

# THE JERSEY LAW COMMISSION

Commissioners:  
Clive Chaplin, Solicitor (Chairman)  
Advocate Barbara Corbett  
Advocate Mark Dunlop  
Timothy Hart, Solicitor  
Dr Elina Steinerte  
Professor Claire de Than  
Jonathan Walker, Solicitor

c/o Corbett Le Quesne  
1a West's Centre  
St Helier  
Jersey JE2 4ST

Secretary: Cairistiona Annan [www.jerseylawcommission.org](http://www.jerseylawcommission.org)

Deputy R D Johnson  
Chairman  
The Legislation Advisory Panel  
19-21 Broad Street  
St Helier  
JE2 3RR

12<sup>th</sup> November 2019

Dear David

There has been much discussion recently about the law of contract in Jersey and its inherent uncertainties.

We understand that a working group has been formed, with the support of the judiciary, to produce a written “restatement” of Jersey contract law. The objective of this exercise is to clarify key aspects of Jersey contract law.

The Jersey Law Commission wishes to state that it disagrees with this “restatement” approach.

We have previously made recommendations set out in our Report on the Law of Contract, published in 2004 concerning the reform of Jersey’s contract law. This Report followed a consultation paper published by the Jersey Law Commission in 2002. As we stated in both the consultation paper and the final Report, the existing law of contract in Jersey faces a number of difficulties including the inaccessibility of Norman texts on which the law is based; language (the texts are all in French); the difficulty of applying ancient concepts to 21<sup>st</sup> century issues; and uncertainty (arising from the inconsistency of approach by Jersey judges over the last 40 or so years).

We believe that any “restatement” will be flawed and that the best way forward is for the States of Jersey to pass legislation bringing into force a modern contract law.

The “restatement” approach is flawed for the following reasons:

- A “restatement” can only state what the existing law of contract is, and has the aim of assisting courts and others who are tasked with applying the law. It cannot make law. However, there are areas of Jersey contract law which are fundamentally uncertain due to conflicting approaches having been taken in Jersey judgments. A “restatement” cannot cure these inconsistencies; if a written document attempts any improvement or reform, then it is not a restatement.
- In addition, there are areas of Jersey contract law which have not been developed due to the absence of Jersey cases. A “restatement” exercise cannot make law and therefore any “restatement” cannot fill in these gaps. Areas of contract law will still need to be developed by the Jersey courts. The temptation of any “restatement” exercise may be to draw on modern French law to fill any gaps (as having a possible link to the old customary law principles). However, modern French law is not the law of Jersey and a “restatement” cannot state what it wishes the Jersey law of contract to be.
- Any restatement will not have official status. It may carry some weight but any person litigating before the Jersey courts would no doubt still wish to research the old materials for the best arguments that favour that person’s case. Indeed, the restatement may be challenged and other authorities cited as appropriate (e.g. modern English law, modern French law, Roman law etc). A “restatement” will therefore not lead to any better certainty as to what the Jersey law of contract is. Moreover, the continued relevance of the original French sources will not address fundamental concerns concerning the accessibility and understanding of Jersey contract law. These concerns raise important issues about legal certainty.
- The working group will no doubt comprise experienced practitioners and experts. However, by number, they will clearly represent a small fraction of Jersey lawyers and other interested parties. They will not have been elected to this role. The “restatement” will therefore only be the unofficial opinion of a small number of lawyers.
- There are those who argue that Jersey contract law should have a distinct French bias, reflecting the origins of our customary law. Part of the rationale, we understand, for this bias is a desire to ensure that Jersey’s contract law remains different to or distinctive from the English law of contract. In contrast, there are those who argue that English contract law should be the preferred model primarily for accessibility and certainty. Views as to the development of Jersey contract law can therefore be polarised. The working group may be biased towards one approach over another. Any such bias may devalue the “restatement”. The future of Jersey’s contract law should therefore be resolved by the legislature as the only appropriate body to make law.

- We presume that any “restatement” would be in English. There is therefore a risk that the subtleties and the full meaning of the original French texts may be lost in any such “restatement”. This is therefore another factor which may lead to continued reliance on old texts which cannot be easily accessed or widely understood.

We therefore advocate legislation to establish a statutory model for Jersey’s contract law. In designing a statutory model, we recommend that the statute should not be based on principles of French law. It is not good policy to base a statute on alien concepts which are introduced deliberately for cultural, romantic or sentimental reasons to be different. Laws should serve the people and, so far as is possible, meet their expectations and avoid unfamiliar concepts. Cherry-picking individual principles and concepts from very different jurisdictions has many potential negative consequences. Further, contract law does not exist in a vacuum; it overlaps and interrelates with various other legal fields, both in Jersey and internationally. Hence it is necessary to consider those overlaps when designing the model; there are good reasons why Law Commissions and other law reform bodies draw experts from multiple fields to consider even single-subject reform.

In our 2004 Report, we never suggested adopting English law “lock stock and barrel”, nor, in recommending an approach similar to that reflected by the Indian Contract Act of 1872 were we recommending that Indian law be adopted. Since our 2004 Report, Dubai has adopted, later in 2004, a Law of Contract for use in the Dubai International Finance Centre. This provides a clear modern law of contract based on an Anglo-Saxon model, and informed by expert academic and professional opinion. Other small jurisdictions with unique elements to their laws have adapted to the economic realities of the twenty-first century, and indeed Jersey did so in relation to Trusts law.

We would urge legislative reform based on an Anglo-Saxon model. Such a legislative reform would provide a modern framework for contract law, allowing Jersey businesses and individuals alike to go about their daily lives making and enforcing agreements in a way that they would expect.

Yours sincerely

**[C.A. CHAPLIN]**

**Clive Chaplin**  
**Chairman of the Jersey Law Commission**