

[Solène Rowan](#)

Resisting termination: some comparative observations

Book section

Original citation:

Originally published in Rowan, Solene (2017) *Resisting termination: some comparative observations*. In: Dyson, Andrew, Goudkamp, James and Wilmot-Smith, Frederick, (eds.) *Defences in Contract*. Hart studies in private law: essays on defences. Hart Publishing, Oxford, UK. ISBN 9781849467230

© 2016 [Hart Publishing](#)

This version available at: <http://eprints.lse.ac.uk/66282/>

Available in LSE Research Online: April 2016

LSE has developed LSE Research Online so that users may access research output of the School. Copyright © and Moral Rights for the papers on this site are retained by the individual authors and/or other copyright owners. Users may download and/or print one copy of any article(s) in LSE Research Online to facilitate their private study or for non-commercial research. You may not engage in further distribution of the material or use it for any profit-making activities or any commercial gain. You may freely distribute the URL (<http://eprints.lse.ac.uk>) of the LSE Research Online website.

This document is the author's submitted version of the book section. There may be differences between this version and the published version. You are advised to consult the publisher's version if you wish to cite from it.

Resisting Termination: Some Comparative Observations

Solène Rowan*

I. Introduction

Termination for breach of contract releases the parties from their contractual obligations to perform.¹ It is a powerful and definitive device that discharges all unperformed primary obligations under the contract yet to accrue and ends the contractual relationship, often instantaneously.² Significant commercial and financial consequences for the parties may ensue. This can be acute for the defaulting promisor. Not only is he deprived of the benefit of the contract; in many cases, he must also compensate the injured promisee in damages for losses caused by breach, possibly including the loss of the bargain.

With the aim of avoiding at least some of these consequences, the defaulting promisor could well wish to resist the promisee exercising his right to terminate. This chapter considers certain 'defences' that the promisor might invoke in order to do so.³ 'Defences' here are defined by reference to their effect.⁴ That is to say, they are the grounds the promisor may rely upon, once the right to terminate has arisen, to resist termination or avoid or reduce its consequences. The chapter does not however seek to address how the remedy arises or the ways that the promisor can deny that the remedy has arisen, such as that one of its essential elements is missing (except briefly to give context to and incidentally in the discussion of the defences to termination that are covered). These topics are dealt with thoroughly elsewhere.⁵

Since termination is a self-help device, a clarifying word is needed on how 'defences' might be invoked in this context. When faced with a repudiatory breach, the injured promisee has a choice: to terminate or affirm the contract. If he elects to terminate, all he must do is communicate to the defaulting promisor that he is treating the contract as being at an end.⁶ He does not need to apply to the court for an order terminating the contract.⁷

This is not to say that the court has no role in this context. Recourse to the court may be necessary for a determination as to whether the contract was terminated effectively and, often more contentiously and importantly, by whom.⁸ The court might also be required to

* Associate Professor at the London School of Economics and Political Science. I would like to thank Gregg Rowan and the organisers and attendees of the Oxford Workshop on Defences in Contract for their comments and suggestions on an earlier draft.

¹ Only termination for breach of contract will be considered in this paper. Termination following frustration and *force majeure* is outside of its scope.

² *Photo Production Ltd v Securicor Transport Ltd* [1980] AC 827 (HL).

³ For some possible grounds for resisting termination not considered in this paper, see M Bridge, 'Freedom to Exercise Contractual Rights of Termination' in L Gullifer and S Vogenauer (eds), *English and European Perspectives on Contract and Commercial Law: Essays in Honour of Hugh Beale* (Oxford, Hart Publishing, 2014).

⁴ See the different meanings that 'defences' can have: A Dyson, J Goudkamp, F Wilmot-Smith, 'Central Issues in the Law of Tort Defences' in A Dyson, J Goudkamp, F Wilmot-Smith (eds), *Defences in Tort* (Oxford, Hart Publishing, 2015)

⁵ See, for instance, H Beale (ed), *Chitty on Contracts*, 32nd edn (London, Sweet & Maxwell, 2015) Chap 24.

⁶ *Vitol SA v Norelf Ltd (the 'Santa Clara')* [1996] AC 800 (HL) (Lord Steyn).

⁷ For a statutory exception, see s90 of the Consumer Credit Act 1974.

⁸ In practice, it is relatively common for one party to purport to exercise a right to terminate for repudiatory breach and the other party to allege that doing so itself amounts to a repudiation and purport to accept the repudiation, in which case, both parties come before the court claiming to have terminated and an entitlement to damages, usually for loss of the bargain.

decide the consequences of termination and, in particular, resolve competing claims to compensatory damages. In any of these contexts, the defaulting promisor might wish to challenge the purported termination or the consequences that are alleged by the injured promisee to flow from it. If he is still willing to perform, he might even seek to argue and claim (or as the case may be counterclaim) a declaration that the contract remains or should be treated as remaining on foot.

There is not necessarily inconsistency between the promisor having committed a breach that gives rise to a right to terminate and nonetheless being willing to perform.⁹ He may wish to do so for any number of reasons. Usually only by performing will he be entitled to receive the reciprocal consideration promised under the contract. He might also want to protect his reputation or be able to honour commitments made to third parties in connection with the contract. It may be that he has incurred expenses in advance of performance that would otherwise be wasted.¹⁰ Members of his workforce who would have had a role in performing the contract may end up being idle and unproductive to his and their own detriment. It should therefore be relatively uncontroversial that the promisor may wish to insist on performance even when in breach.

The subject of this chapter is explored through comparative analysis of French law, a particularly instructive comparator because it is notoriously protective of the contractual bond created by the parties. In France, the promisor can resist termination in a host of ways. If he has performed defectively, he can offer to cure the breach. If he has not performed on time, he can request a time extension even when the breach is sufficiently serious to justify putting an end to the contract. Good faith also plays a role in restricting termination.

It will be shown that the grounds for resisting termination in France go beyond those in English law. This is notwithstanding that, in England, a promisee wishing to terminate often faces a high hurdle to establish that he is entitled to do so. The right to terminate arises only in limited circumstances and the promisor cannot easily be ousted from the contract following a breach. Conversely, however, once the right to terminate has arisen, the grounds for resisting termination are relatively narrow; there is usually little that the promisor can do to resist.

The divergences between England and France will be attributed to different policy choices that have been made in each jurisdiction. In France, the contract is paramount; it should be saved and performed where possible and termination is a remedy of last resort. There is no similar willingness to uphold a failed contract in England; the injured promisee can escape from the contract to reallocate his resources and obtain substitute performance elsewhere without any compunction. The promisor's predicament arouses less sympathy and he has correspondingly fewer defences to resist termination.

The purpose of the chapter is to describe and comment on the defences that are available in England and France, and explain the differences between them. It might provoke but, due to spatial constraints, does not seek to engage in debate as to whether English law should be more protective of the defaulting promisor and allow him to resist termination more widely in circumstances where a right to terminate has arisen. The focus is not so much on English law as comparative analysis of the two systems.

⁹ Except obviously in the case of a renunciation.

¹⁰ See the other reasons given in E Peel, *Treitel on the Law of Contract*, 14th ed (London, Sweet & Maxwell, 2015) [18-004].

II. Resisting Termination in English Law

The practical effect of the high threshold facing the injured promisee wishing to terminate is that the interests of the defaulting promisor are largely protected at this stage rather than when the right has arisen. Brief mention must therefore first be made of how the right to terminate arises.

A The Circumstances Giving Rise to a Right of Termination in English Law

At common law, a contract can be terminated for breach only in narrow circumstances. The threshold for the injured promisee to be entitled to put an end to the contract is high. Only a serious breach will suffice. Such a breach would be made out where the promisor manifests a clear and absolute intention¹¹ not to perform¹² or disables himself from performing.¹³ A right to terminate also arises where the term breached is so important¹⁴ as to be a 'condition' of the contract, or an 'innominate term'¹⁵ and the consequences of the actual breach deprive the injured promisee of substantially the whole benefit of the contract.¹⁶

The narrowness of the circumstances in which the right to terminate arises is illustrated by the fact that, in commercial contracts, the parties often incorporate an express term that confers a broader right to terminate.¹⁷ They can agree, for instance, that the right should arise upon a breach of a term, even where it is not of essential importance or the breach has no serious consequences for the injured promisee. In practice, many commercial contracts are very prescriptive as to the circumstances in which the right to terminate will arise.

The high common law threshold shields the defaulting promisor from being deprived of the benefit of the contract too readily. It is satisfied only by the most severe breaches. When in breach, the promisor can still seek to argue that the right to terminate has not arisen because the term breached is not a condition but a warranty or an innominate term and the consequences of the breach are insufficiently serious. The flexibility of innominate terms reduces the likelihood of a term being classified as a condition such that the injured promisee has an inescapable right to terminate for any breach.¹⁸ This achieves proportionality: the more serious the breach, the more serious are the consequences.

B 'Defences' to Termination in English Law

In English law, where a common law right to terminate for breach has arisen, it is relatively unrestricted. Few defences are available to the promisor, who has little prospect of preventing the injured promisee from exercising the right, should he wish to do so. It is generally not

¹¹ *Chilean Nitrate Sales Corp v Marine Transportation Co Ltd (The Hermosa)* [1982] 1 Lloyd's Rep 570.

¹² For a more detailed account of the law on renunciation, see *Chitty on Contracts* (n 5) [24-018] ff.

¹³ For a more detailed account of the law on impossibility, see *Chitty on Contracts* (n 5) [24-029] ff.

¹⁴ Peel (n 10) [18-023] ff.

¹⁵ *Bremer Handelsgesellschaft mbH v Vanden Avenne-Izegem PVBA* [1978] 2 Lloyd's Rep 109 (HL) 113 (Lord Wilberforce); *Hongkong Fir Shipping Ltd v Kawasaki Kisen Kaisha Ltd (The 'Hongkong Fir')* [1962] 2 QB 26 (CA).

¹⁶ *Hongkong Fir Shipping Ltd v Kawasaki Kisen Kaisha Ltd (The 'Hongkong Fir')* [1962] 2 QB 26 (CA) 70 (Lord Diplock).

¹⁷ S Whittaker, 'Termination Clauses' in A Burrows and E Peel (eds), *Contract Terms* (Oxford, OUP, 2007) 253, 256.

¹⁸ Peel (n 10) [18-050]. For a similar conclusion, see G Treitel, *Remedies for Breach of Contract: A Comparative Account* (Oxford, Clarendon Press, 1988) [259].

possible to require a second chance to perform or even a period of grace where time is of the essence. There is no general right to cure or requirement that the promisee should exercise his election between affirming and terminating in good faith.

Only in specific circumstances can the promisor resist termination. He is confined to relying on the equitable jurisdiction of the court to grant relief against forfeiture or any indirect fetter on termination that results from the doctrine of loss mitigation, which may cause the promisee to accept a new tender from the promisor.

(i) No Second Chances

(a) No General Entitlement to a Grace Period

The court does not have a general power to grant a period of grace to a defaulting promisor in repudiatory breach.¹⁹ Where time is of the essence and the promisor does not perform by the due date, the injured promisee's right to terminate arises immediately.²⁰ The promisor cannot apply to the court for or require from the promisee an extension in time.²¹

One justification for the strict enforcement of time stipulations is the desire for commercial certainty. This was made clear in *Union Eagle Ltd v Golden Achievement Ltd*.²² A contract for the sale of a flat provided that completion should take place before a certain time and that time was of the essence. The purchaser paid the purchase price 10 minutes late. Citing the stipulation making time of the essence, the seller refused to accept payment and terminated the contract. It was held by the Privy Council to be entitled to do so. Lord Hoffmann justified the decision on the ground of commercial certainty. He said 'in many forms of transaction, it is of great importance that if something happens for which the contract has made express provision, the parties should know with certainty that the terms of the contract will be enforced'.²³

In some circumstances the promisee's right to terminate can even arise before the due date for performance. If the promisor clearly renounces the contract or disables himself from performing, this is an anticipatory breach and the promisee can exercise his right to terminate straight away. It makes no difference that the time for performance is in the future and he need not wait until then to terminate.²⁴ Once he has exercised his right to terminate, the contract is definitively discharged.

(b) No General 'Right to Cure' the Breach

In the same vein, where the performance rendered by the promisee does not comply with the contract and the breach is repudiatory, the promisor cannot require the promisee to grant him an opportunity to cure the breach before exercising the right to terminate.²⁵ The promisor has

¹⁹ S Whittaker, 'A Period of Grace for Contractual Performance?' in M Andenas and others (eds), *Liber Amicorum Guido Alpa, Private Law Beyond the National Systems* (London, BIICL, 2007) 1083. For examples of statutory exceptions, see the Law Property Act 1925, s146; the Consumer Credit Act 1974, ss76, 87 and 98.

²⁰ Chitty (n 5) [21-015].

²¹ Whittaker (n 19) 1100.

²² [1997] AC 514 (PC).

²³ *ibid* at 518.

²⁴ *Hochster v De la Tour* (1853) 2 E & B 678, 118 ER 922 (QB).

²⁵ *Buckland v Bournemouth University Higher Education Corp* [2010] EWCA Civ 121 (CA), esp [40]; *Lamarra v Capital Bank Plc* [2006] 2007 SC 95 at [61] but see *Ampurius Nu Homes Holdings Ltd v Telford Homes (Creekside) Ltd* [2013] EWCA Civ 577 at [63]. Peel (n 10) at [18-066] explains the latter decision in the following terms: 'the court was ... primarily concerned with whether there had been a repudiatory breach based on the forward looking element of the uncertainty of future performance and here the fact that the breach had

no entitlement to a 'second chance' to perform. Instead, the promisee can terminate the contract and reject any further tenders that the promisor might make.²⁶ As is explained in *Chitty*, 'English law does not permit a contracting party unilaterally to cure a repudiatory breach once it has been committed ... the choice whether to affirm or not is the choice of the injured party. It cannot be taken from him by the party in breach making an offer of amends'.²⁷

(ii) The Irrelevance of Good Faith and Fairness in Terminating the Contract

The defaulting promisor is also unable to challenge the decision of the injured promisee to exercise a common law right to terminate as not having been made in good faith. The right is not subject to any general requirement of good faith or fairness.²⁸ The promisee's motives in exercising the right are irrelevant and he can put an end to the contract without giving reasons.²⁹ He can therefore terminate to escape what has turned out to be an unprofitable bargain, for instance due to market fluctuations.³⁰ This has been justified by a desire for commercial certainty and speedy resolution of disputes.³¹ Both are facilitated by the courts not investigating the promisee's motives for terminating. It is also consistent with the absence in English law of a general duty to act in good faith or concept of abuse of rights.³²

Where the promisee has a contractual right to terminate, it is similarly unfettered. Outside the sphere of consumer contracts, for which there is specific legislation,³³ termination clauses do not have to pass a threshold test of fairness or reasonableness in order to be valid. As long as they are clearly drafted, there is little inclination on the part of the courts to impede their operation.³⁴ The most that might be expected is that, when ambiguously worded, they will be construed narrowly.³⁵ There is no requirement that they are exercised in good faith.³⁶

been remedied, or the prospect of a cure, was a relevant consideration'. Note that consumer-buyers can under ss19(3), 19(4) and 23 of the Consumer Rights Act 2015 require defaulting sellers to repair or replace non-conforming goods. However, sellers have no right to demand an opportunity to repair or replace: see *Chitty* (n 5) [38-414]. There is also nothing to prevent the parties from stipulating that the promisee is permitted to terminate only after the promisor has had an opportunity to remedy the breach within a defined period of time: see p [cross refer].

²⁶ *Peel* (n 10) [17-004].

²⁷ *Chitty* (n 5) at [24-002].

²⁸ On this topic, see R Hooley, 'Controlling Contractual Discretion' [2013] CLJ 65.

²⁹ *James Spencer Ltd v Tame Valley Padding Co Ltd* (CA, 8 April 1998); *SNCB Holding v UBS AG* [2012] EWHC 2044 (Comm) at [73] (Cooke J); on this point, see R Brownsword, 'Retrieving Reasons, Retrieving Rationality? A New Look at the Right to Withdraw for Breach of Contract' (1992) 5 JCL 83. But see *Heisler v Anglo-Dal Ltd* [1954] 1 WLR 1273.

³⁰ The flexibility of the innominate terms has to a certain extent restricted termination where ulterior motives are in play: see *Peel* (n 10) [18-036] and [18-050]-[18-053]. See also the restriction in s15A of the Sale of Goods Act 1979 on the buyer's right to terminate for breach of a condition where the breach is so slight that it would be unreasonable for him to reject the goods, which is narrow in scope and has been described by Peel as 'an unfortunate provision': *Peel* (n 10) [18-057]. Benjamin describes it as a section 'of severely limited effect' in practice with no reported decisions on it since its enactment in 1994: M Bridge (ed), *Benjamin's Sale of Goods* (London, Sweet & Maxwell, 2015) at [12-026].

³¹ Hooley (n 28) 84.

³² *ibid.* See *Chitty* (n 5) [1-039]-[1-056] and Whittaker (n 17).

³³ See the Consumer Rights Act 2015. For a general discussion of the Act, see *Chitty on Contracts* (n 5) ch 15.

³⁴ J Cartwright, *Contract Law: An Introduction to the English Law of Contract for the Civil Lawyer* (Oxford, Hart Publishing, 2007) 272.

³⁵ *Rice (t/a Garden Guardian) v Great Yarmouth Borough Council* [2003] TCLR 1 (CA) criticised by Whittaker (n 17) 279-81.

³⁶ See Whittaker (n 17).

That no duty of good faith or standard of reasonableness arises, whether at common law or in the context of contractual rights to terminate, has been made clear in several cases. For instance, in *Lomas v JFB Firth Rixon Inc*,³⁷ Longmore LJ said obiter that ‘the right to terminate is no more an exercise of discretion, which is not to be exercised in an arbitrary or capricious (or perhaps unreasonable) manner, than the right to accept repudiatory conduct as a repudiation of contract... No one would suggest that there could be any impediment to accepting repudiatory conduct as termination of the contract based on the fact that the innocent party can elect between termination and leaving the contract on foot. The same applies to elective termination.’³⁸

It has however been suggested in a recent case that good faith could in certain circumstances constrain the promisee's election to affirm or terminate. In *MSC Mediterranean Shipping SA v Cottonex Anstalt*,³⁹ the promisee, faced with a repudiatory breach, sought to affirm the contract and claim the contract price. Leggatt J thought that the decision to affirm and obtain payment had to be exercised in good faith. In his view, there should be no difference of approach between the exercise of a contractual discretion, which cannot be done arbitrarily and capriciously, and a choice whether to affirm or terminate a contract following a repudiatory breach. He said ‘in each case, one party to the contract has a decision to make on a matter which affects the interests of the other party to the contract whose interests are not the same. The same reason exists in each case to imply some constraint on the decision-maker's freedom to act purely in its own self-interest’.⁴⁰ He concluded that the tests were the same and the decision to affirm the contract had to be exercised in good faith. On the facts, the election to affirm the contract was wholly unreasonable. It had not been invoked for a proper purpose but rather to seek to generate a new revenue stream.

It remains to be seen whether Leggatt J's implication of a duty of good faith into the election between affirmation and termination will be applied more widely to all decisions between affirming or terminating. It was made in the particular context of the promisee wanting to affirm, as opposed to terminate the contract in order to perform and obtain the contract consideration.

This type of situation has generated controversy in the past in *White and Carter (Councils) Ltd v McGregor*.⁴¹ In that case, Lord Reid suggested two possible limitations to the right to affirm the contract and claim the agreed price: first, performance by the injured promisee cannot require the cooperation of the other party; second the promisee must have a legitimate interest in performing the contract rather than claiming damages.⁴² It was this second limitation that was the focus of Leggatt J's comments, not whether all elections between affirming and terminating for breach should be made in good faith. It also appears only to have been this limitation that he thought should be reinterpreted in the light of what he characterised as the increasing recognition of good faith principles in contractual dealings.

Another reason for doubting that Leggatt J's implication of a duty of good faith should have general application is that he made no mention of the authorities that draw a distinction between the exercise of a contractual discretion, which involves a choice from a range of

³⁷ [2012] EWCA 419. See also *Sucden Financial Ltd v Fluxo-Can e Overseas Ltd* [2009] EWHC 3555 (QB); *TSG Building Services PLC v South Anglia Housing Limited* [2013] EWHR 1151 (TCC).

³⁸ *Ibid* [46]. See however Hooley (n 28) at 86-88 who argues that the promisee does have a discretion when faced with a repudiatory breach and that ‘there would be much to gain, in terms of reducing opportunistic behaviour or other cases of perceived unfairness, if English law were expressly to adopt a similar approach to the exercise of a right to termination for breach as it does to the exercise of contractual discretion’.

³⁹ [2015] EWHC 283 (Comm).

⁴⁰ *Ibid* at [97].

⁴¹ *White and Carter (Councils) Ltd v McGregor* [1962] AC 413 (HL Sc).

⁴² *Ibid* at 443.

options, and binary decisions as to whether to exercise a contractual right.⁴³ Some recent authorities have suggested that good faith obligations are only relevant in the former case, not the latter. On one view, an injured promisee who elects between terminating and affirming the contract is faced with a binary choice and therefore no duty of good faith arises.

Another feature of Leggatt J's judgment is that he dealt with the consequences of repudiation in just 10 paragraphs, of which only two were focused on good faith and its potential application to the election to terminate. To introduce a general duty of good faith into this election would potentially impose a significant fetter on the promisee. Greater exploration and justification may be necessary in future cases for the duty to achieve wide acceptance.⁴⁴

(iii) Defences in Specific Situations

While English law confers no general right on the defaulting promisor to cure his breach and good faith is irrelevant, except possibly to the injured promisee's election to affirm, an effective termination can be challenged in limited situations.

(a) A Second Chance to Perform

Relief against Forfeiture

If the promisor is willing to perform, equity can intervene to grant relief against forfeiture in narrow circumstances. This arises where, upon the promisor's breach, the promisee invokes a forfeiture clause to forfeit the promisor's contractual rights. The relief generally takes the form of the promisor being allowed additional time to remedy the breach.⁴⁵ As long as the promisor remedies the breach within the time fixed by the court, the contract is preserved and the promisee's right to terminate is lost.⁴⁶

A classic example is in the context of leases. In certain circumstances the landlord's right to forfeit a lease for breach is subject to the tenant having an opportunity to cure the breach. Where, for instance, the lessee defaults on rent payments, the court may protect him against the landlord's right of re-entry or other power to terminate the lease. It does so by affording him more time to pay the outstanding rent and any order for possession of the property is postponed in the meantime. This jurisdiction is now on a statutory footing.⁴⁷ Similarly, in the context of mortgages, equity recognises a mortgagor's right to redeem the mortgage where payments due and not made are brought into court.⁴⁸

The restriction on freedom of contract inherent in the equitable jurisdiction is regarded as a lesser evil than unconscionable insistence on contractual terms.⁴⁹ In the example of leases and mortgages, as long as the lessor and the mortgagee obtain what is contractually due to them, even if belatedly, it is thought fairer to keep the relationship alive.

⁴³ Leggatt J's analysis does not sit easily with the approach of Sir William Blackburne in the recent High Court decision of *Myers v Kestrel Acquisitions Limited* [2015] EWHC 916 (Ch); *Mid Essex Hospital Services NHS Trust v Compass Group UK and Ireland Ltd (t/a Medirest)* [2013] EWCA Civ 200.

⁴⁴ See Peel (n 10)'s view at [18-078] that 'the right to terminate is in the nature of an "absolute right" which is not subject to [an implied term that it must be exercised in good faith]'.

⁴⁵ Chitty (n 5) [21-016]-[21-017].

⁴⁶ Chitty (n 5) [21-016]-[21-017].

⁴⁷ LPA 1925, s146.

⁴⁸ *Shiloh Spinners Ltd v Harding* [1973] AC 691, 722ff.

⁴⁹ J McGhee (ed), *Snell's Equity* (London, Sweet & Maxwell, 2014) [13-001].

The alternative of termination could have potentially significant negative ramifications for the promisor.⁵⁰

The equitable jurisdiction is however limited and exceptional,⁵¹ so as not to undermine contractual certainty.⁵² Relief is not available as of right but rather is discretionary and is only available where the forfeiture clause serves as security for the promisee to obtain payment or another advantage, the contract concerns the transfer or creation of proprietary or possessory rights and the forfeiture would result in the promisor losing those rights. The mere loss of a personal contractual right does not trigger the jurisdiction.⁵³ Most contracts are therefore outside the scope of the doctrine.

A Limited Right to Cure in the Sale of Goods Context

The court also has jurisdiction to allow a second chance to a defaulting seller under a sale of goods contract, albeit in similarly limited circumstances.⁵⁴ There are some authorities, concerned mainly with the tender of documents, which support the proposition that a seller who has made a non-conforming tender before the time for performance can retender.⁵⁵ The scope of this right to cure is narrow, applying only to defective tenders that are not repudiatory. Where the non-conforming tender amounts to a repudiation, the injured promisee is entitled to terminate and not bound to accept the second tender.⁵⁶ It therefore does not restrict the promisee's right to terminate as such.

(b) Restrictions Arising by Operation of the Mitigation Principle

Another 'defence' potentially available to the defaulting promisor as a means of impeding, even if not formally restricting the right to terminate arises through the doctrine of mitigation, which serves to limit the injured promisee's recovery of compensatory damages for losses that he could reasonably have avoided.⁵⁷

While in principle the promisee has a free choice between terminating and affirming the contract, the way that he exercises his election could draw criticism from the promisor for any unreasonable failure to mitigate loss.⁵⁸ If the criticism is justified, the court could reduce

⁵⁰ N Andrews, M Clarke, A Tettenborn and G Virgo, *Contractual Duties: Performance, Breach, Termination and Remedies* (London, Sweet & Maxwell, 2012) [25-065].

⁵¹ Snell's Equity (n 49) [13-027].

⁵² *Union Eagle Ltd v Golden Achievement Ltd* [1997] AC 514 (PC) 519 per Lord Hoffmann.

⁵³ *Scandinavian Trading Tanker Co AB v Flota Petrolera Ecuatoriana (The Scaptrade)* [1983] 2 All ER 763.

⁵⁴ R Ahdar, 'Seller Cure in the Sale of Goods' [1990] LMCLQ 364; A Apps, 'The Right to Cure for Defective Performance' [1994] LMCLQ 343; V Mak, 'The Seller's Right to Cure Defective Performance - A Reappraisal' [2007] LMCLQ 409. Note that consumer buyers have a right to have defective goods repaired or replaced unless this is impossible or disproportionate: s48A of the Sale of Goods Act 1979 and s23 of the Consumer Rights Act 2015 but this does not require the buyer to give the seller an opportunity to cure.

⁵⁵ *Borrowman Phillips v Free & Hollis* (1878-79); *EE & Brian Smith (1928) Ltd v Wheatsheaf Mills Ltd* [1939] 2 KB 302; *Tetley v Shand* (1871) 25 LT 658; *The Kanchenjunga* [1990] 1 Lloyd's Rep 391 (HL). See M Bridge (ed), *Benjamin's Sale of Goods* (n 30) [12-032]; M. Bridge, *The Sale of Goods*, 3rd edn (Oxford, Oxford University Press, 2014) [10.129] ff.

⁵⁶ However, where the first tender puts the promisor in repudiatory breach, the promisee can refuse any second tender from the promisor: Peel (n 10) [17-004]; Goode p374.

⁵⁷ *British Westinghouse Electric and Manufacturing Co Ltd v Underground Electric Railways Co of London Ltd* [1912] AC 673.

⁵⁸ Peel (n 10) [18-009]; S Whittaker, 'Contributory Fault and Mitigation, Rights and Reasonableness: Comparisons between English and French Law' in L Tichy (ed), *Causation in Law* (Prague, Konrad Adenauer Stiftung, 2007) 147, 160-1; Andrews, Clarke, Tettenborn and Virgo (n50) [10-073] ff and [24-056] ff; A Kramer, *The Law of Contract Damages* (Oxford, Hart Publishing, 2014) 399-404. For a possible restriction of the right to terminate resulting from the rule on penalties, see Bridge (n 3).

his entitlement to compensatory damages by a sum representing the amount of loss that he should have mitigated. The practical effect is to impose a fetter on his right to terminate or affirm.

In many situations, the doctrine of mitigation leaves the promisee with little alternative than to terminate and seek substitute performance from a third party. If he prefers to persist with the promisor and affirms the contract, despite the promisor's default and in circumstances where to do so is unreasonable, this could amount to a failure to mitigate. It could cost him some or all of the damages that he might otherwise have recovered.⁵⁹

The doctrine can have the very opposite effect in other situations. The promisee could find that, in order to mitigate losses resulting from the breach, he should accept the promisor's offer of substitute performance, despite being entitled to terminate the contract. This does not mean that he is obliged to do so and he can freely terminate and end his relationship with the promisor, if he so wishes, but his damages award may be reduced commensurately. In this way, the mitigation doctrine incentivises the promisee to accept the promisor's offer to cure the harm caused by the breach and enter into a new contract with him. To this extent, both mitigation and the right to cure share similarities: they minimise the promisee's loss but also reduce the financial impact of breach on the promisor.⁶⁰

The leading case on the interrelation between the mitigation doctrine and the right to terminate is *Payzu Ltd v Saunders*.⁶¹ The seller had agreed to sell to the buyer a fabric called crêpe de chine. Delivery was to take place over a period of 9 months in return for payment within a month of each delivery. The buyer failed to make punctual payment after the first delivery. Erroneously believing that non-payment was due to the buyer's lack of means, the seller refused to deliver more goods under the contract and instead offered to deliver the goods at the contract price only if the buyer agreed to pay in cash at the time of placing the orders. This offer was rejected by the buyer, which instead terminated the contract on the basis of the seller's repudiation. The market price of the goods having risen in the interim, the buyer sued the seller for compensatory damages based on the difference between the market price and the contract price.

The trial judge, with whom the Court of Appeal agreed, held that the buyer should have mitigated its loss by accepting the seller's offer and revised payment terms. Scrutton LJ said 'in commercial contracts it is generally reasonable to accept an offer from the party in default. However, it is always a question of fact.' As a result, the measure of damages awarded was not the difference between the market price and the contract price but instead was confined to the loss that the buyer would have suffered, if it had accepted the offer.

The rationale cited by the first instance judge was to avoid overburdening the defaulting promisor with liability. If the promisee can avoid part of his loss by accepting a reasonable offer made by the promisor, then he is expected to do so. Any remaining loss can be compensated in damages so as not to leave the promisee worse off. On the facts, the court found that the buyer was able to pay cash for the goods and seller's offer was bona fide. The buyer would only have suffered a small loss because of the less favourable payment conditions, for which damages would have been recoverable.⁶² It should therefore not have permitted itself 'to sustain a large measure of loss which as prudent and reasonable people they ought to have avoided'.⁶³

⁵⁹ *Habton Farms (an unlimited company) v Nimmo* [2004] 1 QB 1 (CA) at [128] per Auld LJ.

⁶⁰ M Bridge, 'Mitigation of Damages in Contract and the Meaning of Avoidable Loss' (1989) 105 LQR 398, 412.

⁶¹ [1919] 2 KB 581. See also *Houndsditch Warehouse Co Ltd v Waltex Ltd* [1944] KB 579; *Clegg v Andersson (t/a Nordic Marine)* [2002] EWHC 943 (QB) at [61] per HHJ Richard Seymour QC.

⁶² See the explanation given by MacKenna J in *Strutt Whinell* [1975] 1 WLR 870 (CA) 875.

⁶³ [1919] 2 KB 58, 586 (McCardie J).

In *The Soholt*,⁶⁴ the Court of Appeal went further, finding that the promisee, the buyer of a ship, should actually have solicited such an offer from the defaulting seller after exercising a contractual right to terminate the sale contract for late delivery. By this stage, the value of the ship had appreciated by \$500,000, which the buyer claimed as compensatory damages. It was held that the buyer's failure to purchase the ship from the seller for the original price under a revised contract was a failure to mitigate, even though this had not been proposed by the seller. There was an onus on the buyer to take the initiative and offer to repurchase the ship at the original price after terminating the contract and the judge found that such an offer would have been accepted. It would then have been open to the buyer to seek to recover any losses resulting from the delay as damages. The implication appears to be that the promisee should consider not only any offer made by the defaulting promisor, but also making an offer to the promisor.⁶⁵

It is not solely in relation to sale of goods contracts that the promisee has been found to have acted unreasonably in rejecting the promisor's offer to contract on new terms. An employee who has been dismissed can also in certain circumstances be expected to accept an offer of re-employment. In *Brace v Calder*,⁶⁶ for instance, the manager of a business was dismissed automatically under his employment contract as a result of a change in the ownership of the business. The Court of Appeal held that he should have accepted an offer of re-engagement by the new business owners on the same terms as previously applied. His refusal to do so was unreasonable and the resulting loss was of his own making. Similarly, in building contracts, the refusal by an employer to allow a contractor to undertake remedial works may amount to a failure to mitigate. In *Woodlands Oak Ltd v Conwell*,⁶⁷ for example, the Court of Appeal upheld the first instance judge's decision that the claimant homeowners should have allowed their builders an opportunity to rectify defects that were mere snagging items.

It is important however not to overstate the effect of the mitigation doctrine. Whether the promisee should seek substitute performance from the promisor is a question of fact.⁶⁸ The standard of reasonableness that must be attained for the duty to mitigate to be discharged is relatively low. The courts are sensitive to the circumstances of the promisee, as epitomised by Tomlinson J's observation in *Britvic Soft Drinks Ltd v Messer UK Ltd*⁶⁹ that there should be a 'tender approach to those who have been placed in a predicament by a breach of contract'.⁷⁰ This was echoed by HHJ Coulson QC, sitting as a Judge of the High Court, in *Iggleden v Fairview New Home (Shooters Hill) Ltd*,⁷¹ when considering whether the purchasers of a house that had defects failed to mitigate their loss by not allowing the builders to remedy the defects. He said that 'it would take a relatively extreme set of facts to persuade me that it was appropriate to deny a homeowner financial compensation for admitted defects, and leave him with no option but to employ the self-same contractor to carry out the necessary rectification works'.⁷²

There are many cases in which the courts have found that the promisee has acted reasonably and not failed to mitigate loss by refusing the promisor's offer. By way of example, it has been held to be unreasonable for the promisor to require the promisee to

⁶⁴ *Sotiros Shipping Inc v Samiet Soholt (The Soholt)* [1983] 1 Lloyd's Rep 605 (CA).

⁶⁵ Both *Payzu* and *The Soholt* were forcefully criticised by Bridge (n 60) at p 420 for rendering the 'buyer's right of contractual discharge for late delivery utterly illusory'.

⁶⁶ [1895] 2 QB 253 (CA). See also *Wilding v BT plc* [2002] IRLR 524 (CA).

⁶⁷ [2011] EWCA Civ 254.

⁶⁸ *Payzu Ltd v Saunders* [1919] 2 KB 581, 589 (Scrutton LJ).

⁶⁹ [2002] 1 Lloyd's Rep 20 (QB).

⁷⁰ *ibid* at 46.

⁷¹ [2007] EWHC 1573 (TCC).

⁷² *ibid* at [77].

forfeit his right to compensatory damages.⁷³ It has also been said to be unreasonable to require the promisee to accept an offer where the terms proposed are inferior to those originally agreed,⁷⁴ or where the relationship between the parties has been badly damaged, for instance where confidence has been lost⁷⁵ or the promisor has ‘grossly injured’ the promisee. This is especially true in personal service contracts.⁷⁶ Some judges have also expressed concern that the mitigation doctrine undermines the promisee’s right of termination by covert means and should not be allowed to curtail his choice between alternative remedies.⁷⁷

(c) Defences to Termination by Agreement

A more direct way of limiting or even excluding a common law right to terminate is by the agreement of the parties. It has already been shown that termination clauses prescribing when the right to terminate arises feature widely in commercial contracts. Many such provisions extend the scope for terminating the contract beyond the common law right to accept a repudiatory breach.

There is nothing however to prevent the parties from agreeing to narrow⁷⁸ or even exclude altogether⁷⁹ the common law right. Alternatively, they might stipulate that the promisee is permitted to terminate only after the promisor has had an opportunity to remedy the breach within a defined period of time. He would be able to make good his default under the terms of the contract, which in practical effect is tantamount to a contractual right to cure.

Clauses of this nature are by no means unusual in commercial contracts. Guidance on their drafting and usage can be found in standard texts on boilerplate commercial clauses. Such provisions owe their validity to the widely accepted principle of freedom of contract. By enabling the parties to tailor the remedy to their particular needs and wishes, they are an efficient means of giving the defaulting promisor a second chance and preserving his interest in performing.

C Concluding Remarks on Defence to Termination in English Law

The common law right to terminate arises only in narrow circumstances. The defaulting promisor's interests are protected mainly in the rules as to when the right arises and his primary defence to a purported termination will often be that no right has arisen. However, when the right does arise, the defences available to the promisor are correspondingly narrow. The right is relatively unfettered and there are few grounds on which he might hope to resist termination. This contrasts with French law, in which the grounds for opposing termination are wider.

III. Resisting Termination in French Law

⁷³ *Houndsditch Warehouse Co Ltd v Waltex Ltd* [1944] KB 579; *Shindler v Northern Raincoat Co Ltd* [1960] 1 WLR 1038; *Strutt v Whitnell* [1975] 1 WLR 870.

⁷⁴ In an employment context, see *Jackson v Hayes Candy & Co Ltd* [1938] 4 All ER 587; *Yetton v Eastwoods Froy Ltd* [1967] 1 WLR 104; in the context of sale of good, see *Heaven & Kesterton Ltd v Et Francois Albiac & Co* [1956] 2 Lloyd’s Rep 316 at 321.

⁷⁵ *Jackson v Hayes Candy & Co Ltd* [1938] 4 All ER 353 (Du Parcq LJ).

⁷⁶ *Payzu* at 588 (Banks LJ) and 589 (Scrutton LJ).

⁷⁷ eg *Heaven & Kesterton Ltd v Etablissements Francois Albiac & Co* [1956] 2 Lloyd’s Rep 316, 321 (Devlin J).

⁷⁸ *Hongkong Fir Shipping Ltd v Kawasaki Kisen Kaisha Ltd (The 'Hongkong Fir')* [1962] 2 QB 26 (CA) 69 (Lord Diplock). On the relationship between a contractual right to terminate and the right to terminate at common law, see *Stocznia Gdynia SA v Gearbulk Holdings Ltd* [2009] BLR 196 (CA).

⁷⁹ *Peel* (n 10) [18-074].

Before analysing the approach of French law to defences to termination, it is important to point out that French contract law is in the process of being substantially reformed. By way of context, the section of the Civil Code on contract law has remained largely unchanged since its creation in 1804. It does not reflect the actual state of the law in this area, which has evolved significantly over the last two centuries.

At the time of finalising this chapter (March 2016), new articles of the Civil Code on contract law had just been published.⁸⁰ They are due to come into force in October 2016. Both the approach of French law before the reforms and the changes that they will bring are considered here. It will be shown that, while the reforms introduce changes to the process of terminating a contract, they are unlikely to have a significant impact on the wide defences that the promisor can draw upon to resist termination.

The wider availability in France of defences to termination for breach can be attributed partly to the way that termination has traditionally operated, which is very different from England. A significant role in deciding the fate of the contract is (at least until the incoming reforms) reserved to the French court. Its role is to decide whether the promisee should be entitled to terminate.

A The Process of Termination

As in England, termination is available in France for 'serious' breaches of contract.⁸¹ Factors that are relevant to whether a breach justifies termination include the consequences of the breach, whether the contract would still serve its intended purpose, the nature of the contract, whether the obligation that has been breached is essential, whether the failure to perform is total or partial, and the behaviour of the contracting parties.⁸²

Unlike in England, termination has historically not been a self-help remedy. This will change when the reforms are implemented: the promisor will have a choice between judicial and self-help termination. Until then, the longstanding rule is that, subject to certain exceptions,⁸³ the injured promisee wishing to terminate for breach must apply to the court.⁸⁴ Only by an order of the court can the contract be discharged. He cannot of his own accord treat the breach as discharging him from his contractual obligations.⁸⁵ As such, he cannot be said to have a 'right' of termination, at least in the sense that the term is used in England.

First instance judges in France have considerable room for manoeuvre when deciding whether a contract should be terminated for breach. Generally they endeavour to protect the contractual relationship and the interests of the promisor.⁸⁶ An initial step in this process is to

⁸⁰ *Ordonnance no 2016-131 of 10 February 2016 portant réforme du droit des contrats, du régime général et de la preuve des obligations*: <<https://www.legifrance.gouv.fr/eli/ordonnance/2016/2/10/JUSC1522466R/jo/texte>> (accessed 17 March 2016). It follows two other reform proposals: the 'Proposals for Reform of the Law of Obligations and the Law of Prescription' prepared under the direction of P Catala, 22 Sept 2005 and the 'Ministry of Justice project' (*Projet de la Chancellerie*) of July 2008.

⁸¹ eg Civ (1) 12 Mar 1956, D 1956, 302; Civ (1) 15 July 1999, Bull civ I no 245. Article 1184 of the Civil Code is silent as to the circumstances in which a contract may be terminated. Case law has evolved to require the breach to be 'serious' in order to justify termination. Whether a breach crosses this threshold of seriousness is in the discretion of first instance judges: see S Rowan, *Remedies for Breach of Contract: A Comparative Analysis of the Protection of Performance* (Oxford, OUP, 2012) pp 80-94.

⁸² See Rowan (n 81) at 81.

⁸³ On termination in French law, see Rowan (n 81) 80-94.

⁸⁴ Article 1184, para 3 of the Civil Code.

⁸⁵ Whittaker (n 19) 1090.

⁸⁶ F Terré, P Simler and Y Lequette, *Droit civil, Les obligations* (11th edn, Dalloz Paris 2013) [642]; J Rochfeld, 'Résolution et exception d'inexécution' in P Rémy-Corlay and D Fenouillet (eds), *Les concepts contractuels français à l'heure des principes du droit européen des contrats* (Paris, Dalloz, 2003) 216.

ascertain whether he really is unable or unwilling to perform or the contract can be saved.⁸⁷ This reflects a belief that he should not be deprived of the benefit of the contract too quickly or arbitrarily;⁸⁸ termination is the last possible resort.⁸⁹ Whatever the severity of the breach, the court can still refuse termination and order another remedy⁹⁰ or an intermediate measure such as a grace period in which the promisor may attempt anew to perform. Judicial discretion in relation to termination will remain after the reform where the promisee elects judicial termination over self-help termination or where the issue comes before the court because the promisor disputes the attempted termination, as explained below.⁹¹

B Defences to Termination in French Law

This judicial discretion over termination and the prevailing willingness to protect the contractual relationship and the promisor's interests together give rise to several grounds on which termination can be resisted.

(i) Offer from the Defaulting Promisor to Perform and Grace Period

If a promisor faced with termination proceedings offers to perform or requests an extension of time, this may result in the promisee being deprived of the remedy.

(a) Offer from the Defaulting Promisor to Perform

There is no general 'right to cure' breach in the French Civil Code but several provisions do nonetheless confer such a right on the promisor in the context of specific contracts. As an example, in contracts for the construction and sale of buildings, article 1646-1 of the code expressly provides that the promisor has a right to cure any defects in the building works. If the defects are remedied, the promisee cannot terminate the contract.

In other situations, and in contrast with English law, even if a breach is sufficiently serious to justify termination, it is well established and uncontroversial that the court may refuse the remedy where the promisor is still willing to perform his side of the bargain.⁹² If he makes an offer to perform that is considered by the court to be satisfactory from the perspective of the promisee, the contract remains on foot.⁹³ The promisor can therefore generally resist termination by making a reasonable offer to perform. It is open to him to

⁸⁷ R Cassin, 'Réflexions sur la résolution judiciaire des contrats pour inexécution' RTD civ 1945.12, [2].

⁸⁸ Introductory comments of Rochfeld in *Avant-Projet de Réforme du Droit des Obligations (Art 1101 à 1386 du Code civil) et du Droit de la Prescription (Art 2234 à 2281 du Code Civil) under the direction of P Catala, 22 Sept 2005* (Paris, Documentation française, 2006).

⁸⁹ *ibid*; Jamin, 'Les conditions de la résolution du contrat: vers un modèle unique? – Rapport français' in M Fontaine and G Viney (eds), *Les sanctions de l'inexécution des obligations contractuelles, études de droit comparé* (Bruxelles, Paris, Bruylant, LGDJ, 2001) 451, [482].

⁹⁰ A Ogus and D Tallon, 'Remedies – Summary of Discussion' in D Harris and D Tallon (eds), *Contract Law Today – Anglo-French Comparisons* (Clarendon Press Oxford 1989) 290, 294; Terré, Simler and Lequette (n 86) [652] ff.

⁹¹ See the new article 1228 of the Civil Code: *Ordonnance no 2016-131 of 10 February 2016*.

⁹² Terré, Simler and Lequette (n 86) [651]; J Flour, J-L Aubert; E Savaux, *Les obligations, Le rapport d'obligations*, 7th edn (Paris, A Colin, 2011) [251]; Civ 1, 17 May 1954, Gaz Pal 1954.2.83; Civ 1 22 Oct 1956, Bull civ I no 362; Civ 3, 22 March 1983, Cull civ III, no84, p67, Defrenois 1984.296, obs J-L Aubert; Civ 1 15 April 1986, Bull civ I, no84, p83; RTD civ 1987, p315 obs Mestre.

⁹³ Jamin (n 89) [12]; Terré, Simler and Lequette (n 86) [651]; Civ 1, 27 Jan 1961, Bull civ I, p102, no128; Civ 30 Nov 1949, JCP 1952.II.6802, note Rech, RTD civ 1956.183, noted by H et L Mazeaud.

make such an offer either before termination has been ordered or even when an appeal against the remedy is pending.⁹⁴

The willingness of courts in France to uphold the contract in this way is illustrated by a case arising out of the sale of a plot of land.⁹⁵ The parties had agreed that the price would be paid in 3 instalments. Only the first 2 instalments were paid. After several years, the seller applied to the court for an order terminating the contract. The buyer sought to resist termination by offering to pay the third instalment. The Montpellier Court of Appeal, with which the *Cour de Cassation* agreed, refused to order termination: the offer to cure was held to be satisfactory in the circumstances.

(b) Grace Periods (*Délai de Grâce*)

The Civil Code also gives the court jurisdiction to grant the promisor a period of grace (*délai de grâce*),⁹⁶ provided that performance remains possible and would still serve its intended purpose. Although the agreed timetable can no longer be met and even if the breach is sufficiently serious to justify termination, belated performance is acceptable⁹⁷ and perceived as being better than none at all.⁹⁸

First instance courts have a very wide discretion as to whether to order a grace period, provided that the promisor acts in good faith.⁹⁹ The *Cour de cassation* rarely interferes.¹⁰⁰ There is no limit on the possible duration of the grace period,¹⁰¹ except that it is not renewable. It is therefore open to the court to grant the promisor whatever time is necessary for him to perform and 'save the contract'.¹⁰² The court must also take account of the interests of the promisee and any loss that he would suffer from more time being granted, thereby striking a balance between the interests of both parties.

(ii) The Relevance of Good Faith

It has been held in France that termination 'can only be granted if the injured promisee acts in good faith'¹⁰³ and should be rejected 'if his behaviour is tainted with bad faith'¹⁰⁴ or his

⁹⁴ Terré, Simler and Lequette (n 86) [651]; Treitel (n 18) [243]; Civ 27 March 1911, DP 1915.1.97, note Cezar-Bru; 6 Jan 1932, DH 1932.114. *classification*, thèse Paris I, 2000, no 569, pp736ff; ME Pancazi-Tian, *La Protection judiciaire du lien contractuel* (Aix-Marseille, PUAM, 1996) No 331, p274ff.

⁹⁵ Civ 1, 17 May 1954, Gaz Pal 1954.2.83.

⁹⁶ See art 1184, paragraph 3 of the Civil Code and the new article 1224 of the Civil Code: *Ordonnance no 2016-131 of 10 February 2016*. Aside from the *délai de grâce*, the court can order the partial termination of the contract, see Terré, Simler and Lequette (n 86) [652] ff.

⁹⁷ Whittaker, "'Termination' for Contractual Non-Performance and its Consequences: French Law Reviewed in the Light of the Avant-Projet de réforme' in J Cartwright, S Whittaker, and S Vogenauer (eds), *Reforming the French Law of Obligations, Comparative Reflections on the Avant-Projet de Réforme du Droit des Obligations et de la Prescription* (Oxford, Hart Publishing, 2009) 187, 191.

⁹⁸ Genicon, *La résolution du contrat pour inexécution* (Paris, LGDJ, 2007) [357]; Whittaker (n 19) 1098.

⁹⁹ J-Y Laithier, 'The French Law of Remedies for Breach of Contract' in N Cohen and E McKendrick (eds), *Comparative Remedies for Breach of Contract* (Oxford, Hart Publishing, 2005) 103, 121; contra Jamin (n 88) 470.

¹⁰⁰ Whittaker (n 19) 1098.

¹⁰¹ The absence of any temporal limit on the grace period that may be ordered is in contrast with article 1244-1 of the Civil Code, which gives the court a discretion to allow an extension of time of up to two years to pay a debt that is due.

¹⁰² P Simler, *Fasc 10: Contrats et obligation – Classification des obligations – Distinction des obligations de donner, de faire et de ne pas faire* (LexisNexis Jurisclasseur, 2011) [51].

¹⁰³ Court of Appeal of Poitiers, 1st Civ Chamber, 4 July 2006, Juris-data no 2006-313835: a case in which the injured promisee had waited 19 years before taking formal steps to terminate the contract.

¹⁰⁴ *Ibid.*

request for termination 'can be characterised as disloyal speculation'.¹⁰⁵ The promisor can therefore pray in aid the principle of good faith to challenge the promisee's attempt to terminate. This enables the court to take into consideration the behaviour and motives of the promisee, in particular any evidence of good or bad faith,¹⁰⁶ in deciding whether to order termination. As an example from the cases, a promisee was found to have acted in bad faith by seeking to terminate where he had not complained about the breach for 19 years.¹⁰⁷

Good faith is also relevant where the contract contains a termination clause. In principle, where the promisee invokes a contractual right to terminate, the court can do no more than ascertain whether the conditions for the exercise of the right have been met. However, in practice, termination clauses have been read restrictively and as being subject to a requirement that they be exercised in good faith. When invoked in bad faith, a termination clause will not be enforced.¹⁰⁸

The potential impact of good faith in the context of termination clauses is neatly illustrated by a case from 1994.¹⁰⁹ The Limoges Court of Appeal refused to enforce a termination clause on the ground, amongst others, that the injured promisee had sought to rely on the promisor's breaches and invoke the clause as a pretext in order to be able to enter into more profitable transactions with third parties. This decision was upheld by the Cour de cassation.

(iii) The Reform of the Civil Code

A notable change relating to termination brought about by the reforms that shifts French law towards the position in England is that the promisee will no longer be obliged to seek a court order to terminate a contract. Instead he will be able to elect between judicial and self-help termination.¹¹⁰ Judicial termination will closely resemble the current termination regime. Where the promisee chooses self-help termination, the contract will be discharged unless the promisor brings proceedings to challenge his right to do so.¹¹¹

The promisor will not however be deprived of the currently available defences. If he challenges a purported self-help termination following the implementation of the reforms, the court will still be able to allow a grace period.¹¹² In deciding whether or not to do so, the court is likely to apply the same criteria as at present, with particular focus on whether the promisor has made a satisfactory offer to perform. If the court finds that termination is not justified and performance remains possible, it is likely that performance will be ordered.¹¹³ Much of the considerable protection for the promisor willing to perform therefore remains.

It will be interesting to observe the take-up of the self-help variant of termination as French legal practice acclimatises to the reforms.¹¹⁴ On the face of things, it is a streamline option that should appeal to contracting parties, enabling them to end failed and failing

¹⁰⁵ Court of Appeal of Paris, 22 Dec 1873 cited in Genicon (n 98) [505].

¹⁰⁶ Flour, Aubert, and Savaux (n 92) [252]; Civ 3 29 April 1987 RTD civ 1987.536 noted by J Mestre; Civ 3 3 June 1992, GP 1992.II.656 noted by J-P Barbier.

¹⁰⁷ Poitiers Court of Appeal, 1ere Ch civ, 4 July 2006, juris-data no 2006-313835.

¹⁰⁸ See Rowan (n 81) 85; Jamin (n 89) [34]; Com 31 March 1978, Bull Civ IV, no 102, p84; Civ 3, 6 June 1984, Bull civ II, no 111, p88; Civ 14 March 1956, D 1956, p449; Y Picod 'La Clause résolutoire et la règle morale' JCP 1990, ed G, I, 3447.

¹⁰⁹ Civ 3, 12 Jan 1994, no 91-17023.

¹¹⁰ See the new article 1224 of the Civil Code: *Ordonnance no 2016-131 of 10 February 2016*.

¹¹¹ See the new article 1226 of the Civil Code: *Ordonnance no 2016-131 of 10 February 2016*.

¹¹² See the new article 1228 of the Civil Code: *Ordonnance no 2016-131 of 10 February 2016*. On the remedy for wrongful termination, see Rowan (n 81) 87-88.

¹¹³ *ibid*.

¹¹⁴ Cases on the existing exception to judicial termination where breach is serious (*comportement grave*) have been relatively sporadic: see Rowan (n 81) 86.

contracts and move on swiftly. The knock-on effect may be fewer termination disputes coming before the French courts. There is however also a possibility that legal practitioners and disputants will proceed cautiously at least initially and some may yet prefer the certainty and definitiveness of judicial termination.

C Concluding Remarks on Termination in French law

French courts have wide discretion in relation to termination. It is not confined to protecting the promisee; account can also be taken of the defaulting promisor's circumstances and interests and he is allowed generous opportunity to avoid termination and perform belatedly. It is not unusual for a promisor to be granted a second chance.

IV. Defences to Termination: Comparative Remarks

The preceding survey of the defences to termination in England and France has revealed differences in approach and broader grounds for resisting termination in France than England. It will be argued in the remaining part of this chapter that these differences are largely attributable to divergent policy choices in the two jurisdictions.

A Divergent Policy Choices

The broad availability in France of defences to termination owes much to a desire to uphold contractual relations and protect performance.¹¹⁵ It is widely believed amongst French lawyers that performance is the essence of a contract. Where a breach has been committed, the parties are encouraged to persist in their relationship and find a solution. The contractual relationship should be saved, if possible.¹¹⁶ It is preferable to try to rescue rather than to terminate it. Termination should be the very last resort.

This reflects the importance that French law ascribes to contractual obligations. The concept of the contract is much more subjective than in England, being seen as a consensual bond that has intrinsic value.¹¹⁷ Only performance by the original contracting party is regarded as being truly satisfactory. In the words of the renowned French contract lawyer, Mestre: 'the *raison d'être* [of the contract] is to unite individuals...It is to be performed loyally ... and is ... above all a human affair ... The contract cannot be reduced, in an economic approach, to a transfer of values or a modification of estates'.¹¹⁸

The promotion of performance that is at the heart of the French law on termination is linked to a belief that it is not simply the promisee that has an interest in the performance of the contract. The promisor also has an 'interest in performing'¹¹⁹ worthy of protection. This interest continues to exist where he has committed a breach and regardless even of its seriousness. Restricting the promisee's right to terminate ensures that the interest is upheld and cannot be defeated lightly.¹²⁰ Another eminent French contract lawyer, Genicon, goes as far as to say that 'the position of the promisor is of prime importance'.¹²¹

¹¹⁵ Rowan (n 81) 52, 82, 93-100.

¹¹⁶ On one view, by granting a grace period or giving a second chance to the defaulting promisor, French courts are not enforcing the contract as agreed by the parties; rather, they are re-writing the contract.

¹¹⁷ *ibid.*

¹¹⁸ J Mestre, 'Préface' to B Fages, *Le comportement du contractant* (Aix-en-Provence, PUAM, 1997). On the concept of the contractual relationship in French law; see more generally Rowan (n 81).

¹¹⁹ Whittaker (n 19).

¹²⁰ Whittaker (n 19) 1104.

¹²¹ Genicon, *La résolution du contrat pour inexécution* (n 98) [511].

The commitment to the survival of the contractual relationship in France is not confined to the context of defences to termination. It pervades the whole remedial framework of French law.¹²² For instance, specific remedies such as specific performance and injunctive relief are central and given primary importance. They are available as of right and subject to very few restrictions.¹²³ There is in this respect internal coherence and consistency in the French remedial system: the restrictions on termination interconnect with, and complement, the primacy and wide availability of specific performance.¹²⁴ As between terminating the contract and compelling its performance, French law very clearly favours the latter.

There is no similar willingness to uphold a failed contract in England, where ensuring that the promisor performs the primary obligations that he has undertaken is markedly less important.¹²⁵ It is generally considered that contracting parties should not have to remain tied together when their relationship has been unsuccessful. In many situations the promisee can put an end to the failed contract quickly so as to obtain substitute performance and reinvest his resources in another way. Upholding the contractual relationship is subordinate to the overall economic outcome¹²⁶ and only encouraged if this serves to minimise loss.

The approach adopted in England has been attributed to the commercial nature of the disputes that typically come before English courts. Certainty and speed serve the interests of commercial parties.¹²⁷ The emphasis is on providing an expeditious and convenient way for the promisee to obtain the bargained-for benefit, which often means exiting the contract and using his resources elsewhere. Any additional cost that he incurs in doing so will often be recoverable as damages.

The liberality of this approach has been noted by commentators. As McKendrick has said:

English law ... places considerable emphasis on the importance of termination as a remedy in the event of breach. ... At the risk of some over-statement it can be said that the philosophy of English law is that when one encounters a problem which has been caused by a breach of contract committed by the other party to the contract, the law should make it easy for the innocent party to walk away from the transaction to enter into a fresh transaction elsewhere.¹²⁸

The comparatively narrow circumstances in English law in which the promisee is required or incentivised to give the promisor another chance suggests that there is no particular desire to uphold contractual relationships. A more diverse set of policy considerations is in play and their collective aim appears to be to balance the competing interests of the parties. Beyond this, there does not seem to be any common thread running through the cases in which the promisor has been given a second chance to perform. Relief against forfeiture seeks to prevent unconscionable insistence on a contractual right of forfeiture. The mitigation principle, on the other hand, aims to minimise economic waste,¹²⁹

¹²² Rowan (n 81).

¹²³ *ibid* pp 37-52. See however the new restriction introduced in the new article 1221 of the Civil Code: *Ordonnance no 2016-131 of 10 February 2016*.

¹²⁴ *ibid* pp 97-99.

¹²⁵ Whittaker (n 19) 1103.

¹²⁶ Rowan (n 81) chap 1.

¹²⁷ J Cartwright, 'Damages, Third Parties and Common Sense' (1996) 10 JCL 244, 272.

¹²⁸ E McKendrick, 'Contracts, the Common Law and the Impact of Europe' in *Il Contratto e le tutele : prospettive di diritto europeo / a cura di Salvatore Mazzamuto* (Torino, Giappichelli, 2002) 101, 110-1.

¹²⁹ Chitty (n 5) [26-102]; D Campbell and D Harris, 'In Defence of Breach: A Critique of Restitution and the Performance Interest' (2002) 22 LS 208, 219.

encourage self-reliance in the promisee¹³⁰ and deter him from burdening the defaulting promisor with all conceivable losses.¹³¹

Unlike in France, there is also no or little emphasis on and indeed barely any mention of the promisor having an 'interest in performing'.¹³² The focus in the case law and literature has predominantly been on the protection of the 'performance interest' or 'expectations interest' of the promisee and these terms are commonly used to describe his interest in obtaining the promised performance under the contract.¹³³ Comparatively little work has been done on the corresponding interest of the promisor.¹³⁴ As Treitel summarised, 'Anglo-American courts are, in the matter of termination, less concerned with the protection of the debtor than either German or French law. Their emphasis tends ... to be on speedy and convenient remedies for the creditor'.¹³⁵

This approach to termination also fits coherently and consistently in the wider framework of contractual remedies under English law. The limited restrictions on the right to terminate dovetail with the limited availability of specific performance. There is an inverse and complementary relationship between the two mutually exclusive remedies. As between terminating the contract and compelling its performance, English law inclines towards the former, preferring to compensate any loss suffered with an award of damages.¹³⁶

B Approaches taken by International Instruments

This is not to say however that the differing approaches in England and France are necessarily irreconcilable. Some international instruments have adopted the essential elements of each system. The key tenets of the English approach of encouraging loss mitigation and promoting contractual certainty operate in tandem with those from French law, namely preserving the contractual relationship and protecting the interests of the contracting parties.

For instance, the UNIDROIT Principles do not allow the court to grant a grace period. It is feared that this would only delay the injured promisee exercising the right to terminate.¹³⁷ The promisor does however have a right to cure defective performance where the cure is prompt and the injured promisee has no legitimate reason to refuse.¹³⁸ This is available for all kinds of breach, except where time is of the essence.¹³⁹ Cure can consist of repair or replacement and be effected before or after the due date of performance. It is not precluded by a notice of termination having been given, meaning that 'a contract that has been formally terminated' can be revived.¹⁴⁰ Only where the time allowed for cure has expired can the injured promisee terminate the contract if cure is unsuccessful. The rationale

¹³⁰ Bridge (n 60).

¹³¹ A Burrows, *Remedies for Torts and Breach of Contract*, 3rd ed (Oxford, OUP, 2004).

¹³² Whittaker (n 58).

¹³³ Rowan (n 81) 2.

¹³⁴ With the exception of Whittaker (n 58) and Rowan (n 81) 99-102.

¹³⁵ Treitel (n 18) [259].

¹³⁶ Rowan (n 81) pp 97-8.

¹³⁷ H Schelhaas, Commentary on article 7.1 of the Unidroit Principles at p 828 in S Vogenauer (ed), *Commentary on the Unidroit Principles of International Commercial Contracts (PICC)*, 2nd ed (Oxford, OUP, 2015).

¹³⁸ See article 7.1.4 of the UNIDROIT Principles. Schelhaas (n 137) pp 845-850.

¹³⁹ Schelhaas (n 137) pp 846-7.

¹⁴⁰ Off Comment 10 to article 7.1.4, p230; Schelhaas (n 137) p 849 who criticises this as hardly conducive to legal certainty and open to criticism: the injured promisee is under the impression that he has lawfully terminated the contract yet the defaulting promisor may subsequently exercise his right to cure with the effect that the contract turns out not to be terminated after all.

for allowing cure is to preserve the contract, minimise economic waste and achieve a solution that is in the interests of both parties.¹⁴¹

There is similarly no grace period under the UN Convention on the International Sale of Goods (CISG).¹⁴² This is attributable to concern that the parties could be exposed to judicial discretion that is too broad and creates too much uncertainty.¹⁴³ The defaulting seller does however have a right to cure where he fails to perform by the due date, which principally arises where goods delivered are not in conformity with the contract.¹⁴⁴ Unlike under the UNIDROIT Principles, the promisee's right to terminate seems to take priority over the promisor's right to cure.¹⁴⁵

The apparent priority of the right to terminate is controversial and has been criticised for depriving the promisor's right to cure of any substance.¹⁴⁶ In the legal literature, the prevailing view is that, even where the defect in the non-conforming goods is serious, the promisee's right to terminate should not prevent the promisor from curing the breach where this can be done without undue delay or unreasonable inconvenience to the promisee.¹⁴⁷ The right to terminate should only prevail where this serves to protect special interests of the buyer, for instance where time is of the essence or there has been a breach of trust between the parties.¹⁴⁸

Although not without problems themselves,¹⁴⁹ the defences to termination found in the international instruments demonstrate that there is middle ground between the rules in England and France. In giving less ammunition to the defaulting promisor than in France but more than in England, the instruments have achieved a compromise and a balance between the termination regimes of the two jurisdictions.

V Conclusion

It is fair to say that 'English law seems reluctant to give second chances to [defaulting parties] who fail to get it right the first time round'.¹⁵⁰ The interests of the defaulting promisor are protected mainly in the rules as to when the right to terminate arises. Once the right has arisen, it is relatively unrestricted and there are few defences that he can invoke to resist termination. This contrasts with French law, which has wider grounds for opposing termination, thereby giving greater protection to the defaulting promisor and more generally the contract. Underpinning this is a wider policy of protecting contractual performance.

It is beyond the scope of this chapter to consider whether English law should in the future evolve in this direction to recognise more numerous defences to termination in English law or indeed the form that any such defences might take. What the chapter has shown

¹⁴¹ *ibid.* The same approach can be found in the Draft Common Frame of Reference. The right to cure is justified by the desire to uphold contractual relations where possible and appropriate: see articles II.-3:201-3:204.

¹⁴² Articles 45(3) and 61(3).

¹⁴³ P Huber, Commentary to article 45 at p369 and G Hager, Commentary on article 61 at 481 in P Schlechtriem and G Thomas (eds), *Commentary on the UN Convention on the International Sale of Goods (CISG)*, 2nd ed (Oxford, Clarendon Press, 1998).

¹⁴⁴ Article 48.

¹⁴⁵ See arts 48 and 49.

¹⁴⁶ Huber (n 142) at 406-411.

¹⁴⁷ *ibid.*

¹⁴⁸ *ibid.*

¹⁴⁹ For a criticism of the approaches taken in the international instruments, see the comments made by the contributors in P Schlechtriem and G Thomas (eds), *Commentary on the UN Convention on the International Sale of Goods (CISG)*, 2nd ed (Oxford, Clarendon Press, 1998) and S Vogenauer (ed), *Commentary on the Unidroit Principles of International Commercial Contracts (PICC)*, 2nd ed (Oxford, OUP, 2015)

¹⁵⁰ Mak (n 54) 409 in a sale of goods context.

however is that there are currently few defences that enable termination to be resisted. There is therefore scope for developing new defences, if this were considered desirable.

A possible progression in the near future is a more significant role for good faith, potentially as an aspect of increasing prominence of good faith principles in English law. There have also been calls in the literature for the recognition of a general right to cure in the context of sale of goods contracts, which it is argued would better protect the interests of the parties, increase loss mitigation, and help avoid the possibility of the injured promisee escaping the contract for an ulterior motive such as to take advantage of market fluctuations.¹⁵¹ However, the introduction of such a defence in England presently seems unlikely. It was firmly rejected by the Law Commission in the context of consumer and non-consumer sales.¹⁵² In relation to consumer sales, the Law Commission's view was that it would give too much power to sellers against buyers and be too difficult to implement.¹⁵³ For commercial contracts, it described a right to cure as 'positively inappropriate': it would be impractical in many situations and unsuited to large commercial transactions.¹⁵⁴ The Law Commission recommended instead that contracting parties who wish to have a right to cure following breach should make appropriate provision in their contract.¹⁵⁵ While this approach disappointed many,¹⁵⁶ it has the merit of being simple and easy to adopt: it is founded on the key principle of freedom of contract, requires no drastic change in the law and policy, and gives the parties responsibility for the level of protection that they perceive as being adequate.

¹⁵¹ Ahdar (n 54); Apps (n 54); Mak (n 54).

¹⁵² The Law Commission considered conferring on the seller in breach of contract a right to cure in order to prevent abusive termination by the buyer where the breach was slight. See now s15A and 30(2A) of the Sale of Goods Act 1979.

¹⁵³

¹⁵⁴ See Law Com no 160, *Sale and Supply of Goods* (1987) [4.13]ff and Law Com no 85 *Sale and Supply of Goods* (1983) at [4.52].

¹⁵⁵ *ibid* at [4.55].

¹⁵⁶ See the references in footnote 54.