v Rossborough Ltd* 2012 (1) JLR 245, *Hamon v Webster*, unreported 2002, para 67. Unlike in France, there is no need to go to court for a contract to come to an end on the grounds of non-

relation to the remedy of specific performance has been the French approach.<sup>51</sup> This led the Jersey Law Commission, in para 10 of its final report, to describe this area of the law as illustrative of the “uncertainties that are inherent in seeking to ascertain the Jersey law of contract”. Matters are further complicated by recent legislation in the consumer field (discussed below) based on English legislation, thus introducing an area where the Jersey courts are naturally to look at English authorities. Advocate Kelleher writes—

“ . . . in the area of contract as in many other areas of Jersey law, the Royal Court has simply ‘cherry picked’ elements from both the English and the French legal systems without laying down or following any consistent guidelines with regard to the sources of law to which the Courts will have regard. Although this approach may have advantages of flexibility, it has resulted in a degree of uncertainty and confusion which cannot but prejudice the interests of litigants before the Jersey courts and which reflects poorly on our legal system as a whole.”<sup>52</sup>

He also points out that it is time consuming to research the current state of the law, resulting in increased expense for the client but concludes that—

“the material is there for the taking and developing it into local jurisprudence . . . If Jersey is to hold itself out as a jurisdiction with the appropriate degree of *gravitas* it is beholden on the profession and the Royal Court to establish a sound body of contract law to provide for certainty.”

### **Conclusion**

15 The current state of the law indeed led to the Jersey Law Commission’s reviewing Jersey contract law in 2004 and concluding that it was ripe for reform as being ill-suited to the needs of Jersey, bearing in mind its key position in the offshore commercial world of today. The Law Commission papers, along with the “Contract Law of the Channel Islands at the Crossroads” conference in 2010, hosted by Jersey’s Institute of Law, highlighted the differences of opinion among practitioners and academics. Though traditionalists favour the continuing reliance on the Norman approach as supplemented by the

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performance, though under revisions to the *Code Civil* this has recently changed to allow termination by notification in the case of a serious breach.

<sup>51</sup> For example in *Trollope v Jackson* 1990 JLR 192, at 198. See n 17 for recent reforms in France.

<sup>52</sup> See n 3.

cases, thereby allowing Jersey to develop its own law, without the volume of cases of a larger jurisdiction and the lack of a strict doctrine of *stare decisis*,<sup>53</sup> this status quo approach is likely to lead to continuing uncertainty for many years to come. An alternative suggestion is to look at a restatement or, alternatively, codification of the law, which will be the main focus of this paper. What is commonly accepted, however, is that the status quo is highly unsatisfactory, to the point where some commercial lawyers are advising clients to contract under a governing law other than Jersey.<sup>54</sup> At the conference organised by the Jersey Law Review entitled “Jersey’s Contract Law: A Question of Identity?” in 2004, Professor Sir James Holt, though he believed in the motto “if it ain’t broke, don’t fix it”, having listened to the speeches and comments on Jersey contract law, commented “you’re broke alright”.<sup>55</sup> The next section examines what might be done to remedy the situation.

### Section 3: Possible options for reform

#### *Introduction*

16 Accepting that the current state of Jersey contract law is unsatisfactory, the question arises as to what may be done about it. Broadly, the options are either to legislate for the situation or to proceed without legislation. Without legislation, the only way of effecting an actual change in the law is by means of case law development and this is unpredictable and, in a jurisdiction the size of Jersey, likely to be slow. A restatement of the law, discussed below, cannot actually change the law of itself. A legislative change could be done piecemeal, seeking merely to modify part of the existing law so that the statute just becomes another source of Jersey contract law. Or it could be done more radically by means of wholesale replacement of what went before, but including rules that reflect the existing law insofar as it is not to change. Sir Courtenay Ilbert,<sup>56</sup> English

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<sup>53</sup> See *State of Qatar v Al Thani* 1999 JLR 118. The reasons given were the sources of Jersey law, the closeness jurisprudentially to France and the lack of volume of case law.

<sup>54</sup> Advocate Alex Ohlsson so commented at the conference on the current and future position of the Jersey law of contract and the opportunities presented by a re-statement, November 2015.

<sup>55</sup> Quoted in Hanson, “Jersey’s Contract Law: a Question of Identity”, (2005) 9 *Jersey & Guernsey Law Review* 126, at 138.

<sup>56</sup> *Legislative Methods and Forms*, 1901, chapter 1, available at: <https://archive.org/details/legislativemetho00ilbeiala>, accessed 3 March 2016. This fascinating work is a history of law-making in England, up to the end of the

Parliamentary Counsel, observed that the replacement of the common law with a series of rules comes less naturally to an English lawyer. The English doctrine of precedent has led to a wealth of binding decisions which, he observed, encourages the advocate or judge to seek out a case in point rather than a general principle.<sup>57</sup> Hence, he concluded, “though the leading principles of English law are easy and clear to the trained lawyer, the knowledge of law is more of an esoteric science in England than in countries of written codes”.<sup>58</sup> Considering the development of law in France he observed—

“The great work of digesting and promulgating local customs exercised an important influence on the subsequent development of French law. In the first place, the methodical comparison of conflicting customs, the attempt to discover the common principles which underlay them, the systematic grouping and arrangement of the customs when found, supplied an intellectual gymnastic of the most valuable kind, and trained up generations of lawyers and jurists who were imbued with the principles required for successful codification.”<sup>59</sup>

But before examining restatement and then codification as possible options for reform it would be useful to look at what the Jersey Law Commission proposed.

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19th century. Chapter IV includes an interesting account of attempts at codification of the criminal law in the 19th century as well as Lord Cranworth’s more ambitious proposed “Code Victoria”. In the event, Westminster settled for the less ambitious Statute Law Revision Acts and Consolidation statutes.

<sup>57</sup> Another contributing factor is the way law is taught at universities, largely through the cases which, because of their facts, are much less dry for students than points of principle set out in an Act. See article by Professor John Burrows advocating specific teaching of statute law in *The Loophole*, August 2010, 24 <http://www.calc.ngo/sites/default/files/loophole/aug-2010.pdf>, accessed 12 June 2017. Still today much less time is devoted to rules of statutory interpretation and the study undertaken by the Office of Parliamentary Counsel and the National Archives in 2012 as part of the Good Law initiative, concluded “While some lawyers are highly skilled and very experienced users of legislation, it was evident from the user testing that many lawyers struggle with it at least as much in reading legislation as a lot of non-lawyers.” See Bertlin, *The Loophole*, May 2014, 25. <http://www.calc.ngo/sites/default/files/loophole/may-2014.pdf>, accessed 12 June 2017.

<sup>58</sup> N 56, at 8.

<sup>59</sup> N 56, at 14.

*Jersey Law Commission proposals*

17 In its 2002 consultation paper identifying the problems of Jersey contract law and reviewing various solutions, the Jersey Law Commission considered but dismissed the option of maintaining the status quo while encouraging the Jersey courts to apply a more consistent approach. They also rejected codification which they thought, due to the varying sources of law, would be likely to be difficult and time-consuming. Their preferred solution was that English contract law be incorporated into Jersey law by means of legislation. They did not see the statutory adoption of the English common law as being particularly problematic. As to this suggestion Dawes has commented—

“This overlooks, however, the fundamental role which various statutes play in English contract law. It is difficult to see how one could sensibly import English case-law wholesale without additionally importing those statutes central to the area of law concerned. It is difficult to see why one would want to, given English case-law’s own problems. It would also have the effect of sacrificing jurisdictional independence.”<sup>60</sup>

18 Dawes also observed that it would be a simple task to scan and translate the limited amount of relevant Norman texts and translate other relevant French texts, noting that translations were already available of the *Code Civil* and Pothier’s works. He also dismissed the notion that English law provides certainty and concludes that—

“there is no reason why the Island’s business should not be served well by a distinct Jersey contract law which continues to respect its origins whilst avoiding either resurrecting or perpetuating the impractical or obsolete.”<sup>61</sup>

One might also observe that the fact that England found it so difficult to codify its own law of contract does not augur well for the success of such a project in Jersey. There are undoubtedly less convoluted solutions than trying to reproduce the complex state of English contract law.

19 The Jersey Law Commission published its report in February 2004. It noted comments that though maintaining the status quo would allow judicial flexibility and permit the courts to develop the law locally, it would still leave contracting parties unsure of their rights and

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<sup>60</sup> Gordon Dawes, “Guernsey Law of Tort and Contract: *De Principiis*” (2003) 7 *Jersey Law Review* 306.

<sup>61</sup> *Ibid.*

obligations. The adoption of English law was thought to lead to a further erosion of Jersey's independence and uniqueness, though the counter-argument was that it was unfair to contracting parties to face uncertainty as to what the law is when English law applied already in so many areas. The main argument against codification, said the Law Commission, was the time and effort the process would take and the difficulty in establishing what the Jersey law of contract actually is. They rejected it in favour of basing the statutory framework on a model from another jurisdiction. They considered but rejected the Quebec civil code on the grounds that those parts relating to contract had become too integrated into the remaining parts of the code to form a useful model and it might tempt the courts to look at Quebec and possibly French case law for assistance in interpreting the new law, thus perpetuating the disadvantages inherent in reliance on Norman law. Also rejected was use of the US Uniform commercial code on the basis that its relevant parts were "too deeply imbedded to enable it to be used as a base for codifying Jersey law" and it was another alien system. Instead they suggested using the Indian Contract Act of 1872 as a model as—

"it should not be too great a task to incorporate those aspects of the existing Jersey law of contract that are different from English contract law but which are still regarded as good law, thus ensuring that the Jersey law of contract does indeed remain different from English law."<sup>62</sup>

20 With respect to the Jersey Law Commission, their report seems to demonstrate a lack of familiarity with the law drafting process which, as discussed in Section 4, is essentially to translate the policy and how it is to be given legal effect into law. The Law Commission's suggestions of adopting law from elsewhere, be it common law or statute law, makes no real sense unless this is what is wanted for policy reasons. It is unsurprising that the suggestion of taking a 19th century colonial statute as a starting point did not find favour.<sup>63</sup> As Kelleher has stated, "no self-respecting legislature can automatically

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<sup>62</sup> Law Commission Report on the Law of Contract, at 7.

<sup>63</sup> Ilbert, n 56, in chapter VIII commented thus on the Indian codes:

"These codes have sometimes been unwisely praised. They are not, and do not profess to be, models of the kind of codes required or suitable for a country like England. But they are excellent examples of the kind of codes suitable for unprofessional judges and magistrates, and they illustrate the mode in which, and the extent to which, Bentham's principles can be applied to practical needs."

See further comments on the Indian Contract Act 1872 at para 29.

and without due consideration promulgate the statutes of another jurisdiction”.<sup>64</sup> This is the case never mind the fact that, if one were to attempt to mirror the law elsewhere, one would always be playing catch-up and having to pass amendments whenever the other jurisdiction changed its law. So with no obvious solution provided by the Law Commission, this paper now considers first restatement and then codification.

### ***Restatement***

21 Restatement as an alternative to reform by statute was the option supported by the States of Jersey’s Legislation Advisory Panel. In American jurisprudence, restatements are highly-respected treatises or systematic compilations of legal subjects that seek to inform judges and lawyers about general principles of common law, and which can be of great assistance to them. At the beginning of the 20th century, the law in the United States was found to be uncertain and exceedingly complex. The uncertainty was due to a lack of agreement on the fundamental principles of the common law, lack of precision in the use of legal terms, conflicting and badly drawn statutory provisions, the great volume of recorded decisions and the number and nature of novel legal questions. The main reasons for the complexity were the lack of systematic development and the variations among the laws of the different states. To address these problems, the American Law Institute, an organisation of judges, legal academics and practitioners, was founded in 1923—

“to promote the clarification and simplification of the law and its better adaptation to social needs, to secure the better administration of justice, and to encourage and carry on scholarly and scientific legal work.”<sup>65</sup>

22 The main method was to be a restatement of the most basic legal subjects to make the valid law accessible through the scientific systematisation of the case material into distilled legal rules. The initial attempts were criticised as being too formalistic and conservative and not reflecting the reality that the law is not always clear cut, but later efforts were well received. The ALI has published a series of four restatements that are highly persuasive because of the input from high-ranking judges, academics and legal professionals as the final version

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<sup>64</sup> Kelleher, “Cause for Consideration: Whither the Jersey Law of Contract?” in *A Celebration of Autonomy 1204–2004 800 years of Channel Islands’ Law*, Jersey L Rev, 2005.

<sup>65</sup> See <https://www.ali.org/about-ali/creation/>, accessed 27 September 2016.

is honed from various drafts. However, Zweigert & Kötz have this to say about the US restatements—

“Restatements are rather like the Civil Law codes in their systematic structure of abstractly formulated rules, and in many cases the Continental jurist can use them as a means of easy access to the rules of American private law in the first instance. Warning should be given, however, not to use them too uncritically, for the only way to be sure whether a particular rule is in force in a particular state is by consulting the judicial decisions of that state. If the problem in question has not yet been decided or clearly decided in that state, an American judge will often have recourse to the Restatement, but will normally accord it only fractionally more weight than he would to a leading textbook, and that, in a Common Law country, is not very much.”<sup>66</sup>

23 Restatements are rare in common law jurisdictions outside of the US though they are not unknown on the Continent, for example the project leading to the *Principles of European Contract Law*, an initiative by the Commission of European Contract Law completed in 2003 with a view to providing general rules of contract to be applied throughout the European Union. The European approach seeks more coherence than the recent US approach because it is not concerned with distilling the common law so much as paving the way for codification. However there are also examples in England such as the *Restatement of the English Law of Unjust Enrichment* (2012) and the *Restatement of the English Law of Contract* (2016) produced by an advisory group convened by Professor Andrew Burrows. Whether the purpose of a restatement is just to state existing law or to promote law reform is, however, still a matter of debate though it is clear that Professor Burrows sees it as a supplementing and enhancing the common law.<sup>67</sup>

24 But can a restatement be regarded as an adequate alternative to legislation? Ralf Michaels argues<sup>68</sup> that the distinction between the two is not that great—

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<sup>66</sup> Zweigert & Kötz, *An Introduction to Comparative Law* (Tony Weir, tr), 3rd edn, OUP 1998, at 252.

<sup>67</sup> See Duncan Fairgrieve, “Reforming Jersey Contract Law: the Restatement Model”, paper presented at a conference on the current and future position of the Jersey law of contract and the opportunities presented by a re-statement, November 2015.

<sup>68</sup> See *Oxford Handbook of European Private Law*, Basedow, Hopt, Zimmermann (eds), OUP 2011.

“[T]he structure and content of a restatement look similar to a codification, and substantively most codifications are in large part restatements of existing law rather than the creation of new law. A restatement can thus be called a private codification. Compared to principles and to general principles of law, the rules of a restatement are normally more detailed so that they can be applied as rules. Many texts labelled principles, however, resemble more closely restatements in rule form.”

The biggest limitation of a restatement is that it cannot of its very nature change the law and so cannot cure defects. It can only ever be a secondary source of law, however influential it is. It can do no more than point to what reforms may be desirable and its influence is limited to the areas of law that are within the interpretative reach of the courts, and there is no guarantee that future court decisions would follow it. One positive feature of a restatement is that, unlike a statute, it contains comments and illustrations allowing clarification of meaning and scope,<sup>69</sup> especially as regards earlier case law, and therefore better suits the more pragmatic approach of common lawyers. The arguments in favour of restatement, however, that law reform by statute is difficult to find time for and is inflexible, are not convincing if there is political will to make time for the law and a willingness to amend it when needed. This can actually be easier than waiting for a suitable case to come along and be adjudicated on at a high enough level. Legislation is a much more powerful tool because it is unlimited in the extent of the reforms it can make. Nevertheless, restatement is a flexible, less formal and cheaper option to codification and can be made equally accessible.

25 Having regard to its limitations, is restatement a viable method of dealing with the ambiguities currently inherent in Jersey contract law? Professor Fairgrieve advances thus—

“The Jersey restatement would be intended to draw together the current principles underlying Jersey contract law into a set of clear, accessible and succinct rules. There will be real and appreciable benefits to be gained from setting out the Jersey law of contract in one place, in clear and accessible form. This would further the objective of legal certainty by allowing contracting

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<sup>69</sup> But it is now common for Australian legislation to contain notes and examples in the Act which, though not part of the text, supplement its meaning. For examples closer to home, see the Isle of Man Flood Risk Management Act 2013, Interpretation Act 2015 and Legislation Act 2015, many sections of which contain notes and examples. Manx legislation is available at [www.legislation.gov.im](http://www.legislation.gov.im).

parties to have greater clarity as to the rules governing agreements subject to Jersey law. It would facilitate the work of legal advisors providing advice on Jersey contract law.”<sup>70</sup>

He describes how the drafting of the restatement could be structured to allow for input from various stakeholders and how its supporting commentary would provide interested parties with sources and clarification for its provisions where relevant. Restatement is certainly a flexible way forward since the language is less constrained perhaps than in a law, although it is of course legitimate to publish annotated versions of statutes with accompanying commentaries as noted below. Rather than overriding existing law a restatement leaves customary law the freedom to develop further.

26 At the recent conference organised by the Institute of Law<sup>71</sup> the restatement option was not supported by the delegates any more than the status quo. One of the reasons for this was it was felt that the current law was not fit for purpose so that reform was needed rather than mere clarity of exposition. Instead it was codification that found favour with the majority. There is perhaps a certain irony in that when Jersey’s law has traditionally relied so much on secondary sources like the coutumiers and Pothier’s treatises. The restatement approach still has considerable value, however, as a significant step along the way to achievement a statutory rewrite of contract law. A well-analysed statement of the current law that identifies what ambiguities need to be clarified and what changes ought to be made would be a very good foundation for a set of drafting instructions as discussed in Section 4. This is precisely where the expertise could and should feed into the law-making process.

### ***Codification***

27 There a number of definitions of codification but Lord Scarman, the first Chairman of the Law Commission of England and Wales, described it as—

“enacted law which . . . may cover the whole legal field or only part . . . intended . . . to supersede all previous law and where appropriate [containing] provisions modifying and reforming existing law.”<sup>72</sup>

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<sup>70</sup> N 67.

<sup>71</sup> On the current and future position of the Jersey law of contract and the opportunities presented by a restatement, November 2015.

<sup>72</sup> Scarman, *A Code of English Law*, Hull University 1966, at 5.

These final words, it is suggested, are of great importance as a code should be able not only to restate existing law but to reform it. Without the ability to reform the law, to iron out ambiguity, perhaps by choosing between various expositions of the law, codification would be merely a more formalised version of a restatement.

28 While legal codes are usually associated with civil as opposed to common law jurisdictions, it would be wrong to think of them as alien to England and Wales and the Commonwealth jurisdictions that inherited this jurisprudence. The philosopher Jeremy Bentham is said to have coined the word “codification”. In his *General View of a Complete Code of Laws*, Bentham said that “the object of a code is that every one may consult the law of which he stands in need, in the least possible time”.<sup>73</sup> In short the code was to be complete and self-sufficing and was not to be developed, supplemented or modified except by legislative enactment,<sup>74</sup> a somewhat black and white view since no statute can ever be entirely immune from judicial commentary and interpretation. Because experience shows that enacted law is most useful if confined to the statement of general principles, the more it descends into details, the more likely it is to commit blunders, to hamper action, and to cramp development.<sup>75</sup> Leading academics such as Sir Roy Goode and Sir Rupert Cross saw codification as a live issue some years ago and the Law Commission of England and Wales, now established for over 50 years, is at the forefront of suggesting reforms of various areas of the law, including contract, by means of codes. In fact the draft code for the law of contract did not come to fruition<sup>76</sup> and instead work was concentrated on individual aspects of contract law in most need of reform. The attempt at wholesale codification was described<sup>77</sup> as “the least successful” part of the Law Commission’s work and has not been resurrected. The reasons for the failure, as well as the lack of political will, would seem to include the common lawyer’s negative association of codification with the Napoleonic era together with the fear that this approach would annihilate the common law. It is argued, however, on the basis not just of Bentham but also

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<sup>73</sup> Quoted in Ilbert, n 50, chapter VIII on Codification at 122.

<sup>74</sup> *Ibid* at 123.

<sup>75</sup> *Ibid* at 125.

<sup>76</sup> It was published privately in 1993 and used as the basis for a group of European lawyers seeking to codify a European law of contract, see Halson, n 81.

<sup>77</sup> See Farrar, “Law Reform Now—A Comparative View” (1976) ICLQ 214, at 218.

the work of Chalmers and the Indian codes of the 19th century, that codification is not so alien to the British tradition.<sup>78</sup>

29 Though a code seems to imply legislative enactment, few common law enactments are codes. One needs to be careful not to confuse codification with consolidation. Both are aimed at changing the form of the existing law rather than altering its substance, by restating the law in legislative terms. In the UK consolidation bills are enacted using a shortened parliamentary procedure and bring together provisions scattered among several acts into one new act that repeals all the old law. The law is the same but it is easier to find and follow. Consolidation is thus “a palliative used to limit the natural tendency of the statute book towards chaos”.<sup>79</sup> Jersey has law revision powers enabling provisions to be moved around, amendments written into the text, renumbered, etc enabling its legislation to be revised in a way that is legally authoritative without any need for re-enactment.<sup>80</sup> But a code is something more than this, most particularly because it often involves the statutory conversion of common law rules embodied in case law. It is in the nature of a code to offer a comprehensive exposition of whatever area of law, great or small, it is designed to cover. Professor Halson states that in addition to this requirement of completeness, codes must have legislative authority and “[s]uch enactment may not . . . take the form of the usual legislative enactment in the UK characterised by non-purposeful, detailed drafting by a non-subject specialist”.<sup>81</sup> One might take issue with these words as it is surely the efficacy of the resulting text rather than the experience of the draftsman that is important, but one assumes that he is seeking to emphasise the seminal nature of the work. All enactments have the same authority but a comprehensive exposition of the law may and perhaps should lead to less development or resort to case law to supplement it. A fine example of this was the Sale of Goods Act 1893 which in effect reduced the material contained in Benjamin’s Sale to Goods to little more than 60 sections. Less successful was the Indian Contract Act 1872 which was enacted only after considerable

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<sup>78</sup> Steiner, “Codification in England: The Need to Move from an Ideological to a Functional Approach—a Bridge too Far?” *Statute Law Review* 25(3), 209.

<sup>79</sup> Described thus in a speech by Christopher Jenkins, Parliamentary Counsel, at the Franco-British Conference on statutory drafting, April 1986.

<sup>80</sup> See the Law Revision (Jersey) Law 2003.

<sup>81</sup> Roger Halson, “A Common Lawyer’s Perspective on Contract Law Codes”, (2011) 15 *Jersey & Guernsey Law Review* 150.

wrangling and concessions to the Indian legislature<sup>82</sup> and sought to change the law only for the judiciary to reinstate it.<sup>83</sup> Indeed the Act was exported to Kenya and Uganda only to be rejected in favour of the English common law.<sup>84</sup>

30 The advantages of codification are, first, the opportunity to simplify the law. Making the law clearer and more accessible should reduce the need to invest the cost and time inherent in resorting to the courts to settle disputes. These days with initiatives such as the Declaration on Free Access to Law by the Free Access to Law Movement<sup>85</sup> and the UK's "Good law" initiative,<sup>86</sup> modern practice dictates that the law should be readily accessible to, and understandable by, the citizen. A well-expressed series of statutory rules should be much easier to follow than a hunt through a mass of case law which inevitably will place different slants on the law because of the primary purpose of resolving a particular case. Professor Aubrey Diamond wrote—

“Most of our fundamental legal principles have emerged from decided cases. In principle it is much more straightforward to take your law from a statute where you will, if you are lucky, find statements of law laid down in simple language, uncluttered by the detailed facts of particular cases. Handling a case is much more complicated . . . The technique to be used for extracting the *ratio decidendi* involves not only professional expertise but also an inspired appreciation of trends in judicial attitudes.”<sup>87</sup>

He conducted a survey back in the 1960s that concluded that case citation in areas like sale of goods, where the law has to an extent been codified, was about a third less than in the case of other contractual disputes where there is no codification of the law.<sup>88</sup> Halson also refutes claims that where codification might result in the replacement of finely grained and focused specific rules with generalised discretions that this would result in less predictable outcomes, based on the findings of surveys by two Australian academics.<sup>89</sup> Their

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<sup>82</sup> See Swain, “Codification of Contract Law: Some Lessons from History” (2012) UQLJ 2. This article also notes that English case law continued to have a pivotal role despite codification.

<sup>83</sup> Halson, n 81.

<sup>84</sup> See Steiner, n 78.

<sup>85</sup> See [www.fatlm.org](http://www.fatlm.org), accessed 3 March 2016.

<sup>86</sup> See [www.gov.uk/guidance/good-law](http://www.gov.uk/guidance/good-law), accessed 3 March 2016.

<sup>87</sup> Diamond, “Codification of the Law of Contract” (1968) 31 MLR 361.

<sup>88</sup> *Ibid.*

<sup>89</sup> Halson n 81.

studies found that broad principles were more likely to result in “just” outcomes, were more accessible and less costly.<sup>90</sup> Lord Wilberforce observed in a House of Lords debate as follows—

“By presenting to the courts legislation drafted in a simple way by definition of principles, we may restore to the judges what they may have lost for many years to their great regret; the task of interpreting law according to statements of principle, rather than by painfully hacking their way through the jungles of detailed and intricate legislation. So I believe that a process of codification, intelligently carried out, will revive the spirit of the Common Law rather than militate against it.”<sup>91</sup>

31 Secondly, codification is said to assist law reform, both current and future.<sup>92</sup> Chalmers observed in the introduction to his book of the annotated text of the Sale of Goods Act 1893, “It is always easier to amend an Act than to alter common law. Legislation, too, is cheaper than litigation”. One doesn’t have to wait for a case on a particular point to come along and resolve an ambiguity. Thirdly, a country with codified legislation is able to export its law to other territories, as France did with its *Code Civil*, which is further discussed in Section 4 below. England did this to a lesser extent with its Indian codes. The export of a code may be associated with an extension of political influence though we no longer live in a world of colonisation. Another use may be the resolution of conflicted laws in a federal jurisdiction, though neither of these advantages have much practical application to Jersey. Finally, there may be economic advantages in encouraging business into the jurisdiction. The argument is sometimes made that the application of English commercial law in Jersey would be to its advantage. However, no-one seems to have suggested that the differences between English and Scottish law has been a barrier to trade between those countries. So long as it is clear whose law is to apply to a particular contract the need for parity would seem to be over-emphasised. Halson observes that the economic arguments in favour of a European code on contract are much disputed.<sup>93</sup>

32 One of the main arguments against codification in England and Wales is the fundamental differences between civil law and common

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<sup>90</sup> Ellinghaus and Wright, “The Common Law of Contracts; Are Broad Principles Better than Detailed Rules? An Empirical Investigation” [2005] *Tex Wesleyan L Rev* 399.

<sup>91</sup> *H L Deb*, vol 264, cols 1175–1176 (1 April 1965).

<sup>92</sup> *Diamond* n 80.

<sup>93</sup> *Halson* n 81.

law.<sup>94</sup> Civilian codes are expressed as comprehensive general principles and concepts rather than as detailed rules. Civilian judges apply deductive reasoning to move from the generalised statement in the code to the resolution of the dispute in hand. By contrast the common law judge draws broader principles from the vast array of decided cases which, depending on the court hierarchy, may be binding on that judge. However, just as the civil judge may refer to prior decisions where the code may be lacking,<sup>95</sup> the common lawyer may find a key statute has obviated the need for too much delving into decided cases, leading Halson to state that there has been “a relentless and ongoing convergence between the two great legal traditions since the Norman Conquest”.<sup>96</sup> The common legal origins and the identification of shared values and starting points make codification of a common law system achievable.<sup>97</sup> Eva Steiner points out that the French code was not so much revolutionary as drawing on the pre-code law and that codification in England could happily emerge from a body of case law.<sup>98</sup> It must be acknowledged, however, that in a common law system judges are likely to go on interpreting statutes,

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<sup>94</sup> Ilbert (n 56) states

“we have learned to form a more modest way of conception of what codification can effect, and to realize more clearly the difficulties which it involves, especially in countries which have already an advanced system of jurisprudence. Those difficulties are so serious as to deter any prudent legislature from attempting the task on a large scale, except under strong pressure from practical needs.”

<sup>95</sup> See the comments in Zweigert and Kötz (n 60) at 268 of the need for case law to “leap into the breach” in the large areas of law where statute offers no rules of general or outline provisions, or where the codes don’t cater for modern situations, and that “it is really undeniable that in Civil Law countries judges are playing a large and constantly growing part in the development of law”. Some of the recent change to the *Code Civil* reflect advances made in case law.

<sup>96</sup> Halson n 81. Similar sentiments are expressed by Zweigert and Kötz (n 60) at 271 and by Bell and Byron, “Sources of French Law” in Bell, Boyron and Whittaker, *Principles of French Law*, OUP 2nd ed, at 35–36. See also Levitsky, “The Europeanisation of the British Legal Style” (1994) 42 *American Journal of Comparative Law* 347, at 369, quoted in Xanthaki, *Drafting Legislation*, 2014, Hart Publishing, who concludes that the “civil versus common law dividing wall is now critically shaken” (at 211). Paragraph 4.7 below suggests, however, there is still a dichotomy when it comes to style of drafting.

<sup>97</sup> See Halson (n 81), n 94–97.

<sup>98</sup> Steiner (n 78), at 216–217.

even codifying statutes, and though there might be concerns that a code might stultify evolution, the likelihood is that in a common law jurisdiction, judicial development will continue.

33 One way of encapsulating the difference might be to say that while civil law judges ask themselves “What should we do this time?,” common law judges ask “What did we do last time?”<sup>99</sup> Professor Carney<sup>100</sup> states that the key to understanding the difference is understanding how the doctrine of separation of powers operates in each jurisdiction. In post-revolutionary France the judiciary was not allowed to engage in legislative activity. Article 5 of the *Code Civil* states that judges are forbidden to decide cases submitted to them by way of general and regulatory provisions. However, art 4 states that a judge who refuses to give judgment on the pretext of legislation being silent, obscure or insufficient, may be prosecuted for being guilty of a denial of justice. This article then presupposes there are no gaps in the *Code Civil* and the net effect of the two provisions is to prevent the judge’s interpretation of the code being a precedent for any future case, which is one reason why judgments are so short. English judges in theory only declare what has always been the common law and strive only to determine the intention of Parliament, thus adhering to the separation of powers doctrine, but in practice create a body of law by virtue of laying down precedent. Another difference is that the *Code Civil* provides no general rules of statutory interpretation while common law jurisdictions normally have an interpretation act setting out a series of general interpretive provisions common to all legislation enabling the shortening of individual acts. However, when it comes to applying the common law rules of statutory interpretation, Carney finds that the rules are not dissimilar to the methodologies used in the French courts, and in both jurisdictions it is legitimate for judges to look at *travaux préparatoires* or parliamentary debates as the case may be.<sup>101</sup>

34 Halson<sup>102</sup> observes that in a Jersey context a common law-based code would appear to combine the benefits of clarity and predictability of a code with the familiarity and perceived business friendliness of common law principles. A bespoke code for Jersey would not obviate

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<sup>99</sup> Lord Justice Cooper in “The Common and Civil Law—a Scots View” [1950] Harv LR 63, 468 at 471.

<sup>100</sup> Gerard Carney, “Comparative Approaches to Statutory Interpretation in Civil Law and Common Law Jurisdictions”, (2015) 36 (1) *Statute Law Review* 46.

<sup>101</sup> *Ibid.*

<sup>102</sup> N 81.

the need for local advocates in the way that wholesale adoption of English law might, though it has to be remembered that these days there are many UK lawyers working in Jersey applying English law to contracts anyway, because of the international nature of Jersey's legal work. Along with giving close attention to the need for reform as well as restatement, and caution as to the extent of the economic driver, Halson concludes that engagement with the local profession and aligning their support with broader social needs is important for advancing codification.

35 On balance then, there would appear to be a number of advantages for Jersey in going down the codification route, though it would clearly not be straightforward. The next section looks at how, in particular, a codification might be effected in practice.

#### **Section 4: Reform models—practical implications**

##### ***Role of the draftsman***

36 Writing in the 1870s, the English jurist Sheldon Amos remarked that, “No one who has practically tried his hand at the Codification of the English Law can be unaware of the extraordinary difficulties by which the task is beset”.<sup>103</sup> This section now examines these difficulties. In order to understand the practical issues surrounding codification as a law drafting project, some background is needed on the different roles of the draftsman and those responsible for the formulation of policy and law drafting instructions, the brief to the law draftsman telling him or her what the law needs to do. Jersey legislation is drafted—in common with the rest of the Commonwealth—by lawyers who have become experts in the very specialist field of legislative drafting.<sup>104</sup> The key to good law-making is in the drafting instructions, which is where the subject expert is needed, to develop the policy and consider how it may be implemented by means of legislation. Good drafting instructions will set out the aims of the law and how those aims are to be achieved. They will say what the law should cover without telling the draftsman how to achieve this in terms of the structure of the law or the words used. There is nothing more frustrating for a draftsman than to receive instructions in the form of a draft or existing legislation from another

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<sup>103</sup> Swain, n 82.

<sup>104</sup> Halson's description of them at para 29 as non-subject specialists, implies that major legislation on specific subject areas is better handled by those whose expertise might be, say, the law of contract rather a specialist draftsman. This misunderstands the particular skill that the draftsman brings to the project.

jurisdiction and being merely told to copy it without analysis or explanation.<sup>105</sup> It is essential for the draftsman to know what is wanted *for Jersey*, and in developing that, the policy maker/instructor is free to look at the law in any jurisdiction and pick whatever best suits that aim. The draftsman may well adopt, with or without alteration, wording from elsewhere and has no objection to being referred to it provided it is made clear what is intended by following that provision.<sup>106</sup> The crucial thing is that the resultant provision must reflect the intention of the policy maker. If it does, its original source does not matter. Draftsmen will always counsel against wholesale copying and pasting of legislation from elsewhere unless there is a particular reason for it, such as an agreed common approach with the UK on a matter such as TV licensing or anti-terrorism. Jersey courts will interpret a provision in accordance with local jurisprudence. How a particular phrase is interpreted in another jurisdiction is persuasive only.

37 The natural starting point would be to look at what the law is in Jersey and where this is unclear, there is scope for a policy decision as to what the law should be. It would seem sensible to start from this surely much smaller cadre of law than that of England and Wales. As recently pointed out, many of the key aspects of the law of contract in Jersey are clear, such as the principle of *la convention fait la loi des parties*, from which stems the importance of consent in the formation of contracts and the subjective approach to the constituent elements of contract law.<sup>107</sup> It is suggested that the only way forward, if legislation is to be the solution to the problem, is for the existing law to be stated with such amendments as are agreed from a policy stance and this worked up into a law drafting brief. As part of this process it may indeed be useful to look at legislation elsewhere for inspiration.

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<sup>105</sup> This is analogous to a doctor being told by his patient what drug to prescribe instead of being told the patient's symptoms, or to being presented with a completed crossword grid from which one has to work out the clues in order to assess its correctness.

<sup>106</sup> There is no point in reinventing the wheel. Doubtless an analysis of the Jersey statute book will reveal wording taken from, not just UK legislation, but from that of many other jurisdictions. This may be the result of a suggestion in the law drafting brief but it is just as likely that the draftsman has found a precedent from a jurisdiction he or she is familiar with or from picking out a relevant precedent from the vast array of legislation readily available online. Often the legislative scheme of another small jurisdiction will provide better inspiration for both draftsman and policy-maker than one designed for a larger jurisdiction with multiple layers of bureaucracy.

<sup>107</sup> Fairgrieve, n 67.

***Funding and approval***

38 Today the most obvious limitation to the production of a contract code for Jersey is likely to be cost. There would need to be considerable work undertaken in preparing a comprehensive statement of what the law is, and from there decisions made as to what the law should be, so that it can be seen how the law is changing.<sup>108</sup> A project of this size could not be managed routinely as part of Government's normal programme of legislation and such is the squeeze on resources that it would be difficult to get the funding for it to be carried out as an additional project, whether or not it is outsourced. The Jersey Law Commission does not have anything like the resources to take on a project of this magnitude. However, comfort might be taken by the fact that the work on the restatement model was promoted by the Legislation Advisory Panel with the implication that funding might have been found for this project. As stated above, a large part of this work is the same as one would need for a law drafting project. It might also be worth exploring the extent to which Guernsey, whose law of contract is even less developed than Jersey's, might want to be part of the project.<sup>109</sup> This seminal project might be a rare occasion where pooled resources could work in favour of both Islands, even if different policy decisions are made down the line; otherwise Guernsey might stay on the side-lines only to adapt the Jersey law later on. However, if the project were to lead to legislation it would need Jersey's Council of Ministers' agreement in order for it to be taken forward to the States and this requires political will not just to fund it

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<sup>108</sup> The code would not be a short piece of work. The Principles of European Contract Law is around 200 articles and the failed English Law Commission code contained 673 clauses. The American Second Restatement of the Law of contract is nearly 400 clauses and with commentary runs to six volumes, see Swain, n 82.

<sup>109</sup> In Guernsey, the works of Pothier have similarly been relied upon to plug the gaps in customary law, though the *Approbation des Lois*, a work sanctioned by an Order in Council of 1583 proclaiming which chapters of the commentary of Terrien on Norman law represents Guernsey law, has a little about contract. Where there is no answer to a problem from Guernsey law, according to Dawes, *Laws of Guernsey*, regard is had to Jersey case law, then Pothier, then English case law and modern French contract law, then the law in other common law and civil law jurisdictions. Robilliard, "The Guernsey Law of Contract—An Explanation", (1998) 2 Jersey L Rev 35, suggests that a pragmatic approach has been taken in recent times, with greater willingness to rely on English law when dealing the commercial matters, but there does not seem to be the same impetus for reform.

but to give it some priority over other important law drafting projects.<sup>110</sup> Jersey's Government would need to be convinced of the merits of the project, that it would be of real benefit to the Island. Such a case is much more likely to be made out if it can be demonstrated that there is real economic advantage from the work, that it would encourage business, enhance the reputation of the Island, etc., and the case would be strengthened by some empirical evidence of savings in court time, costs of legal advice to Government and the like. In addition to the cost of preparation of law drafting instructions, which would be virtually certain to require external consultants, money would need to be found to fund the services of a law draftsman, either a suitably experienced consultant or by using in-house resources, which would come at the price of potentially displacing other work. Consequently, it is likely to take some time to get approval as it would be a large project and unlikely to be a top political priority.

### ***Project management***

39 Assuming funding is granted and political support is forthcoming, careful management of the project would be important to prevent early derailment. This is lawyers' law and not headline-grabbing reform, though there would be interest from a consumer rights point of view and because of its potential bearing on finance and commerce. Someone needs to drive it forward or there is a risk it will simply be displaced by other more high-profile projects. This, for example, happened with a comparatively small project for a Burials and Exhumations Law for Jersey, in effect a small statute to codify the customary law. Back in the 1990s the Comité des Connétables promoted the legislation which was drafted in fits and starts over several years with no Government department having an interest in its enactment and the Connétable who originally pressed for it being long since retired. It was finally enacted in 2004 but has so far not been brought into force.<sup>111</sup> Care should be taken then that the project does not run out of momentum.<sup>112</sup> But provided the contract project

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<sup>110</sup> For details of how legislation is produced in Jersey from policy formulation to enactment see Marsh-Smith, "The Production of Legislation in the Crown Dependencies", (2010) 14 *Jersey & Guernsey Law Review* 70.

<sup>111</sup> Some background to this law drafting project will be found in the report of the *Projet de Loi* at [www.statesassembly.gov.je/AssemblyPropositions/2003/19120-41553-25112003.pdf](http://www.statesassembly.gov.je/AssemblyPropositions/2003/19120-41553-25112003.pdf), accessed 3 March 2016.

<sup>112</sup> Lessons may be learnt from Australia where an exciting project on codification of contract law was rolled out for consultation then not taken forward as its original enthusiasts had moved on to other responsibilities, another example of codification being more easily said than done. See

remained firmly on the radar of the Law Officers' Department, who would be likely to have a major role in its running internally, and a champion on the Legislation Advisory Panel, the risk of its running out of steam would be minimised.

40 Another aspect of project management is sensible use of law drafting time. A common mistake is to assume that a legislation project starts with law drafting when the law drafting phase is in reality a much later part of the project. That is not to say that a person engaged in the preparation of law drafting instructions should not have recourse to the draftsman for advice. Law draftsmen are only too happy to offer practical guidance, deal with queries and make suggestions as to how the instructions might be framed. But law drafting is an expensive resource and the process requires, as far as is possible, full instructions in order that the draftsman may plan the legislative scheme and deliver the draft as efficiently as possible. A project that engages the instructor and the draftsman at roughly the same time is not likely to go well as there will be little for the draftsman to do until the instructions are complete.<sup>113</sup> In 2011 the Isle of Man Government sought to recruit a legislative drafter on a two-year contract to backfill the post of a drafter who was seconded to work a major project to reform company law and insolvency law in the Isle of Man. The instructor and the drafter worked together to produce draft legislation that included a Companies Bill based on UK legislation that ran into almost 1,000 clauses which was then put out for consultation for three months in 2013.<sup>114</sup> By that time, the two years had passed, and the project has not progressed further to date. It is suggested that had the instructions been developed and consultation with the business community taken place at this stage, opinion could have been taken on board much sooner and before such a high level of resources expended. This project, like Jersey's contract law, would seem to require substantial stakeholder engagement and acceptance to have a realistic chance of success and there is no point in expending costly law drafting resources until the proposed content of legislation is reasonably settled. Jersey's large project to reform criminal procedure is already leading to legislation because, it is suggested, as well as being more amenable to being split

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<https://www.ag.gov.au/Consultations/Documents/ReviewofAustraliancontractlaw/Shouldcontractlawbecodified.pdf>, accessed 9 June 2016.

<sup>113</sup> A useful analogy is to think of the instructor as the architect of a large building project drawing up the design and specification, and the draftsman as the builder. There really is very little the builder can do unless he knows in detail what is required.

<sup>114</sup> [www.gov.im/news/2013/feb/18/consultation-on-modernising-manx-comp-any-law/](http://www.gov.im/news/2013/feb/18/consultation-on-modernising-manx-comp-any-law/), accessed 3 March 2016.

up into smaller projects, something that will probably not be feasible with a contract law code, the instructor was engaged on the project and consultation took place well before law drafting time was expended.<sup>115</sup>

***Content of proposed legislation***

41 What any proposed new legislation will contain is a matter for the law drafting instructions and there is little to be gained here by speculating in any detail as to the actual content, in terms of which way various policy decisions might go. One assumes, however, that the law would aim to set out the current state of the law as modified as a result of whatever policy decisions are taken to amend or clarify it in a series of legally binding propositions. In order to do this the draftsman will need to work out an overall structure or scheme for the law, as would happen with any other law drafting project. Where this project will differ is that there will also be a need to address (1) whether the style of the draft should be different from other Jersey legislation in view of the civil law origins of the subject matter; (2) whether there might be different considerations in terms of statutory interpretation that might be brought to bear; (3) the need to codify case law; and (4) how this new law might sit with the rest of the statute book if it is to be drafted in any substantially different style. These matters are now considered in turn.

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<sup>115</sup> See for example [www.jerseylawsociety.je/news-room/forthcoming-events/reform-1864-loi-reglant-la-procedure-criminelle-presentation-30-september-2014/](http://www.jerseylawsociety.je/news-room/forthcoming-events/reform-1864-loi-reglant-la-procedure-criminelle-presentation-30-september-2014/), accessed 3 March 2016.

*Drafting style*

42 Turning to issues of style, as well as the challenge of converting what is largely case law into statute law, there is the potential difficulty of integrating civil law-based concepts into a statute book that is these days drafted in a style reflecting that of Westminster and Commonwealth jurisdictions. Lord Wilberforce, referred to the English style of “elaborate, detailed drafting, covering every individual case” and the French style of “elegant generalities from which applications are deduced”.<sup>116</sup> The Renton Committee justified the detailed approach of English legislation, stating “that it is only fair to those whom the law will affect that they should be able to see how Parliament requires the law to be applied in differing circumstances, and it creates uncertainty if the detailed application of a general principle is left to be interpreted by the judiciary, or to be worked out by the Executive in regulations embodied in subordinate legislation”.<sup>117</sup> Renton described the aim of codes as being “to confine the statement of terms to principles of wide application, and to practise deliberate restraint in the proliferation of detailed rules”.<sup>118</sup> Zweigert & Kötz observed—

“If England and the Continent have become closer in past decades as regards techniques of statutory construction, there is still a vast difference in statutory drafting. English statutes try to be as precise as possible; they go into great detail even on trivial points and often adopt a form of expression so complex, convoluted, and pedantic that the Continental observer recoils in

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<sup>116</sup> *British and French Statutory Drafting, Proceedings of the Franco-British Conference, April 1986*, Institute of Advanced Legal Studies. In fact the distinction is not so clear cut. The leading drafting academic, Sir William Dale, observed in his book *Legislative Drafting: A new Approach*, that some continental statutes are very detailed and the common idea that continental legislation is drafted only in terms of principle, “demonstrably mistaken”. In relation to French law this was supported at the 1986 conference by M Jean-Paul Costa, Rapporteur-General du Section des Rapports et des Etudes, Conseil d’Etat who said that that French Acts contain “very often a great deal of substance and sometimes almost as much as in British Acts”. See Turnbull, “Plain Language and Drafting in General Principles”, *The Loophole*, July 1995, at 25. <http://www.calc.ngo/sites/default/files/loophole/jul-1995.pdf>, accessed 12 June 2017.

<sup>117</sup> *The Preparation of Legislation* Cmnd 6053, para 9.2.

<sup>118</sup> *Ibid* para 9.1. The example is given of art 1382 of the Code which states “Any Act whatsoever by a man that causes damage to another obliges the person at fault to repair the damage.”

horror . . . [I]t is equally important that the law should be clear and comprehensible, that it reveal the principle which underlies it, and that it presents in a logical order the rules it enacts. These virtues do not appeal to the English draftsmen: they put exactitude above all else.”<sup>119</sup>

It is true that England does not have the same background in codification as, say, France but as the drafting style of the UK and the Commonwealth has developed, led by the plain English approach starting in Australia, New Zealand and Canada, the gap has undoubtedly narrowed.<sup>120</sup> Today broad statements of principle are more common and purposes clauses are not unknown in UK legislation.<sup>121</sup> The need to implement legislation from the EU has also had an influence on English style. It has also had an impact on the French civil code where the detailed rules required by a directive can create internal disharmony, leading the French to consider whether there needs to be reform in the area of obligations.<sup>122</sup> Professor Driedger illustrates, using the English language version of Quebec legislation as examples, how civil law drafting style could be improved by bringing it closer to the common law style, concluding that there may not be as much difference as supposed and hoping that eventually there would be one common style for Canada.<sup>123</sup> It would thus not be

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<sup>119</sup> N 66, at 267. Despite their conclusions, it is contended that English drafting style has simplified significantly in recent years. The third edition was published back in 1998.

<sup>120</sup> But “Making the Law”, the Report of the Hansard Society Commission on the Legislative Process in 1992 rejected the idea that the European a style of drafting should be generally adopted in Britain, fearing it would result in a great recourse to the courts.

<sup>121</sup> See, for example, Family Law Act 1996, s 1. But one parliamentary counsel has expressed concern that legislation drafted overall in broad principles would not sit well with *Pepper v Hart* and the right to consult Hansard because there would be a temptation to flesh out the principles with political intention, possibly transferring too much power to the executive. See Bowman, *The Loophole*, June 2000, at 5 <http://www.calc.ngo/sites/default/files/loophole/jun-2000.pdf>, accessed 12 June 2016.

<sup>122</sup> Whittaker, “The Law of Obligations” in Bell, Boyron and Whittaker, n 96, at 301. In fact some reform has now taken place as noted above, n 17.

<sup>123</sup> Driedger, *A Manual of Instructions for Legislative and Legal Writing* vol 6, Department of Justice, Canada, 1982. The new Civil Code for Quebec discussed below has been a springboard for the gradual and systematic revision of federal legislation to harmonise with province private legislation and especially the new Quebec Code—see Cuerrier, “Drafting against a

so remarkable were Jersey to enact codifying legislation based on a version of the *Code Civil* but in a style familiar to common law legislation.

### ***Statutory interpretation***

43 Where legislation is in the English style, the Jersey courts have generally followed the English approach to statutory interpretation, judging by the citation of the leading works of *Bennion on Statutory Interpretation*, *Maxwell on Interpretation of Statutes* and *Cross on Statutory Interpretation*. However, it should always be borne in mind that English authorities are merely persuasive<sup>124</sup> and it has been said that in some contexts the circumstances of Jersey may require a different approach.<sup>125</sup> If a new law is enacted that draws heavily on the *Code Civil* or English language legislation derived from it, might very different rules of interpretation be brought to bear? It is suggested that a new Contract (Jersey) Law or a contract code, whatever it is called,<sup>126</sup> is likely to be just the same as any other seminal piece of legislation in a common law jurisdiction.<sup>127</sup> Whatever style of drafting

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Background of Differing Legal Systems: Canadian Bijuralism', *The Loophole*, July 2007, at 50. <http://www.calc.ngo/sites/default/files/loophole/jul-2007.pdf> accessed 12 June 2017.

<sup>124</sup> See *Public Services Committee v Maynard* 1996 JLR 343, at 357.

<sup>125</sup> See the *obiter dicta* of Southwell, JA in his dissenting judgment in *Janvrin Holdings Ltd v Att Gen* 2001 JLR 637 which discussed the meaning of "development" in the planning context as being different in a small place like Jersey as opposed to the UK.

<sup>126</sup> For the lambasting of the New Zealand Contractual Mistakes Act 1977 in baldly stating in s 5 that the Act is to be a Code and then listing a number of other doctrines and Acts that are to continue to apply, see Jamieson, "Codes, Contracts and Commerce: The Contractual Mistakes Act Part II: Releasing more Light than Heat", *Statute Law Review* 31(2), 107.

<sup>127</sup> It is to be hoped that the new code would be changed only by textual amendments, something which can happen seamlessly under the law revision powers, rather than by enacting separate legislation. The Isle of Man has an enactment called "The Criminal Code 1872", accessible in its current form at: <http://legislation.gov.im/cms/images/LEGISLATION/PRIN>

CIPAL/1872/1872-0001/CriminalCode1872\_4.pdf. Its long title is "An Act to consolidate and amend the Criminal Law of this Island". It was clearly intended to bring all the criminal law and procedure in one place and had originally 423 sections. Unfortunately the Code, largely a product of wordy English statutes, has been dismembered over time with a vast amount of it repealed and re-enacted in other criminal legislation so that it has lost all the

is used it is highly unlikely that the courts would feel inhibited from applying their preferred methods of construction and nor would the doctrine of *stare decisis*, to the extent that it applies in Jersey, be constrained. Indeed, any attempt in the new law to limit the traditional approach of the courts would be unwise and, even if enacted, the courts are likely to find a way to sidestep such constraints. The law would inevitably be interpreted by the courts and its meaning honed, refined and adapted to circumstances. It would be naïve to expect otherwise. There will always be gaps and situations either unplanned or not catered for specifically. A comprehensive code may lead to litigation less frequently but it will in time be supplemented by the courts and doubtless in time subject to amendment. The fact that it is based on or inspired by the *Code Civil* will not turn back the tide of how the courts now operate in terms of their judgments<sup>128</sup> and the draftsman should draft with the same expectation of judicial interpretation as with any other law. It would not be safe to assume that new legislation looking more continental in style might encourage a different approach to interpretation or that judgments based on it would have the brevity of the French. If different rules of interpretation are to apply as a matter of policy this should be catered for specifically in the new law, albeit this is not usual in a civil code.

### *Codifying case law*

44 In addition to style and interpretation are the difficulties inherent in codifying common law rules derived largely from cases, a very different task to the drafting of codes in a civil law jurisdiction. Speaking at the Franco-British drafting conference in 1986, Norman Adamson, the then First Parliamentary Draftsman for Scotland, referred to the Sale of Goods Act 1893 as being the best known example of UK legislation coming close to being an economic statement of principle and observed—

“Let no one believe, however, that such economy in drafting inevitably leads to immediate clarity in the interpretation of the legislation. One needs only look at the text books—the best known of which was written by Chalmers himself—and to the

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qualities of a Code. See Edge “A Criminal Code—Lessons from the Isle of Man?” (2017) 21 *Jersey and Guernsey Law Review* 101. Edge counsels against the “reliance upon legislative precedents from a non-codified, dominant, legal hegemon” suggesting foreign models be used with care.

<sup>128</sup> See the article by Bailhache, “Jersey: Avoiding the Fate of the Dodo” in Farran, Orucu & Donlan (eds) *A Study of Mixed Legal Systems: Endangered, Entrenched, Blended*, Routledge, 2014.

multitude of judicial decisions on the Sale of Goods Act, to see that even in this exemplary case, the brevity was not attained without the necessity for detailed subsequent judicial interpretation . . . Nevertheless I concede that in a field of common law such as the Sale of Goods, provided that the legislature does not insist on superimposing too complex a structure with the object for instance of improving consumer protection, there is room for the application of generally applicable rules classified according to recognisable classes of case and client.”

45 At this same conference, Parliamentary Counsel Christopher Jenkins rehearsed the difficulty of distilling rules from decided cases referred to above, stating that “the aggregate of all the rules established by all the cases will often have the appearance of a patchwork, and will not convert easily into a consistent and comprehensive pattern”. His conclusion was that in reality a codification cannot be restricted to a mere restatement of the existing law because gaps have to be filled and principles teased out of unpromising material. The consequence is that codification is bound to involve some degree of law reform and so cannot be as uncontroversial as a consolidation, which he suggests is the reason why the Law Commission of England and Wales did not fulfil their earlier ambition for codification so much as gradual reform. A practical reason for having a codification for Jersey based on a reformed version of Jersey’s current law rather than that of England and Wales is that the body of law (in terms of the cases) will be much shorter and therefore more manageable. An examination of the reported cases decided by the Jersey courts indicates that between 1998 and 2003 there were 15 cases on contract (compared, for example, with 94 on trusts).<sup>129</sup> A distillation and rationalisation of the principles of the case law may not be such a huge task after all, and certainly nothing like the task of codifying English law. The disadvantage is of course that the local law remains underdeveloped through lack of case law and anomalies have failed to be corrected. There are too few contract cases coming before the Jersey courts for the Island to take the Norman customary law and the law as expounded by Pothier and develop a legal framework which achieves certainty and keeps up to date with modern society.<sup>130</sup>

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<sup>129</sup> Binnington, “The Law of Contract—Which Way?” Published in *A Celebration of Autonomy* (n 52), at 61.

<sup>130</sup> *Ibid.*

***Integration with Jersey statute book***

46 Turning to the Jersey statute book itself, the majority of legislation currently in force is derived from the UK, with some originating from other Commonwealth countries and some bespoke for Jersey. There are several pieces of modern legislation in Jersey that might be said to have code-like qualities in terms of covering a subject comprehensively. One is the Children (Jersey) Law 2002 which is heavily based on the UK Children Act 1989 and provides a comprehensive framework for the rights and responsibilities of and towards children. But even here the new law was not able to sweep away the old.<sup>131</sup> Because that is the current house style and because since 1963 the draftsmen have been recruited from non-Jersey lawyers experienced in drafting in the UK or elsewhere in the Commonwealth, the language and format of Jersey legislation is broadly similar to that of the UK's common law tradition, though, as we have already noted, this is evolving due to outside influences. Inevitably when EU legislation is given effect, the phraseology of Brussels has crept in too,<sup>132</sup> and in more recent times there have been greater efforts to produce bespoke legislation for Jersey rather than copying, pasting and making simple adaptations of UK legislation.<sup>133</sup> It should be remembered that legislation from Westminster reaches its final form after detailed consideration in a party political forum. Some of its complexities derive simply from the political expediency of accepting amendments or having them forced on the Bill rather than because they were part of the draftsman's original plans, a result that often militates against simplicity. This happens much less in Jersey where comparatively few amendments are made. Thus Westminster is unlikely to be the best model for Jersey, not only because it has been formulated for a much larger jurisdiction but also because the actual

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<sup>131</sup> The Law defines "parental responsibility" in art 1(1) as

"all the rights, duties, powers, responsibilities and authority which the father of a legitimate child had in relation to the child and the child's property *prior to the commencement of Part 1*, save that rights in respect of custody shall not be exclusive."

In other words, the customary law position is enshrined in statute and will continue to apply for the purposes of that definition. This is somewhat an own goal for codification!

<sup>132</sup> See for example the Consumer Safety (Jersey) Law 2006 which is in part modelled on the EU General Product Safety Directive.

<sup>133</sup> Compare the approach taken in the Discrimination (Jersey) Law 2013 which, though it is inspired in its content by the UK's Equality Act, does not seek to reproduce its form, with the Employment (Jersey) Law 2003, which much more closely followed its UK equivalent.

wording made not be optimal. Before the German Occupation it was commonplace for Jersey legislation to be drafted in French but this was much more to do with French being the official language of Jersey and a legacy of its lawyers being French-speaking rather than the influence of French legislation. For example, the *Loi (1861) sur les sociétés à responsabilité limitée* was based on a UK Companies Act.<sup>134</sup> Even legislation in areas largely governed by the customary law are in a recognisably English style, such as the Wills and Successions (Jersey) Law 1993. Property law, however, is still in French, not just the *Loi (1880) sur la Propriété Foncière* (which was in part derived from the *Code Civil*) but also legislation as recent as *the Loi (1991) Sur la Copropriété des Immeubles Bâties* (which is a French language Law derived from French law but still in the style of its English language fellows). With conveyancing now being conducted in English perhaps that will not happen in the future.

47 There is also the potential problem inherent in following Westminster legislation of English concepts being introduced into Jersey statutes that are unknown to Jersey Law. While some of these may be legitimate because the statute is referring to the word in the context of a jurisdiction other than Jersey, that by no means accounts for all the references to “mortgage” (34 in total, as opposed to 33 references to “hypothec”, “lien” (36) and several hundred references to “consideration” but only two to “*contrat à titre onéreux*”. Why is this the case? First because for a number of years now Jersey has employed draftsmen with no knowledge of Jersey law<sup>135</sup> and secondly because many of those writing the instructions will also not be familiar with it. Where instructions have come from the Law Officers’ Department there is less likely to be a problem and one also hopes that a review by Jersey lawyers in that department will pick up on misplaced concepts. It is not always the case though even in recent times, judging for example by the Goods and Services Tax (Jersey) Law 2007 and its

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<sup>134</sup> Further examples of English equivalent legislation being enacted in French are in the article by Bailhache, n 128.

<sup>135</sup> The Bailhache article, n 128, quotes a number of other drafting solecisms (ironically all but one of which occurred prior to the influx of non-Jersey draftsmen). He observes that a number of statutes enacted since 1963 “jar with the customary law” and that “some of the thinking behind certain statutes reveals the mind of a common lawyer unschooled in the principles of the civil law”. He hopes that Jersey draftsmen will now gain some knowledge of the principles of Jersey law, especially since the establishment of the Institute of Law. One draftsman completed the Advocates exams in 2011 and another is currently a student. Both have commented that the study of Jersey law has assisted them considerably in avoiding cutting across customary law.

large number of references to “consideration”. Another related problem is the need for the new law to sit well with other concepts of Jersey law. As Advocate Binnington has observed, “Simply choosing to follow the provisions of the *Code Civil* relating to contract risks confusion where a contractual dispute overlaps other areas of the law such as tort”.<sup>136</sup> The law of contract should not be reformed without consideration of the impact of changes on Jersey law as a whole.

48 The Supply of Goods and Services (Jersey) Law 2009 is a rare statutory intervention in the field of contract law.<sup>137</sup> The Law is based on English statutes<sup>138</sup> because of the existing trade and commercial links with the UK and because both local retailers and consumers had some familiarity with the UK law.<sup>139</sup> The draft Law was—

“the culmination of extensive development work drawing on expertise within the local legal profession in providing comprehensive drafting instructions as well as specialist expertise and advice from the Law Officers”,<sup>140</sup>

and the drafting process involved detailed consideration of customary law as well as relevant English legislation.<sup>141</sup> The Law, however, does not wholly override customary law even in the limited area of its scope.<sup>142</sup> It certainly improves the position of the Jersey consumer but the amount of work involved in this relatively small piece of legislation perhaps illustrates the size of the task ahead if Jersey were to legislate comprehensively in the field of contract law.

***Lessons and inspiration from elsewhere***

49 From the above we see that it would not be impossible to draft legislation that impinges on or covers areas of customary law in a style

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<sup>136</sup> N 129.

<sup>137</sup> The Consumer Safety (Jersey) Law 2006 and the Distance Selling (Jersey) Law 2007 should also be mentioned.

<sup>138</sup> Namely the Sale of Goods Act 1979, the Supply of Goods (Implied Terms) Act 1973 and the Supply of Goods and Services Act 1982, with some regard also to the Sale and Supply of Goods Act 1994 and the Sale and Supply of Goods to Consumers Regulations 2002.

<sup>139</sup> Hanson & Marr, “An Introduction to the Supply of Goods and Services (Jersey) Law 2009” (2009) 13 *Jersey and Guernsey Law Review* 336.

<sup>140</sup> See the Report on the *Projet de Loi* giving rise to the Law at [www.statesassembly.gov.je](http://www.statesassembly.gov.je).

<sup>141</sup> Hanson and Marr, n 139.

<sup>142</sup> Article 95(2) specifically states that the rules of customary law, except in so far as they are inconsistent with this Law, continue to apply to contracts for the supply of services and hire-purchase agreements.

of drafting that originates from a common law jurisdiction. But is the same true of a much larger scale project based on civil law? There are likely to be further difficulties for the draftsman or with the ensuing draft that we have not foreseen. Are there factors that should lead the project towards preserving the original law or towards that of England? This is where Jersey might benefit from looking at what has happened in other mixed jurisdictions that have relied on the *Code Civil* but nevertheless operate a Commonwealth style of drafting. Quebec, St Lucia and Mauritius are all jurisdictions whose contract law is derived from the *Code Civil* but which have since seen an influx of the common law.

50 Jersey may well find it useful to look at the evolution of Quebec's contract law as an example of a jurisdiction that has successfully modernised and adapted its legal system without abandoning its civilian heritage. Today Quebec's private law is governed by the Civil Code of Quebec of 1991, which replaced the Civil Code of Lower Canada of 1866 derived from the Custom of Paris, the *Code Napoleon* and the common law. It was seen as "quite a feat to have successfully accomplished the recodification for it is uniformly acknowledged to be an arduous and precarious undertaking".<sup>143</sup> The reform of the code was said to have three purposes—to close the gap between existing rules and practical experience, to consolidate and rationalise conflicting currents in judicial interpretation and to reassert the centrality of the civilian legal tradition in Quebec. It builds on the older code—70% is the same—but modernises it, using as its inspiration many different codes and civilian jurisdictions as well as the common law to adapt to the needs of contemporary society.<sup>144</sup> In considering what Jersey could learn from Quebec's experience, Professor Jukier<sup>145</sup> points out first that as Jersey has never had a code there is no document to reform or recodify, so any codification of the law of contract would have to start from scratch. Secondly, Quebec is a much larger jurisdiction with a robust legislative and jurisprudential evolution built up over a long period. Thirdly, there was the political will to retain civil law as part of Quebec's identity as a jurisdiction. The latter may exist in Jersey, but

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<sup>143</sup> Jukier, "Contract Law: What can Jersey learn from the Quebec Experience?" (2011) 15 *Jersey & Guernsey Law Review* 131. According to Swain, n 82, it involved nearly 200 people at the outset and took many decades.

<sup>144</sup> For example, it codifies the doctrine of good faith in both the creation and performance of contractual obligations, adopts the whole regime of the trust which is so alien to the civilian tradition and creates the option to have hypothecs on moveable property.

<sup>145</sup> N 143.

there are also overriding financial and economic motivations for legal certainty. Despite the differences, she concludes that the similarities in the legal histories, traditions and aspirations enable relevant conclusions to be drawn from Quebec's experience. Once Jersey has made its choices so that there is certainty and it has sorted out its legal identity, she considers that businesses will adapt to whatever system is chosen.

51 St Lucia's hybrid legal system is also founded on the transplantation of the common law onto the civil law inheritance, based on the pre-1789 body of French laws. The St Lucia Civil Code of 1879 was modelled on the 1866 Quebec Code, which already had its share of infusion of English common law rules and remedies. Common law was adopted by legislation and English law was fed into the code. Then in 1954 an Ordinance was passed giving the Law Reform Commissioner power to assimilate the code to the law of England in accordance with the needs of the Island where they differed. In 1956, a Civil Code (Amendment) Ordinance was enacted, replacing many provisions of the code with the prevailing English law. This was effected primarily by reception clauses incorporating English law, including the law of contract. However, there is a curious qualification in that the English doctrine of consideration is not to apply. Instead the term is to continue to mean cause or reason for entering a contract or incurring an obligation, and consideration may be either onerous or gratuitous. The Ordinance also states that where a conflict exists between the law of England and the express provisions of the code or any other statute, the code or the statute should prevail. In *Velox v HelenAir Corp*<sup>146</sup> it was held that consideration must be given the meaning set out in the code. The Ordinance also introduces provisions proscribing the interpretation of certain articles in accordance with the Quebec code and requiring common law interpretations to be used as far as possible. This was complemented by express repetition of certain English statutory provisions on a variety of topics including trusts. Despite the injection of the common law, the Quebec code of 1866 remains at least highly persuasive for interpreting the St Lucia code, particularly where it is silent on the interpretation of a particular provision. In *Poliniere v Felicien*<sup>147</sup> the Privy Council held that provisions derived from the Quebec code should mean what they did in Quebec and if there is no available authority in Quebec the courts could look to the French code for meaning.

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<sup>146</sup> (1997) 55 WIR.

<sup>147</sup> (2000) 56 WIR 264.

52 The overall result of the code is that is hard to know the true state of the law in St Lucia. Belle-Antoine states that—

“[I]t is difficult for lawyers trained in the common law tradition to appreciate the different nuances of the civil law, while it is equally demanding to operate within a system which is neither civil nor common law, although possessing characteristics of both.”<sup>148</sup>

The inherent difficulties of this hybrid system are further complicated by the uncertainty surrounding the exact scope of the general reception clause in the light of the specific reception of a number of English statutory provisions. This may be due to the incoherent legislative approach to the introduction of common law rules. In *Spiricor of St Lucia Ltd v Att Gen of St Lucia*,<sup>149</sup> the Court of Appeal had to choose between conflicting provisions in the code and provisions in the Registered Land Act 1984, holding that the transfer of land is no longer based on the consent of the vendor but on the completion of the registration process, so the code provisions were no longer determinative. The case illustrates the traps for the draftsman in not being fully conversant with the code and for lawyers interpreting the law to take account of abrogations made by ordinary legislation.

53 The vulnerabilities of the St Lucia Civil Code can be partly explained by the failure of the legal system to afford it adequate protection in the form of appropriate rules to interpret it, bearing mind it is sitting, perhaps now rather uncomfortably, in the middle of a common law regime with judges poised to scrutinise it as they would any common law statute. It does have its own rules of interpretation, but they were doubtless designed for civilian not common law judges and external to the code there are rules of interpretation mostly derived from judicial decision. Anthony writes that “Few judges saw the maintenance of the civilian system as their judicial responsibility. Thus, in St Lucia, there was no attempt like that of Quebec to protect *l’intégrité du Code Civil*”.<sup>150</sup> In addition the Interpretation Act, which was intended for ordinary legislation, was applied to the code, often with unfortunate consequences. Where aspects of the common law have been incorporated into the code, special interpretation approaches may apply, such as the rules in arts 945–953 which apply to the

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<sup>148</sup> Belle-Anthoine, *Commonwealth Caribbean Law and Legal Systems*, Routledge–Cavendish, 2008, chap 4.

<sup>149</sup> (1997) 55 WIR.

<sup>150</sup> KD Anthony, ‘The Courts and the Interpretation of a Civil Code in a Mixed Legal System: Saint Lucia Revisited’, [1995] 5(1) Carib LR 144, at 146.

interpretation of a contract. This approach is alien to the code tradition as is the greater reliance on precedent and risks compromising the very character of a civil code. The conclusion reached was that the future of St Lucia's legal system hinges between the renewed vigour of a uniquely hybrid system and the complete adoption of the common law. The latter choice may even be inevitable, since the process of Anglicisation has been allowed to undermine the civil law tradition to such a degree that it will be difficult to reverse the process. Perhaps *dicta* in *Poliniere* concerning the rich civil law jurisprudence from France and Quebec available to the St Lucia courts will serve to encourage the continued flourishing of the hybrid legal system.

54 The experiences in St Lucia may serve as a warning for Jersey of the difficulties of enacting a civil law style code in a mixed system with large common law elements. Whereas Quebec has a new code with a deliberate intention to preserve the civil law, St Lucia has combined civil law and common law elements in a way that makes the law very difficult to follow. The code's being interpreted largely in the common law tradition is what was predicted above as likely to happen in Jersey. The difference is that Jersey's legislation would be new, not a relic of the past, though if it is based on pre-existing law that dates back to Pothier and the French code, perhaps this distinction could be overplayed.

55 In Mauritius,<sup>151</sup> three of the Napoleonic codes were adopted which, as with St Lucia, survived British rule. The law developed following independence and the strength of the legal culture and the local pride was such that Mauritius made a sustained effort to patriate its legislation. This meant reviewing and promulgating French law as Mauritius laws and reviewing their compatibility and that of British colonial laws with the Constitution. These laws were also updated to reflect contemporary local conditions and their status as Mauritian legislation. The reforms culminated in the *Code Civil Mauricien* promulgated in 2001. As well as local specificities (Muslim and Hindu religious law) the new code also reintegrated elements of the French code that had been repealed and replaced by English law in the appropriate places in the new code and added a number of new topics. Lawyers used to be trained in England but since 1985 it is possible to

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<sup>151</sup> For the material on Mauritius, reliance is placed on Sir Victor Glover, "Legislative Drafting in Mauritius: A Developing Discipline", *The Loophole* August 2011, at 20 <http://www.calc.ngo/sites/default/files/loophole/aug-2011.pdf>, accessed 3 March 2016 and Tony Angelo, "Mauritius: Capitulation, Consolidation, Creation" in *A Study of Mixed Legal Systems, Endangered, Entrenched or Blended*, n 128.

study for a law degree in Mauritius and both English and French principles are taught. Since 2013 a vocational course has been taught in both English and French. Most of the cases cited in the Supreme Court of Mauritius are Mauritian, but where foreign cases are cited they are usually from the UK, reflecting, it is supposed, the fact that these judgments are likely to be fuller than French ones. In fact the signs are that Mauritius is developing its own national law rather than a mere blending of the common law and French legal systems. It is perhaps this last point that will excite Jersey reformers.

### **Section 5: Conclusion**

56 This paper has examined the origins of Jersey's contract law in customary law as supplemented by the civil law of France, to which a number of elements of English law have been grafted, creating a number of areas of uncertainty. It concludes that, however difficult, bespoke comprehensive legislation is likely to be the best way forward. The first hurdle will be to ensure resources and the will to legislate come from Jersey's government. Then a detailed brief needs to be developed identifying what the Jersey law of contract should be. This is where work that might be directed towards restatement would come in useful, whether or not published as a restatement as an interim measure. Specialist input is needed for this along with consultation with the profession and other stakeholders as it will involve detailed analysis from a variety of legislative, case law and other sources. Only then should significant law drafting time be expended. Legislation from a variety of sources may be useful to inspire the policy maker and the structure and wording of the Law, but the most successful model will be a law drafted in the modern Commonwealth style, but as broadly principled as possible, and on the assumption that the courts will interpret the new law as they do other Jersey legislation.

57 A brief study of other mixed systems in the Commonwealth that derive their law of contract from the French *Code Civil* suggests that a civilian approach will work only if it is clearly defined and protected from common law erosion. However it would seem too that it is possible to develop a national law that utilises elements from different legal traditions, for example Quebec's new civil code which includes useful common law concepts. One view is that original creations have resulted from the creative amalgamation of common law and civil law elements<sup>152</sup> and Jersey, with its ability to choose between elements of

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<sup>152</sup> See Palmer, "Mixed Jurisdictions", in Elgar, *Encyclopaedia of Comparative Law*, 2nd ed, at 596. Quebec's floating charge is one example of this.

civil law and common law jurisdictions, has a rich legal tradition enabling it to adapt to an ever-changing world.<sup>153</sup> Like Mauritius, Jersey has developed its own academic and vocational training for lawyers and this may be the springboard for the jurisdiction to come out of the shadows of both England and France. This may well strengthen Jersey's uniqueness. It is suggested that a new law will have the greatest integrity for the future if it is seen as the modern choice for Jersey, a selection of the best from both the civil and common law, provided that this is done in a way that produces a seamless and logical whole rather than cherry-picking or melding distinct concepts like consideration and *cause*; lessons could here be learnt from St Lucia. So long as the overall jurisprudence is an integral scheme that fits with Jersey law on related topics, policy makers should have the courage to develop a law of contract for Jersey that has the best features of other jurisdictions as well as its own, but rejects those that work less well. A bespoke law of contract for Jersey can but enhance its reputation as a modern jurisdiction that protects the consumer and provides the framework for commercial transactions. As Binnington has written—

“The development of a modern law of contract which reflects the ‘custom, usage or habit’ of the Island today rather than that of the 1880s is essential in maintaining confidence in the Island’s ability to serve not only the finance industry but the community as a whole . . . [T]here is no reason why a codification, with a leaning towards English common law, should not be used to speed up the process and to produce a framework which is in keeping with the needs of today’s society.”<sup>154</sup>

The momentum is there and should be seized upon at the earliest opportunity.

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<sup>154</sup> Binnington, n 105, at 64.

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