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## DEVELOPMENT OF DOMESTIC SALES LAWS

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## A. General

- 2.01** No comparative work on sales and contract law can dispense with providing at least a brief overview on the historical development of domestic sales and contract law.

## B. Roman Law

### I. General

- 2.02** Roman law is the foundation on which Continental European legal systems like France, Germany, Italy, Spain, and those legal systems influenced by them in Eastern Europe and Central Asia, East Asia, Ibero-America, and Africa, have been built.<sup>1</sup> But as of today the impact of Roman law even on Anglo-American and Scandinavian law is considered to have been a lot stronger than originally assumed.<sup>2</sup> It is therefore not surprising that numerous legal mechanisms and solutions have survived in practice and then found their way into civil codes and statutes.<sup>3</sup>
- 2.03** Roman law has brought forth famous legal sources such as the Twelve Tables from around 450 BC and the *Corpus Iuris Civilis* from 529 and 534 AD. The decline of the Roman Empire starting in the third century AD turned Roman law into what has become known as vulgar law. The classic methods of legal thinking and terminological techniques were abandoned and the law was left to laymen or just slightly educated legal professionals.<sup>4</sup> Nevertheless, with the survival of vulgar law basic Roman law was preserved in Western Europe.<sup>5</sup> By the end of the eleventh century the *Corpus Iuris Civilis* was thoroughly examined in Italy. In the following centuries the rediscovered Roman law found its way into the European legal systems where it combined with the existing laws.

### II. Roman Sales Law

- 2.04** Under Roman sales law contracts for the sale of goods could be concluded without any formal requirements and with almost no restrictions as to the object of the contract.<sup>6</sup> However, the contract was null and void due to initial impossibility where the goods to be sold had ceased to exist before the conclusion of the contract.<sup>7</sup> In cases where the goods did not yet exist, a contract of sale only became effective if the goods later came into existence;<sup>8</sup> the contract was then given retroactive effect.<sup>9</sup>
- 2.05** Generally speaking, Roman sales law was based on the sale of specific goods. The sale of unascertained goods as such was unknown even though stockpiling purchase was accepted.<sup>10</sup> The sale of goods was generally understood to be a cash sale and, naturally, the goods to be sold had to be determined at the time of the conclusion of the contract.<sup>11</sup> The purchase price had to consist

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<sup>1</sup> Kaser/Knütel, § 1, para 1.

<sup>2</sup> Ibid.

<sup>3</sup> Zimmermann, p 230 even states that Roman sales law provides the background against which decisions of legislators not to follow the example of Roman law were to be evaluated.

<sup>4</sup> Kaser/Knütel, § 1, paras 12 et seq.

<sup>5</sup> Ibid, § 1, para 25.

<sup>6</sup> Rabel, *Grundzüge*, pp 107ff; Zimmermann, p 234.

<sup>7</sup> Zimmermann, pp 687ff; Honsell, *Römisches Recht*, p 39.

<sup>8</sup> Kaser/Knütel, § 41, para 9.

<sup>9</sup> See Zimmermann, p 246.

<sup>10</sup> Zimmermann, p 236; Kaser/Knütel, § 41, para 8.

<sup>11</sup> Kaser/Knütel, § 41, para 1.

of a determined or at least determinable sum of money. The purchase price further had to be meant seriously but did not have to be just.<sup>12</sup>

The *Corpus Iuris Civilis* generally placed the risk of loss with the buyer at that point in time where the contract was perfected.<sup>13</sup> In case of stockpiling purchase risk passed upon the separation of the goods from the stock.<sup>14</sup> **2.06**

Under Roman law the seller was obliged to deliver the goods which had to be free from any right of the seller itself or third parties. Yet, the seller's obligation was not the transfer of title<sup>15</sup> which occurred with the handing over of the goods (*traditio*), if the seller was the owner.<sup>16</sup> The seller, however, was liable in situations where third parties successfully claimed possession of the goods sold to the buyer and the buyer was then evicted. **2.07**

Naturally, neither the category of impossibility nor that of delay directly deals with defective goods. This is due to the fact that, at first, this was only of significance where pieces of land had been sold.<sup>17</sup> As the basic Roman concept for the sale of movable goods was that of cash sale, the goods sold were usually physically present to both parties.<sup>18</sup> In the typical scenario the buyer therefore had the chance to see the goods before entering into the sales contract. Hence, liability for defective (movable) goods never became a general category comparable to 'impossibility' and 'delay'. According to the classic Roman law the seller was only liable if it had given a special guarantee (*stipulation*) or if it had acted fraudulently (*dolus*). **2.08**

However, in the field of slave and cattle trade—economically the most important markets at that time—two remedies for the buyer in case of defects were developed, the *actio redhibitoria* and the *actio quanti minoris*. For a period of six months the former entitled the buyer to the unwinding of the contract and the latter allowed a reduction of the purchase price.<sup>19</sup> A claim for damages additionally required fault on the side of the seller. Although these rules were originally designed specifically for the trade of slaves, Justinian later applied them to all sales of goods.<sup>20</sup> **2.09**

With respect to defect in title, Roman law did not accept the acquisition of ownership in good faith.<sup>21</sup> Therefore, where the buyer was sued by a third party, the buyer had an action against the seller who then had to defend it against the third party claim (*actio auctoritate*).<sup>22</sup> If the third party succeeded, the seller was liable to the buyer for a sum that equalled double the purchase price. The *actio auctoritate* was, however, limited to cases where a *res mancipi* (land, slaves, **2.10**

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<sup>12</sup> Zimmermann, pp 250ff.

<sup>13</sup> This general rule is commonly referred to as *periculum est emptoris*, see *ibid*, pp 281ff; Kaser/Knütel, § 41, paras 20 et seq; Hager, *Gefahrtragung*, pp 38, 39.

<sup>14</sup> Kaser/Knütel, § 41, para 8.

<sup>15</sup> *Ibid*, para 17.

<sup>16</sup> Otherwise the rule *nemo plus iuris transferre potest quam ipse haberet* (nobody can transfer a stronger right than he himself holds) prevailed and the buyer became owner of the goods only one year after delivery, even if it learned afterwards about the defect in title on the side of the seller—*mala fides superveniens non nocet* (subsequent bad faith is not hurtful), see Zimmermann, pp 279, 280.

<sup>17</sup> Most cases related to the size of the piece of land. If it was smaller than the contract required, the buyer had an *actio de modo agri* which granted a claim for the double amount of that portion of the purchase price that was above the price that would have been paid for the actual size, see Liebs, p 277.

<sup>18</sup> This rule of the buyer having the goods before its eyes and who therefore could be expected to examine the goods (*caveat emptor*) was later expressed in several proverbs such as 'Wer die Augen nicht auf tut, der tue den Beutel auf' (He who does not open his eyes will have to open his purse), or 'Let their eye be their chapman', see Hamilton, 40 *Yale LJ* (1931), 1164.

<sup>19</sup> See Liebs, p 278.

<sup>20</sup> Kaser/Knütel, § 41, para 48.

<sup>21</sup> See Liebs, p 268, Zimmermann, p 279.

<sup>22</sup> See Rabel, *Haftung des Verkäufers*, pp 5ff.

certain types of cattle, rights as to the use of another's property)<sup>23</sup> had been sold. Nevertheless, in all other cases it had become common practice for buyers to stipulate the payment of the double purchase price (*stipulatio*)<sup>24</sup> in case the goods delivered had a defect in title.<sup>25</sup> If neither of these actions was available to the buyer, it could still resort to the *actio empti* if the seller had known of the third party right but not informed the buyer.<sup>26</sup>

## C. Common Law

### I. General

- 2.11** The common law is generally understood to have begun during the reign of King Henry II of England (1154–89),<sup>27</sup> although some have dated it to 1066 and the arrival of William the Conqueror.<sup>28</sup> Notably Henry's reforms consisted of issuing *writs*. Each type of writ specified a particular cause of action and the remedy. Petitioners had to choose the writ that most accurately reflected their grievance. If the court agreed, the remedy was granted. 'The compilation and reconciliation of the customary laws of England's individual counties and localities instituted by Henry II formed a legal structure truly common to all Englishmen'.<sup>29</sup> The very name the 'common law' signifies its ambition to be what in modern parlance would be described as uniform law.
- 2.12** The common law continued to develop across all areas of law without distinction. The doctrine of precedence, or *stare decisis et non quieta movere* is a relatively modern development. To operate as it is understood today, the doctrine of precedence requires a hierarchical court structure and a reliable system of reporting judgments. It has been suggested that a genuine court structure was not settled in England until the mid nineteenth century.<sup>30</sup> The reporting system, in England at least, can be traced back to the thirteenth century and the Year Books.<sup>31</sup> However these early reports could not be described as reliable; indeed they were not relied upon.<sup>32</sup> It was not until the 1600s that law reports, akin to those of today, were printed and made available to judges and lawyers in regular practice.<sup>33</sup>

### II. The English Model

#### 1. General

- 2.13** Statutory developments in the sale of goods throughout the common law world have been well documented.<sup>34</sup> The first earnest attempt to describe and codify the relevant common law principles was undertaken by Sir Mackenzie Chalmers. When the Sale of Goods Bill 1888 (No 267) was introduced to the House of the Lords an accompanying memorandum from Chalmers

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<sup>23</sup> See Kaser/Knütel, § 7, para 5.

<sup>24</sup> Often even three or four times the purchase price, as the restrictions of the *actio auctoritate* did not apply to the *stipulatio*, see Liebs, p 269.

<sup>25</sup> See *ibid*, p 269; Kaser/Knütel, § 41, para 29.

<sup>26</sup> See Rabel, *Haftung des Verkäufers*, p 94: flexible and always available measure. See also Liebs, p 269; Kaser/Knütel, § 41, para 31.

<sup>27</sup> Stucky, 59 *Okla L Rev* (2006), 410.

<sup>28</sup> Barnes, 65 *La L Rev* (2005), 688 and fn 42.

<sup>29</sup> Stucky, 59 *Okla L Rev* (2006), 411.

<sup>30</sup> Wise, 21 *Wayne L Rev* (1974–5), 1048.

<sup>31</sup> Stucky, 59 *Okla L Rev* (2006), 411. See also Barnes, 65 *La L Rev* (2005), 691.

<sup>32</sup> Stucky, 59 *Okla L Rev* (2006), 411.

<sup>33</sup> Barnes, 65 *La L Rev* (2005), 691. See also Stucky, *Okla L Rev* (2006), 412.

<sup>34</sup> eg two concise descriptions can be found in Ilbert, 2 *J Comp Legis & Int L* (1920), 77ff; *Benjamin's Sale of Goods*, paras 1-001 et seq. See also Bridge, *Sale of Goods*, paras 1.01 et seq.

claimed it was ‘almost entirely a reproduction of the common law’.<sup>35</sup> The original bill failed to pass but was reintroduced and became the Sale of Goods Act 1893 (UK).<sup>36</sup> Its subsequent adoption throughout the British Empire was thorough and swift.<sup>37</sup>

## *2. Adoption in Other Jurisdictions*

In the present work, common law is often summarized by reference to the USA and those jurisdictions following the English model. The latter phrasing gives expression to the fact that English law and, for present purposes, in particular the sale of goods legislation today is still similar in legal systems with a common law tradition in different regions of the world. This is true for English-speaking countries such as Australia, Canada, and New Zealand but also for the East Asian common law jurisdictions: Hong Kong, India, Malaysia, Pakistan, and Singapore. As far as specific sales law is concerned, all of these legal systems closely follow the English model in that the respective sale of goods Acts do not display substantial differences. Nevertheless, some significant subsequent changes in England have not been followed. Prominent examples include the change in the definition of specific goods and the inclusion of an undivided share into that definition.<sup>38</sup> This change has only been followed in Singapore.<sup>39</sup> Another example is that the English Sale of Goods Act no longer speaks of an implied condition of merchantable condition but of an implied term of satisfactory quality,<sup>40</sup> a change which again only Singapore has followed.<sup>41</sup>

**2.14**

## *3. Modifications of the Basic Model*

However, those common law legal systems following the English model do not indiscriminately do so. Apart from the changes to the English Sale of Goods Act which were not followed in almost all of these jurisdictions, the most striking difference exists in the area of general contract law which inter alia comprises formation of sales contracts. Under English law, and most of its followers, general contract law is still judge-made common law. However, India and Pakistan have enacted separate contracts Acts at a relatively early point in time.<sup>42</sup> This approach was later followed by Malaysia<sup>43</sup> and some sub-Saharan common law jurisdictions.<sup>44</sup> Some of the last-mentioned systems, however, repealed their contracts Acts and returned to English common law.<sup>45</sup>

**2.15**

# **III. The United States of America**

## *1. General*

Although the United States of America obtained its independence from the United Kingdom nearly 100 years earlier, it too took its lead from the British legislation.<sup>46</sup> The reasons for doing so appear to have been pragmatic and mindful of what were even then perceived to be benefits

**2.16**

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<sup>35</sup> House of Lords Parliamentary Papers, vol VIII, p 253 as cited in New South Wales Law Reform Commission Report 51 (1987), Sale of Goods, p1.

<sup>36</sup> Royal Assent was given on 20 February 1894, with retrospective effect from 1 January 1894.

<sup>37</sup> See Ilbert, *2 J Comp Legis & Int L* (1920), 78. Ilbert notes ‘[a]n examination of the commercial laws of the British Empire shows how widely a well drafted Act of Parliament may be adopted throughout the Dominions and Crown Colonies. The following British possessions have adopted the Act with only slight verbal alterations’ and then proceeds to list the dates the Act was adopted in the various Commonwealth jurisdictions along with the only minor variations that were made.

<sup>38</sup> UK Sale of Goods (Amendment) Act (1995).

<sup>39</sup> SGP Sale of Goods (Amendment) Act (1996).

<sup>40</sup> UK Sale and Supply of Goods Act (1994).

<sup>41</sup> SGP Sale of Goods (Amendment) Act (1996).

<sup>42</sup> IND Contracts Act (1872); PAK Contracts Act (1872).

<sup>43</sup> Contracts Act 1950.

<sup>44</sup> See para 2.85.

<sup>45</sup> See para 2.86.

<sup>46</sup> Ilbert, *2 J Comp Legis & Int L* (1920), 78.

of uniform law. Samuel Williston drafted the Uniform Sales Act 1906 (US) based on the English Sale of Goods Act 1893 and has been described as 'the maker and builder of [the US] law on Sales'.<sup>47</sup>

- 2.17** The Act was adopted in more than 30 states; however, it did not cover many issues arising out of contracts for the sale of goods, thus these issues remained largely governed by common law, except in Louisiana and California which retained the civil codes that were the product of their French and Spanish history respectively. In addition to the Uniform Sales Act and the common law, a number of other uniform acts were introduced in the first half of the twentieth century.<sup>48</sup>

### *2. The Uniform Commercial Code*

- 2.18** The American Law Institute (ALI) and the National Conference of Commissioners on Uniform State Laws (NCCUSL) joined forces under the leadership of Karl N. Llewellyn as Chief Reporter and Soia Mentschikoff as Associate Chief Reporter to draft a comprehensive Uniform Commercial Code, expanding on the Uniform Sales Act. The ALI and NCCUSL approved a final Official Draft in 1952, and made several amendments up through to the 1957 Official Edition.

- 2.19** Karl Llewellyn's keen interest in German law and legal philosophy is clearly reflected in the UCC.<sup>49</sup> Thus the UCC exhibits many characteristics very distinct from traditional English common law and the Sale of Goods Acts following the English model, and instead it more closely resembles classic civil law concepts. Examples of this influence can be seen in UCC § 1-203 which imposes an obligation of good faith in the performance or enforcement of every contract, or in UCC § 2-302 which addresses unconscionable contract terms.

- 2.20** The UCC as it stands today seeks to provide a comprehensive set of rules for commerce. Hence, the role of judge-made common law is somewhat more restricted than under the English model. Of central interest for the present work is Article 2 of the UCC which in seven sub-parts deals with all aspects relevant to the sale of goods.

- 2.21** Thirteen states had adopted the 1958 Official Text by 1961 followed by New York in 1964. Several states made various amendments to the Code before adopting it. In order to prevent the breakdown of uniformity the Permanent Editorial Board was established in 1961, which considered upon the actual or proposed amendments of the states. The amendments that were approved were incorporated into the 1963 Official Text. Today the Code has been adopted by all states with the exception of Louisiana.<sup>50</sup> Thus, while sales law is still governed by state as opposed to federal law, having a uniform code allows for predictability and uniformity throughout the jurisdictions of the USA.

- 2.22** The NCCUSL and ALI approved a revised version of Articles 1 and 2 in 2003. At the time of this writing, nearly a decade after the revisions, no state has adopted the Revised Article 2 of 2003.

### *3. Restatements of Law*

- 2.23** When the ALI was founded in 1923 it sought to correct two defects in American law—namely the uncertainty that resulted from a lack of consensus regarding fundamental principles of common law and the complexity that resulted from variations among the different US jurisdictions.<sup>51</sup> The ALI's solution was to create the Restatements of the Law, which they developed

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<sup>47</sup> Karl Llewellyn as quoted in Movsesian, 62 *Was & Lee LR* (2005) at p 208.

<sup>48</sup> Braucher, 58 *Colum L Rev* (1958), 798.

<sup>49</sup> For discussion of German influence on Karl Llewellyn's legal philosophy see Whitman, 97 *Yale LJ* (1987), 156.

<sup>50</sup> Farnsworth/Young, *Selections for Contracts* (2004), pp 1–5.

<sup>51</sup> White, 15 *Law & Hist Rev* (1997), 2.

between 1923 and 1944 in the fields of agency, conflict of laws, contracts, property, and torts among others. These Restatements presented the general principles of laws and included case examples. The ALI has continued to expand and update the Restatements; the second series was published between 1957 and 1981, and the third in 1986 to the present.

In drafting the PECL the Commission of European Contract Law noted in its introduction that the idea and purposes of a restatement like those seen in the USA served as a model. **2.24**

#### IV. Mixed Systems Leaning Towards Common Law

References to the law of sales are among the oldest surviving records of law in Scotland; however, unfortunately these records reveal little more than that the concept of sale was recognized.<sup>52</sup> From the early sixteenth century onwards, Scottish law has seemingly been subject to the oscillating influences of English law and the civil law, however it has embraced neither in their entirety. This is true even today insofar as the UK Sale of Goods Act 1979 specifically dictates that certain sections are not applicable in Scotland,<sup>53</sup> and additionally sets out some sections which are only applicable in Scotland.<sup>54</sup> **2.25**

Some of the major differences that were evident between Scottish law and English law were revealed most clearly during the attempts to introduce what would become the Sale of Goods Act 1893. One of the reasons the bill had to be presented to the English Parliament numerous times was the question of its applicability to Scotland. Immediately prior to the introduction of the Sale of Goods Act there were a number of significant differences between the English and Scottish approaches to the sale of goods.<sup>55</sup> One of the most significant was that Scottish law did not recognize the concepts of conditions and warranties. Furthermore Scottish law had earlier rejected *actio quanti minoris*—the reduction of the price in a sales transaction. This was seen in the English position of allowing the aggrieved buyer to accept defective performance and to claim compensation or damages. Another difference concerned the passing of property. Whereas under English law parties could agree when property passed, under Scottish law property passed only with delivery. A final noteworthy difference was the Statute of Frauds requirement found at that time in English law. **2.26**

When the Sale of Goods Act 1893 passed into law it did have the effect of changing Scottish law to a degree. *Actio quanti minoris* effectively became available in the manner described above and parties were free to choose the time of the passing of property. However, the distinction between conditions and warranties was not imported into Scottish law and does not exist even today. Other aspects of English law were also not imported into Scotland, such as the Statute of Frauds requirement. **2.27**

Among the first legislative acts taken by the Israeli parliament upon the foundation of Israel on 14 May 1948 was to preserve the application of the law already in place.<sup>56</sup> This existing law was a complicated mix of Ottoman law<sup>57</sup> and law introduced by Great Britain following its reception of Palestine from the League of Nations in 1922. Although thus preserving much of the Ottoman law, where there was a gap in the existing law this was then to be determined by the common law. As a consequence it developed in the style and tradition of a common law jurisdiction.<sup>58</sup> **2.28**

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<sup>52</sup> Gordon, p 305.

<sup>53</sup> See as just one example, s 11 SGA.

<sup>54</sup> See eg s 15B SGA.

<sup>55</sup> Gordon, pp 328ff.

<sup>56</sup> See Zweigert/Kötz, p 236.

<sup>57</sup> See paras 2.98 et seq.

<sup>58</sup> Zweigert/Kötz, p 237.

- 2.29** However, despite adopting many common law practices and positions, particularly in respect of commercial law, Israel is now moving closer to becoming a civil law jurisdiction. A draft Civil Code was presented in 2004<sup>59</sup> and is still the subject of debate.
- 2.30** South Africa is another mixed legal system which appears to lean towards the common law in the context of the law of sales. It is addressed below.<sup>60</sup>

## D. Continental Europe

### I. General

- 2.31** Continental Europe comprises mostly civil law jurisdictions. They share a common tradition insofar as, starting in the eleventh century in northern Italy, Roman law was rediscovered, thoroughly studied, and spread through Central Europe. However, in the northern parts, especially of France and Germany, the law was in the main part customary. This customary law combined with Roman law and formed what has become known as the *ius commune*. This body of rules remained the dominating law in the region until the turn of the eighteenth to the nineteenth century. First Prussia (1794), then France (1804), and finally Austria (1811) started a wave of codifications that lasted throughout the entire nineteenth century. The relative harmony of civil law jurisdictions in Central Europe at the time followed from the broad acceptance of the French Civil Code which served as a role model in many civil law jurisdictions.<sup>61</sup> In recent times Central European legal systems display greater diversity as in some of them fundamental reforms have taken place, most notably in Germany and the Netherlands.

### II. French Law

#### 1. General

- 2.32** After the collapse of the Western Roman Empire in 476, Roman law survived in the south of France through Alarics' *Breviarium Alaricianum* or *Lex Romana Wisigothorum* (506)—a commentary of the *Codex Theodosianus*. Later, in the twelfth century, Roman law was rediscovered through the study of Emperor Justinian's *Corpus Iuris Civilis* (529–34)—composed of the *Codex Iustinianus*, the Digest and the Institutes—mainly in the Universities of Montpellier and Toulouse. Private law was thus divided between Roman law-based codified law (*droit écrit*) in the south of France and German law-influenced customary law (*droit coutumier*) in the north of France.
- 2.33** However, the unification of French law was underway. First, the legal divide between the north and the south was more apparent than real, since German law customs coexisted with Roman law in the south while Roman law (in particular contract law) was called upon as *ratio scripta* to supplement or interpret customary law in the north. In contrast with Germany, Roman law was never effectively made the law of France; it only operated to the extent that it had become local customs in the south or that it was called upon as *ratio scripta* in the north. Secondly, the French monarchs' sixteenth compilation of customs laid the foundations for the blending of *droit coutumier* and *droit écrit*. Later, the *Coutume de Paris*—a digest of judicial decisions of *Parlement de Paris*—was recognized as nationally applicable, in effect taking precedence over Roman law in its gap-filling role of regional laws. This in turn made possible the unification of French private law under the *Code civil* of 1804, which was drafted after Domat's reordering of Roman rules according to natural law principles and, more significantly, after Pothier's reformulation of both Roman law and customary laws.

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<sup>59</sup> Kedar, *SSRN* (2007), 22.

<sup>60</sup> See para 2.87.

<sup>61</sup> See para 2.34.

## 2. The Code civil

The French *Code civil* of 1804 is without a doubt one of the most famous private law codifications in the world. In 1807 France introduced its *Code du commerce*, thereby adopting the dualist approach. Immediately after its entry into force the *Code Civil* became the flagship of the civil law tradition and throughout the nineteenth century served as a role model for numerous legal systems in all regions of the world. This is naturally true for France's immediate neighbourhood, namely Belgium and Luxembourg, where the respective *Codes civils* are almost identical to the French. Italy must be also counted among the traditional Roman-French civil law legal systems. The Spanish Civil Code of 1889, however, did not follow French law as closely as the aforementioned legal systems but rather looked to its former colonies for additional inspiration.<sup>62</sup> Furthermore, France as a dominating colonial power brought the *Code civil* into many countries, especially on the African continent.<sup>63</sup> **2.34**

It would, however, be inaccurate to state that the *Code civil* has only influenced civil law jurisdictions. For example, the foreseeability rule as a method of limiting damages is, contrary to popular belief, not a creature of common law but was adopted by common law jurisdictions from French law.<sup>64</sup> **2.35**

As much as it bears the traces of pre-revolutionary law (*ancien droit*), as was shown above, the *Code civil* owes to the French Revolution and its natural law-based concepts of property, freedom of contract, and family. The unification of the laws of France was, however, not achieved by the Revolution, but by Napoléon I. Indeed, all three Cambacérès-supervised drafts for a 'code of civil law common to the whole kingdom' were rejected by the revolutionary congress set up for drafting a constitution (*Assemblée Constituante*). In contrast, Napoléon appointed four law practitioners (Tronchet, Bigot de Préameneu, Portalis, and Maleville) with the mission to produce a *Code civil des Français*. Drafted in four months in 1804, the *Code civil* (also referred to as the *Code Napoléon*) reflects Napoléon's taste for clear and practicable rules and conservative social values (save for its liberal views on divorce) while remaining true to the spirit of the French Revolution. To the very day the *Code civil* is praised for its concise language that almost entirely dispenses with purely explanatory provisions and cross-referencing. Based on the revolutionary ideal the *Code civil* speaks to the free *citoyen* who does not need tutelage by higher authorities. In that it differs considerably from the two other main codifications inspired by the Age of Reason, namely Prussian law<sup>65</sup> and the Austrian Civil Code.<sup>66</sup> **2.36**

General sales law provisions are found in Book III, Title VI, *De la vente*, of the *Code civil*, defining a sale as well as outlining the essential elements for the valid formation of a sale (Articles 1582–98 CC) and the seller's main obligations consisting of delivery (Articles 1603–4 CC) and of warranty (Articles 1625–6 CC). They must be complemented by the otherwise applicable general contract rules on formation (Articles 1108 et seq CC), effects (Articles 1134 et seq CC) and interpretation (Articles 1156 et seq CC) of contract. **2.37**

Once a model for all the Roman law-based legal systems, the *Code civil* has lost its lustre outside of France, and surrendered its prominent role to special law codes within France. Against the background of the 2004 bicentenary of the *Code civil*, academics took a strong stance for modernization of the *Code civil*, which was deemed all the more vital in the context of the (still ongoing) harmonization and unification of European contract law. **2.38**

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<sup>62</sup> See paras 2.62 et seq.

<sup>63</sup> See for the influence of French law in this region paras 2.75 et seq.

<sup>64</sup> See on this issue paras 44.85 et seq.

<sup>65</sup> See para 2.45.

<sup>66</sup> See para 2.46.

### 3. Current Reform Projects

- 2.39** First changes to the *Code civil* were suggested or even completed around the time when the German Civil Code entered into force in 1900 and the Swiss Civil Code was finalized in 1907. Further changes were made throughout the twentieth century. However, these were not major reforms to the general structure of the *Code civil*.
- 2.40** At the time of writing, major reform projects were in process but not completed. Contrary to former changes to the *Code civil*, a fundamental change is intended. The overhaul of French private law follows a three-step process: limitation of action, contract, and civil liability. The first step has been completed, with the enactment in June 2008 of the statute reforming the law on prescription. The second—Book III (on contracts) of the *Code civil* is to be rewritten—and the third steps are yet to be taken.
- 2.41** At the time of writing, the French Ministry of Justice had still not accepted any of the proposals for reform (*Avant-projet Catala*, *Projet de la Chancellerie* and *Projet Terré*) which had been submitted by academics since 2005. First, the *Avant-projet Catala de réforme du droit des obligations et de la prescription* (November 2005) keeps with the grand French tradition of contract law: maintained are the traditional concept of ‘cause’<sup>67</sup> and the prohibition of judicial revision of contracts for change of circumstances. Secondly, the *Projet de la Chancellerie* (September 2008) is more amenable to European and international concepts, as adopted in the PECL or the PICC: in particular, the cause is replaced with the novel concept of *intérêt au contrat*, judicial adaptation of contracts (with the parties’ consent) is recognized, and three overarching principles (*principes directeurs*) are codified, namely freedom of contract, *pacta sunt servanda*, and good faith. It is noteworthy that both the *Avant-projet Catala* and the *Projet de la chancellerie* fill the gaps of the *Code civil* by setting definitions and establishing rules relating to pre-contractual obligations, formation of contracts, agency, and supervening events. Lastly, the *Projet Terré* (December 2008) markedly breaks with the grand French tradition of contract law by calling for the suppression of cause and broadly recognizing judicial power to modify the contract for change of circumstances. The strong European and international influences translate into the strengthening of the duty of good faith and recognition of the overarching principles of contract (freedom, loyalty, and coherence) but also, as critics say, into an economic law bias. The revised draft of January 2009 will most likely form a substantial part of the draft statute on contract law.

## III. Germanic Legal Systems

### 1. General

- 2.42** Germanic legal systems in the narrower sense comprise Austria, Germany, and Switzerland. In a broader sense they also cover those legal systems strongly influenced by these legal systems in Central Europe, such as Greece, but also in Eastern Europe and Central Asia<sup>68</sup> as well as East Asia.<sup>69</sup> Even Turkey could be counted among those legal systems with a Germanic background as the Turkish Civil Code of 1926 is a translation of the French version of the Swiss Civil Code and remains so despite the re-enactment in 2002. Today the Germanic legal systems in the narrower sense are Member States of the CISG.

### 2. Codifications During and at the End of the Nineteenth Century

- 2.43** The rediscovery of Roman law reached German territories at the beginning of the thirteenth century where it encountered Germanic law. In the following centuries Roman and Germanic

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<sup>67</sup> See on this concept Ch 9.

<sup>68</sup> For German influences in this region see para 2.118.

<sup>69</sup> For German influences in this region see paras 2.123 et seq.

law became more and more one single law and had fully combined by the seventeenth century.<sup>70</sup> This legal system has traditionally been called *ius commune*,<sup>71</sup> which at the beginning of the nineteenth century was, however, superseded by regional laws such as in particular the Prussian ALR of 1794.

As is the case with all civil law jurisdictions independent of the region, the nineteenth century was the century where the major codifications in Germanic legal systems were drafted and enacted. **2.44**

**(a) Prussian *Allgemeine Landrecht*** The first notable codification was the *Allgemeine Landrecht für die Preußischen Staaten* of 1794. Apart from the Austrian Civil Code it is considered the most important German codification stemming from the Age of Reason.<sup>72</sup> With its almost 20,000 provisions it is by far the largest codification of its era. The rules applying to sales contracts are found in Part 1, Section 11, Subsection 1 with its 375 paragraphs.<sup>73</sup> The number of details addressed clearly reflects the self-image of Prussia at the time. The Prussian ALR explains to everyone every detail of their position in society. It does so in a very fatherly manner—that is, it is written in comprehensible but even condescending language. No room is left for individual space but the individual is assured of an omnipotent administration taking care of everything.<sup>74</sup> **2.45**

**(b) The Austrian Codifications** Together with the French Civil Code of 1804 and the Prussian Code of 1794, the Austrian Civil Code of 1811 is the third major codification in Europe. As is the case with the former two codes, the Austrian Civil Code is clearly inspired by the Age of Reason. It was prepared from the middle of the eighteenth century onwards. The tone used is less fatherly and explanatory than that of Prussian law but in a number of instances still displays the hierarchy of a monarchical system<sup>75</sup> in that it does not achieve the thrifty legal language of the French Civil Code which, in the spirit of revolutionary France, intends to speak to the free individual who is not in need of tutelage. The Austrian Civil Code was reformed on three main occasions (*Teilrechtsnovellen*) the last of which was in 1916. **2.46**

Austria follows the dualist approach in that aside from the Civil Code it has enacted a separate Commercial Code (*Handelsgesetzbuch*). This latter code was reformed in 2007 and is now called *Unternehmensgesetzbuch* (Company Law). The goal of the legislator to adapt the code also to developments at the international level becomes apparent when having regard to the fact that the obligation of the buyer to notify the seller of any defects found is now phrased along the lines of Article 39(1) CISG requiring notice to be given within a reasonable period of time.<sup>76</sup> **2.47**

**(c) The German Codifications**

**(i) General** The German Civil Code (BGB) entered into force on 1 January 1900. A first commission with the task of drafting a civil code had been instituted in 1874; its draft was published in 1888. In 1890 a second commission began revisions on the draft. On 18 August 1896 Kaiser Wilhelm II signed the law. The German Civil Code was subsequently embraced **2.48**

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<sup>70</sup> See Wieacker, p 82.

<sup>71</sup> See *ibid.*

<sup>72</sup> See Zweigert/Kötz, p 137.

<sup>73</sup> All further §§ Pr ALR cited are to be found within Part 1, Section 11, Subsection 1.

<sup>74</sup> See Zweigert/Kötz, p 137.

<sup>75</sup> See *id.*, p 163 who point out explanatory provisions and express cross references within the code.

<sup>76</sup> See AUT § 377 Comp C.

especially in the East Asian region<sup>77</sup> but also in Greece, Portugal, and some Eastern European and Central Asian legal systems.<sup>78</sup>

- 2.49** The spirit of the BGB is a liberal one and its language and technique reveal that its drafters had upper-class citizens in mind rather than working people or small manufacturers.<sup>79</sup> The social developments in Germany that had started in the middle of the nineteenth century and substantially changed the country's social structure in the following decades have to a great extent gone unnoticed. The BGB has thus rightly been described as being more like the end of the nineteenth rather than the beginning of the twentieth century.<sup>80</sup>
- 2.50** Germany also follows the dualist approach which means that besides the BGB there exists a specific code dealing with commercial contracts in cases where at least one of the parties is a merchant as defined by this code,<sup>81</sup> this code being the *Handelsgesetzbuch* (HGB) of 10 May 1897 which—together with the BGB—entered into force on 1 January 1900. It is also a product of the unification processes in the nineteenth century.
- 2.51** (ii) *Modernization* On 1 January 2002 the modernization of the German law of obligations entered into force. It was the largest law reform since the introduction of BGB more than 100 years before. Even in 1978 the German Minister of Justice announced preparations for a modernization of the law of obligations. Between 1981 and 1983, in the wake of the drafting and finalizing of the CISG, 24 expert opinions were requested dealing with all areas of the law of obligations.<sup>82</sup> On 2 February 1984 the Commission for the Reform of the Law of Obligations held its constituent assembly. Its task was to make suggestions as to how the legislator could adapt the law of obligations to modern day conditions, in particular the fields of general liability for breach of contract, liability for breach of sales contracts, as well as work and service contracts and the rules governing the limitation of actions.<sup>83</sup> In 1991—the same year in which the CISG entered into force in Germany—the Commission completed its report including the draft of a new law of obligations.<sup>84</sup> It was in most aspects closely modelled on the CISG both in legislative technique and legal concept.<sup>85</sup> In 1994 the sixtieth DJT discussed the report and the majority voted for a modernization of the law of obligations.
- 2.52** By that time however, the enthusiasm for a fundamental change of the law of obligations had substantially diminished. It was only the need to implement new EC directives<sup>86</sup> into domestic law that revived the reform project in the year 2000. Yet, it put the federal government under intense time pressure.<sup>87</sup> Although the directives offered to change the law only at certain points without fully revising it, the German legislator decided in favour of the so-called '*große Lösung*' ('large solution').<sup>88</sup> The Federal Department of Justice issued a second draft for

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<sup>77</sup> See paras 2.123 et seq.

<sup>78</sup> See for these latter legal systems para 2.115.

<sup>79</sup> See Zweigert/Kötz, pp 142, 143.

<sup>80</sup> This is a famous statement by Gustav Radbruch (cited *ibid*, p 142).

<sup>81</sup> For the definition of merchants see §§ 1–6 HGB.

<sup>82</sup> These expert opinions were published in Bundesminister der Justiz (ed), *Gutachten und Vorschläge zur Überarbeitung des Schuldrechts*, vols I–III (Cologne: Bundesanzeiger, 1981–3).

<sup>83</sup> See the detailed statement of the then German Minister of Justice Hans A Engelhard concerning the task of the Commission in *NJW* (1984), 1201ff.

<sup>84</sup> This report is published as Bundesminister der Justiz (ed), *Abschlussbericht der Kommission zur Überarbeitung des Schuldrechts* (Cologne: Bundesanzeiger, 1992).

<sup>85</sup> cf *Abschlussbericht*, pp 26ff; Schlechtriem/Schmidt-Kessel, para 10; Lorenz/Riehm, para 3.

<sup>86</sup> Directive of 25 May 1999 (1999/44/EC—Consumer Protection), Directive of 8 June 2000 (2000/31/EG—e-Commerce), Directive of 29 June 2000 (2000/35/EG—Delay in Payment).

<sup>87</sup> These directives had to be implemented by 1 January 2002.

<sup>88</sup> In favour of this solution with convincing arguments Schlechtriem, *Gewährleistungsrecht*, pp 205ff.

a possible law reform on 4 August 2000 which received harsh criticism.<sup>89</sup> On 17 January 2001 a second commission (Reform Commission II) held its constituent assembly. This Commission reversed a number of decisions of the first Commission and led the draft in various respects away from the CISG and back to German dogmatism.<sup>90</sup>

**(d) Codifications in Switzerland**

*(i) General* Switzerland has seen a complex history in the development of its current private law codifications. It differs from Austria and Germany structurally insofar as it has not enacted a civil code and a commercial code but has chosen a different line drawing. The current Swiss private law codifications are the Civil Code of 1907 and the Code of Obligations of 1911. The latter contains the Swiss sales law. However, the Code of Obligations is not structured along the lines of civil and commercial contracts and obligations in general, but rather establishes specific provisions applying only to merchants at various points and always directly in the context of the legal issue addressed. Consequently, Switzerland has not enacted a separate commercial code. **2.53**

*(ii) Law of Obligations and Civil Code* Originally, the Swiss federal legislator was not vested with the competence to codify private law. Yet, the wave of codifications in the nineteenth century also reached the individual Swiss cantons which—beginning in the 1830s and through to the 1860s—enacted individual private law codifications. Notable examples are the Berne Civil Code of 1834 and the Zurich Law of Obligations of 1855. **2.54**

With commerce increasingly extending beyond cantonal borders the unification of Swiss private laws became desirable. In 1874 after intense debates the federal legislator was vested with the competence to make laws at least in some areas of private law. However, this competence was broad enough to cover the law of obligations. The first federal law of obligations was enacted in 1881. Existing tendencies to strive for a general Swiss civil code gained momentum in the following years. In 1884 Eugen Huber, a professor at Basel University, was given the task of preparing a report on the existing private laws in Switzerland. Before that report was finished, Huber was asked by the head of the federal department of police and justice to prepare a draft for a civil code. Huber completed the draft before 1898 when by a change of the constitution the federal legislator was vested with the authority to enact a Swiss civil code. Huber, also a member of parliament, subsequently guided his code through the swamps of parliamentary proceedings and created public support by publishing newspaper articles and public lectures until in 1907 his code was accepted as the Swiss Civil Code. It entered into force on 1 January 1912. The interval was used to adapt the existing Code of Obligations. **2.55**

The Swiss Civil Code and the Swiss Code of Obligations are two separate codifications and with an individual numbering of the respective provisions. The Code of Obligations is divided into a total of five parts. The first part contains general contract law, tort law, and unjust enrichment. The second part contains the rules on specific contracts, among them sales contracts. Parts three to five contain corporate law and commercial papers. Despite their separation, the Swiss Civil Code and Code of Obligations must be seen together. From a substantive point of view the Code of Obligations is part of the Civil Code. This means in particular that the general rules of the Civil Code also apply to the Code of Obligations and hence also to sales contracts. This in particular addresses issues such as legal capacity. **2.56**

Although Switzerland has never witnessed a comprehensive reception of Roman law, the Code of Obligations displays strong Roman law influences. The reason is that the current Code of **2.57**

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<sup>89</sup> The respective contributions are published in Ernst/Zimmermann (eds), *Zivilrechtswissenschaft und Schuldrechtsreform* (Tübingen, 2001).

<sup>90</sup> See on the developments of the revised law of obligations Schlechtriem, *Neues Schuldrecht*, pp 71ff.

Obligations mainly consists of the first Code of Obligations of 1881. The latter in turn was based on the Zurich Law of Obligations of 1855 and an 1866 German draft for a law of obligations. Both sources were based on the pandectist school prevalent in Germany at the time.

#### IV. Nordic Systems

- 2.58** Nordic<sup>91</sup> legal systems (Denmark, Finland, Iceland, Norway, and Sweden) are considered to form an individual legal family which displays both civil law and common law elements.<sup>92</sup> They resemble the traditional concept of 'common law' insofar as they all lack an integral codification of private law but have developed individual 'Acts' for the respective fields of private law, such as general Acts on contracts and more specific Acts relating to sales law,<sup>93</sup> company law, intellectual property rights, etc. This statement must of course be qualified in that Sweden in 1734 enacted the Code which, however, has been repealed in many aspects and is described as being 'nominally in force'.<sup>94</sup>
- 2.59** However, despite the resemblance to common law jurisdictions, none of these legal systems is familiar with a method of creating law by court practice which would be comparable to the concept of 'case law' as can be found in the traditional common law.<sup>95</sup> It follows that the respective 'Acts' in Scandinavian legal systems have a different function within the legal system from 'statutes' in common law legal systems.
- 2.60** On the other hand, Scandinavian legal systems are related to the civil law as well as they display Roman, German, and French influence.<sup>96</sup> Indeed, Sweden in particular at the beginning of the nineteenth century started works for a new civil code to replace the 1734 Code.<sup>97</sup> The proposed code was finalized in 1826.<sup>98</sup> The main influence on the drafters came from the French Civil Code; the German historic school strongly influenced legal scholars and conservative politicians whose resistance eventually led to the failure of the project.<sup>99</sup>
- 2.61** By the end of the nineteenth century the Nordic systems resumed work on their contract laws and thereby focused on commercial law and more specifically sales law.<sup>100</sup> In 1905 the Swedish Sale of Goods Act entered into force and was followed by the respective Sale of Goods Acts in Denmark, Finland, and Norway.<sup>101</sup> Subsequent legislative activities relevant to sales law included statutes on consumer protection. Most notably the entry into force of the CISG caused most of the Nordic systems (save for Denmark and Iceland) to reform their respective Sale of Goods Acts which were then closely modelled on the CISG and entered into force between 1988 and 1990. Denmark reformed its Sale of Goods Act in 2007.

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<sup>91</sup> The term 'Scandinavian' is also often used but geographically neither Finland nor Iceland belongs to Scandinavia, see Lindblom, 39 *Scand Stud L* (2000), 325. Admittedly, the term 'Nordic' may also be misleading as the Baltic States (EST, LVA, LITU) might also consider themselves to be Nordic rather than Eastern European countries. See generally on the terminology Bernitz, 50 *Scand Stud L* (2007), 15.

<sup>92</sup> See Lindblom, 39 *Scand Stud L* (2000), 326; Malmström, 13 *Scand Stud L* (1969), 127 et seq. See generally also Hondius, 50 *Scand Stud L* (2007), 144ff.

<sup>93</sup> See for the old Nordic Sale of Goods Acts, Rabel, *Recht des Warenkaufs*, vol I, pp 25 et seq. For the development of the current Swedish Sale of Goods Act see Hellner, 22 *Scand Stud L* (1978), 55ff.

<sup>94</sup> See Hellner, 40 *Scand Stud L* (2000), 327.

<sup>95</sup> See on the role of the respective Supreme Courts in the Nordic systems Lindblom, 39 *Scand Stud L* (2000), 325ff.

<sup>96</sup> See on the role of the respective Supreme Courts in the Nordic systems Lindblom, 39 *Scand Stud L* (2000), 325ff.

<sup>97</sup> See Hellner, 40 *Scand Stud L* (2000), 326.

<sup>98</sup> See *ibid.*

<sup>99</sup> See *ibid.*

<sup>100</sup> See *ibid.*, 330.

<sup>101</sup> See *ibid.*, 326.

## E. Ibero-American Legal Systems

### I. General

The term ‘Ibero-American legal systems’ in this work refers to Portugal and Spain in Europe and the legal systems in Middle and South America. The Ibero-American legal systems clearly belong to the civil law legal family. More precisely they can to some extent be counted among the Romanistic systems. However, as further discussed below, the Ibero-American legal systems as they stand today have incorporated various influences from different legal traditions. Statements simply classifying the Ibero-American legal systems as French legal systems are therefore an inaccurate assessment.<sup>102</sup> **2.62**

### II. Codifications

#### 1. Early Laws

The first codifications of private law for the Ibero-American legal systems can be traced back to the fourteenth century when in Spain a codified body of laws was established named *Las Siete Partidas*. In essence, this code was Roman law as adapted by the glossators. The fifth part, *Quinta Partida*, dealt with the law of obligations and contracts. Among other rules and laws, this codification was introduced to the newly discovered colonies. However, in the hierarchy of applicable laws it ranked behind the *Ordenanzas*, rules dictated by the royal court and the king himself which would prove to be of crucial importance from the sixteenth until the nineteenth century. **2.63**

Similarly, Portugal had developed codified private law in the *Ordenações Alfonsinas* of 1446. **2.64** Two further *Ordenações* followed in the next two centuries, namely in 1521 and 1603. These were brought to the colony Brazil where the last remained the applicable private law until 1917 when the first Brazilian Civil Code entered into force. In the same way as their Spanish counterparts, the *Ordenações* mainly followed Roman law, partly because *Las Siete Partidas* were influential in the development of the *Ordenações*.

#### 2. Codifications in the Nineteenth Century

(a) **General** Between the sixteenth and the nineteenth century, contract and commercial law in the Ibero-American systems were developed by specific rules contained in *Ordenanzas* and *Ordenações*. As stated, in Brazil, the only Portuguese colony on the American continent, the *Ordenações* applied. In the Spanish colonies the *Las Siete Partidas* and the *Ordonanzas de Bilbao* were the main laws applicable in that period. The latter had become the standard code for commercial law in the eighteenth century in Spain as well as the Spanish colonies and provided the foundation for the development of the commercial codes in the Ibero-American legal systems. **2.65**

(b) **Wave of Codifications in the Nineteenth Century** The wave of codifications that had been ignited at the beginning of the nineteenth century by the French Civil Code in particular soon reached the Ibero-American legal systems. Interestingly enough, it would be the former Spanish colonies that took the lead in this regard. Upon gaining their independence these legal systems primarily focused on the organization of their respective administrations and governments. Hence, for several years *Las Siete Partidas* and the *Ordonanzas de Bilbao* remained in force. By the middle of the nineteenth century works on the private law codifications began. With their newly gained freedom the former Spanish colonies would also take the opportunity to broaden the outside legal influences beyond the existing Spanish and Portuguese laws in **2.66**

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<sup>102</sup> See Muñoz, p 3.

their region. These were in particular Roman-Germanic law, the French Civil Code and other codifications from German and Swiss territories but also Austria and Prussia.

- 2.67** The first influential new codification of private law in the Ibero-American region was the Chilean Code of 1855 which inspired the codes in Colombia (1858), Ecuador (1858), El Salvador (1860), and Honduras (1880) as well as the first codifications of Nicaragua (1867) and Venezuela (1862). In essence it embodies the colonial private law which its principal drafter, Andreas Bello, believed to be advantageous as they were already known. In the 1860s the Argentinean Civil Code emerged as the model for private law codifications in the former Spanish colonies. This code entered into force in 1869. In Paraguay it entered into force even earlier, namely in 1866. This code was also adopted in Uruguay (1869), Nicaragua (1904),<sup>103</sup> and Panama (1916). Its main influences came from the colonial laws in Brazil and *Las Siete Partidas* but also a variety of European ideas were considered. The principal drafters, however, explicitly refused to simply follow the French model.
- 2.68** Compared to its Spanish counterparts the former Portuguese colony of Brazil stayed with the existing Portuguese colonial law for a considerably longer period of time. Having declared independence in 1822 (accepted in 1825), the first Brazilian Civil Code entered into force in 1916. This code was significantly influenced by the Portuguese, Italian, German, and Swiss codifications. It remained in force until 2003 when after 30 years of preparation a new Civil Code was enacted.
- 2.69** In the former colonial powers Portugal and Spain civil codes entered into force in 1867 and 1889 respectively. Interestingly enough, Spain in particular moved closer to the model presented by its former colonies while moving away from the dominant French model. The Spanish Civil Code would, however, exert little influence but apply only in Cuba and Puerto Rico until they enacted their own codes. Portugal enacted its current Civil Code in 1966 and repealed that of 1867. The current Portuguese Civil Code has been heavily influenced by German law.
- 2.70** The vast majority of Ibero-American legal systems follow the so-called dualist approach,<sup>104</sup> which means that they have enacted a separate code for commercial transactions.<sup>105</sup> Through the Spanish Commercial Code these commercial codes were influenced by the French Commercial Code of 1807.

### *3. The Situation Today*

- 2.71** In summary, the Ibero-American legal systems as they stand today are a fairly homogeneous group of legal systems. Common origins in Portuguese and Spanish law, which in turn were influenced by Roman-French law as well as reciprocal influence in the drafting process of their own civil codes, have to a certain degree harmonized these legal systems.
- 2.72** The Ibero-American legal systems display a positive attitude to the development of sales law at the international level. Thirteen of them have become Member States of the CISG.<sup>106</sup> In the near future Brazil and Portugal are expected to do so as well.

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<sup>103</sup> Nicaragua had previously adopted the 1855 Chilean Civil Code in 1858.

<sup>104</sup> See for the monist and dualist approaches also paras 6.03 et seq.

<sup>105</sup> See Muñoz, p 41.

<sup>106</sup> ARG, CHL, COL, CRI, CUB, DOM, ECU, ESP, HND, MEX, PER, PRY, SLV, URY.

## F. African Legal Systems

### I. General

In the present work the reference to African legal systems is a reference to the sub-Saharan region. North African legal systems are classified as Arabic legal systems despite their geographic location. **2.73**

### II. Pre-Colonial Period

Before the colonial period the sub-Saharan region had barely any contact with the outside world. Societies were organized in empires, tribes, and communities with individual legal systems. As far as can be determined, law was entirely based on customs, tribal practices, and religious beliefs individual to the respective societies. The lack of written pre-colonial history, however, makes it impossible to access reliable information in this regard. The colonizing powers did also not establish records of the situation they found upon their arrival. **2.74**

### III. The Colonial Period

For its main part the colonization of the African continent took place from the sixteenth century to the first decade of the twentieth century. In this period almost the entire continent was colonized,<sup>107</sup> predominantly by Europeans. The main legal influences were French law and laws based on the French model, Dutch, and English law. **2.75**

The interplay of these outside legal influences with the existing pre-colonial law very much depended on the way the colonizers ruled the individual colonies. The English used what has become known as an ‘indirect rule’. This meant that the local chiefs and institutions were left in place and given—albeit restricted—authority to make decisions. In this way they acted as intermediaries between the people and the English administration. This structure allowed indigenous law to coexist with English law. A similar approach was taken by Dutch colonizers who in the seventeenth century established Roman-based Dutch law alongside the existing indigenous law, especially in South Africa. Subsequently, a combination of English common law and indigenous law was implemented. **2.76**

The French, however, exercised a so-called ‘direct rule’. This meant that they replaced the existing institutions with their own administration and ruled without local intermediaries. This also entailed a strict implementation of French law thus suppressing indigenous law. This approach was also taken by Italian, Portuguese, and Spanish colonizers who strictly implemented their laws in the colonies.<sup>108</sup> Similarly, the USA introduced their common law to Liberia, the only US colony on the African continent. **2.77**

A third approach was taken by Belgian colonizers who did not introduce pure Belgian law to their colonies but had elaborated a specific civil code that was adapted to the situation in the colonies.<sup>109</sup> **2.78**

It is clear that through the centuries of colonization and wars individual countries would experience different colonial powers and hence different legal influences. For the time after World War II these influences can be narrowed down to Dutch, English, and French law. **2.79**

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<sup>107</sup> Ethiopia does not have a colonial history and is indeed considered to be the oldest state worldwide to be still in existence.

<sup>108</sup> Among the existing countries Italy colonized Somalia. Portuguese colonies were Angola, Cape Verde, Guinea-Bissau, and Mozambique. Spain colonized Equatorial Guinea.

<sup>109</sup> These colonies were Burundi, Democratic Republic of Congo, and Rwanda.

## IV The Situation Today

### 1. General

**2.80** The variety of legal influences during the colonial period is still present as the colonies did not undertake major law reforms upon gaining independence but stayed with the legal systems introduced by the colonizers. Broadly speaking, the sub-Saharan legal systems can be grouped along the traditional lines of civil law, common law, and mixed jurisdictions.

### 2. Civil Law Jurisdictions

**2.81** Among the sub-Saharan civil law legal systems are Benin, Burkina Faso, Burundi, Cameroon, Central African Republic, Chad, Comoros, Democratic Republic of Congo, Republic of Congo, Ivory Coast, Gabon, Guinea, Guinea Bissau, Equatorial Guinea, Mali, Niger, Rwanda, Senegal, and Togo.

**2.82** When gaining independence the majority of the sub-Saharan countries were French colonies and consequently they inherited the 1804 French Civil Code, the 1806 French Commercial Code, and the 1807 French Law on Commercial Companies. Through the next decades individual reforms in France were either followed, ignored, or simply remained unnoticed. Major law reforms were only undertaken in Senegal, Mali, and Guinea where new legislation on contract law was enacted. However, they still reflected the French Civil Code.

**2.83** Hence, today the sub-Saharan civil law legal systems display a certain degree of harmonized laws in that the 1804 French Civil Code in one or the other version is still in force in these legal systems. However, these legal systems have not collectively developed their private laws, as some adopted French reforms while others did not and some adopted all reforms while others only a few. It is, however, recognized in these legal systems that harmonized laws are desirable to facilitate trade and foster economic development.

**2.84** In order to achieve this, the *Organisation pour l'Harmonisation en Afrique du Droit des Affaires* (OHADA) was founded.<sup>110</sup> This organization has, inter alia, produced the *Acte Uniforme Relatif au Droit Commercial General* (AUDCG) to govern sales transactions.<sup>111</sup> As clarified by OHADA, uniform acts enacted by OHADA apply not only to cross-border contracts between parties located in OHADA Member States but also supersede domestic laws addressing the same issues. Hence, in the area of sales law domestic law only applies where the OHADA legislation is silent.

### 3. Common Law Jurisdictions

**2.85** The sub-Saharan common law jurisdictions except for Liberia are all based on English law. These systems include Ghana, Kenya, Nigeria, Malawi, Tanzania, Uganda, and Zambia. It should be noted, however, that the East African common law jurisdictions—Kenya, Uganda, and Tanzania—when becoming English colonies did not immediately adopt English contract law but rather implemented the 1872 Indian Contracts Act. That Act at the time also contained specific sales law which was repealed when India adopted the 1893 English Sale of Goods Act, which then was also adopted in the East African common law jurisdictions.

**2.86** Today the sub-Saharan common law jurisdictions all have established individual sale of goods Acts (sometimes called ordinances) which essentially reproduce the 1893 English Sale of Goods Act. In the area of general contract law these jurisdictions also follow the English model in that there is no statute governing general contract law. Among the East African common law jurisdictions Tanzania maintains its Law of Contracts Act, which continues to be a reproduction of

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<sup>110</sup> See also paras 3.39 et seq.

<sup>111</sup> See also *ibid.*

the 1872 Indian Contracts Act, while Kenya and Uganda have repealed it and introduced English common law for the area of general contract law.

#### 4. Mixed Systems

The two most important mixed jurisdictions on the African continent are Cameroon and South Africa. However, the South African legal system and its sales law in particular also apply in Botswana, Lesotho, Namibia, Swaziland, and Zimbabwe. **2.87**

Initially, Cameroon was ruled by German and Portuguese colonizers. After World War II it was shared by England and France. Upon gaining independence the northern part of Cameroon maintained French law while the southern part maintained English law. This potential conflict of sales laws today is mitigated by the fact that the *Acte Uniforme Relatif au Droit Commercial General* (AUDCG) enacted by OHADA applies to all domestic sales in the whole of Cameroon as the whole of Cameroon is an OHADA Member State. Divergent approaches may, however, resurface where the *Acte Uniforme* is silent. Depending on where the case is litigated, English or French law applies to the remaining issues. **2.88**

South Africa—and hence the legal systems following it—displays a variety of influences. Roman law continues to exist alongside a combination of Dutch law and English common law mixed with indigenous law. The main source of sales law therefore is uncodified judge-made law. However, it appears that sales law generally follows the English model. **2.89**

## G. Middle Eastern and Arab Countries

### I. General

The legal systems treated in this work as Middle Eastern and Arab countries are those on the Arabian Peninsula, the Middle East, and Northern Africa. In particular, these systems include Afghanistan, Algeria, Bahrain, Egypt, Iran, Iraq, Jordan, Kuwait, Lebanon, Libya, Mauritania, Morocco, Oman, Qatar, Saudi Arabia, Syria, Tunisia, United Arab Emirates, and Yemen. **2.90**

All Middle Eastern and Arabic legal systems can be classified as civil law legal systems in that they all have enacted central private law codifications which contain typical Roman law-based legal concepts. Over the centuries a total of four colonizing powers have exerted influence on these legal systems, namely the Islamic Empire, the Ottoman Empire, the British Empire, and France. **2.91**

### II. Main Influences

Contrary to popular belief the laws existing in the Middle Eastern and Arabic legal systems cannot simply be equated with religious rules such as Shari'a. Rather these legal systems employ both religious and secular laws. The interplay of these sources of law differs among these legal systems. To understand the general picture it is necessary to bear in mind where the legal influences came from. **2.92**

#### 1. Shari'a

During the sixth and seventh centuries the Middle Eastern countries adopted Islam as their religion. The Islamic Empire then continued to extend across North Africa and the southwestern parts of Europe until it reached Tours and Poitiers in 732 AD. With the religion of Islam the Shari'a was introduced to the individual countries in the Middle East and North Africa. **2.93**

(a) **General** To understand the influence of Shari'a it is necessary to first clarify the term itself. The traditional Shari'a is not a written codification of rules and laws but rather a cultural tradition. It consists of the whole body of religious, legal, and social commandments that according to Islamic belief was handed down from Allah through the Prophet Mohammad. **2.94**

The main sources in Shari'a are the Quran and the *Sunna* (the Prophet's deeds, utterances, and unspoken approvals).

- 2.95** As Shari'a as a cultural tradition is a rather vague body of norms, a total of five schools of thought has developed in the centuries following the Prophet's death into medieval times. Each of these schools offers different interpretations of Islamic law. Four of these schools (Hanafi, Maliki, Shaf'i, and Hanbali) are in the tradition of Sunni Islam and one (Ja'fari) in the tradition of Shi'ite Islam. These schools of thought, however, not only interpret existing Islamic law but are also called upon when it comes to developing law because the sources of Shari'a are silent. Main disputes include the legitimacy of drawing analogies; the necessity of consensus in the community; and endorsement by the infallible Imam, sound reason, and public interest as sources of law.
- 2.96** Shari'a contains an entire law of contract which was shaped during the seventh century. The general framework is formed by the prohibitions of usury (*riba*) and speculative contracting (*ghbarar*). Within that framework it is acknowledged that commercial trade is allowed under Shari'a. A number of transactions are subsumed under sales contracts, including the sale of commodities, contracts for goods to be manufactured, barter, and money exchange.
- 2.97 (b) Impact** Although Shari'a has undeniably influenced all codifications in the Middle Eastern and Arabic legal systems, the extent of this influence varies significantly among these legal systems. In particular, the impact of Shari'a depends on the individual school of thought that is favoured in a legal system. Over time the Middle Eastern and Arabic legal systems have increasingly restricted the application of Shari'a. It was either replaced by secular laws or with laws that were considered to give codified expression to a more modern interpretation of Shari'a. Today Saudi Arabia and Iran are the only two countries where Shari'a is said to be enforced in its entirety. In these legal systems religious councils are in charge of determining the application of Shari'a and to a large extent may veto legislation if not compatible.

### 2. Ottoman Empire

- 2.98 (a) General** The Ottoman Empire lasted from 1299 to 1923. Its successor is Turkey. During the sixteenth and seventeenth centuries the Ottoman Empire ruled territories in south-eastern Europe, south-western Asia and North Africa. Its main legal reforms began in the second half of the nineteenth century. At the heart of these legal reforms lay the codification which became known as *Al Majalla* and which had lasting influence on the Middle Eastern and Arab countries long after the Ottoman Empire had collapsed.
- 2.99 (b) Development of *Al Majalla*** The development of *Al Majalla* began in 1869 when a drafting committee was instituted to produce a Shari'a-based private law. The committee soon came to the conclusion that the rules and laws embodied in Shari'a had to be codified in order to make them manageable. As a result, the Ottoman Civil Code—termed *Al Majalla*—gave Shari'a a comprehensive written form and became the first authoritative text to embody substantive Islamic law.
- 2.100** *Al Majalla* was implemented into the legal systems that belonged to the Ottoman Empire at the time and remained in force for decades after the Empire had collapsed. It was only during the 1950s when the Middle Eastern and Arab countries re-codified their laws in civil codes and codes of obligations that *Al Majalla* was revoked. Today it is nowhere in force. The last legal system to revoke it was Kuwait in 1980. However, as Shari'a continues to exist in Middle Eastern and Arab legal systems alongside the private law codifications, *Al Majalla* is used as the reference for the principles of Shari'a.

### 3. England and France

- 2.101** A few Middle Eastern and Arab countries were, for some time, under English control. Prominent examples include Bahrain, Egypt, Iraq, Jordan, Kuwait, Oman, and parts of Yemen. The common law, however, had no long-term impact in this region.

In contrast, French law to the very day has held a dominating position in Middle Eastern and Arabic countries. Even those systems that were under English control based their laws on French law upon gaining independence. **2.102**

### **III. The Situation Today**

#### *1. General*

Nowadays the Middle Eastern and Arabic legal systems form a fairly homogeneous group of legal systems. The interplay of secular private law and religious law continues to be of relevance. In that regard three groups of legal systems are distinguished: first, legal systems that modernized their legal systems and used Western societies as guidelines; secondly, legal systems that re-Islamized themselves; thirdly, Saudi Arabia, which preserves the traditional model of a Shari'a legal system. **2.103**

#### *2. Codifications*

The vast majority of Middle Eastern and Arabic legal systems today have enacted comprehensive private law codifications. All of them are based on French law. Islamic law is represented at varying degrees. As regards the codifying technique, some systems have enacted a separate code of obligations alongside their civil codes. Those systems that did not establish a separate code of obligations typically have enacted a separate commercial code. **2.104**

The earliest codification following *Al Majalla* was enacted in Lebanon in 1932. However, the actual wave of codifications was set off in 1948 by the Egyptian Civil Code that became the blueprint for a number of other Middle Eastern and Arab legal systems. Similarly, the Jordanian Civil Code of 1978 had significant influence on the Federal Civil Code of the United Arab Emirates (1985) and the Yemeni Civil Code (1992) as Islamic law is more strongly represented than in the Egyptian Civil Code. **2.105**

## **H. Eastern Europe and Central Asia**

### **I. General**

The collapse of the Soviet Union turned Eastern Europe and Central Asia into a region of transition both politically as well as legally. For present purposes Eastern European and Central Asian legal systems are understood to include Albania, Armenia, Azerbaijan, Belarus, Bulgaria, Croatia, Czech Republic, Estonia, Georgia, Hungary, Kazakhstan, Kyrgyzstan, Latvia, Lithuania, Moldova, Poland, Romania, Russia, Serbia, Slovakia, Slovenia, Tajikistan, Turkmenistan, Ukraine, and Uzbekistan. As discussed below, it is almost impossible to group these legal systems regarding their legal traditions. However, all of these legal systems can be classified as civil law legal systems. **2.106**

At the time of writing the transition period reached the twenty-year mark. The reforms made in this region, especially in the 1990s, and the integration into the international legal community have been successful. Indeed, a significant number of the Eastern European legal systems have joined the European Union,<sup>112</sup> will do so in the near future,<sup>113</sup> or are official candidates.<sup>114</sup> Furthermore, the CISG has gained broad acceptance among Eastern European and Central Asian legal systems. **2.107**

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<sup>112</sup> BGR, CZE, EST, HUN, LTU, LVA, POL, ROM, SVK, and SVN.

<sup>113</sup> HRV.

<sup>114</sup> ALB, SRB.

## II. Pre-Soviet Period

### 1. General

- 2.108** To understand the legal traditions in the Eastern European and Central Asian region it is necessary to briefly look to the time before the Soviet Union. The legal systems in the region under consideration here border different cultural regions and consequently a variety of cultural, and thus also legal, influences can be discerned.

### 2. Main Historical Influences

- 2.109** The list of influences discernible in Eastern Europe and Central Asia is long and the legal systems of that region can hardly be grouped along any lines in this regard. This is also due to the fact that influences changed over time and many legal systems have witnessed a rich and complex legal history. Hence, only very broad categorizations can be made.
- 2.110** Those systems bordering the Middle Eastern and Arabic legal systems have been under the influence of Byzantine, canonical, and Islamic law. Indeed the above-mentioned *AlMajalla*<sup>115</sup>—that is, the Shari'a as codified in the Ottoman Empire—was the applicable law in Albania, Armenia, and Azerbaijan. Islamic laws were also present in Kazakhstan, Kyrgyzstan, Tajikistan, Turkmenistan, and Uzbekistan. Bulgaria was under Islamic as well as Byzantine influence. Byzantine influence was the predominant one in Georgia, Moldova, Romania, and Serbia.
- 2.111** The Western influences came from Austria and France in particular. Austrian law was especially influential in Croatia, Czech Republic, Hungary, Slovakia, and Slovenia. French law exerted influence on Poland which has, however, also seen influences of Austrian and German law. Romania also displays influence of French law.

### 3. Pre-Soviet Codifications

- 2.112** As in other civil law legal systems, the first wave of codifications took place in the nineteenth century. In this regard the earlier influences continued to be of importance. However, the Eastern European and Central Asian legal systems frequently used their new codifications to follow the leading codifications of the time. These were in particular the French Civil Code of 1804 and the Austrian Civil Code of 1811 which formed the basis for the pre-Soviet codifications in Eastern Europe and Central Asia.

## III. Soviet Period

- 2.113** With the establishment of the Soviet Union, which encompassed almost all of the Eastern European and Central Asian jurisdictions, the legal development in these systems is fairly uniform. As a first step the Soviet regime sought to remove all pre-existing legislative acts in its republics. These jurisdictions would then implement the 1922 Russian Civil Code. The Russian Civil Code in essence adopted Roman-Germanic legal structures but was adapted to the premises of socialism. Plans to draft a new codification as envisaged by the 1936 Stalin constitution were dropped. However, in 1964 a set of general principles of Soviet private law was published and implemented in the individual republics.

## IV. Post-Soviet Period

- 2.114** After the collapse of the Soviet Union the former Soviet republics upon declaring their independence also declared the priority of their individual laws over the laws of the USSR. In 1991 the Commonwealth of Independent States (CIS) was founded and vested with the authority to draft model laws and recommend legislative acts. Between 1994 and 1996 the Model Civil Code was published in three parts. This found acceptance among various former

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<sup>115</sup> See paras 2.99 et seq.

Soviet republics<sup>116</sup> and has led to a considerable degree of harmonization among the laws of this region. The Model Civil Code draws heavily on the CISG. Hence, its broad acceptance by the former Soviet republics at the same time made them more receptive of the CISG. It is therefore not surprising that most of these legal systems have become Member States of the CISG without any great difficulties.<sup>117</sup>

However, acceptance of the Model Civil Code was not universal. In particular, Georgia, Moldova, and Turkmenistan followed the German model and even anticipated some of the changes that took effect in Germany upon the modernization of the law of obligations in 2002. Similarly, the Baltic States did not adopt the Model Civil Code drafted by CIS. Estonia and Lithuania adopted new codifications. Lithuania enacted a comprehensive civil code in 2000 which in the area of contract law was built on the CISG and the PICC. Estonia adopted a separate code of obligations in 2002 which today is considered one of the most modern laws of obligations currently in existence. It is built primarily on the CISG and the PICC but also takes into account the Dutch Civil Code and the Swiss Code of Obligations. In contrast, Latvia re-enacted its 1937 Civil Code. **2.115**

## I. East Asia

### I. General

The East Asian region is of eminent economic importance. When determined by gross domestic product, China and Japan are the second and third largest economies worldwide respectively.<sup>118</sup> India is ranked fourth<sup>119</sup> and Singapore, South Korea, and Taiwan are rapidly growing markets. Apart from these legal systems this work considers Cambodia, Malaysia, Mongolia, Pakistan, the Philippines, Thailand, and Vietnam. Although belonging to China, Hong Kong and Macau are addressed individually. **2.116**

The growing economic importance of the East Asian region is accompanied by significant movements in the development of private law in general and contract law in particular. In the last 15 years a number of these systems have reformed their laws or begun preliminary works for reforms. The currently most anticipated reform is that of private law in Japan where the draft for a new civil code has been published and is now discussed. **2.117**

In addition, the East Asian legal systems in their desire to grow economically have been particularly receptive to the developments in commercial law at the international level. As is discussed below the CISG was the basis for recently modernized legal systems and provides the blueprint for reforms which are currently in motion.<sup>120</sup> Furthermore, the Convention is also used to interpret existing traditional law in order to adapt to globalized trade. **2.118**

### II. Legal Families Represented

The East Asian legal systems are a heterogeneous group of legal systems.<sup>121</sup> However, broadly speaking they can be grouped along the traditional lines of civil law legal systems, common law legal systems, and mixed legal systems. These are discussed individually in the following. **2.119**

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<sup>116</sup> It was adopted in ARM, KAZ, KGZ, TJK, and UZB.

<sup>117</sup> ALB, ARM, BLR, BIH, BGR, CZE, EST, GEO, HRV, HUN, KGZ, LTU, LVA, MDA, MKD, MNE, ROM, RUS, SRB, SVK, SVN, UKR, UZB.

<sup>118</sup> As reported by the World Bank, see <[http://siteresources.worldbank.org/DATASTATISTICS/Resources/GDP\\_PPP.pdf](http://siteresources.worldbank.org/DATASTATISTICS/Resources/GDP_PPP.pdf)> (last accessed 24 July 2011).

<sup>119</sup> As reported by the World Bank, see <[http://siteresources.worldbank.org/DATASTATISTICS/Resources/GDP\\_PPP.pdf](http://siteresources.worldbank.org/DATASTATISTICS/Resources/GDP_PPP.pdf)> (last accessed 24 July 2011).

<sup>120</sup> See para 3.21 below.

<sup>121</sup> See paras 2.120 et seq for the different legal families represented.

1. *Traditional Civil Law Legal Systems*

- 2.120 (a) General** One group of legal systems in East Asia belongs to the civil law legal family. These legal systems are Cambodia, China, Japan, Macau, Mongolia, South Korea, Taiwan, Thailand, and Vietnam. These again can be grouped into traditional civil law legal systems—which are Japan, Macau, South Korea, Taiwan, and Thailand—and modern legal systems which are Cambodia, China, Mongolia, and Vietnam. This latter group is discussed separately below.<sup>122</sup>
- 2.121** In the development of their laws these legal systems were on the one hand receptive to influences from civil law legal systems in Europe and on the other hand influenced each other. This, however, not only concerns the drafting of law. These influences also take effect at the educational level, as for example traditional German-style courses have been adopted at Chinese law schools.<sup>123</sup> Similarly, authoritative textbooks on Taiwanese law continue to be main educational material at Chinese law schools.<sup>124</sup>
- 2.122** Part of the European civil law influence came from Portugal as Macau was under Portuguese rule between 1887 and 1999.<sup>125</sup> Portugal extended the sphere of application of its Civil Code to Macau in 1966 where it was applied from 1967.<sup>126</sup> Upon its return to China in 1999, Macau enacted a new civil code in a Chinese and Portuguese version.<sup>127</sup> The new code, however, still closely follows the 1966 Portuguese Civil Code with some modifications based on Roman and German tradition.<sup>128</sup>
- 2.123 (b) German Influence** The main influence on East Asian civil law legal systems, however, came from Germany, with Japan acting as the gateway. Initially, the French Civil Code of 1804 was the role model for the Japanese Civil Code. However, after strong controversy the Japanese legislature ultimately abandoned this role model in 1898. Already in 1896 books 1–3 of the current Civil Code were enacted and in 1898 books 4 and 5 followed. Both parts were modelled almost exclusively on the first draft of the German Civil Code from 1888. Traces of French law, however, are still to be found in the Japanese Civil Code. It should be noted that the drafting committee over the course of the preliminary works on a Japanese Civil Code had collected and evaluated materials from over 30 legal systems, including the USA and England. As stated earlier, the Japanese Civil Code is currently under revision and a draft has been published. The main sources of influence are now the CISG and the uniform projects.<sup>129</sup>
- 2.124** Shortly after the enactment of the Japanese Civil Code, German law was exported to Taiwan, South Korea, and Thailand. In addition to Japan, these legal systems are typically referred to as Asian-Germanic legal systems.
- 2.125** By the end of the first decade of the twentieth century Japanese legal experts were invited to China by the emperor to draft a civil code. After the Qing dynasty ended, this code in large parts survived and was maintained in the first Chinese Civil Code of 1930. This code—in contrast to the Japanese Civil Code—was built on the second draft for the German Civil Code. When, due to the Chinese civil war, the Republic of China government relocated to Taiwan it introduced the Chinese Civil Code there. Today the interpretation of the code is often based on comparative analysis taking into account especially Germanic legal systems. The modernized

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<sup>122</sup> See paras 2.132 et seq.

<sup>123</sup> See SJ Yang, p 5.

<sup>124</sup> See *ibid*, p 9.

<sup>125</sup> However, for two years during World War II Japan exerted control over Macau.

<sup>126</sup> See SJ Yang, p 5.

<sup>127</sup> See *ibid*.

<sup>128</sup> See *ibid*, p 6.

<sup>129</sup> See on the development of international sales law and the CISG and the uniform projects in particular Ch 3.

German law of obligations within the Civil Code and the Commercial Code, the CISG, as well as the PICC receive particular attention.

Around the same period of time German law found its way to South Korea when occupied by Japan between 1910 and 1945. Over this period the German pandectist legal concepts were introduced and then laid down in the South Korean Civil Code of 1960 which drew heavily on the Japanese Civil Code. Also in South Korea steps are being taken for a revision of the law, in particular the law of obligations and contracts. **2.126**

In Thailand the legislature in 1892 faced the choice between following English law or civil law of Continental European tradition. English law had strong support in Thailand as many jurists had been trained in the United Kingdom. Nevertheless, the legislature decided in favour of Continental European civil law and German law in particular. However, in the area of sales law English law exerted considerable influence. The Civil Code was then enacted in 1925. **2.127**

## *2. Common Law Legal Systems*

The East Asian common law legal systems are Hong Kong, India, Malaysia, Pakistan, and Singapore. All of these legal systems are based on English law. However, the extent to which English law is followed differs among these legal systems. **2.128**

As a starting point all East Asian Common Law legal systems have—although at different points in time—enacted sale of goods Acts. The original basis for these sale of goods Acts was the English Sale of Goods Act 1893. This Act was followed in Hong Kong, India, Pakistan, and Singapore. India and Pakistan enacted new (essentially identical) sale of goods Acts in 1930. Malaysia adopted the Indian Sale of Goods Act in 1957. Singapore subsequently adopted the 1979 English Sale of Goods Act and later amendments to it which became effective in 1997. **2.129**

With regard to general contract law there are marked differences among the East Asian common law legal systems. Under English law, general contract law has not yet been codified in statutes but judge-made common law remains applicable. This approach is also followed by Hong Kong and Singapore. However, India and Pakistan had already enacted (identical) Contracts Acts in 1872.<sup>130</sup> Malaysia followed this model in 1950 although the then enacted Contracts Act deviated from its role models to some extent. **2.130**

## *3. Mixed Jurisdiction*

The Philippines are the only mixed jurisdiction in East Asia. The roots of the Philippines, however, lie in the civil law tradition. Ruled by the Spanish between 1565 and 1898, Spanish law was applied, first in the form of the Code of Alaric and later based on the French Civil Code of 1804. After the American–Philippine war the Americans took control over the Philippines. However, they did not introduce new laws but allowed Spanish law to remain in force. In 1946 preparations for a new civil code began. During the preliminary works the legislature had taken up influences from a broad range of legal systems in all regions of the world, including common law jurisdictions. The Civil Code was finally enacted in 1950. Hence, in contrast to the typical understanding of a mixed jurisdiction, the Philippines indeed possess a central and comprehensive codification of private law. **2.131**

# **III. Modern Legal Systems and Tendencies**

## *1. General*

As indicated earlier, there is a great movement among the East Asian legal systems towards a modernization of their laws, especially among the civil law legal systems. The current revisions **2.132**

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<sup>130</sup> These acts had also contained a chapter on sales law. These were repealed upon the subsequent enactment of the sale of goods Acts.

of private law in Japan, South Korea, and Taiwan have already been mentioned. In Cambodia, China, Mongolia, and Vietnam modernization has already taken place. These legal systems heavily relied on the CISG and the uniform projects.

*2. Modern Legal Systems*

- 2.133** Among the modern East Asian legal systems China is the most prominent. Since the 1978 reforms China has gradually developed towards the rule of law. Subsequently various instruments were enacted to deal with contract law and specifically the sale of goods. Most of these instruments were repealed in 1999 when the current PRC contract law entered into force. The dominating influence in the drafting process was the CISG. In order to ensure a consistent interpretation of the provisions, the Chinese Supreme Court has issued rules on the interpretation of contract law in 1999 and 2009. Although not legislation they are styled in a similar way and adhered to in practice.
- 2.134** Following the lead of China, Mongolia and Vietnam modernized their laws in 2002 and 2005 respectively. In the field of contract and sales law in many instances the provisions of the CISG were simply reproduced. In Cambodia the 2008 Civil Code followed suit. It is interesting to note that since 1998 Japanese experts assisted the Cambodian legislature in the drafting process. The Cambodian Civil Code is therefore perceived as a forecast on the results of the reforms in Japan.

*3. Principles of Asian Civil and Commercial Law*

- 2.135** In recent times the idea of a unification of the private law in East Asia has been strengthened by the launch of an initiative to develop Principles of Asian Civil/Commercial Law (PACL) which has been inspired by PICC and PECL. This initiative is intended to provide a legal framework for commercial transactions. The diversity of the East Asian legal systems has, however, created doubts as to whether this can be realistically achieved. The consensus appears to be that the CISG represents the common core of contract law in East Asia.