

Preface

This volume in the Studies of the Oxford Institute of European and Comparative Law is the product of a colloquium held at St John's College, Oxford, in March 2007, the purpose of which was to discuss the *Avant-projet de réforme du droit des obligations et de la prescription* both from an internal French perspective and from wider perspectives of comparative law.

The *Avant-projet*, drawn up by a group of distinguished French jurists and retired judges under the leadership of Pierre Catala, was presented to the French Minister of Justice in September 2005. If enacted, it would lead to the most far-reaching reform of the French Civil Code since it came into force in 1804, and would fundamentally alter many central aspects of contract law, the law of delict and the law of unjustified enrichment. There is currently a very lively debate in France as to the merits or demerits of both the particular draft provisions and the general idea of recodification as such. These discussions are not only of interest to French lawyers, since one of the main aims of the *Avant-projet* is to update the French Civil code in order to make it more attractive as a model for other jurisdictions and to give French legal thought more weight in the continuing debates on the future of harmonisation of the laws of contract and tort in Europe: to enhance the 'exportability' of French law. To this end, various official translations of the *Avant-projet* were commissioned, amongst them one into English by two of the co-editors of this volume, John Cartwright and Simon Whittaker.

The purpose of the volume is to make both this translation and the original text of the *Avant-projet* accessible to an English speaking audience, together with discussion of particularly interesting aspects of the substantive draft provisions in a comparative perspective. Eight topics are dealt with first from an internal French perspective by French lawyers, and then subjected to a comparative assessment by contributors from other jurisdictions. Other contributions within the volume include an overall assessment of the draft provisions by one of the most senior French judges who headed a Working Party on the *Avant-projet* established by the French Supreme Court, the Cour de cassation.

The colloquium was organised by the Institute of European and Comparative Law at Oxford and supported financially by the *Association Sorbonne-Oxford pour le droit comparé*, whose founding members are the Université de Paris I, the Institute of European and Comparative Law of the University of Oxford and Clifford Chance. The objects of the *Association* are to develop exchanges, teaching and research in the field of

Anglo-French comparative law between the two universities. The *Association* is funded principally by Clifford Chance, and we should like to thank the *Association*, and Clifford Chance in particular, for their support which enabled us to bring scholars to Oxford in order to participate in the colloquium. We were very pleased that Michael Elland-Goldsmith, partner of Clifford Chance and Secrétaire Général—and long-standing supporter—of the *Association*, was able to participate in the colloquium. It is with great sadness that we record his premature death in June 2007.

We should also like to thank Jenny Dix, Administrator of the Institute of European and Comparative Law, for her invaluable assistance throughout the preparation for, and the running of, the colloquium; Janice Feigher and James Dingley of Clifford Chance, who took notes of the discussions at the colloquium; the President and Governing Body of St John's College, Oxford, for their hospitality; Jonathan Bremner, Wendy Kennett, Marina Milmo and Peter Wilson, for their assistance in translating papers that had originally been written in French; Adam Sher, for his help in editing the contributions; Pierre Catala and *La documentation française* for allowing us to reproduce the text of the *Avant-projet*; and most particularly, of course, the participants at the colloquium, both those who presented papers (which are now, in their revised forms, contained in this volume) and those who attended and made a very significant contribution to the discussion.

Since the Oxford colloquium, in the wake of the *Avant-projet*, various steps have been taken towards the reform of the laws of contract and prescription. Some of these developments took place only after submission of the manuscripts to the publishers. They concern many of the topics covered in this volume, and particularly those dealt with in chapters 4, 5, 16 and 17. It was not possible to update all the contributions in the light of these most recent developments but we are grateful to Richard Hart for allowing us to change the end of the penultimate section of chapter 1 in order to give a very brief account of the current state of the debate.

John Cartwright
Stefan Vogenauer
Simon Whittaker
Oxford
December 2008

Contents

Preface	v
Contributors	xv
List of Abbreviations	xvii
Part I Introducing the <i>Avant-projet de réforme</i>	
1 The <i>Avant-projet de réforme</i> : An Overview STEFAN VOGENAUER	3
I. Background	3
(a) Codification, Decodification and Recodification	4
(b) European and Global Challenges	7
II. Genesis	9
III. Structure, Presentation and Style	10
IV. Content	11
V. Reception	15
VI. Conclusions	20
Bibliography	22
Part II Assessing the <i>Avant-projet de réforme</i>	
A. Negotiation and Renegotiation	
2 Negotiation and Renegotiation: A French Perspective BÉNÉDICTE FAUVARQUE-COSSON	33
I. Negotiation	34
(a) Good Faith During Negotiations	35
(b) Sanctions	38
II. Renegotiation	43
(a) Articles 1135 to 1135-1 of the <i>Avant-projet</i>	43
(b) Comparative Perspective	45
III. Conclusion	48
3 Negotiation and Renegotiation: An English Perspective JOHN CARTWRIGHT	51
I. Negotiation	51

(a) English Law: No General Duty between Negotiating Parties	52
(b) French Law: The Move Towards a Protected Relationship?	57
(c) Essential Differences in the Approach to the Negotiations	60
II. Renegotiation	62
(a) French Law: A Link between Negotiation and Renegotiation	62
(b) English Law: Breaking Down the Resistance to a Duty to (Re)Negotiate?	65
(c) Parallels and Differences	68
B. A Future for <i>la cause</i>?	
4 A Future for <i>la cause</i>? Observations of a French Jurist	
JUDITH ROCHFELD	73
I. The Renewal of the Definition: from Counterparty to Interest	75
(a) The ‘Concretisation’ of Cause: The Consideration of the Real Interest	77
(b) The ‘Subjectivisation’ of Cause: The Consideration of Individually Defined Aims	81
II. The Renewal of the Uses of Cause: from an Abstract Control of Balance to a Control of the Real Utility of the Contract	83
(a) The Imposition of a Minimum Inviolable Reasonable Interest, or Typical Cause	84
(b) The Control of the Reasonable Interest According to the ‘Desired Economic Outcome’ or Atypical Cause	87
(c) Cause, Proportionality and Coherence	90
III. The Renewal of the Sanction: from the Nullity of the Contract to the Eradication of Clauses Undermining Goals	93
(a) The Recognition of the Protection of Individual Interests: Relative Nullity	93
(b) The Defence of the Essence of Contract: The Invalidation of a Clause Undermining the Goal	94
IV. Conclusion	99
5 <i>La cause</i> or the Length of the French Judiciary’s Foot	
RUTH SEFTON-GREEN	101
I. Fair Exchange and Making Good Choices	103
(a) Judicial Assessment of the Parties’ Substantive Bargain	103
(b) Judicial Elimination of Terms of the Contract that are Incompatible with the Contract’s Core	112
II. The Legitimacy of Judicial Intervention: Paternalism	117

(a) Evaluating the Extent of Judicial Intervention	118
(b) Justification for Judicial Intervention: The Acid Test	118
C. Enforcement of Contractual Obligations	
6 The Enforcement of Contractual Obligations: A French Perspective YVES-MARIE LAITHIER	123
I. The Preference for the Voluntary Performance of Contractual Obligations	124
(a) Performance of the Contract in Which the Debtor has an Interest	124
(b) The Performance of a Contract Which has Lost its Point for the Debtor	128
II. The Preference for the Enforced Performance in Kind of Contractual Obligations	131
(a) The Obstacles to Enforced Performance in Kind	132
(b) Contractual Arrangements for Enforced Performance in Kind	137
7 The Enforcement of Contractual Obligations: Comparative Observations on the Notion of Performance LUCINDA MILLER	141
I. Introduction	141
II. <i>Exécution en nature</i> and the <i>Avant-projet</i>	143
(a) Proposed Article 1154; the Primacy of <i>exécution en nature</i>	143
(b) <i>Exécution en nature</i> and (Non)-Performance	149
(c) Protection of the ‘Performance Interest’	152
III. Penalty Clauses and Performance	158
(a) The <i>clause pénale</i> within the Code civil	160
(b) <i>Avant-projet</i> Modifications	162
IV. Conclusion	165
D. Termination for Non-performance and its Consequences	
8 Termination of Contract: A Missed Opportunity for Reform MURIEL FABRE-MAGNAN	169
I. The Only Question Considered: Termination of Contract as a Remedy for Non-performance by One Party of his Obligations (Termination for Non-performance)	170
(a) The Conditions for the Remedy	170

x *Contents*

(b) The Effects of the Remedy	175
II. The Neglected Issue: Termination of Contract as a Right for Each Party to Extricate Himself from a Contract of Indefinite Duration (A Right to Unilateral Prospective Termination)	177
(a) Unilateral Prospective Termination of Contracts of Indefinite Duration	178
(b) The Adaptation of the General Law of Contract to the Diversity of Contractual Instances	184
9 ‘Termination’ for Contractual Non-performance and its Consequences: French Law Reviewed in the Light of the <i>Avant-projet de réforme</i> SIMON WHITTAKER	187
I. ‘ <i>La révolte du droit contre le code</i> ’	190
II. <i>Résolution</i> and the Avoidance of Logic	198
(a) The Survival of Some Contract Terms after <i>résolution</i>	198
(b) Contractual Liability in Damages and its Measure	200
III. Concluding Observations	203
E. The Effects of Contracts on Third Parties	
10 Contracts and Third Parties in the <i>Avant-projet de réforme</i> DENIS MAZEAUD	207
I. Reproducing the Current Law	210
(a) The Relative Effect of Concluded Contracts	210
(b) The Obligational Effect of Contracts in Progress	214
(c) The ‘Opposability’ of Contractual Non-performance	218
II. Reform of the Current Law	223
(a) The Attractive Effect of Contractual Non-performance	223
(b) The Principle of the Attractive Effect of Contractual Groups	227
11 The Effects of Contracts on Third Parties: The <i>Avant-projet de réforme</i> in a Comparative Perspective STEFAN VOGENAUER	235
I. Reinforcing Relative Effect	235
II. Reinforcing Exceptions to Relative Effect	239
(a) Stipulations for the Benefit of a Third Party	239
(b) A Multitude of Further Exceptions	263
III. Reinforcing Relative Effect?	268

F. The Definition of *la faute*

12	The Definition of <i>la faute</i> in the <i>Avant-projet de réforme</i> JEAN-SÉBASTIEN BORGHETTI	271
	I. Assumed Faithfulness to the Existing Law	275
	(a) Endorsing the Objective Conception of Fault	275
	(b) Endorsing the Definition of Objective Fault Espoused by Academic Writers	277
	II. Confirmation of a Development	283
	(a) Fault, an Increasingly Abstract and Disembodied Idea	284
	(b) Fault, Merely a Criterion for the Imputation of a Duty to Make Reparation?	286
13	The Role of <i>la faute</i> in the <i>Avant-projet de réforme</i> PAULA GILIKER	289
	I. Introduction	289
	II. A Recategorisation of Contractual and Delictual Liability	291
	III. General or Special Regimes of Liability: A Re-examination of <i>faute</i> in the Law of Delict	293
	IV. Article 1362: Liability for <i>les activités dangereuses</i> —A Step Too Far?	299
	V. Conclusion	302

G. Damages, Loss and the Quantification of Damages

14	Damages, Loss and the Quantification of Damages in the <i>Avant-projet de réforme</i> PAULINE RÉMY-CORLAY	305
	I. A Victimophile Law on Reparation	310
	(a) A Law on Reparation	310
	(b) The Right to Compensation: Personal Injury	315
	II. A Law of Reparation Seeking the Fusion of Contract and Delict	318
	(a) The Distinctiveness of Contractual Liability?	318
	(b) Reparation in Kind as Contrasted with Performance in Kind	322

15 Comparative Observations on the Introduction of Punitive Damages in French Law	
SOLÈNE ROWAN	325
I. Introduction	325
II. The Rationale Underlying Punitive Damages	327
III. The Circumstances Giving Rise to Punitive Damages	328
IV. The Justification for, and Itemisation of, Punitive Damages Awards	333
V. The Level of Punitive Damages	334
VI. To Whom may Punitive Damages be Awarded?	336
VII. Insurance	339
VIII. Is The Introduction of Punitive Damages in French Law Desirable?	340
IX. Conclusion	343
H. Reforming the French Law of Prescription	
16 Reforming the French Law of Prescription: A French Perspective	
ROBERT WINTGEN	347
I. What Would Change	348
(a) With Regard to Periods	348
(b) The Causes of Interruption and Suspension	352
II. What Would Not Change	354
(a) The Retention of Certain Provisions Relating to the Causes of Suspension	354
(b) The Retention of the Unitary Approach to Acquisitive and Extinctive Prescription	356
17 Reforming the French Law of Prescription: An English Perspective	
JOHN CARTWRIGHT	359
I. Some Fundamental Questions (and Instincts?) about the Law of Prescription	362
(a) Legal Instincts? Striking a Balance	362
(b) Roman Law: Instincts and Policies	363
(c) English Law: Instincts and Policies	365
II. The Pressures for Reform in Modern French Law and English Law	366
(a) Problems in the Existing French Law	366
(b) Problems in the Existing English Law	368

III. The Proposals of the <i>Avant-Projet</i> —and some English Law Comparisons	370
(a) Overview: A ‘Limited Reform’?	370
(b) Limitation Periods	371
(c) The Starting-point for the Running of the Period	373
(d) Suspensions and Interruptions	375
(e) The Place of the Court and of the Parties	376
IV. Harmonisation of the Law of Prescription?	376
V. Postscript: The Proposals for the Reform of the Law of Prescription as an Illustration of Different Approaches to Law Reform	378
I. The Perspective of the Judiciary	
18 The Work of the Cour de cassation on the <i>Avant-projet de réforme</i> PIERRE SARGOS	383
I. The Reform of the Law of Obligations	388
II. The Reform of the Law of Civil Liability and the Law of Prescription	394
III. Conclusions	401
J. Summaries of the Discussions and Emerging Themes	
19 Summaries of the Discussions SIMON WHITTAKER, STEFAN VOGENAUER AND JOHN CARTWRIGHT	405
I. Discussions on the Law of Contract: Negotiation and Cause (Simon Whittaker)	405
II. Discussions on the Law of Contract: Enforcement, Termination and Effects on Third Parties (Stefan Vogenauer)	407
III. Discussions on the Law of Delict and Prescription (John Cartwright)	409
(a) Delict	409
(b) Prescription	411
20 Emerging Themes HUGH BEALE, PHILIPPE THÉRY AND GERHARD DANNEMANN	413
I. Emerging Themes in the Law of Contract: Negotiations and Cause (Hugh Beale)	413

II. Emerging Themes in the Law of Contract: Enforcement, Termination and Effects on Third Parties (Philippe Théry)	416
III. Emerging Themes in the Law of Delict (Gerhard Dannemann)	419
Part III Translating the <i>Avant-projet de réforme</i>	
21 Translating the <i>Avant-projet de réforme</i> SIMON WHITTAKER AND JOHN CARTWRIGHT	425
I. General Observations	426
II. The Translation of French Terms with Multiple Significance	429
(a) ‘de plein droit’	429
(b) ‘acte’ and ‘fait’	432
(c) ‘contrat’ and ‘convention’	435
III. Translating Difference: The Analytical Structure of Contractual <i>Obligations</i> and their Effects	437
APPENDIX: Avant-projet de réforme du droit des obligation et de la prescription (original French text by PIERRE CATALA and parallel English translation by JOHN CARTWRIGHT AND SIMON WHITTAKER)	445
Index	917

Contributors

Hugh Beale is Professor of Law at the University of Warwick; from 2000 to 2007 he was a Law Commissioner for England and Wales.

Jean-Sébastien Borghetti is Professor of Private Law at the University of Nantes.

John Cartwright is Professor of the Law of Contract at the University of Oxford and Tutor in Law at Christ Church, Oxford; and Professor of Anglo-American Private Law at the University of Leiden.

Gerhard Dannemann is Professor for British Legal, Economic and Social Structures at the Humboldt-Universität zu Berlin.

Muriel Fabre-Magnan is Professor of Private Law at the University of Paris I (Panthéon-Sorbonne).

Bénédicte Fauvarque-Cosson is Professor of Law at the University of Paris II (Panthéon-Assas).

Paula Giliker is Professor of Comparative Law at the University of Bristol.

Yves-Marie Laithier is Professor of Law at the University of Reims.

Denis Mazeaud is Professor of Private Law at the University of Paris II (Panthéon-Assas).

Lucinda Miller is Lecturer of Laws at University College London.

Pauline Rémy-Corlay is Professor of Comparative Law and Private International Law at the University of Paris XI, Faculté Jean Monnet, and Director of the Institut Charles Dumoulin.

Judith Rochfeld is Professor of Private Law (French and European) at the University of Paris I (Panthéon-Sorbonne).

Solène Rowan is a Fellow in Law at Queens' College, Cambridge.

Pierre Sargos was a Président de chambre à la Cour de cassation (France).

Ruth Sefton-Green is Maître de conférences at the University of Paris I (Panthéon-Sorbonne).

Philippe Théry is Professor of Law at the University of Paris II (Panthéon-Assas), Director of the Institut d'études judiciaires and formerly French Deputy Director at the Oxford Institute of European and Comparative Law.

Stefan Vogenauer is Professor of Comparative Law at the University of Oxford. He is a Fellow of Brasenose College and Director of the Oxford Institute of European and Comparative Law.

Simon Whittaker is Fellow and Tutor in Law at St John's College, Oxford and Professor of European Comparative Law at the University of Oxford.

Robert Wintgen is Professor of Law at the University of Paris X (Nanterre).