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Book Review: Remedies for Breach of Contract by Solene Rowan

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Book Reviews

Remedies for Breach of Contract by Solene Rowan,
Oxford University Press, New York, 2012, 265 pp, ISBN 978-01-99606-603.

The title of this volume suggests broader coverage than the book delivers, even if one notes the subtitle 'A Comparative Analysis of the Protection of Performance'. The book compares English common law remedies with French civil law remedies in the protection of what the author calls the 'performance interest' of the non-breaching party. Despite the slightly misleading title, this volume is an excellent addition to the literature on contract remedies. The author does a fine job of describing and comparing the different approaches of the English and French legal systems, and, in so doing, she identifies the jurisprudential differences between the two systems. Her discussion of French remedies offers some helpful suggestions for possible adjustments in the English common law which would do more to protect the performance interest without abandoning the fundamental principles of the common law of contracts. Perhaps in her next book or two, the author could expand the coverage to include a comparison of variations among the many common law jurisdictions and also look beyond France to other major civil law jurisdictions.

The central theme of the book has to do with the 'performance interest' and how one system or the other defines that interest and offers remedies that — more or less — protect that interest. She does not attempt to present one system as better or worse than another and she recognises that neither the English nor the French are likely to adopt the other's system. Her concern is with the 'functionality' of various remedial approaches (pp 6–11).

Not surprisingly, the author first looks at the availability of specific remedies and notes the traditional preference of English law for the substituted remedy of damages. The French law, as all common lawyers know, takes the opposite approach and prefers specific remedies to damages. As the author notes, one of the reasons for the English preference for damages is historical accident — a result of the separate development of the law courts and the equity courts and the political tensions between the two (p 32). That reason, standing alone, is insufficient to explain the secondary role of specific remedies, and the author takes due note of concerns about enforcement (contempt as opposed to levy and execution on property), efficiency theories and problems of supervision (pp 25–34). The fundamental basis for the common law approach is more philosophical than simply practical. Contract is understood to be a practical mechanism for the exchange of goods and services between parties who, separately, retain substantial liberty interests which allow the parties to choose to perform or not to perform. In that context, an economic substitute (damages) can be seen as sufficient to satisfy the expectations of a party.

If one starts from the premise that performance and damages fulfil in equal measure the expectations of the promise, damages will almost invariably be adequate, and instances of specific relief will necessarily be rare [p 34].

French law, the author notes, goes to almost the opposite extreme and will require specific performance of a contract even when, for example, the buyer does not want performance and is willing to pay the anticipated profit to the seller. She notes a case in which a defaulting buyer of kitchen equipment did not want the equipment nor its installation, but the seller asked for performance and the court ordered that the buyer had to go through with the contract.[1] Two others noted by the author bring to mind the well-known

Ruxley swimming pool case.[2] In one case, a contractor breached the specifications of a contract by completing a building 13 inches lower than required. The trial court found the variation in height not to be a breach of an essential term nor to have any appreciable effect on the economic value of the performance. Nevertheless, on appeal the Cour de Cassation ordered specific performance which required demolition and rebuilding.[3] A swimming pool was built with three steps instead of the specified four. There was no discernible difference in value nor in utility, but the contractor had to rebuild the pool to the original specifications.[4]

The author states that a contract, in the French legal system, is a solemn undertaking of obligations between parties who bind themselves into a relationship, the breach of which is an act of disloyalty and is reprehensible (p 53). It is not simply a mechanism for efficient economic exchange of goods and services.[5]

Since the raison d'etre [of contract] is to unite individuals and also because, born of the mutual will of the parties, it is to be performed loyally, the contract is … ,above all, a human affair … The contract cannot be reduced to a legal creation of one or several obligations. Nor can it be reduced, in an economic approach, to a transfer of values or a modification of estates.

Even if the English courts are not likely to abandon their principles to embrace French law, the author argues that there are lessons that can be learned from the French with respect to some of the practical problems which concern courts about specific performance orders, such as continuing supervision. One of her most interesting suggestions is that English equity courts consider an enforcement mechanism similar to the French astreinte instead of the bludgeon of contempt. Astreinte is a fine for non-performance of a specific performance order that increases with time but which is limited by the financial status of the defaulting party (pp 49, 58).

One of the strongest sections of the book deals with the problem of termination for breach of contract. The author succinctly describes the common law distinctions between conditions and warranties, the use of termination clauses, anticipatory repudiation, and the other situations when a non-breaching party can treat a breach as a repudiation that justifies termination (pp 70–80). By comparison, French law requires that the decision on termination come from the court, not from a party. A non-breaching party can petition the court for termination and damages, but cannot make the decision on termination unilaterally (pp 80–4, citing French Civil Code s 1184). The author's discussion of this difference, and the rare circumstances under which a party may possibly terminate unilaterally (a comportement grave), further illustrates the sharp distinctions between the two systems and leads to an interesting consideration of the 'legitimate interest' standard of White and Carter.[6]

In her discussion of damages the author notes that many of the basic calculations for damages are similar in the two systems, except that the French do not have a mitigation rule and that a non-breaching party may sue for the faculte de remplacement, the cost of having a third party complete the work not finished or done incorrectly by the defaulting party (pp 109–114). Recovery for what the English courts call 'loss of amenity' is usually available as dommage moral, and the author's discussion illustrates how examples from the French experience could be useful to English courts faced with non-economic, but nevertheless real, losses felt by the non-breaching party (pp 120–6).

The author's treatment of restitution and disgorgement remedies may be the least satisfactory section of this otherwise fine volume. She covers the usual discussions based on the decision in Attorney-General v Blake,[7] but the discussion is largely descriptive — perhaps because French law has no such concept as disgorgement. This section could have been improved by venturing beyond the pure English–French

comparison and taking into account the rich literature surrounding the drafting and final publication of the recent Restatement (Third) of Restitution (2011) by the American Law Institute.

In the chapter on deterrence and punishment, the author aptly summarises the various arguments that have been made in favour of the use of punitive damages in contract cases and concludes, in general, that the case has not been made for the use of punitives in common law contract actions. There would be incoherency, according to the author, if an underlying principle is the liberty to choose to perform or not to perform and pay damages, but a court then 'punished' a breaching party for exercising the liberty of choice. She correctly recognises that the manner and method of breaching may constitute a separate tort and that relationships between contracting parties vary. Some contracts are truly arm's length between independent parties whereas others involve some degree of trust and mutual confidence, such as those between insurers and insureds (pp 172–9). French law does not provide for punitive damages in contract cases, but French courts can consider the manner of breach and the context in which the breach occurred in deciding upon the compensatory damages award (p 172).

The discussion of penalty clauses and agreed remedies is especially interesting. French law enforces negotiated penalty clauses, the same as other clauses within a contract. The English common law continues to have some difficulty with penalty clauses despite a stated deference to party autonomy. The author's consideration of the utility of penalty clauses which are freely negotiated between independent parties of similar bargaining power adds interesting arguments to what is developing as a serious debate within various common law jurisdictions. In this regard, the French experience provides useful examples. The author suggests greater deference to party autonomy not only in connection with penalty clauses but also in connection with other agreed remedies (pp 212–36).

The suggestion that advance agreement of the consequences of breach ought to be valid and enforceable should not be controversial. In the absence of any insurmountable public policy objections, and as agreed remedies are founded on the principle of freedom of contract, their integration into English contract law should not be problematic. With proper safeguards, they would give effect to the contractual will of the parties without causing unfairness [p 236].

Throughout the text the author makes reference to various law reform proposals, most particularly those aimed at harmonising contract and commercial law within the European Union. These proposals are important to note, but, as the author concludes, neither the French nor the English are likely to adopt proposals that fundamentally alter the philosophical and traditional underpinnings of their respective laws of contract. The French and other common law jurisdictions, but not the United Kingdom, have adopted, for example, the UN Convention on the International Sale of Goods, which incorporates elements of both the civil law and the common law. Proposals that deal with a specific subset of contracts, especially ones that are transnational by nature, may be well received in either a civil or common law country, but ones that would alter fundamental principles are not likely to be successful.

In the end, the author concludes much as she began — the differences between French and English remedies for contract breaches are based on deeply seated and firmly established ideas of the function of contracts. Neither is going to adopt the approach of the other, but the experiences of each system can be useful in developing sensitive and appropriate responses to varying situations.

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1 Paris 5, September 2001, Juris-Data no 2001-152770, n 170 p 43, discussed pp 42–3.

2 Ruxley Electronics v Forsyth [1995] 3 All ER 268.

3 11 May 2005, RDC 2005.323, discussed pp 45–6.

4 17 January 1984, RTD Civ. 1984.711, discussed pp 45–6.

5 J Mestre, Preface to B Fager, Le comportement du contractant, PUAM, Aix-en-Provence, 1997, quoted, p 53.6 White and Carter (Councils) Ltd v McGregor [1962] AC 413.7 [2000] 4 All ER 385.