

**Barry
Nicholas**

**French
Law of
Contract**

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French Law of Contract

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Preface

This book is an essay in comparative law in the sense that it attempts to set out the elements of the French law of contract as they appear to someone familiar with a Common law system, and in particular with English law. It assumes therefore that the reader is acquainted with the problems with which the law of contract has to deal in a modern western society, and that he approaches those problems with the methods and preconceptions of one whose first introduction to them was through the medium of the Common law. A comparative study of this kind should have two aims: to promote a better (and more critical) appreciation of the characteristic of one's own system, and to provide the essential keys to the understanding of the system with which the comparison is made. It should provide the keys, but not a full-scale exposition of the system itself. For this would both make the attainment of the first aim more difficult by importing an excess of detail, and also be (at least in the case of a system as accessible as the French) an unnecessary expense of labour. Comparative law, it has been well said, should enable one to use the index to a foreign law-book. This book therefore differs from a French book on the same subject¹ in leaving out both elementary matter directed to the beginner in the law and also a good deal of detail. But it differs also in other respects.

One of the important ways in which systems of law differ from one another (especially systems as divergent as the French and the English) is in their conceptual structure, and this difference must be reflected in any exposition, since the reader

1 But, as is said below (p. 19), it is not the French practice to write books on individual parts of the *droit civil*, such as the law of contract.

will otherwise lack an essential key. The arrangement of this book is therefore in general French, but since its purpose is to see French law through Common law eyes, that arrangement is modified not only by references throughout to corresponding Common law (and particularly English law) rules and institutions, but also by some modifications of the rigour of the arrangement itself.

A difference between this book and a French book of the classical type lies in its use of cases. The classical French textbook adheres to an abstract style of exposition and rarely leavens the abstraction by an admixture of concrete cases. This book tries, within the limits of the space available, to provide this leaven. In this it is in step with the type of French textbook which has begun to appear in the last few years. There is, however, for the readers of this book, a danger of being misled into thinking that cases play the same part in French law as they do in the Common law. One of the greatest difficulties for a Common lawyer is to get the 'feel' of his French counterpart's attitude to the authority of cases. Some attempt is made to communicate this 'feel' in the General Introduction to this book.

The subject matter, it must be emphasised, is the general principles of the law of contract. For reasons which are explained,² the specific contracts play a larger part in French law than in the Common law and the Common lawyer must bear in mind the importance for his French counterpart of the need to categorise an agreement as one of the specific contracts in order to determine the rules which apply to it.

But why French law and why the law of contract? A simple practical argument in favour of French law is that, though this book does not assume that the reader knows French, some acquaintance with the language is obviously an advantage in the study of a foreign system, and French is the foreign language most likely to be accessible to English-speaking lawyers. But beyond this there is the intrinsic importance of French law. For not only is it the law of France and the former French empire, but it is also the principal source of the laws of many other countries as well. The inherent virtues and the immense prestige of the Napoleonic Code led to its adoption

2 Pp. 44 f, 47, 55, below.

(or the adoption of codes based on it) not only in countries in which the Napoleonic writ once ran, but also in a number of others. The French legal family now includes Belgium, the Netherlands, Luxemburg, Italy, Spain, Portugal, Egypt, Quebec, Louisiana and countries of Latin America, as well as the francophone countries of the Third World.

The reasons for choosing the law of contract lie not only in its importance in any modern system, but also in the fact that the problems which it has to solve and the relationships which it has to regulate are the same in France as they are in England and therefore that the differences in method and approach can be seen unencumbered by differences of economic or social background. It is, moreover, a field in which lawyers are increasingly having to look beyond the confines of their own systems, particularly within the European Economic Community, and in which the movement for harmonisation and unification is likely to gain momentum. But before there can be harmonisation or unification there must first be mutual understanding.

From what has been said it will be evident that the book is directed in the first place to the student. The practitioner who needs advice on French law will of course go to an expert, but he will understand the expert's opinion the better for possessing what I have called the essential keys.

BARRY NICHOLAS
Oxford
December 1981

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