UNITED RENTALS v RAM HOLDINGS AS TRANSPLANT FAILURE: STRATEGIC AMBIGUITY, GOOD FAITH AND THE FORTHRIGHT NEGOTIATOR PRINCIPLE IN US CONTRACT LAW

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INTRODUCTION

The case of United Rentals Inc v RAM Holdings and RAM Acquisition Corp¹ (United Rentals) turned on the interpretation of a termination clause in a merger agreement between two large business entities. The clause having been found ambiguous on its face, the Chancery Court of Delaware sifted through the records of the parties’ pre-contractual discussions in search of an interpretation that might have been shared by the two parties, if only informally. Finding none, the Court adopted the meaning that the defendant alone attached to the clause, all the while reiterating its “adherence to the objective theory of contracts”.² In support of that decision, the Court invoked the “forthright negotiator principle” crystallized at Section 201(2) of the

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² Ibid at 835.
Restatement (Second) of Contracts, which the Court summed up as: “where the extrinsic evidence does not lead to a single, commonly held understanding of a contract’s meaning, a court may consider the subjective understanding of one party that has been objectively manifested and is known or should be known by the other party.” As the defendant’s understanding of the clause had indeed been communicated to, and not disavowed by, the plaintiff, the Court was apparently satisfied that its judgment aligned with the objective conception of contract.

I propose to argue that that case was wrongly decided as it purports to conflate two unconfatable contractual paradigms, and consequently yields an unfair result. The Court clearly felt the tension emanating from its decision but ascribed that tension, as indicated, to the seminal opposition between “subjective” and “objective” conceptions of contract. I prefer to stay away from such terminology as it has lent itself to so many uses and abuses that it arguably has become largely unhelpful if not altogether misleading. On a very general level, it is possible to say that “subjective” refers to an individual’s inner intentions whereas “objective” in contrast shifts the focus onto the words and actions through which said intentions are externally manifested.

But all forms of consensus seem to break down from the moment we try to apply that distinction in specific situations.

For one, wherever objective and subjective intentions actually compete with one another, the subjective, like the objective, cannot but be manifest in some way. If the subjective intention remained entirely internal, it would be unknowable by anybody except the intending individual (“the promisor”) and no issue of divergence with the objective would even arise. If only as an evidentiary matter, then, there can be no issue of subjective and

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3 Restatement (Second) of Contracts §201(2) (1981), “[w]here the parties have attached different meanings to a promise or agreement or a term thereof, it is interpreted in accordance with the meaning attached by one of them if at the time the agreement was made (a) that party did not know of any different meaning attached by the other, and the other knew the meaning attached by the first party; or (b) that party had no reason to know of any different meaning attached by the other, and the other had reason to know the meaning attached by the first party”.

4 United Rentals, supra note 1 at 836.

5 This is perhaps most famously articulated in the English case of Smith v Hughes, (1871), LR 6 QB 597 [Smith] and the US case of Hotchkiss v National City Bank of New York, 200 F 287 at 293 (SDNY 1911), aff’d 231 US 50 (1913) where it was stated that “[a] contract has, strictly speaking, nothing to do with the personal, or individual, intent of the parties...If...it were proved by twenty bishops that either party, when he used the words, intended something else than the usual meaning which the law imposes upon them, he would still be held”. According to Reinhard Zimmermann, The Law of Obligations: Roman Foundations of the Civilian Tradition (New York: Oxford University Press, 1996) at 559ff, this same distinction appears to be operative in all modern legal systems.
objective intentions diverging unless the existence and content of both are independently identifiable to a court's satisfaction.\textsuperscript{6}

It might accordingly be suggested that the subjective/objective distinction in fact attaches, not so much to whether the intention is externally knowable, as to who it is knowable to: the court or the other contracting party ("the promisee"). Under that suggestion, the promisor's intention would qualify as "subjective" wherever the promisee is actually unaware of it, quite apart from whether its existence can be established to a court's satisfaction. But in many cases where the promisee's awareness is established, the promisor's intention is still treated as "subjective".\textsuperscript{7}

Perhaps, then, the distinction pertains to how the promisee gains that awareness. The promisor's intention would be "subjective" where the promisee finds out about it, not directly from the promisor (through direct communication), but rather merely incidentally, through words and actions of the promisor's directed at others. Yet the court in United Rentals clearly worried that interpreting a contract in accordance with one party's understanding, which that party communicated to the other, might detract from the objective conception of contract!

Inasmuch as the term "objective" stands for the negation of "subjective", any confusion surrounding the latter naturally applies to it as well. But that term has also generated much uncertainty of its own. With regards to written contracts, for instance, it has been associated with a strict "four corners" or "plain meaning" interpretive approach, one barring resort to any kind of extrinsic evidence as to, inter alia, contractual history or context.\textsuperscript{8} It indeed is on that account that the Restatement (Second), which makes room for extrinsic factors, has been widely described as "less objective" than its predecessor.\textsuperscript{9} But in what sense, one might ask, can allowance for extrinsic factors really be viewed as detracting from "objective" interpretation? That view clearly is warranted where the factors in question relate to, say, the

\textsuperscript{6} The objective/subjective distinction indeed is often reduced to an evidentiary matter, the objective manifestations of an intention being significant only as the most reliable evidence of it, see e.g. G H Treitel, The Law of Contract (London: Sweet & Maxwell, 1995).

\textsuperscript{7} See e.g. Dickinson v Dodds (1876), 2 Ch D 463 (CA) [Dickinson].


parties' actual intentions, as revealed through their pre-contractual negotiations. But what of such contextual factors as customary norms of conduct or industry standards and practices? These are as far removed as can be from the forum internum of any contracting party, yet they nonetheless are regarded by many as partaking of "non-objective" (for transcending the "four corners") contractual interpretation.

Finally, and not unrelatedly, the objective conception has been associated with the "fly on the wall", "third party hypothetical observer" perspective on the contract, by distinction with the promisee's reliance perspective. Of course, if the actual promisee is replaced by a "reasonable" one, the two perspectives may not be so different. Then again, it all depends on how much of the promisee's actual circumstances the hypothetical observer is allowed to take into account. If subjectivity and objectivity are, as is often maintained, just a matter of zooming in or out, the line between them is doomed to remain somewhat arbitrary.

In an effort to free the present discussion from such loaded preconceptions, I propose to drop the objective/subjective taxonomy, at least for now, and instead use the terms "English" and "French". That is, I propose to revisit United Rentals from a comparative perspective, specifically, a comparison of English and French contract law. This may seem like sheer window dressing insofar as English and French contract law have long, and for good reasons, been respectively associated with the objective and subjective conceptions of contract. But it is precisely part of the present aim to show that these two bodies of law differ in a more fundamental way than is conveyed through their description as "objective" and "subjective"—under any of the above understandings.

Whereas all these understandings paint the objective/subjective distinction as one that is ultimately merely factual (what can actually be found inside the promisor's mind or at various distances from it), I want to claim that the most fundamental difference between English and French contract law is normative. In my view, English and French contract law differ most fundamentally in the forms of justifications they exhibit, which are only incidentally reflected in their respective predilections for objective and subjective (factual) considerations. And it is the court's doomed attempt at


11 See e.g. Greenawalt, supra note 9, at 577; Eisenberg, supra note 8 at 1121.

conflating these (unconflatable) justificatory paradigms in United Rentals that, I will argue, resulted in that decision being deeply unfair.

Parts I and II lay out my proposed English and French paradigms of contract justification. For contrasting purposes, I label them “internal” and “external”. These labels may strike the reader as surprising insofar as they are usually used in the reverse. English contract law is typically considered “objective” insofar as it focuses on considerations “external” to the individual mind, while French law is said to be “subjective” because it instead centers on “internal” thoughts. I propose to associate the English with the internal, and the French with the external and I do so quite deliberately, with a view to emphasizing that the move from “objective/subjective” to “English/French” indeed entails a change of venue. Whereas the first treads in and around the mind of the individual contracting party, the second centers on the bilateral interaction between the two parties. English law qualifies as “internal” insofar as it assesses the parties’ claims against standards that are inherent to their particular contractual interaction, whereas French law is “external” in that it makes the same assessments by reference to standards lying outside that interaction—quite apart from what is being assessed in each case (“external” actions or “internal” thoughts). Parts I and II survey English and French contract doctrines respectively with a view to sustaining that claim. Part I summarizes previous findings of mine on contractual interpretation before moving to other areas of English contract law that underscore its fit with the internal paradigm. Part II surveys the counterpart doctrines at French law, relating them instead to the external paradigm.

I bring the two paradigms to bear on the Anglo-American objective/subjective debate in Part III. In particular, I claim that the tension emanating from the United Rentals decision can be traced to the court attempting to conflate the internal and external paradigms, which cannot be accomplished coherently. Additionally I will show that consistent adherence to the former alone would have yielded an outcome that, in addition to being more fair, would have better aligned with the letter and spirit of the Restatement (Second) properly construed.

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13 In a companion paper (on file with author), I map the internal and external models on moral philosopher Stephen Darwall’s second- and third-personal models of moral justifications, (Stephen L Darwall, The Second Person Standpoint: Morality, Respect, and Accountability (Cambridge, Mass: Harvard University Press, 2006).
I. THE "INTERNAL" PARADIGM OF ENGLISH CONTRACT LAW

I will briefly review in turn contractual interpretation, judicial justifications for the authority of contracts, the bargain conception and attendant doctrine of consideration, some rules of formation, remedies, unilateral mistake, and the function of equity in contract adjudication more generally.

a. Contractual interpretation

Earlier work of mine suggests that, while English and French contractual interpretation both involve a combination of factual investigation and normative evaluation, they are structured very differently. whereas the factual and the normative tend to be neatly delineated and discharged sequentially at French law, they tend to be collapsed into one at English law.

At French law, the court first establishes what the parties actually did or did not intend, what they actually thought, said or did, as a strictly empirical matter. Only thereafter will the court proceed to decide what if anything is to be done with the facts from a legal (i.e., normative) perspective. In this second step it is determined which, if any, of these facts are legally relevant, which call for judicial consecration, negation or correction.

I have suggested that ...
this two-step approach explains why French courts might agree to review any kind of evidence going to subjective intentions, including pre-contractual negotiations (under step 1) while being in many ways heavier-handed on the parties (under step 2) than English courts. It likewise explains why French courts might acknowledge the distortive impact of any kind of serious mistakes on a party’s subjective intention (step 1) yet choose to disregard such mistakes where fairness to the other party so requires (step 2). It also accounts for the strict fact/law dichotomy in the French law of evidence, as well as for the French generally lacking appetite for such staple English institutions such as rectification, the Parol Evidence rule, and literal interpretation more generally.

There simply is no reason to constrain the investigation of party intention (under step 1) where it ultimately is “the law’s prescriptive power, not party intention (or the absence thereof, in the case of mistake), that is...primarily determinative of the parties’ contractual rights and obligations” (under step 2).

On the English side I argued that the merger of the investigative and normative stages is most evident in the judicial treatment of “reasonable intention”. While English courts make great use of that phrase, they seem loathe to specify which of two very different meanings they attribute to it: the factual “what the parties reasonably can be taken to have intended” or the normative “what the parties reasonably can have intended”. I suggested the courts have resisted singling out either definition for the simple reason that:

[I]t is because a particular intention reasonably can be attributed to the parties as a matter of fact that the court will endorse that intention as that which reasonably can be attributed to them as a matter of law.

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18 In particular where the mistake is found to be “inexcusable” or pertaining to an aspect of the contract that the non-mistaken party did not or had no reason to suspect was important for the other, ibid at 76.
19 Ibid at 76-77.
20 Ibid at 72-73.
21 Ibid at 76.
22 Ibid at 79 [emphasis in original].
The merger of factual and normative in the English treatment of party intention explains the heavier constraints placed from the outset on the determination of what is to count as such intention—the inclination towards literalism (the "plain meaning" rule and "four corners" approach, inadmissibility of pre-contractual negotiations, the Parol Evidence rule, etc.) and attendant corrective measures (rectification, non est factum). It also accounts for the fact that much of the disciplining that is achieved through explicit legal rules at French law has been accomplished more surreptitiously by English courts, through what Lord Denning called the "secret weapons". Concealed under party intention reconstruction, mistake, frustration and even remedies are commonly conceptualized as issues of interpretation (implied terms, implicit risk allocation, rules of construction), and unfair terms more readily struck out than rewritten by courts. Finally, the fuzzier demarcation between evidentiary and substantive law issues, as well as between issues of fact and issues of law, can likewise be ascribed to this fundamental ambiguity in the English conception of contractual intention. The mixed evidentiary/substantive law status of the Parol Evidence rule, in particular, arguably is to be expected where "evidence of intention is, as between the contracting parties, in many respects as significant as intention itself [given that] the only relevant intention is that of which the other party was given evidence".

Looking for now only on the English side of things, it seems clear that the merger of facts and norms just described is entirely consistent with the internal paradigm of contract justification. English law can afford that merger precisely because it considers that the normative basis for determining contract claims is to be found within the contractual interaction itself. What the particular contract says as a matter of fact is seen as supplying whichever normative standards are needed to determine any and all claims that may
arise from it. As contracts are considered inherently authoritative, there is no need to look past them to determine the normative claims they may ground. In other words, what the contract actually says *ipso facto* determines what the parties ought to do (at least at law—we take up equity later). In principle there is no room to conceptualize the evaluative step as separate from, or subsequent to, the investigative step.\(^{31}\)

b. Judicial justifications for the authority of contracts

If contracts are inherently authoritative there is, by definition, no need to justify their authority. The existence of a contract immediately secures its authority and therefore all that needs to be established is the existence of the contract itself. I would suggest it is indeed a striking feature of the English law of contracts that it is very short (at least when compared to the French) on such justifications. Upon determining whether a contract exists, courts rarely bother to explain why, or even just remind readers that, contracts are legally authoritative.\(^{32}\) That authority appears to be taken as a given and the whole of the judges discussion tends to focus on the questions of the contract's existence and content. As discussed, the inclination of English courts to reduce most contractual matters to issues of interpretation shows that they view contracts as, at the very least, *authoritative* with respect to these matters. The absence of any explanation as to why and how this is so, arguably confirms that that authority is considered inherent. The why and how questions admitted to much debate in scholarly circles,\(^{33}\) but scholars as we know are not nearly as influential in the English system as they

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\(^{31}\)This arguably holds despite what is known as "the plain meaning rule" of English law—counterpart to the "*clauses claires et précises*" doctrine of French law, supra note 16—according to which interpretation would be called for only where the meaning of the text has been found to be ambiguous. Elmer A Driedger, *Construction of Statutes*, 2nd ed (Toronto: Butterworths, 1983) at 1. Though that rule might seem to imply a two-step process similar to that ascribed above to French law (first establishing what the contract says as a matter of fact, then and only then launching into legal interpretation proper where found necessary), critics of that rule have been quick to point out—as was done, on the French side, with respect to the '*clauses claires et précises*' doctrine and the 'théorie de l'acte clair' (supra note 16)—that it misrepresents the interpretive act insofar as the very observation that a text is clear cannot but itself result from an act of interpretation. See e.g. Ruth Sullivan, "The Plain Meaning Rule and Other Ways to Cheat at Statutory Interpretation", *Legal Drafting*, online: <aixl.uottawa.ca/resu1iv/legdr/pmr.html>.  

\(^{32}\)See e.g. Hadley, supra note 16; Anglia Television, supra note 16; Victoria Laundry, supra note 16.  

are on the continent, and little of that scholarship indeed has transpired into the case law.

To be sure, English judges commonly launch into lofty speeches about the sanctity of contracts, security of commerce, protection of reasonable reliance and the like. But I would argue such discussions typically arise where the court contemplates departing from the contract. Where even the most creative act of reconstruction cannot account for the court’s contemplated solution, with the result that that solution necessarily requires counteracting the contract (e.g. unconscionability, illegality, third-party beneficiaries), justifications are given to support that counteraction. But if anything this serves to confirm my point: only departures from the contract call for justification precisely because the inherent authority of contracts is treated as the baseline for analysis.

c. Bargain and consideration

The inherent authority of contracts, and consequent possibility of contract analysis reaching no further than the particular contractual interaction, is fully consistent with the bargain conception of contract and pillar doctrine of consideration. The bargain conception and the doctrine of consideration stand out particularly prominently in some philosophers’ accounts of contract as “joint intentional activity.” A “joint intentional activity,” under Michael Bratman’s conception, involves more than just “coinciding” or “correlated” intentions between two individuals. Two persons independently casting votes for the same candidate in an election would be an example of coinciding voting intentions; these intentions would become “correlated” if the voting action of each is a factor for the other (such as where one might vote for a particular candidate only if others do as well). In either case, however, the most that can be said is that these individuals “are in agreement”; it cannot be said that there is “an agreement” between them. For there to be an agreement, the individuals’ respective intentions would have to

35 See e.g. Shatilla v Feinstein [1923] 3 DLR 1035, [1923] 1 WWR 1474 (Sask CA); Royal Bank of Scotland v Etridge (No 2) and other Appeals, [2001] UKHL 44, [2002] 2 AC 773.
37 Markovits, supra note 36 at 1452, n 72 [emphasis in original].
join into an altogether new, *shared* intention. This new shared intention would not exist before insofar as it is indeed conceptually distinct from either and both of the individual intentions at its root.\(^38\) Such shared intention can only emerge where the individual intentions are self-consciously “interlocking”.\(^39\) It requires, in other words, that:

> [E]ach participant’s intention to join in [it]...be common knowledge among the participants. Two people who pursue a common intention and adjust their intentions and actions in all the ways [that common intention] requires nevertheless fail to act jointly unless these features of their actions are out in the open between them.\(^40\)

Publicness is essential for joint intention, not merely so that each participant can be made *aware* of the other’s (individual) intention, but most importantly so that the joining of these intentions into a common one can in fact take place. Such a joining act being necessarily carried out in the public space between the parties.\(^41\)

Bratman’s account of “joint intention” involving “interlocking” intentions largely matches the English conception of contract as bargain, and attendant doctrine of consideration.\(^42\) As Peter Benson describes it,\(^43\) and

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\(^38\) This is Kant’s concept of contract as a “united will”. See Arthur Ripstein, *Force and Freedom: Kant’s Legal and Political Philosophy* (Cambridge, Mass: Harvard University Press, 2009) at 111ff.

\(^39\) Bratman, *supra* note 36, at 102. As Markovits explains, *supra* note 36, at 1454–57, “interlocking” intentions are necessarily “mutually responsive” on Bratman’s account. Unlike Markovits, however, I take such responsiveness to pertain, in the contractual context, to formation rather than performance of contracts. Mutuality in formation is present where the parties’ individual intentions are given in exchange for one another, regardless of what is required for these intentions to be subsequently performed; mutuality in performance in contrast involves the parties subsequently carrying on their intentions in an interactive way. The absence of mutuality in performance in what Bratman describes, *supra* note 36 at 106, as “pre-packaged cooperation” is what causes Markovits to exclude such pre-packaged cooperation from the realm of contracts proper (“contracts as collaboration”). But, like Bridgeman, *supra* note 36 at 393–99, I see no reason to insist on the stricter requirement of mutual performance, and consider that pre-packaged cooperation indeed accounts for many forms of joint action commonly regarded as contracts proper.

\(^40\) Markovits, *supra* note 36 at 1455 [emphasis added].


\(^42\) As apparently do Markovits, *supra* note 36, and Bridgeman, *supra* note 36, whose respective accounts of common law contracts likewise build on Bratman’s teachings. I nonetheless refrain from using either of these accounts here for a number of reasons. Markovits’ account, *supra* note 36 at 1421, 1467, of “contract as collaboration” comes with a set of moral justifications that, in addition to being unnecessary for present purposes, may cause it to be inapplicable in to business contracts. If so, that account would clearly be unsuited to the present purpose of analysing the United Rentals, *supra* note 1, decision. This decision involved precisely such a contract, in addition to lacking explanatory power more generally, since many
contrary to LL. Fuller's notorious claim,\textsuperscript{44} consideration is not just evidence of contractual intention, it is to a large extent constitutive of that intention. Consideration goes beyond confirming the presence of two correlated individual intentions and serves to actually weld these intentions together. The mere presence of correlated intentions is sufficiently established through the offer and acceptance requirements. Where I accept your offer, my acceptance by definition "refers to", "responds to", and is "prompted by" that offer, and conversely, your offer by definition is meant to "prompt" my acceptance.\textsuperscript{45} But more is needed in order for these (correlated yet still separate) intentions to interlock into a single, common contractual intention. What we need, in particular, is a joint declaration of the parties to that effect, a joint declaration that they both mean their respective commitments to be mutual—what is sometimes referred to as an animus contrahendi.\textsuperscript{46} That declaration can be explicit or implicit, but as explained it must, in order to be joint, necessarily be public in the sense above.

Consideration arguably stands for precisely such joint, public statement of mutuality. "[B]y the express or implied terms of the supposed contract, the promise and the consideration must purport to be the motive each for the other".\textsuperscript{47} "[T]he promise and consideration must each appear as inducements of the other; it must be possible reasonably to view each side...as the effect [and] the cause of the other."\textsuperscript{48} This would explain why, where the consideration is in the form of a return promise, the two promises cannot possibly be analyzed in isolation from one another. As noted in Pollock's Principles of Contract,\textsuperscript{49} the return promise cannot logically be valid consideration unless it is binding. But the same is true of the first promise, with the circular result that neither can be binding unless the other one already is. As it turns out, this logical conundrum simply evaporates under the account of contract as bargain: the contracts indeed are business contracts. As Bridgeman's account of "contracts as plans", supra note 36, has arguably a higher degree of moral neutrality, it seems more suitable at first sight. Yet Bridgeman claims his account extends to such other systems of contract law as European civil law (ibid at 379), which the present account crucially aims to exclude. (That claim however is not entirely convincing. For one, the doctrine of consideration, which Bridgeman acknowledges is absent in civil law, plays a central role in his own account (ibid at 380-81).)

\textsuperscript{43} Supra note 30 at 154ff.

\textsuperscript{44} LL. Fuller, "Consideration and Form" (1941) 41:5 Colum L Rev 799.

\textsuperscript{45} See Markovits, supra note 36.


\textsuperscript{47} Justice Holmes in Wisconsin & Michigan Railway Co v Powers, 191 US 379 at 386 (1903) [emphasis added].

\textsuperscript{48} Benson, supra note 30 at 156 [emphasis added].

two promises are binding only insofar as they are considered together, as just one, joint statement of mutuality.\(^{50}\)

It is well-known that the bargain idea radiates through English contract law and serves to explain many of its finer segments.\(^{51}\) It obviously accounts for all direct extensions of the consideration doctrine, such as the rules pertaining to unilateral contract modifications and to third-party beneficiaries. Insofar as the parties' bargain fully determines their contractual relation, any valid modification of that relation—even such as may be desired by both parties—must account for and build on that bargain in some way. To allow the parties to reinvent their relation at whim would be to treat their initial interaction as unconstraining. The requirement that valid contract modifications be supported by new consideration, over and above that initially bargained for,\(^{52}\) serves to confirm the binding force of the initial bargain. Likewise with respect to privity of contract and third-party claimants, where such claimants by definition stand outside the bargain, their claims in principle cannot be contractual in nature.\(^{53}\) And wherever courts have allowed (ostensible) third-party claims, they have done so by finding some way to shoehorn the claimants within the bounds of the bargain. In particular this is done via (bargain-friendly) devices such as agency,\(^{54}\) unilateral contract,\(^{55}\) or plain old contractual interpretation.\(^{56}\)

d. Formation

The bargain idea also explains several rules of contract formation. Most strikingly is that providing revocation of an offer is ineffective until the offeree has been properly notified.\(^{57}\) When I make you an offer, I reach out to you and effectively place that offer in the public space between us—the only


\(^{51}\) See e.g. Waddams, supra note 10.

\(^{52}\) Stilk v Myrick (1809), 2 Camp 317, 170 ER 1168 (KB).

\(^{53}\) Twaddle v Atkinson (1861), 1 B & S 393, 121 ER 762 (QB).

\(^{54}\) Midland Silicones Ltd v Scrutons Ltd (1961), [1962] AC 446 (HL (Eng)).


\(^{56}\) In the Canadian cases of London Drugs Ltd v Kneile & Nagel International Ltd, [1992] 3 SCR 299, 97 DLR (4th) 261 [London Drugs]; and Fraser River Pile and Dredge Ltd v Can-Dive Services Ltd, [1999] 3 SCR 108, 176 DLR (4th) 257, the Supreme Court of Canada purported to create a new exception to the rule of privity of contract, but justified such exception on the basis of (implicit) contractual risk allocation.

\(^{57}\) Henthorn v Fraser, [1892] 2 Ch 27 (CA). Contra Dickinson, supra note 7, where the Court of Appeal was satisfied that the offer had been revoked insofar as the offeree had found out about the offeror's change of heart through his own means.
space where, as discussed, our contemplated bargain can possibly be struck. If I want to cancel that offer, I have no choice but to return to that same space. I can retrieve the offer only from where I initially placed it (as it is my offer, no one else could have had the power to move it around). By attempting to revoke my offer internally, in a space beyond your reach, therefore cannot be effective.

e. Remedies

With respect to remedies, it is well established that the expectation measure of damages—also known as “loss of the bargain” or “performance” measure—\(^{58}\) is meant to reflect precisely what is owed under the contract, no more, no less.\(^ {59}\) The obligation to mitigate and the bar on consequential damages likewise aim to insure that the promisee get exactly what was bargained for, insofar as both are default rules, hence meant to reflect what most people view as implicit in their bargains.\(^ {60}\) Where contract performance is not easily reducible to a monetary value, the court has the power to order specific performance,\(^ {61}\) but the ultimate objective remains the same. Like damages, specific performance aims to approximate as best as possible, the position the promisee would have occupied had the contract been performed.\(^ {62}\)

Most importantly for present purposes, the nature and measure of the remedy is unaffected by the particular reason(s) or motive(s) behind the breach as liability for breach is “strict.”\(^ {63}\) Whereas some breaches are

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\(^ {60}\) See e.g. Hadley, supra note 16 at 151, where Alderson, B stated “the damages which the [non-breaching] party ought to receive...should be such as...may reasonably be supposed to have been in the contemplation of both parties, at the time they made the contract...Now, if the special circumstances under which the contract was actually made were communicated by the plaintiffs to the defendants, and thus known to both parties, the damages resulting from the breach of such a contract...would be the amount of injury which would ordinarily follow from a breach of contract under these special circumstances so known and communicated...For, had the special circumstances been known, the parties might have specially provided for the breach of contract by special terms as to the damages in that case” [emphasis added].

\(^ {61}\) Falcke v Grey (1859), 4 Drew 651, 62 ER 250 (Ch).


undoubtedly more morally reprehensible than others, that moral dimension is considered irrelevant, presumably because it is extraneous to the parties’ contractual interaction stricto sensu. From the perspective of that interaction, all that matters is that substitute performance be provided wherever real performance is not. The law’s reluctance to sanction motive hence explains the emergence of such staples as the “efficient breach” doctrine. By favoring a damage remedy, the amount of which can never exceed the loss of bargain, the law in effect allows (if not condones\(^64\)) contract breaching where efficient.\(^65\) Most importantly for present purposes, moral considerations of motive are external to the bargain and are deemed irrelevant. Thus, in principle, remedies are fully determined by the bargain alone.

f. Unilateral mistake

The “objective theory” of contract, and representative landmark case Smith v Hughes,\(^66\) in my view stand for precisely that account of contract as bargain—contract as “shared intention”, created by the parties so as to act as the exclusive source of legal authority between them. While the excerpt of Smith v Hughes most frequently cited relates to the parties’ inner thoughts being contractually irrelevant (unlike their words and actions),\(^67\) the case’s broader message about the nature of contracts arguably looms larger.

At issue, as we know, was a sale of oats which the buyer thought were old and the seller knew to be new. The judgment shows the court’s primary concern was to determine which of the many elements in the parties’ interaction could reasonably be seen as falling within their bargain. As the sale was by sample, and it was found that no words had been exchanged about the oats being of a particular quality, the court concluded that the bargain was for the oats in the sample, whatever their particular quality. It followed that the buyer’s subjective belief that the oats were old, and the

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\(^{64}\) Markovits, supra note 36, at 1498–99 (suggesting US law).


\(^{66}\) Supra note 5.

\(^{67}\) Ibid at 607. Blackburn J states “[i]f, whatever a man’s real intention may be, he so conducts himself that a reasonable man would believe that he was assenting to the terms proposed by the other party, and that other party upon that belief enters into the contract with him, the man thus conducting himself would be equally bound as if he had intended to agree to the other party’s terms.” Although Smith v Hughes is the case most commonly cited in support of this proposition, the general idea predates it, see Scott v Littledale (1858), 8 El & Bl 815, 120 ER 304; Cornish v Abington (1859), 4 H & N 549 at 556, 157 ER 956.
seller's subjective awareness of that belief, were found to be irrelevant. But that indeed just followed naturally from the court’s more fundamental point about the parties' bargain determining any and all claims between them. The parties' internal beliefs and knowledge simply happened to be one of the many elements that can be ignored insofar as they are peripheral to the bargain. In particular, these beliefs being “internal” did not appear to be determinative. Had these beliefs been disclosed to third parties, or even to the parties themselves in a different context, they presumably would have been irrelevant all the same. Though such beliefs and knowledge might arguably fall within the bargain in certain circumstances (e.g. fiduciary situations), they clearly do not in cases of commercial sales by sample. On the present account an “objective” theory of contract is one wherein the parties' claims are fully and immediately determined by the bargain between them. This being consistent with the (internal) reading of Smith v Hughes just advanced.

g. Equity

But what of equity, one might ask, which often brings into play ostensibly external factors of motive, character, good faith and the like. Courts acting in equity admittedly operate “in conscience”, which entails considering any and all (external) moral factors bearing on the matter. When doing so, however, they arguably leave the realm of the internal paradigm and cross over into the external one, long favored by their Canon Law-inspired, continental counterparts (as we will see shortly).

This certainly is consistent with the view of equity put forward by some authors, according to which that distinct body of rules would govern the relation of the parties to the court, as public institution, rather than to one another, the latter falling under private law. It is also consistent with the above noted pattern of justification. English courts tend to offer greater justification where they counteract bargains (at equity) than when they enforce them (at law), insofar as such justifications are necessary under the external (non-inherently authoritative) paradigm and unnecessary under the internal (inherently

68 Likewise, a sale of land where the plans of the land are made available for inspection was deemed to be for the land as indicated on the plan in Tamplin v James (1880), 15 Ch D 215 (CA).
The historical struggle to keep equity separate from law arguably testifies to the importance, in the English legal psyche, of preventing the external paradigm from overtaking the internal. The line was drawn at equity stepping in merely to “soften the rigors” of the law—to “complement” rather than “contradict” it—a fine line indeed, yet executed with some success through such English landmarks as the doctrine of estoppel. In illegality cases, for example, estoppel has allowed the courts to distinguish between cases where the illegality is integral to the bargain and cases where it is merely peripheral. Whereas integral illegality necessarily causes the bargain to be void ab initio, illegality that taints the parties’ peripheral behavior or motive bars those parties from making claims on the bargain, but otherwise leaves the bargain intact.71 Third-party claims and unilateral contract modifications offer other good examples. Whereas consideration issues, as discussed, stand in the way of enforcing these types of claim, estoppel has in both cases proven effective to mitigate the resulting unfairness.72

But it bears emphasis that, in all these cases, the culpable behavior sanctioned in equity remains peripheral to the bargain. In contrast, whatever matter is covered by the bargain is governed by it, as Smith v Hughes stands to remind us. Whereas that case is often read as affirming that the seller’s failure to disabuse the buyer of his mistake was morally but not legally culpable,73 I would suggest it was neither. For, once the parties have agreed to be exclusively governed by the sample, it becomes perfectly coherent, as well as morally acceptable, for the seller to think to himself, “I know that he is mistaken but I also know that I am entitled to ignore that mistake and rely exclusively on the sample”—despite emphatic judicial pronouncements to the contrary.74 In other words, the presence of the bargain here has the effect of modifying the moral as well as the legal landscape. Even from the strict perspective of equity it can be concluded that the presence of the bargain

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71 See e.g. Archbolds (Freightage) Ltd v S Spanglett Ltd (1960), [1961] 1 QB 374 (CA).
72 On third-party claims, see Lord Denning’s dictum in Central London Property Trust Ltd v High Trees Ltd (1946), [1947] KB 130. On unilateral contract modification, see London Drugs, supra note 56.
73 Smith, supra note 5. Contra Lord Denning in Solle v Butcher (1949), [1950] 1 KB 671 (CA).
74 See US West, Inc v Time Warner Inc, 1996 WL 307445 at 10 (Del Ct Ch), where the Court affirms that “it is logically impossible for a contracting party, operating in good faith, both to have a subjective interpretation of ambiguous language different from that of her counterparty and to know of her counterparty’s differing interpretation” [emphasis in original].
relieves the seller of any moral obligation to disabuse the buyer, with the result that demanding that he do so would in fact be (morally as well as legally) inappropriate. It would be tantamount to equity not so much "contradicting" the law as being simply inequitable. In such cases, the internal realm of the bargain ultimately swamps all that would have been external space otherwise.

II. THE "EXTERNAL" PARADIGM OF FRENCH CONTRACT LAW

We now turn to the French counterparts of the English doctrines just surveyed, namely, contractual interpretation, juristic justifications for the authority of contracts, causa, rules of formation, les sanctions de l'inexécution, unilateral mistake, and the function of l'équité in contract adjudication.

a. Contractual interpretation

Whereas the one-step approach to contractual interpretation favored by English courts was shown above to cohere with the internal paradigm, the two-step approach deployed at French law arguably meshes with the external paradigm. The reader will remember that English courts can discharge the investigative ("What does the contract say?") and evaluative ("How ought the parties behave?") steps at once because they view the contractual interaction as inherently authoritative. As that interaction, crystallized in the bargain, is taken to contain all that is needed to resolve any and all claims of the parties acting in that capacity, there simply is no need to look past the bargain when assessing contractual claims. Thus the investigative and evaluative steps accordingly can be conceptualized as one and the same.

Conversely, it is because French jurists regard contracts as devoid of inherent authority that they must look past the contract when assessing a claim grounded upon it. The fact of a contract's existence indeed is at the outset treated as just that: a fact like any other, to which the court may decide to grant or deny legal authority at a later stage. As the contractual interaction carries no inherent authority, any justification for or against the parties' claims must necessarily transcend that interaction altogether—it must be "external" to it. As no normative standards inherent to the interaction are

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75 This is not to deny that disabusing the buyer might not be morally superior; doing so where it is not morally required in fact might prove particularly virtuous. It seems fair to say, however, that Equity aims not so much to actively promote virtue as to sanction moral violations.
available, in sum, the normative void can only be filled through resort to such external factors.

But also noteworthy here is the fact that, at French law unlike at English law, much of the work of contractual interpretation is already done by the time the rules of interpretation even come into play. Before invoking these rules, French courts typically proceed to classify the contract as belonging to one or the other of the various kinds of contracts listed in the Code (the various "contrats nommés"\textsuperscript{76}), each coming with its particular framework and attendant set of default rules. The authority of the contract thus clearly is seen as deriving in large part from the relevant designated system of rights and obligations established rather than any particular interaction between the parties.

b. Juristic justifications for the authority of contracts

Contracts clearly are authoritative at French law,\textsuperscript{77} but it is arguable that they are only authoritative insofar as some independent, external basis has been found to justify that authority. \textit{La doctrine}—a quasi-formal source of law in the French system—is replete with such justifications, which moreover are thoroughly moral in nature. Rare is the French treatise on the law of contractual obligations that does not open with a discussion tracing the binding force of contracts to the morality of promising, itself analyzed in terms of Kantian ideals of human agency and the autonomy of the will.\textsuperscript{78} George Ripert is perhaps the most prominent proponent of that view,\textsuperscript{79}

\textsuperscript{76} See e.g. "la vente", arts 1582-1701 C civ; "l'échange", arts 1702-1707 C civ; "le louage", arts 1708-1831 C civ; "le mandat", arts 1984-2010 C civ. This explains why contractual documents typically are much shorter at French than English law, William Tetley, "Mixed Jurisdictions: Common Law vs Civil Law (Codified and Uncodified) (Part II)" (1999) 4:4 Unif L Rev 877 at 881, 892-93.

\textsuperscript{77} art 1134 C civ provides that legally formed conventions stand as law for those who made them [translated by author].


having repeatedly maintained that human law in general is but enforced morality.\(^8\) With respect to contracts in particular, he remarked:

In order to arrive at this conception of the sovereign will, creative of rights and obligations by its force alone, it has been necessary that...philosophy spiritualize the law to extract the pure will from its material forms, that Christian religion impose upon men the faith in the word scrupulously kept, that Natural Law teach the superiority of the contract by rooting in it even society itself.\(^8\)

Ripert’s views have by no means been unanimously endorsed by his peers, many of whom are strong dissenters even today.\(^8\) But the sheer volume of the doctrinal writing engulfed in this debate arguably indicates that French scholars are agreed on at least one point; whatever authority governs contracts (if not other forms of legal interaction) calls for some kind of external (in this case, moral) justification.

To be clear, the difference between French and English law here does not pertain to whether or not the parties’ contract is ultimately what governs their interaction—that is the case in both systems. Rather, the difference lies with the nature of the justification given for why that is so: whereas English law seems content to say that the parties are governed by their contract because they mutually so intended, French law seems to go one step further in saying that parties are governed by their contract because each promised that that would be the case and promises are morally binding.

c. Promise and causa

The independent justification most commonly offered relates, as just indicated, to contracts involving promises—exercises in human agency—which morality mandates that they be honored.\(^8\) As Joseph Raz has noted this

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\(^8\) *Ibid* at vii. In the Preface of this classic work Ripert announces his intention to “defend the essential idea that, in the principles of obligations, the positive law cannot violate moral rules or even do without their support.” Ripert likewise takes issue with claims that “modern law might be normatively self-sufficient” and counters that that law in fact remains “dominated by the great morality that, over centuries of Christianity, has governed the soul of so many peoples” (*ibid* at 2) [translated by author].

\(^8\) *Ibid* at 37 [translated by author].


\(^8\) “Respect of contract is one of the first moral principles”, Ripert, *supra* note 79 at 39 [translated by author]. For similar accounts from common law scholars, see Charles Fried, *Contract as Promise: A Theory of*
justification does not differ in kind from, say, “the legal proscription of pornography.” What ties the contractual parties to one another on the French account accordingly is not so much the contract itself, as the fact that they are both answerable to the same moral rules on promising. The parties hence are not directly connected to one another through the contract so much as vicariously connected through their shared accountability to the same set of moral ideals. In Ripert’s own, revealing words, “[o]ne must never forget that the promisor and the promisee ... are individuals who belong to the same community, whom a sublime morality calls brothers, and who can hold, the first, rights, and the second, obligations, only insofar as that moral law permits [it]”.

To be sure, the moral truth in question does command that the promisor be accountable to the promisee, but arguably this is only because her particular promise provides as much. That is to say, where I promise to do something for you, I am obligated towards you for no other reason than the fact that I said so. In particular, no involvement of yours, in the form of return promise or even just acceptance of my promise, is required for that obligation to exist between us. This much is suggested by the text of the French Civil Code, which specifies that with respect to consensual obligations only “the consent of the obligated party” is required. French law does make correlated consents, secured through the offer and acceptance process, a requirement of contractual obligations. But that requirement arguably goes merely to earmarking the obligations as “contractual”, not to making them “obligations” as such. The essential difference between contractual and non-contractual promises is one of content, not kind. Contractual promises, unlike non-contractual ones, are promises that the promisor (unilaterally) intends as calling for an acceptance by the promisee.

Accordingly the promisee does not need to rely on some privileged normative status of his or hers vis-à-vis the promisor. The promisee could demand that the promise be performed based upon the fact that the condition appended to that promise, her acceptance, has materialized. Presumably, then, the promisor dispensing with that condition, or substituting any other for it, would not affect the promise’s obligatory nature.


85 Ripert, supra note 79 at 5 [translated by author].

86 art 1108 C civ.
And French law does motion in that direction insofar as it shows inclinations to enforcing certain “unilateral juridical acts,” not accepted by anyone.\textsuperscript{87} Though the enforceability of unilateral juridical acts remains a highly contested issue, I would suggest the mere fact that French legal scholars have long struggled with it reveals the significance they attach to the promissory dimension of juridical acts, whether correlated or not. It thus seems that promises are promises are promises under French law and whether contractual or not, will all ultimately call for enforcement under the moral law of promising.

Now turning to contractual promises as such, it seems that these promises involve correlated but not otherwise welded individual consents, as confirmed by the fact that consideration is not a requirement for their enforceability. \textit{Causa} of course is such a requirement but, as many comparatists have warned,\textsuperscript{88} the difference between these counterpart notions remains significant. It first is important to distinguish between the \textit{causa} of the contract, taken as a whole,\textsuperscript{89} and that attaching to individual contractual obligations.\textsuperscript{90} Whereas some French jurists have defended an objective conception of the latter (at least in the context of certain types of contracts),\textsuperscript{91} the \textit{causa} of the contract is decidedly subjective, as it evinces private motives and moral culpability.\textsuperscript{92} The French Civil Code, after all, explicitly stipulates that a valid contract must exhibit a “cause \textit{licite}” (rather than just a “cause”),\textsuperscript{93} thus overtly inviting judicial inquiries into the moral acceptability of contractual purposes, which invitation French courts have not hesitated to take up at every turn.\textsuperscript{94}

\textsuperscript{87} See Fabre-Magnan, \textit{Droit des obligations}, supra note 78 at 697ff; Flour & Aubert, \textit{supra} note 78 at 389ff.
\textsuperscript{89} art 1108 C civ.
\textsuperscript{90} art 1131 C civ.
\textsuperscript{91} See e.g. Pierre Louis-Lucas, \textit{Volonté et cause: étude sur le rôle respectif des éléments générateurs du lien obligatoire en droit privé} (Paris: Recueil Sirey, 1918); Henri Capitant, \textit{De la cause des obligations} (Paris: Dalloz, 1923) at 12.
\textsuperscript{93} arts 1108, 1133 C civ.
\textsuperscript{94} Currently most commentators seem agreed that the French \textit{causa} has become just a hodge-podge of highly disparate elements for the courts to seize upon whenever they disapprove of a particular contract. See e.g. Ruth Sefton-Green, “La cause or the Length of the French Judiciary’s Foot” in John Cartwright, Stefan Vogenauer & Simon Whittaker, eds, \textit{Reforming the French Law of Obligations: Comparative Reflections on the
With respect to the *causa* of individual obligations, a distinction again needs to be made between one-sided contracts ("contrats de bienfaisance"), wherein the *causa* of the promisor’s obligation is just her *animus donandi*, and bilateral contracts ("contrats à titre onéreux"), which involve two *causae* (one per promise) that indeed come closest to the consideration of English law. But even then, an important difference remains.

As discussed, the two promises cannot possibly be analyzed separately from one another at English law, they arguably can at French law. The explanation for this lies, I would argue, with the above English and French models of contractual interpretation. English law tends to merge the normative and factual stages of analysis, whereas French law in contrast tends to keep these stages separate. We saw that at English law, mutual promises must necessarily be conceptualized as a single package. This is the only way out of the vicious circle whereby each can be valid consideration for the other only if it is binding, which it cannot be unless the other already is, and so on. The logical conundrum arguably arises here because consideration combines a factual and a normative dimension. It is not just something the promisor *does* for the promisee, it also is something she *ought* to do. For it is the requirement that the consideration be binding, in addition to just factually present, that triggers the circularity. French law in contrast avoids that circularity by distinguishing the obligation as such (the normative component) from its object (the factual component), and defines *causa* by reference to the latter only. The promisor’s obligation does require a valid *causa*, but that *causa* is found in the object of the other’s obligation, not in that obligation as such. Accordingly each party’s obligation can be conceptualized as complete independently from the other. Once it is determined what action each party is meant to perform, the requisite *causa* is present, regardless of whether that action might not yet be obligatory. It thus seems that even the most objective inception of *causa* is still a far cry from English consideration.

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96 While most French treatises ostensibly define *causa* in much the same terms as common law consideration (as the other party’s "engagement", see e.g. Flour & Aubert, supra note 78 at para 258), the examples given almost uniformly point instead to the object of that "engagement", suggesting, for example, that in a contract for the sale of a house, the *causa* of the buyer’s and the seller’s obligations respectively are "obtaining the house" and "obtaining the money".
Absent the consideration requirement, many of the consideration-related dilemmas of English law disappear. Purely consensual contract modifications, unilateral or not, are not problematic at French law. If correlated individual consents suffice to create a contract, they likewise suffice to undo it. Article 1134 of the French Civil Code indeed provides that "[a]greements ... may be revoked only by [the parties'] mutual consent". The same reasoning applies with respect to extending contract protection to third-parties. Contract burdens of course ought to impact only the parties themselves. The same principle of individual autonomy that mandates that contracts be enforced on the parties also prohibits their enforcement on others, as it is the latter's autonomy that would otherwise be violated. The French Civil Code thus confirms that "[a]s a rule, one may, bind oneself and stipulate in his own name, only for oneself". But there is no reason to apply the same restriction to contract benefits. So long as the parties clearly "stipulate" that a third party is to benefit from their contract, no moral objection can stand in the way of that party enforcing that stipulation. Moreover, the French Civil Code specifies that the stipulation becomes irrevocable upon acceptance by the third party, which is fully consistent with French contractual reasoning in general. Quite simply, the third party’s acceptance effectively serves to bring her into the realm of correlated promises, thus causing her to qualify for moral recognition. Though the exact nature of the "stipulation pour autrui"—as contract derivative or stand-alone institution—has been much discussed, its possibility remains unchallenged.

97 art 1134 C civ.
98 See generally Jean-Louis Goutal, Essai sur le principe de l'effet relatif du contrat (Paris: Librairie Générale de Droit et de Jurisprudence, 1981). This is not to say that individuals can deny or even just ignore the existence of contracts to which they are not parties. Contracts are “opposable” to non-parties insofar as, once a contract is validly formed and acquires legal existence, it becomes, legally speaking, an objective entity "out there", one with which all must contend as they would with material entities. See generally R. Wintgen, Étude critique de la notion d'opposabilité: Les effets du contrat à l'égard des tiers en droit français et allemande (Paris: Librairie Générale de Droit et de Jurisprudence, 2004). Contract rights indeed are “patrimonial” rights that, like property rights, can be bought and sold. See generally CB Gray, “Patrimony” (1981) 22 C de D 81.
99 art 1119 C civ.
100 art 1121 C civ.
101 ibid.
d. Formation

The (external) conception of contract as merely correlated promisory intentions is corroborated by the French rules on contracts by correspondence. With respect to such contracts, French doctrine states that acceptance ought to be deemed effective “from the moment an external manifestation of the [acceptor’s] intention has taken place.” French law, like English law, ultimately came to endorse the theory of emission, but it is the justification given for this endorsement that is particularly enlightening. Emission is to be favored to reception or communication, it is argued, because “[t]o require that the intention of the acceptor be made known to the offeror is arbitrarily to add a new element to the intention and to the contract”. Furthermore “[t]o require knowledge of the acceptance is to add a condition for the formation of contracts which the law does not require” and “[t]he fact that the acceptance is made known to the offeror adds nothing to the legal consequences of the acceptance.”

In the same spirit, classic French scholar Robert Pothier claimed that where an offeror changes his mind and revokes the offer before it is accepted, subsequent acceptance attempts by the offeree cannot be effective, as these would fail to meet the offer. In such a case, the two wills indeed are neither “coinciding” nor “correlated”, for the second cannot possibly be an “acceptance” or a “response to” a first that is no longer present. The offeror...

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108 Ambroise Colin & Henri Capitant, Cours élémentaire de droit civil français, t 1, 4th ed (Paris: Dalloz, 1923) at 1316 [translated by author].
109 “[I]f I write a letter to a merchant living at a distance, and therein propose to him, to sell me a certain quantity of merchandise, for a certain price; and, before my letter has time to reach him, I write a second, informing him that I no longer wish to make the bargain; or if I die; or lose the use of my reason; although the merchant, on the receipt of my letter, being in ignorance of my change of will, or of my death or insanity, makes answer that he accepts the proposed bargain; yet there will be no contract of sale between us; for, as my will does not continue until his receipt of my letter, and his acceptance of the proposition contained in it, there is not that consent or concurrence of our wills, which is necessary to constitute the contract of sale.” Robert Joseph Pothier, Treatise on the Contract of Sale, translated by LS Cushing (Boston: Little & Brown, 1839) at 18 [emphasis added].
remains free of contractual liability, as he has broken no promises. He withdrew an offer of promise rather than a promise proper, an offer that could have, but had yet to, become a promise. Moreover, the fact that the offeree might not be aware of the offeror’s change of heart is, from a strict (French) contractual perspective, irrelevant. An offer is first and foremost a statement of private intention, a change of heart suffices to negate the offer (provided, of course, that the change can be proven to a court’s satisfaction). Whereas the circumstances surrounding the offer and its subsequent withdrawal may trigger some other form of liability, this cannot change the combined facts that a contract requires a promise, and an offer withdrawn before acceptance is no promise at all.

**e. Sanctions de l’inexécution**

Under French law where a promise proper is broken, the sanction is, somewhat stiffer than at English law. Though it is unclear whether, in practice, forced performance is ordered any more frequently in France than in England, the French’s formal consecration of *exécution en nature* as the primary sanction for breach of contract is widely seen as a loud statement in favor of promise keeping (*le respect de la parole donnée*). At French law, breaching a contract constitutes a “fault” and is remedied as such. Whereas comparative lawyers have tended to focus on the hierarchy of the French sanctions (i.e. the priority of *exécution en nature* over money damages), a more striking feature is that the choice of remedy falls, not to the court, as it does in England, but rather to the promisee. This places the promisee, or the party not at fault, in a position to block any profit-motivated breach, and to appropriate to himself the new profit opportunity. Between the promisor who

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110 The situation of course is different if the parties had concluded a separate contract with respect to the offeror keeping the offer open for a certain period. Withdrawing the offer before the end of the stated period would then amount to a breach of that separate contract.

111 Withdrawing an offer before the expiration of the stated term or, where no term is stated, before a “reasonable” time has elapsed, is typically treated as a “fault”, which engages the offeror’s delictual liability under art 1382 C civ. See e.g. Pothier, supra note 109, at 18-19.


113 The Quebec Civil Code, which was molded on the French, is particularly explicit in this regard, where breach of contract is treated as a particular instance of the more general duty to “abide by the rules of conduct incumbent on [persons], according to the circumstances, usage or law, so as not to cause injury to another”, art 1457 CCQ. See also art 1458 CCQ.

114 Here again, the Quebec Code is particularly explicit, see art 1590 CCQ.
needs to commit a fault in order to secure the additional profits, and the promisee who does not, it presumably is reasoned that it is best to favour the latter. By leaving the choice of remedy to the promisee French law effectively bars the possibility of “efficient” breaches and redirects post-contract profit opportunities to non-breaching parties.

But the promisee’s high hand goes further still. Where the promisor fails to comply with an order of exécution en nature, she is constrained to do so through a procedural mechanism called l’astreinte.\(^{115}\) As a substitute for imprisonment for debts (abolished with respect to non-penal matters in 1867),\(^{116}\) l’astreinte imposes on recalcitrant defendants periodic payments that continue to accumulate for as long as the refusal to comply persists. It is pronounced by the judge ex officio and is clearly intended to be punitive given that it is in principle payable over and above any compensatory damages owing to the plaintiff. The amount for such damages is set with reference to such factors as the defendant’s conduct, financial resources and apparent frame of mind. Of course, all legal systems punish defendants who fail to comply with court orders. But the French astreinte is particular in that the final amount of the fine is payable to the plaintiff rather than the state—which confirms that it might be regarded as a straight punitive transfer from the party at fault to the other contractual party. Though this particular aspect has attracted much criticism from the local legal community, l’astreinte appears to be alive and well, widely used and highly effective.\(^{117}\)

f. L’équité

None of this should come as any surprise. It is a well-known fact of legal history that French law has long been suffused with Canon law. Unlike English law, which managed to contain canonist influences by confining them to a distinct jurisdiction (equity), French law is a direct offspring of the medieval ius Commune, itself a thorough blend of Canon and Roman law.\(^{118}\) Thus, whereas legal and equitable considerations are conceptualized distinctly at English law, there is no sense in which the legal could not also be the equitable (at least aspirationally) at French law.

\(^{115}\) See generally Harris & Tallon, supra note 78; Romero, supra note 112.

\(^{116}\) Romero, supra note 112 at 807.

\(^{117}\) See generally Harris & Tallon, supra note 78; Romero, supra note 112.

This is perhaps most evident from the omnipresent obligation of good faith.\textsuperscript{119} It is also pointedly illustrated through our above example of cases of illegality. We saw that in such cases English law typically deploys estoppel when possible with a view to sanction the parties' morally objectionable behavior without undermining the contract itself. This is not possible at French law, where the parties' private motives feed directly into the contract through the \textit{causa} requirement. As a \textit{cause licite} is explicitly required for a valid contract under the French Civil Code, there simply cannot be a contract where the parties harbor illicit motives. This is in direct opposition to the situation at English law where the moral analysis ends up swamping the contractual.

g. Unilateral mistake

The French equivalent to \textit{Smith v Hughes} was a case which involved the purchase of a fake Louis XV armchair in the belief that it was real.\textsuperscript{120} Given our analysis of the variations between English and French contractual law, it should come as no surprise to find out that the court held that the seller cannot just ignore the buyer's mistake and proceed with the sale. She must, under French law, act to correct the mistake, as she owes the buyer an \textit{obligation de renseignement}.\textsuperscript{121} (In Markovits's words, she is held to a "cooperation" rather than a mere "collaboration" standard.\textsuperscript{122}) Unlike the English oat farmer, the French antique dealer simply lacks any basis upon which to assume that it is acceptable for him to say and do nothing. Whereas the English seller can rest assured that his knowledge of the buyer's mistake is peripheral and hence ultimately irrelevant to their bargain-governed interaction, the French seller can draw no such distinction. The antique dealer knows that her contractual position is only as strong as the mutual promises that constitute it. These promises in turn draw their force from morality and her judgment as to what to do is moral through and through.\textsuperscript{123}
As the only morally coherent course of action open to her is to assist in fixing the buyer's promise, the law will deprive her of the benefit of the contract should she fail to do so. In sum, the French seller, unlike the English one, lacks an internal reason based on the contract for ignoring the buyer's mistake. Accordingly the French seller cannot fall back into the external realm, where any and all moral factors count.

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In conclusion, our discussion so far confirms the standard comparative law descriptions of French and English contract law as respectively 'idealistic/moralistic' and 'pragmatist/empiricist'—unqualifiedly with respect to French law, and with some qualifications concerning English law. The French/external paradigm is idealistic/moralistic in that, in good Cartesian fashion, it portrays what is as clearly separate from a higher ought, to which it must aspire. The English/internal paradigm in contrast qualifies as "pragmatist/empiricist", at least where these terms are meant to denote a particular deference to facts, or a willingness to be driven by them. But that label would be plainly inadequate were it meant to convey instead an absence of normativity or a complete indifference to normative considerations. Although the English/internal paradigm is unambiguously normative, its normativity lies within its factual dimension. That model can accordingly be described as inherently rather than transcendentally normative, but not as altogether a-normative.

what degree of morality the law should impose on the parties. See e.g. De Caqueray, reporting that Aquinas in such cases favored adopting more lenient moral standards—"appropriate not for saints but for regular mortals", cited in Fabre-Magnan (ibid at 29) [translated by author]; Ripert, supra note 79, at 6-7 where it was stated that "morality teaches us that we ought to worry about the feelings on which legal subjects act, to protect those acting in good faith, to counter those acting out of male or deception, to chase down fraud or even just fraudulent thoughts. It must be inquired to what extent the law can receive such search of intentions, such purely subjective examination of acts." [translated by author].


III. THE CLASH OF EXTERNAL AND INTERNAL CONTRACT PARADIGMS IN UNITED RENTALS v RAM HOLDINGS

I propose to show that the two paradigms just presented are mutually incompatible and hence not conflatable within the same conceptual space. I first point to the Chancery Court of Delaware’s ruling in United Rentals as one example of a failed attempt to conflate the unconflatable and argue that, contrary to the Court’s suggestion, such conflation if anything violates the letter and spirit of the Restatement (Second) of Contracts. I thereafter suggest an alternative ruling, which would have been fairer as well as more consistent with the Restatement provisions.

a. United Rentals v RAM Holdings

Whereas Chancellor Chandler opens with a plea of allegiance to the internal paradigm (which he calls “objective”), he then switches over to the external paradigm when he proceeds to endorse the defendant’s (“subjective”) interpretation of the contract on the ground that the plaintiff was aware of it.

The plaintiffs in United Rentals were well aware that the defendants wanted to limit liability for breach to just monetary compensation, thus precluding the possibility of specific performance. The defendants had made that clear several times and had never conceded otherwise over the course of the negotiations preceding the closing of final agreement. But the plaintiffs surely were aware that the text of the agreement was not entirely clear on that point. While Section 9.10 explicitly provides for specific performance in case of breach by either party, it also states in its last sentence that the whole Section is to yield to Section 8.2(e) with respect to “the circumstances provided therein.” Section 8.2(e) specifies the circumstances in which the parties can terminate the agreement in exchange for payment of a termination fee of $100 million, but then adds that “in no event shall the [plaintiff]...”
Company seek equitable relief or seek to recover any money damages in excess of such amount from [the defendants]." Thus, to the extent that "equitable relief" is read as including specific performance, that last sentence appears to nullify the right of specific performance explicitly spelled out at Section 9.10. Under that reading, the agreement indeed is internally contradictory, and the right to specific performance accordingly is uncertain at best.

What were the plaintiffs to do in the circumstances? As in any case of "strategic ambiguity", they could either (1) ignore the defendant’s precontractual insistence on excluding the right to specific performance and hope that their own reading of the contract as including that right (i.e. the prepositional phrase of Section 8.2(e) being narrowly construed as qualifying only the terms "money damages") would prevail in an eventual court challenge; or (2) openly oppose the defendant’s position and insist that the contract be re-written so as to reflect their own position in favor of allowing specific performance more clearly, but then risk the defendants walking away and losing the deal altogether. Which of these two courses of action is preferable of course depends on the odds of a court allowing the first (endorsing the plaintiffs’ reading of the contract) compared to the odds of the second in fact being a deal breaker. Whereas the plaintiffs cannot easily assess the latter, they ought to know something about the former, as it is a legal question, in principle determinable (at least to some extent) via existing legal materials.

Under the above reading of Smith v Hughes—inescapable material for any court professing “adherence to the objective theory of contracts”—the determinative factor is not so much whether the defendant’s position on specific performance was disclosed or not, known or knowable, to whom and by what means, as whether that position is integral or peripheral to the bargain and whether the parties intended it to be relevant. If it is integral to the bargain—if its relevance was “bargained for”—it ought to inform the

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130 United Rentals, supra note 1 at 815–17 [emphasis added].
131 Alternatively, under the plaintiffs’ interpretation (at 39), Section 8.2(e) should be read as limiting monetary remedies, whether equitable or in damages, to a maximum amount but not ousting specific performance.
133 United Rentals, supra note 1 at 835. That US law shares the English, bargain conception of contract is confirmed at Restatement (Second) of Contracts §17(1) (1981).
134 Greenawalt, supra note 9 at 575.
interpretation of the written agreement; otherwise, it should be altogether ignored.

Answering that question naturally requires identifying the contours of the bargain, which may turn out to be trickier than expected. Whereas it once was considered a quasi-absolute rule of law that wherever contracts are written down the writing is to stand for the whole bargain,\textsuperscript{135} that is no longer the case.\textsuperscript{136} Whether the writing is to be regarded as the whole bargain—a "completely integrated agreement", under the Restatement\textsuperscript{137}—is now treated as a matter of construction to be determined prior to interpreting the substance of that writing.\textsuperscript{138} That is to say, what is and is not to be regarded as the parties' bargain under the law is that which the parties themselves appear to have designated as such. The court accordingly is faced with two distinct consecutive questions of construction: first, the preliminary qualification question ("is the written contract the whole bargain?") and, second, the central substantive question ("what does that contract say?"). Insofar as the designation of what counts as the parties' bargain is itself a matter of construction, it can be expected to yield different answers depending on the context and the kind of contract. In the context of a sale by sample, the sample as we saw can reasonably be taken to represent the whole bargain, but in the case of, say, standard form contracts, it may be more reasonable to view the bargain as including oral clarifications of, and additions to, the written terms.\textsuperscript{139}

Of course, in all cases involving a written contract, the question will arise as to why the parties did not bother to reduce their entire agreement to writing.\textsuperscript{140} But that question arguably is more easily answered in some contexts than others. Where the written contract is a standard form, by definition not punctually modifiable, the fact that the parties did not modify the written document can hardly be taken as evidence that they meant that

\textsuperscript{135} Goss v Lord Nugent (1833), 5 B & Ad 58, 110 ER 713 (KB).
\textsuperscript{137} Restatement (Second) of Contracts §210 (1981), "Completely and Partially Integrated Agreements
(1) A completely integrated agreement is an integrated agreement adopted by the parties as a complete and exclusive statement of the terms of the agreement.
(2) A partially integrated agreement is an integrated agreement other than a completely integrated agreement."
\textsuperscript{138} See Restatement (Second) of Contracts §§ 211(3), 214(c) (1981).
\textsuperscript{139} Hoyt's Proprietary Ltd v Spencer (1919), 27 CLR 133 (HCA); Hawrish v Bank of Montreal, [1969] SCR 515, 2 DLR (3d) 600.
document to represent their whole agreement.\textsuperscript{141} And where the contract is of the sort at issue in United Rentals—a fully dickered, highly specialized, lawyer-negotiated agreement between large business entities—it seems quite clear that the written contract was meant to specifically exclude any and all aspects of the parties’ interaction not explicitly included in it.\textsuperscript{142} The parties’ behavior leaves little doubt in this respect; they each hired a team of sophisticated lawyers to fight over the drafting of each and every word as they regarded the written document as the end all and be all of their contractual liability.

So it seems the plaintiffs are told one thing by the law, and its exact opposite by the Court in this case. The law affirms, from an internal standpoint, that the parties are exclusively governed by the written document insofar as that document can be taken to represent the whole bargain. But Chancellor Chandler instead adopts an external standpoint and tells the plaintiffs they need to account for considerations peripheral to that bargain. The parties are told that the bargain both \textit{is} and \textit{is not} the exclusive source of authority between them. Whereas the English oat seller and the French chair seller were each coherently told they could respectively ignore and not ignore their buyers’ unilaterally mistakes, the plaintiff in United Rentals was effectively told, incoherently, that they should do both and neither.

Chancellor Chandler might take issue with the account just given, insisting that his decision is incoherent only if it affirms these two things \textit{in one and the same breath}, whereas it did not. The consideration of the defendant’s subjective understanding comes into play \textit{only after} the agreement has been found “hopefully conflicted”.\textsuperscript{143} The parties hence are told they should rely exclusively on the bargain \textit{where that bargain is clear}, yet account for each other’s subjective understanding \textit{where the bargain is unclear}. So divided, the analysis indeed appears to be free of incoherence.\textsuperscript{144}

\textsuperscript{141} Evidence as to the parties’ subjective understanding of the contract terms accordingly is more readily admissible. See e.g. Pope \textit{v} Gap, Inc, 961 P (2d) 1283 (N Mex Cr App 1998); Bull Motor Co \textit{v} Murphy, 270 SW (3d) 350 (Ark Cr App 2007); \textit{In re Nation’s Capital Child and Family Development, Inc}, 457 BR 142 (Bankr D DC 2011).


\textsuperscript{143} United Rentals, supra note 1 at 836.

\textsuperscript{144} Even so, it is noteworthy that the proposed sequence is in the exact reverse of that dictated in various international commercial law instruments, most notably \textit{United Nations Convention on Contracts for the International Sale of Goods}, 11 April 1980, 1489 UNTS 58 art 8 (entered into force 1 January 1988); \textit{International Institute for the Unification of Private Law, UNIDROIT Principles of International Commercial Contracts} (Rome: UNIDROIT, 2010) art 4.2. Both of which direct courts first to interpret the acts or statements of a party according to that party’s subjective intent, provided that the other party was or
But I would suggest there is reason to doubt whether that division is conceptually sustainable, for it supposes that the bargain being unclear is a feature that can be observed separately from its substance. Yet said confusion was here, as in all cases of "strategic ambiguity", very much a part of the bargain. Each party consciously took on the risk that their interpretation of the written document might not survive a court challenge.\textsuperscript{145} As amply demonstrated in the law and economics literature,\textsuperscript{146} it was a part of the bargain \textit{ex ante} that the parties would delegate to the court the task of sorting out the confusion \textit{ex post}, as that seemed necessary in order to close the deal. And it was also a part of the bargain (as "fully integrated agreement") that the court would, in doing so, not consider the pre-contractual history. In that sense the analytic bifurcation proposed by Chancellor Chandler (the bargain's lack of clarity being conceptualized separately from its content) simply is unsustainable.

b. \textbf{Section 201(2) of the \textit{Restatement (Second) of Contracts}}

The \textit{Restatement (Second)} arguably says as much. As justification for the second step in its analysis, the Court cites section 201,\textsuperscript{147} which provides in part:

\textit{Where the parties have attached different meanings to a promise or agreement or a term thereof, it is interpreted in accordance with the meaning attached by one of them if at the time the agreement was made (a)...the other knew the meaning attached by the first party; or (b)...had reason to know...}

But the omitted portions of (a) and (b) are crucial here, as they mention one additional condition, which the Court fails to emphasize. In order for the meaning attached by the first party to be determinant, it must be the case, not just that the other knew or had reason to know of that meaning, but also that

\textsuperscript{145}This arguably is the case whenever courts reason that it falls to the parties to insist, \textit{ex ante}, on their subjective understanding of the contract being reflected the written document, see \textit{e.g.} \textit{Public Service Co of Colorado v Kempthorne}, 2006 WL 1459843 (D Idaho 2006); \textit{Vianix Delaware LLC v Nuance Communications, Inc}, 2010 WL 3221898 (Del Ct Ch 2010); \textit{Paige Capital Management, LLC v Lerner Master Fund, LLC}, 2011 WL 3505355 (Del Ct Ch 2011).

\textsuperscript{146}See \textit{e.g.} Bernheim & Whinston, \textit{supra} note 132; Scott, \textit{supra} note 132. Scott however takes the view that it ultimately is more efficient for the courts to refuse to fill in such blanks \textit{ex post}, so as to set incentives for the parties to do it themselves \textit{ex ante}, in a way that better reflects their individual preferences.

\textsuperscript{147}\textit{United Rentals, supra} note 1 at 836, n 122, citing \textit{Restatement (Second) of Contracts} §201(2) (1981).
“(a) [the first] party did not know of any different meaning attached by the other...; or (b)...had no reason to know of any different meaning attached by the other”. 148

And in the context of a large transaction where the written document is confused on precisely the point at issue, the first party has every reason to know that the other might attach a different meaning to the term. In the context of a standard form contract, some terms of which would have been orally clarified by the parties, it may very well be that one of them has no reason to suspect that its own interpretation of the form might not be shared by the other. But in the context of a fully negotiated agreement, where the contentious matter could not be clearly formulated one way or the other in the written document despite extensive pre-contractual discussion, surely both parties have reason to suspect there is disagreement. The document’s lack of clarity is the very reason the parties ought to know they disagree on how that document ought to be interpreted. 149 Perhaps that is why the Court here tiptoes around the written agreement when defending its finding that the “Defendants Did Not Know and Had No reason to Know of [the Plaintiffs’] Understanding”. 150

Thus, whereas Chancellor Chandler’s analysis admittedly might have been coherent had it been divisible into two distinct steps, respectively addressing the confusion and the content of the bargain, that division is not possible in cases like United Rentals, where “strategic confusion” is integral to the bargain. In such cases, to account for the parties’ subjective understandings of the written document communicated pre-contractually indeed is tantamount to telling them that their bargain at once is (as per the internal contract model) and is not (as per the external model) the exclusive source of authority between them.

So what else could the Court have done that would have avoided putting the plaintiffs in such an intractable position? In consistence with the internal contract model it could have just enforced the parties’ bargain, confusion and all. That is, it could have done precisely what the parties asked it to do ex ante, namely, to determine which of their ex post contradictory

148 Restatement (Second) of Contracts §201(2) (1981) [emphasis added].
149 There admittedly is a limit to this argument: the bargain must otherwise be sufficiently clear that it is possible to say there is one to begin with. If it is nothing but confusion, it amounts to just a blanket license to the courts to write a whole contract for the parties, which the courts will (rightly) refuse to do. As confirmed in Restatement (Second) of Contracts §33(1) (1981) “an offer...cannot be accepted so as to form a contract unless the terms of the contract are reasonably certain.” The Court never suggested that limit might have been crossed, however, as the written agreement contained many other important and clear clauses beyond that at issue.
150 United Rentals, supra note 1 at 837.
interpretations is a better fit to their written contract, looking to nothing else than that very contract. But the Court implies that that is not possible, as both interpretations are “reasonable”, and the written contract accordingly is “hopelessly conflicted”. I would respond that no text can be described as “hopelessly conflicted” lest all proposed reasonable interpretations of it are equally reasonable. That they all be reasonable in other words is not enough to throw in the towel, so long as one of the proposed interpretations can be identified as more reasonable than the others, there is room for hope.\(^{152}\) And the odds of this being the case are high indeed.

In the case at hand, the plaintiffs’ reading of the written contract arguably was the more reasonable one. Under the defendants’ interpretation, the whole of Section 9.10 is useless as it is effectively nullified by the last sentence of Section 8.2(e).\(^ {153}\) The plaintiffs’ interpretation in contrast accounts for Sections 9.10 and 8.2(e) fulfilling different functions, and hence both being useful to some extent. Whereas Section 9.10 provides for the right of specific performance in the event of breach, Section 8.2(e) governs termination, and any form of monetary liability attending termination or breach more generally. This requires reading “equitable relief” narrowly, as “monetary equitable relief” (i.e. restitution). I would suggest that such a reading is not much of a stretch, and is in fact explicitly condoned by the Restatement (Second), which states that “[w]ords...are interpreted in the light of all circumstances, and if the principal purpose of the parties is ascertainable it is given great weight.”\(^ {154}\) If interpreting one term narrowly was all that was required in order to make sense of the entire written agreement, that agreement could hardly be described as “hopelessly conflicted”. Though the words of the bargain admittedly might have been somewhat confused, that bargain clearly charged the court with the task of supplying the requisite clarification. In declining to do so, the Court denied the bargain the full and exclusive authority it deserves under the internal paradigm, and brought much confusion to the law more generally.

151 United Rentals, supra note 1 at 836.


153 United Rentals, supra note 1 at 831. “This reading is required, URI says, because otherwise this sentence would render section 9.10 ‘mere surplusage’ devoid of any meaning in violation of longstanding principles of contractual interpretation” [footnotes omitted].

CONCLUSION

American scholars typically frame the contract debate as an opposition between subjective and objective conceptions. These terms respectively refer to the parties' individual intentions, on one hand, and the external manifestations of those intentions, on the other. At least, that is the basis upon which the Restatement (Second) was described as "more subjective" than its predecessor, and the movement from literalism to contextualism, as anti-objectivist.

I attempted to show that such opposition is misconceived insofar as an objective conception, properly construed, can sometimes (in cases of standard form contracts, for example) include a consideration of individual intentions. A more fundamental opposition is that between what is integral and what is extraneous to the bargain. Parties bargaining for certain individual intentions to be treated as integral to the bargain is not incoherent in the slightest. It is just a consistent application of the "internal" contract paradigm that I have associated with English law, following a brief review of English contract doctrine. But where the context and/or kind of contract indicates, as in United Rentals, that the parties intended to exclude any and all aspects of their interaction not reflected in the written document, doing the opposite triggers into play a radically incompatible, "external" form of reasoning I have associated with French law. For, if these other factors are not included in the (inherently authoritative) bargain, their authority must necessarily be derived from a more general, transcendental source. In such cases, the clash between the English/internal/objective and French/external/subjective paradigms can only yield unfairness, as it indeed stands for the incoherent proposition that the bargain at once is and is not the exclusive source of authority between the parties.