


> IFE Benelux Seminar:  
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> Fundamental differences between the  
common law approach and the civil law  
approach to contracts



# Fundamental differences between the common law approach and the civil law approach to contracts

The aim of this text is to provide an introduction for Civil Code lawyers to contracts under common law by outlining fundamental differences between the common law and the civil law approach to contracts. For this comparison, we shall essentially base ourselves on Belgian and English law.

We shall first briefly compare the origins and main characteristics of the two laws and then examine some general principles governing contracts and their interpretation in each of the two legal systems before drawing some conclusions on the divergences and convergences of the two systems.

## 1 Background of common law and civil law systems<sup>1</sup>

The national legal systems of the Western world are members of two great families: Romanic civil law and English common law. Within each family, the national legal systems share certain characteristics that, despite their many dissimilarities, mark them as participants in a common legal culture<sup>2</sup>.

### 1.1 Civil law system

#### 1.1.1 Roman law

Civil law is a result of the accumulation of centuries of legal history and the interaction of Roman law with the customary and localised laws that evolved in Europe after the fall of Rome. The complexity and variety of Roman law of contracts, as found in Justinianus' codification *Corpus Juris Civilis*<sup>3</sup>, reflects a long economic, social and legal evolution. The Romans had no generalised theory of contractual obligations such that contract law comprised several categories of transactions. In medieval times, a revival of the study of Roman law, which started at the Italian Universities, made it of great significance for Western European law.

#### 1.1.2 Napoleonic Code

The French Civil Code (1804) was conceived as a complete legislative statement of principles rather than rules and a truly revolutionary enactment designed to remake the law in the image of a new and better society<sup>4</sup>. It was founded on the premise that for the first time in history a purely rational law should be created. The Napoleonic Code still forms the basis for French and Belgian civil law and the general principles relating to obligations and contracts have not been substantially modified since it was drafted. Codifications of civil law in Germany, Austria and Greece as well as other European countries, have been significantly influenced by the French Civil Code.

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<sup>1</sup> Based upon VERBEKE A., 'Elementen van Anglo-Amerikaans recht', Maklu, Antwerpen, 1994 and TETLEY W., 'Mixed Jurisdictions: common law vs. civil law, in *Louisiana Law Review* 2000, p. 677-738, for the full text see also <http://www.unidroit.org/english/publications/review/articles/1999-4a.htm>.

<sup>2</sup> MERRYMAN J.H., '*The loneliness of the comparative lawyer*', Kluwer Law International, The Hague, 1999, p. 18.

<sup>3</sup> Prepared between 528 and 534 A.D.

<sup>4</sup> TETLEY W., o.c., Chapter IV.

## 1.2 Common law system

### 1.2.1 Common law

The common law of England was created after the battle of Hastings (1066), when a new central system of royal common law courts was set up, developing a common law that replaced the largely diversified local customary law resulting from the feudal system in place at that time. This meant that French local customs were partly integrated into common law as they were imported from Normandy into England by William the Conqueror<sup>5</sup>.

The first steps to the creation of common law (i.e. the first meaning of the phrase being “the law common to all Englishmen”) took place gradually. Royal commissioners, representing the King, travelled around the country to first assess the local sheriffs or other dispensers of justice, and in a later stage to take the role of itinerant judges<sup>6</sup>. These judges went ‘on circuit’ through England to administer justice. Local juries were established under oath and perceived the facts of the cases<sup>7</sup>. When the judges ‘on circuit’ passed by, the jury was convened and the trial could take place. If no direct verdict could be rendered, the judge discussed the issues with other itinerant judges when he returned to London. Cases which followed, where the factual situation was identical and in which the same questions were at stake, were always answered in the same way. Consequently, a system of verdicts including rules was established, which became known as ‘common law’ and still forms the basis of English law<sup>8</sup>. The principle of case law, as the basis of common law was established<sup>9</sup>.

Early common law dealt mainly with serious crime and land tenure and it was not until the late 15<sup>th</sup> century that the common law courts acquired general jurisdiction over both formal and informal contracts. Prior to this, remedies were sought before a large variety of courts (market courts, University courts, Church courts, etc.)<sup>10</sup>

The common law courts then gradually developed a general jurisdiction over wrongs or torts that first concerned issues in which the Crown had a special interest (i.e. breach of royal peace) and then also covered purely private wrongs. Actions based on torts committed within the framework of informal contracts then gradually led to the action for breach of promise that could be used where an informal contractual undertaking was poorly performed or not respected (“assumpsit”). In the 19<sup>th</sup> century, there was a shift in emphasis from this essentially unilateral notion of a promise to that of a bilateral contract generating rights and duties for the parties, accompanied by contractual doctrine which was influenced by the civil law tradition<sup>11</sup>.

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<sup>5</sup> KOKKINI – IATRIDOU D., o.c., p. 270.

<sup>6</sup> VERBEKE A., o.c., p. 22-24.

<sup>7</sup> SAUVEPLANNE J.G., ‘*Rechtstelsels in vogelvlucht*’, Kluwer, Deventer, 1975, p. 112.

<sup>8</sup> KOKKINI – IATRIDOU D., ‘*Een inleiding tot het rechtsvergelijkende onderzoek*’, Kluwer, Deventer, 1988, p. 256-257.

<sup>9</sup> VERBEKE A., o.c., p. 22-24.

<sup>10</sup> FURMSTON M., ‘*Cheshire, Fifoot & Furmston’s law of contract*’, Butterworths, 2001, p. 2.

<sup>11</sup> FURMSTON M., o.c., p. 4, 5, 12

### 1.2.2 Equity law

By the end of the 15<sup>th</sup> century, an independent Court of Chancery<sup>12</sup> was established, which did not apply the rather rigid and strict common law. It should be mentioned that this Court was only authorised to act in those cases where no satisfactory solution could be found at law<sup>13</sup>.

The idea behind the Court of Chancery was that it examined the case of the parties involved from a morality point of view and the good faith principle and verdicts were made according to the Chancellor's conscience (these verdicts could vary "according to the length of the Chancellor's foot"). As a result 'equity law' was created; equity law follows common law in the sense that it does not change common law, but it complements it as an appendix to the law. However, in case of conflict between both systems, equity prevailed.<sup>14</sup>

The Judicature Acts (1873-1875) reformed the judicial organisation through which both equity and common law were fused together. Some important applications of equity such as equitable remedies trust and promissory estoppel remained<sup>15</sup>.

## 2 Sources of law and their hierarchy

### 2.1 Civil Code

Civil law Codes are relatively concise and set out principles; they form the primary source of law in a civil law system, after the Constitution. Particular statutes then complete the civil law Codes.

It can be argued that, as a general rule, precedence is given to doctrine over case law, while the opposite is true in common law. One explanation of this difference can be found in the fact that French civil law adopted Montesquieu's theory of separation of powers, whereby the function of the legislator is to legislate and the function of the courts is to apply the law. The function of doctrine in civil law is to provide practitioners and the courts with a guide for the solution of particular cases in the future.

Civil law systems can be said to be 'closed' in the sense that every possible situation is governed by a limited number of general principles, while common law systems can be said to be 'open', in the sense that rules may be created or imparted from new facts<sup>16</sup>.

### 2.2 Common law

#### 2.2.1 Case law

We have seen that contrary to civil law, common law is not based on the idea of a codification. Although English philosopher Jeremy Bentham (1748-1832) made several attempts to draft a clear overview of the existing law in

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<sup>12</sup> Presided over by the Lord Chancellor, a government minister.

<sup>13</sup> VERBEKE A., o.c., p.50.

<sup>14</sup> VERBEKE A., o.c., p. 50.

<sup>15</sup> KOKKINI – IATRIDOU D., o.c., p. 277.

<sup>16</sup> TETLEY W., o.c., Chapter V, paragraph 12.

<http://www.unidroit.org/english/publications/review/articles/1999-4a.htm>.

the form of codification, this was met with clear resistance by the 'common lawyers'<sup>17</sup>.

Common law can be said to be based on judge-made law. Previous cases are considered to set precedents that are to be respected by judges in future cases. This is the theory of "stare decisis" (i.e. literally, to stand by things decided)<sup>18</sup>. To what extent are such precedents binding? A first distinction is to be made between the part of the judgement that constitutes an "authoritative precedent" and is binding (the "ratio decidendi") and the part of the judgement that constitutes a "persuasive precedent" (the "obiter dicta", literally, a remark made in passing) – although in practice it may sometimes be difficult to distinguish between the two. There appears here to be a difference between the English approach, where authority can be attributed to a single decision and the approach in the U.S.A. where binding authority is said to be attributed to a line of decisions.

A second distinction is to be made upon the basis of the place in the hierarchy of courts of the court issuing the decision and each level of court is in a slightly different position in this regard. In brief, the "ratio decidendi" of the House of Lords<sup>19</sup> are binding upon the Courts of Appeal and all lower courts and are normally followed by the House of Lords itself, those of the Courts of Appeal are binding upon all lower courts and, subject to certain exceptions, upon the Court of Appeal itself. However, "ratio decidendi" of the High Courts are binding upon lower courts but not on themselves.

Case law therefore sets out new specific rules to a new specific set of facts and provides the principal source of law. The function of doctrine in common law is to extract from specific rules and it tends to focus on fact patterns. Authors analyse cases presenting similar but not identical facts, extracting from specific rules and through deduction determine the often very narrow scope of each rule. As a result, English law is built up by cases and remains a rather unsystematic whole<sup>20</sup>. It is also a system that relies upon extensive and systematic reporting of cases.

### 2.2.2 Statute law

Common law does, of course, also comprise statutes which typically provide detailed definitions; statutes complete case law and have to be read against a case law background<sup>21</sup>.

## 3 Methodology

Civil and common law are generally considered to be characterised by two separate reasoning processes.

It is often maintained that civil lawyers reason by applying a principle to a concrete case (i.e. deduction), whereas common law is empirical, reasoning by example and from a specific case to a principle (i.e. induction). It can be said that the continental

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<sup>17</sup> KOKKINI – IATRIDOU D., o.c., p. 272-273.

<sup>18</sup> KOKKINI – IATRIDOU D., o.c., p. 281.

<sup>19</sup> In application of a constitutional convention, only the Lord Chancellor, the Law Lords and others who have held high judicial office take part in the appellate committees that establish the opinions then adopted by the House of Lords in its judicial capacity.

<sup>20</sup> KOKKINI – IATRIDOU D., o.c., p. 273.

<sup>21</sup> SAUVEPLANNE J.G., o.c., p. 119.

lawyer puts his faith in syllogisms and has an instinct for systematisation, while the English lawyer relies on existing precedents<sup>22</sup>.

However, when the civil lawyer determines the scope of application of a principle, this also often involves reasoning from particular examples in existing case law to establish a general rule (i.e. using inductive reasoning) and conversely, delimiting exceptions involves some deduction. The reasoning process used in common law is nowadays generally characterised as being neither strictly deductive nor inductive reasoning but rather as reasoning by example.

### 3.1 Interpretation of laws

In civil law jurisdictions, the first step in interpreting an ambiguous law tends to discover the intention of the legislator by examining the legislation as a whole, including parliamentary minutes and work papers (“travaux préparatoires” or “parlementaire voorbereiding”), as well as the provisions more immediately surrounding the obscure text<sup>23</sup>.

In common law jurisdictions, by comparison, statutes are to be objectively construed on a stand alone basis according to certain rules, such as that an enactment must be read as a whole, and that special provisions will take precedence over general provisions, so as to meet the subject’s reasonable understanding and expectations.

These different approaches to the interpretation of laws can also be linked to different notions of the role of the State. The civil law approach can be said to tie-in with Rousseau’s theory that the State is the source of all rights under the social contract, whereas the Common law approach ties in with Hobbes’s theory that the individual agreed to forfeit to the State only certain rights<sup>24</sup>.

### 3.2 Civil law general principles vs. common law precedents

Civil law principles are frozen into Codes and are imposed on courts, whereas most common law rules can be changed from time to time, although in practice common law judges seem to be hesitant to change a rule<sup>25</sup>.

The principles of civil law are viewed as rules of conduct and are situated above the specific applications which courts or practitioners may make in any concrete case. The English rule is situated at the level of the case for which it has in fact been found and enunciated in order to ground a decision. The cases contain no broad statement of principle, but proceed from case to case until the principle emerges<sup>26</sup>.

Whereas civil law focuses on rights and obligations, common law is oriented towards the jurisdiction of particular courts to grant a sought after remedy (“remedies precede rights”)<sup>27</sup>. It follows that, in a civil law system, no clearly defined system of remedies exists, rather courts choose or sometimes even create the appropriate remedy. On the other hand, the common law system does not provide for a unitary system of rights and obligations. Only through precedents can specific rights be found.

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<sup>22</sup> KOKKINI – IATRIDOU D., o.c., p. 281.

<sup>23</sup> TETLEY, W., o.c., Chapter V, paragraph 9.

<sup>24</sup> GUCHET Y., ‘*La pensée politique*’, Armand Colin, Paris, 1992, p. 56-60.

<sup>25</sup> TETLEY, W., o.c., chapter V, paragraph 11.

<sup>26</sup> Lord Denning in *Chic Fashions (West Wales) Ltd. v Jones*, 1968, 2QB 299.

<sup>27</sup> BUCKLAND W.W. and McNAIR A.D., ‘*Roman law and Common law: A comparison in outline*’, 2<sup>nd</sup> Ed. Rev., Cambridge, Cambridge U.P., 1952, p. 399 and KOKKINI – IATRIDOU D., o.c., p. 272.

## 4 Contracts

We have seen that whilst the general principles of contract law are to be found in the Civil Code<sup>28</sup> in Civil Code countries, they are to be found in case law in the common law system.

We shall now examine certain basic characteristics of contract law in each system.

### 4.1 Negotiation of contracts

The conclusion of a binding agreement is mostly preceded by a period of negotiation of the terms by the parties. It is often difficult to ascertain the point at which the parties have reached a binding agreement and the exact terms of that agreement.

#### 4.1.1 Civil law

##### *Principle of good faith ("bonne foi" or "goede trouw")*

The requirement of good faith in connection with the performance of contracts is explicitly mentioned in some Civil Codes (for example, the French, Belgian and German Civil Codes) and was first introduced as regards the formation of contracts under cover of the requirement of a genuine consent<sup>29</sup>. The term good faith should be taken in an objective sense, meaning a behavioural norm imposed on the contractual parties<sup>31</sup>.

A party's right to break off negotiations for a contract is limited; for example, when parties have entered into confidentiality agreements, agreed on a prohibition from entering into negotiations with third parties, or in other words, have organised the pre-contractual process, the obligation to pursue negotiations may have been created. Furthermore, the parties may not 'manifestly' abuse their freedom to contract, nor their contractual rights. An abuse of rights exists when one party breaks off serious and advanced negotiations without discussion or warning or for reasons which appear under the circumstances evidently unjustifiable. Prudence or reticence of a party leading to a break off of negotiations does, however, not constitute an abuse of rights<sup>32</sup>.

Any abuse of rights is assessed by the court in a restrictive manner, meaning that the conduct of a party has to be such that any reasonable person would consider such conduct as obviously abusive or unfair ("marginale toetsing"). The good faith principle applies to dealings in bilateral relationships, where it obliges one party to refrain from taking undue advantage of the other party in circumstances where the latter is vulnerable<sup>33</sup>.

In the pre-contractual process, the theory of abuse of rights is connected to the theory of "culpa in contrahendo".

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<sup>28</sup> To be completed as regards Belgium by certain provisions of the less systematic Commercial Code.

<sup>29</sup> In Belgium, the principle of good faith is explicitly mentioned in article 1134 of the Civil Code.

<sup>30</sup> J. HERBOTS, o.c., Kluwer, 1995, p. 72.

<sup>31</sup> J. HERBOTS, o.c., p. 72; VAN OEVELEN A., 'De zgn. subjectieve goede trouw in het Belgisch materiële privaatrecht' in *T.P.R.* 1990, p. 1093.

<sup>32</sup> HERBOTS J., 'Contract law in Belgium', Kluwer, Brussels, 1995, p. 115-119.

<sup>33</sup> HERBOTS J., o.c., p. 115-119.

### *Example of a letter of intent*

Letters of intent are generally regarded as non-binding documents. However, certain Belgian case law has stated the contrary in the past, even in the case where parties have explicitly mentioned the wording 'subject to agreement' on the letter of intent<sup>34</sup>.

#### 4.1.2 Common law

##### *Principle of good faith*

English law does not recognise a general obligation of good faith, even in the performance of contracts<sup>35</sup>. Each party is entitled to pursue his own interest, so as long as he avoids making misrepresentations. Some authors state that duty to negotiate in good faith is unworkable and inherently inconsistent with the position of a negotiating party<sup>36</sup>. Case law has also decided that parties cannot, by agreement, impose upon themselves the duty to negotiate in good faith (*Walford v. Miles*, 1992).

As a result, there seems to be no general clause or general principle of good faith which applies, even for a particular area of English law<sup>37</sup>. However, it is not inconceivable that on the basis of appropriate facts and with skilful argument, English law may make tentative steps in the direction of the civil law approach<sup>38</sup>. In the conclusion of a recent study of English law, good faith is characterised as a fundamental principle derived from the rule "pacta sunt servanda" and other legal rules distinctively and directly related to honesty, fairness and reasonableness, the application of which is determined at a particular time by the standards of honesty, fairness and reasonableness prevailing in the community which are considered appropriate for formulation in new or revised legal rules<sup>39</sup>.

It is to be noted as regards the United States of America, that the principle of good faith was incorporated in the Uniform Commercial Code at the beginning of this century<sup>40</sup>.

##### *Example of a letter of intent*<sup>41</sup>

Non-binding letters of intent are frequently used in the negotiating process of mergers and acquisitions and, in general, in international transactions. Under English law, one of the four basic elements (see below under 4.3) of a binding agreement is the intention of the parties to create legal relations. It is for the issuer of the letter of intent to show that by drafting this document, no intention to create legal relations existed. To rebut the contractual intention, parties could expressly disclaim contractual intent in the letter itself, i.e. by using the wording "subject to contract" or similar.

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<sup>34</sup> Decision of the Commercial Court of Brussels, June 24, 1985 in *J.T.* 1986, p. 236; BOLLEN M., Precontractuele aansprakelijkheid voor het afspringen van onderhandelingen, in het bijzonder m.b.t. een acquisitieovereenkomst' in *T.B.H.* 2003, p.137, p.143.

<sup>35</sup> J. HERBOTS, o.c., p.72; B. NICHOLAS, '*French law of contract*', Butterworths, 1982, p. 69.

<sup>36</sup> Dixit Lord Ackner, *Walford v. Miles*, 1992, 1All ER 453.

<sup>37</sup> O'CONNOR, J.F., '*Good faith in English law*', Dartmouth, Hants, 1990, p. 100.

<sup>38</sup> FURMSTON, M., o.c., p. 28.

<sup>39</sup> O'CONNOR, J.F., o.c., p. 102.

<sup>40</sup> Section 1-203 of the UCC states that "Every contract or duty within this Act imposes an obligation of good faith in its performance or enforcement".

<sup>41</sup> See also FURMSTON, M., o.c., p. 48-49.

## 4.2 Form and types of contract

### 4.2.1 Civil law

#### *Principle of autonomy of will*

In civil law jurisdictions, a contract between two parties is mainly formed by the mere will of the parties to enter into an agreement<sup>42</sup>. Other than for certain categories of transactions (for example, for the transfer of real estate, a deed passed before a notary public is required), no written document is required (other than reasons of proof).

#### *Classification of contracts under Belgian civil law*<sup>43</sup>

Civil law contracts can be classified using the following main categories: consensual contracts, solemn contracts, synallagmatic (or bilateral) and unilateral contracts, onerous and gratuitous contracts, *intuitu personae* contracts, named and unnamed contracts and *sui generis* contracts. Specific rules may apply to the different types of contracts.

Consensual contracts retain the principle of consensualism, whereby the mere will to enter into a contract is deemed to be a sufficient requirement to create a valid and binding agreement. A contract will be subjected to a formal requirement only by way of exception.

Solemn contracts require the fulfilment of certain formalities to be valid. The absence of a written document or a notarial deed will make the contract void.

Synallagmatic (or bilateral) contracts create reciprocal obligations (for example, a sales contract) for the parties, whereas unilateral contracts create only rights in one party and only duties in the other party (for example a gift)<sup>44</sup>.

In onerous contracts, the obliged party confers an advantage on the other party with the intention of obtaining a reciprocal advantage for himself, whereas in gratuitous contracts, the obliged party confers the advantage with the intention of obtaining no such advantage<sup>45</sup>. The cause in gratuitous contracts is the '*animus donandi*'.

*Intuitu personae* contracts are entered into in consideration of the personal qualities of the other person. A mistake as to the person constitutes grounds for seeking for the contract to be nullified.

Named contracts are specifically governed by Codes and other statutes covering that type of contract (for example, sale, lease etc.) All other contracts, not being governed by Codes or statutes are deemed to be unnamed contracts (for example, service or factoring contracts).

The name '*sui generis*' contract is used for those contracts which cannot be classified under a certain type of contract (for example a lease, a sale or an employment agreement) and stand on their own.

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<sup>42</sup> MARCHANDISE P., 'La libre négociation. Droit et obligations des négociateurs' in *J.T.* 1987, p. 621.

<sup>43</sup> HERBOTS J., o.c., p. 47-51.

<sup>44</sup> Articles 1102 and 1103 of the Belgian Civil Code.

<sup>45</sup> Article 1105 and 1106 of the Belgian Civil Code.

#### 4.2.2 Common law

Oral and written contracts are frequently termed “simple” contracts as opposed to contracts under seal (i.e. deeds).

##### *Oral contracts*

Oral contracts are legally enforceable. However, for evidence purposes a written contract is always deemed to be useful. In some situations, a written contract is required by law, such as, for example, the transfer of shares or the creation of a guarantee.

##### *Written contracts: the parol evidence rule*

Statements in a written document are its terms and should be taken as the whole contract. It is firmly established as a rule of law that parol evidence cannot be admitted to add to, vary or contradict a deed or other written instrument<sup>46</sup>. Exceptions to the parol evidence rule are numerous. For example, should a reasonable person think that the writing is not meant as the whole contract, evidence varying the terms of the written document can be admissible. However, this exception does not apply in case of certain types of contracts such as, for example, lease contracts.

##### *Deeds*

A deed is necessary for a small category of transactions, such as the transfer of land and the granting of a power of attorney.

A deed may also be chosen if it is unclear that valuable consideration is given. English contract law is based on the idea of reciprocity and if a contract lacks a consideration, it will only be enforceable if it is made as a deed.

Furthermore, a deed gives the benefit of the longer limitation period of 12 years, as opposed to six years for a simple contract, which is why this form is frequently used for engineering or building contracts.

##### *General nature of contract law*

In principle, the law of contract is the same for all contracts, although Parliament has consistently taken a different approach, such that most legislation relating to contracts only applies to a limited list of contracts<sup>47</sup>. We shall see that the underlying principle in English law is that a contract is a bargain.

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<sup>46</sup> FURMSTON, M., o.c., p. 134-136.

<sup>47</sup> FURMSTON, M., o.c., p. 25.

## 4.3 Contract formation

### 4.3.1 Civil law

#### *Basic elements of a contract*

The Belgian Civil Code defines a contract as 'an agreement by which one or more persons obligate themselves toward one or more other persons to give, to do or not to do something'. Parties should have the will to enter into an agreement (autonomy of free will) and the contract is formed through the meeting of free wills.

#### *Conditions of validity*<sup>48</sup>

The cumulative conditions of substantive validity of a contract under Belgian civil law are the following:

- capacity of the parties (for example, in general, minors are unable to enter into legal transactions)
- valid consent: consent must not be affected by an impediment or defect. The type of impediment or defect that renders consent invalid is limited: consent granted in error, consent obtained by fraud or deceit, consent obtained through violence or duress
- an existing and lawful cause
- a determined or determinable and lawful object.

The notion of "cause" is difficult to define and has led to an important controversy between the "objective" cause and the "subjective" cause.

The *objective* notion of the cause is the direct result sought when contracting an obligation<sup>49</sup> (i.e. a buyer's cause in a Sale of a House Agreement is to become the owner of the house). This notion has, however, been criticised because it is rather abstract and not very different from the definition of the obligation itself.

The *subjective* notion of the cause is the indirect result sought when contracting an obligation, the motives that lead to it (i.e. a buyer's subjective cause in a Sale of a House Agreement is that he wishes to begin a business in this house)<sup>50</sup>.

The cause must not be unlawful in order for the obligation to be valid (i.e. an unlawful cause would be for the buyer to buy the house with the intention of making it a gambling house, without the required authorisation).

If the cause of an agreement disappears after the obligation is contracted, the agreement is normally not affected (except in case of a liberality, which could be rendered void if its cause were to disappear<sup>51</sup>).

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<sup>48</sup> Article 1108 and following of the Belgian Civil Code.

<sup>49</sup> H. DE PAGE, 'Les obligations. Livre III', p. 443-445.

<sup>50</sup> B. DUBUISSON, M. FONTAINE, 'Obligations', T.I, Université Catholique de Louvain, 1989, p. 112-115.

<sup>51</sup> Cass. January 21, 2000, J.T. 2000, p. 573 and comments by P.-A. FORIERS, in J.T. 2000, p. 676-679.

#### 4.3.2 Common law

##### *Basic elements of a contract/ Conditions of validity*

The formation of a contract is complete when the four basic elements of intention to be legally bound, offer and acceptance, consideration and certainty as to terms are satisfied<sup>52</sup>.

The agreement is thus formed through the acceptance of an offer, which basically involves a matching of two communications. Acceptance is final and unqualified assent to an offer. It has no effect until actually communicated to the party making the offer. It can be said that common law attaches particular importance to the outward and visible signs of assent, i.e. the function of the judge is to ensure that the reasonable expectations of honest men are not disappointed<sup>53</sup>.

In determining the intention of the parties, an objective test is used by asking if reasonable people would regard the agreement as legally binding. In commercial circumstances, there exists a rebuttable presumption that the parties intend their agreement to be legally binding.

Furthermore, for a binding contract to exist, the terms must be certain, meaning that incomplete, ambiguous terms or vagueness may not amount to a legally enforceable contract, despite the parties' intentions. An example of this can be found in *British Steel Corporation v. Cleveland Bridge and Engineering Co Ltd* (1984) where a letter of intent had been sent by the defendant stating its standard terms of business and accepting prices quoted by the plaintiff but the plaintiff had made it clear that it did not accept to contract under those terms. Although all the work was completed, the court held that there was no contract, but the plaintiff was entitled to reasonable remuneration for services rendered. Another surprising example for Civil Code lawyers is the case where parties have reserved major questions such as price for a future decision – a contract which stipulates that the price is to be fixed by one party might appear uncertain but is commonly assumed to be valid<sup>54</sup>.

As regards consideration, in common law, a promise is only considered binding if it is made for a consideration, contrary to civil law. The doctrine of consideration has varied over the centuries and has led to much debate. A general contemporary definition of consideration is that it is the act or promise offered by one party and accepted by the other as the price of that other's promise<sup>55</sup>. Consideration is generally classified into two categories: executory and executed. Executory consideration occurs when one party's promise is made in exchange for the other party's promise and executed consideration is where a promise is made in return for the performance of an act. Again, the notion of consideration confirms the English concept of a contract as a bargain<sup>56</sup>. It is to be noted that the courts will not enquire as to the adequacy of consideration and hence the popularity of contracts concluded for a symbolic pound sterling, however, there are exceptions where consideration is considered insufficient by the courts (such as, for example, where a party

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<sup>52</sup> WHINCUP M., *Contract law and practice. The English system and continental comparisons*, Kluwer Law International, The Hague, 2001, p.15.

<sup>53</sup> FURMSTON, M., o.c., p.33

<sup>54</sup> Examples given in FURMSTON, M., o.c., p. 49.

<sup>55</sup> FURMSTON, M., o.c., p. 88.

<sup>56</sup> FURMSTON, M., o.c., p. 86.

promises to perform an obligation already imposed upon him by a contract concluded with a third party).

Similarly to civil law systems, contracts that are contrary to public policy are, of course, illegal and so void and specific rules govern a person's capacity to enter contracts such that the contracts may be voidable.

#### 4.4 Contents and interpretation of contracts

##### 4.4.1 Civil law

Civil law, which is based on the autonomy of free will, acquires actual consent (a subjective standard)<sup>57</sup>, but presumptions of fact are available to the trial judge.

The Belgian Civil Code contains a number of rules intended to guide the courts when interpreting a contract whose terms are obscure. As a starting point, article 1156 of the Code says that the literal wording of contracts should not be followed as such, rather the common intention of the parties should be respected.

Furthermore, should a clause of a contract have a double meaning, it should be explained in that sense in which it has an effect, according to what is regarded as customary in the area and with a view to the rest of the contract<sup>58</sup>.

In addition, a contractual undertaking will be explained in favour of the party making a commitment, in case of doubt with respect to its interpretation<sup>59</sup>.

The Civil Code approach towards interpretation of legal transactions tends to be much less bound by the wording of a contract than is the case under English law.

##### 4.4.2 Common law

We have seen that a contract under common law is in principle a stand-alone document and that it is established as a rule of law that parol evidence cannot be admitted to add to, vary or contradict a deed or other written instrument.

However, in addition to the express terms of the contract, there are also implied terms, whether implied by custom, by statute or by the courts.

The common law objective contract theory dictates that contractual promises be interpreted according to the reasonable expectation of the promisee (an objective standard)<sup>60</sup>.

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<sup>57</sup> Article 1108 of the Belgian Civil Code.

<sup>58</sup> Articles 1157, 1158 and 1159 of the Belgian Civil Code.

<sup>59</sup> Article 1162 of the Belgian Civil Code.

<sup>60</sup> *Smith v. Hughes* (1871), L.R. 6 Q.B. 597, p. 607: 'If, 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'.

## 4.5 Effect of contracts on third parties: principles of privity of contract

### 4.5.1 Civil law

#### *Principle*

Article 1165 of the Belgian Civil Code contains the principle of privity of contracts and states that "agreements bring about consequences between the contracting parties; they cannot disadvantage third parties and are only to the benefit of third parties in the case provided by article 1121". Third parties are to be considered as all those who are not a contracting party.

As a general rule, a contract cannot confer rights or obligations arising under it on any person except the parties to the contract (internal consequences). Moreover, there exists a duty for third parties to respect the existence of a contract (external consequences)<sup>61</sup>.

#### *Exceptions<sup>62</sup>*

##### 1. Clause for the benefit of a third party (article 1121 Belgian Civil Code)

This is a clause in a contract by virtue of which one of the parties to the contract (the stipulator) makes the other one (the promisor) promise something for the benefit of a third party (the beneficiary). An example can be found in the system of life insurance. The intention to bestow a benefit on a third party must exist without any doubt<sup>63</sup>.

##### 2. "Direct actions" and "indirect actions"

Through the so called "direct actions", a cause of action is foreseen for third parties under certain circumstances. Indeed, a third party, taking no part in the contract, may force himself into the position of a creditor on the contractual debtor and demand performance.

As an example, article 1759 of the Belgian Civil Code can be given: "if a tenant, who is subletting, fails to pay the rent, the landlord may claim against the sub tenants to the extent of the rent which they owe to the tenant".

The theory of "indirect actions" can be found in article 1166 of the Belgian Civil Code. According to this article, creditors may assume action to exercise the rights and obligations of their debtors, apart from those that are directly related to the person of the debtor.

##### 3. "Action pauliana"

Article 1167 of the Belgian Civil Code says that "creditors may act in their own name against actions of their debtors, through which the creditor's rights were falsely disadvantaged". As a result of this article, the creditor does not have the obligation to accept the existence of an agreement between its debtor and a third party, in case the debtor concluded such agreement at the disadvantage of the creditor with deceitful intentions".

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<sup>61</sup> DIRIX, E., 'Beginselen van privaatrecht – Zekerheidsrechten', Kluwer, Brussel, 1999, p. 94, nr. 97 and HEJERICK N., 'Inleiding tot het burgerlijk recht', Die Keure, Brugge, 2002, p. 132.

<sup>62</sup> Based on VAN GERVEN W. and COVEMAERKER S., 'Verbintenissenrecht', Leuven, Acco, 2001, p. 135-157.

<sup>63</sup> Cass. September 27, 1974 in R.W. 1974-75, p. 944.

#### 4.5.2 Common law

##### *Principle*

In *Tweddle v. Atkinson* (1861) it was declared that no one may be entitled to or bound by the terms of a contract to which he is not an original party. In 1915, the doctrine of privity was reaffirmed by the House of Lords in *Dunlop v. Selfridge*<sup>64</sup>.

The main difference between English law and other systems was that a third party was not able to derive contractual rights, even if the contracting parties clearly intended to confer benefits on the third party. A substantial reform was made by the Contracts Act or Rights of Third Parties Act of 1999, although discussions exist as to whether the Act should be regarded as abolishing the doctrine or merely as creating a large exception. Under the Rights of Third Parties Act, the parties may choose to confer rights on a third party<sup>65</sup>.

##### *Exceptions*

The right of intervention, known as the doctrine of the undisclosed principal can be described as follows: if A has made a contract with B, C may intervene and take A's place if he can show that A was acting throughout as his agent, and it is irrelevant that B entered into the contract in ignorance of this fact<sup>66</sup>.

#### 4.6 Damages

Liquidated damages under common law are deemed to be in lieu of damages, whereas under civil law, contractual damages provided for in a contract can serve the purpose of a sanction in addition to and independently from a claim for damages.

Furthermore, in civil law it is not sufficient that contractual damages be the immediate and direct consequence of the non-performance, they must have been foreseen or foreseeable at the time that the obligation was contracted unless there is intentional or gross fault<sup>67</sup>.

### 5 Divergences or convergences of the civil law and the common law approaches ?

We have seen the following important differences in the two different approaches to contract law:

- Existence of a contract:  
We have seen that under common law there is a more rigid and formalistic stance as to the very existence of a contract. Certainty as to what is agreed and consideration form essential requirements of a contract, such that, under common law, a contract may be deemed not to exist in circumstances where a contract would exist under civil law.

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<sup>64</sup> FURMSTON M., o.c., p. 499-500.

<sup>65</sup> FURMSTON M., o.c., p. 501.

<sup>66</sup> FURMSTON M., o.c., p. 502.

<sup>67</sup> Article 1150 of the Belgian Civil Code.

- Principle of consensualism:  
Civil law refers to the will of the parties creating their law. Common law appears to seek a more pragmatic, less abstract notion of common agreement by attaching particular importance to the outward and visible signs of assent, i.e. the function of the judge is to ensure that the reasonable expectations of honest men are not disappointed. Common law contract law is also characterised by the notion of a contract as a “bargain” between the parties.
- Interpretation of contracts:  
Civil law has a body of principles governing interpretation of contracts, whereas common law does not rely on rules of interpretation and bases itself rather on detailed contracts, whereby literal interpretation is important.
- General civil law principles vs. detailed common law contracts:  
In a civil law contract, parties agree on the principles and fundamental provisions and let the Civil Code regulate all details, whereas in a common law contract all that has been agreed between parties should in principle be mentioned in the agreement. A common law contract is therefore characterised by being very detailed and extensive and favours an approach whereby each individual foreseeable situation and event is specifically provided for. It is based upon cases and reasons by example, whereas civil law contracts follow general principles set out in a code. Binding side documents can form part of the agreement in civil law, whereas this option is much more limited in common law.
- Principle of good faith:  
In Belgian civil law, the idea behind the “good faith” doctrine is generally accepted (article 1134 of the Belgian Civil Code), whereas English law does not rely on a good faith principle.

Furthermore, factors of convergence seem to influence both systems increasingly: we have seen that contract law under common law has also been influenced by the civil law authors of the 18<sup>th</sup> and 19<sup>th</sup> centuries and that an increasing amount of statutes (such as the Rights of Third Parties Act of 1999) now regulate contract law, including statutes that are based upon European directives. The influence of the case law of the European Court of Justice as regards the implementation of directives and the application of regulations has also had significant impact on English law. Finally, there appears to be a tendency towards codification in major common law countries (such as the codification activities of the Law Commission in England), also as a result of the implementation of European directives. It can also be argued that a codification would make the law more accessible to non specialists.

Conversely, in practice, many civil law contracts extensively use the format and wording of common law contracts, with the aim of strengthening legal predictability and achieving commercial certainty. The fact that many of these contracts are typically dealt with by arbitrators and not the courts may also be a factor of convergence.

It is to be noted that ‘The Principles of European Contract Law’ have been drawn up by an independent body of experts from each Member State of the European Union and cover the core rules of contract, formation, authority of agents, validity,

interpretation, contents, performance, non-performance (breach) and remedies. The Principles form an essential step towards the creation of a European Civil Code<sup>68</sup>.

According to the J.H. Merryman, there exist significant tendencies in both the direction of divergences and that of convergences between civil law and common law but that the convergence is the more powerful one<sup>69</sup>.

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<sup>68</sup> See also SMITS J., 'A principled approach to European Contract Law?', in *Maastricht Journal of European and Comparative Law* 2000, 7, p. 221-223.

<sup>69</sup> MERRYMAN J.H., o.c., p. 19.