

LICENSING IN OTHER LANGUAGES

CONTRACT LAW AND DISPUTE RESOLUTION IN CIVIL LAW SYSTEMS

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Licensing Executives Society
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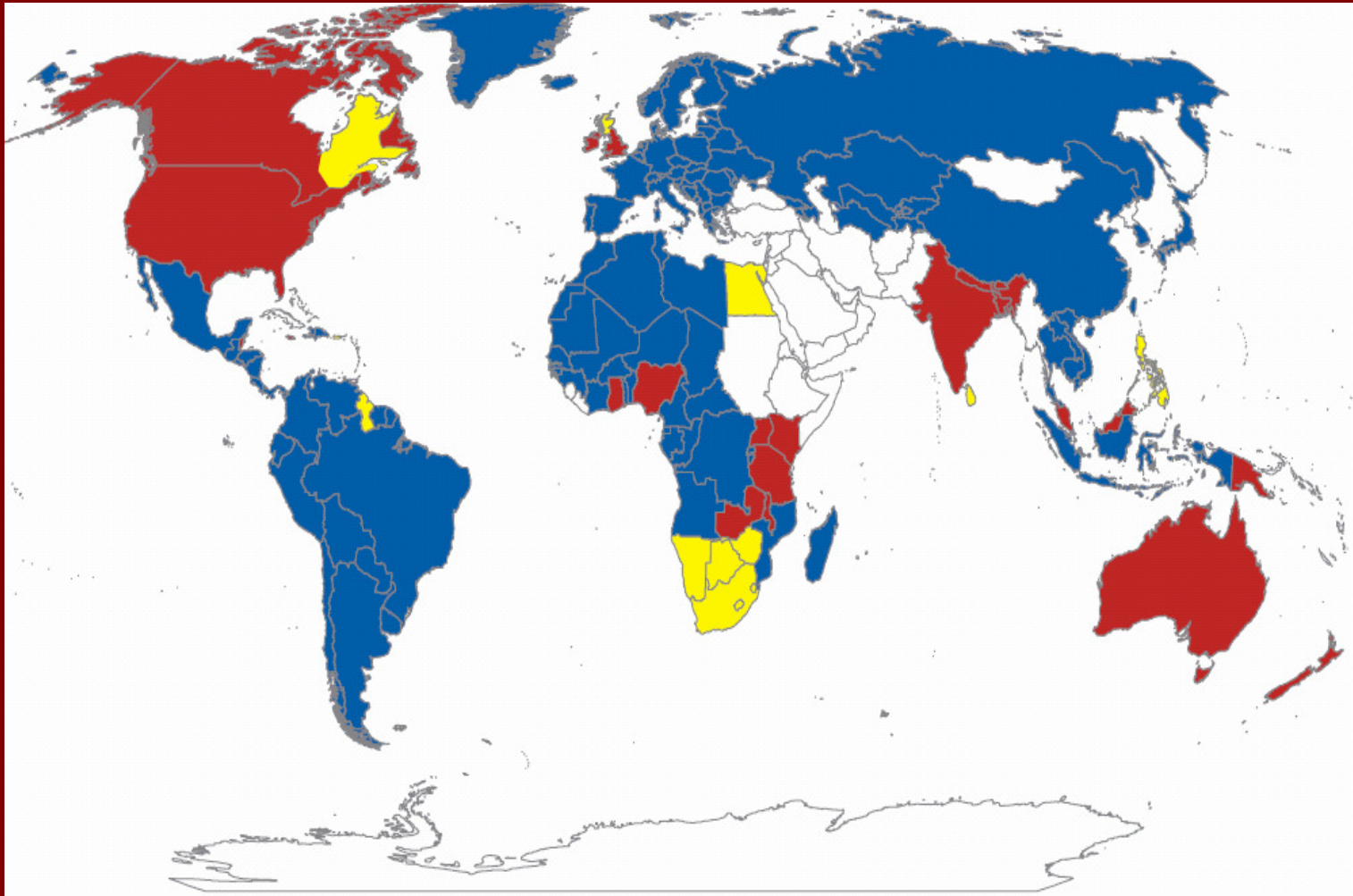
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Licensing in Other Languages

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Introduction: World's Legal Systems



Introduction: Civil Law - Europe

- Iceland
- Norway
- Sweden
- Denmark
- Finland
- France
- Germany
- Netherlands
- Belgium
- Luxembourg
- Switzerland
- Spain
- Portugal
- Italy
- Austria
- Poland
- Czech Republic
- Slovakia
- Slovenia
- Croatia
- Bosnia
- Serbia
- Montenegro
- Macedonia
- Romania
- Moldova
- Bulgaria
- Albania
- Greece
- Russia
- Ukraine
- Belarus
- Estonia
- Latvia
- Lithuania
- Hungary

Introduction: Civil Law - Asia

- People's Republic of China
- Macau SAR
- Japan
- Korea
- Thailand
- Vietnam
- Laos
- Cambodia
- Indonesia
- Republic of China (Taipei)
- East Timor
- Armenia
- Georgia
- Azerbaijan
- Kazakhstan
- Uzbekistán
- Turkmenistán
- Tajikistan
- Kyrgyzstan

Introduction: Civil Law – Latin America

- Mexico
- Guatemala
- Honduras
- El Salvador
- Nicaragua
- Costa Rica
- Panama
- Colombia
- Venezuela
- Ecuador
- Peru
- Bolivia
- Chile
- Suriname
- Brasil
- Uruguay
- Paraguay
- Argentina
- Haiti
- Dominican Republic

Introduction: Civil Law – Africa

- Morocco
- Algeria
- Tunisia
- Libya
- Mauritania
- Senegal
- Guinea
- Côte d'Ivoire
- Mali
- Burkina Faso
- Níger
- Benin
- Togo
- Cameroun
- Gabon
- Congo (Brazzaville)
- Congo (Kinshasa)
- Chad
- République Centrafricaine
- Burundi
- Rwanda
- Angola
- Mozambique
- Madagascar

Introduction: Common Law

- United Kingdom (except for Scotland)
- Ireland
- Canada (except Québec)
- United States
- Jamaica
- Bahamas
- Barbados
- Belize
- Trinidad & Tobago
- Australia
- New Zealand
- Papua New Guinea
- Malaysia
- Singapore
- Hong Kong SAR
- India
- Bangladesh
- Nepal
- Nigeria
- Ghana
- Kenya
- Uganda
- Tanzania
- Zambia
- Malawi

Introduction: Mixed Jurisdictions

- Québec
- Scotland
- Philippines
- Egypt
- South Africa
- Zimbabwe
- Botswana
- Lesotho
- Swaziland
- Namibia
- Sri Lanka
- St. Lucia
- Puerto Rico
- Guyana

Introduction: Changing Economics

BRIC:

Brasil

Russia (Россия)

India

China (中国)

“If things go right, in less than 40 years, the BRICs economies together could be larger than the G6 [six largest countries] in US dollar terms.”

Wilson & Purushothaman, “Dreaming with the BRICs: The Path to 2050,” Goldman Sachs Global Economics Paper No.: 99, New York, New York, October 1, 2003

<http://www2.goldmansachs.com/insight/research/reports/99.pdf>

Introduction: Changing Economics

“The relative importance of the BRICs as an engine of new demand growth and spending power may shift more dramatically and quickly than expected.”

“As early as 2009, the annual increase in US dollar spending from the BRICs could be greater than that from the G6 and more than twice as much in dollar terms as it is now.”

General Principles - Origins

- Rome – Corpus Iuris of Justinian – 6th Century
 - James G. Apple & Robert P. Deyling, A Primer on the Civil Law System
 - Caslav Pejovic – Civil Law and Common Law: Two Different Paths Lead to the Same Goal (2001)
- Codification
 - By 1400 in continental Europe the practice of relying on written treatises for the law, rather than judges, was well established

General Principles - Origins

- Example – Grotius (1583-1645) father of public international law
- tried to develop universal concepts of law that transcended national boundaries
- Enlightenment – Rule of Reason
- French Revolution 1789

General Principles - Origins

- Napoleonic Code –
Code Civil des Français 1804
 - Three “books”
 1. Civil rights and the status of persons
 2. Real and personal property rights
 3. Contracts and obligations

General Principles - Origins

- Bavaria , Prussia and Austria – started codification
- 1871 unification of Germany
- *Bürgerliches Gesetzbuch* (BGB)
 - Approved 1896
 - In force 1900
 - same three “books” as in France plus two “books” on family law and succession

General Principles - Comparison

Civil Law

- development of law from broad general principles – or “Deductive Reasoning”

Common Law

- development of law from decided cases to more general principles – or “Inductive Reasoning”

General Principles - Comparison

Civil Law – Authors

- scholars, law professors
- political rationale – devolution of power – French Revolution

Common Law – Authors

- Judges – concept of precedent

General Principles - Comparison

Common Law

- binding precedents made the law static
- development of the concept of equity

Civil Law

- Where is the concept of equity?
- tort law developed in the book of obligations - delicts

Contract Principles

Common Law

- consideration
- privity - cannot benefit third parties
- breach of contract may occur without fault

Civil Law

- no consideration, but require “causa”
- can benefit third parties if accepted
- breach must be the fault of the party through intention or negligence

Contract Principles

Québec – Code civil - Article 1371

Il est de l'essence de l'obligation qu'il y ait des personnes entre qui elle existe, une prestation qui soit l'objet et, s'agissent d'une obligation découlant d'un acte juridique, une cause qui en justifie l'existence.

It is of the essence of an obligation that there be persons between whom it exists, a prestation which forms its object, and, in the case of an obligation arising out of a juridical act, a cause which justifies its existence.

Contract Principles

Québec – Code civil - Article 1444

On peut, dans un contract, stipuler en faveur d'un tiers. Cette stipulation confère au tiers bénéficiaire le droit d'exiger directement du promettant l'exécution de l'obligation promise.

A person may make a stipulation in a contract for the benefit of a third person. The stipulation gives the third person beneficiary the right to exact performance of the promised obligation directly from the promisor.

Contract Principles

Common Law

- notice of default originally must be in the contract
- mortgages – right to possession

Civil Law

- notice of default an implied term of the law
- Hypotheque – no transfer, no right to possession
- nominate contracts

Contract Principles

Common Law

- buyer beware or “caveat emptor”
 - warranties and representations are negotiated
- good faith during term emerging

Civil Law

- pre-contractual good faith or “culpa in contrahendo”
 - disclosure of material facts required
- Good faith is required in all civil conduct

Contract Principles

Québec – Code civil

6. Toute personne est tenue d'exercer ses droits civils selon les exigences de la bonne foi.

7. Aucun droit ne peut être exercé en vue de nuire à autrui ou d'une manière excessive et déraisonnable, allant ainsi à l'encontre des exigences de la bonne foi.

1375. La bonne foi doit gouverner la conduite des parties, tant au moment de la naissance de l'obligation qu'à celui de son exécution ou de son extinction.

Contract Principles

Québec - Code civil cont'd

6. Every person is bound to exercise his civil rights in good faith.
7. No right may be exercised with the intent of injuring another or in an excessive and unreasonable manner which is contrary to the requirements of good faith.
1375. The parties shall conduct themselves in good faith both at the time the obligation is created and at the time it is performed or extinguished

Contract Principles

- Bulgaria – ЗАКОН ЗА ЗАДЪЛЖЕНИЯТА И ДОГОВОРИТЕ - Obligations and Contracts Law

Чл.12. (изм.,ДВ,бр.12 от 1993 г.) При воденето на преговори и сключването на договори страните трябва да действуват добросъвестно. В противен случай те дължат обезщетение.

Article 12 The parties shall act in good faith in conducting negotiations and concluding contracts. Otherwise they shall owe damages.

Contract Principles

Bürgerliches Gesetzbuch (German Civil Code)

- In 2002 Germany amended the BGB to codify the doctrine of *culpa in contrahendo* (fault in negotiating).
- § 241(2) Das Schuldverhältnis kann nach seinem Inhalt jeden Teil zur Rücksicht auf der Rechte, Rechtsgüter und Interessen des anderen Teils verpflichten.

An obligation may require each party to have regard to the other party's rights, legally protected interests and other interests ...

Contract Principles

Bürgerliches Gesetzbuch (German Civil Code) cont'd

§ 311 Ein Schuldverhältnis mit Pflichten nach § 241(2) entsteht auch durch...

(2) die Anbahnung eines Vertrags, bei welcher der eine Teil im Hinblick auf eine etwaige rechtsgeschäftliche Beziehung dem anderen Teil die Möglichkeit zur Einwirkung auf seine Rechte, Rechtsgüter und Interessen gewährt oder ihm diese anvertraut, ...

An obligation with duties in accordance with § 241(2) also arises as a result of...

(2) preparations undertaken with a view to creating a contractual relationship if one party permits the other party to affect his rights, legally protected interest or other interest or entrusts them to that party, ...

Contract Principles

German Decisions

Landgericht Kaiserslautern – Aktenzeichen 4 O 607/00, 26 Mai 2004

Die Klägerin hat aus dem Gesichtspunkt der *culpa in contrahendo* wegen Verletzung vorvertraglicher Aufklärungs- und Informationspflichten einen Anspruch gegen die Beklagte auf Schadensersatz. Der Franchisegeber hat bei Verhandlungen über den Abschluss eines Vertrages die Verpflichtung, den anderen Teil über Umstände aufzuklären, die zur Vereitelung des Vertrages zweckgeeignet sind und für die Entschließung des anderen Teils von wesentlicher Bedeutung sind (vgl. OLG Rostock 1996, 13 ff. m. w. N.). Zu solchen Umständen gehören, ohne dass es weiterer Begründung bedarf, insbesondere Angaben über die Gewinnerwartung und Rentabilitätsberechnung.

Contract Principles

German Decisions cont'd

Landgericht Kaiserslautern – Aktenzeichen 4 O 607/00, 26 Mai 2004

The Plaintiff has a claim against the Defendant based on the doctrine of culpa in contrahendo because of its breach of its pre-contractual duty to provide education and information, which breach gives rise to compensation. Before concluding a contract the Franchisor has an obligation to explain to the other party facts that would thwart the purpose of the contract and that are of substantial importance to the other party in the resolution of the negotiations (see Rostock 1996, ff. m.w.N.). Such circumstances include particularly, without further justification, information regarding expected profits and financial feasibility.

Contract Principles

合同法 1999 (Hetong Fa or Contract Law)

第四十二条 当事人在订立合同过程中有下列情形之一，给对方造成损失的，应当承担损害赔偿责任：（一）假借订立合同，恶意进行磋商；（二）故意隐瞒与订立合同有关的重要事实或者提供虚假情况；（三）有其他违背诚实信用原则的行为。

Contract Principles

China's Contract Law – 1999

Art. 42 In the making of a contract, the party that falls under any of the following circumstances, causing loss to the other party, shall hold the liability for the loss.

- (1) engaging in consultation with malicious intention in name of making a contract;
- (2) concealing intentionally **key facts** related to the making of the contract or providing false information;
- (3) taking any other act contrary to the principle of **good faith**

Contract Principles

Ontario – Arthur Wishart Act (Franchise Disclosure), 2000

Fair dealing

3. (1) Every franchise agreement imposes on each party a duty of fair dealing in its performance and enforcement. 2000, c. 3, s. 3 (1).

Right of action

(2) A party to a franchise agreement has a right of action for damages against another party to the franchise agreement who breaches the duty of fair dealing in the performance or enforcement of the franchise agreement. 2000, c. 3, s. 3 (2).

Interpretation

(3) For the purpose of this section, the duty of fair dealing includes the duty to act in good faith and in accordance with reasonable commercial standards. 2000, c. 3, s. 3 (3).

Civil Procedure

Common Law

- judges recruited from senior practitioners
- adversarial proceedings
- focus on oral evidence

Civil Law

- judges recruited out of law school
- judges have an “inquisitorial” role
- focus on written evidence

Civil Procedure

China – 民事诉讼法 (Civil Procedure Law)

第六十四条 (Article 64)

当事人对自己提出的主张，有责任提供证据。

当事人及其诉讼代理人因客观原因不能自行收集的证据，或者人民法院认为审理案件需要的证据，人民法院应当调查收集。

人民法院应当按照法定程序，全面地、客观地审查核实证据。

Civil Procedure

China – 民事诉讼法 (Civil Procedure Law)

第六十四条 (Article 64)

It is the duty of the party to an action to provide evidence in support of his allegations.

If, for objective reasons, a party and his agent ad litem are unable to collect the evidence themselves or if the People's Court considers the evidence necessary for the trial of the case, the People's Court shall investigate and collect it.

The People's court shall, in accordance with the procedure prescribed by the law, examine and verify evidence comprehensively and objectively.

Civil Procedure

Bulgaria - ГРАЖДАНСКИ ПРОЦЕСУАЛЕН КОДЕКС

Чл.127. (1) Всяка страна е длъжна да установи обстоятелствата, на които основава своите искания или възражения. Не подлежат на доказване само общоизвестни обстоятелства и служебно известни на съда, за които той е длъжен да съобщи на страните.

Article 127 Each party shall prove the circumstances upon which it bases its claims or regulations. Facts of public or common knowledge or those known ex-officio by the court shall not be subject to proof, with regard to which the court shall inform the parties.

Civil Procedure

Common Law

- discovery
- interim injunctions – but Mareva injunctions not commonly used
- plead facts and law

Civil Law

- no obligation to provide other party with adverse evidence – no discovery
- no interim injunctions – but safeguard procedures common
- plead facts primarily

Civil Procedure

Common Law

- decisions are intended to develop the law
- appeals on primarily on law

Civil Law

- decisions often narrower, more formalistic
- appeals often involve de novo review

Civil Procedure

JUGEMENT

- [1] Les demandresses recherchent l'émission d'une injonction permanente contre les défendeurs
- [2] **CONSIDÉRANT** que les **Défendeurs en défaut de comparaître** n'ont pas comparu dans le délai imparti suivant la production au dossier de la cour d'une Déclaration de leurs procureurs voulant qu'ils cessent d'occuper;
- [3] **VU** l'affidavit de Michel Auclair daté du 20 décembre 2006;
- [4] **VU** les pièces produites au soutien de l'affidavit de Michel Auclair;
- [5] **CONSIDÉRANT** que la demandresse Century 21 Real Estate Inc. LLC est propriétaire de la marque enregistrée « Century 21... »;
- [6] **CONSIDÉRANT** que la demandresse Century 21 Canada, société en commandite, détient une licence exclusive pour le Canada pour l'utilisation des marques « Century 21 »;
- [7] **CONSIDÉRANT** que les demandresses ont prouvé que les **Défendeurs en défaut de comparaître** utilisent sans droit les marques de commerce « CENTURY 21 » nonobstant l'Ordonnance d'injonction interlocutoire prononcée par l'honorable Michel Déziel le 10 juillet 2006, dont il n'y a pas eu appel, en ce que :....
- [8] **CONSIDÉRANT** que les dommages-intérêts compensatoires ne peuvent être accordés qu'aux termes de l'article 1611 *C.c.Q.*, soit pour la perte que le créancier subit ou pour le gain dont il est privé et que le fardeau d'établir le quantum de cette perte ou de ce gain repose sur les demandresses qui le réclament;^[1]
- [9] **CONSIDÉRANT** que ...
- [10] **CONSIDÉRANT** par ailleurs que....
- [11] **CONSIDÉRANT** que, cela étant, ...
- [12] **CONSIDÉRANT** que les demandresses ont prouvé que les **Défendeurs en défaut...**
- [13] **CONSIDÉRANT** que le Tribunal fait siens les propos tenus par son collègue l'honorable Gilles Hébert aux paragraphes 131 à 138 de son jugement dans l'affaire *Distech C.V.A.C. inc. c. Distech Contrôles inc.*^[3];
- [14] ...
- [15] **CONSIDÉRANT** que le seul défendeur qui n'était pas en défaut de comparaître....
- POUR CES MOTIFS, LE TRIBUNAL :**
ORDONNE aux défendeurs CENTURY 21 SUPRÊME INC.

Licensing in Civil Law Jurisdictions

- Civil law drafting focuses more on the principles than on the technicalities
- agreements are generally shorter
- greater reliance on the terms implied by law
- disclosure of material facts required even if no representations and warranties given

Licensing in Civil Law Jurisdictions

- consider the greater need for written evidence – use recitals, appendices
- contractual provisions for limited discovery?
- are there special rules for this type of contract ? – “nominate contracts”

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