International Arbitration

Could French Contract Law Become the Preferred Governing Law for International Business Contracts?

On January 26 2017, Bryan Cave's London office hosted a debate on the recently implemented reform of French contract law – the French Civil Code – which is designed to make it the law of choice for international companies. Two teams of lawyers discussed whether French law was now a challenge to the dominance of English law in cross-border contracts.

The English law argument was presented by:

- Rémy Blain, Bryan Cave M&A Partner and Managing Partner of the Paris office
- Jeremy Aron, Group Legal Director, Packaging at DS Smith

And the French law argument by:

- Mathew Rea, Co-head of the Global International Arbitration Team and a Partner in Bryan Cave's London office
- Catherine Pédamon, Deputy Head of the LLM Course in International Commercial Law in the Department of Advanced Legal Studies at Westminster Law School and a Senior lecturer in Law

The event was moderated by Peter Rees QC of 39 Essex Chambers. Peter is a leading expert in international arbitration and commercial litigation and the former Legal Director of Royal Dutch Shell plc.

In Good Faith – Mathew Rea

Mathew highlighted that unlike English law, French legislation looks at the intentions of parties, rather than at the letter of a contract (Article 1188 of the French Civil Code).

Article 1171 of the French law stipulates that in standard form agreements, clauses which create a significant imbalance between the parties are generally not taken into account.

This approach can help avoid absurd results, like the one in *Arnold v Britton & Ors* case [2015].

Owners of around 20 holiday chalets on a plot in South Wales entered into long leases for 99 years. There was an annual service charge for maintenance of the chalets at £90 per year with a 10% uplift every year compounded. By the end of the lease, it came to £575,000 annually, which is many more multiples than what the chalets were worth. The Supreme Court however, in its interpretation, was guided by the letter of the contract.

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The only equivalent in English law is the Unfair Contract Terms Act. But it only covers part of what is provided by the French law.

A TV channel sold its content to a satellite platform. It promised to offer the latest series of *Homeland, Law and Order* and *House*. The contract said 'general entertainment programmes', and the platform found itself broadcasting *Perry Mason, Columbo* and other programmes from the 1970s. Under English law, there was not much of a case there, but under French law the channel would have had a much stronger case.

Mathew concluded with reference to French legislation enshrining in law the principle of acting in good faith (Article 1104), a provision that does not exist in English law.

Unnecessary Complications? - Jeremy Aron

Jeremy, however, disagreed with Mathew's argument. To him, this over-reliance on good faith is a shortcoming under French law.

During negotiations for the purchase of a Romanian business under French law, just before purchase the buyer discovered that two of the key employees had recently handed in their notice. However despite this, withdrawing from the potential transaction proved difficult and lawyers on the other side threatened to sue over the alleged failure to act in good faith.

Jeremy also pointed out contradictions in the new French law, such as the concluding part of Article 1188 that suggests that the construction of intention may be allowed to trump the literal terms. There seems to be inconsistency between Article 1188 and Article 1192 which says that "Clear and unambiguous terms are not subject to interpretation as doing so risks their distortion." To him, these create ambiguity. He believes that English law offers less opportunity for competing interpretations of contract terms.

Finally, English law is accepted much more widely for international business transactions. While French law does have an opportunity to gain more prominence following Brexit, Jeremy believes that it still faces a lot of barriers.

"A perfect marriage for a successful law" - Catherine Pédamon

In Catherine's view, there are three cornerstones of the French law's possible success with international companies, the concepts of: unforeseen circumstances; unilateral promises; and the idea of good faith.

"Good faith" now permeates the whole lifecycle of a contract. While some think that the obligation to negotiate in good faith can be detrimental to *"adversarial position of the parties involved"* (*Walford v Miles*), Catherine disagrees: the best negotiations are always collaborative.

She also rejected the common idea that there can be too much judicial interference under French law. French judges have been treading cautiously; and Catherine believes that they will continue to do so.

There is also significant attraction for businesses under Article 1195, which provides for renegotiating a contract in unforeseen circumstances or hardship. This allows parties to ask for renegotiation if economic, political or legal circumstances threaten to disrupt the economic equilibrium of a contract. This can sometimes save an important deal.

Finally, Article 1124, which creates a provision for unilateral promises or pre-contract, is a useful tool and does not exist in English law.

Catherine thus believes that the new French law allows much shorter contracts, it is more business friendly, less time consuming and more readable.

Bringing Past Cases Together - Rémy Blain

Rémy pointed out that the reform brings together all of the developments of French case law over recent decades.

This is meant to increase the efficiency of French law on the international business scene.

However, the new French contract law also requires even more documenting of every step of contract-making. Storage and archiving of multiple copies and traveling documents under French law is costly and time-consuming and this will be off-putting for international companies keen to minimise any additional red tape.

Rémy also questioned how far outside interference will come into the contract as he believes that there are many provisions in the French law which the parties will have to opt out of.

A victory for English Law – for now?

Having heard the debate, the audience were asked to vote on the motion: 'The new French Contract Law will soon become the governing law of choice for international business transactions'. Their collective view was that, given English law's current dominance, this was unlikely in the short term.

However, many felt the arguments put forward by those supporters of the French approach were very persuasive and that the London legal community should certainly not rest on its laurels.

Indeed, those considering how English law is interpreted and applied might want to look to the innovations within the new French codes and consider if there are elements that they can learn from.

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