MITIGATION OF DAMAGE: A FRENCH PERSPECTIVE

I. INTRODUCTION

'Nothing ventured, *everything* gained!' is an apt summary of the position recently adopted by the French *Cour de Cassation* towards the subject of mitigation of loss. In two seminal judgments of 19 June 2003,[1] the French supreme court[2] explicitly rejected the introduction of a general principle of mitigation in the French law of tort, thereby departing from the solutions reached in England and other neighbouring legal systems.

Mitigation as a limitation on recoverable compensation is understood by common lawyers to comprise three distinct but interrelated ideas.[3] The first is that an injured party cannot recover damages for losses flowing from the defendant's wrong which he could have avoided through reasonable action. The second is that the claimant can recover for the loss and expense incurred in mitigating his damage. The third is that where the claimant successfully mitigates his loss, the wrongdoer is only liable for the loss as reduced, even if the mitigating action was not required of the claimant under the first rule.

This article addresses the evolution of the mitigation of damage principle in France prior to 2003 and proceeds to consider the ratios and scope of the two judgments of the *Cour de Cassation*. It will be shown that French law focuses exclusively on the interests of the victim to the detriment of those of the party in breach of duty. The final part of this paper assesses whether it is desirable for the French legal system to adopt the mitigation of damage principle, if not in tort law, at least in contract law.

II. THE EVOLUTION OF THE MITIGATION OF DAMAGE PRINCIPLE IN FRANCE PRIOR TO 2003

French law shares the pre-occupation of its common law neighbour with achieving a fair level of compensation. As in England, it has well-defined rules for the ascertainment of the appropriate level of damages. Professor Barry Nicholas has summarized the French contract law position in the following terms:

> Since compensation is the aim, it is settled that whereas the moment at which the loss to be compensated is determined is the date of non-performance, the relevant moment for the calculation of damages is that of judgment, except where this will result in giving the creditor more than compensation. He may, for example, have obtained some countervailing benefit, or he may have taken steps to repair the loss at some earlier time when the cost was less, or have otherwise mitigated his damage.[4]

[1] Cass 2ème civ (19 June 2003) No 930 FS-PBRI, Xhauflaire c/Decrept and No 931 FS-PRBI, Dibaoui c/ Flamand, Bull Civ II No 203, D 2003 Jur 2396; Petites Affiches 2003, No 208, 16, noted by Reifegerste; RTD Civ 2003 No 4, 716, noted by Jourdain; Gaz Pal(8–9 Oct 2003) No 281, 9, noted by Rosenfeld and Bouchez; Répertoire Defrenois 2003, No 23, 1566, noted by Aubert; Droit et Patrimoine (2003) No 120, 82, noted by Chabas; D 2003, No 34, 2326, noted by Chazal; JCPG (2003) No 45 (1933) noted by Castets-Renard; Petites Affiches 2003, No 261, 17, noted by Dagorne-Labbe; Responsabilité Civile et Assurances (2004) No 1, 6 noted by Agard; RJDA(4 Apr) noted by Aubert, 355. [2] In civil, criminal, and commercial matters.

[3] McGregor *McGregor on Damages* (Sweet & Maxwell London 2003) 216–17; *Chitty on Contracts* (Sweet & Maxwell London 2004), I, 1478; Bridge 'Mitigation of Damages in Contract and the Meaning of Avoidable Loss' (1989) 105 LQR 398.

[4] Nicholas *French Law of Contract* (2nd edn Clarendon Press Oxford 1992) 231–2.

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The foregoing synthesis highlights an important parallel between the English and French approaches in that neither jurisdiction permits the victim of the breach to recover damages in respect of losses which he has voluntarily mitigated. This ensures that the victim is compensated commensurately with the loss suffered (*tout le préjudice mais rien que le préjudice*) and perceived over-compensation is avoided.[5]

The point at which the two jurisdictions diverge relates to the question of whether the victim of the breach should be under a positive 'duty' to mitigate his loss. Notwithstanding early conceptual support from eminent French legal theorists such as Domat,[6] and Pothier,[7] there is no general provision in the French Civil Code requiring a claimant to mitigate his loss. This silence has been attributed at least in part to the fact that the mitigation principle had not reached a sufficient degree of abstraction at the time of codification to justify its inclusion in the Civil Code.[8] Since codification, the mitigation principle has made only occasional appearances in discrete areas of French law such as leasing,[9] insurance,[10] and the international sale of goods.[11]

At a practical level, it was perhaps inevitable that despite the silence of the Civil Code, French courts would be faced with disputes in which a claimant's failure to mitigate was invoked by the defendant as a defence to a claim for damages. It is therefore somewhat surprising that the mitigation principle was not the subject of definitive judicial pronouncement before 2003. A review of the authorities provides an explanation for this peculiarity. It reveals that notions of mitigation did indeed surface intermittently prior to 2003, albeit that French lawyers have never thought in terms of the common law's 'duty' to mitigate.[12] Instead, the concept has been addressed obliquely under a variety of judicial guises, each of which diverted attention away from the potential relevance of mitigation. For instance, as noted by Nicholas, the matter has been considered 'if at all, as an aspect of the need for a causal link'.[13] A case illustrative of this point arose where the victim of a car accident had to close his business for several months by reason of his injuries. Liability having been established, the Montpellier Court of Appeal refused to make an award in respect of the entire economic loss flowing from the closure of the business as it was not a necessary consequence of the accident. As soon as the claimant had recovered his intellectual and

[5] See Cass civ (20 Dec 1966) D 1967, 169; Recently, Cass 2ème civ (23 Jan 2003) Bull Civ II, No 20; Cass 1ère civ (25 Mar 2003) Bull inf.

[6] Domat *Les Lois Civiles dans leur Ordre Naturel* Paris Rollin et fils (1745), T I, Livre III, Titre V, Section III, Para 162.

[7] Pothier *Traité des Obligations* T III, para 162. See also the support of Demogue at the beginning of the 20th century in *Traité des Obligations en Général* T IV.

[8] Michaud 'Mitigation of Damage in the Context of Remedies for Breach of Contrat' (1984) RGD 293, 338; Hanotiau 'Régime Juridique et Portée de l'Obligation de Modérer le Dommage dans les Ordres Juridiques Nationaux et le Droit du Commerce International' Revue de Droit des Affaires Internationales (1987), 393, 398; Laude, Colloque 'Faut-il Moraliser le Droit Français de la Réparation du Dommage?', Centre de Droit des Affaires et de Gestion, Faculté de Droit de Paris V (21 Mar 2002) Petites Affiches No 232, 55.

[9] Art 1760 of the Civil Code.

[10] Art L172-23 of the Insurance Code.

[11] Art 75 and 77 of the United Nations Convention on Contracts for the International Sale of Goods (1980), into force in France since 1988.

[12] Nicholas (n 4) 231–2.

[13] ibid.

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management capacity he should have re-opened the business by hiring a replacement employee for the duration of his absence. [14]

An exhaustive trawl through the relevant authorities reveals that finding a break in the causal chain is not the only way in which French courts have penalised claimants for their passivity towards accruing losses. In several personal injury cases the injured party's refusal of medical treatment or a minor operation capable of improving his condition at minimal risk has been held to be a fault (*faute de la victime*) with the quantum of any award in his favour reduced accordingly.[15] In a further notable case, the Versailles Court of Appeal invoked the doctrine of remoteness to achieve the same objective, holding that a trader who had been supplied with defective products in breach of contract should have limited the detriment flowing from the breach by finding an alternative intermediate solution. Any damage resulting from his failure in this regard was held to be unforeseeable by the parties at the time the contract was executed and irrecoverable.[16] The civil law notion of good faith has also been called upon to perform a similar function to mitigation in a debt claim before the Paris Court of Appeal. In that case, the claimant declined to exercise a contractual option to serve a break notice which would have terminated his contract with the debtor, even though the debtor was already in significant arrears under the agreement. The claim in respect of debts accruing thereafter was dismissed. To allow the contract to continue in such circumstances was held to be an act of bad faith which effectively aggravated the claimant's own loss.[17]

Although the foregoing authorities were sometimes cited in support of the contention that the mitigation principle existed in French law,[18] they were mostly decided by lower appellate courts, were few in number and the respective decisions had different legal bases.[19] None of the cases laid down or even contemplated a refined mitigation principle comparable to that which has been developed in English law. There was no attempt to set a standard of conduct for the victim of the breach and the common law emphasis on the reasonableness of his actions was not considered. Instead, the concern was that the claimant 'should not be allowed to *increase* the damages for losses which were avoidable'.[20] At all events, any potential for the evolution of case law rationalized as supportive of an unarticulated duty to mitigate in French law was ended by the two decisions of the *Cour de Cassation* on 19 June 2003.

[14] Court of Appeal of Montpellier (9 Dec 1965) D 1967, 477, noted by Azard.

[15] Cass crim (3 July 1969) JCP 1970 II 16447, noted by R Savatier; RTD Civ 1969 782, obs Durry; Cass Crim (30 Oct 1974) D 1975 178, noted by Savatier; JCP 1975 II 18038, obs Mougeon; RTD Civ 1975. 713, obs Durry. But see Cass 2ème civ (19 Mar 1997) Bull Civ II, No 86; RTD Civ 1997 675, obs Jourdain, in which the *Cour de Cassation* affirmed that, pursuant to Art 16-3 of the Civil Code 'except as provided by law, no one can be forced to undergo a surgical operation'.

[16] Court of Appeal of Versailles (26 Nov 1986) Gaz Pal 1987, 2, somm 402.

[17] Court of Appeal of Paris (22 June 2001) D 2002, 843, noted by Coulon.

[18] See, eg Michaud (n 8) 311, who argued that the concept of mitigation was part of the doctrines of *dommage direct* and *préjudice réparable* in civil law.

[19] Note that French commentators have argued that the duty to mitigate has also been applied on the basis of the theory of the acceptance of risks (*théorie de l'acceptation des risques*) in Court of Appeal of Douai (15 Mar 2001) JCP ed Ent 2001, 1861, noted by Pédamon; D 2002, 307, noted by André; RTD Civ 2002, 296 noted by Mestre and Fages. It is submitted that this is not the case as the factors taken into account by the court to limit the award of damages pre-dated the loss.

[20] Harris and Tallon *Contract Law Today* (Clarendon Press Oxford 1989) 293.

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III. THE REJECTION OF LOSS MITIGATION IN FRENCH LAW

Whilst the *Cour de Cassation* was unambiguous that the victim of a wrong need not mitigate his loss in French tort law, the scope of the two decisions should be addressed in order to assess their impact on French contract law.

A. The two decisions of the Cour de Cassation *of 19 June 2003*

In the first of the two cases, the claimant sought damages as compensation for a mental disorder which she developed following an accident for which the defendant was held liable. The Bourges Court of Appeal decided that she should only be partially compensated on the basis that her omission to follow the advice of two different doctors who had recommended that she undergo psychological treatment which could have improved her condition, amounted to a fault.[21] The Second Chamber of the *Cour de Cassation* quashed this decision and held that the tortfeasor had to compensate the victim of a tort for all the losses flowing from the accident and the victim did not have to mitigate her loss in the interests of the tortfeasor.[22] The claimant had therefore no obligation to follow the medical treatment recommended by her doctors and her refusal to do so did not constitute a fault.[23]

In the second case, the manager of a bakery suffered incapacitating injuries in a car accident for which the defendant was held liable. Due to her injuries, she was unable to continue the running of the bakery business which remained closed for an extended period during which it lost considerable goodwill and the machinery installed in the bakery became obsolete. The Amiens Court of Appeal rejected the claim for compensation for the devaluation of the business and the loss of a chance to continue running the same on the basis that a temporary manager ought to have been installed during the claimant's absence. It was said that the detriment to the value of the business was not a consequence of the accident but a direct result of the decision not to find alternative means of running the bakery.[24] The Second Chamber of the *Cour de Cassation* quashed the decision of the Court of Appeal and held that the tortfeasor had to compensate the victim of a tort for all the losses flowing from the accident and the victim did not have to mitigate her loss in the interests of the tortfeasor.[25] The entire devaluation of the bakery was therefore attributable to the claimant's incapacity and the causal chain between the accident and the loss had not been broken.[26]

The legal basis of the foregoing decisions is stated by the *Cour de Cassation* to be Article 1382 of the Civil Code according to which 'every act whatsoever of man which causes damage to another obliges him by whose fault the damage occurred to repair it'. This article is the cornerstone of French tort law, setting out the three conditions of tort liability for fault as being damage, fault and a causal link between the fault and the

[21] Court of Appeal of Bourges 29 Mar 2000 1ère Ch.

[22] 'Attendu que l'auteur d'un accident est tenu d'en réparer toutes les conséquences dommageables; que la victime n'est pas tenue de limiter son préjudice dans l'intérêt du responsable.'

[23] Cass 2ème civ (19 June 2003) No 931 FS-PRBI, Dibaoui c/ Flamand, Bull Civ II No 203, D 2003 Jur 2396.

[24] Court of Appeal of Amiens 4 Nov 1999 (1ère Ch Civ).

[25] (n 22).

[26] Cass 2ème civ (19 June 2003) No 930 FS-PBRI, Xhauflaire c/Decrept, D 2003 Jur 2396.

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damage. The presence of these three elements will ordinarily lead to an award of damages. Whilst the quantum of damages is a matter for judicial discretion, the courts are guided by the principle of 'full compensation' (*principe de réparation intégrale du préjudice*), also referred to as 'principle of equivalence between compensation and damage'. This principle is often presented in France as being a fundamental requirement of justice. At a practical level, the overriding concern is to avoid under-compensating tort victims who can expect to be returned as closely to the position they would have been in had the wrong not been committed as can be achieved monetarily.[27] The reasoning underlying the *Cour de Cassation*'s rejection of mitigation appears to be that it contravenes the principle of 'full compensation'. A duty to mitigate is a restriction on compensatory damages and is capable of reducing the damages awarded to a tort victim beneath the level of 'full compensation'. By holding that the tortfeasor had to compensate the victim for *all the losses* flowing from the accident, the *Cour de Cassation* made it clear that compensatory damages must be measured solely by reference to the objective loss of the victim and should be the strict pecuniary equivalent to the entire loss suffered.

Regrettably, the *Cour de Cassation* did not give a more extensive explanation for either of the decisions. This is attributable to the manner in which judgments are rendered in France.[28] They are typically very short, being confined to a brief outline of the facts of the case, the decision of the lower appellate court and an equally brief *ratio decidendi*. Despite the brevity of the two decisions, a strong clue to the likely deliberations of the *Cour de Cassation* is discernable from the French literature addressing the issue of mitigation of loss. It is largely accepted that the initial fault of the tortfeasor entitles the victim to stay passive and to be compensated for any aggravation of his loss subsequent to the tortious act.[29] The freedom of action of tort victims should not be unduly restricted and it is considered to be unacceptable that the victim of a wrong should be further inconvenienced when the situation in which he finds himself is not of his own making.[30] It would be burdensome and unjust to require him to advance money in mitigation of his loss when he cannot be certain whether he will be compensated.[31] For the wrongdoer to expect otherwise would be tantamount to a role reversal in which the equities shift in his favour. His victim would effectively be obliged to take action for his benefit.[32] It is considered that justice and fundamental values should not be subordinated to the economic interests of the defendant.[33]

[27] Cass 2ème civ (4 Feb 1982) JCP 1982 II 19894, noted by Barbiéri.

[28] On the style of judgments in France, see Bell *French Legal Cultures* (Butterworths London 2001) 70.

[29] Muir-Watt 'La Modération des Dommages en Droit Anglo-américain'; Colloque 'Faut-il Moraliser le Droit Français de la Réparation du Dommage?' Centre de Droit des Affaires et de Gestion, Faculté de Droit de Paris V (21 Mar 2002) Petites Affiches No 232, 45.

[30] On this point see Rosenfeld and Bouchez (n 1); Aubert (n 1); Jourdain, 'Rapport Introductif', Colloque 'Faut-il Moraliser le Droit Français de la Réparation du Dommage?' Centre de Droit des Affaires et de Gestion, Faculté de Droit de Paris V (21 Mar 2002) Petites Affiches No 232, 1.

[31] On this point see Rosenfeld and Bouchez (n 1); Aubert (n 1).

[32] Chazal (n 1); Dagorne-Labbe (n 1); Gautier 'Contre Betham: L'Inutile et le Droit', RTD Civ (1995) 824.

[33] Gautier (n 32) ; Viney 'Rapport de Synthèse' in 'Faut-il Moraliser le Droit Français de la Réparation du Dommage?' Centre de Droit des Affaires et de Gestion, Faculté de Droit de Paris V (21 Mar 2002) Petites Affiches No 232.

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The reasoning set out above is undoubtedly consistent with broader trends in French tort law. By degrees, the 20th century saw the French law of tort evolve in favour of the victim and towards what some commentators have described as a '*culte victimaire*'.[34] This is at least in part attributable to the development of a comprehensive insurance system. The interests of the defendant have been relegated to such an extent that the relationship of victim and tortfeasor has become more imbalanced than ever. One of the most significant manifestations of this evolution is the judicial creation of several strict liability regimes (*responsabilité de plein droit* or *responsabilité objective*)[35] such as the 'liability for other people' regime (*responsabilité du fait d'autrui*)[36] and the 'liability for things' regime (*responsabilité du fait des choses*).[37]

B. The scope of the decisions of 19 June 2003

Having been expressly decided by reference to Article 1382, the decisions of 19 June 2003 will be central to the French law of obligations. They should be categorized as *décisions de principe* which inferior courts will be likely to follow.[38] The *Cour de Cassation* was deliberate in its use of exactly the same terminology in both decisions, thereby demonstrating a clear intention that the principle enunciated is of general application to all types of loss whether physical, as in the first case, or economic, as in the second case. A further pertinent consideration in gauging the importance of these decisions is that the *Cour de Cassation* could have resolved both disputes without reference to mitigation of loss. In the first case, it was open to the court to reach the same result on the basis of the absence of fault of the claimant. The court could have resolved the second case by identifying an unbroken causal link between the accident and the loss of the claimant. Despite these viable alternatives, the *Cour de Cassation* chose to explicitly enunciate the principle that the claimant need not mitigate his loss.[39] A final telling factor is that the decisions were widely published, thereby ensuring that the judgments were disseminated to the largest possible audience.[40]

Although the two decisions are unambiguous that the victim of a wrong has no duty to mitigate his damage in the French law of tort, the use of Article 1382 as the legal basis of the judgments begs the question of whether the principle is capable of exten-

[34] Rosenfeld and Bouchez (n 1); Chabas (n 1) 82–3. See *Gazette du Palais* (24 Aug 2000) in which Professor Chabas remarked, 'un mouvement continu projette la nébuleuse du droit de la responsabilité vers un point oméga: la faveur de la victime'.

[35] By reference to Art 1384, al 1 of the Civil Code.

[36] *Blieck* case, Cass Ass Plen (29 Mar 1991) D 1991, 324, noted by Larroumet, Gaz Pal (1992) 513, noted by Chabas, JCP 1991 II 21673, concl Donrenwille, noted by Ghestin, RTD civ (1991) 312, obs Hauser, obs Jourdain; *Foyer Notre Dame des Flots* case, Cass Crim (26 Mar 1997) Gaz Pal (1997) 2 Ch Crim, 151; for parents, *Bertrand* case (19 Feb 1997) D 1997, 265, noted by Jourdain, D (1997) Somm 190, obs, Mazeaud Gaz Pal (1997) 572, noted by Chabas JCP (1997) II 22848, concl Kessous and noted by Viney.

[37] Cass Civ 11 June 1896, S 1897, noted by D Esmein 1987, 1, 433, noted by Saleilles and concl Sarrut; *Jand'heur* Case, Cass Ch Réunies, 13 Feb 1930, rapport Le Marc'hadour, concl Matter and noted by Ripert, S 1930, 1, 121 and noted by Esmein, Gaz Pal (1930) 1, 393 and concl Matter.

[38] On the authority of case law in France, see Bell (n 28) 66–72.

[39] Aubert (n 1).

[40] The decisions were published in the *Bulletin mensuel*, the *Bulletin d'information* and the *Rapport annuel de la Cour de Cassation*. On the indicators used to determine the importance given to a decision of the *Cour de Cassation*, see Bell (n 28) 67–8.

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sion to French contract law. The law of remedies in the French law of tort and contract share many similarities[41] and the principle of 'full compensation' dominates French contract law remedies as much as their tort law equivalents.[42] As this principle is central to the foregoing decisions, it is likely that when the occasion arises, the *Cour de Cassation* will reach an identical solution in the law of contract. This would be compatible with the freedom of action which French contract law already affords to the victim of a breach of contract. He is not obliged to take any particular course of action and may choose his preferred remedy without considering how it impacts on the party in breach.[43] The innocent party can claim either the specific performance of the contractual obligation where such performance is possible (*exécution en nature*)[44] or the cost of substitute performance by a third party (*faculté de remplacement*).[45] A further alternative is an award of compensatory damages (*exécution par equivalent*) together with the discharge of the contract by the court where it is satisfied of the seriousness of non-performance.[46] Substitute performance by a third party is therefore only an option and a claim for specific performance will not be dismissed on the basis that substitute performance is possible or damages are an adequate remedy.

Some scholars have commented that the introduction of the principle of mitigation in French contract law is undesirable as it would be inconsistent to entitle the claimant to specific performance of the contract *and* to insist that he takes reasonable steps to minimise the loss arising from the breach.[47] At a practical level, it would restrict the right to specific performance where a substitute transaction on a market is reasonably feasible.[48] This would undermine the primacy of specific performance as a remedy and it would be incompatible with the traditional French conception of a contractual engagement and the principle of the *force obligatoire du contrat*.[49] It would completely destroy the balance of remedies available for non-performance of contractual obligations in French law.

Whilst these difficulties must be acknowledged, it is submitted that they are not unbridgeable. This is illustrated by the United Nations Convention on Contracts for the

[41] Tort principles were modeled at least in part on the codified principles of contract; See Aubert (n 1); See also Chazal (n 1).

[42] Art 1149 of the Civil Code provides that damages are due to the creditor for the loss suffered and the profit he has been deprived of.

[43] See, eg Court of Appeal of Paris (22 June 1987) D (1987) IR 178 in which the court held that where the buyer of goods had not accepted the order as agreed, the seller could ask for damages rather than specific performance of the said order.

[44] Pursuant to Art 1184, al 2 of the Civil Code for bilateral contracts. See Art 1142 of the Civil Code which is subject to the limitations of Arts 1143 and 1144 of the Civil Code for the '*obligation de faire*' and '*obligation de ne pas faire*'.

[45] See Art 1144 of the Civil Code. See also Art 1143 which deals with orders of judicial destruction of things made in contravention of obligations not to do.

[46] Pursuant to Art 1184, al 2 of the Civil Code for bilateral contracts. Note that the court has a discretion to terminate the contract and may declare it subsisting and award damages only or grant the party in breach more time to perform (Art 1384, al 3). There is no need to go before a court to claim termination for non-performance if there is an express contract term which gives the innocent party the right to terminate the contract (*clause résolutoire*).

[47] Muir-Watt (n 29); Parry, *The Sanctity of Contracts in English Law* (Stevens & Sons London 1959) 5–8. Michaud (n 8) 337.

[48] Laithier 'The French Law of Remedies for Breach of Contract' in Cohen and McKendrick (eds) *Comparative Remedies for Breach of Contract* (Hart Publishing Oxford 2005) 114–16.

[49] Muir-Watt (n 29).

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International Sale of Goods, which has adopted both the principle of mitigation of damage and the civil law notion that the innocent party to a breach of contract is entitled to ask for specific performance, irrespective of whether the seller[50] or the buyer[51] is in breach. The duty to mitigate only affects the measure of damages[52] and the innocent party remains entitled to choose his preferred course of action and remedy.[53] Accordingly, the Convention does not exclude specific performance merely because the innocent party could reasonably have entered into a substitute contract.[54] Such a system could inspire French law and the desirability of convergence in this regard must therefore be addressed.

IV. THE DESIRABILITY OF THE INTRODUCTION OF THE PRINCIPLE OF MITIGATION IN FRENCH LAW

One difficulty with the decisions of the *Cour de Cassation* of 19 June 2003 is that they set French law apart from the approaches of other European countries, conventions regulating international trade and international principles of contract law. Neighbouring jurisdictions such as England, Germany,[55] Italy,[56] and Belgium[57] have embraced the duty to mitigate. Additionally, as the trend across Europe is to develop common principles of European contract law with a view to strengthening cross-border trade and the single European market, the mitigation of damage principle has been included in the Principles of European Contract Law prepared by the Commission on European Contract Law.[58] It is also recognized in international commercial law and is

[50] Art 46(1) of the United Nations Convention on Contracts for the International Sale of Goods (1980).

[51] Art 62 of the United Nations Convention on Contracts for the International Sale of Goods (1980).

[52] The irrelevance of the principle of mitigation to the choice of remedies is evident in that the only sanction for the failure to mitigate is a reduction of damages and a proposal during the preparatory works to conclude the second sentence of Art 77 of the Convention (which addresses mitigation) with 'for a corresponding modification or an adjustment of any other remedy' was defeated.

[53] On this point see Colloque Witz 'Faut-il Moraliser le Droit Français de la Réparation du Dommage?' Centre de Droit des Affaires et de Gestion, Faculté de Droit de Paris V (21 Mar 2002) Petites Affiches No 232, 50; Heuzé *La Vente Internationale de Marchandises, Traité des Contrats*, sous la direction de Jacques Ghestin LGDJ (2000) 405. Note the remarks of Honnold in *Uniform Law for International Sales* (Kluwer Deventer 1999) 460–2 that there is scope for conflict between the obligation of the victim of a breach of contract to mitigate his loss and his right to require specific performance. He argues however that such instances will be rare and that 'the appropriate response is to adopt the solution that does the least violence to either principle'. In the same vein, Witz observes that in certain cases such as anticipatory breach of contract, whilst the innocent party has a theoretical choice as to whether to avoid the contract, he will, in practice, have to avoid it and find a replacement if he does not want to stand accused of having acted unreasonably by a court. In *White and Carter (Councils) Ltd v McGregor* [1962] AC 413 Lord Reid specifically closed the door to such an argument insofar as English law is concerned, stating that the court would not support any attempt to subject the enforcement of contractual rights to a test of reasonableness.

[54] Criticized by Treitel *Remedies for Breach of Contract: a Comparative Account* (Clarendon Press Oxford 1988) 73–4.

[55] BGB 254(2).

[56] Art 1227 (2) of the Italian Civil Code.

[57] Where it is treated as a sub-species of contributory negligence, Cass 14 May 1992 or on the ground of 'abuse of right'.

[58] The Principles of European Contract Law (1999) Art 9:505(1) and 9:505(2). Note however

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part of the UNIDROIT Principles of International Commercial Contracts.[59] Although the UNIDROIT principles and those of European Contract Law have no compulsory authority, they are suggestive of the likely content of a European Code, if such a text was to come into existence. The duty to mitigate is also a principle of the *lex mercatoria* and is regarded as one of the most established general principles in arbitration.[60] Against such wide-ranging international support for the principle of mitigation of loss, the sustainability of this '*exception juridique française*'[61] remains a question for lively debate.

It is submitted that there is no insurmountable obstacle to the introduction of a mitigation principle in French contract law. Even the sanctity of the principle of full compensation can be overcome. Indeed, French law has already created expedient exceptions to full compensation which is now far from absolute. It is, for instance, limited by general principles of law such as remoteness and contributory negligence[62] and it has become commercial practice for many agreements to include a clause limiting compensation or fixing its amount in advance.[63] Additionally, the principle of mitigation has moral, social and economic justifications which have greater force than the rationale for the claimant's 'full compensation'. First, the introduction of a duty to mitigate in French law would immediately encourage potential claimants to resist adversity and join with the defendant to ensure that they are fairly indemnified for their loss. A legal system which compensates all losses irrespective of mitigation gives no incentive to claimants to show initiative. On the contrary, it permits irrational and irresponsible behaviour. It contributes to the '*de-responsibilization*' of litigants by allowing passivity rather than engendering productivity and dynamism.[64] In English law, a common justification of the mitigation principle is that it encourages self-reliance amongst claimants and it deters them from burdening the defendant with all conceivable losses.[65] Contractual damages continue to protect the claimant's expectation interests but are subject to the supplementary policy 'that the promisee should not leave it simply to the courts to ensure fulfilment of his expectations, but should rather take it upon himself to adopt other reasonable means to ensure the fulfilment of his expectations'.[66] The effect is to give the innocent party responsibility for his own welfare.[67]

that Art 9:102 allows the innocent party to a breach to ask for specific performance unless the aggrieved party may reasonably obtain performance from another source. Unlike in the United Nations Convention on Contracts for the International Sale of Goods (1980), the availability of specific performance is therefore restricted.

[59] UNIDROIT Principles of International Commercial Contracts (2004) Art 7.4.8(1) and 7.4.8 (2).

[60] Derains *L'Obligation de Minimiser le Dommage dans la Jurisprudence Arbitrale*, RDAI, No 4 (1987) 375 ; CCI, No 2139, 2142, and 2216.

[61] Chazal (n 1).

[62] See Art 1149 of the Civil Code which expressly states that the damages due to the victim of a breach of contract for loss suffered are subject to the exceptions and modifications of Arts 1150–1155 of the Civil Code.

[63] Subject to certain conditions, Cass 1ère civ (19 Jan 1982) D (1982) 457, noted by Larroumet; JCP (1984) II. 20215, noted by Chabas; RTD civ (1983) 144, obs Durry; Cass 1ère civ (8 Nov 1983) Gaz Pal 1984, 1, 384, noted by Tarabeux.

[64] Rosenfeld and Bouchez (n 1) .

[65] Burrows *Remedies for Torts and Breach of Contract* (OUP Oxford 2004) 122.

[66] id 'Contract, Tort and Restitution—A Satisfactory Division or not?' (1983) 99 LQR 217, 266.

[67] As Professor Bridge explained, 'the law quite rightly seeks to bolster stoicism and self-reliance' by imposing a duty to mitigate, so that the claimant is in charge of his own welfare (n 3) 409.

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Secondly, to hold a defendant responsible for the pecuniary consequences of the claimant's arbitrary and capricious refusal to take steps to mitigate his loss risks being unduly harsh.[68] Far from being regarded as an unfortunate consequence of the principle of full compensation, such an outcome is envisaged by some French commentators who, in their consideration of mitigation of loss, sail dangerously close to advocating the punishment of the defendant. It is said that the commission of a wrong not only gives rise to liability to pay damages but also debars the wrongdoer from any expectation that the claimant will behave reasonably. It is submitted that such an unyielding approach ignores the primarily compensatory function of damages and that in all but the rarest of circumstances, damages are not intended to be punitive.[69] It should not be overlooked that the reduction of a claimant's loss is to the financial advantage of both parties. Whilst even the most ardent exponents of the principle of mitigation of loss would agree that care should be taken to avoid reversing the roles of the party in breach and the injured party, the victim, who is often the only or the best situated person to control the level of loss stemming from the breach, ought at the very least to act reasonably.

Thirdly, the concern expressed by some commentators in France that the introduction of a mitigation principle might burden the victim of a wrong or restrict his freedom of action can be accommodated. The standard of reasonableness by which the claimants' attempts to mitigate are assessed could be fixed at a sufficiently low level to permit the courts to sanction a failure to mitigate only in the most obvious cases of incoherent and arbitrary conduct on the claimant's part. This would serve to ensure an equitable balance between the interests of the claimant and those of the defendant. English courts have endeavoured to be sensitive to the circumstances of the claimant, responding to the defendant's status as a wrongdoer by holding that the standard of reasonableness is relatively low. As J Tomlinson noted in *Britvic Soft Drinks Ltd v Messer UK Ltd*, the law of contract adopts a 'tender approach to those who have been placed in predicament by a breach of contract'.[70] The claimant is required to do what is reasonable in the circumstances rather than what is possible.[71] Whilst an injured party might have to advance money, he need not risk it[72] and will not be prejudiced by his impecuniosity and consequent inability to take steps to mitigate his loss.[73] A claimant will not need to risk his person in the hands of surgeons in attempting to miti-

[68] See Chazal (n 1) and Agard (n 1).

[69] In English law on this point see Bridge (n 3) 409 in which he states that 'it has been said that relieving the claimant from the duty to mitigate would punish the defendant'; See Ogus *The Law of Damages* (Butterworths London 1973) 85.

[70] [2002] 1 Lloyd's Rep 20, 46. See also Lord Macmillan's citation in *Banco de Portugal v Waterlow* [1932] AC 452, 506.

[71] *Lesters Leather and Skin Co v Home and Overseas Brokers* (1948) 64 TLR where the Court of Appeal held that considering the circumstances prevailing at the time in India, the buyers did not have to contract with a seller they did not know and at 569, Lord Goddard CJ added that they were not 'bound to be hunting the globe' in order to mitigate.

[72] *Jewelowski v Propp* [1944] KB 510.

[73] *Clippens Oil Co v Edinburgh and District Water Trustees* [1907] AC 291 per Lord Collins 303; See *Lagden v O'Connor* [2004] 1 AC 1067, where Lord Nicholls said at 1072 that in terms of financial weaknesses 'a negligent driver must take his victim as he finds him' and Lord Hope of Craighead at 1084 thought that 'the rules of mitigation, both in tort and in contract, do not require the victim to do what he cannot afford to do when he is seeking to reduce the damages payable by the wrongdoer'. The majority of the House of Lords took into account the claimant's want of means when assessing the amount of his loss.

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gate,[74] nor risk embarking on complicated and uncertain litigation against a third party,[75] nor prejudice his commercial reputation,[76] nor sacrifice any of his property or rights.[77]

Fourthly, in the context of contract law, mitigation of loss ensures that the concept of economic efficiency, which is of great importance when commercial relationships are on foot, is not overlooked when they are breaking down. If one accepts that the law should 'protect and conserve economic welfare and prosperity of the whole community'[78] and reduce social costs,[79] a legal system should discourage any activities which could be economically wasteful. The common law is remarkably alive to the need to protect finite resources.[80] As Lawson pointed out the 'English law of remedies seems to have been greatly influenced by the need to keep the economic machine running with the least possible disturbance' and the principle of mitigation of damage is a notion which seems to work well in commerce.[81] This trend could be developed by French Courts of Appeal, which have in the past shown themselves to be sensitive to economic imperatives and willing to ensure that they prevail over the old French liability principles.[82]

Fifthly, a practical advantage of the introduction of a general duty to mitigate into French law is that it would enable French courts to achieve uniformity in their decision-making. It seems illogical that different rules apply depending on whether a contract for the sale of goods falls within the scope of the United Nations Convention on Contracts for the International Sale of Goods or is purely domestic in nature.

Finally, the interest of the injured party cannot be isolated from the interest of society as a whole and the insured community in particular.[83] The rejection of the mitigation principle has the potential to put upward pressure on insurance premium payments which is to the detriment of all.[84]

If mitigation of loss is to be introduced into French law, a legal basis that is consistent with its prevailing principles must be found. The notion of good faith has been extensively cited in French and Belgian literature as the preferred legal ground of a

[74] *Steele v Robert George* [1942] AC 497; *Richardson v Redpath* [1944] AC 62; *Selvanayagam v University of the West Indies* [1983] 1 WLR 585, PC.

[75] *Pilkington v Wood* [1953] Ch 1970*; Horsfall v Haywards* (1999) 63 Con LR 81; *Dean v Allin & Watts* [2000] Lloyd's Rep 469.

[76] *Finlay v Kwik Hoo Tong* [1929] 1 KB 400, CA; *Banco de Portugal v Waterlow & Sons Ltd* [1932] AC 452 ; *The Lily Prima* [1976] 2 Lloyd's Rep 487.

[77] *Elliott Steam Tug Co v Shipping Controller* [1922] 1 KB 127, 140–1; But see *Weir (Andrew) & Co v Dobell & Co* [1916] 1 KB 722.

[78] McCormick *A Handbook on the Law of Damages* (St Paul West 1935) 127.

[79] Coase 'The Problem of Social Cost' (1960) 3 Journal of Law and Economics.

[80] McCormick (n 78); *Chitty on Contracts* (n 3) 1479; Treitel (n 54) 184; Ogus (n 69) 85; Anson's *Law of Contract* (OUP Oxford 2002) 615; Feldman and Libling 'Inflation and the Duty to Mitigate' (1979) 95 LQR 270, 282; For a criticism see Bridge (n 3) 404–5.

[81] Lawson *Remedies of English Law* (Butterworths London 1980) 67; See also Michaud (n 8) 300–1; See, eg, *Darbishire v Warran* [1963] 3 All ER 310, 315 *per* Pearson LJ, 'it is vital, for the purpose of assessing damages fairly between the plaintiff and the defendant, to consider whether the plaintiff's course of action was economic or uneconomic, and if it was uneconomic it cannot … form a proper basis for assessment of damages'.

[82] Reifegerste, Petites Affiches (17 Oct 2003) No 208.

[83] Chazal (n 1); Aubert (n 1).

[84] On this point see Azard (n 1).

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duty to mitigate.[85] Exponents of this view will undoubtedly draw support from the recent extension of the concept of good faith by the development of an *affectio contractus* or *'duty of cooperation between the parties to a contract'* in French law.[86] However, to say that the *affectio contractus* is capable of reducing the quantum of liability of the party in breach would be to misunderstand the realities of the business world. Additionally, unlike the duty to mitigate, the duty of good faith is bilateral and not unilateral.[87] Perhaps the most transparent and coherent approach open to French contract law would be to create a principle of mitigation in its own right. Such an approach is advanced in the 'Draft Project of Reform of the Law of Obligations (Articles 1101 to 1386 of the Civil Code)' dated 25 September 2005[88] prepared by a committee of French academic lawyers charged with revising the Articles of the Civil Code relating to contracts.[89] Their proposals include a new Article 1373 of the Civil Code which would give the court a general discretion to reduce an award of damages for the failure to mitigate loss. It states that 'when the victim has the possibility by sure, reasonable and proportionate means of reducing the extent of his loss or avoiding its aggravation, he is to be held to account for any failure by the reduction of his damages, except where the measures were of a kind that interfered with his physical integrity'.[90]

This text will ensure continued debate about the role of a duty to mitigate in French law. However, until such time as it is accepted and enacted, one pragmatic course would be for contracting parties to agree to incorporate a mitigation of damage clause in their contract terms. Such clauses are common in international commercial agreements and should not be objectionable to French courts as long as they have been freely agreed and do not require the injured party to undertake any unreasonable step.[91] Alternatively, the parties to an international commercial contract may agree to choose the UNIDROIT Principles or the Principles of European Contract Law to govern their contract.

V. CONCLUSION

Although the *Cour de Cassation* must be taken by its decisions of 19 June 2003 to have rejected mitigation in the law of tort, the introduction of the mitigation principle at least in French contract law would nonetheless be welcome. Its rejection in tort law is purely the result of judicial decision-making and there is nothing in the provisions of the Civil Code preventing the introduction of such a principle in contract law. Any such reform

[85] Reifegerste 'Pour une Obligation de Minimiser le Dommage' PUAM (2002); Hanotiau (n 8).

[86] Reifegerste (n 85).

[87] Viney (n 33).

[88] 'Avant-Projet de Réforme du Droit des Obligations (Art 1101 à 1386 du Code Civil) et du Droit de la Prescription (Art 2234 à 2281 du Code Civil)' under the direction of Professor Pierre Catala.

[89] Title III of the Book III of the Civil Code on Contracts and Conventional Obligations.

[90] Note the equally important proposed Art 1344 which states that 'Any reasonable expenses incurred in preventing an impending loss or in avoiding its aggravation, or in reducing its consequences, constitute compensable loss.'

[91] Aubert (n 1). In any event contractual clauses limiting compensation are generally accepted subject to certain conditions—(n 64).

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could be justified by the voluntary nature of contractual relationships and adapted to suit the ideological and institutional environment of the French legal system. It is regrettable that in the meantime, contract as well as tort claimants in France can happily rest on their laurels.

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