CIVIL LAW AND COMMON LAW: TWO DIFFERENT PATHS LEADING TO THE SAME GOAL

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There are many ways to skin the cat
(English saying)

I. INTRODUCTION

In comparative law, there are many situations where the same legal term has different meanings, or where different legal terms have same legal effect. This can often cause confusion to both lawyers and their clients. This confusion most often occurs when civil lawyers have to deal with common law, or *vice versa*, when common law lawyers deal with civil law issues. While there are many issues which are dealt with in the same way by the civil law and common law systems, there remain also significant differences between these two legal systems related to legal structure, classification, fundamental concepts, terminology, etc.

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This paper will not deal with theoretical examination of differences between the common law and the civil law, but will focus rather on various distinctive features of civil law and common law, with several illustrations of resulting differences in both substantive law and procedural law. There is a great number of these differences and all of them, of course, cannot be dealt with in a short study of limited scope as this one. Even the books on comparative law which have extensively examined the differences between the civil law and the common law could not cover all those differences.[1] Any attempt to make a selection of differences between the civil law and the common law on the basis of their importance would be difficult. Hence, this paper will review only several typical examples of differences between the civil law and the common law, both in substantive law and civil procedure. These differences will not be examined in detail as they should serve only as illustration of those differences.

The scope of this paper will be mainly focused on the civil law issues and will not deal with other areas of law. In order to emphasize distinctive features of common law system and civil law system, some important differences which exist within these two "families" (e.g. differences between American and English law, or differences between French and German law) will not be examined and it will be assumed that all common law systems are alike in essential respects, and that all civil law systems are also alike in essential respects.[2] The paper will not enter into polemic as to which legal system is better and what are the advantages of common law or of civil law. The purpose of this short study is simply to highlight some of the main conceptual differences between common law and civil law systems, and to explore the possibilities of reconciling of some of those differences.

II. CIVIL LAW AND COMMON LAW COMPARED

Notion of Civil Law

Civil law has its origin in Roman law, as codified in the Corpus Iuris Civilis of Justinian. Under this influence, in the ensuing period the civil law has been

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1 K. ZWEIGERT & H. KOTZ, *INTRODUCTION TO COMPARATIVE LAW* (3rd Ed. Clarendon Press - Oxford 1998); R. B. SCHLESINGER ET AL., *COMPARATIVE LAW* (Mineola, New York, 1998); J.H. MERRYMAN, *THE CIVIL LAW TRADITION: AN INTRODUCTION TO THE LEGAL SYSTEMS OF WESTERN EUROPE AND LATIN AMERICA* (2nd Ed. Stanford University Press, 1985); M. A. GLENDON ET AL., *COMPARATIVE LEGAL TRADITIONS* (West Publishing Co., 1994).

2 According to Zimmermann there are "as many legal systems as there are national states." See, R. Zimmermann, Savigny's Legacy Legal History, Comparative Law, and the Emergence of a European Legal Science, *LQR 580 (1996)*.

developed in Continental Europe and in many other parts of the world. The main feature of civil law is that it is contained in civil codes,[3] which are described as a "systematic, authoritative, and guiding statute of broad coverage, breathing the spirit of reform and marking a new start in the legal life of an entire nation."[4] Most civil codes were adopted in the nineteenth and twentieth centuries: French Code Civil, 1804, Austrian Bürgerliches Gesetzbuch, 1811, German Bürgerliches Gesetzbuch, 1896, Japanese Minpo, 1896, Swiss Zivilgesetzbuch, 1907, Italian Codice Civile, 1942, etc. Between these codes there are some important differences, and they are often grouped in the Romanic and the Germanic families. Even though the civil codes of different countries are not homogenous, there are certain features of all civil codes which bind them together and "sets them apart from those who practice under different systems."[5]

Civil law is largely classified and structured and contains a great number of general rules and principles, often lacking details. One of the basic characteristics of the civil law is that the courts main task is to apply and interpret the law contained in a code, or a statute to case facts. The assumption is that the code regulates all cases that could occur in practice, and when certain cases are not regulated by the code, the courts should apply some of the general principles used to fill the gaps.[6]

Notion of Common Law

Common law evolved in England since around the 11th century and was later adopted in the USA, Canada, Australia, New Zealand and other countries of the British Commonwealth. The most obvious distinction between civil law and common law systems is that a civil law system is a codified system, whereas the common law is not created by means of legislation but is based mainly on case law. The principle is that earlier judicial decisions, usually of the higher courts, made in a similar case, should be followed in the subsequent cases, i.e. that precedents should be respected. This principle is known as *stare decisis* and has never been legislated but is regarded as binding by the courts, which can

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[3] The term "civil law" has two meanings: in its narrow meaning it designates the law related to the areas covered by the civil codes, while broader meaning of civil law relates to the legal systems based on codes as contrasted to the common law system. In this paper the broader meaning of civil law shall be used.

[4] R. B. SCHLESINGER ET AL., *supra* note 1 at 271.

[5] *Id.* at.282.

[6] E.g. Italian Civil Code art. 12 para. 2 provides that "if a controversy cannot be decided by a precise provision, consideration is given to provisions that regulate similar cases or analogous matters; if the case still remains in doubt, it is decided according to the general principles of the legal order of the State." Similar provision is contained in art. 4 of the French Code Civil.

even decide to modify it.[7]

The claim that common law is created by the case law is only partly true, as the common law is based in large part on statutes, which the judges are supposed to apply and interpret in much the same way as the judges in civil law (e.g. the Sale of Goods Act, 1979, the Uniform Commercial Code, etc.).

Comparison Between Civil Law and Common Law

The common law and civil law systems are the products of two fundamentally different approaches to the legal process. In civil law, the main principles and rules are contained in codes and statutes, which are applied by the courts codes. Hence, codes and statutes prevail, while case law constitutes only a secondary source of law. On the other hand, in the common law system, the law has been dominantly created by judicial decisions, while a conceptual structure is often lacking. This difference is the result of different role of legislator in civil law and common law. The civil law is based on the theory of separation of powers, whereby the role of legislator is to legislate, while the courts should apply the law. On the other hand, in common law the courts are given the main task in creating the law.

The civil law is based on codes which contain logically connected concepts and rules, starting with general principles and moving on to specific rules. A civil lawyer usually starts from a legal norm contained in a legislation, and by means of deduction makes conclusions regarding the actual case. On the other hand, a lawyer in common law starts with the actual case and compares it with the same or similar legal issues that have been dealt with by courts in previously decided cases, and from these relevant precedents the binding legal rule is determined by means of induction. A consequence of this fundamental difference between the two systems is that lawyers from the civil law countries tend to be more conceptual, while lawyers from the common law countries are considered to be more pragmatic.

One of the main differences between the civil law and common law systems is the binding force of precedents. While the courts in the civil law system have as their main task deciding particular cases by applying and interpreting legal norms, in the common law the courts are supposed not only to decide disputes between particular parties but also to provide guidance as to how similar dis-

[7] There is a distinction in the way the *stare decisis* doctrine is applied by American and English courts. In the United States, under this doctrine a lower court is required to follow the decision of a higher court in the same jurisdiction. In England, the previous rule under which courts were bound by their own prior decisions was reversed by the House of Lords (Practice Statement, which declared that it considered itself no longer formally bound by its own precedents and announced its intention "to depart from a previous decision when it appears right to do so." *[1966] 1 WLR 1234.*

putes should be settled in the future. The interpretation of a legislation given by a court in specific case is binding on lower courts, so that under common law the court decisions still make the basis for interpretation of legislation.

On the other hand, in contrast to common law, the case law in civil law systems does not have binding force. The doctrine of *stare decisis* does not apply to civil law courts, so that court decisions are not binding on lower courts in subsequent cases, nor are they binding on the same courts, and it is not uncommon for courts to reach opposite conclusions in similar cases. In civil law the courts have the task to interpret the law as contained in a legislation, without being bound by the interpretation of the same legislation given by higher courts; this means that under civil law the courts do not create the law, but only apply and interpret it. In practice, however, the higher court decisions certainly have a certain influence on lower courts, since judges of lower courts will usually take into account the risk that their decisions would probably be reversed by the higher court if they contradict the higher court decisions. Judges normally try to avoid the reversal of their decisions by higher courts as if too many of their decisions are reversed their promotion may be adversely affected. Hence, even though in civil law systems the case law formally has no binding force, it is generally recognized that courts should take into account prior decisions, especially when the settled case law shows that a line of cases has developed.[8]

III. SUBSTANTIVE LAW

As it is stated in the introduction, there is a great number of differences between the civil law and the common law and any attempt to make a selection of those differences on the basis of their importance would be difficult, especially in a short study as this one. Hence, this paper will review only several typical examples of differences between the civil law and the common law, without examining them in detail, as they should serve only as illustration of the diversity of legal concepts characterizing these two legal systems.

Consideration and Causa

In common law, a contract has no binding effect unless supported by consideration. The doctrine of consideration essentially means that a contract must be supported by something of value, such as the promise of a party to provide goods or services, or a promise to pay for goods or services.

[8] M. A. GLENDON ET AL., *supra* note 1 at 208.

On the other hand, in civil law a contract cannot exist without a lawful cause (*causa*).[9] Cause is the reason why a party enters a contract and undertakes to perform contractual obligations. Cause is different from consideration as the reason why a party binds himself need not be to obtain something in return.[10] For example, a party may enter a gratuitous contract which may bind him to perform an obligation for the benefit of the other party without obtaining any benefit in return. One of the major practical consequences of the difference between consideration and cause is that common law does not recognize the contracts in favor of third party beneficiary as only a person who has given consideration may enforce a contract.

Contracts for the Benefit of Third Parties and the Doctrine of Privity of Contract

In civil law, the parties to a contract may agree that contractual rights can be transferred to a third party (*stipulatio alteri*). For example, sect. 328 of the German Civil Code provides that "a contract may stipulate performance for the benefit of a third party, so that the third party acquires the right directly to demand performance."[11] The right, of course, cannot be forced upon the third party; if the third party rejects the right acquired under the contract, the right is deemed not to have been acquired.[12]

Common law does not recognize contracts for the benefit of third parties. Instead, the doctrine of privity of contract applies, which effectively prevents stipulations in favor of third parties. According to this doctrine, a contract cannot impose obligations on, or give rights to, anyone other than contracting parties: "only a person who is a party to a contract can sue on it."[13]

The doctrine of privity of contract was developed by the common law because common law focuses more on the issue who is entitled to sue for damages, rather than who derives rights under the contract. In the last several decades this doctrine has caused numerous problems and has proved inconvenient to commercial practice. As result, legislation accepting contracts for the

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[9] For example, art. 1131 of the French Civil Code provides that "an agreement without cause or one based on a false or an illicit cause cannot have any effect."

[10] For a discussion of the differences between *consideration* and *causa*, see, C. Larroumet, Detrimental Reliance and Promissory Estoppel as the Cause of Contracts in Louisiana and Comparative Law, *60 TUL. L. REV. (1986) 1209*.

[11] Art. 1121 of the French Civil Code, art. 1411 of the Italian Civil Code, art. 112(2) of the Swiss Code of Obligations, and art 537 of the Japanese Civil Code contain similar provisions.

[12] For instance, sect. 333 of the German Civil Code.

[13] Dunlop Pneumatic Tyre Co. v. Selfridge & Co. *[1915] A.C. 847*, per Lord Haldane L.C. at p. 853.

benefit of third parties has been adopted in several common law countries.[14] On November 11, 1999, at the proposal of the English Law Commission, the Contracts (Rights of Third Parties) Act received the Royal Assent thereby removing the doctrine of the privity. [15] This legislation is aimed at introducing contracts in favor of third parties into English law. The Act sets out the circumstances in which a third party on whom benefits are conferred may enforce his rights against the party conferring the benefit.

Revocation of the offer

In comparative law there are differences concerning the possibility to revoke an offer. In the common law, an offer may always be revoked or varied, in principle, until the moment when it was accepted. This applies even to firm offers which expressly state that they are irrevocable. This is because before acceptance no consideration is given for these undertakings.[16]

In Civil law, in principle, an offer has binding character and can't be revoked after being given (sect. 145 of the German Civil Code, art. 1328 of the Italian Civil Code, art. 3 of the Swiss Code of Obligations, art. 521 of the Japanese Civil Code). Depending on the offer's content, the offeree is bound by the offer for the period specified therein, or if this period is not specified, then for a reasonable period. The offer will be considered as revoked if it was not accepted, or it was not accepted within specified period.

In practice, the differences between the civil law and the common law are not so great as they may seem. In civil law an offer may be revoked until it reaches the offeree, while in common law an offer cannot be revoked after being accepted by the offeree. This means that in the common law the offeree bears the risk of revocation only for the period between the arrival of the offer and the dispatch of the acceptance, the period during which he is considering whether to accept or not (which period is usually very short).[17] Several international instruments aimed at unification and harmonization of international commercial law have attempted to bridge these differences by a compromise solution.[18]

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[14] For instance, New Zealand has adopted Contracts (Privity) Act 1982. Contracts for the benefit of third parties are also accepted in the U.S.A.; see Eisenberg, Third Party Beneficiaries, *92 COLUM.L.REV. 1258 (1992).*

[15] M. Dean, Removing a Blot on the Landscape - The Reform of the Doctrine of Privity, *JBL 143 (2000).*

[16] K. ZWEIGERT & H. KOTZ, *supra* note 1 at 357.

[17] K. ZWEIGERT & H. KOTZ, *supra* note 1 at 363.

[18] See *infra* notes 60 and 65.

Force Majeure and Frustration of Contract

Force majeure has origins in Roman law (*vis major*) and is later adopted in civil law system. *Force majeure* means unforeseen and unexpected event outside the control of the parties which makes impossible performance of the contract. The consequence of *force majeure* is exclusion of liability of a party for non performance of the contract.

Common law originally did not recognize the principle that impossibility excused performance of a contract, as it was based on strict liability: if a supervening event occurred during performance of the contract, in order to invoke it, the parties had to provide expressly in the contract exemption of liability in such case. Only later in 19th century common law has developed concepts of impossibility of performance and frustration, which operate in a way similar to *force majeure*. Under the doctrine of impossibility, a party to a contract is relieved of the duty to perform when performance has become impossible or totally impracticable without his or her fault. The effect of frustration is that the contract is considered terminated at the time of frustrating event and no party is liable for damages. Differently from the courts in most civil law countries, under the common law the courts have not the power to adjust or adapt the contract to changing circumstances.

Differently from civil law, in the common law *force majeure* does not have a precisely defined meaning. The parties have to specify in the contract events of *force majeure* that will exclude their liability for nonperformance. That is why the *force majeure* clauses in common law are often very long and comprehensive trying to cover as many *force majeure* events as possible.

On the other hand, civil law concept of *force majeure* does not recognize commercial difficulties as exemption. In that respect, *force majeure* differs from frustration. *Force majeure* applies to situations where the performance of contract is substantially impossible, not merely something different from what was originally contemplated by the parties. In the case of substantially changed economic conditions the doctrine of changed circumstances applies (*clausula rebus sic stantibus*).

In civil law systems, *force majeure* operates independently of party agreement, which means that it will protect an obligee even if the contract does not contain a *force majeure* clause. Since in civil law the liability is based on fault, the party will not be liable in case of *force majeure*. On the other hand, in common law *force majeure* leads to the termination of the contract and not to exoneration of a party from liability. In other words, in civil law *force majeure* is related to the obligation of one party, whereas in common law it affects the whole contract.[19]

[19] B. Nicholas, Rules and Terms - Civil Law and Common Law, *48 TUL.L.REV. 956 (1974).*

Within the European Union there were several attempts at harmonizing the rules on force majeure. The European Commission has expressed the view that "*force majeure* is not limited to absolute impossibility but must be understood in the sense of unusual circumstances, outside the control of the trader, the consequences of which, in spite of exercise of all due care could not have been avoided except at the cost of excessive sacrifice."[20] However, the Commission makes clear that the concept of *force majeure* in European law may not be the same as that in the national laws of the member states.

Breach of Contract and Fault

The general principles on liability for breach of contract are based on similar principles in both common law and civil law, but there are some important differences related to damages. A fundamental difference between the common law and civil law concepts related to the recovery of damages for breach of contract is the requirement of fault in the civil law, whereas this requirement is absent in the common law.

In common law, fault is not a requirement for breach of contract, and damages can be awarded without fault. Contract law is "a law of strict liability, and the accompanying system of remedies operates without regard to fault".[21] For example, under art. 260 (2) of the Restatement 2d, "when performance of a duty under a contract is due, any non-performance is breach". Strict liability for performance of the contract in common law has been softened by the exemption of liability in the events of impossibility, and changed circumstances.

On the other hand, in civil law countries, existence of fault is the basis for awarding damages to the innocent party; the recovery of damages can be awarded only if the breach of contract is caused at least by negligence.[22] For example, sect. 276 of the German Civil Code provides that "the debtor is responsible for deliberate acts and negligence" and under sect. 285 "the debtor is not in default as long as the performance does not take place because of a circumstance for which he is not responsible." Hence, the debtor is responsible for damages he caused intentionally or negligently, but he will not be responsible for damages that are purely accidental or are caused by force majeure.[23] Under French law, the concept of contractual liability based on fault is found in art. 1147 of the Civil Code.

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[20] Notice 88/C259/07; O.J. C259/11. Also, in the cases 284/82 Bussoni, ECJ 1984 557 and 209/83 *Valsabbia ECR 1984 3089*, the European Court of Justice has established rules on *force majeure*.

[21] A. FARNSWORTH, *CONTRACTS* (Boston-Toronto, 1982) 843.

[22] A. VON MEHREN & J. GORDLEY, *THE CIVIL LAW SYSTEM* (2nd Ed. 1977) 1106.

[23] N. HORN, H. KOTZ & H.G. LESER, *GERMAN PRIVATE AND COMMERCIAL LAW* (Clarendon Press - Oxford 1982) 112.

This general principle is subject to some important exceptions which provide for strict liability regardless of fault. Strict liability is introduced by the concepts of contracts that emphasize the manner of performance (Fr. *obligations de moyens*), and contracts that specify a given result (Fr. *obligations de resultat*).[24] *Obligations de moyens* impose a duty to perform certain act without guaranteeing a promised result; essentially, *obligations de moyens* correspond to the common law concepts of "due diligence" and "best efforts".[25] On the other hand, *obligations de resultat* impose a duty to achieve a promised result. While in case of *obligations de moyens* a party claiming damages for breach must prove the fault of the obligee, in case of *obligations de resultat* it is sufficient to prove that the promise made was not performed. It can be concluded that the civil law structure of liability is opposite of that of common law: it starts from a general principle of liability based on fault, but this is subject to important exceptions resulting in strict liability.

Liquidated Damages and Penalties

The common law distinction between liquidated damages and penalties often causes confusion and creates problems of interpretation. Liquidated damages and penalty clauses in advance specify the amount of damages for breach so that an innocent party which suffered damage need not prove its loss in the case of a breach, and will recover the specified amount of compensation regardless of the amount of actual damages. While liquidated damages represent a genuine pre-estimate of damage, penalties provide for extravagant and exorbitant amount in comparison with the greatest loss which could be caused by the breach.[26] As result liquidated damages are normally enforced by the courts, while penalties are not.

The common law terms "liquidated damages" and "penalties" may cause confusion in civil law, especially in French law, because the French term "clause penale" and the English term "penalty clause" seem to be similar, but they have very different meanings.[27] *Clause penale* specifies the sum of money which is recoverable by the creditor if the debtor fails to perform his obligations. The amount specified by *clause penale* should correspond to the estimated loss suf-

[24] U. DRAETTA, R.B. LAKE & V.P. NANDA, *BREACH AND ADAPTATION OF INTERNATIONAL CONTRACTS* (Butterworth 1992) 36.

[25] A. Farnsworth, On Trying to Keep One's Promises: The Duty of Best Efforts in Contract Law, *46 U. PIT. L. REV. 4 (1984).*

[26] *CHITTY ON CONTRACTS* (25th Ed., Sweet & Maxwell 1983) 958.

[27] On some practical consequences of different concepts of penalty under common law and civil law, see, R. B. SCHLESINGER ET AL., *supra* note 1 at 681.

fered by the innocent party. Hence, the correct English translation of *clause penale* is "liquidated damages clause" and not "penalty clause".[28] While under common law the courts do not enforce penalty clauses which provide for excessive amount of damages, under civil law the courts may reduce the agreed amount of damages if that amount is found to be excessive because it contravenes the principle of good faith, or even increase them, if the amount of liquidated damages is considered to be too low.[29]

Notice of Default

In civil law systems, the general principle is that in case of delayed performance of a contract the creditor must put the debtor in default by a notice of default (Ger. *Mahnung*, Fr. *mise en demeure*). For example, sect. 284 of the German Civil Code provides that "if after his obligation is due, the debtor does not perform after a warning from the creditor, he is in default because of the warning..." The purpose of this notice is to warn the debtor that he is in delay. The notice may also specify a reasonable time within which the debtor is required to perform his obligation (grace period). The notice usually contains a statement of the claimant that he will not accept performance upon expire of the designated period. If the debtor fails to undertake action despite the notice, this will assist the creditor to prove the debtor's fault and recover damages.[30]

In common law systems, there is no requirement of notice of default and the general rule is that performance is due without notice.[31] Instead, the debtor is bound to perform his obligation within reasonable time. For example, Sale of Goods Act 1979 sect. 29 (3) provides that "where under the contract of sale the seller is bound to send the goods to the buyer, but no time for sending them is fixed, the seller is bound to send them within a reasonable time."

Transfer of Property

The rules regulating the transfer of property are different in various national laws. For example, English, French and German laws treat the transfer of property of specific goods in different ways.[32]

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[28] Benjamin, Penalties, Liquidated Damages and Penal Clauses in Commercial Contracts: A Comparative Study of English and Continental Law, *INT'L. & COMP. L. Q. (1960)* 600.

[29] *Law No. 85-1097 of Oct. 11 1985 and Law No. 75-597 of 9 July 1975.*

[30] K. ZWEIGERT & H. KOTZ, *supra* note 1 at 493.

[31] G. H. TREITEL, *THE LAW OF CONTRACT* (9th Ed. Sweet & Maxwell 1995) 743.

[32] See, A. VON ZIEGLER ET AL., *TRANSFER OF OWNERSHIP IN INTERNATIONAL TRADE* (Kluwer, The Hague, 1999).

In English law, property in goods is transferred when the parties to the contract intend it to be transferred (Sale of Goods Act sect. 17).[33] It is the intention of the parties, predominantly of the seller, which controls when and under what conditions the property can pass.

In French law, property in goods passes from the seller to the buyer at the moment when they have agreed about the goods and price (*solo consensu*), even though the goods are not delivered nor the price paid (Civil Code art. 1583). Differently from English law, under French law the transfer of property is an immediate result of the agreement between the parties and the intention of the parties is irrelevant after that moment.

In German law, there are two conditions for the transfer of property: the agreement of the parties and the delivery of the goods (sect. 929 of the Civil Code). This system is based on Roman law, according to which property could be transferred if two conditions were fulfilled : the legal ground (*iustus titulus*) and the method of acquiring the thing (*modus acquirendi*). The legal ground is the contract of sale and the way of acquiring is delivery of the goods. For example, a subsequent buyer of goods may exercise against a seller all contractual rights which belonged to the original buyer.

Trust

Trust is a fiduciary relationship with respect to property, subjecting the person by whom the title to the property is held to equitable duties to deal with the property for the benefit of designated beneficiaries.[34] In principle, the trustee has the legal right and the beneficiary the equitable right. The trustee is the holder of the legal title to property and he may exercise all the powers with respect to property that a legal owner has, but without right to enjoy the benefits of ownership. On the other hand, the beneficiary has no legal title to property, but he is entitled to enjoy the assets belonging to the trust. The trust is not a contract but it is created through a unilateral declaration of will made by the owner of property (settlor). The concept of trust is used in the company law, in the law of succession, in family law etc.

The trust, as it is understood under the common law, does not exist in civil law.[35] Instead civil law uses various legal institutions (*fiducia, fondation, Treuhand*)

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[33] In American law, the rules on transfer of property are very similar. The general rule is that property is transferred when the parties so intend (UCC sect. 2-401 (1). When there is an explicit agreement "title passes to the buyer at the time and place at which the seller completes his performance with reference to the physical delivery of the goods" (UCC sect. 2-401 (2).

[34] *BLACK'S LAW DICTIONARY* (6th Ed. West Publishing Co. 1990) 1509.

[35] See, S. Grundmann, Trust and Treuhand at the End of the 20th Century. Key Problems and Shift of Interests, *AJCL 401 (1999)*, M. Milo & J. Smits, Trusts in Mixed Legal Systems: A Challenge to Comparative Trust Law, *European Rev. Private L. 421 (2000).*

which can serve some of the functions the trust has in common law. However, all these institutions of civil law can never achieve all functions of the common law trust without profound changes of the civil law concepts related to property. In civil law, there are serious difficulties for a potential trustee demanding conveyance of trust property to himself, or to register himself as the owner of the property, as he may not be regarded as the owner of the property under civil law.

Mortgage and Hypotheque

The civil law hypotheque differs from the common law mortgage, particularly that it confers on the hypothecary creditor no immediate right to possession of the property, but only a right against the proceeds of sale of the property after enforcement of the right in judicial proceedings. The common law mortgage, on the other hand, gives and immediate right of property to the mortgagee, who can take possession of the property by a simple notice, without the necessity of taking suit, as well as a right of foreclosure at law.

Under common law, when foreclosure process is completed and the mortgagor failed to pay his debt to the mortgagee, from that moment the mortgagor has lost his property right and the mortgagee obtains the absolute control of the property. As a consequence, the mortgagor's right to recover his property is extinguished and the mortgagee can exercise all property rights. On the other hand, under civil law the mortgagor remains the owner of the property until the purchaser obtains ownership, and the mortgagee acquires property only of the money paid by the purchaser in the amount of his claim plus interest.

Bills of Exchange

There are two main legal systems which regulate the law of bills of exchange. First group covers the countries which adopted the Geneva Uniform Law on Bills of Exchange and Promissory Notes, 1930, which is mainly based on French and German law. This system is adopted in most civil law countries. Second system applies in common law countries and is based on the English Bills of Exchange Act, 1882, and the American Uniform Negotiable Instruments Act, 1896, which was later replaced by sect.3 of the UCC. Between these two systems there are some important differences. Here are some illustrations.

As compared to the civil law system, in the common law system the bill of exchange is not subject to such strict rules regarding its form and content. For example, while under art. 1 of the Geneva Uniform Law on Bills of Exchange, 1930 the term "bill of exchange" has to be inserted in the document, no such requirement exists in common law system.

In common law there is a special kind of bill of exchange called "promissory note". A promissory note contains an unconditional promise whereby the maker

undertakes to pay a definite sum of money to the payee or to his order. The promissory note can be distinguished from the bill of exchange mainly because it contains a direct promise of payment by the person who signs it, instead of an order directing a drawee to pay. So, in case of promissory notes, there is no drawee involved.

In civil law, the bill of exchange is strictly an abstract document, which means that the obligations arising from the document are unconditional and cannot be connected with obligations from other documents. So, under art. 26 of the Geneva Uniform Law, the acceptance of a bill of exchange is unconditional. Under common law, the obligation from a bill of exchange can be made subject to performance of another obligation.[36]

Under Geneva Uniform Law a bill of exchange can be issued on order only, while under common law a bill of exchange can be issued on bearer.[37]

Under art. 30 of the Geneva Uniform Law payment of a bill of exchange may be guaranteed by a special kind of guarantee instrument called "aval". An *aval* is given by a signature of the giver of this guarantee on the bill of exchange. The *aval* should also specify for whose account it is given. The giver of an *aval* is bound in the same manner as the person for whom he guarantees. In the common law system, there is no this kind of special kind of guarantee, but the guarantee relating to bills of exchange is governed by the general principles of suretyship.[38]

IV CIVIL PROCEDURE

Comparison of Procedural law

Differences in procedural law between the civil law and common law are even more obvious than those in substantive law. Common law procedure is usually called "adversarial", which means that the parties in a dispute act as adversaries leading the proceedings; they have control over proceedings which they initiate and may decide to terminate them at any point by amicable settlement. The position of judge is rather passive as he or she does not undertake any independent investigation into the subject matter of the dispute acting as neutral arbiter between the parties in dispute as they each put forward their case. The

[36] For example, sect. 19 of the Bills of Exchange Act 1882 provides that the acceptance may be conditional.

[37] E.g. sect. 3-109 of the UCC.

[38] See, E.A. Peters, Suretyship under Article 3 of the Uniform Commercial Code, *YALE L.J. 843 (1968).*

role of judge is not to find the ultimate truth but to oversee the proceedings and to ensure that all aspects of the procedure are respected. The judge does not himself interrogate the witnesses, but his task is to ensure that the questions the parties put to the witnesses are relevant to the case. At the end, the judge should decide the case according to the more convincing of the competing presentations.

Civil law procedure is usually called "inquisitorial", because the judge is in control of the proceedings and he or she examines the witnesses, while the parties in dispute practically have no right of cross-examination. Compared to common law, the judge in civil law plays a more active role in the proceedings, e.g. by questioning witnesses and formulating issues. This is because the court has the task to clarify the issues and help the parties to make their arguments. The judge plays the main role in establishing the material truth on the basis of available evidence. The judge does not have to wait for the counsels to present evidence, but he or she can actively initiate introducing of relevant evidence and may order one of the parties to disclose evidence in its possession. The role of a judge is not merely to decide the case according to the stronger of the competing presentations, but to ascertain the definite truth and then to make a just decision.

With respect to the resolution of legal issues, the civil law system is based on the principle *jura novit curia* ("the Court is supposed to know the law"), which means that there is no need for parties to plead the law. On the other hand, in common law the law has to be pleaded, the precedents for or against have to be submitted and distinguished.

The use of the terms "adversarial" and "inquisitorial" is misleading and cannot help much in identifying the actual differences between the common law and civil law procedures, as these two terms could be used for both procedures.[39] In order to find out those differences the more appropriate way is to compare certain aspects of common law and civil law procedures, such as the way of determination of facts, service of documents, rules on admission and weight of evidence, witness statements, position of court experts, standard of proof in civil and criminal cases, etc.

Determination of Facts

While in common law system the parties and the court first investigate the facts in order to establish the truth, in civil law system the court is mainly con-

[39] The use of the adjective "inquisitorial" has a negative connotation, referring to the notorious Spanish Inquisition, known for its use of torture in obtaining confessions. The term "adversarial" applied to the common law procedures would be more appropriate, as the core of the both civil law and common law proceedings is the opposition of contending parties, while the judge acts as an independent arbitrator. A more active role of the judge in civil law proceedings does not justify the use of term "inquisitorial".

cerned with the claims of the parties as they are expressed in the pleadings. In common law a complaint is merely a formality which starts a procedure of investigation aimed at establishing the truth. On the other hand, in civil law the complaint actually determines the parameters of the case.[40] Consequently, the judges in civil law countries will concentrate on the facts which are submitted by the parties and if the facts as presented by the parties differ, the judge will make a decision on the basis of the available evidence as presented by the parties.[41] "*Da mihi factum, dabo tibi jus*" (give me the facts, I shall give you the law).

The parties, of course, are also active in a civil law trial. The parties are entitled to introduce evidence and propose motions. The parties are allowed to introduce evidence after providing the other side with an opportunity to inspect. While the judge makes the initial interrogation of witnesses, the counsels have the right to make additional questions.

Also, there are important differences between civil law and common law in the way a trial is conducted. A civil law trial is consisted of a number of hearings, and written communications between the parties, their attorneys and the judge during which an eventual dispute on court's jurisdiction is resolved, evidence is presented, and motions are made. Compared to the common law system, there is less emphasis on oral arguments and examination. Instead, written communication is prevailing, and if during the trial a new point is raised by one of the attorneys, the other may ask the court for a certain period of time to answer that issue in writing.

Service of Documents and Discovery

Another important difference between common law and civil law exists in the methods of gathering evidence in the pre-trial stage.

In common law, the pre-trial search for evidence is dominated by the process of discovery. The parties are obliged to produce for inspection by the other party all documents or information which are relevant to the matters in dispute and which are in their possession without the intervention of the court, whether or not the documents favor their claim or defense. Through discovery of documents, the parties to a dispute can obtain access to facts and information the adverse party intends to rely on at trial. Thus, discovery enables the parties to obtain facts and information about the case from the other party, which assists them in preparing for trial.

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[40] According to art. 4 of the French New Code of Civil Procedure "the object of suit is determined by the respective claims of the parties."

[41] For example, art. 7 of the French New Code of Civil Procedure provides that "the judge may not base his decision on facts which do not appear from the hearing."

On the other hand, in civil law civil there is no pre-trial discovery. The main purpose of evidence presented by a party is to prove his or her legal or factual arguments. Consequently, a party is obliged to produce only those documents which are referred to in its pleadings. Under civil law, the parties are not obliged to produce documents voluntarily to the other party during the course of civil litigation. While in the common law system the parties should collect and introduce evidence, in the civil law system the judge plays the main role in collecting evidence.[42] If one party wishes to obtain access to documents held by another party, it will have to ask the court to order the other party to disclose the document in question. The parties are bound to co-operate in the investigation, and "if one party withholds an item of evidence, the judge may, at the request of the other party, require him to produce it under penalty of a fine."[43] So, while the common law process of discovery is, generally speaking, a private matter, performed by lawyers in accordance with prescribed procedure, the civil law process of collecting evidence is a public function conducted by the court. This is in accordance with the general principle in the civil law system that the court rather than the parties is in the charge of the process of the development of evidence.

Rules on Admission and Weight of Evidence

The common law contains several rules which restrict admission of evidence. The main barriers to the production of documentary evidence are: authencity, the hearsay rule, and the best evidence rule. The requirement of authencity as a condition precedent to admissibility of evidence is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims.[44] The authencity of a document may be proven in any way, such as handwriting verification, or oral testimony of a person who saw the document executed. The admission of the authencity of a document is no evidence that the content of the document is accurate, nor does it deprive a party of an opportunity to object to its admissibility in evidence. Under the "hearsay" rule, a witness may not testify about fact of which he or she has no direct knowledge, e.g. about conversation of other people a witness heard. Under the "best evidence" rule, the evidence must constitute the best available evidence. In the case of written documents, the original document must be presented.

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[42] In criminal procedure there is even a special judge, called the "investigating judge" whose main task is to investigate all facts for and against the accused person. In the common law system this kind of judge does not exist.

[43] Art. 11 of the French New Code of Civil Procedure.

[44] Fed.R. Evid. 901

The civil procedure rules in the civil law system contains the rules on evidence which determine what may be introduced as evidence and sets conditions of admissibility and weight of evidence. However, in the civil law, while there are some restrictions, there are not rules corresponding to the common law rules on admissibility such as " hearsay" and "best evidence" rules. In principle, any evidence is admissible, but the court will evaluate how much weight is to be accorded to an evidence. Evidence admitted is subject to appeals for factual error.[45]

Witness Statements

There are significant differences between common law and civil law in relation to witness evidence. One of the basic principles of common law is the cross-examination of witnesses, which allows a thorough examination of the case. Oral evidence is given considerable weight and will usually prevail over written evidence. At a common law trial witnesses are examined and cross-examined in the presence of the judge and jury. Motions and objections are often made orally by counsels, and the judge rules on orally on them.

In the civil law, on the contrary, written evidence prevails over oral evidence. If a claim is supported by a document, the judge will usually not go further. If a document is contradicted by oral statement of a witness the document will normally prevail. In commercial cases, the use of witness evidence is very unusual. In some civil law countries, the court may even exclude the evidence given by a party witness in his or her own case. In criminal cases, most civil law countries recognize testimonial privilege for potential witnesses drawn from the family.

Cross-examination of witnesses is virtually unknown in civil law. However, in some civil law countries counsel is allowed to question the witness directly, while in some other civil law countries counsel can only formulate questions and ask the judge to put them to the witness.[46] The judge has a discretionary right to decide whether to ask the proposed questions or not. The judge also has the power to ask further questions beyond those proposed by the parties, if that is necessary for establishing the truth. The usual practice in most civil law countries is that witness testimony in not recorded verbatim, but the judge dictates a summary of the testimony into the dossier in the judge's own words. Then this

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[45] M. DAMASKA, *THE FACES OF JUSTICE AND STATE AUTHORITY* (New Heaven: Yale University Press, 1986) 85.

[46] In regard to the examination of witnesses, art. 294 of the Japanese Code of Civil Procedural combines elements of both the civil law and the common law by providing for direct examination and cross-examination of witnesses upon petition to the court, in addition to examination by the court. Direct examination and cross examination was introduced by the 1948 Amendment under the influence of the American law.

statement is signed by the parties. In common law, this practice would be considered as a denial of basic procedural fairness.

Another important difference between common law and civil law, in relation to the witness evidence, is so-called "preparation of witnesses". In common law, the counsels would normally "prepare" their witnesses for the hearing in order to avoid surprises during the trial and to make sure that the witness statements are accurate.

In civil law, the preparation of witnesses is strictly forbidden. The attorneys are normally not allowed to discuss the issues related to trial with witnesses out of court and may face disciplinary sanctions if they breach this rule. If the judge is informed that a witness was questioned by the attorney before the trial, the witness' testimony may not be given full credibility.[47]

Court experts and Expert witnesses

The courts often invite experts in certain fields to give testimony on the facts which require highly technical knowledge, such as engineers, physicians, accountants, handwriting experts, etc. They are considered as witnesses whose task is to provide the court with information related to a specialized area.

In common law, the experts are appointed and paid by the parties. Therefore, the experts are usually partial and their task is to support the position of the party who appointed them. Like other witnesses, they are examined and cross-examined by attorneys.

On the other hand, the experts in a civil law trial are not considered as witnesses and they are usually called "court's experts". The court experts are appointed by the court from a list of experts registered with the court, not by the parties, and they are expected to be impartial. The courts often rely on expert opinion, and many cases are decided mainly on the basis of expert evidence. The expert is usually instructed by the court to prepare a written opinion, which is then circulated to the attorneys. The parties may demand the court to order the expert to come to the court's hearing, so that they can interrogate the expert and ask him to explain the conclusions contained in the report. If one of the parties objects to the expert opinion, or the court finds the expert's report unsatisfactory, the court may appoint another expert. A party may propose a particular expert but the court may reject this proposal and select another expert.[48]

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[47] B. Kaplan, A. T. von Mehren & R. Schaefer, Phases of German Civil Procedure I, *HARV.L.REV. 1201 (1958).*

[48] *Id.* at 1243.

Effect of a Criminal Judgment on Subsequent Civil Proceedings

When one wrongful act serves as basis for both civil and criminal liability, among common law and civil law systems there are some important difference related to the effect of a criminal judgment on subsequent civil proceedings.

In common law, the rule is that in a civil action facts in issue cannot be proved by reference to previous criminal proceedings.[49] In civil proceedings, the criminal judgment is not admitted as evidence of the facts established by it, even against the person who is a party in both proceedings. Hence, the civil court is free to decide differently from the criminal court even if the facts of the case are the same. It is important to note that in common law, there is a difference of standard of proof in civil and criminal cases. In civil cases the plaintiff is required to prove a "balance of probabilities" or "preponderance of evidence", which means to prove that what is sought to be proved is more likely true than not. In criminal cases the standard of evidence is "beyond reasonable doubt" which is much stricter.

In many civil law jurisdictions a criminal judgment has the force of a conclusive evidence and binds the whole world.[50] Criminal jurisdiction is regarded as superior to civil jurisdiction (*le criminel emporte sur le civil*), and civil courts are bound by the decisions of criminal courts. Actually, there is often a direct link between the criminal fault and the civil tort liability: the conviction in a criminal case may serve as a basis for the award of damages in a civil tort case.

Differently from common law, in civil law the standard of proof is the same for both criminal and civil cases. Also, under civil law, there is no distinction between criminal and civil negligence, so if the criminal court has acquitted a person of negligence, the civil court will be bound by this judgment. However, there are some exceptions and limits to this principle. For example, if the criminal court has acquitted a person of liability in a criminal case, the civil court is free to hold that person civilly liable under the rule of strict liability. Also, in some civil cases (e.g. cases related to traffic accidents), the civil court is not bound by the views of the criminal court related to the extent of the damage suffered by a plaintiff.

Attachment and Saisie Conservatoire

Under American law, the plaintiff can rely on attachment for securing its claim against defendant before the court renders the judgment.[51] Attachment is

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[49] Hollington v. Hewthorn *[1943] K.B. 587 (C.A.).*

[50] RUDOLPH B. SCHLESINGER ET AL., *supra* note 1, at 497.

[51] Fed.R.Civil P. 64.

the legal process of seizing the defendant's property in accordance with a writ or judicial order for the purpose of securing satisfaction of the judgment in the event the suit succeeds. While under English law there is no attachment, the Mareva injunction, introduced into English law in 1975, has similar effect.[52] Mareva injunction prohibits the defendant, before or during a suit, from removing assets from the jurisdiction or from dealing with them when it appears to the court that without such an order the plaintiff's recovery on his claim will be imperiled. It is merely a court order freezing assets and it does not relate to the merits of the case.

Under French law, *saisie conservatoire* permits any property of the debtor to be seized and detained by the court pending judgment. The judgment in favor of claimant can be enforced against the attached property. Similarly to attachment in American law, but differently from Mareva injunction, *saisie conservatoire* places the defendant's assets under the court's authority so as to permit their judicial sale in order to enforce the judgment allowing the claim.

Maritime law offers an interesting comparison of effects of the civil law and common law versions of attachment. In maritime law there are two types of action: *in personam* and *in rem*. While action *in personam* is common to any jurisdiction or branch of law, action *in rem* is virtually unknown outside maritime law. An action in rem literally means "against the thing". This suit is filled against the vessel itself and can be brought even though the owner has no personal liability, e.g. supplies ordered by a charterer, or collision or marine pollution caused by the master or crew employed by the bareboat charterer. Thus, the liability of ship is personalized and may exist independently of the liability of shipowner.

In civil law, the arrest of a ship is a kind of pre-trial attachment; a ship may be arrested either to enforce a maritime lien or a personal claim against the owner. In both cases the action is directed against the owner personally and never against a ship. Differently from the attachment under common law, *saisie conservatoire* can be applied to property other than ships and ships can be arrested for most civil claims, not only maritime.

V. RAPPROCHEMENT OF COMMON LAW AND CIVIL LAW

During the period of national codification many divergent legal systems were established, which proved to be an obstacle to the world economic integration. Since the end of 19th and the beginning of 20th century started the

[52] Mareva Compania Naviera S.A. v. International Bulkcarrriers S.A. *[1975] 2 Lloyd's 509.*

process of unification and harmonization of law, especially in the fields of international private and public law. The growing globalisation of the world economy, based on closer integration and cooperation among states, imposed a need for legal certainty and unification of law, so that an eventual dispute could be solved in the same way regardless of what court decides it and what law applies to it. This process involved reducing differences between various legal systems and an approaching between common law and civil law legal systems.[53] As an illustration of this rapprochement, English law has introduced contracts for benefit of third parties by adopting the Contracts (Rights of Third Parties) Act, 1999, while the Japanese Code Civil Procedural provides for possibility of direct examination and cross-examination of witnesses.

The binding force of precedents, as one of the main distinctive features of common law, is not so unique to the common law as it may seem, because of the actual influence the case law has on the courts in all legal systems.[54] In some civil law countries the decisions of supreme courts have been made binding by statute. Even in the countries where the decisions of higher courts are not formally binding, they are likely to be followed by lower courts. On the other hand, the rigidity of the *stare decisis* doctrine has been softened by a number of changes in the common law countries, including the famous Practice Statement by the House of Lords, which declared that it considered itself no longer formally bound by its own precedents.[55] Whether courts are bound or not by precedents, judges in all legal systems are aware that the need of reasonable certainty and predictability requires that like cases be treated alike. Hence, in contemporary civil law the role of judges in the creation of law is increasingly important, while the difference between civil law and common law courts shows a tendency of disappearing, or at least looking less significant. The presence or absence of a formal doctrine of *stare decisis* does not have crucial importance and it may be expected that differences between the common law and civil law systems in this area will diminish over time.[56]

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[53] The mutual influence and mixing of civil law and common law elements has created mixed legal systems in several parts of the world, like Scotland, South Africa, Quebec, Louisiana, Puerto Rico, Sri Lanka, etc.

[54] D. N. MACCORMICK & R. S. SUMMERS (eds.), *INTERPRETING PRECEDENTS: A COMPARATIVE STUDY* (Aldershot: Darmouth Publishing Co. Ltd. 1997). National reports from several civil countries contained in this book indicate to an increasing importance of precedent in civil law system. For example, according to reporters on German law (R. Alexy & R. Dreier, *Precedent in the Dederal Republic of Germany*, at 17, 23) between 97% and 99% of judicial decisions in Germany make reference to precedent, while in France lawyers and the advocate-general discuss precedents extensively in their filings (M. Troper & C. Grzegorczyk, *Precedent in France*, at 103, 112).

[55] See, *supra* note 7.

[56] M. A. GLENDON ET AL., *supra* note 1 at 208.

On the other hand, large sections of common law have been regulated by statutes and even codes (e.g. the UCC). This proliferation of statute law in the common law system has narrowed the court's power of interpretation. Modern common law courts also tend to give greater weight to the problem of individualized justice in the particular case instead of trying to provide guidance for the future.[57] This tendency makes the role of common law courts similar to that played by the civil law courts.

An important step towards bringing together the civil law and the common law has been made through adopting international treaties, conventions and uniform rules containing elements of both the civil law and the common law. Such an example is the 1980 Vienna Sales Convention, which was adopted by both the civil law and the common law countries.[58] The UNIDROIT Principles for International Commercial Contracts represent another attempt at bridging differences between the civil law and the common law. [59] Differently from the Vienna Convention, the UNIDROIT Principles are not intended to become binding law, but they are aimed to serve as a model to national legislators and to provide guidance to courts and arbitrators when interpreting existing uniform law and deciding disputes relating to international commercial contracts. As result of the attempts to reconcile differences between the civil law and the common law, the Vienna Convention and UNIDROIT Principles contain some identical provisions.[60] The 2000 INCOTERMS provides an additional set of rules which uniformly regulates the transfer of risk and costs in contracts of sale, thus avoiding inconveniences which may arise from differences between the civil law and the common law. There are similar examples in other fields of law, like international carriage of goods, international payments, international commercial arbitration, etc.

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[57] Atiyah, From Principles to Pragmatism: Changes in the Function of the Judicial Process and the Law, *IOWA L. REV. (1980) 1250.*

[58] See, J. O. HONNOLD, *UNIFORM LAW FOR INTERNATIONAL SALES* (3rd Ed. Kluwer Law International 1999); P. SCHLECHTRIEM, *COMMENTARY ON THE UN CONVENTION ON THE INTERNATIONAL SALE OF GOODS (CISG)* (Clarendon Press - Oxford, 1998).

[59] On the UNIDROIT Principles see, for example, UNIDROIT Principles for International Commercial Contracts: A New Lex Mercatoria? (ICC Publishing S.A. 1995).

[60] For example, art. 16 of the Vienna Convention and art. 2.4 of the UNIDROIT Principles provide that the offer can be revoked until the moment a contract is concluded "if the revocation reaches the offeree before he has dispatched an acceptance". However, an offer cannot be revoked if it indicates that it is irrevocable, or if it was reasonable for an offeree to rely on the offer as being irrevocable and the offeree has acted in reliance on the offer (art. 16, 2). First exception is based on the civil law system, while the second exception is based on the common law (estoppel).

The creation of European Union (EU) law greatly contributes to the process of rapprochement between common law and civil law.[61] The EU has brought together different legal systems under a single legislature, especially after 1973, when the UK and Ireland joined the EU. The membership of these common law countries, in addition to all other civil law countries opened the way for convergence within the EU of common law and civil law elements and creation of a common legal framework. The process of European integration and the supremacy of Community law over national law represents a driving force leading to the creation of a mixed legal system which contains elements of both civil law and common law systems.

The EU has been very active in adopting a great number of regulations and directives which have precedence over national laws. These legislation of EU often incorporate elements specific for either civil law or common law. There are several examples of common law elements incorporated in the EU law, like the concept of true and fair view in accounting law.[62] The European Parliament has adopted several resolutions calling for unification of private law, especially in the areas relevant to the development of common market.[63] Also, the Commission on European Contract Law (the Lando Commission) has prepared the Principles of European Contract Law, which attempt to reconcile the differences between the civil law and the common law.[64]. These Principles presently have the status of 'soft law', but they may be the forerunner of a European Civil Code which would greatly contribute to the further convergence of civil law and common law.[65]

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[61] W. Van Gerven, ECJ Case-Law as a Means of Unification of Private Law, *2 EUROPEAN REVIEW OF PRIVATE LAW (1997) 293.*

[62] Council Directive 78/660/EEC of 25 July 1978 on the Annual Accounts of Certain Types of Companies, *1978 O.J. (L 222).*

[63] For example, Resolution on Action to Bring into line the Private Law of the Member States, *1989 O.J. C158/400*, and Resolution on the Harmonization of Certain Sectors of the Private Law of the Member States, *1994 O.J. C205/518.*

[64] See, O. LANDO & H. BEALE (eds), *PRINCIPLES OF EUROPEAN CONTRACT LAW* (Kluwer, The Hague, 2000).

[65] As an illustration of attempts to reconcile differences between the civil law and the common law, art. 2:202 of the Principles regulates the revocation of offers almost identically with art. 16 of the Vienna Convention and art. 2.4 of the UNIDROIT Principles (see *supra* note 60).

VI. CONCLUSION

The examination of common law and civil law reveals that there are more similarities than differences between these two legal systems. Despite very different legal cultures, processes, and institutions, common law and civil law have displayed a remarkable convergence in their treatment of most legal issues.

Under the contemporary pressure of globalisation, modern civil law and common law systems show several signs of convergence. Many of the differences that used to exist between the civil law and common law systems are now much less visible due to the changes which have occurred both in common law and civil law. In the common law, regulatory law has achieved a greater importance leaving less room for the courts, while in the civil law the role of the courts in the creation of law has greatly increased. As a result of these processes going to opposite directions, many of the differences between common law and civil law look now more like nuances rather than major differences.

The differences which exist between civil law and common law should not be exaggerated. It is also important to note that differences on many issues exist both among civil law and among common law countries. The differences between civil law and common law systems are more in styles of argumentation and methodology than in the content of legal norms. By using different means, both civil law and common law are aimed at the same goal and similar results are often obtained by different reasoning. The fact that common law and civil law, despite the use of different means arrive at the same or similar solutions is not surprising, as the subject-matter of the legal regulation and the basic values in both legal systems are more or less the same.

While a certain rapprochement between civil law and common law systems is evident and this tendency will continue, there are still important differences which will continue to exist for an indefinite period. This paper has given several examples of these differences between the common law and civil law systems. An awareness of these differences is necessary for any lawyer dealing in international law. The differences in some areas are substantial and the parties contemplating starting proceedings in another legal system are advised to check those differences before taking action.

The aim of this paper was not to judge which legal system is better: civil law or common law. The task of lawyers should not be to defend their legal systems, but to improve them. Each legal system may have some advantages and deficiencies. If a foreign legal system has some advantages, why not incorporate them in our domestic legal system? In that way the resulting convergence of the two legal systems can only contribute to their common goal of creating a fair and just legal system which can provide legal certainty and protection to all citizens and legal persons.

Č. Pejović, Civil Law and Common Law: Two Different Paths Leading to the Same Goal, PPP god. 40 (2001), 155, 7-32

Sažetak

"CIVIL LAW" I "COMMON LAW": DVA RAZLIČITA PUTA DO ISTOGA CILJA

Uspoređivanje kontinentalnog i anglo-američkog pravnog sistema je tema koja nije neposredno iz oblasti pomorskog prava, već se prije radi o temi komparativnog prava. Autor se odlučio obraditi ovu temu nakon što se ploveći oko dva desetljeća vodama pomorskog prava često susretao, a ponekad bivao i iznenađen, drugačijim pristupom kojeg imaju ova dva u svijetu dominantna pravna sistema. Ovaj rad se bavi samo nekim od brojnih razlika između kontinentalnog i anglo-američkog prava u oblasti materijalnog i procesnog prava. U dijelu koje se bavi razlikama u oblasti materijalnog prava, kao ilustracija su izabrane neke od razlika u oblasti ugovora, svojine i trgovačkog prava, dok dio koji se bavi procesnim razlikama obrađuje ulogu suda u parničnom postupku, dokazni postupak, saslušanje svjedoka i sudskih vještaka, djelovanje krivične presude na građansko-parnični postupak i privremene mjere. U zaključnom dijelu autor ukazuje na tedenciju približavanja između kontinentalnog i anglo-američkog prava kao rezultat globalizacije svjetske privrede, koja nameče potrebu pravne sigurnosti i unifikacije prava. Kao dokaz ove tendencije, autor navodi pokušaje da se u anglo-američkom pravu kodificiraju neke oblasti prava, dok u kontinentalnom pravu ističe činjenicu da se sudovi sve više oslanjaju na sudsku praksu. Autor također navodi neke primjere približavanja kontinentalnog i anglo-američkog prava kao rezultat unifikacije i harmonizacije prava, kao što su Bečka konvencija o međunarodnoj prodaji robe, UNIDROIT principi koji se primjenjuju na međunarodne trgovačke ugovore i konvencije u oblasti pomorskog prava. Na kraju, autor ukazuje na promjene u pravnom sistemu Europske unije, koje ukazuju na korištenje elemenata kontinentalnog i anglo-američkog prava, što doprinosi smanjenju razlika između ova dva sistema. Autor skreće pažnju da usprkos značajnim razlikama koje još uvijek postoje izmedju kontinentalnog i anglo-američkog prava, i kojih pravnici koji se bave međunarodnim pravom moraju biti svjesni, postoji jasna tendencija k približavanju ova dva glavna svjetska pravna sistema. Autor zaključuje da je to približavanje logično zbog sličnosti odnosa koje ovi pravni sistemi reguliraju, kao i sličnih kriterija vrijedosti.