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Third Party Rights in Contract: A Case Study on Codifying and Not Codifying

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Abstract

A comparative and historical study of the problems and pitfalls of codification with special reference to China and Scotland and the law of third party rights in contract. The paper argues for the inclusion of a provision on this subject in the Chinese Contract Law and for a statutory modernisation to rescue Scots law from the position of being, as one critic has put it, stuck in the seventeenth century.

Keywords

Contract law, third party rights, Chinese law, Scots law, comparative law, legal history

THIRD PARTY RIGHTS IN CONTRACT: A CASE STUDY ON CODIFYING AND NOT CODIFYING

Hector L. MacQueen*

Introduction

The kind and much appreciated invitation to speak at a conference on the codification of civil law in China prompted many thoughts alongside those of gratitude to the organisers. The most general were about the phenomenon of codification; the most specific recalled a PhD thesis about third party rights in Chinese contract law which I had the good fortune to supervise at the Edinburgh Law School between 2002 and 2007. The latter was the work of Dr Ren Chen, now pursuing postdoctoral research in Beijing at the Institute of Law, Chinese Academy of Social Sciences. From her Edinburgh research I had learned that third party rights in contracts are seriously problematic in China.¹ I myself am now working on a general review of contract law in Scotland, one result of which may be a legislative restatement of all or some of the law, and part of that review is the subject of third party rights. I therefore decided that it might be worthwhile to take that topic as the basis for a case study on the merits and de-merits of codifying the law – and also, with Scotland very much in mind, of not having it codified or, at any rate, stated in legislative form.

I begin, however, with some general observations on codification that will, I hope, be useful background to my subsequent discussion of third party rights in particular. In turn that discussion will inform some concluding comments about the desirability (or otherwise) of codification and legislative restatement.

When to codify?

The origins of the modern European experience of codification of civil law lie in the eighteenth century.² The development was partly the result of Natural Law and Enlightenment thinking, emphasising the notion of law as a system of universal truths which were however accessible to human reason and which were not dependent on either divine wisdom or affirmation of the current social structure. But codification would not have begun without politics. The early European codes were often part of reconstruction of the state (e.g. Austria, 1811) or, as in the most famous of them (France, 1804), revolution in effect creating a new departure if not a new state altogether. Later nineteenth-century codifications were

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¹ Ren Chen, “Comparative Study on Third Party Rights” (PhD diss, University of Edinburgh, 2007).

² My comments on codification in this and the next section of this paper owe much to the accounts to be found in e.g. Konrad Zweigert and Hein Kötz (translated by Tony Weir), *An Introduction to Comparative Law* (3rd edition (Oxford: Oxford University Press, 1996): chapters 6-8, 10-13; Olivia F. Robinson, T. David Fergus and William M. Gordon, *European Legal History: Sources and Institutions* 3rd edition (London, Edinburgh and Dublin: LexisNexis, 2000): chapters 15, 16; Raoul C. van Caenegem (translated by David Johnston), *An Historical Introduction to Private Law* (Cambridge: Cambridge University Press, 1992), chapters 1, 4 and 5; Randall Lesaffer, *European Legal History: A Cultural and Political Perspective* (Cambridge: Cambridge University Press, 2009), chapter 6.

certainly driven by the need of new states to assert their status, as when Belgium (1830)⁴ and the Netherlands (1838) were liberated from French hegemony, or even more strikingly, following the unifications of Italy (1865) and Germany (1900). Greek aspirations towards a civil code seem also to have begun after the country gained independence from Turkey in 1827, although not completely realised until after the Second World War. Even where the stimulus of revolution or the nationalist fervour inspired by newly-won independence or unification was lacking, nineteenth-century states seem to have seen codes rather as their twentieth-century successors saw airlines, as an essential badge of statehood: hence codification in Spain (1889), Portugal (1867) and, after decades of preparation, Switzerland (1907).

Another significant point is the inter-relationship of the codes, with the French Code Civil serving as a powerful model for many others later in the nineteenth century, and the German BGB playing a significant role in the twentieth. The codifier has almost always been something of a plagiarist. This seems not to involve political choice, since the French code has had most influence in countries which it previously held by conquest (Belgium, the Netherlands and Italy), while its German counterpart has been an important source for modern codifications in countries with good reason not to like things German (e.g. Greece, Israel). Legal culture, perhaps in particular in its academic aspects, seems to play the main part in determining to which codification to turn in search of inspiration.

That civil codes have not lost their symbolic standing as a signal of statehood for new or newly independent or freshly starting states is shown very clearly by the ongoing creation of codes in the former Iron Curtain countries since the fall of the Berlin Wall in 1989 and the collapse of the Soviet Union in 1991: for example, in Russia (1994-2006), Lithuania (2001), Estonia (2002), Ukraine (2004) and Hungary (2009). Outside Europe there may also be noted the continuing importance and renewals of the civil codes of Louisiana and Quebec, helping to maintain each jurisdiction's distinctive legal identity and traditions within the much larger and typically non-codal federations of the USA and Canada respectively.⁵ Back in Europe, the twentieth century saw at least three complete re-codifications in Italy (1942), Portugal (1966) and the Netherlands (1992), while Germany carried out a major reform of the section of its code dealing with the law of obligations in 2002.⁶ France is currently contemplating a similar project.⁷ All this shows that the age of codes is far from over in Europe (and elsewhere), even if the early ideal of the code as a complete statement of a country's civil law has long since disappeared in a welter of other, more particular legislation.

What and how to codify?

⁴ The French Code Civil continued in force as the Belgian Civil Code after Belgian independence in 1830; projected fundamental revision did not however take place. See Zweigert and Kötz, *Comparative Law*: 101.

⁵ An important exception to this is of course the USA's Uniform Commercial Code, first promulgated in 1952 and now largely enacted in all 50 states, including Louisiana.

⁶ For an account of this in English, see Reinhard Zimmermann, *The New German Law of Obligations: Historical and Comparative Perspectives* (Oxford: Oxford University Press: 2005): 30-35. The German reforms were primarily driven by implementation of the Consumer Sales Directive 1999, which is itself now incorporated into the DCFR.

⁷ See *Reforming the French Law of Obligations* ed. John Cartwright, Stefan Vogenauer and Simon Whittaker (Oxford: Hart Publishing, 2009); François Terré, *Pour une Réforme du Droit des Contrats* (Paris: Dalloz, 2009).

The history of codification shows that the process rarely occurs all at once, with an entire code presented to the legislature for enactment in a single stroke. In France, for example, thirty-six separate statutes were passed before their final consolidation as the Code Civil in 1804. There had been over a decade of preparation before that momentous event. In Germany the process took at least three times as long and successive drafts were carefully considered before the final enactment in 1896; and then the code's coming into force was postponed to the symbolically loaded date of 1 January 1900. The new Dutch Civil Code of 1992 was the outcome of work that began nearly half a century before, and parts of it were enacted en route. Those who begin the work of codification will be lucky if they see the complete realisation of their goal.⁸

It is therefore necessary to ask with which parts of the law to begin the codification process. The criteria for choosing may include the relative ease of constructing a code in the various possible areas of private law, their relative social and economic importance, and the message that the codifier wants to send and to whom. The law of obligations, and in particular contract, is often a strong candidate for early work, in part because its content is broadly similar across many jurisdictions, but also because of its clear social and economic significance. Family law and land-ownership, on the other hand, may be more difficult, because the substance of the law is often heavily dependent on local considerations of legal and social policy.

What is clear, however, is that European codes, and the codes of other jurisdictions strongly influenced by them, follow the classical division of private law into the three areas of persons, things and actions. Consistently with the ideals of the Enlightenment, the focus of the civil code remains the human being as a bearer of powers, rights and duties from conception to death, in relation to the self, other persons, and objects in the surrounding world. The code then concludes with the ways in which the powers, rights and duties may be enforced, through the courts and otherwise. This focus on the individual as the principal subject of law can be criticised for its failure to recognise the inequalities between individuals in any society; but nonetheless the totality of the vision which underlies the classic codes is a remarkable achievement, the insights of which deserve to be remembered in a world where the rights of the individual have often been ruthlessly suppressed for the supposed betterment of all.

Codification in Britain

The British Isles have traditionally not proved fertile ground for the codification of law. England, the largest and longest unified of the British jurisdictions, is famously the home of the opposite – and, one could add, the opposition – to codification. Its Common Law, a legal system that stretches back to the twelfth century at least, is founded on judicial decisions, with legislation playing an interstitial role, or operating as the major source only where the Common Law has nothing to say. Wales was brought under English dominion in the middle ages and there is no such thing as Welsh law. Likewise Ireland's modern legal development

⁸ See also Dirk Heirbaut's contribution to this volume.

was entirely under English influence until the twentieth century, and codification has played no part in either of its present jurisdictions. Scotland might have been different, given that its independence of England until 1707 meant that its legal development was quite distinct and much influenced by the Continental Civil Law; but the 1707 Union of the two countries, although not a union of laws, ensured that Scotland did not, any more than England, pursue a path towards codification. So while the 1707 Union was a new departure in its creation of the United Kingdom, with a single Crown and a unitary (if bicameral) Parliament, this triggered no attempt to create a unified private law or court system; indeed, quite elaborate provisions of the Union agreement ensured that distinctions between Scotland and England remained firmly in place on these matters.⁹

The 1707 Union did however envisage change in the law to facilitate the creation of a common market in the new United Kingdom (probably the chief goal of the Union, in fact). So UK-wide legislation has been possible and has extensively happened in “single-market” areas such as taxation, welfare law, companies, intellectual property and employment. In the late nineteenth century there was also piecemeal quasi-codification, taking effect throughout the United Kingdom, of areas of commercial law such as bills of exchange, sale of goods, partnership and marine insurance.¹⁰ Although many of these quasi-codes remain in force today, they have not succeeded in removing fairly widespread hostility to codification, at least in the legal professions and the judiciary.

In 1965 the English and Scottish Law Commissions were set up, with codification of law being one of their express statutory objectives;¹¹ but nearly half a century later, while various areas of law in both England and Scotland have been put on a modern statutory basis, the prospect of a general civil code, or of giving up judge-made law and the system of precedent, remains as distant as ever. The entrenched view is that legislation of any kind is likely to be rigid, inflexible and unduly prescriptive, whereas judge-made law is responsive to the specifics of particular fact-situations and so not dependent upon the political whims of the legislature or incapable of meeting changing conditions in the outside world. Codes and codifications have become the “C” words, not mentioned in polite society.

One of the most interesting of the failures to achieve codification in Britain was an early Law Commissions project to produce a Contract Code.¹² It is worth noting that one of the major drivers for beginning this in the mid-1960s was the prospect of the United Kingdom joining what was then known as the European Communities, i.e. what we now know as the European Union. In other words, a Contract Code was seen as needed in the

⁹ For valuable recent studies of the 1707 Union from a legal perspective see John D. Ford, “The Legal Provisions in the Acts of Union,” *Cambridge Law Journal* 66 (2007): 106; John W. Cairns, “The Origins of the Edinburgh Law School: the Union of 1707 and the Regius Chair,” *Edinburgh Law Review* 11 (2007): 300.

¹⁰ The classic examples are the Bills of Exchange Act 1882, the Partnership Act 1890, the Sale of Goods Act 1893 (now the Sale of Goods Act 1979) and the Marine Insurance Act 1906. They are quasi-codifications in that they do not purport to be complete statements of the law but instead pre-suppose the continuation of the common law in areas not dealt with by the statute.

¹¹ Law Commissions Act 1965, s 3(1).

¹² See generally Hector L. MacQueen, “Glory with Gloag or the Stake with Stair? T B Smith and the Scots Law of Contract,” in *A Mixed Legal System in Transition* ed. Elspeth Reid and David L. Carey Miller, (Edinburgh: Edinburgh University Press, 2005): 157-161. The text of the complete draft Code was published as Harvey McGregor, *Contract Code Drawn up on behalf of the English Law Commission* (Milan: Giuffrè, 1993).

light of a radical new departure for the British state. While to some extent the Code could have been defensive of particular characteristics of the contract law of the British jurisdictions, in point of fact the Law Commissions proved eager to take the opportunity to remove what were seen as peculiarities by comparison with Continental contract laws, notably the English doctrines of consideration and (as we will discuss further below) privity of contract. Had the project been successfully completed, it would therefore have sent out a strong message that in joining the European Communities the United Kingdom was ready and open for business with its partner Member States. The project's failure, ironically just as the United Kingdom became a Member State in 1973, may not have transmitted the opposite message, but can nevertheless be seen, I think, as symptomatic of how that membership was going to develop in the years of "Euro-scepticism" that have followed since.

Codification and the European Union

One of the key characteristics of the European Union is its nature as a legal system going alongside and indeed embracing the legal systems of its Member States. This is not the place for an analysis of the relationship between the EU legal system and those in the Member States and how that is variously perceived around the Union. It is enough for present purposes to note that the Union legislates extensively and its courts give authoritative rulings on the meaning and application of that law. Amongst the subjects on which the European Union has legislated is contract law, especially but not exclusively in relation to consumer contracts.¹³ It is thus possible already to speak of a European Union contract law, albeit one that is far from completeness or internal coherence.¹⁴ For at least the last thirty years that has prompted contract lawyers in Europe to think about what a complete and coherent European contract law might look like, in the process drawing not only upon the EU legislation in the field, but also upon comparison of the laws of Member States and other cognate jurisdictions. Study of comparative law has not been limited to domestic laws but has extended to other trans-national contract law initiatives. A particular stimulus was provided by the general contract law parts of the Vienna Convention on the International Sale of Goods 1980 (CISG), and their further development in the Unidroit Principles of International Commercial Contracts (PICC), first published in 1994 and elaborated in a second edition published in 2004.¹⁵ There was a considerable overlap between the lawyers who worked on PICC and the unofficial Commission on European Contract Law which under the chairmanship of Professor Ole Lando eventually completed the Principles of European Contract Law (PECL) in 2003.¹⁶ Not surprisingly, there is a considerable similarity between PICC and PECL.

Until the early years of the twenty-first century the European Union remained somewhat aloof from the unofficial, academic interest in a general European contract law; but since then this has become a central plank of policy in building the single market and promoting economic growth in Europe. The European Commission funded the production by academic groups of what was carefully called, not a draft European Civil Code, but a Draft

¹³ See e.g. Unfair Terms in Consumer Contracts Directive (93/13/EC); Consumer Sales Directive (99/44/EC).

¹⁴ See e.g. *Diritto Privato Europeo* ed. Nicolò Lipari (Padua: CEDAM, 1997).

¹⁵ *Principles of International Commercial Contracts* 2nd edition (Rome: Unidroit, 2004).

¹⁶ *Principles of European Contract Law Parts I and II* ed. Ole Lando and Hugh Beale (The Hague, London and New York: Kluwer, 2000); *Principles of European Contract Law Part III* ed. Ole Lando, Eric Clive, Andre Prüm, and Reinhard Zimmermann (The Hague, London and New York: Kluwer, 2003).

Common Frame of Reference (DCFR). This was published in 2009.¹⁷ It was based upon PECL but added model rules on particular contracts such as sale and lease of goods as well as on the subjects of tort or delict, unjustified enrichment, securities and trusts. Now the Commission is working on producing from this in the course of 2011 a Common Frame of Reference (CFR). This will be either a “toolbox” to help with the coherence of EU legislation, or, more ambitiously, an “optional instrument” which contracting parties in the European Union can choose as their contract’s governing law. At the time of writing (January 2011) it is thought that this optional instrument would cover general contract law, sale of goods and the supply of services associated with the supply of goods, as for example in installation and maintenance contracts. But it would be capable of extension to other forms of contract in due course. It would not necessarily be limited to consumer contracts.¹⁸

In terms of the earlier discussion of factors in codification, the European Union’s contract law project can perhaps be linked to the Union’s development more generally, notably with the renewal of its constitutional framework by the Treaty of Lisbon 2009. But more significant is the choice of contract law as the starting point for a European code in the civil law area: first, because it was relatively easy to do, given the comparative study and model rule-making that had already taken place and, second, because the subject-matter is obviously central to the operation of the single market which remains at the heart of the whole European project.

What is also worth mentioning is the impact that European law-making in the field of contract has also had in the further development of the law of Member States: for example, it has led to the already mentioned 2002 revision of the law of obligations in Germany and the ongoing reform projects in France.¹⁹ In Scotland, the Scottish Law Commission is reviewing the domestic law of contract in the light of the DCFR.²⁰ In a sense with the last of these the wheel has come almost full circle, back to the Contract Code project that failed in 1973. But this time, in a world much more aware of the importance of the European single market, the results may not be the same.

Scotland, Hong Kong, People’s Republic of China

Finally, I turn to codification in Scotland, Hong Kong and the People’s Republic of China. Scottish devolution, and the creation of a Scottish Parliament in 1999 with extensive legislative powers in relation to Scots law, did raise the possibility that codes of law might be developed, and a draft Criminal Code, compiled unofficially by a group of interested academics, was indeed published by the Scottish Law Commission in 2003.²¹ A code of

¹⁷ *Draft Common Frame of Reference: Principles, Definitions and Model Rules of European Private Law*, Full Edition, 6 vols and Outline Edition, ed. Christian von Bar et al. (Munich: Sellier, 2009).

¹⁸ Progress towards the production of a CFR can be followed on a European Commission website at http://ec.europa.eu/justice/policies/consumer/policies_consumer_intro_en.htm.

¹⁹ See above, 000.

²⁰ Scottish Law Commission, *Eighth Programme of Law Reform* (February 2010), available on the Commission’s website, <http://www.scotlawcom.gov.uk>.

²¹ See further Eric Clive, “Submission of a Draft Criminal Code for Scotland to the Minister for Justice,” *Edinburgh Law Review* 7 (2003): 395-398. The Draft Criminal Code remains available on the Scottish Law Commission website at <http://www.scotlawcom.gov.uk/publications/consultation-papers-and-other-documents/>.

private law was also debated, but mostly by legal scholars rather than practitioners and judges – or the general public and politicians.²² In the absence of any popular, political or professional pressure in their support, neither of these codification projects proceeded any further. Perhaps only if Scotland became an independent state would the question be likely to become live again in any strong sense. For the time being, Scotland remains a jurisdiction in which the law is a mixture of legislation and judicial precedents as well as being in the substance and content of its private law a mixture of Common Law and Civil Law.

Hong Kong's possible codification moment came in 1997 when it became a Special Administrative Region of the People's Republic of China after the United Kingdom's lease of the territory came to an end. The Basic Law of Hong Kong provides for the continuation of the territory's Common Law framework alongside and as part of the capitalist economic system the integrity of which is guaranteed until at least 2047. But so far as I am aware there was not in 1997, nor has there been at any time since, any pressure for the codification of any aspect of Hong Kong law, even although it might have been thought that comprehensive legislative restatement would be helpful in maintaining its content, character and identity as an important component of the territory's international commercial reputation. The Common Law tradition evidently remains in vigorous life in Hong Kong.

This contrasts significantly with the People's Republic of China itself where, as discussed in detail elsewhere in this collection of papers, a movement towards codification of law began as the country started to move on from the Cultural Revolution and embrace a socialist vision of the market economy at the end of the 1970s. A striking manifestation of this was China's adherence to CISG in 1981. But the progress of legal development since has been slow and steady rather than all at once. A general contract law statute or code was achieved only in 1999, with many precursors over the previous two decades (mostly still in force). Other parts of what can become a complete civil code have been emerging over that period and in the decade since.²³ So the Chinese experience well illustrates the points already made about the codification process: it can usually be related to momentous change but need not occur all at once, while contract law is very often one of the first parts of the law to undergo codification. However, as we will shortly see, this early lead for contract can sometimes produce difficulties further down the line.

Third party rights in codes

If we move from generalisations about codes to the particularity of third party rights, a first and fairly obvious point is that no Western codified system of contract law from the Code Civil of 1804 on is without articles recognising that third parties may have rights under other parties' contracts as a result, not of assignment or other juridical act over and above the contract itself, but of provision in the contract itself. There is no controversy about this, and it is not surprising to find such third party rights also recognised in the PICC, PECL and the

²² See in general Eric Clive, "The Scottish Civil Code Project," in *Regional Private Law and Codification in Europe* ed. Hector L. MacQueen, Antoni Vaquer Aloy and Santiago Espiau (Cambridge: Cambridge University Press, 2003): 83.

²³ See in general, and in addition to papers elsewhere in this volume, Ren Chen "Comparative Study", chapter 1.

DCFR.²⁴ Also to be noted is that the abortive Contract Code of the 1960s and the early 1970s in the United Kingdom had a chapter of some nine articles under the heading “Creation of rights and duties in third parties by contract”, permitting the creation and enforcement of third party rights and thus bringing at least English law into line with its Continental counterparts.²⁵

The subject of third party rights is an excellent illustration of how Natural Law thinking followed by Enlightenment emphasis on the autonomy of the individual will led lawyers in the era of codification away from the strict rules of Roman law. As has frequently been pointed out, quite apart from Roman law’s lack of a general concept of contract, it did not recognise any idea that a contract might confer rights on anyone other than the parties to it: as Ulpian put it, *stipulatio alteri non potest*.²⁶ The notion that third parties might have rights if the contracting parties intended them to do so was a creation of the later medieval Canon law, the thinking of the Spanish Scholastics of the sixteenth and seventeenth century, and the systematisation of Natural Law developed in particular by Grotius in the first half of the seventeenth century.²⁷

The initial French recognition of third party rights in the Code Civil bears some of the marks of this departure from the Roman law, although Article 1119 echoes Ulpian’s famous rejection of the stipulation for another in stating that “as a rule one may bind oneself and stipulate in his own name, only for oneself”. But Article 1121 then provides that a party “may stipulate for the benefit of a third party, where it is the condition of a stipulation which one makes for oneself or of a gift which one makes to another.” So, on the face of it, the creation of a third party right by contract is merely an exception, arising only in very specific circumstances, to a general rule that contracting parties can create rights for themselves alone. This is reinforced by Article 1165: “Agreements produce effect only between the contracting parties; they do not harm a third party, and they benefit him only in the case provided for in Article 1121.”

This is not the place to elaborate on the background to the Article 1121 requirements of stipulator interest, conditionality and gift, which spring from antecedents in the European *ius commune*.²⁸ What forced French law to move beyond the strict wording of Article 1121 was the nineteenth-century rise of life assurance, and a felt need to make enforceable by a third party contracts of insurance in which the parties provided for the benefit of that person. Only with considerable ingenuity (which was however forthcoming) could it be seen that the

²⁴ PECL art 6:110; PICC arts 5.2.1-6; DCFR arts II.-9:301-303. Note also the European Code of Contract produced in 2001 by a group under the leadership of Professor Giuseppe Gandolfi of Pavia University, Italy (English translation published as a special issue of vol 8 of the *Edinburgh Law Review* in 2004), articles 72-74 of which deal with “Contracts for the benefit of third parties”.

²⁵ McGregor, *Contract Code*, arts 641-649. Scots law of course already had its doctrine of *ius quaesitum tertio*: see further below, 000-000.

²⁶ D. 45, 1, 38, 17.

²⁷ See generally *Ius Quaesitum Tertio* ed. Eltjo J. H. Schrage (Berlin: Duncker & Humblot, 2008); *Contracts for a Third-Party Beneficiary: A Historical and Comparative Account* ed. Jan Hallebeek and Harry Dondorp (Leiden and Boston: Martinus Nijhoff, 2008).

²⁸ See David Deroussin, “La Stipulation pour Autrui de l’ancien Droit Français au XIX^{ème} Siècle, ou Comment se Débarrasser d’une Tradition Gênante,” in *Ius Quaesitum Tertio* ed. Schrage: 215-249; Harry Dondorp, “The Nineteenth Century,” in *Contracts for a Third-Party Beneficiary* ed. Hallebeek and Dondorp: 74-84.

stipulation in favour of the third party was dependent in any way upon another in favour of the party assured; but once that step had been taken, the requirement of such a principal stipulation began effectively to disappear.²⁹ As a result the French courts “in effect transformed ... a limited exception ... into a general principle of third party contractual rights.”³⁰

By the time of the German BGB’s enactment at the end of the nineteenth century third party rights doctrine had largely shaken off the encrustations of Roman law and the *ius commune*, and there accordingly emerged the first major codal statement of modern third party rights law.³¹ It stands unchanged despite the major reform of the German law of obligations in 2002. Just as the French Code provided the model for subsequent nineteenth-century codifications, so in the twentieth did the BGB.³² But now the French are considering reform of their law of obligations, making a fresh start by stating the rules in a much more direct fashion and in more detail.³³ While the reform proposals are by no means similar to German law, it is clear that the redundant baggage of the past will be discarded in any new statement of French law on the subject.

Privity of contract in non-code countries

The starting point of the Common Law jurisdictions which knew – and mostly still know - no code was privity of contract: only the parties to a contract could acquire rights under it.³⁴ Yet there has been a very substantial departure from that position in most of the Common Law countries, and some of it not very recent. Thus in the United States the New York Court of Appeal led the way to the recognition of third party rights in contracts as long ago as 1859.³⁵ But this was unusual in that the change was effected by judicial decision rather than legislation, when perhaps US law was still in its formative stages.³⁶ The law in the United States is probably best approached now through the avenue provided by its code-like

²⁹ The history is traced in Barry Nicholas, *The French Law of Contract*, 2nd edition (Oxford: Oxford University Press, 1992): 184-187; see also Deroussin, “La Stipulation pour Autrui”: 247; Dondorp “Nineteenth Century”: 84-87.

³⁰ Nicholas, *French Law of Contract*: 88.

³¹ BGB §§328-335. See further Dondorp, “Nineteenth Century”: 72-74, 79-84; Martin Pennitz, “Ius Quaesitum Tertio: German Legal Doctrine and Practice in the 18th and 19th Century,” in *Ius Quaesitum Tertio* ed. Schrage: 251; Martin J Schermaier, “Contracts for the Benefit of a Third Party in German Law,” in *Ius Quaesitum Tertio* ed. Schrage: 289.

³² For French influence see e.g. the Belgian Code Civil (1830), art 1121; Spanish Codice Civile (1889), art 1257; and (belatedly) the Italian Codice Civile (1942) arts 1411-1413. For German influence see the ABGB, §881 (introduced by the Third Teilnovelle (1916)); Swiss Code of Obligations (1912), art 112; Portuguese Civil Code (1966), art 443. The Dutch, in the French tradition since 1838, struck out in a new direction in 1992: NBW, art 6:253. See Edgar du Perron, “Third Party Stipulation in Modern Dutch Law,” in *Ius Quaesitum Tertio* ed. Schrage: 385.

³³ See the *Avant-projet Catala*, art 1171, discussed by Stefan Vogenauer, “The Effects of Contracts on Third Parties: the *Avant-projet de Réforme* in a Comparative Perspective,” in *Reforming the French Law of Obligations*, ed. Cartwright et al.: 235; and now the *Avant-projet Terré* of 2008 (above, note 6), arts 142-146.

³⁴ See in particular for this the contributions of David Ibbetson to *Contracts for a Third-Party Beneficiary* ed. Hallebeek and Dondorp: chapters 5 and 6.

³⁵ *Lawrence v Fox* 20 NY 268 (1859).

³⁶ Note however the Civilian influence in nineteenth-century US legal development, summarised with further references in Zweigert and Kötz, *Comparative Law*: 240.

Restatement (Second) of Contracts of 1982.³⁷ In other parts of the Common Law world, the abandonment of strict privity has been by way of legislation: notably the Contracts (Privity) Act 1982 in New Zealand, the Contracts (Rights of Third Parties) Act 1999 in England and the Contracts (Rights of Third Parties) Act 2001 in Singapore. Some of the Australian states and Canadian provinces have also rid themselves of privity by statute,³⁸ while the superior courts in these countries have also moved a good distance towards recognition of third party rights in contracts.³⁹ In general, however, judicial change can only provide “relaxations” of the strictness of privity, or ways around that strictness by means of other doctrines, on the facts of the particular cases that come before them; systematic and comprehensive reform requires legislation. Overall, there can be little doubt that the trend in the Common Law is convergent with the established position in the Civil Law jurisdictions outlined in the previous section.

It is also worth noting that the major mixed jurisdictions of the world all recognise third party rights.⁴⁰ In the case of the long codified mixed systems such as Louisiana and Quebec, drawing as they have done (and still do) upon the French tradition, this is of course only to be expected.⁴¹ Israel’s more recent codification departed from the Common Law and followed the German model with regard to this subject, however.⁴² The two un-codified mixed systems, Scotland and South Africa, have both long recognised third party rights. But this is a feature of their common (non-statutory) law, in each case having its ultimate origins in the European *ius commune* rather than any statute. Both struggle to some extent with the consequences.⁴³ Indeed a legal practitioner in Scotland has recently written of Scots law being “stuck in the seventeenth century” on the subject.⁴⁴ There is a clear need in both systems for modernisation in the light of comparative study and, as I have already indicated, the Scottish Law Commission will be starting the process in Scotland as part of its current review of contract law in general.

In sum, if we look at contemporary contract law around the Western world we find third party rights widely accepted and increasingly recognised. That recognition flows from the even wider recognition that the objective of contract law is to give effect to the lawful intentions of the contracting parties. If it is their intention to confer rights upon a third party, then there is no particular reason why that should not be enforced and, indeed, be enforceable

³⁷ See §§302-315 (chapter 14).

³⁸ See Property Law Act 1969 (Western Australia); Property Law Act 1974 (Queensland); Law of Property Act 2000 (Northern Territory); Law Reform Act 1993 (New Brunswick). The Quebec Civil Code (1992) of course recognises third party rights (arts 1444-1450), as did its predecessor code from 1866.

³⁹ The leading Australian case relaxing the privity rule is *Trident General Insurance Co Ltd v McNiece Bros Pty* (1987-1988) 165 CLR 107 (High Court of Australia). In Canada see *London Drugs Ltd v Kuehne & Nagel International Ltd* (1992) 97 DLR (4th) 261 and *Fraser River Pile & Dredge Ltd v Can-Dive Services Ltd* [1999] 3 SCR 108 (both Supreme Court of Canada).

⁴⁰ On mixed jurisdictions see Vernon V. Palmer, *Mixed Legal Systems Worldwide: The Third Legal Family* (Cambridge: Cambridge University Press, 2001).

⁴¹ Louisiana CC, arts 1978-1982. For Quebec see note 37 above.

⁴² Israel Contracts (General Part) Law 1973, chapter 4 (arts 34-38).

⁴³ See the discussion by Philip Sutherland, “Third-party Contracts,” in *European Contract Law: Scots and South African Perspectives* ed. Hector MacQueen and Reinhard Zimmermann (Edinburgh: Edinburgh University Press, 2006): 203.

⁴⁴ See Douglas Mathie (Brodies, Edinburgh), *Techblog*, <http://techblog.brodies.com/2010/08/26/third-party-rights-%e2%80%93-scots-law-stuck-in-the-17th-century/>, August 26, 2010.

by the third party in question. There are questions upon which the legal systems that I have mentioned give different responses – for example, whether an act of acceptance is required of the third party, or whether the contracting parties can change their minds and withdraw the third party’s right – but the overall general picture and trend is clear.

Privity in Hong Kong and the People’s Republic of China

It is thus striking that the doctrine of privity remains alive and well in the contract laws of Hong Kong and the People’s Republic of China. This is despite an excellent report of the Law Reform Commission of Hong Kong, published in 2005, recommending abolition of the doctrine and its replacement with a statutory scheme of third party rights substantially modelled on the English Contracts (Rights of Third Parties) Act 1999.⁴⁵ I gather that the proposal foundered upon opposition from the Hong Kong construction and insurance industries, concerned about possible uncertain liabilities and risks that the reform might entail. One can only say that such concerns are not really justified by any comparative study of third party rights law as it operates in other parts of the world. But it may be that business conditions in Hong Kong are not the same as elsewhere.

The case of China is certainly different inasmuch as contract law has been codified, and one might therefore expect to see a provision on third party rights along the usual lines, possibly following the German model, since that seems to have been influential in other parts of the Contract Law of 1999. But what we find instead is a lack of any article directly addressing the question of rights for third parties along with a statement in its Article 8 that may remind the reader of Article 1119 of the French Code Civil. Article 8 reads as follows (in part):

A lawfully established contract shall be legally binding on the parties thereto, each of whom shall perform its own obligations in accordance with the terms of the contract

...

While this does not exclude the possibility of a third party right under a contract, no exception is stated in the Article that is in any way akin to those in Article 1121 of the Code Civil. The first possibly relevant reference to third parties in the 1999 Law does not appear until Article 64, and on its face this pretty clearly reinforces the proposition that only the contracting parties have rights under the contract. Article 64 reads:

Where the parties agree that the obligor shall perform the obligations to a third party, and the obligor fails to perform its obligation to such third party or its performance of the obligations is not in conformity with the agreement, the obligor shall be liable to the obligee.

So, in the language of French law, while a contracting party may stipulate for the other party to perform to a third, it is that first contracting party alone who has the entitlement to claim performance of the contract to the third party, or damages for non-performance by the other

⁴⁵ Law Reform Commission of Hong Kong Report, Privity of Contract (September 2005), accessible at <http://www.hkreform.gov.hk>.

contracting party. The third party remains on the outside, dependent on the willingness of the stipulating party to take action against the party due to perform. The possible argument that Article 64's recognition of the possibility of a contract providing for performance to a third party could be read as implicit support for a right to performance vested in that third party was squashed by the 2009 ruling of the People's Supreme Court that the Article did not give rise to any right of claim independent of that of the contracting parties themselves.⁴⁶

Dr Ren Chen's thesis charts the efforts that have been made to circumvent this restriction of the Chinese Contract Law, mostly drawing on either the principle of freedom of contract stated in Article 4 or the duty of honesty and good faith which Article 6 imposes on contracting parties in exercising their rights and performing their obligations.⁴⁷ She notes too the possible relevance of Article 60, which requires parties to perform their obligations fully as agreed, abiding by the principle of good faith and giving effect to the contract in accordance with its nature and purpose. But she concludes that the Chinese courts tend to apply the privity rule strictly, and that this is unsatisfactory. Accordingly she argues that the law should be reformed to admit third party rights in general, noting that there are already specific provisions in the law on insurance and on maritime contracts.⁴⁸

Ren Chen's basic reform model is provided by the English legislation of 1999, on the basis that there too a strict doctrine of privity had been replaced and so the situation was quite close to that prevailing in China. She did look outside England and even Scotland, but she argued that the experience of a jurisdiction moving from privity to third party rights was the most relevant for consideration in China. I would hope that if writing now she would also look at the relevant articles of the DCFR, as a still more recent attempt to capture and state clearly a set of general rules on third party rights, based on extensive comparative research. I commend both that and Ren Chen's thesis to the attention of law reformers in China.

Conclusions: (1) Risks of codifying

What does the story about third party rights that I have just briefly summarised tell us about codification in general? I think the first point that strikes me is the risk inherent, not just in codifying, but in legislating generally. The peril is fixing the law in some verbal formula which then turns out to be unable to cope with developments which are for the social good, or even to be an obstruction to their proper realisation. Given the definitive character of a code, and its internally integrated nature, making the necessary changes may be very difficult; not just a matter of sorting out an aberrant article or two, but of having to rework the document as a whole.

In third party rights law, the classic example of this problem is the French codification which, as we have seen, proved to have great difficulty with the rise of life assurance in the nineteenth century. That problem was resolved as a practical matter by robust courts

⁴⁶ Article 16 of Interpretation II of the Supreme People's Court of Several Issues concerning the Application of the Contract Law of the People's Republic of China, accessible in English translation at the LawInfoChina website (<http://www.lawinfochina.com>).

⁴⁷ Ren Chen, "Comparative Study" (especially chapter 2).

⁴⁸ Insurance Law 1995; Maritime Code 1992, chapter IV.

fortunately not spell-bound by the sacred text of the code. But where a jurisdiction cannot place complete confidence in the abilities of its judges to see when this sort of thing is necessary (as may perhaps be true of China at its present state of legal development), then the text is likely to become an obstacle to legal advance and a source of injustice in individual cases. Ren Chen shows that this may indeed be happening in China at the moment.⁴⁹

A different aspect of the risk of fixation is the “dis-connect” which can open up between the text and what happens in court and in practice. The uncertainty as to what the law actually is in such situations is damaging both for people trying to organise their affairs in a lawful manner as well as for those who are trying to learn what the law is. It engenders a lack of respect for the law if one is told that despite what the supposedly core text says the reality is otherwise. A culture of the rule of law should mean that the law in the books is a reasonably good approximation of the law in action, and vice versa.

The other possible hazard is incompleteness. Again the French code may provide a historical example. A comparison between it and the German code a century later shows that by the time of the latter a whole range of possible problems have been identified along with principled solutions. The French codified just as the law on third party rights began to become a serious practical question; so not surprisingly their legislation left gaps. Again the courts (and legal writers) were able to provide solutions, so the problems were addressed. But once again this meant that the ideal of the code as the complete statement of the law was significantly undermined.

It is not easy to know when a complete understanding of any legal topic has been achieved, even if it has been the subject of intensive comparative studies for a couple of hundred years. The single Article on the subject in PECL is transformed into three fairly lengthy Articles in the DCFR. Amongst the matters with which PECL had not dealt were whether exclusion or limitation of a third party’s liability to one of the contracting parties counted as a benefit giving rise to a third party right; whether the third party’s remedies extended beyond a claim for performance to, e.g., damages; and the defences available to the contracting parties against the third party’s claim. Now it might have been argued that all of the answers to these questions could have been supplied in principle under PECL; but it is undoubtedly better from the perspective of legal certainty to be able to find them clearly stated in the legal text itself, as with the DCFR.

For China, it seems to me, the risk of carrying out a reform of its Contract Law in relation to third party rights is comparatively slight. Chinese law reformers are in a much better position than the French codifiers of the early 1800s. There are well-worked and recent models to hand, and behind each of them lies serious comparative study and analysis. The issues involved in systems of third party rights have been identified, and the situations in which they tend to arise are reasonably well-known. The fear that allowing third party rights exposes contracting parties to the risk of liabilities to all sorts of unknown and unexpected persons can be met by basing the existence of the rights firmly on the intention of the parties and, perhaps, as in the English Act, providing that the third party must be expressly identified

⁴⁹ Ren Chen, “Comparative Study”, chapters 3-6, provides a detailed account and analysis of Chinese cases as well as comparative information.

in the contract, whether by name as an individual, or as a member of a class of persons, or as answering a particular description.⁵⁰ The requirement of intention should be enough to exclude those who are merely incidental beneficiaries of a contract's due performance but one can, as in England, build in additional safeguards.

Conclusions: (2) Problems with un-codified law

These are problems that do not affect China, at least in relation to contract law and third party rights, since the code is there and the present position clear, if unsatisfactory. But they do affect Hong Kong and, of course, Scotland, albeit in different ways, since Hong Kong retains a rule of privity while Scotland has an antiquated and problematic law of third party rights.

The first point is that it probably lies beyond judicial power – or at least the proper exercise of judicial power – to shift the law from one doctrinal position to another in a complete and systematic way.⁵¹ Certainly while the English judges before 1999 often talked about changing the rules of privity to admit third party rights, they never actually tried to do so. While Australian and Canadian judges have moved further than their English counterparts managed before 1999, their decisions have “relaxed” rather than abolished the doctrine of privity in these jurisdictions. Probably this is because the judicial task is at bottom that of deciding individual cases; and the solution that seems just in one case may not be so satisfactory when generalised across a whole field of possible cases. Judicial change of law can only ever be incremental and always falls to be tested in subsequent cases. If however the existing state of the law is unsatisfactory, then leaving change to the incremental judicial process and the necessarily random occurrence of cases raising the relevant issues is obviously not the best way to tackle the problem.

Even where a non-statutory body of third party rights law exists, as in Scotland, judicial caution and lack of cases may mean that it continues indefinitely in an unsatisfactory state. The major problem in Scotland is the rule that says irrevocability is a condition rather than a consequence of the creation of a third party right under a contract, and that the contracting parties must do something more than form the contract as a result. This creates serious practical difficulties for those who wish to create third party rights while at the same time retaining the ability to change the underlying contract. Although the issue has been known about for at least sixty years, nothing has been done to address it judicially.⁵² It would probably need a UK Supreme Court decision to change the law definitively; and we may wait a long time before the opportunity for that arises. Legislation seems to be the only sensible way of dealing with the problem. The DCFR actually provides a direct answer to the Scottish difficulties, as it seems to me, so a model solution lies readily to hand.

⁵⁰ Contracts (Rights of Third Parties) Act 1999, s 1(3). For a commentary on the first decade of the Act see Hugh Beale, “A Review of the Contracts (Rights of Third Parties) Act 1999,” in *Contract Formation and Parties* ed. Andrew Burrows and Edwin Peel (Oxford: Oxford University Press, 2010): 225.

⁵¹ It is worth noting that the crucial US case of *Lawrence v Fox* was decided in 1859, two years before *Tweddle v Atkinson* (1861) 1 B&S 393 decisively fixed the doctrine of privity as the core of English law in this area.

⁵² See further Hector L. MacQueen and W. David H. Sellar, “Scots Law: Ius Quaesitum Tertio, Promise and Irrevocability,” in *Ius Quaesitum Tertio* ed. Schrage: 357.

The final problem of un-codified law, which again is well illustrated in Scotland, is the gaps lying between the precedents that are the main source of the rules. A small legal system simply does not generate enough case law with which to answer many questions about the law; and only a very small amount of that case law is of such economic value as to justify going all the way to the topmost levels of the judicial system and so obtain authoritative answers to the outstanding questions. There are numerous important issues on which we have to guess what Scots law is on third party rights, although these guesses may be reasonably good ones if based on the general principles of the law of obligations. The issues involved are actually quite similar to those mentioned above to which no reference was made in PECL; so once again the DCFR provides us with a useful model of what a legislative gap-filler here could look like for Scots law.

Conclusions: (3) Weighing the balance

In sum, therefore, I have come to the view that codification – or at least legislative statements of problematic parts of the law – would be a good thing for the Scots law of contract, and I rather envy China what it has now got, at least in general terms. The balance between code and precedent seems to me to tilt strongly in the direction of the former. The argument that case law is more flexible and responsive, and so capable of changing to meet new challenges, does not work too well in a small system, whether or not it does so in a larger one like England. The charge that the Scots law on third party rights in contract is “stuck in the seventeenth century” is over-stated, but has enough truth in it to hurt. Codes are not typically rigid or the death of judicial creativity: wriggle room for judges can be built in through general clauses such as Article 6 of the Chinese Contract Law 1999 (honesty and good faith), and a strong judiciary can work wonders with even the most obstinate codal texts, as the nineteenth-century French experience with Article 1121 of the Code Civil well illustrates.

It would be possible for both China and Scotland to develop a modern, systematically thought-through yet flexible law on third party rights by looking to texts such as the relevant Articles of the DCFR or the Contracts (Rights of Third Parties) Act 1999. The deep comparative study and analysis underpinning each instrument should give confidence that all the major issues have been properly addressed; and where the two differ in their solutions, a choice can be made between them in accordance with the respective needs of Chinese and Scottish society. It will, lastly, be important to have in place machinery that keeps the law so codified or legislatively stated under review, to ensure as far as reasonably possible that the rules are kept up to date and do not end up 200 years from now incurring the charge that they are stuck at the beginning of the twenty-first century.