

Mixed jurisdictions : common law vs civil law (codified and uncoded) (Part II) *

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VI. – CIVIL LAW AND COMMON LAW : RESULTING DIFFERENCES IN LAW

A study of several differences in substantive law as between the civil law and the common law is very instructive in illustrating the diversity of basic juridical concepts underlying the two legal systems.

1. Economic loss

Civil law's unitary system of obligations provides for the same means of enforcement (*moyens de mise en oeuvre*) whatever the obligation (patrimonial or not, contractual or not), including performance by equivalence (*exécution par équivalent*), i.e. damages (*dommages-intérêts*), which include losses of profits (*pertes de profit* or *lucrum cessans* in Latin).¹⁴⁴ Common law, while allowing consequential damages in contract, used to be unwilling to award pure economic loss (i.e. damages in tort when there is no physical damage).¹⁴⁵ This attitude has been softened recently, however.¹⁴⁶

2. Pre-judgment interests

Pre-judgment interests are recoverable as of right in civil law,¹⁴⁷ because they are understood as part of the *lucrum cessans*. On the contrary, pre-judgment interest has been awarded only in relatively recent times in common law systems, except in maritime law.

3. Lex mercatoria

The modern *lex mercatoria* finds its strength in civilian jurisdictions, as was pointed out by Thomas CARBONNEAU:

"It is not surprising that the strongest advocates of the new law merchant are from civil law jurisdictions where general legal principles constitute the primary source of law and specialized courts have long handled commercial disputes at an intermediary level of the

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¹⁴⁴ Art. 1149 c.c. (France); *Civil Code of Québec*, S.Q. 1991, c. 64 at Art. 1611 C.C.Q.; Art. 1995 C.C. (Louisiana).

¹⁴⁵ *Robins Drydock Co. v Flint*, 275 U.S. 303, 1928 AMC 61 (1927).

¹⁴⁶ *The Jervis Crown (CNR v Norsk Pacific)*, [1992] 1 S.C.R. 1021, (1992) 91 D.L.R. (4th) 289, 1992 AMC 1910 (Supr. Ct. of Can.).

¹⁴⁷ Art. 1153 C.C. (France); Art. 1617 C.C.Q. (Québec); Art. 2000 C.C. (Louisiana).

legal system. Nor is it astonishing that the most virulent critics of *lex mercatoria* and delocalization are steeped in the common law tradition of narrow rules and holdings, where decisional law is the foremost source of law and courts are its oracles." 148

4. Conflict of laws¹⁴⁹

Terminology – In common law, "conflict of laws" includes choice of law, choice of jurisdiction and recognition of foreign judgments. In civil law, the appropriate translation is "private international law" (as opposed to internal law) because conflict of laws (read literally) merely governs choice of law rules.

History – While private international law dates back to Roman times, common law conflict of laws rules are relatively new, because the procedural requirement of service used to be sufficient to limit the jurisdiction of the court to domestic conflicts.

Emphasis – Civil law, being essentially substantive instead of adjectival, puts more emphasis on its choice of law rules, while common law, being essentially procedural, focuses on the rules of jurisdiction (for example, service *ex juris*).

Traditional method – The civil law traditional method (imported into many common law systems) consists in characterising the dispute as belonging to a defined category, and then identifying the applicable internal law in relation to points of attachment of the category concerned. Even with similar categories (e.g. procedural versus substantive issues), the characterisation of issues is always influenced (if not mandatorily governed) by the *lex fori*; hence a delay to sue issue would be characterised as substantive in civil law (relating to prescription)¹⁵⁰ and procedural in common law (relating to limitation periods).¹⁵¹ The same is true of maritime liens, which are procedures in England,¹⁵² and substantive rights in civil

¹⁴⁸ Th.E. CARBONNEAU, "The Remaking of Arbitration: Design and Destiny", in Carbonneau (ed.), *Lex Mercatoria and Arbitration*, rev. ed., Transnational Juris Publications, Yonkers, N.Y. (1998), 37.

¹⁴⁹ See W. TETLEY, *International Conflict of Laws. Common, Civil and Maritime*, Les Editions Yvon Blais, Montreal (1994).

¹⁵⁰ See, for example, Art. 3131 C.C.Q. (Québec 1994): "Prescription is governed by the law applicable to the merits of the dispute"; Louisiana Art. 3549 C.C. In the case of European Union countries, the Rome Convention 1980, at Art. 10(1)(d), now subjects prescription to the law applicable to the contract.

¹⁵¹ In recent years, however, common law jurisdictions have begun to treat foreign limitation periods as substantive, rather than procedural, matters, subject to only a few exceptions. See, for example, the *Foreign Limitation Periods Act 1984*, U.K. 1984, c. 16. For Scotland, see the *Prescription and Limitation (Scotland) Act 1984*, U.K. 1984, c. 45. See generally, W. TETLEY, *supra* note 149 at 694-698. In Canadian common law conflict of laws, limitation periods are now also treated as substantive, thanks to the decision of the Supreme Court of Canada in *Tolofson v Jensen and Lucas v Gagnon*, [1994] 3 S.C.R. 1022. See also W. TETLEY, "New Development in Private International Law: *Tolofson v Jensen and Lucas v Gagnon*" (1996), 44 *Am. J. Comp. L.* 647.

¹⁵² *The Halcyon Isle* [1981] A.C. 221, [1980] 2 *Lloyd's Rep.* 325, 1980 AMC 1221 (P.C). See generally TETLEY, *supra* note 149, 569-575. Many other countries which received English common law also treat maritime liens as procedural for conflict of laws purposes, and thus subject to the *lex fori* (e.g. South Africa, Cyprus, New Zealand and Australia). See TETLEY, *supra* note 149 at 574-579.

law,¹⁵³ as in certain common law jurisdictions.¹⁵⁴

Special methods – Civil law and common law developed similar rules to limit the scope of the traditional method when its strict application led to undesirable results. The civil law notions of *fraude à la loi* and *fraude au jugement*¹⁵⁵ are similar to the common law rule of “no evasion of the law”;¹⁵⁶ the same is true of civil law’s international public order¹⁵⁷ and common law’s public policy.¹⁵⁸ The civil law concept of *loi d’application immédiate* (mandatory rules) is also making its way outside the civil law jurisdictions – see the reservation at Article 7(1) of the 1980 Rome Convention.¹⁵⁹

5. Forum non conveniens¹⁶⁰

Forum non conveniens is the common law principle whereby a court, which has jurisdiction to hear a claim, refuses to do so, because it believes another court of another State also has jurisdiction to hear the claim and can better render justice in the circumstances.¹⁶¹ This principle was unknown to civil law courts, which are often required by the constitutions of their respective countries to hear an action, although they may suspend it. Scotland was first to develop the concept of *forum non conveniens*¹⁶² and now Québec¹⁶³ and Louisiana¹⁶⁴ have adopted the principle.

¹⁵³ The substantive character of “maritime privileges” (*i.e.* maritime liens) in traditional civil law was recognised long ago by eminent jurists such as Story J. in *The Nestor* 18 Fed. Cas. 9 (Case No. 10,126) (C.C. D. Me. 1831) and by Sir John Jervis in *The Bold Buccleugh* (1851) 7 Moo. P.C. 267 at 284, 13 *E.R.* 884 at 890 (P.C.). See generally TETLEY, *Maritime Liens and Claims*, 2 Ed., Les Editions Yvon Blais, Montreal (1998), 56-60.

¹⁵⁴ *The Ioannis Daskelidis* [1974] S.C.R. 1248, [1974] 1 *Lloyd’s Rep.* 174, 1973 AMC 176 (Supr. Ct. of Can.). See TETLEY, *supra* note 149, 565-569 and other Canadian decisions cited there. The US, with its largely civilian maritime law heritage, also treats foreign maritime liens and claims as substantive. See TETLEY, *supra* note 149, 552-565 and US decisions cited there. See also TETLEY, *supra* note 153 at 39-41.

¹⁵⁵ See TETLEY, *supra* note 149 at 141-144.

¹⁵⁶ See *ibid.* at 144-154.

¹⁵⁷ See *ibid.* at 103-106. See also Arts. 3081 and 3155(5) C.C.Q. Québec 1994; Louisiana C.C. Arts. 3520, 3538, 3540, requiring consideration of the public order of the otherwise applicable law in respect of marriage, forms of contract and party autonomy in contract respectively.

¹⁵⁸ See generally TETLEY, *supra* note 149 at 107-116.

¹⁵⁹ See generally *ibid.* at 128-132.

¹⁶⁰ See *ibid.* at 799-803.

¹⁶¹ *Spiliada Maritime Corp. v Cansulex Ltd. (The Spiliada)*, [1987] A.C. 460 at 476, [1987] 1 *Lloyd’s Rep.* 1 at 10 (H.L.).

¹⁶² *Forum non conveniens* was developed by Scottish courts in the nineteenth century in decisions such as *Clements v Macaulay* 4 Macpherson (Sess. Cas., 3d ser.) 583 at 592 (1866). See also *Société du Gaz de Paris v La Société Anonyme de Navigation “Les Armateurs Français”* 1925 S.C. 332 (Ct. of Session), upheld 1926 S.C. 13, (1925) 23 *L.L. Rep.* 209 (H.L.). The Scottish origin of *forum non conveniens* was acknowledged by the House of Lords in *Airbus Industrie GIE v Patel*, [1998] 1 *Lloyd’s Rep.* 631 at 636 (H.L. *per* Lord Goff).

¹⁶³ Art. 3135 of the Civil Code of Québec 1994 codified the rule as follows: “[e]ven though a Québec authority has jurisdiction to hear a dispute, it may exceptionally and on an application by a party, decline jurisdiction if it considers that the authorities of another country are in a better position to decide.”

Lord GOFF of CHIEVELY of the House of Lords suggests that:

[t]he principle [*forum non conveniens*] is now so widespread that it may come to be accepted throughout the common law world; indeed since it is founded upon the exercise of self restraint by independent jurisdictions, it can be regarded as one of the most civilised of legal principles. Whether it will become acceptable in civil law jurisdictions remains however to be seen.¹⁶⁵

Forum non conveniens was accepted by English courts¹⁶⁶ in order to palliate the absence of rules of international jurisdiction (the only procedural rule limiting jurisdiction then being service).

6. *Forum conveniens*¹⁶⁷

Forum conveniens is the common law principle whereby a court, which does not have jurisdiction over a claim, nevertheless accepts jurisdiction, because there is no other appropriate jurisdiction to hear the claim and justice would not otherwise be done.

The principle is not known in civil law, although it has been placed in the new Québec Civil Code 1994 at Article 3136.¹⁶⁸

7. *Arbitration*¹⁶⁹

A common law equity clause in an arbitration agreement "purports expressly to dispense the arbitrator from applying the law either wholly or in part."¹⁷⁰ In civil law, these

¹⁶⁴ In fact, *forum non conveniens* applies generally in U.S. federal conflict of laws. See *Gulf Oil Corp. v Gilbert* 330 U.S. 501 (1947); *Piper Aircraft v Reyno* 454 U.S. 235, 1982 AMC 214 (1981).

¹⁶⁵ *Airbus Industrie GIE v Patel* [1998] 1 *Lloyd's Rep.* 631 at 642 (H.L.). Lord Goff points out, *ibid.* at 636, that *forum non conveniens* has been approved in Australia (see *Voth v Manildra Flour Mills Pty Ltd* [1990] 65 *A.L.J.R.* 83); Canada (see *Amchem Products Inc. v British Columbia Workers' Compensation Board* [1993] 1 S.C.R. 897, (1993) 102 D.L.R. (4th) 96) and in New Zealand (see *Club Méditerranée N.Z. v Wendell* [1989] 1 N.Z.L.R. 216). He also notes that the principle has no application as between States party to the 1968 Brussels Convention on Jurisdiction and the Recognition of Judgments in Civil and Commercial Matters.

¹⁶⁶ See decisions such as *The Atlantic Star* [1974] A.C. 436, [1973] 2 *Lloyd's Rep.* 197 (H.L.); *MacShannon v Rockware Glass Ltd.* [1978] A.C. 795 (H.L.); *The Abidin Daver* [1984] 1 A.C. 398, [1984] 1 *Lloyd's Rep.* 339 (H.L.); and *Spiliada Maritime Corp. v Cansulex Ltd (The Spiliada)* [1987] A.C. 460, [1987] 1 *Lloyd's Rep.* 1 (H.L.). By virtue of sect. 49 of the *Civil Jurisdiction and Judgments Act 1982*, U.K. 1982, c. 27, as amended in 1991 by the *Civil Jurisdiction and Judgments Act 1991*, U.K. 1991, c. 12, Schedule 2, para. 24, any court in the United Kingdom may stay any proceeding on the ground of *forum non conveniens* or otherwise, where to do so is not inconsistent with the 1968 Brussels Convention on Jurisdiction and the Recognition of Judgments in Civil and Commercial Matters or the very similar 1988 Lugano Convention.

¹⁶⁷ See W. TETLEY, *International Conflict of Laws* at 803-804. See also *The Rosalie* (1853) 1 *Sp.* 188 at 192, 164 *E.R.* 109 at 112, where the great English (civilian) Admiralty judge, Dr Stephen LUSHINGTON, took jurisdiction in an Admiralty case where no other court would do so, in order to prevent a denial of justice, although technically he lacked any statutory basis for doing so.

¹⁶⁸ Art. 3136 C.C.Q. provides: "Even though a Québec authority has no jurisdiction to hear a dispute, it may hear it, if the dispute has a sufficient connection with Québec, where proceedings cannot possibly be instituted outside Québec or where the institution of such proceedings outside Québec cannot reasonably be required."

¹⁶⁹ TETLEY, *supra* note 149 at 385-419.

are called *amiable compositeur* clauses. While strict equity clauses (also known as *ex aequo et bono* clauses) are suspect in England,¹⁷¹ *amiable compositeur* clauses are generally permitted in civil law jurisdictions and are found in civilian codes.¹⁷²

8. Interpretation / construction of contracts¹⁷³

The common law objective contract theory dictates that contractual promises be interpreted according to the reasonable expectation of the promisee (an objective standard).¹⁷⁴ Civil law, which is based on the autonomy of free will, requires actual consent (a subjective standard),¹⁷⁵ but presumptions of fact are available to the trial judge.

VII. – SOME CIVILIAN PRINCIPLES NOW IN THE COMMON LAW

1. Restitution

Restitution is the new common law science which in recent years has spawned textbooks, law journals and law articles, lectures and conferences where none had existed before. Restitution is proof that the common law is not dead.

Much of the modern law of restitution resembles the civil law principles of quasi-contract found for centuries in Scottish civil law. The revival or creation of restitution in England intrigues civilians, particularly in codal countries.

Terminology – While the principle of unjust enrichment now unites restitutionary claims at common law,¹⁷⁶ unjust enrichment at civil law is but one of the quasi-contracts (others being *negotiorum gestio* and reception of what is not due) which triggers restitution.

¹⁷⁰ MUSTILL & BOYD, *Commercial Arbitration*, 2 Ed., Butterworths, London, 1989, 74. A typical equity clause may read: "The arbitrator shall be entitled to decide according to equity and good conscience and shall not be obliged to follow the strict rules of law." See W. TETLEY, *supra* note 149 at 413.

¹⁷¹ See MUSTILL & BOYD, *supra* note 170 at 75-77; W. TETLEY, *supra* note 149 at 413-414. See also *Czarnikow v Roth, Schmidt & Co.* [1922] 2 K.B. 478 at 491, (1922) 12 *Ll. L. Rep.* 195 at 198 (C.A. *per* Atkin L.J.).

¹⁷² See the New Code of Civil Procedure (France) Art. 1474 (*re. domestic arbitration*) and Art. 1497 (*re. international arbitration*) and the Code of Civil Procedure (Québec) at Art. 944.10. Besides, they are specifically permitted under Art. 28(3) of the 1985 UNCITRAL Model Law on International Commercial Arbitration, as well as under Art. VII(2) of the European Convention on International Commercial Arbitration (Geneva 1961) and Art. 42(3) of the Convention on the Settlement of Investment Disputes between States and Nationals of other States (Washington 1965).

¹⁷³ See W. TETLEY, *supra* note 117 at 226-227.

¹⁷⁴ The leading statement is by Blackburn J. in *Smith v Hughes* (1871) L.R. 6 Q.B. 597 at 607: "If, whatever a man's real intention may be, he so conducts himself that a reasonable man would believe that he was assenting to the terms proposed by the other party, and that other party upon that belief enters into the contract with him, the man thus conducting himself would be equally bound as if he had intended to agree to the other party's terms."

¹⁷⁵ Art. 1108 c.c. (France); Arts. 1385, 1386 C.C.Q. (Québec 1994); Art. 1927 C.C. (Louisiana).

¹⁷⁶ Lord GOFF OF CHIEVELEY & G. JONES, *The Law of Restitution*, 4 Ed., Sweet & Maxwell, London, 1993 at 12 *et seq.*

The common law used to be restricted to specific forms of action which did not include a general restitutionary claim for unjust enrichment. The law of restitution therefore developed mainly through the action *indebitatus assumpsit* under the implied contract theory.¹⁷⁷ The latter concept was abandoned with the abolishment of the forms of actions, and has recently been replaced by a substantive principle of unjust enrichment which underlies, according to GOFF & JONES,¹⁷⁸ not only quasi-contractual claims (as in the civil law) but also the other related causes of action which trigger a restitutionary claim.

It is interesting that today the three basic requirements of unjustified enrichment under both civil law and common law are (1) an enrichment by the receipt of a benefit, (2) that this benefit be gained at the plaintiff's expense, and (3) a lack of legal cause.

2. *Negligence – delict – general tort of negligence*

Before *Donohue v Stevenson*,¹⁷⁹ there was no general duty of care at common law. There were many tort causes of actions, and the tort of negligence covered only certain special duties.

Civil law, on the contrary, always recognised the general obligation not to act unreasonably in situations not governed by contract.

Donohue v Stevenson created, amongst the special duties of care already sanctioned by the action in negligence, a general duty of care similar to that of civil law: "you must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour,"¹⁸⁰ neighbours being "persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or omissions which are called in question."¹⁸¹ Since then, "obligations" have been taught in common law schools and books are written on the subject (e.g. TETTENBORN).

3. *Foreseeable contractual damages*¹⁸²

In civil law, it is not sufficient that contractual damages be the immediate and direct consequence of the non-performance; they must have been foreseen or foreseeable at the time that the obligation was contracted unless there is intentional or gross fault.¹⁸³

In 1854, *Hadley v Baxendale*,¹⁸⁴ citing POTHIER, the French authority,¹⁸⁵ the court adopted the rule that, besides those damages arising naturally from the breach, consequential damages include such damage as "may reasonably supposed to have been

¹⁷⁷ *Ibid.* at 5-12.

¹⁷⁸ *Ibid.* at 11.

¹⁷⁹ [1932] A.C. 562 (H.L.).

¹⁸⁰ *Ibid.*, at 580, *per* Lord Atkin.

¹⁸¹ *Ibid.*

¹⁸² See TETLEY, *supra* note 117 at 319-323.

¹⁸³ Art. 1150 c.c. (France); Art. 1613 C.C.Q. (Québec 1994); Art. 1996 C.C. (Louisiana).

¹⁸⁴ (1854) 9 Ex. 341; 156 E.R. 145.

¹⁸⁵ (1854) 9 Ex. 341 at 345-6; 156 E.R. 145 at 147.

in the contemplation of both parties, at the time they made the contract, as the probable result of the breach of it;"¹⁸⁶ if there are special circumstances, they must be communicated and thus known to both parties.

4. Pre-judgment interests¹⁸⁷

In civil law, the general principle of *restitutio in integrum* entails that pre-judgment interests be granted as a loss of profit.¹⁸⁸ Interest is even payable as of right when the debtor has delayed in performing an obligation to pay a sum of money, and are calculated from the date the obligation was due.¹⁸⁹ It is not surprising that "damages" is translated into "*dommages-intérêts*" in French.

Pre-judgment interests were gradually awarded in common law. *Lord Tenterden's Act*¹⁹⁰ opened the door slightly in 1833 – the Court was granted discretion to award interest for debts of sums of money. The *Law Reform (Miscellaneous Provisions) Act 1937*,¹⁹¹ at Section 3, later Section 35A of the *Supreme Court Act 1981*,¹⁹² finally confirmed the discretionary powers of the courts to award interest "at such rate as it thinks fit or as rules may provide". (The Admiralty Court had already adopted the civil law rule that interest was always due to the obligee when payment was not made in time.)¹⁹³

5. Proof of foreign law¹⁹⁴

Common law is more adversarial, while civil law is more inquisitorial, when it comes to proving the substance of a foreign law, a question of fact arising in a choice of law or recognition of foreign law situation. At common law, foreign law was proven by the testimony of qualified expert witnesses, who were summoned to court, and subject to examination as to both their qualifications as experts and their knowledge and interpretation of the foreign law in question. In civil law jurisdictions, on the other hand, foreign laws needed usually to be proven only by the production of a certificate, prepared by a diplomat of the relevant State or an expert in the foreign law concerned, who, however, was not called to testify as a witness at trial. Moreover, judicial notice was possible and is now compulsory.¹⁹⁵

¹⁸⁶ (1854) 9 Ex. 341 at 354-5; 156 E.R. 145 at 151.

¹⁸⁷ See TETLEY, *supra* note 149 at 747-756.

¹⁸⁸ Art. 1618 C.C.Q. (Québec 1994).

¹⁸⁹ Art. 1153 C.C. (France); Art. 1617 C.C.Q. (Québec 1994); Art. 2000 C.C. (Louisiana).

¹⁹⁰ *An Act for the further Amendment of the Law, and the better Advancement of Justice, known as the Civil Procedure Act*, (1833) 3 & 4 Will. 4, c. 42, sect. 28.

¹⁹¹ U.K., 24 & 25 Geo. 5, c. 41.

¹⁹² Inserted by the *Administration of Justice Act, 1982*, U.K. 1982, c. 53, sect. 15(1) and Sch. 1, Part I.

¹⁹³ See *The Northumbria*, (1869) L.R. 3 A. & E. 6 at 10 (High Ct. of Admiralty).

¹⁹⁴ See TETLEY, *supra* note 149 at 763-786.

¹⁹⁵ The *Rebouh* and *Schule* decisions, *Cour de Cassation*, October 11 and 18, 1988, (1989) 78 *Rev. cr. dr. int. pr.* 368, Clunet 1989, 349, note Alexandre, which imposed on French judges the duty of inquiring into the foreign law applicable according to French conflict rules, even where the parties do not invoke that law. *Lloyd v Guibert*, (1865) L.R. 1 Q.B. 115 at 129 (Exch.) stands for the common law position that judicial notice of a foreign law cannot be taken.

Today, the United Kingdom has softened its rules of proof of foreign law. Pursuant to Section 4(1) of the *Civil Evidence Act 1972*,¹⁹⁶ any person suitably qualified by virtue of his knowledge or experience is a competent expert, "irrespective of whether he has acted or is entitled to act as a legal practitioner" in the country concerned (what was required before), and uncontradicted evidence of the expert witness as to the effect of the sources he has referred to is usually accepted. Moreover, the *Contracts (Applicable Law) Act 1990*¹⁹⁷ implementing the 1980 Rome Convention¹⁹⁸ now permits judicial notice in ascertaining contractual obligations. Other common law jurisdictions such as Canada and the United States of America have taken an even more civilian route in adopting less formalistic means of proof and permitting judicial notice as a general rule.

6. *Contributory negligence*¹⁹⁹

While at common law contributory negligence has always been a complete bar to an action in tort, civil law has always dealt with this issue as a mere question of causation, thereby apportioning liability according to the gravity of the concurrent faults. Moreover, the common law developed the "last opportunity rule" (known as the "the last clear chance rule" in the U.S.) in order to avoid triggering the contributory negligence rule against an otherwise faulty claimant.

By way of statute, most common law jurisdictions have now limited, if not abolished, the contributory negligence rule, and adopted the more equitable "proportionate fault" (comparative fault) rule.²⁰⁰ The Supreme Court of Canada even took the matter of reform in its own hands and eliminated the contributory negligence bar in respect of torts aboard a single ship under Canadian maritime law.²⁰¹ As to the "last opportunity rule", it was held to be incompatible with the new proportionate fault system and hence fell obsolete.²⁰²

7. *Marine insurance*²⁰³

Common law and civil law define marine insurance in different terms. Common law speaks of an undertaking to indemnify "marine losses, that is to say, the losses incident to marine adventure".²⁰⁴ Civil law is concerned instead with the guarantee of "risks in

¹⁹⁶ U.K. 1972, c. 30.

¹⁹⁷ U.K. 1990, c. 36.

¹⁹⁸ See *supra* note 88.

¹⁹⁹ See TETLEY, *supra* note 149 at 476-478.

²⁰⁰ The most noteworthy statute is the United Kingdom's *Law Reform (Contributory Negligence) Act, 1945*, U.K., 8 & 9 Geo. VI, c. 28.

²⁰¹ *Bow Valley Husky (Bermuda) Ltd v Saint John Shipbuilding Ltd*, [1997] 3 S.C.R. 1210, (1997) 153 D.L.R. (4th) 385, (1997) 221 N.R. 1, (1997) 158 Nfld. & P.E.I.R. 269, (1997) 48 C.C.L.I. (2d) 1 (Supr. Ct. of Can.).

²⁰² H.V. BRANDON, "Apportionment of Liability in British Courts under the Maritime Conventions Act of 1911" (1976-1977), 51 *Tulane Law Rev.* 1025 at 1030.

²⁰³ See TETLEY, *supra* note 149 at 331-383.

²⁰⁴ *Marine Insurance Act 1906*, U.K. 6 Edward VII, c. 41 at sect. 1.

respect of a maritime operation".²⁰⁵ Despite this different wording, however, common law marine policies cover risk interests as well as property rights.

VIII. – THE *LEX MERCATORIA*

1. *The influence of the lex mercatoria*

In medieval Europe, beginning as early as the ninth century and continuing up until the sixteenth century, there existed a remarkably uniform body of customary mercantile law which was applied by merchant courts in commercial disputes. This transnational custom was known as the *lex mercatoria*, or in English, the "Law Merchant".²⁰⁶ The *lex mercatoria* incorporated a body of customary private maritime law, the *lex maritima*, or "*Ley Maryne*" as it was called in Law French. The two were interrelated because of the importance of seafaring commerce in medieval Europe. The relationship was colourfully described as follows by MALYNES writing in 1622:²⁰⁷

"And even as the roundness of the globe of the world is composed of the earth and waters; so the body of the Lex Mercatoria is made and framed of the Merchants Customs and the Sea Laws, which are involved together as the seas and the earth."

Over time, various principles of the *lex maritima* were committed to writing in primitive codifications, of which the three most important were the *Rôles of Oléron* (c. 1190),²⁰⁸ which applied in northern and western Europe from the Atlantic coast of Spain to Scandinavia; the *Consolato del Mare*,²⁰⁹ which governed Mediterranean

²⁰⁵ Translation of Art. 1 of the French *Code des assurances*, Law No. 67-522 of 3 July 1967, codified as Arts. L.171-1 to L.173-26 inclusive of the *Code des assurances* by Decree No. 76-666 of 16 July 1976 (*J.O.* 21 July 1976, 4341).

²⁰⁶ On the Law Merchant of the Middle Ages, see generally L. TRAKMAN, *The Law Merchant: The Evolution of Commercial Law*, F.B. Rothman, Littleton, Colorado (1983); *idem*, "The Evolution of the Law Merchant: Our Common Heritage" (1980), 12 *JMLC* 1 at 3: "Merchants began to transact business across local boundaries, transporting innovative practices in trade to foreign markets. The mobility of the merchant carried with it a mobility of local custom from region to region. The laws of particular towns, usually trade centers, inevitably grew into dominant codes of custom of transterritorial proportions."

²⁰⁷ MALYNES, *Consuetudo vel Lex Mercatoria* (1622), cited by W.S. HOLDSWORTH, "The Development of the Law Merchant and its Courts" in Holdsworth, *Select Essays in Anglo-American Legal History*, vol. 1, Little, Brown & Co., Boston (1907), 292-293.

²⁰⁸ The *Rôles of Oléron* were probably composed on the island of Oléron off Bordeaux (France), in the late twelfth century. They are compilations of both principles and reported judgments relating to legal matters arising in the then burgeoning wine trade between Aquitaine (Guienne) and England and Flanders. Thirty known manuscripts of the *Rôles* are in existence, most of them written in Old French. For one English translation of a later version, consisting of forty-seven articles, see 30 Fed. Cas. 1171. Earlier versions, consisting of thirty-five and twenty-four articles, were published by Sir TRAVERS TWISS in *The Black Book of the Admiralty*, in vol. 1 (1871) and vol. 2 (1873) respectively. The best modern scholarly treatment of the *Rôles*, although regrettably unpublished, is that of J. SHEPHARD, *Les Origines des Rôles d'Oléron*, unpublished Master's thesis, University of Poitiers (1983) and *Les Rôles d'Oléron: Etude des Manuscrits et Edition du Texte*, unpublished D.E.A. thesis, Université de Poitiers (1985). See generally TETLEY, *supra* note 153 at 13-17.

²⁰⁹ The *Consolato del Mare* is a compilation of decisions rendered by "consuls" who dispensed maritime justice in various Mediterranean ports (notably, Barcelona, Valencia and Marseilles). The earliest text available of the *Consolato* is a version in Catalan, dating from 1494, although the compilation is thought to date from towards the end of the fourteenth century. See also TETLEY, *supra* note 153 at 21.

maritime affairs from about the late 1300s; and later the *Laws of Wisbuy* (or *Visby*),²¹⁰ based on the *Rôles of Oléron*, which regulated trade on the Baltic.²¹¹

The *lex mercatoria* and its maritime component, the *lex maritima*, were administered by local courts, often by the “piepowder” (*piepoudre*) courts at medieval fairs, which typically heard the disputes between the merchants concerned and rendered judgments between tides, so as not to delay the merchants unduly on their voyages.²¹² The Law Merchant, including maritime law, thus constituted a legal system, with rules and institutions of its own, which relied upon codified principles in the civilian manner, and which was burdened with little conflict of laws because of its Europe-wide character. Even in England, it was this transnational, essentially civilian *ius commune* which governed commercial and maritime litigation conducted before the High Court of Admiralty sitting at Doctors’ Commons in London.²¹³ Scotland too accepted the *lex maritima*. In *Nicolson v Watsoun*, a decision of Scotland’s Admiralty Court, it is reported that there was pleaded “the law of the buik of Olouris safer as thai ar ressavit in this realme” (the law of the book of Oléron so far as they are received in this realm).²¹⁴

A surprising amount of this historic, civilian maritime *ius commune* continues to exist in the admiralty law of modern nations, including common law countries, and particularly in the United States. Many principles, such as abandonment in shipowners’ limitation of liability, proportionate fault in marine collisions, wrongful death remedies for the survivors of deceased seafarers, maintenance and cure rights of sick and injured seamen, the awarding of prejudgment interest as an integral part of damages from the date of the casualty, the civilian *assistance* principle in modern salvage law, marine insurance and the application of equity, are among the examples in substantive law. Procedural law also reflects the same heritage in the maritime attachment, an admiralty application of the *saisie conservatoire* of traditional civil law.

But in addition there is what has been called the “new” Law Merchant, the modern *lex mercatoria*, which many scholars believe is gradually beginning to take shape in

²¹⁰ The *Laws of Wisbuy*, first published in Copenhagen in 1505, were possibly brought from Flanders, a meeting place for merchants who plied the North Sea and the Baltic, to the Hanseatic cities (notably Hamburg, Lübeck and Bremen) and thence to Baltic towns (notably Rostock, Stralsund and Danzig). They may in fact be a Low German translation of the *Judgments of Damme*, a compilation of Flemish sea laws based on the *Rôles of Oléron*. For an English translation, see 30 Fed. Cas. 1189. See also TETLEY, *supra* note 153 at 20-21.

²¹¹ See W. TETLEY, “The General Maritime Law – The *Lex Maritima*” (1994), 20 *Syracuse J. Int’l. L. & Comm.* 105, reprinted in 1994 *ETL* 469.

²¹² See, for example, the charter of Newcastle-upon-Tyne, which during the reign of Henry I (1100-1135) gave the City court the authority to judge cases between merchants and seamen before the third tide. Certain Scottish cities also had charters permitting courts to sit and adjudge maritime matters before the third tide. See M. BATESON, *Borough Customs*, Selden Society, vol. 2, London (1906) at 184; Tetley, *supra* note 153 at 12-13.

²¹³ See GRAVESON, *Conflict of Laws*, 7 Ed., Sweet & Maxwell (1974) at 33-34: “But even in Admiralty there was no conflict of laws because, in cases to which the law merchant applied, there was only one law. And when, in the sixteenth century, the law merchant was taken over and administered in the courts of common law, it was applied on the theory that it was part of the common law, and not a law foreign to the court.”

²¹⁴ See *Stair Society*, vol. 2, *Acta Curiae Admirallatus Scotiae* (1557-1561) 164 (1937).

international commerce. The 1993 Uniform Customs and Practice for Documentary Credits (UCP 500)²¹⁵ published by the International Chamber of Commerce is one example, being a compilation of modern banking practices which enjoy near universal acceptance and "... will readily be treated by the court as impliedly incorporated into the various documentary credit contracts as established usage."²¹⁶ The 1990 Incoterms of the International Chamber of Commerce also provide a transnational set of conditions on price and delivery applied uniformly in international sale of goods contracts.

Another significant development is the 1980 Vienna Sales Convention²¹⁷ which "seeks to maintain a delicate balance between the contrasting attitudes and concepts of the civil law and of the common law ..."²¹⁸ in harmonizing law on the sale of goods between States party to the Convention. It is noteworthy that the Convention has been applied as part of the modern *lex mercatoria* by the Iran-United States Claims Tribunal.²¹⁹

In shipping, the influence of the contemporary Law Merchant may be seen in the use by shippers and shipowners and their respective agents of a multitude of standard-form contracts, particularly standard-form bills of lading²²⁰ and charterparties,²²¹ as well as in certain normative documents frequently incorporated by reference into carriage of goods by sea contracts.²²²

One of the areas in which growth of a modern *lex mercatoria* is most visible is in international commercial arbitration. With each passing year, there is an ever-increasing volume of reported arbitral awards (particularly in civil law jurisdictions, as well as in the United States), and arbitrators are tending more and more to refer to previous awards

²¹⁵ ICC Publications No. 500. See E.P. ELLINGER, "The Uniform Customs and Practice for Documentary Credits – the 1993 revision", [1994] *LMCLQ* 377.

²¹⁶ R. GOODE, *Commercial Law*, 2 Ed., Penguin Books, London (1995), 985.

²¹⁷ The United Nations Convention on Contracts for the International Sale of Goods (sometimes called the "CISG"), adopted at Vienna, 11 April 1980 and in force 1 January 1988.

²¹⁸ See GOODE, *supra* note 216 at 927. The general requirement of good faith enshrined at Art. 7(1) of the CISG is absent from English law, for example, but very present in civil law. GOODE, *supra* note 216 at 931-932, stresses that the Convention's rules on offer and acceptance follow the civil law rather than the common law, and also characterises (at 937) Art. 79 relieving a party from liability in damages for a failure to perform caused by an impediment beyond his control as "more akin to the French law of *force majeure* than to the English law of frustration.

²¹⁹ *Watkins-Johnson Co and Watkins-Johnson Ltd v Islamic Republic of Iran*, (1990) XV *Yearbook of Commercial Arbitration* 220, cited by GOODE, *supra* note 216 at 929.

²²⁰ See, for example, the "Congenbill" bill of lading of the Baltic and International Maritime Council (BIMCO); the "Liner Bill of Lading" ("Conlinebill") (BIMCO) and the Combined Transport Bill of Lading ("Combiconbill") (BIMCO).

²²¹ See, for example, the BIMCO Uniform Time-Charter (Balttime), the New York Produce Exchange (NYPE) forms of time charterparty and the BIMCO Uniform General Charter (Gencon) form of voyage charterparty, among many others.

²²² See, for example, the 1990 Uniform Rules for Sea Waybills of the Comité maritime international (CMI); the 1993 Voyage Charterparty Laytime Interpretation Rules, issued jointly by BIMCO, the CMI, the Federation of National Associations of Ship Brokers and Agents (FONASBA) and the General Council of British Shipping (GCBS); and the 1994 York/Antwerp Rules on general average, adopted by the CMI.

rendered in similar cases, thus gradually developing a system of arbitral precedent.²²³ International commercial arbitration is also greatly aided by major international Conventions such as the New York Convention 1958²²⁴ and the 1985 UNCITRAL Model Law on International Commercial Arbitration.²²⁵ The latter instrument offers a complete legislative cadre for international commercial arbitration, including both substantive and procedural rules.²²⁶ Legislation based on the Model Law is now in force in such widely divergent jurisdictions as Australia, Bulgaria, Canada (at the federal level and in all provinces and territories), Cyprus, Hong Kong, Nigeria, Peru, Scotland²²⁷ and Tunisia, as well as in several U.S. states.²²⁸ As the American arbitration scholar, T. CARBONNEAU, has noted:²²⁹

“There is a body of legal rules that represents a world law on arbitration. States basically agree directly and indirectly on those legal principles that should attend the operation and define the legitimacy of the arbitral process. These rules of law surround arbitration and regulate its activity on a world-wide basis. They have arisen as a result of the arbitral process and represent its acceptance within most national legal systems. They constitute, in effect, a body of world law on the procedure and regulation of arbitration that is highly consistent in both principle and policy.”

The existence of a modern *lex mercatoria* remains a controversial one, especially in common law countries, where some critics deny that there can be any such thing as transnational norms having legal force independent of contractual incorporation, national statutes or international Conventions. The debate in itself says much about the difference between common law and civil law thinking.²³⁰

2. *The 1994 UNIDROIT Principles of International Commercial Contracts*

A major step forward in the development of a modern *lex mercatoria* was taken in 1994 when the Governing Council of the International Institute for the Unification of Private

²²³ See TETLEY, *supra* note 211 at 134-142, especially at 140-141, and authorities cited there. See also T. CARBONNEAU, *Cases and Materials on Commercial Arbitration*, Juris Publishing Inc., Yonkers, New York (1997), 565-568.

²²⁴ *Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, adopted at New York, 10 June 1958, and now in force in over ninety States, including the United Kingdom.

²²⁵ Adopted by the United Nations Commission on International Trade Law (UNCITRAL) on 21 June 1985.

²²⁶ See J.E.C. BRIERLEY, “Canadian Acceptance of International Commercial Arbitration”, (1988) 40 *Maine L.R.* 287.

²²⁷ The 1985 UNCITRAL Model Law on International Commercial Arbitration applies in Scotland by virtue of the *Law Reform (Miscellaneous Provisions (Scotland) Act 1990*, U.K. 1990, c. 40, sect. 66 and Sch. 7). It is interesting that Scotland is party to the UNCITRAL Model Law, while England is not. England, however, has incorporated elements of the Model Law into its *Arbitration Act 1996*, U.K. 1996, c. 23.

²²⁸ See TETLEY, *supra* note 149 at 393-394.

²²⁹ CARBONNEAU, *supra* note 223 at 567. See *ibid.* at 23: “Despite the private character of their jurisdictional authority, international arbitrators occupy a unique vantage point for articulating international commercial law principles. Their practical mission allows them to craft functional predicates of substantive decision.”

²³⁰ See discussion (and quote from CARBONNEAU) surrounding note 147.

Law (UNIDROIT) in Rome (Italy) adopted the "Principles of International Commercial Contracts".²³¹ This document was the fruit of some fourteen years of labour by a working group comprising some of the most respected specialists in contract law and international trade law from the civil law, common law and Socialist legal systems in different countries of the world. Its drafters took account of both common law and civilian compilations and codifications.²³² Together with the Comments, the UNIDROIT Principles set forth some of the fundamental concepts underlying international commercial contracts in the modern world. The purpose of the Principles is clearly set forth at the outset of the text:

"These Principles set forth general rules of international commercial contracts.

They shall be applied when the parties have agreed that their contract be governed by them.

They may be applied when the parties have agreed that their contract be governed by "general principles of law", the "*lex mercatoria*" or the like.

They may provide a solution to an issue raised when it proves impossible to establish the relevant rule of the applicable law.

They may be used to interpret or supplement international uniform law instruments.

They may serve as a model for national and international legislators."

Accordingly, the Principles constitute more than just a checklist or guide to negotiators in concluding transborder trade agreements. They are autonomous in character, in that they permit issues which are not addressed specifically to be resolved in harmony with their basic tenets.²³³ Certain of their rules are mandatory and may not be contracted out of, notably the standards of good faith and fair dealing prescribed by Article 1.7.2. Most importantly, the Principles may be applied as constituting the *lex mercatoria* when the parties to the contract have agreed that it should be applicable, thus giving added credibility to the existence of the new Law Merchant itself.²³⁴ Finally,

²³¹ *Principles of International Commercial Contracts*, UNIDROIT, 1994. See also the English version of the Principles reproduced in J.M. PERILLO, "UNIDROIT Principles of International Commercial Contracts: The Black Letter Text and a Review", (1994) 63 *Fordham L. Rev.* 281.

²³² Among the principal sources of the UNIDROIT Principles, one may cite the U.S. Uniform Commercial Code and the Restatement (Second) of the Law of Contracts, the Algerian Civil Code of 1975, the Foreign Economic Contract Law of the People's Republic of China, and the drafts of the Netherlands and Québec Civil Codes which came into force in 1992 and 1994 respectively, as well as the 1980 Vienna Convention on the International Sale of Goods and several Model Laws adopted by UNCITRAL. See M.J. BONELL, "The UNIDROIT Principles of International Commercial Contracts and the Principles of European Contract Law: Similar rules for the Same Purposes?", *Unif. L. Rev.* 1996, 229 at 231.

²³³ K. BOELE-WOELKI, "The UNIDROIT Principles of International Commercial Contracts and the Principles of European Contract Law: How to Apply them to International Contracts", *Unif. L. Rev.* 1994, 652 at 658. See also the decision of the *Cour d'appel de Grenoble*, 24 January 1996, *Unif. L. Rev.* 1997, 180, where the Principles were used to determine the rate of interest to which a creditor of a debt due under an international sale of goods contract was entitled where the debtor delayed in making payment, in the absence of a specific rule on the point in the 1980 Vienna Convention on the International Sale of Goods.

²³⁴ The Principles were soon adopted by international commercial arbitrators, particularly of the International Chamber of Commerce. They were regarded as the most genuine expression of general rules and principles enjoying a wide international consensus, in a 1995 partial award on a contractual dispute

it is immensely significant that the Principles can be, and are being, applied as models for national and international lawmakers in drafting new legislation on commercial contracts.²³⁵

Among the reasons for the rapid acceptance of the UNIDROIT Principles is their accessibility in many languages.²³⁶ They have also found a place in the curricula and teaching materials of literally dozens of law faculties in Europe, North America, South America, Africa and Asia.²³⁷ Another is the fact that they represent a consensus of over seventy specialists from all major legal systems. Finally, as one experienced American lawyer has commented:²³⁸

"[...]the great importance of the [UNIDROIT] Principles is that the volume exists. It can be taken to court, it can be referred to by page and article number, and persons who are referred to its provisions can locate and review them without difficulty. This alone is a great contribution towards making *lex mercatoria* definitive and provable."

The UNIDROIT Principles, in the few years since their approval, have achieved an impressive synthesis of the law of international trade, reconciling different legal traditions in a creative and beneficial fashion, to the benefit of the international business community.

between an English company and a governmental agency of a Middle East State, where the contract referred merely to "principles of natural justice". The same year, they were accepted, in respect of their rules of interpretation, as a proper source of "Anglosaxon principles of law" in a dispute between a U.S. company and a governmental agency of a Middle East country. In a third dispute, between an Italian company and a governmental agency of a Middle East country, on a contract without a choice of law clause, the arbitral tribunal, in a partial award on the applicable law, decided to base its decision on the "terms of the contract, supplemented by general principles of trade as embodied in the *lex mercatoria*". In its subsequent award on the merits, the same tribunal referred to various articles of the UNIDROIT Principles, thereby implicitly holding them to be a source of the *lex mercatoria*. See M.J. BONELL, "The UNIDROIT Principles in Practice: The Experience of the First Two Years", *Unif. L. Rev.* 1997, 34 at 42-43.

²³⁵ BONELL, *ibid.*, at 37-38, reports that the UNIDROIT Principles have been a source of inspiration in the Netherlands Civil Code 1992, the Québec Civil Code 1994, and the new Civil Code of the Russian Federation. Individual provisions of the Principles have been referred to in the final Report of the Commission for the Revision of the German Law of Obligations 1992, and in the drafts of the Civil Codes of Lithuania and the Czech Republic, the draft Commercial Code of Tunisia and in the draft Uniform Law on General Commercial Law being prepared by the Organization for the Harmonization of Business Law in Africa. The Scottish Law Commission, in its Discussion Paper No. 101, "Interpretation in Private Law", August 1996, also expressly referred in its proposals for the reform of the rules on interpretation of legal acts to Arts. 4.1, 4.2, 4.4, 4.5, 4.6 and 4.7 of the UNIDROIT Principles.

²³⁶ BONELL, *ibid.* at 38, writing in late 1996 or early 1997, reported that the complete version (the articles and the comments) was available in Chinese, English, French, Italian, Portuguese, Russian, Slovak and Spanish, with a German version then in preparation, and that the "black letter rules" (*i.e.* the articles without the comments) had been translated into Arabic, Bulgarian, Czech, Flemish, Hungarian, Korean and Serbian, with a Japanese translation then in preparation.

²³⁷ BONELL, *ibid.* at 36-37, lists over sixty law faculties in which the UNIDROIT Principles figure in the courses and/or teaching materials at the time of his article. Both the University of Edinburgh and the University of Glasgow appear in the list.

²³⁸ B.S. SELDEN, "Lex Mercatoria in European and U.S. Trade Practice: Time to Take a Closer Look", in Golden Gate University School of Law, *Annual Survey of International & Comparative Law*, vol. 2 (1995) 111 at 122, cited by BONELL, *supra* note 234 at 44.

IX. – STATUTES TO UNIFY OR RECONCILE THE TWO SYSTEMS

A unique initiative in the reconciliation of the common law with the civil law by statute is underway in Canada. In June 1998, the federal Minister of Justice introduced in the Canadian House of Commons, Bill C-50, entitled *Federal Law – Civil Law Harmonization Act, No. 1*.²³⁹

In Canada, where nine provinces and three territories are common law jurisdictions, and only one province (Québec) is a civil law jurisdiction, there has been a regrettable tendency in the past for federal statutes to be drafted using the vocabulary and style of the common law alone. This was understandable, especially because many of the federal legislative drafters and law officers were trained exclusively in that legal system. The tendency was exacerbated by the fact that until recent years, federal legislation in Canada was usually drafted first in English and then translated into French before its introduction in the federal Parliament.²⁴⁰ As a result, there is a constant risk that the civil law terms and ideas may be either forgotten or distorted in federal enactments, resulting in difficulties of interpretation and application of those laws in Québec.

Bill C-50 seeks to correct such distortions in present federal law and to prevent their repetition in the future. The major purpose of the Bill is to "... ensure that all existing federal legislation that deals with private law integrates the terminology, concepts and institutions of Québec civil law."²⁴¹ It is hoped that this harmonisation of federal legislation with the civil law as codified in the Civil Code of Québec 1994²⁴² will improve the application of federal laws in that province, increase the efficiency of courts administering federal laws²⁴³ and better respect what is referred to as the "bijural" character of Canadian federalism (*i.e.* the coexistence of the common law and the civil law systems of private law within the Canadian federation). The specific purposes of the Bill are:²⁴⁴

"To repeal the pre-Confederation provisions of the 1866 Civil Code of Lower Canada that fall within federal jurisdiction and replace certain provisions with appropriate provisions on marriage applicable only in the Province of Quebec;

"To add rules of construction that recognize the Canadian bijural tradition and that clarify the application of provincial law to federal law on a suppletive basis, as well as bijural provisions in federal statutes;

²³⁹ The full title of Bill C-50 is "A First Act to harmonize federal law with the civil law of the Province of Quebec and to amend certain Acts in order to ensure that each language version takes into account the common law and the civil law." The Bill was introduced in first reading in the House of Commons on 12 June 1998.

²⁴⁰ Today, however, both official language versions of new federal statutes are drafted in original English and French texts.

²⁴¹ See the News Release *re.* Bill C-50, released 12 June 1998.

²⁴² S.Q. 1991, c. 64, in force 1 January 1994.

²⁴³ In Canada, both provincial superior courts (whose judges are appointed by the federal government) and provincial inferior courts (whose judges are appointed by the provincial governments) administer federal, as well as provincial, laws. The only major exception to the rule is the Federal Court of Canada, a statutory court whose jurisdiction is limited to certain domains of federal law specified by statute.

²⁴⁴ See the Progress Table to Bill C-50.

"To harmonize Acts of Parliament, including the Federal Real Property Act,²⁴⁵ the Bankruptcy and Insolvency Act,²⁴⁶ the Crown Liability and Proceedings Act²⁴⁷ and other statutes of a lower degree of complexity which relate to security and property law, with the civil law of the Province of Quebec."

Of particular interest are the proposed new Sections 8.1 and 8.2 of the Canadian *Interpretation Act*²⁴⁸ which would be enacted by Section 8 of the Bill:

"8.1 Both the common law and the civil law are equally authoritative and recognized sources of the law of property and civil rights in Canada and, unless otherwise provided by law, if in interpreting an enactment it is necessary to refer to a province's rules, principles or concepts forming part of the law of property and civil rights, reference must be made to the rules, principles and concepts in force in the province at the time the enactment is being applied.

"8.2 Unless otherwise provided by law, when an enactment contains both civil law and common law terminology, or terminology that has a different meaning in the civil law and the common law, the civil law terminology or meaning is to be adopted in the Province of Quebec and the common law terminology or meaning is to be adopted in the other provinces."

Since 1993, the Department of Justice of Canada has reviewed approximately 700 federal laws to identify those whose content or format would be most affected by changes in the Québec Civil Code, and has identified approximately 300 such statutes which will require further review *over the next nine years*. The challenge of effective harmonisation is therefore one of considerable magnitude. It remains to be seen to what extent the high hopes underlying Bill C-50 will be realised. Nevertheless, harmonising two legal systems by *statute*, in a manner designed to respect the essence and genius of each system, is a creative undertaking, and a development which, if successful in the Canadian/Québec context, might well be of interest to other mixed jurisdictions around the world.

X. — PRACTISING IN A MIXED JURISDICTION

My first contact with a mixed jurisdiction was in law school in Québec (1948-1951) and then during nineteen years in the practice of law. As lawyers, we understood we had been trained as civilians, but in corporate, tax, criminal and administrative matters, the law was common law in both its nature and its drafting. The judges and lawyers had no difficulty in adapting to both systems, so that imperceptibly one legal tradition impinged on the other.

In consequence, in our day-to-day work, we found no major problem in practising civil law in Québec and then moving over to the common law of another province or of the Federal courts.

²⁴⁵ R.S.C. 1991, c. 50.

²⁴⁶ R.S.C. 1985, c. B-3.

²⁴⁷ R.S.C. 1985, c. C-50.

²⁴⁸ R.S.C. 1985, c. I-21.

In other words, lawyers and judges are not concerned about practising and adjudging law in the mixed jurisdiction of Québec. Rather, if they are aware of the dual legal systems, they rejoice in them.

XI. – LEGISLATING IN A MIXED JURISDICTION

My second experience with a mixed jurisdiction was in the Québec National Assembly where I was a back-bencher in the Opposition from 1968 to 1970 and then a cabinet Minister from 1970 to 1976.

At first, I was quite unaware of any role I had to protect and advance the civilian tradition and was quite willing to have the new Insurance Act adopted as a statute and extract it from the Civil Code of 1866. This caused no hue and cry at all, except from one McGill Professor, Paul-André CRÉPEAU, whom I had not met but who convinced me that insurance principles should remain in a code, with the administrative principles consigned to a statute.

This we did. We also systematically drew up all the statutes with which the Ministry of Financial Institutions was concerned – concerning real estate, corporations, trusts, consumer protection, co-operatives, etc. – in the *civilian* style.

This was one of the major revelations of my time in politics.

Today, one of the purposes of the nationalist movement and of separatist politicians in Québec is the protection of the civil law of Québec, along with the French language and culture. It is my view that they can be protected as well, or perhaps better, in a federal system.

XII. – TEACHING IN A MIXED JURISDICTION

Professors in mixed jurisdictions are much more concerned with the distinction between the civil law and the common law than are practitioners. The latter consider the other tradition merely as a different law, or a foreign law, with which they must contend.

In Québec, the civil law is very important as a major part of Québec's distinctive nature. The civil law, like the French language, must be protected from the intrusions of the common law. Professors lead the charge in this regard, whether or not they are separatists politically.

At McGill Law Faculty, two law degrees are presently given, being a bachelor of civil law (B.C.L.) after three years of study and a bachelor of common law (LL.B.), also after three years. Both degrees are granted in the National Programme after four years. There is much intentional transsystemic teaching at McGill, and the two legal traditions are now being taught *concurrently* from the very first year of law school, so that all future McGill law graduates will complete their legal education with a thorough grounding in both legal traditions, assimilated in a comparative law perspective.

Teaching both civil law and common law in a mixed jurisdiction is exceedingly demanding, as my own experience at McGill (1976 to the present) has convinced me. It is also challenging, exciting and very satisfying.

XIII. – CREATION OF MIXED JURISDICTIONS

It is my view that mixed jurisdictions are created when one culture, with its law, language and style of courts, imposes upon another culture, usually by conquest.²⁴⁹ The imposition on Québec of the English common law, together with England's administrative, judicial and legislative system, leaving the French civil law to continue unchanged, is an example. The intrusions of other cultures by armies and treaties, as seen in Belgium and much of the rest of Europe at the time of Napoleon, as well as in the cases of South Africa and Louisiana, provide further examples.

Mixed jurisdictions may also be created by the voluntary "reception" of foreign law.²⁵⁰ The classic example of this process may be found in Scotland. Robin EVANS-JONES²⁵¹ describes how Scottish lawyers in the sixteenth and seventeenth centuries, having been trained in Roman law in European universities, developed a preference for that law, which they brought home with them at the end of their studies. Roman law had the advantage of being written, as opposed to customary; it was systematic and was also more certain and often more just than the indigenous Celtic law which had prevailed previously in Scotland. Gradually, the Roman law familiar to the foreign-trained jurists supplanted the indigenous law, and was "received" into the country, becoming Scots law. Significantly, Evans-Jones notes:²⁵²

"The fundamental factor explaining why receptions occur is that a strong system of law comes up against a weak system which it then overwhelms to a greater or lesser extent. In other words, the reception of Roman law happened because it was stronger than the indigenous laws it came up against."

A second "reception" occurred in Scotland in the nineteenth century (and continues today), as more and more English common law began to be introduced into Scots law, once again because of the comparative weakness of that law.²⁵³

²⁴⁹ See also ÖRÜCÜ, "Mixed and Mixing Systems: A Conceptual Search", in ÖRÜCÜ *et al.*, *supra* note 7 at 348, 349: "They [mixed jurisdictions] can be said to be the direct outcome of the British colonial policy in ceded colonies of leaving intact most of the existing legal institutions and the law already in force, only imposing Common Law for convenience, as opposed to the civilian colonisers who introduced codes and therefore, a way of life. When the forces behind the formation of mixes are looked at historically, it is impositions or partial impositions that are responsible for the coming into being of most mixed systems of the past."

²⁵⁰ See ÖRÜCÜ, *ibid.* at 341, referring to movements of migration of laws and people as catalysts in the formation of mixed jurisdictions, and identifying the forces behind these movements as including "expansion, occupation, colonisation and efforts of modernisation, and the ensuing impositions, imposed receptions, voluntary receptions, infiltrations, inspirations and imitations and concerted- or co-ordinated parallel developments."

²⁵¹ See EVANS-JONES, *supra* note 3 at 231. See also our remarks on Scotland, Louisiana, South Africa and Egypt, *supra*.

²⁵² *Ibid.* at 230-231.

²⁵³ *Ibid.* at 231-232.

XIV. – SURVIVAL OF MIXED JURISDICTIONS

It is my very strong view that it is very difficult for a mixed jurisdiction to survive if it has only one language, one legislature and one court system. The two legal systems in such a mixed jurisdiction are soon melded together as one.

1. Language

The long-term vitality of two legal systems in a mixed jurisdiction is greatly assisted, and may in fact be dependent upon, the official recognition of two languages, one of which is particularly associated with each legal system in question. The examples of Québec, South Africa, Louisiana and Scotland are very telling in this regard.

(a) Québec

Under Canada's *Constitution Act, 1867*,²⁵⁴ all provincial laws and regulations of Québec, as well as all federal laws and regulations, must be adopted in both French and English, so that Canada and Québec have, in fact, two languages of legislation. Both languages may be used in the debates and must be used in the records of both the federal Parliament and the Québec National Assembly. Either of those languages may be used in any court of Canada (*i.e.* the Supreme Court of Canada and the Federal Court of Canada), as well as in the courts of Québec. French, of course, is a major language of the civil law, Québec's system of private law. English, on the other hand, is traditionally the language of the common law, which forms the basis of Québec's public law, as well as of many spheres of federal law (*e.g.* criminal law, maritime law, etc.).

Linguistic duality is not purely a matter of constitutional law in Québec, however, but is also a living reality. Both the historic languages of the civil law and the common law *in fact* continue to be read, understood, spoken and written by Québec's legislators, judges, lawyers and scholars. Law students must have a solid command of *both* French and English in order to pursue legal studies in Québec in *either* of those tongues and in order to practise effectively at the Bar and on the Bench in the province. Their resulting professional bilingualism enables Québec jurists to have ready access *in the original* to both civil law jurisprudence and doctrine emanating from France and other francophone countries, as well as to common law decisions and legal writings from the United Kingdom, the United States, the other provinces of Canada and other wholly or

²⁵⁴ See sect. 133 of the *Constitution Act, 1867* (formerly the *British North America Act (1867)* 30 & 31 Vict. c. 3 (U.K.)) and renamed by the *Canada Act, 1982*, U.K. 1982, c. 11. The present Canadian citation is R.S.C. 1985, Appendix II, No. 5. Sect. 133 provides: "Either the English or the French Language may be used by any Person in the Debates of the Houses of the Parliament of Canada and of the Houses of the Legislature of Quebec; and both those Languages shall be used in the respective Records and Journals of those Houses; and either of those languages may be used by any Person or in any Pleading or Process in or issuing from any Court of Canada established under this Act, and in or from all or any of the Courts of Quebec. The Acts of the Parliament of Canada and of the legislature of Quebec shall be printed and published in both those Languages." See also the *Canadian Charter of Rights and Freedoms*, being Part I of the *Constitution Act 1982*, which itself is Schedule "B" to the *Canada Act 1982*, at sects. 16(1), 17(1), 18(1) and 19(1), reiterating the provisions of sect. 133 of the *Constitution Act 1867* concerning the official status of the English and French languages in respect of the federal Parliament and government and courts established by Parliament.

predominantly anglophone jurisdictions. The decisions of Québec judges frequently contain quotations from both civil law sources (generally in French) and from common law sources (generally in English). The concepts, terminology and method of reasoning of the two legal systems are familiar to an increasingly wide circle of Québec jurists, many of whom qualify to practise their profession in both Québec and one or more other Canadian provinces and/or abroad. Legal publishing too is done in both French and English in Québec.²⁵⁵ All these factors make Quebecers particularly conscious of both the traditions from which their legal rights and obligations spring and ever more committed to preserving and enhancing those traditions, without permitting either to obliterate or overshadow the other. A clear commitment to the preservation of the civilian legal tradition of Québec law, even in the context of Canadian *federal* legislation, is seen in the draft *Federal Law-Civil Law Harmonization Act, No. 1*²⁵⁶ discussed above.

This "bijuralism" and bilingualism also cause Québec lawyers (especially graduates of the "National Programme" offered by the Faculty of Law of McGill University) to be in great demand in international law firms and international organisations, as well as in the Canadian federal civil service, where both their language skills and their knowledge of the two principal legal systems of the Western world are highly prized.

(b) *South Africa*

South Africa's mixed legal system also thrives largely because both Afrikaans and English are recognised as official languages of the Republic, together with a number of indigenous languages.²⁵⁷ Historically, the fact that Dutch and German were languages accessible to so many Afrikaners also contributed, particularly in the later nineteenth and early twentieth centuries, to the survival of Roman-Dutch law, at a time when it risked being totally undermined by the common law and the English language. Daniel VISSER notes the assistance which the "purist" defenders of Roman-Dutch law at that period of South African history derived from the institutional writings of modern European civilian authors, especially those who published in Dutch and German:²⁵⁸

"This practice brought much modern civilian learning into South African law, a process greatly facilitated by virtue of the fact that the Afrikaans-speaking academics enjoyed a linguistic affinity to at least two of the most influential European countries."

²⁵⁵ As an example, my three major books, *Marine Cargo Claims*, 3 Ed., 1988; *International Conflict of Laws*, 1994; and *Maritime Liens and Claims*, 2 Ed., 1998, were all published in English by Les Editions Yvon Blais, Inc., Montreal, a firm most of whose law books are published in French.

²⁵⁶ Bill C-50 of 1998 (Canada); see discussion surrounding notes 239 to 248, *supra*.

²⁵⁷ See the Constitution of the Republic of South Africa (Act 108 of 1996), signed into law on 10 December 1996, at Chap. 1, sect. 6, recognising eleven languages, including Afrikaans and English, as well as nine indigenous languages, as official languages of the Republic. By sect. 6(3)(a), the national government and provincial governments may use any particular official languages for the purposes of government, taking into account usage, practicality, expense, regional circumstances and the balance of the needs and preferences of the population as a whole or in the province concerned; but the national government and each provincial government must use at least two official languages.

²⁵⁸ D. VISSER, "Placing the Civilian Influence in Scotland: A Roman-Dutch Perspective", in D.L. Carey Miller / R. Zimmermann (eds.), *supra* note 38, 239 at 249.

As in Québec, South African bijuralism today is strengthened by the bilingualism of members of the Bar and the Bench, as well as by that of legislators, scholars and students. The laws of the Republic are enacted in both Afrikaans and English, which languages are also official in the courts. Law students require a knowledge of both those tongues to pursue their studies and to practise effectively afterwards. Judgments are written in both languages, and both civil law and common law authorities are cited in them. Legal publishing is also done in both Afrikaans and English, with much of the writing on Roman-Dutch law appearing in Afrikaans.

There is also a recognition of customary law in the new Constitution of 1996. The Bill of Rights, enacted by Chapter 2 of the Constitution, provides at Section 39(2) that when interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights. Section 39(3) further provides that the Bill of Rights does not deny the existence of any other rights or freedoms that are recognised or conferred by common law, customary law or legislation, to the extent that they are consistent with the Bill.

(c) *Louisiana*

By comparison, the difficulty which the civilian tradition experiences in surviving and developing in Louisiana is directly proportional to the constantly declining use of the French language in that state. The state's first Constitution in 1812 was actually drafted in French, and only a duly authenticated English translation was sent to Washington, to comply with the requirements of the Enabling Act of the U.S. Congress,²⁵⁹ which permitted Louisiana to accede to statehood.²⁶⁰ Nevertheless, even that early Constitution provided that the laws, public records and judicial and legislative written proceedings of the State would be promulgated, preserved and conducted "in the language in which the Constitution of the United States is written" (Article VI, Section 15). Under Louisiana's 1845 Constitution, the Constitution and laws of Louisiana were required to be promulgated in the English and French languages (Article 132), although Article 103, confusingly, reiterated the earlier English-only rule for laws, public records and judicial and legislative written proceedings, and the 1852 Constitution (Article 100) repeated that latter rule. The Constitutions of 1845 (Article 104) and 1852 (Article 101) also obliged the Secretary of the State Senate and the Clerk of the House of Representatives to be "conversant" with both French and English, and permitted members to address either House in French or in English. The State Constitutions of 1879 (Article 154), 1898 (Article 165) and 1913 (Article 165), however, all contained provisions requiring the laws, public records and judicial and legislative written proceedings to be promulgated, preserved and conducted in English, but also empowered the General Assembly to provide for the publication of the laws in the French language, while also permitting judicial advertisements to be made in French in certain designated cities and parishes. Eventually, however, under the 1921 Constitution, the English language alone

²⁵⁹ Act of 20 February 1811, c. 21, 2 U.S. Stat. 641, sect. 4.

²⁶⁰ See L. HARGRAVE, *The Louisiana State Constitution. A Reference Guide*, Greenwood Press, New York, Westport, Conn., London (1991), 2.

came to prevail in the legislature and the courts of Louisiana, as it did also in public education.²⁶¹

Under Louisiana's present Constitution of 1974, there is no provision on the official language or the language of the legislature or the courts, but in fact English alone is the official tongue.²⁶² There is no need for legislators, judges, lawyers, law professors or students to possess even a reading knowledge of French in order to complete their training and to practise their professions. Even some of the great French civil law treatises have been translated into English²⁶³ and are consulted only in translation by most Louisiana jurists, because they cannot read the original versions. Legal publishing in the state is in English only. These factors contribute to the weakness of the civil law tradition in Louisiana, which coupled with the strength of federal law, has resulted, for example, in the replacement of the provisions on securities in the new Louisiana Civil Code,²⁶⁴ by the Uniform Commercial Code chapter.

(d) *Scotland*

A similar situation prevails in Scotland, where language, and culture generally, played a role in the "reception" of Roman law into Scots law in the sixteenth and seventeenth centuries, and more recently, in the reception of much English common law, thus making Scotland a "mixed jurisdiction". Robin Evans-Jones attributes the first reception largely to the influence of Scottish lawyers who received their legal education in continental European universities and then went home with "an intellectual and cultural preference for the Civil law in which they had been trained."²⁶⁵ At that time, such studies were undertaken in Latin, French and/or Dutch. In the nineteenth century, however, as a result of a "cultural shift in Scotland from continental Europe towards England,"²⁶⁶ Scottish lawyers ceased being trained on the Continent and began to see

²⁶¹ The Constitutions of 1898 and 1913, at Art. 251 in each case, required the "general exercises" in the public schools to be conducted in the English language; but permitted the French language to be taught in those parishes or localities where French predominated, provided that no additional expenses were thereby incurred. Under the 1921 Constitution (Art. 12, sect. 12), however, "[t]he general exercises in the public schools shall be conducted in English."

²⁶² Art. XI, sect. 4 of the 1974 Constitution, however, does provide that "[t]he right of the people to preserve, foster, and promote their respective historic linguistic and cultural origins is recognized." This complements Art. I, sect. 3, which prohibits unreasonable discrimination based on culture, and reflects a reawakening of cultural consciousness in Acadian Louisiana, but has no impact on the status of English as the sole *de facto* official language of the state. See L. HARGRAVE, *supra* note 260 at 187.

²⁶³ See, for example, M. PLANIOL / G. RIPERT, *Treatise on the Civil Law* in 3 tomes and 6 vols., translated by the Louisiana State Law Institute, Baton Rouge, La. (1959), from the original *Traité élémentaire de droit civil*. A multi-volume treatise of Louisiana civil law (in English) by various authors also exists.

²⁶⁴ The Louisiana Civil Code has been so extensively and repeatedly amended since its last great revision in 1870, and particularly in the period 1976-1984, that it may for all practical purposes be regarded as a "new" Civil Code. These frequent and major amendments demonstrate the unfortunate (and common law-inspired) tendency of the Louisiana legislators to treat the Code as just another statute.

²⁶⁵ EVANS-JONES, *supra* note 3 at 231.

²⁶⁶ *Ibid.* at 232. See also A. RODGER, "Thinking about Scots Law", (1996) 1 *Edinburgh L. Rev.* 3, who notes: "...a tendency from the later years of the 19th century onwards for Scots to see themselves as part of a larger English-speaking family of lawyers scattered throughout the Empire; a vision which began to

themselves as part of a world-wide community of *English-speaking* lawyers sharing with English and American jurists a legal heritage associated with justice and freedom. The result of this cultural transformation has been a slow erosion of the civilian heritage of Scots law, in favour of its English common law component. Evans-Jones cites the example of the concept of *condictio indebiti*, or unjustified enrichment, which Scottish judges have increasingly refined and interpreted in accordance with English, rather than modern civil, law. He observes that the general principle of unjustified enrichment, as a source of obligations, is really the creation of the later civilian tradition (not generally taught in Scottish law schools), rather than of Roman law, and notes: ²⁶⁷

“The substance of this law has since been developed in a Civilian legal culture from which Scots lawyers were remote and *expressed in languages which most Scots could not read*. It is through academic work that the law of modern Civilian systems needs to be made accessible in Scotland. If this is lacking *it is not surprising that English law, because of its proximity, accessibility and powerful culture should provide such an attractive model to Scots.*” (italics added for emphasis)

The fact that English is the only official language in Scotland obviously makes it much harder to secure the kind of widespread knowledge of the modern European civil law among Scots lawyers which Evans-Jones sees as vital to shoring up the foundation of Scots law. Nor does it appear likely that any traditional civil law language (e.g. Latin or French) will be made official by Scotland’s new Parliament which assumed its legislative powers on 1 July 1999. It is to be hoped, however, that the knowledge of modern European civil law in Scotland will be enhanced by courses in Scottish universities offered by professors familiar with the major European codes and the languages in which they are drafted. Such teaching would surely assist Scotland in maintaining the integrity of its civilian tradition within the United Kingdom and the European Union.

It is therefore clear that the presence of two (or more) official and “living” languages in a mixed jurisdiction makes a major contribution to the flourishing of the two (or more) legal systems of that jurisdiction, as well as to the preservation of the genius and tradition underlying each system. Conversely, the existence of only one official language in a mixed jurisdiction tends to foster the erosion of any legal system other than the one of which that language is the principal medium of expression. As ÖRÜCÜ has stressed: ²⁶⁸

speak of the white races of the Empire and the United States being linked by a unique heritage of law...” Rodger observes that the civil law was reviled at this time, because it was associated with dictatorship.

²⁶⁷ *Ibid.* at 246. EVANS-JONES, *supra* note 3, further observes (at 247) that the lack of familiarity of Scottish lawyers with concepts that are part of their own law “...will in time lead to its ossification.”

²⁶⁸ ÖRÜCÜ, “Mixed and Mixing Systems” in ÖRÜCÜ *et al.*, *supra* note 7 at 349-350, citing T.B. SMITH, “The Preservation of the Civilian Tradition in ‘Mixed Jurisdictions’”, in A.N. Yiannopoulos (ed.), *Civil Law in the Modern World*, Baton Rouge, Louisiana (1965), who states that mixed legal systems which use English as the language of the courts are particularly exposed to subversion through the imposition or incautious acceptance of technical terms of Common Law as equivalent to civilian concepts. He notes that the influence of English law has frequently resulted from terminological misunderstandings or manipulations usually initiated by the appellate courts, especially in uncodified mixed jurisdictions such as Ceylon, Scotland and South Africa.

"Racial and cultural dualism lead to legal dualism, whether as a mixed system or legal pluralism ... The preservation of a legal tradition has been shown to be related to the growth of national and cultural consciousness, a feeling of 'otherness' and 'power'. However, when two systems co-exist, the stronger one, demographic or otherwise, may take over, over-shadow or overthrow the other. The conclusions may seem simple, that is, if one hopes to preserve fidelity to a legal culture or heritage, one must rescue it from suffocation by the other law, in most cases by Common Law procedural methodology. *The factors in maintaining a legal tradition generally referred to are: shared language and terminology, legal education and legal literature; closeness to the mother of the component to be preserved and the value attributed to the distinct cultural background.*" (italics added for emphasis)

(e) *Other jurisdictions*

It would be interesting to study the effect on the law of Israel of the presence in that country of two languages (Hebrew and English),²⁶⁹ and the effect on Egypt of the presence of two legal systems (*Sharia* law and French civil law) in that country, which has only one official language (Arabic).

2. *Separate legislatures*

Where a mixed jurisdiction has its own legislature separate from the legislature of the federation (if any) of which it forms part, and separate from the legislature of any other country, it is easier to secure the future of the divergent legal traditions of the jurisdiction than it is where only one assembly exercises legislative power.

Québec has had its own legislature, separate from the federal Parliament in Ottawa, from the beginning of Canadian Confederation in 1867. This feature of Canadian federalism has not only helped maintain Québec's distinct cultural identity as the one jurisdiction in North America where the language and culture of the majority of the people is French; it has also served to safeguard and to foster the development of the civil law tradition of the province, as a mixed jurisdiction, within Canada. Scarcely a session of the Québec National Assembly goes by without at least one statute being introduced to amend the Québec Civil Code or the Code of Civil Procedure. Indeed, it is quite likely that had there been no separate Québec legislature, the civilian heritage of the province would have been considerably eroded by the influence of the common law of the surrounding Canadian provinces and the neighbouring United States. The new Civil Code of 1994,²⁷⁰ the product of some forty years of labour by Québec jurists, and among the most modern codifications in the contemporary world, would most likely never have been enacted had Québec been forced to rely on the federal Parliament to adopt its internal legislation.

Louisiana too possesses its own legislature, but the less extensive legislative authority of the states of the American Union compared to the provinces of the Canadian federation,

²⁶⁹ For an interesting study of Israel as a mixed jurisdiction, with private law which has changed from primarily common law to primarily civil law, and public law which has developed in the direction of common law (notably, American common law), see S. GOLDSTEIN, "Israel: Creating a New Legal System from Different Sources by Jurists of Different Backgrounds", in ÖRÜCÜ *et al.*, *supra* note 7 at 147-163.

²⁷⁰ See discussion surrounding notes 79-86, *supra*.

coupled with the power of the federal common law of the United States, makes it more difficult for Louisiana than for Québec to preserve and enhance its civilian tradition. Nevertheless, the 1870 Civil Code has been amended very significantly in recent years to make it more responsive to contemporary social realities and the Code as revised continues to be the basic private law of Louisiana. The state also has the benefit of the Louisiana State Law Institute, which in 1976 assumed the task of studying and proposing amendments to the Civil Code to the Legislature.²⁷¹

South Africa, with its own national and provincial legislatures, is also able to protect and stimulate the growth of its mixed legal system.

Scotland has its own Parliament again after nearly two hundred years during which its legislation has been enacted by the United Kingdom Parliament sitting at Westminster. It should therefore be able to take action to develop both the civilian and common law components of Scots law by legislation.²⁷² With respect to the civilian heritage, it is to be hoped that Scots legislators, now that the new Parliament has assumed its functions, will set in motion a planned process for the codification of Scottish civil law, entrusting this task to a carefully selected group of experts, who will have the general civilian background and language skills necessary to permit them to draw inspiration from contemporary codifications in the States of the European Union, as well as from Louisiana, Québec, Japan, and the Latin American countries, in drafting a code responding to the needs of contemporary Scotland.

It should be noted, however, that where a mixed jurisdiction lacks its own legislature, the protection and promotion of its different legal traditions can nevertheless be supported beneficially by the involvement of an active law commission or other specialised legal agency. Scotland again affords a notable example. For many years, there has been a Scottish Law Commission working in tandem with the Law Commission²⁷³ in studying and proposing reform of the law applicable in Scotland. Eventually the proposed reforms are submitted to the United Kingdom Parliament, often in special statutes applicable only to Scotland. Mention must also be made of the Scottish Office,²⁷⁴ the main arm of the United Kingdom Government dealing with Scottish

²⁷¹ See discussion surrounding notes 104 and 105, *supra*.

²⁷² The new Scottish Parliament, pursuant to sects. 28-30 of the *Scotland Act 1998*, U.K. 1998, c. 46, is empowered to enact laws on a wide range of subjects ("devolved matters"), other than those "reserved matters" which continue to be under the exclusive legislative jurisdiction of the U.K. Parliament pursuant sect. 30 and Schedule 5 of the *Act* and other than certain matters which relate to European Union law. In general, all matters not defined in the *Act* as falling outside the jurisdiction of the Parliament will be devolved. In particular, the whole of Scots private law will be devolved, except for provisions which make modifications to that law as it applies to reserved matters. See the *Scotland Act 1998*, sect. 29(4). See also the White Paper, "Scotland's Parliament" (Cmnd. 3658), dated 24 July 1997, at para. 2.4, indicating that devolution will extend to "civil law except in relation to matters which are reserved."

²⁷³ The Law Commission (for England and Wales) and the Scottish Law Commission were set up in 1965 to study and propose law reform. The two Commissions consist of experienced barristers, solicitors and teachers of law, supported by a Secretary, and other staff members, including research assistants. In addition to law reform, the Commissions are involved with the consolidation of statutes and statute law revision.

²⁷⁴ The Scottish Office was first established in 1885 in London, as the administrative structure within which the "Secretary for Scotland" (renamed the "Secretary of State for Scotland" in 1926) took

affairs, under the direction of the Secretary of State for Scotland, and which, *inter alia*, has played the leading role in the preparation of the *Scotland Act 1998*,²⁷⁵ giving effect to the long-awaited "devolution".

It is also significant that the *Scotland Act 1998* provides for the appointment of an Advocate General for Scotland, who is a minister in the United Kingdom Government, with responsibility for providing advice on Scots law.²⁷⁶ This would seem an important reform, designed to secure greater respect for the integrity of Scotland's mixed legal system in future United Kingdom legislation applicable to that country.

Separate legislative structures, or at least separate law enforcement and law reform agencies, are vital to the survival of mixed jurisdictions.

3. *Separate courts*

Apart from distinct languages and separate legislatures, another major support for a mixed jurisdiction is a separate court system.

In *Canada*, the administration of justice in the provinces generally falls under the jurisdiction of the provincial legislatures.²⁷⁷ The federal Government nevertheless has the power to appoint judges of the superior courts of the provinces (including the provincial courts of appeal),²⁷⁸ with the appointment of judges of inferior courts being the responsibility of the provincial governments. The provincial courts (superior and inferior) adjudicate *all* claims within their respective monetary jurisdiction, whether those claims arise under federal or provincial law. For this reason, Canada is said to have a "co-operative" court system (sometimes called a "unitary" court system, not to be confused with a unitary State). There are also two federal courts established by Parliament for the "better administration of the laws of Canada":²⁷⁹ the Supreme Court of Canada (the final court of appeal for Canada since 1949 in all cases decided by the provincial courts of appeal) and the Federal Court of Canada (which has both a Trial Division and an Appeal Division and is a statutory tribunal deciding disputes in a limited number of fields of federal law, such as industrial property, admiralty matters and immigration appeals).

As a Canadian province, *Québec* has the Court of Québec (an inferior court with provincially-appointed judges), as well as the Québec Superior Court (a superior court of general jurisdiction) and the Court of Appeal of Québec (a superior court of appeal), both of which have federally appointed judges. These judges decide civil cases arising under both federal and provincial law, and therefore under both of Québec's legal

responsibility for administering Scotland's separate legal system and various Boards dealing with Scottish affairs. In 1939, the headquarters of the Office relocated to Edinburgh, while retaining an office in London for purposes of liaison with Whitehall. Today, the Scottish Office has five departments operating under the Secretary of State for Scotland, who, as a member of the U.K. Cabinet, is directly responsible to Parliament for those functions of government which are separately administered in Scotland.

²⁷⁵ U.K. 1998, c. 46.

²⁷⁶ *Ibid.* sect. 87. See also the White Paper, "Scotland's Parliament" (Cmnd. 3658) at para. 4.9.

²⁷⁷ See the *Constitution Act, 1867*, *supra* note 254, sect. 92(14).

²⁷⁸ *Ibid.* at sect. 96.

²⁷⁹ *Ibid.* at sect. 101.

systems. The judges are appointed from among practising lawyers trained in Québec civil law, and who are also familiar with common law, at least to the extent that it underlies much statutory law, both federal and provincial, which they are called upon to apply.

It is also noteworthy that the Supreme Court of Canada, the highest court of appeal in both civil and criminal cases, ordinarily has three justices from Québec who are jurists trained and experienced in the civil law of the province. They sit with six judges drawn from the common law provinces. The Québec justices normally write the leading decisions in all appeals in cases involving Québec civil law. The common law justices are in most cases well versed in the civil law, however, as are the Québec judges in the common law. The two legal traditions therefore continue to be living realities in the highest court of the land, and they interact with one another without compromising the integrity of either system.

Louisiana, like other American states, has both federal and state courts of first instance and appeal. Most of the civil litigation involving the Louisiana Civil Code is tried in the state courts,²⁸⁰ whose elected judges are former lawyers with at least five years of practice in the state.²⁸¹ As former lawyers, they must have passed Bar examinations testing their knowledge of civil law before being admitted to legal practice,²⁸² as well as those aspects of common law which apply in Louisiana. There is no tradition, however, of having Louisiana civil law justices on the U.S. Supreme Court, which means that appeals to that Court from decisions of the Louisiana Supreme Court in disputes governed by the civil law of the state are usually heard and decided by justices schooled and experienced only in the common law. Despite the unquestioned learning of all U.S. Supreme Court justices, there is therefore always a certain risk that the civilian component of Louisiana law will be unduly influenced, in this context, by the common law which predominates elsewhere in the United States.

In *South Africa*, under the 1996 Constitution, the judicial structure of the Republic consists of the Constitutional Court, the Supreme Court of Appeal, the High Courts, including any high court of appeal that may be established by an Act of Parliament to hear appeals from High Courts, the Magistrates' Courts and any other court established or recognised in terms of an Act of Parliament, including any court of a status similar to either the High Courts or the Magistrates' Courts.²⁸³ The judges of these courts are

²⁸⁰ In the hierarchy of Louisiana's state courts, district courts have original jurisdiction in civil and criminal matters. Appellate jurisdiction in civil matters is exercised by the circuit courts of appeal, and above them, by the Louisiana Supreme Court. See the Louisiana Constitution of 1974, Art. V, sects. 3, 10(A) and 16(A).

²⁸¹ See Louisiana Constitution of 1974, Art. V, sect. 24.

²⁸² See Rule 17 of the Rules of the Louisiana Supreme Court, which provides that the rules set forth in Art. XIV of the Articles of Incorporation of the Louisiana State Bar Association, as amended, and as approved by the Court, govern all admissions to the Bar of that state. Art. XIV of those Articles of Incorporation requires applicants for Bar admission in Louisiana to have passed at least 7 of 9 subject examinations, including 4 "Code examinations". Generally, these are three examinations in the Louisiana Civil Code and one in the Code of Civil Procedure.

²⁸³ The Constitution of the Republic of South Africa (Act 108 of 1996), signed into law 10 December 1996, sect. 166.

trained ex-practitioners of both Roman-Dutch and common law, as are those of the Supreme Court of Appeal, the Republic's final court of appeal, and of its Constitutional Court. The legal profession consists of "advocates" (similar to English barristers) and "attorneys" (similar to English solicitors). The advocates are organised into Bar associations or societies (one each at the seat of the various divisions of the Supreme Court), with the General Council of the Bar of South Africa acting as the co-ordinating body of those associations. The attorneys are organised into one law society for each province, with the Association of Law Societies playing the co-ordinating role. Advocates must pass the National Bar Examination of the General Council of the Bar, and attorneys must meet certain degree requirements.

The key part which the South African courts play in maintaining the country's distinct legal heritage is recognised officially in the 1996 Constitution, which provides at Section 173: "The Constitutional Court, Supreme Court of Appeal and High Courts have the inherent power to protect and regulate their own process, *and to develop the common law, taking into account the interests of justice.*" (italics added for emphasis) "Common law" is taken to mean the full South African law, including both its English and Dutch legacies, as they have evolved in the Republic.

Scotland too has long had a separate court system, including sheriffs' courts and the Court of Session, with its Outer and Inner Houses. The fact that the House of Lords is the final court of appeal for *Scotland* in civil cases has sometimes been invoked by authors concerned over the maintenance of the civilian heritage of Scots law. It is significant that the *Scotland Act 1998* provides that judicial appointments are a devolved matter, in the sense that although the Lord President of the Court of Session and the Lord Justice Clerk shall continue to be recommended by the Prime Minister to the Queen for appointment, such recommendations must be based upon a nomination by the Scottish Executive.²⁸⁴ The other judges of the Court of Session, sheriffs principal and sheriffs shall be recommended for appointment to the Queen by the First Minister (of *Scotland*), after consulting the Lord President.²⁸⁵ These provisions indicate a firm commitment to ensuring that the selection of all judges for *Scotland* shall be controlled there, where persons best suited to maintain the mixed tradition of Scots law can be best identified. There is also a Scottish presence in the House of Lords in London, where final appeals on Scots law in civil matters will continue to be decided.

Egypt no longer has its *Sharia* courts administering *Sharia* law, separate from the national courts administering its codes. Nonetheless, the judges of the unified, national courts possess expertise in both *Sharia* and codal law, so that *Egypt's* mixed legal heritage appears to be safeguarded for the future.

²⁸⁴ *Scotland Act 1998*, U.K. 1998, c. 46, sect. 95(1), (2) and (3) provide that it shall continue to be for the Prime Minister to recommend to Her Majesty the appointment of a person as Lord President of the Court of Session or Lord Justice Clerk, but the Prime Minister shall not recommend to Her Majesty the appointment of any person who has not been nominated by the First Minister (the leader of the Scottish Executive) for such appointment. Before nominating persons for such appointment, the First Minister shall consult the Lord President and the Lord Justice Clerk (unless, in either case, the office is vacant).

²⁸⁵ *Ibid.* sect. 95(4). Similar provisions govern the removal from office of a Court of Session judge (see sect. 95(6)).

The survival of mixed jurisdictions is immensely aided by the existence of separate judicial structures, staffed by judges possessing a thoroughgoing understanding of the different legal traditions concerned. Such separate court structures exist in virtually all mixed jurisdictions today. It is desirable to ensure as well the representation, in the highest court of the State in which a mixed jurisdiction exists, of a certain number of judges trained in the two legal systems, especially where one of the systems applies to a minority population and/or to only one particular region (e.g. Québec, Louisiana and Scotland).

XV. – CONCLUSION

This paper has identified some of the principal mixed jurisdictions in the contemporary world and has sketched (very briefly) the historical development of their respective mixed legal systems. Special attention has been devoted to systems combining elements of the common law tradition with elements of the civilian tradition in either uncoded form (e.g. Scotland and South Africa) or in codifications (e.g. Louisiana and Québec). Some major differences in content, structure and style as between these two traditions have been explored, and some examples of differences between the substantive law rules of each have been presented.

The contribution of the *lex mercatoria* (both ancient and modern) to reconciling differences between legal traditions has been surveyed. In this domain, the 1994 UNIDROIT Principles of International Commercial Contracts, that remarkable synthesis of fundamental values and ideas on international trade law achieved by specialists from different legal systems, is of particular importance, because it is increasingly accepted as a guideline and applied as a substantive restatement of supranational commercial norms. The paper has also noted the recent Canadian project of harmonising federal legislation (reflecting common law) with Québec civil law by statute. I have also made personal observations on mixed legal systems, from the viewpoint of a practitioner, a legislator and a law teacher. Finally, I have warned that mixed jurisdictions can best survive if each legal system has its own language, courts and legislature.

The preservation of different languages, cultures and institutions (legislative and judicial) within a mixed jurisdiction, high quality legal education and the enactment of codes and statutes, can all be of significant assistance in the continuance and evolution of a mixed legal system, in the face of globalisation and pressures for standardisation. Equally important to the survival and development of any mixed legal system, however, is the *awareness* of judges, lawyers, legislators and academics of the distinctiveness of the legal traditions underlying the system. This must be coupled with a profound *commitment* to defend, and indeed to celebrate, the integrity of each of those traditions, so that they may make their particular contributions to the system as a whole.

For those of us living and practising in mixed jurisdictions, the fate of our mixed legal systems at the turn of the millennium depends, in the final analysis, not on our stars, but on ourselves.



LES SYSTÈMES JURIDIQUES MIXTES : TRADITIONS DE COMMON LAW ET DE DROIT CIVIL (CODIFIÉ ET NON CODIFIÉ) (Résumé)

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L'actualité du sujet est évidente face à la consolidation de l'Union européenne, dans un cadre mondial qui nous presse à la standardisation. L'auteur nous livre ses réflexions concernant les réalités, les caractères, les richesses des systèmes juridiques mixtes, en prenant particulièrement comme exemples quatre systèmes qui ont marié common law et droit civil: Québec, l'Afrique du Sud, la Louisiane et l'Ecosse.

En ce qui concerne les systèmes de droit civil, l'auteur examine en premier lieu les formes codifiées, qui sont fondées sur la codification napoléonienne de 1804. Les systèmes de droit civil non codifié en revanche ont puisé leurs fondements dans le substrat juridique de droit romain, de droit féodal ou de droit canonique antérieur à la codification Napoléon. C'est le cas de l'Ecosse et de l'Afrique du Sud. Quant au Québec, son nouveau code civil de 1994 consacre des principes et des institutions de droit anglais et de common law, tout en respectant la structure de base et la terminologie de la codification de droit civil.

Les systèmes de droit civil et ceux de common law reposent sur des fondements philosophiques différents (pour les premiers, la source essentielle du droit est la règle écrite émanant du législateur, tandis que pour les seconds, il s'agit du précédent de jurisprudence) dont dérivent les divergences de conception quant aux fonctions, aux méthodes, aux techniques de rédaction et d'interprétation existant face à la doctrine et à la jurisprudence au sein des deux systèmes; ils déterminent aussi certains caractères du droit (sa capacité d'adaptation, la nature de la règle de droit, les classifications droit matériel / droit procédural et ses conséquences).

Ce sont les aspects de droit substantiel qui illustrent ensuite la diversité (mais aussi parfois la rencontre) des concepts juridiques fondamentaux sur lesquels reposent les deux systèmes: ainsi, les pertes économiques, les dommages-intérêts avant jugement, la *lex mercatoria*, les conflits de lois, les concepts de forum non conveniens et de forum conveniens, l'arbitrage, l'interprétation des contrats. Un certain nombre de principes de droit civil ont été incorporés dans la common law: la restitution, l'obligation de diligence en matière extra-contractuelle, les dommages contractuels prévisibles, les dommages-intérêts avant jugement, la preuve du droit étranger, les effets de la faute de la victime ayant contribué au dommage, l'assurance maritime.

La *lex mercatoria* fait l'objet d'un examen particulier. Véritable droit marchand coutumier qui régit les relations commerciales du Moyen-Age à la Renaissance, le concept rend compte aujourd'hui de la pratique des opérateurs commerciaux, reflétée notamment dans les instruments de la Chambre de commerce internationale ou qui se dégage des documents des associations professionnelles du monde maritime. L'arbitrage commercial international, qui repose désormais sur des règles largement harmonisées dans le monde tant pour le droit matériel que procédural, est lui-même une source créatrice de règles relevant de la *lex mercatoria*. Quant aux Principes d'UNIDROIT relatifs aux contrats du commerce international, ils ont réalisé "une synthèse impressionnante du droit du commerce international, conciliant les différentes traditions juridiques d'une manière créative et bénéfique, à l'avantage de la communauté internationale des affaires".

Une initiative de grand intérêt est celle qui consacre le bijuridisme du Canada (projet de loi C-50 de juin 1998) visant à donner plein effet à l'harmonisation entre common law et droit

civil au niveau fédéral et dans la province de Québec. Sont aussi évoqués les points de vue du praticien, du législateur, du professeur de droit, dans la réalité canadienne – précisément le Québec – qui dérivent de l'expérience de l'auteur dans son pays d'origine.

Pour finir sont examinés les éléments qui assurent le maintien d'un système mixte, et le préservent d'un progressif amalgame des systèmes juridiques. La pratique de différentes langues officielles, l'existence d'organes législatifs propres (ou du moins d'institutions spéciales pour la mise en œuvre du droit et des réformes juridiques) et de systèmes judiciaires largement autonomes sont enfin des garants de la vivacité des différences au sein des systèmes juridiques mixtes. Les mots de conclusion mettent l'accent sur l'importance de la volonté des juges, des avocats, des législateurs et des théoriciens de préserver l'identité des traditions juridiques, qui doit être liée à un engagement profond pour défendre et même célébrer l'intégrité de chacune d'elles, afin qu'elles puissent continuer leurs apports à l'ensemble du système.

