Developments of International Commercial Contract Law in Major Legal Traditions

DANG VAN QUAN

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論文題目：　Developments of International Commercial Contract Law in Major Legal Traditions

(比較法的視点から見た国際商事契約法 の発展）

神戸大学大学院法学研究科

専攻：法学政治学専攻

指導教員：齋藤　彰

学籍番号：174J108J

氏名：Dang Van Quan

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ABSTRACT

In primitive societies, the demand of people for commodities was supplied by themselves and their families. Economic markets did not exist. Along with the development of societies, labour specialization had promoted exchanges of goods and services, markets started to develop, and become globally integrated as today. Commercial contracts had been playing an increasing role in exchanges of goods and commercial transactions. However, on the national and international scale, there are not many codes named “contract law”. Instead, they use different names, such as commercial code or civil code, CISG (United Nations Convention on Contracts for the International Sale of Goods, Vienna, 1980), or PICC (UNIDROIT Principles of International Commercial Contracts), etc. Thus, contract law is a common representative name of codes, principles, rules regulating sellers, and buyers’ rights and obligations. Research of contract law is fascinating and conductive because apart from legal knowledge, it provides knowledge and understanding of various fields such as economics or socio-economics and important skills in thinking, negotiating, collaborating, and dispute settlement.

Choosing a topic as broad as the development of contract law to study is risky. The risk is that the thesis’s content tends to be general and rambling if we do not limit a reasonable sphere to select appropriate matters. It would be necessary to balance between ground contents and detailed technical contents. Among the ground contents, the author hopes that by the historical research of legal traditions, we can find some useful lessons somewhere for the law development. Taking legal traditions as a starting point is a new and broad approach in the study of contract law.

This starting point brings a significant historical dimension to the thesis. One of this part's contents is on the contrast between civil and common law solutions relating to remedy for breach of contract. The aim is not to provide detailed accounts of particular systems but rather to identify the preferential type of solutions in each tradition and make ground for the next chapters' analyses of how far differences in theoretical approaches are reflected in practical results. In addition, some related economic concepts are chosen to be another ground matter along with the historical research. This is expected to bring an economic dimension into the research of contract remedy and dispute resolution. Among technical contents, the author concedes the important involvement of policies relating to remedies for breach of contract, mechanisms in dispute resolution, and international harmonisation rather than the contract formation in building interesting and frequently used knowledge of contract law. The point of view is that contract remedies can affect many decisions, for example, allocating risks between parties, parties' incentives to take precautions before they happen, or to select partners with differing amounts of risk, so even in the discussion of harmonisation by CISG and PICC, remedy also is a major part. Moreover, the contract formation process is becoming more convenient thanks to the accumulation of experiences in contract making, the knowledge-sharing tendency, and especially the effective support of information technology in the digital age. Therefore, the thesis will exclude matters relating to the contract formation (rules of offer and acceptance, etc.) which gives no key to the door of enlightened wisdom for business trouble handling. A detailed explanation of the study's scope and thesis' structure will be discussed in the introduction section. The approach employed in this thesis is comparative, historical, and evolutionary. At the end of each part, the thesis will highlight

valuable experiences for building implications for subsequent developments of contract law.

I would like to express my gratitude to Professor Akira Saito - my supervisor - for his kindness, courtesy, forbearance, and thorough guidance, his great help with providing weekly meetings and making valuable comments for the whole of this, kindly permitting me to cite from his papers and giving me precious materials. He is always ready with a word of wise advice for my concerns expressed in the mildest terms. I was particularly fortunate to study under his supervision. Actually, his name appears in not only this but my master's thesis. It means this dissertation could never have been written were it not for his support. Besides, particularly thanks to Kobe University, Professor Akira Saito, and the discussing team in Top Lawyers Program, I have been weekly joined many informative meetings during the course of writing this thesis, other discussions with the participation of jurists from various jurisdictions and leading law firms in Tokyo, Malaysia, Singapore, etc., and well-known visiting professors, like Professor Ingeborg Schwenzer on topics closely related to that of the thesis. I am grateful for their generosity and owe a debt of gratitude to all of the aforementioned helpers. Top Lawyers Program was conducted in a serious academic spirit and always an atmosphere of cordiality. This academic activity had become a joyful hobby for students at the end of every week. I wish to be given a long-lasting opportunity of participating in such an exciting program as a rewarding experience as long as I am permitted even after completing the Ph.D. course. In the final message, writing a thesis in English is a formidable task. Though I have tried to correct the content with effort, some linguistic errors and stylistic shortcomings may still exist.

Furthermore, the opinions expressed in this thesis are those of the author only. I am solely responsible for any mistake if it remains.

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LIST OF ABBREVIATIONS

No	Acronym	Explanation
1	UNCITRAL	The United Nations Commission on International Trade Law
2	UNIDROIT	The International Institute for the Unification of Private Law
3	PICC	UNIDROIT Principles of International Commercial Contracts **(2016)**
4	CISG	United Nations Convention on Contracts for the International Sale of Goods, Vienna, 1980
5	PECL	Principles of European Contract Law
6	ULIS	Uniform Law on the International Sale of Goods
7	ULFC	Uniform Law on the Formation of Contracts for the International Sale of Goods
8	New York Convention	The 1958 United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards
9	Singapore Convention	The United Nations Convention on International Settlement Agreements Resulting from Mediation
10	2018 Mediation Model Law	Model Law on International Commercial Mediation and International Settlement Agreements Resulting from Mediation, 2018
11	2006 Arbitration Model Law	UNCITRAL Model Law on International Commercial Arbitration (1985), with amendments as adopted in 2006.
12	2005 Hague Convention	2005 Hague Convention on Choice of Court Agreements
13	2019 Hague	2019 Hague Convention on the Recognition and Enforcement of Foreign Judgments in Civil or

No	Acronym	Explanation
	Convention	Commercial Matters
14	UN	United Nations
15	SICC	Singapore International Commercial Court
16	DIFCC	The Courts of the Dubai International Financial Centre
17	LCC	London Commercial Court
18	IMI	International Mediation Institute
19	LCIA	London Court of International Arbitration
20	ICC	International Chamber of Commerce
21	ITC	International Trade Centre
22	ALI	American Law Institute
23	ELI	European Law Institute
24	CTL	Court Tech Lab
25	QMUL	Queen Marry University of London
26	ENE	Early Neutral Evaluation
27	The UAE	The United Arab Emirates
28	SCT	Small Claims Tribunal
29	TCD	Technology and Construction Division
30	AED	United Arab Emirates dirham
31	SIFoCC	Standing International Forum of Commercial Courts
32	JIN	Judicial Insolvency Network
33	GDP, GNP	Gross Domestic Product, Gross National Product
34	SCNA	The Standing Committee of the National Assembly

No	Acronym	Explanation
35	ODR	Online Dispute Resolution
36	ADR	Alternative Dispute Resolution
37	¶	Paragraph
38	Art	Article

INTRODUCTION

Generally, when discussing the development of an object, what would you imagine? For instance, to assess the development of a society, it requires not only the economic growth's indexes, such as GDP, GNP, inflation rate, unemployment rate, export-import balance, etc. but additional indexes, such as HDI (Human Development Index[1] is a summary measure of average achievement in key dimensions of human development: a long and healthy life, being knowledgeable and have a decent standard of living), gender equality, religious freedom, etc. The 2002 World Summit on Sustainable Development in Johannesburg adopted a declaration that determines three pillars of sustainable development: economic development, social development, and environmental protection.[2] It illustrates that assessing the development is a complex task with differently combined standards varying on specific objects and individual purposes.

What criteria will be used to measure the development of contract law? Possible answers might be something like the maturity of legal and economic doctrines underlining the rules and regulations, or the dynamism of legal practice, especially dispute resolution, or the efficiency in governing the economic relations, or the easy access to the law, or a harmonised level in the legal system, or high abilities of legal actors, or the possibility of supporting parties in forming their contract effectively, or on respects such as recognition and enforcement of a judicial decision, or the existence of coherent and consistent rules and regulations, etc. There are

[1] Human Development Index (HDI), available at http://hdr.undp.org/en/content/human-development-index-hdi, accessed 03 January 2021.

[2] Chapter I Resolutions adopted by the Summit, 5, available at https://undocs.org/en/A/CONF.199/20, accessed 03 January 2021.

many suggestions. They are referentially valuable and seem to suit a specific legal system but still insufficient, especially for assessing international contract law. According to Cambridge Dictionary's definitions, one of the meanings of the term "development" is "*the process in which someone or something grows or changes and becomes more advanced*"[3] or "*growth or changes that make something more advanced*" (in business English).[4] The thesis prefers to use the former one. Furthermore, the dissertation will regard contract law as an institution and chooses to assess its development in a more overall and somewhat different view with the above discrete criteria. An institution can be understood only if it is located in the whole system of which it is part.[5] Following this indication, the study of development chosen in this paper is not on matters of measuring a level of the advance of a specific legal system, but as a flow of evolvement. It means that the assessment will be conducted in a wider range of legal systems and periods, from jurisdiction to jurisdiction and from the past to present, to draw out a whole picture with remarkable highlights of the flow of contract law's evolvement. We may name it the "evolutionary approach".

It will be more convenient from the outset of the study to say a little bit about some characters of our research object - contract law - for easier capture of what is going on in the discussion. Contract law is still more international in substance and character than any other core areas of private law.[6] Moreover, contract law is flexible and facilitative too. The adaptive and conducive nature means that if parties do not like a particular

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[3] Cambridge Dictionary, the meaning of "*development*": https://dictionary.cambridge.org/dictionary/english/development.

[4] Ibid.

[5] Harris, D., Tallon, D. (1989). *Contract Law Today.* Oxford: Clarendon Press, p395.

[6] Jansen, N. Zimmermann, R. (2017). *Commentaries on European Contract Laws.* Oxford: Oxford University Press, ¶11.

rule, they can change it. Hence, looked at its essence, formal contract law provides only a set of default rules. Due to these traits, we may agree that we should not pose rigid views when approaching such a set of default rules. In addition, it is not peculiar that, during the discussion of law, we will repeatedly find the occurrence of the term “transaction” or “exchange” (which seems too economical), especially in theories of relational contract and transaction cost economics, because of the correlation between transactions and institutions. Transactions are central to institutions.[7] A transaction is defined as an action taken when a commodity is transferred from one party to another.[8]

Another additional note is that though the thesis is discussed in major legal traditions, it does not mean that one legal tradition’s representative traits will share exactly at all aspects with all the jurisdictions belonging to that tradition. Because different systems of law are sometimes out of step, and the similarity is relative. For instance, England and the United States are different in common law systems. They are “two countries separated by a common law”.[9] France and Germany also are different. They gave to the civil law world two different models of codification and legal science.[10] Because of this divergence, one certain content may be selected from one jurisdiction when making a definite comparison between traditions, but another may be taken from others. The prevailing goal is to scrutinize contract law in legal traditions and deepen understanding of the nature of contractual obligation in general. It is expected that this thesis may benefit a young law student or young practitioner with only limited prior knowledge

[7] Greif, A. (2006). *Institutions and the Path to the Modern Economy - Lessons from Medieval Trade.* Cambridge: Cambridge University Press, p45.

[8] Ibid, p46.

[9] Glendon, M., Carozza, P., Picker, C. (2016). *Comparative Legal Traditions in a Nutshell. 4th Edition*. The USA: West Academic Publishing, p16.

[10] Ibid.

of other legal systems different from his home jurisdiction or his targeted studying jurisdiction.

1. The Scope of the Thesis

Before proceeding, it is important to confine the scope of the thesis. The thesis covers matters relating to international commercial contract law for sales of goods. The international character can be understood as the descriptions in PICC (The UNIDROIT Principles of International Commercial Contracts):[11] having "*the place of business or habitual residence of parties in different countries*" or having "*significant connections with more than one state*" or involving "*a choice between the laws of different states*" or affecting "*the interests of international trade*". In other words, an international contract excludes situations where there is no international element at all (i.e., all the relevant elements of the contract are connected with only one country). Besides, the commercial character excludes sales of goods bought for personal, family, household use (consumer transactions).

We start by looking at the historical influences of legal tradition on the different approaches to contract law of common and civil law systems in Chapter 1, and contractual concepts - in Chapter 2 - which had been changing and affecting the policies towards remedy for breach of contract, before going on to look at nuances of legal technique, such as harmonizing contract law by CISG (United Nations Convention on Contracts for the International Sale of Goods, Vienna, 1980) and PICC in Chapter 3, the dynamism of legal practice in dispute resolution in Chapter 4, and finally some suggestions for the future of contract law in Chapter 5. Remarkably, remedy for breach of contract is the central technical theme

[11] Preface, PICC 2016, p1, available at https://www.unidroit.org/instruments/commercial-contracts/unidroit-principles-2016, accessed 10 December 2020.

discussed, as a means to point out the different treatments between common law and civil law tradition, due to its important role in any contractual relations.

2. Questions to Pursue

The thesis will address five research questions below:

1) How had legal tradition shaped the development of contract law? What are the lessons learned from the past?
2) How did the related contractual concepts evolve? How had they affected the policies of protecting parties' interests?
3) For contracting internationally, what does the law assist business parties? What tendency suit contract law, harmonization, or unification?
4) How is the development in practice, especially in dispute resolution?
5) What are the suggestions for the future of contract law?

CHAPTER 1: TRADITIONAL PATH

The study of contract law cannot be conducted in isolation from its institutional context and historical background. Gaining a better understanding of history, therefore, promises to advance our knowledge regarding why and how the contract law has evolved. Indeed, the further back into the past the study goes, the more the validity of legal achievements is found because the greater length of the investigation will give us a more understanding of law developments. Furthermore, the Roman contribution is affirmed that it is "largest in the law of contractual obligations".[1] This statement suggests us to choose comparative law and legal traditions as a starting point to kick off our research, to make sure that we understand what civil law and common law are, where they were constituted, and how they work together throughout history. The views on contract law between civil law and common law are reflected and distinguished with many significant distinctions, which may help us have a thorough insight of contract law at the whole and also at individual aspects, as well as to draw a historical dimension into the study of the law development.

The study of legal traditions can be useful for the research of legal development in general and contract law development in particular due to two following reasons. First of all, it relates to the institutional effect caused by the institution of contract. One of the institution's definitions may be accepted that "*institutions are systems of factors that are social in being man-made, nonphysical, and exogenous to each individual whose*

[1] Harris, D., Tallon, D. (1989). *Contract Law Today.* Oxford: Clarendon Press, p7.

behaviour they influence".[2] *"Exogenous" character of factors is the linchpin of institutions.*[3] The institution of contract is the general form of regulation of economic exchange.[4] In the second place, that is the influential effect of the so-called path-dependence on contract law development. The path-dependence literature developed by David (1985) and Arthur (1988) emphasizes the stability of historically inherited phenomena, the impact of the past on subsequent developments. Existing institutions affect the processes of learning, imitation, and experimentation that lead to new ones.[5]

1. Two Major Legal Traditions

What is the legal tradition? In my comprehension, "legal tradition" is a broader term than the "legal system". It implies many legal systems, like a family name of people who have the same ancestors. Legal systems called by a common name like "civil law" systems or "common law" systems or other names share a distinctive heritage with other legal systems called by other common names. Within one legal tradition, legal systems have common characters because they inherit the same heritage. For example, the tradition of the civil law is characterized by a particular interaction in its early formative period among Roman law, Germanic and

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[2] Greif, A. (2006). *Institutions and the Path to the Modern Economy - Lessons from Medieval Trade.* Cambridge: Cambridge University Press, p44.

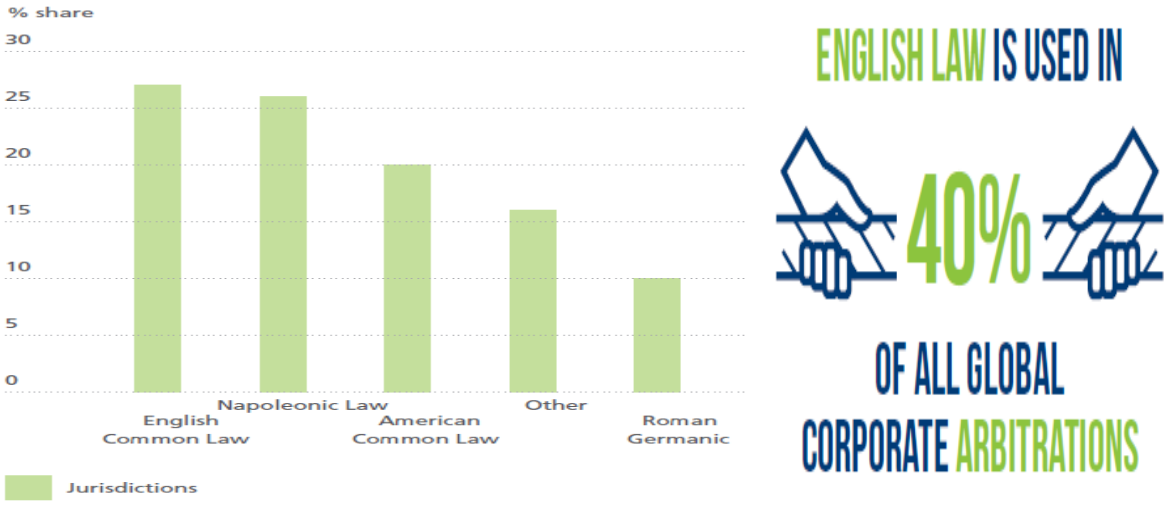
[3] Ibid.

[4] Campbell, D. (2005). *The Relational Constitution of Remedy: Co-Operation as the Implicit Second Principle of Remedies for Breach of Contract*. Texas Wesleyan Law Review, Vol.11, p465. available at: https://heinonline.org/HOL/Page?public=true&handle=hein.journals/twlr11&div=28&start_page=455&collection=journals&set_as_cursor=0&men_tab=srchresults, accessed 1 August 2020.

[5] Ibid, n 2, p23.

local customs, canon law, the international law merchant, and, later, by a distinctive response to the break with feudalism and the rise of states.[6]

There are many different legal traditions in the world, for example, civil legal tradition, common legal tradition, Islamic legal tradition, Hindu legal tradition, Talmudic legal tradition, and so on. However, civil and common legal traditions are the two major ones. This is affirmed by the fact that many parties opt for their agreements to be governed by common law and civil law. Common law tradition is the most widely-used legal tradition, with English common law and American common law respectively covering 27% [7] and 20% [8] of the world's 320 legal jurisdictions (English law is also the most widely-used foreign law in Asian markets[9]). Civil law tradition is the second most widely-used legal tradition, with Napoleonic law and Roman Germanic law respectively covering 26% and 10% of the world's jurisdictions.



Comparison of global legal systems [10]

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[6] Glendon, M., Carozza, P., Picker, C. (2016). *Comparative Legal Traditions in a Nutshell. 4th Edition*. The USA: West Academic Publishing, p21.

[7] *Legal excellence, internationally renowned: The UK legal services 2019*, p41, available at https://www.thecityuk.com/research/legal-excellence-internationally-renowned-uk-legal-services-2019/, accessed 22 November 2020.

[8] Ibid.

[9] Ibid.

[10] Ibid.

Civil law and common law share many similarities, even there are differences. For example, the basic sense of justice has been commonly shared.[11] Furthermore, the legal system itself started from the systematization of dispute resolution procedures in both systems.[12] In this part, we are going to see how they differ and resemble in detail.

1.1 Civil Law Tradition

Things began to happen in Rome, which were identifiable as legal, but no civil code was written. Everything was simple at the first stage.[13] There was a lot of internal debate in Rome between those of high rank and those of lower rank. Eventually, they tried to placate people by writing down on tablets some very elementary principles of how to resolve disputes.[14] The Twelve Tables (around 450 BC) are often seen as the beginning of Roman law, but they were really just a peace-making endeavor.[15] Roman law thus found its origins in advice concerning particular cases or disputes. The law which emerged looks very much like life.[16]

The Romans took their law with them all over Europe.[17] When the Romans were eventually driven out, Roman law was off the European territorial map for centuries, except for some of its versions in Italy and the south of France. When Roman law was re-discovered in the eleventh

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[11] Saito, A. (2008). *Legal Education for Value Creative Business Lawyers: A Multidisciplinary Perspective Towards Globalising Market Societies*. CDAMS (Centre for Legal Dynamics of Advanced Market Societies, Kobe University): Legal Dynamics Series, LexisNexis, p133.

[12] Ibid.

[13] Glenn, H. P. (2014). *Legal Traditions of the World*. Fifth Edition. New York: Oxford University Press, p133-134.

[14] Ibid, p134.

[15] Ibid.

[16] Ibid, p136.

[17] Ibid, p139.

century,[18] it became substantively adequate to deal with an entire range of social problems and continued to expand by its established positions in universities.[19]

Thousands of students who came to the Italian law faculties[20] from every corner of Europe carried back to their own nations and universities the methods and ideas of Roman law as "torch bearers" of the new legal science,[21] furnished the common methodology for the further development of national laws. The Roman civil law, together with the immense literature generated by commentators, came to be the *jus commune* or *ius commune*, the common law of Europe as a common legal language and a common method of teaching and scholarship.[22] At this time, there were no strong centralized political administrations, no unified legal systems, and no any code.[23] From the fifteenth century onwards, the position of *jus commune* began to be affected by the rise of legal nationalism and political power centralization. Eventually, it was displaced as the basic source of law after the introduction of national civil codes.[24]

The first national code appeared in the Scandinavian countries in the seventeenth and eighteenth centuries.[25] However, the 1804 French Civil Code (under Napoleon) was more complete, systemic, and was claimed

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[18] Glenn, H. P. (2014). *Legal Traditions of the World*. Fifth Edition. New York: Oxford University Press, p139.

[19] Ibid, p145.

[20] It was started in the University of Bologna (Italy) under the Roman Empire. The University considered the first university in Europe, and was the prototype of universities in the world.

[21] Glendon, M., Carozza, P., Picker, C. (2016). *Comparative Legal Traditions in a Nutshell. 4th Edition*. The USA: West Academic Publishing, p29-30.

[22] Ibid, p30.

[23] Ibid, p34.

[24] Ibid, p36-37.

[25] Ibid, p36.

as the world's first modern code.[26] The 1900 German Civil Code was a very logical construction and advanced systemic legal thought. Then all of Europe, including Eastern Europe and Russia, had to have their codes. The 1804 French Civil Code and the 1900 German Civil Code have served as models for most other modern civil codes.[27] They have both decisively affected the shape of civil law systems today.[28] Just as ancient Roman law was once introduced into the conquered territories, the French Civil Code was brought by Napoleon conquests and then French colonialism to colonies in Europe, Africa, Asia, Oceania, Caribbean islands.[29] Although the German Civil Code as a whole was not built to travel, the legal science that preceded and accompanied it has had an important influence on legal theory and doctrine in other countries.[30]

From the beginning, judges relied heavily on legal scholars for information and guidance. By the year 1600, judges normally sent out the record of a difficult case to a university law faculty and adopted the faculty's collective opinion on questions of law.[31] This practice continued until the nineteenth century, resulted in the accumulation of an extensive body of common doctrine, reports, and essays. Scholarly opinions rendered in actual controversies became a kind of case-law.[32] Therefore, it is true to say that the civil law system has been and still is based on the research activities of legal scholars in universities, then additionally has been based on codified law systems as a product of the constitutions of

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[26] Glendon, M., Carozza, P., Picker, C. (2016). *Comparative Legal Traditions in a Nutshell. 4th Edition*. The USA: West Academic Publishing, p38.

[27] Ibid, p37.

[28] Ibid.

[29] Ibid, p49.

[30] Ibid, p51.

[31] Ibid, p34.

[32] Ibid.

states in Europe.[33] Academic writers have a role in explaining the general principles of legislative texts, and they involve in the process of law-making. Even today, legal academics still play important roles despite the legal practice becoming much more important than before and gathering much attention in societies.[34]

The world now recognises widely some features of the civil law tradition. First of all, as to the sources of law, the primary sources in all civil law systems are enacted law and custom, with the former overwhelmingly more important.[35] Sometimes "general principles of law" are also considered a primary source. The secondary sources may have weight when primary sources are absent, unclear, or incomplete, but they are never binding, and they are neither necessary nor sufficient as the basis for a judicial decision. Case law and the writings of legal scholars are such secondary sources.[36] Civil law theory does not recognise the existence of a formal doctrine of "*stare decisis",*[37] *(stare decisis* applies in common law systems to require a lower court to follow the decision of a higher court). [38] Hence, it is adequate to comment that civil law tradition also uses case law to supplement enacted law and custom. Secondly, codification is the easily noticed feature of a civil law system.[39] Codification creates an expectation that all branches of the law will be presented in a systematic form.[40]

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[33] Saito, A. (2008). *Legal Education for Value Creative Business Lawyers: A Multidisciplinary Perspective Towards Globalising Market Societies*. CDAMS (Centre for Legal Dynamics of Advanced Market Societies, Kobe University): Legal Dynamics Series, LexisNexis, p133.

[34] Ibid.

[35] Glendon, M., Carozza, P., Picker, C. (2016). *Comparative Legal Traditions in a Nutshell. 4th Edition*. The USA: West Academic Publishing, p147.

[36] Ibid.

[37] Ibid, p155.

[38] Ibid, p158.

[39] Glenn, H. P. (2014). *Legal Traditions of the World*. Fifth Edition. New York: Oxford University Press, p133.

[40] Harris, D., Tallon, D. (1989). *Contract Law Today.* Oxford: Clarendon Press, p16

Because of this systematic form, codification requires interpretation with the sense of searching for the truest meaning.

1.2 Common Law Tradition

The term “common law” is used in different senses. It can mean the law which is “common” across a country applied by its court system. On the other hand, it is often used in its narrowest sense to refer to the law found in decisions of courts which existed in England from the early middle ages until the late nineteenth century, the King’s courts,[41] as contrasted with the law found in legislative enactments. The “common law” is judge-made law and has no origin in any legislative enactment.[42] (Of course, there are many areas of English law that its rules are contained wholly or mainly in legislation. For example, much of company law has now been taken over by statute).

We will study the history of the common law tradition. As R. C. Van Caenegem[43] has concluded that the best explanation for the existence of the common law tradition is the historical accident, or chance, of the military conquest of England in 1066 by the Normans. The only avenue for a Norman legal order was through a loyal judiciary. This immediately marks off a common law tradition from all others. The Normans noticed that a country could be conquered militarily, but it was not easy to govern militarily. So they incorporated the local jury into the working of their new, modern, royal courts. Then the common law grew through the accumulation of precedent, and it expanded throughout much of the world

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[41] Cartwright, J. (2013). *Contract Law - An Introduction to the English Law of Contract for the Civil Lawyer*. Second Edition. Oxford and Portland, Oregon: Hart Publishing, p3.
[42] Ibid, p4.
[43] Raoul Charles, Baron Van Caenegem (14 July 1927 – 15 June 2018), was a Belgian historian and noted expert in the field of European legal history. https://en.wikipedia.org/wiki/Raoul_Van_Caenegem

as a result of the British Empire. English technique generally involved a more hands-off approach, leaving existing law for existing people, new laws for new people. At this point, the common law tradition differs from the civil law tradition which tends to try keeping the original code for new lands.

Common law systems around the world have drawn their legal system from England,[44] typically in the context of having been British colonies, such countries as Australia, Canada (except Quebec, which has a civil law code: it was a French colony before it was passed to the British crown in 1763), India, the Republic of Ireland, Hong Kong, New Zealand, Singapore and the states within the United States of America except for Louisiana (which has a civil law code. Spain and France held it before it was passed to the United States in 1803).[45] Other countries have received the common law only in part and are generally referred to as “mixed” jurisdictions-such as Scotland and South Africa. Although, from its origins in Southern England, the common law became the principal basis of the procedure and substance of the legal systems for nearly a third of the world’s population. It is inappropriate to suggest that English law exists in the United States, Indian, or Commonwealth countries. English law applies only in England and in increasingly modified form in Wales.[46] For example, there is no general principle of good faith in the English law of contract, but the courts in the United States and Australia have gone much further than the English courts in accepting a significant role for the requirement of good faith between contracting parties in particular contexts, especially a duty of good faith in the performance of a contract.

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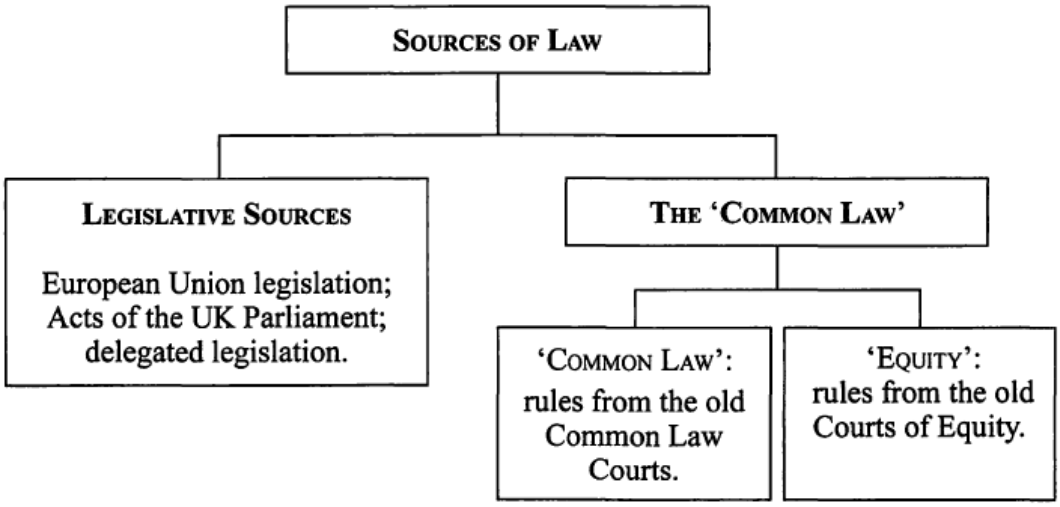
[44] Cartwright, J. (2013). *Contract Law - An Introduction to the English Law of Contract for the Civil Lawyer*. Second Edition. Oxford and Portland, Oregon: Hart Publishing, p9.

[45] Ibid.

[46] Glendon, M., Carozza, P., Picker, C. (2016). *Comparative Legal Traditions in a Nutshell. 4th Edition*. The USA: West Academic Publishing, p195.

When talking about the origin of the common law tradition, we find the involvement of courts - King's courts – in England. It will be clearer to distinguish the King's courts and others, or in other words, to distinguish the common law and equity. The "common law" is different from "equity" - the law which can be found in the decisions of courts under the control of the King's Chancellor (known as the Chancery Courts, or the Courts of Equity) and developed from the late fourteenth or early fifteenth century (after the King's courts of common law were already established) until the late nineteenth century. This distinction between "common law" and "equity" is discussed further below.[47]



The relationship between the common law and equity

During the fifteenth and sixteenth centuries, the Chancellor decided cases according to what "equity" required as a decision of "conscience", which based on the Chancellor's discretion. He had no legal rules to follow. Over the years and centuries, the Courts of Equity developed principles and rules by reference to which they would grant remedies-just as much as the common law courts applied the legal rules which had been

[47] Cartwright, J. (2013). *Contract Law - An Introduction to the English Law of Contract for the Civil Lawyer*. Second Edition. Oxford and Portland, Oregon: Hart Publishing, p4.

developed over the years by the common law judges. Although the courts were fused into a single new court structure in the late nineteenth century, the reform of the courts did not itself reform the rules of common law and equity. These separate "streams" of rules-common law and equity-continue to be developed by the courts in modern law. The rules of modern law can often be understood by reference to their origins in the common law or in equity. Today, in England and Wales, there are still three divisions at the High Court of Justice, namely Chancery Division (hearing cases involving business and property disputes, including intellectual property claims, estates, etc.), the Queen's (or King's) Bench Division (hearing cases involving contract, tort, etc.), and the Family Division.[48] Besides, there is reliable information that they are thinking of changing this structure of three divisions to merge the Chancery Division and the Queen's (or King's) Bench. Hence, the current structure may be changed in the near future. Furthermore, it is also necessary for any study of the law of contract to understand the relationship between contract and tort. Tort law is the area of law that covers most civil suits. Generally, every claim that arises in civil court, with the exception of contractual disputes, falls under tort law.

Developed slightly later but in almost the same period of time with civil law tradition, the English legal system was not a direct reception of Roman law. However, there has been an indirect effect on the development of the early English legal system from Roman law, principally from the area of canon law. Some Chancellors were educated at Oxford and Cambridge with the study of civil law, and judges had considered Roman doctrines when difficult questions were presented and there was no direct, traditional

[48] High Court of Justice, England and Wales, https://www.britannica.com/topic/High-Court-of-Justice-British-law, accessed 22 November 2020.

source of English law as a guide.[49] However, we should not say that there has been a reception of Roman law. Reception means a direct acceptance of Roman law as a principal source of law.[50] All legal systems tend to benefit from others, particularly as comparative legal study becomes prevalent.

For centuries English precedent not only existed as law, as it continues today, but it existed as the primary source of law, giving way partially only to legislative enactments of Parliament after the civil war (1642–1651), and later being overshadowed by legislation as a source of social reform in the mid-19th century.[51] Parliament may enact unwise laws which the courts nevertheless in theory are bound to apply. However, the role of the Human Rights Act 1998 has provided the courts with the ability to issue "declarations of incompatibility" where statutes are inconsistent with certain human rights.[52] Sources of law in common law systems derive mainly from precedents, a small portion from the legislation of Parliament and delegated legislation of the chairperson of governments like a Minister or a President (in England, from 2021, after Brexit EU law will not be a source of law). In England, it is rare to find legislation on general rules of contract law, and contract theory is derived from case law.[53] [54]

The significance of case law as a source of law places the court at the centre of the law-making process. As a consequence, the role of judges is significant to the point where judges of higher courts have a high status

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[49] Glendon, M., Carozza, P., Picker, C. (2016). *Comparative Legal Traditions in a Nutshell*. 4th Edition. The USA: West Academic Publishing, p330.

[50] Ibid, p331.

[51] Ibid, p303.

[52] Ibid, p315.

[53] Harris, D., Tallon, D. (1989). *Contract Law Today.* Oxford: Clarendon Press, p389.

[54] Cartwright, J. (2013). *Contract Law - An Introduction to the English Law of Contract for the Civil Lawyer*. Second Edition. Oxford and Portland, Oregon: Hart Publishing, p4.

within the legal system. In addition, academic writing is not so significant. Less reliance has traditionally been placed on academic writers. A common law judge will generally give a detailed exposition of his reasoning, not only by interpretation of legislative texts but in the development of the rules of the common law. His power to develop the law is limited to relevant points of law which arise in the case.

2. Different Approaches to Contract Law

A codified system (or civil law system) differs from a common law system in that, in principle, the whole law is to be found in the codification. In contrast, the common law is never complete but is in a state of continuous creation.[55] The distinction is not only confined within the manners in which the two systems built up, but between them, amongst other things, there are different approaches to contract law doctrine that we can find more details in this part. This section aims to draw a contrasting picture of chosen aspects vital to contract law in any legal system. However, they are mainly in principle, because in the ensuing part of this Chapter, part 3, we will find some new movements in facts that bridge the distinctive distance.

2.1 Legal Methodology

Generally speaking, the two legal systems appear to be very close and yet very different: very close, because contract performs the same function in societies, and very different because there are different approaches in legal methodology. A university in England when needed practical legal advice will not consult its own law faculty but will seek counsel's opinion. In France, such a proceeding would seem perverse.[56] Furthermore, a law

[55] Harris, D., Tallon, D. (1989). *Contract Law Today.* Oxford: Clarendon Press, p8.

[56] Ibid.

professor may have in mind a reformulation of a whole area of law, but a common-law judge's job is to focus on specific cases and how to fit existing principles set out in precedents.[57]

The type of legal reasoning predominantly used in the two systems is different. In civil law, because of the methodology based on theory or principles, the predominant kind of legal reasoning is deductive reasoning. Academic writers and lawyers in civil law use mostly deductive reasoning than inductive reasoning. This is not to say inductive is not used, but less often used than the deductive one. In contrast, induction from the decided cases is the mostly-used method of reasoning in common law, and the supplement method is deduction because common law also has legislation. Reasoning from precedent is the most characteristic mode of reasoning in the common law,[58] besides they reason from principles[59] (for example, no person should unjustly enrich himself at another's expense), from doctrines[60] in literature, or from hypotheticals[61]. However, in common law due to contract law mainly derives from case law, so we can say that induction is used very predominantly.[62]

In practice, legal reasoning is a concept of legal methodology, it plays an important role in the development of law and contract law, and causes some consequences: First, legal consequences, which refer to the effects of a given rule on the body of the law; Second, logical consequences, which refer to the result of the logical development of the rule; And, third,

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[57] Campbell, D., Mulcahy, L. and Wheeler, S. (2013). *Changing Concepts of Contract - Essays in honour of Ian Macneil*. London: Palgrave Macmillan, p195.

[58] Eisenberg, M. A. (1991). *The Nature of the Common Law*. The USA: Harvard University Press, p50.

[59] Ibid, p76-83.

[60] Ibid, p96-99.

[61] Ibid, p96-103.

[62] Harris, D., Tallon, D. (1989). *Contract Law Today.* Oxford: Clarendon Press, p389.

the behavioural consequences, which refer to the effect of the rule on how people actually behave in society.[63] The capacity of a lawyer, or a law professor, or a judge in applying his legal reasoning skill in the traditional ways familiar with his legal tradition leads to different consequences, and these consequences are reflected in the development of contract law.

2.2 Remedies for Breach of Contract

The remedies provided by a legal system for breach of contract tell us much about the system's notion of contract. We shall outline some of the rules of English law (as a delegated legal system of common law) concerning the remedies for breach and discover some key ideas about how English law views a contract. We need to consider not only the range of available remedies, the particular rules of each remedy but also such questions as the hierarchy of remedies. In some respects, the answers given by English law are significantly different from those given by many civil law systems. This fact is also pointed out to highlight the more deeply distinctive differences between common law and civil law.

First of all, to make sure we are discussing the same object, we need to introduce what is a breach of contract? Amongst many definitions, one may be accepted is that a breach of contract involves the failure by one party to fulfil an obligation under the contract through non-performance or defective performance.

a. Notice of default

In civil law systems, it is not sufficient merely to show that performance had become due.[64] Where performance was merely delayed, the general rule is that the creditor must put the debtor in default by a notice of default

[63] Harris, D., Tallon, D. (1989). *Contract Law Today.* Oxford: Clarendon Press, p390.

[64] G.H.Treitel.(1988). *Remedies for Breach of Contract*. Oxford: Clarendon Press, ¶111.

(or demand for performance).[65] The purpose of such a notice is to make it clear to the debtor that he is required to perform, or indeed sometimes to inform him that he is in breach.[66] The notice can only be given after the time fixed for performance. Furthermore, extremely seller-friendly rules are found in many commercial codes of civil law systems.[67] The buyer is obliged to examine the goods and inform the seller about any defect in quality or quantity. Failure to give notice regularly engenders the loss of any right.[68] It may yield highly unsatisfactory results on the international level. For instance, complex machinery is sold by a seller from a developed country to a buyer in a transitioning country where lacks equipped technical tools or expertise.[69]

The common law has no general requirement of notice of default.[70] Sometimes it requires notice of default to be given where one party to a contract of a specified type (such as a lease of land or a regulated hire-purchase agreement) seeks to terminate it on account of the other's breach. The notice is, therefore, a prerequisite of termination. However, it is not needed to establish a breach or to give rise to liability in damages.[71] In this respect, it again differs from the civil law requirement of notice of default.

In common law systems, the fault is discussed in connection with the substantive issue of liability to determine whether there is a breach

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[65] Ibid.

[66] G.H.Treitel. (1988). *Remedies for Breach of Contract*. Oxford: Clarendon Press, ¶111.

[67] Schwenzer, I. (2016). *The CISG – a fair balance of the interests of the seller and the buyer*, p80. available at: https://www.ingeborgschwenzer.com/contract-commercial-arbitration. Accessed 25 June. 2020.

[68] Ibid, p80.

[69] Ibid.

[70] G.H.Treitel. (1988). *Remedies for Breach of Contract*. Oxford: Clarendon Press, ¶115.

[71] Ibid.

(relevant to definitions of breach).[72] Remedies may depend on the degree of fault, i.e., whether the breach was innocent, negligent, or wilful. In civil law systems, however, the question of fault is more commonly discussed under the heading of the legal effects of that failure,[73] i.e., the fault is a requirement for the availability of contractual remedies (relevant to discussions of remedies).[74] This reveals the different views of the two legal systems. The former views fault in connection with discussions of the breach first and then of remedies. The latter views fault in connection with discussions of remedies. Although this is not a huge distinction, it implies the consideration and deliberation in a slightly different manner.

b. Choices for Remedy

A fundamental contrast between common law and civil law is the choice between specific performance and monetary compensation (or damages). Civil law views the specific performance of agreements as a primary remedy, while common law accords it only secondary status, regarding it as appropriate only where the damages are inadequate [75] (for example, in cases of buying a parcel of land or rare assets, the buyer would be unable to find equivalent goods if the court awards damages). The common law takes the view that it would be a waste of time and money to force the seller to perform the contract for generic goods after the breach. Instead, damages would be sufficient to put the buyer in a position that he could acquire alternative goods from other providers.[76]

In common law, claims based on the defendant's breach of contract have their historical roots in the law of tort, which explains why the primary

[72] G.H.Treitel. (1988). *Remedies for Breach of Contract*. Oxford: Clarendon Press, ¶8.
[73] Ibid.
[74] Ibid, ¶10.
[75] Harris, D., Tallon, D. (1989). *Contract Law Today.* Oxford: Clarendon Press, p243.
[76] Kötz, H. (2017). *European Contract Law.* 2nd Edition. Oxford: Oxford University Press, p203.

remedy is damages.[77] Besides, there were pragmatic reasons for the pre-eminence of damages in common law. If there is a conflict between the parties, it would be over-optimistic to expect the faithful performance of the contract.[78] Specific performance order could prolong the battle between parties. An award of damages is expected to bring the dispute to an end.[79] Further, it would be difficult for the court to check if the debtor performs in line with the contract, especially if it covers a long period.[80] All things should be considered, the account must also be taken of the situation of parties whether they are bound by a "one-off" contract or a long-term relationship.[81] In this aspect, we will turn back the matter in part 3.3 (of this Chapter) and part 3 (of Chapter 2), to know more about the new trend and the effect of the relational contract theory on the choice of remedy for a long-term contractual relationship.

From the side of an aggrieved party (the plaintiff), although he does not make a fault, and is a victim of the breach caused by the defaulting party, he is expected to do further acts if he is awarded monetary compensation as a remedy. Damages require the plaintiff to mitigate his loss where it is reasonable for him to do so,[82] typically by securing alternative performance. In case specific performance is chosen as a remedy, it does not require the plaintiff to mitigate, but it shifts the obligation on the defendant to seek out alternative performance if that will be cheaper for him than the promised performance.[83] It means some conditions need to be considered when choosing damages or specific performance as a

[77] Kötz, H. (2017). *European Contract Law.* 2nd Edition. Oxford: Oxford University Press, p202.
[78] Harris, D., Tallon, D. (1989). *Contract Law Today.* Oxford: Clarendon Press, p297.
[79] Ibid, n 77, p204.
[80] Ibid, p205.
[81] Ibid, n 78.
[82] Ibid, p257.
[83] Ibid.

remedy. There is not a justice ground for believing that either approach is superior to the other. Much will depend on the market setting for the contract. For example, French contract law distinguishes between contracts “to do” and contracts “to give”, with damages as the normal remedy for the former and specific performance as a normal remedy for the latter.[84] A contract to design an aircraft is a contract to do. A contract to sell an aircraft is a contract to give. A contract to build an aircraft to a certain design and then to transfer ownership of it is a contract both to do and to give.[85] In this thesis, only the scope in sales of goods is mentioned, in other words it means we are discussing contracts “to give” rather than contracts “to do”. So, we can regard specific performance as a primary choice in civil law. Now we examine in detail each kind of remedy.

(i) Specific performance

Specific performance is a decree issued by a court ordering the defendant to carry out his contractual obligations.[86] There are some principles for the exercise of discretion. Firstly, the plaintiff must show that damages would be an “inadequate” remedy.[87] Such is the case where no satisfactory equivalent is available to the plaintiff in the market; for example, a parcel of land was promised to be sold. Specific performance is typically available for the sale of unique goods, sale of real property.[88] Alternatively, the value of the plaintiff’s loss may be uncertain or very difficult to assess, and to award damages would create the risk of under-

[84] Goldberg, Victor P. (1989). *Readings in the Economics of Contract Law*. Reprinted 1990. Cambridge: Cambridge University Press, p122.

[85] Ibid.

[86] Harris, D., Tallon, D. (1989). *Contract Law Today.* Oxford: Clarendon Press, p249.

[87] Ibid, p250.

[88] Ibid, p251.

compensation.[89] Secondly, concerning justice and fairness, specific performance may be refused where it would cause severe hardship to the defendant (e.g., where the cost of performance is out of all proportion to the benefit accruing to the plaintiff; where the plaintiff has acted unfairly; and, perhaps, where the substance of the contract is regarded as unconscionable).[90] Clearly, the remedy will not be ordered where performance is no longer possible.[91]

Sometimes agreements are made whereby a party agrees to pay a certain amount of money to the other party if there is non-performance. For creditors, it avoids difficulties in proving the damages. All legal systems use two terms to describe such agreements:[92] (1) Liquidated damages clauses are provisions to make a reasonable estimate of the damages in case of non-performance of the contract; (2) Penalty clause is a clause to put the debtor under financial pressure to perform the contract properly. Sometimes it is difficult to differentiate between these two types. It should be based on the purpose of the clause if one would like to distinguish.[93] The penalty clause was already known under Roman law.[94] Both terms are normally accepted in civil law systems, but the story is quite different in common law on accepting penalty clauses. In Anglo-American law, a penalty clause is normally invalid.[95] However, liquidated damage clauses

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[89] Harris, D., Tallon, D. (1989). *Contract Law Today.* Oxford: Clarendon Press, p250.

[90] Ibid.

[91] Ibid.

[92] Kötz, H. (2017). *European Contract Law.* 2nd Edition. Oxford: Oxford University Press, p275.

[93] G.H.Treitel. (1988). *Remedies for Breach of Contract*. Oxford: Clarendon Press, ¶179.

[94] Ibid, n 92.

[95] Ibid, n 93, ¶164.

are accepted, and parties are encouraged to make their damage remedies explicit.[96]

To take a correct response to penalty clauses, we should carefully clarify it with other guises. Penalty clauses must be distinguished from clauses for the payment of money on events other than default, such as the death or bankruptcy of the debtor, the lawful termination of the contract. A provision for the payment of a bonus in the event of early completion is not regarded as a penalty.[97] A clause accelerating the liability of a party in case of, for example, default in payment is generally held to be not penal since it does not actually increase the amount payable.[98] A penalty clause is one by which the parties at the time of making the contract provide for certain consequences of default. If they make such a provision after the default has occurred, it is not in principle a penalty.[99]

(ii) Damages

Damages are commonly classified as expectation, reliance, and restitution damages:[100] There are basically three methods of compensating the creditor (plaintiff): The expectation interest, the reliance interest, the restitution interest. First of all, the expectation interest measure confers the plaintiff the value of the debtor's promise, the object of the award thus being to put him in the position he would have been in if the contract had been performed.[101] In this kind of damages, consequential damages form

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[96] Goldberg, Victor P. (2006). *Framing Contract Law: an economic perspective.* The USA: Harvard University Press, p377.

[97] G.H. Treitel. (1988). *Remedies for Breach of Contract*. Oxford: Clarendon Press, ¶166.

[98] Ibid.

[99] Ibid.

[100] Goldberg, Victor P. (1989). *Readings in the Economics of Contract Law*. Reprinted 1990. Cambridge: Cambridge University Press, p75.

[101] Harris, D., Tallon, D. (1989). *Contract Law Today.* Oxford: Clarendon Press, p247.

part of the expectation interest of the aggrieved party, to refer to such things as personal injury or damage to property suffered as a result of the breach.[102] Secondly, the reliance interest measure indemnifies the plaintiff against expenses reasonably incurred through relying on the promise of performance.[103] Therefore, its object is to put him in the position he would have been in if he had not made the contract. The award rests on the idea of detrimental reliance rather than on the exchange of promises.[104] Thirdly, the restitution interest measure restores to the plaintiff benefits conferred on the defendant in the performance of the contract. It may simply be part of the reliance interest measure,[105] for example, buyer's claim for repayment of the price on account of non-delivery.[106]

Expectation interest is sometimes called a positive interest, while reliance and restitution interest are called negative interests.[107] When performance is impossible and the defendant is aware of this fact, it is generally agreed that there is some liability. However, there is considerable divergence as to which of the interests is protected. French law holds the defendant liable but apparently for positive interest. German law holds him liable but only for negative interest. English law would allow recovery but would base it on negative interest only.[108] In the view of academic scholars, the standard remedy is expectation damages.[109] [110] In

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[102] G.H.Treitel. (1988). *Remedies for Breach of Contract*. Oxford: Clarendon Press, ¶86

[103] Harris, D., Tallon, D. (1989). *Contract Law Today.* Oxford: Clarendon Press, p248.

[104] Ibid.

[105] Ibid.

[106] Ibid, n 102, ¶83.

[107] Ibid, ¶87.

[108] Ibid.

[109] Goldberg, Victor P. (2006). *Framing Contract Law: an economic perspective*. The USA: Harvard University Press, p5.

[110] Ibid, p204.

other words, the interest most generally protected is that which the plaintiff has in the performance of the contract.[111]

It is impossible to find any general principles which determine when an aggrieved party can claim reliance or restitution instead of, or together with expectation.[112] Different systems of law have different approaches. In some systems, the relationship between these various interests is determined by a provision of a code. In others, it is left to the discretion of the court.[113] In yet others, it is left to the choice of the aggrieved party.[114] However, one principle of general application is that the injured party cannot combine the various types of claims to obtain compensation over his actual loss.[115] The statement that restitution and expectation damages can only be claimed in the alternative now remains true,[116] even in the United States, full damages and complete restitution will not both be given for the same breach of contract.[117] A buyer of defective goods cannot both keep them and claim restitution of the price. Similarly, a buyer who has paid in advance for goods which are not delivered cannot recover both his payment and the value of the goods. This is seen as the policy against double recovery.[118]

Because of the complexity in compensating in this kind of remedy, it is useful to know some general compensatory principles. First of all, the first principle is that “damages are based on loss” to the plaintiff and not based

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[111] G.H.Treitel. (1988). *Remedies for Breach of Contract*. Oxford: Clarendon Press, ¶75.
[112] Ibid, ¶87.
[113] Ibid.
[114] Ibid.
[115] Ibid.
[116] Ibid, ¶95.
[117] Ibid.
[118] Ibid.

on the gain to the defendant.[119] For example, A sells goods to B for £100, and before delivery is due, he resells them to C for £150. If, at the date fixed for delivery to B, the goods have a market value of £100 or less, B will not recover any substantial damages. The fact that A has made a profit of £50 is irrelevant since B has suffered no loss.[120] The second principle is "damages not to exceed loss". An award of damages should not enrich the plaintiff.[121] He cannot recover more than his loss.[122] Thirdly, in common law, the third principle is "no punitive damages" (or exemplary damages).[123] Punitive damages or exemplary damages will not be awarded for breach of contract (in common law).[124] Finally, as a result of the first principle, the final principle is "plaintiff must suffer loss". No damages are recoverable if the plaintiff has suffered no loss.[125] Loss may be broadly defined to include any harm to the person, personality (injury to feelings, honour, and reputation), or property (physical harm) of the plaintiff.[126]

Where the assessment of damages is based on the cost of a substitute contract, a distinction is drawn in many systems between the "concrete" and "abstract" methods of quantifying that cost.[127] In the case of a seller's failure to deliver goods, the "concrete" method of quantifying the buyer's loss looks to the actual cost incurred by him in procuring a substitute, while the "abstract" method is based on the market price at which a substitute

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[119] G.H.Treitel. (1988). *Remedies for Breach of Contract*. Oxford: Clarendon Press, ¶76.
[120] Ibid.
[121] Ibid, ¶77.
[122] Ibid.
[123] Ibid, ¶78.
[124] Ibid.
[125] Ibid, ¶80.
[126] Ibid.
[127] Ibid, ¶102.

could be obtained.[128] In the case of a buyer's failure to accept and pay, the "concrete" method is based on the amount for which the seller has actually resold the goods and the "abstract" method is based, once again, on the market price.[129] English law tends to favour the "abstract" assessment. There is no express provision for assessing damages "concretely".[130]

Regarding the time for the "abstract" assessment, one note should be made that postponement of the date at which damages are assessed will usually tend to favour the aggrieved party in most of the cases.[131] In English law, damages are assessed by reference to the time of the breach (or in some circumstances, by reference to the time at the end of the ten days after the breach for the injured party's action to mitigate).[132] This principle is based on the view that any loss resulting from market movements after the time of breach is not caused by the breach but by the injured party's failure to mitigate by making a substitute contract. In addition, it is based on a number of assumptions:[133] that the injured party knows of the breach as soon as it has occurred, and he is in a position to take steps to mitigate the loss. Where the facts show any of these assumptions to be untrue, the courts will depart from the principle and refer to other dates as may be reasonable in the circumstances.[134] In the United States, the assessment varies on whether the party in default is the buyer or the seller. The seller's damages are quantified by reference to the market price at the time for tender, while the buyer's damages are quantified by reference to the market price at the time when the buyer

[128] G.H.Treitel. (1988). *Remedies for Breach of Contract*. Oxford: Clarendon Press, ¶102.
[129] Ibid.
[130] Ibid.
[131] Ibid, ¶104.
[132] Ibid.
[133] Ibid.
[134] Ibid.

learned of the breach.[135] In French law, damages are to be evaluated at the time of judgment (also in Germany).[136] This rule is contrary to the earlier French view that assessment ought to be made at the time of default.[137] In Vietnam law, "the damages shall be decided by the court according to contents of the case".[138]

There are some rules to limit the damages recoverable that the common law takes a very serious attitude to. For example, only losses that were reasonably foreseeable or noticed at the time of the agreement are recoverable. This rule ensures that parties can take account of the potential risks when making the contract.[139] Another rule is the doctrine of mitigation which was well developed in common law jurisdictions and assumes a central role in the law of damages.[140] It prescribes that damages should be limited to losses that could not reasonably be avoided by the plaintiff following the breach.[141] Mitigation has two aspects. Firstly, the plaintiff may be bound to take positive steps to minimize the loss. Secondly, he may be bound to refrain from taking steps which may unjustifiably increase the loss,[142] such as expensive steps, commercial reputation, or business ethics-harmful steps.

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[135] G.H.Treitel. (1988). *Remedies for Breach of Contract*. Oxford: Clarendon Press, ¶104.

[136] Ibid.

[137] Ibid.

[138] 2015 Vietnam Civil Code, Art 419, Clause 3, available at https://www.wipo.int/edocs/lexdocs/laws/en/vn/vn079en.pdf , accessed 24 Nov 2020.

[139] Harris, D., Tallon, D. (1989). *Contract Law Today.* Oxford: Clarendon Press, p248.

[140] Ibid, p293.

[141] Ibid, p249.

[142] Ibid, n 135, ¶146.

3. Mixed Trends in Practice

In this part, we are going to review some recent trends in practice to procure our insight of the traditional path which has been influencing civil law and common law from theory to reality.

3.1 Starting Use of Precedents in Communism-Inherited Civil Law (Case Study: Vietnam)

a. Deployment

Case law (jurisprudence or precedent) plays an enormous role in the everyday operation of civil law systems because of the necessity to interpret and apply the "written" law.[143] It is not a new matter if we look up the application of case law in the civil law tradition. However, within the civil law systems, the development of law in its family members is at different stages. For example, Japan, China, and Vietnam are all civil law countries, but case law has been applied in Japan long ago,[144] China already started to apply case law.[145] However, the matter is being a high-profile event in Vietnamese society. In such a situation, this part is to draw out a general picture of the case law application in Vietnam.

In the past, precedent was not strange to Vietnamese legal history. The "Hồng Đức" Rule of the "Lê" dynasty enacted in the fifteenth century had several provisions which summarized certain cases concerning land issues in very simple texts.[146] The "Hoàng Việt Luật Lệ" (Hoang Viet Law and Precedents) of the "Nguyễn" dynasty, enacted in 1815, includes two

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[143] Glendon, M., Carozza, P., Picker, C. (2016). *Comparative Legal Traditions in a Nutshell*. 4th Edition. The USA: West Academic Publishing, p154.

[144] Supreme People's Court of Vietnam and JICA. (2008). *Vietnam-Japan joint research on the development of judicial precedence in Vietnam*. Hanoi: NXB Thanh Nien, p205.

[145] Ibid.

[146] Trương Thị Hòa, Một số kỹ thuật án lệ đã từng áp dụng ở nước ta từ lâu đời [*Precedent - A Legal Technique Applied in Vietnam Long Ago*], available at: https://perma.cc/VU76-CDY2

systems: law ("luật") and precedents ("lệ").[147] Precedents were also applied in the legal system under the French colonial empire and the Republic of Vietnam in the South during the Vietnam War.[148] Under the Socialist Republic of Vietnam (Vietnam), with the Marxist-Leninist social-economic theory and Soviet law, from the outset, precedents had been out of place to be applied. Because the Socialist concept of "democratic centralism" rejects the separation of powers, subordinates the judiciary to the government and power of the Communist Party: "Courts were seen as extensions of Party control".[149] The consequence is that courts were not allowed to make law and must apply legislative and administrative regulations.

However, recently the attitude of the Vietnam Government to precedents has been gradually changed. With the support from the "Japanese Technical Cooperation Project in the Legal and Judicial Field", members of the Vietnamese-Japanese Working Group have conducted joint research on the development of a judicial precedent system in Vietnam.[150] The Communist Party of Vietnam has issued Resolution No. 49-NQ/TW,[151] dated 2/6/2005, regarding the judicial reform strategy until 2020. The Resolution pointed out that "*the Supreme People's Court shall take the duty of…developing judicial precedents*".[152] In addition, the basis

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[147] Trương Thị Hòa, Một số kỹ thuật án lệ đã từng áp dụng ở nước ta từ lâu đời [*Precedent - A Legal Technique Applied in Vietnam Long Ago*], available at: https://perma.cc/VU76-CDY2.

[148] Ibid.

[149] Partlett, W., & Ip, E. C. (2016). *Is socialist law really dead*. New York University Journal of International Law and Politics, 48(2), 463-512, p502.

[150] Supreme People's Court of Vietnam and JICA. (2008). *Vietnam-Japan joint research on the development of judicial precedence in Vietnam*. Hanoi: NXB Thanh Nien, p192.

[151] Nghị Quyết số 49-NQ/TW, về Chiến lược Cải cách Tư pháp đến năm 2020 [Resolution No. 49 NQ/TW, on Strategy for Judicial Reform until 2020] Available at: http://hoiluatgiavn.org.vn/nghi-quyet-so-49-nqtw-ngay-02-thang-06-nam-2005-cua-bo-chinh-tri-ve-chien-luoc-cai-cach-tu-phap-den-nam-2020-d563.html

[152] Ibid, n 150, p212.

for the courts applying precedents has been regulated in the two Vietnam Civil Codes: Firstly, the 2015 Code of Civil Procedure, Art 45(3)[153] (rules for resolving civil cases without law provisions to apply): *"Courts shall apply…precedents…to settle civil cases when the application of law provisions applicable to the same matters…is not available; Precedents shall be studied and applied…after being selected by the Council of Judges of the Supreme People's Court and announced by the Chief Justice of the Supreme People's Court"*. Secondly, the 2015 Civil Code, Art 5(2)[154] (application of practices): "*In cases where it is neither provided for by law nor agreed upon by the parties, practices may apply*". One note taken here is that merely decisions of the Justice Council of the Supreme People's Court (hereinafter the Supreme People's Court is referred to as the SPC) can become judicial precedents. Besides, as to the hierarchy of precedents and law provisions, if law provisions are available, they still are superior to precedents. One more observation is that from the year 2005, when the Communist Party approved the policy for applying precedents (in Resolution No. 49-NQ/TW), it needed ten years round to be stipulated in the law (in the 2015 Civil Code and 2015 Civil Procedure Code). Putting it in the context of a fast-changing economy like Vietnam, this codification seems sluggish (the scale of the economy increased over three times with GDP in 2005, and 2015 respectively were 57.6 and $193.2 Billion[155]; the

[153] 2015 Vietnam Code of Civil Procedure, available at https://www.wipo.int/edocs/lexdocs/laws/en/vn/vn083en.pdf accessed 25 November 2020.

[154] 2015 Vietnam Civil Code, available at https://www.wipo.int/edocs/lexdocs/laws/en/vn/vn079en.pdf, accessed 25 November 2020.

[155] GDP of Vietnam 2005-2015, available at https://data.worldbank.org/indicator/NY.GDP.MKTP.CD?end=2015&locations=VN&start=2005, accessed 25 November 2020.

economic growth rates[156] were always high across the world with the lowest rate at 5.2% and the highest rate at 7.5% in the period 2005-2015).

Since 2015 the SPC has issued and officially published 37 precedents,[157] and they have built their own website for access.[158] The majority of precedents are on matters related to a parcel of land, inherited assets (19/37 cases), and sales of good contracts (8/37 cases). The remainders are on criminal, administration, family, and labour related matters. Furthermore, according to the SPC report, up to 20th March 2019, 275 judgments of district courts and 88 judgments of provincial courts have been decided by applying precedents in civil disputes.[159] This figure illustrates that precedents have been put in operation by courts.

The aforementioned result is mostly in domestic cases. For international experience, along with Japan's support, from August 2016, the SPC of Vietnam has been supported by a project funded by the UK

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156 GDP growth of Vietnam 2005-2015, available at https://data.worldbank.org/indicator/NY.GDP.MKTP.KD.ZG?contextual=default&end=2015&locations=VN&start=2005, accessed 25 November 2020.

157 The first set of six precedents was published on 6th April 2016: https://thuvienphapluat.vn/van-ban/Thu-tuc-To-tung/Quyet-dinh-220-QD-CA-cong-bo-an-le-2016-310639.aspx, accessed 25 November 2020.

The second set of four precedents was published on 17th October 2016: https://thuvienphapluat.vn/van-ban/thu-tuc-to-tung/Quyet-dinh-698-QD-CA-cong-bo-an-le-2016-326627.aspx, accessed 25 November 2020.

The third set of six precedents was published on 28th December 2017: https://thuvienphapluat.vn/van-ban/thu-tuc-to-tung/Quyet-dinh-299-QD-CA-2017-cong-bo-an-le-370829.aspx, accessed 25 November 2020.

The fourth set of ten precedents was published on 17th October 2018: https://thuvienphapluat.vn/van-ban/thu-tuc-to-tung/Quyet-dinh-269-QD-CA-2018-cong-bo-an-le-420127.aspx, accessed 25 November 2020.

The fifth set of three precedents was published on 9th September 2019: https://thuvienphapluat.vn/van-ban/thu-tuc-to-tung/Quyet-dinh-293-QD-CA-2019-cong-bo-an-le-423854.aspx, accessed 25 November 2020.

The sixth set of eight precedents was published on 25th February 2020: https://thuvienphapluat.vn/van-ban/thu-tuc-to-tung/Quyet-dinh-50-QD-CA-2020-cong-bo-an-le-435698.aspx, accessed 25 November 2020.

158 Vietnam website of precedents, https://anle.toaan.gov.vn, accessed 25 November 2020.

159 Áp dụng án lệ trong xét xử các vụ án dân sự (Application of precedents in adjudicating of civil cases), available at https://tapchitoaan.vn/bai-viet/binh-luan-trao-doi-gop-y/ap-dung-an-le-trong-xet-xu-cac-vu-an-dan-su-tu-thuc-tien-xet-xu-cua-toa-an-nhan-dan-tinh-dong-nai, accessed 25 November 2020.

Government's Prosperity Fund through the British Embassy in Hanoi.[160] The project has helped enhance the capacity of the SPC in handling foreign commercial disputes, recognizing and enforcing foreign court judgments and arbitration awards. The project also provides a series of training courses regarding the application of precedents, especially precedents on international commercial disputes. In connection with our topic, this project is expected to push the process of applying precedents in Vietnam.

b. Assessments

The application of precedents in Vietnam influences the legal methodology. Traditionally, a Vietnamese lawyer or an academic employs predominantly deductive reasoning from law and principles. As a result of the adoption of precedents, they are officially permitted to use inductive reasoning before courts from cases to produce their arguments.

What is more, legislation is generally seen as a manifestation of the will of states and therefore obtains a unity of intention.[161] However, unfortunately, the contents of provisions in codes are still not always clear-cut and understood in a single meaning. Thus, the legislation seems to regulate not as its exact intended intention. We also know that, in all countries, they have a body that is in charge of interpreting their laws. For example, in Vietnam that is the Standing Committee of the National Assembly (according to Art 74(2), the Constitution of the Socialist Republic of Vietnam 2013:[162] "*The Standing Committee of the National Assembly*

[160] The UK-funded project will help improve Vietnam's performance in recognising and enforcing foreign arbitral awards, available at https://www.gov.uk/government/news/vietnam-supreme-peoples-court-capacity-to-be-further-improved, accessed 25 November 2020.

[161] Harris, D., Tallon, D. (1989). *Contract Law Today.* Oxford: Clarendon Press, p12.

[162] The Constitution of the Socialist Republic of Vietnam (2013), available at http://constitutionnet.org/sites/default/files/tranlation_of_vietnams_new_constitution_enuk_2.pdf, accessed 25 November 2020.

has the following duties and powers: [...] to interpret the Constitution, the law, and decree-laws"). Although there is such a body, it is still not sufficient to ensure a consistent application of the law.[163] The body shall not be able to interpret every circumstance that may occur in practice.[164] The use of precedents creates a new means to supplement the interpreting role of the Standing Committee.[165] When a legal system procured a consistent application of the law, it also will foster the predictability of the public. People may foresee how the law applied to their case. Hence, they shall be able to avoid the violation of the law, to do business confidently.[166] Furthermore, this leads to an efficient operation of the economic market ruling by a predictable legal system.

3.2 Growing Role of Academics in Common Law (Case Study: England)

The rule that academic writing is not a source of law has been maintaining in common law, but attitudes towards the citation of academics' opinions have been changed considerably in recent years. Sometimes English judges have resorted to academic writing, or have referred to civilian authors,[167] or have leaned on doctrinal analysis. Furthermore, it is acknowledged that academics have an increasing influence in the development of common law and statutory interpretation through their role as teachers of future generations of lawyers and judges. Some senior judges claimed that judge and academic inhabit the same world and that a genuine dialogue between judges and scholars now

[163] Supreme People's Court of Vietnam and JICA. (2008). *Vietnam-Japan joint research on the development of judicial precedence in Vietnam*. Hanoi: NXB Thanh Nien, p211.

[164] Ibid, p205.

[165] Ibid, p211.

[166] Ibid, p203.

[167] Harris, D., Tallon, D. (1989). *Contract Law Today.* Oxford: Clarendon Press, p388.

exists through the medium of judgments and academic articles.[168] Academic sources are increasingly cited as secondary sources.[169] The use of academic sources suggests that judges now consider academics as "players" rather than as mere observers of the evolution of law.[170] The informal partnerships between bench, bar, and academia will help to breathe new life into areas of English law,[171] and it affirms the increasingly important role of academics in the common law's development.

3.3 Greater Use of Specific Performance in Common Law

English law is more commercially inspired than civil law when granting priority to monetary remedies.[172] However, recently specific performance has been selected more readily since the courts have recognized more broadly the inadequacy of monetary compensation.[173] Apart from the known reasons mentioned in part 2.2 of this Chapter, where monetary compensation has revealed the inadequacy in such cases as the goods are unique or rare, an additional reason has been considered from economic and contractual aspects after the invention of the relational contract theory.

Discrete contracts typically involve a short-term relationship, whereas relational contracts involve a long-term relationship where a formal agreement is only a part thereof. The problem with the conventional damages remedy applied to a relational contract is that it may seriously undercompensate the plaintiff since it is generally in the interest of both

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[168] Campbell, D., Mulcahy, L. and Wheeler, S. (2013). *Changing Concepts of Contract - Essays in honour of Ian Macneil*. London: Palgrave Macmillan, p195.

[169] Ibid.

[170] Ibid.

[171] Ibid.

[172] Harris, D., Tallon, D. (1989). *Contract Law Today.* Oxford: Clarendon Press, p298.

[173] Ibid.

parties to keep the relationship continuous. One solution to this problem is to render specific performance as a remedy.[174] In the context of more complex market arrangements, specific performance is often selected.[175] This view is a supplement to the traditional view on the nature of goods, whether they are unique or rare, by viewing the essence of the contract, whether it is discrete or relational. The new angle of view is assumed to make judges deliberate more precisely. According to the relational contract theory, every contract is relational to some extent. In the circumstances of economics and trade integration and international cooperation, the trend towards greater use of specific performance may be more apparent. As to the relational theory, we are going to explore what it is in Chapter 2.

4. What may the Traditional Path tell us about Legal Developments?

When approaching matters belonging to history and tradition, if we attempt to rate events by making an event superior to others or to pose a subjective attitude that that event should not have existed, it could be not rational. We should not challenge the past since we cannot change anything. We are viewing historical matters from the contemporary time that most of the historical circumstances and factors may not be measured enough, even though social science has always been trying to analyse the facts properly as possible. Furthermore, an event itself contains not much value rather than a reason behind it. It would be more appropriate to receive historical events by accepting them, and if possible, try to understand what were the undercover factors affecting their evolvements and how we can learn some useful lessons they revealed. We are going to

[174] Harris, D., Tallon, D. (1989). *Contract Law Today.* Oxford: Clarendon Press, p253.
[175] Ibid, p254.

check and withdraw some of the messages beneficial for the development of law.

First of all, the starting points and the initial approaches are so influential in shaping the development of law. We have seen civil law chose universities, an academic environment, to develop its legal methodology and recognized their roles in judicial practice. Therefore, civil law has moved in the direction of abstract academia; Academics, codes, and legal interpretation play vital roles. Codification also results in an easily-received legal tradition.[176] Furthermore, the approach of civil law in expanding itself around the world was to set original codes for new lands. By contrast, common law from the outset chose the court system as the place to develop its legal methodology, and the expanding approach was hands-off, which did not set the original law for new lands, as well as the role of precedents and judges is particularly dominant. Moreover, the accumulation of precedents also makes common law more active, not "static" like civil law. The starting points and approaches have shaped the path of development in the two major legal traditions.

At the second point, the development of law depends on both endogenous and exogenous factors. It can be a political and economic influence, but also a rational development of legal science. We have seen that the Roman Empire, French colonialism, and British imperialism expanded their political governance, resulting in different legal traditions spreading around the world. On the other hand, the economic growth in Japan or the development of legal science in Germany also spurred the development of law. For Japan, no specific attention was paid to Japanese

[176] Glendon, M., Carozza, P., Picker, C. (2016). *Comparative Legal Traditions in a Nutshell*. 4th Edition. The USA: West Academic Publishing, p198.

law in Europe during the first half of the twentieth century.[177] Until the 1980s, the subject area of Japanese legal study did not even exist in German universities.[178] However, in the mid-1980s, when Japanese companies began to penetrate the European and American industries,[179] the story had changed. The Japanese legal system became an issue of comparative interest.[180] In the case of the 1900 German civil code, it was not travelled through territorial expansion. However, due to its logical and valid legislative science, it has been considered by many countries as a model for reference.

Thirdly, legal education strongly influences the development of law. We observe that the formation of *jus commune* in Europe was significantly attributed to "torch bearers" who were the first thousands of students from all over Europe traveling to Italy to study at universities, then returned to their home countries with the new legal methodology trained in Italy. Also, the role of academics in the development of civil law and judges in the development of common law is evident in the above section. In short, the common denominator of these stories is related to human resources and training. Therefore, we can conclude that legal education strongly influences the development of law. This conclusion offers the first suggestion in Chapter 5 that we will have an opportunity to come back later for more details.

Fourthly, development requires changes in conception. In part 2, in principle or general views, we have seen the diversity or differences (and also similarities) between the two legal traditions. In part 3, we know about

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[177] Steele, S., Taylor, K. (2010). *Legal Education in Asia-Globalization, change and contexts*. Routledge Law in Asia, p91.

[178] Ibid.

[179] Ibid.

[180] Ibid, p92.

some new trends that show their combinations in practice. These changes are due to the new conceptions, either in policy or in doctrine. The forcing factors underpinning these movements may come from the requirement of responding to the economic emergence and integrated markets, the mutual information exchange, and the result of comparative law study. Changes in conception will also result in a greater homogeneity between traditions on a global scale. From this finding, some proposals will be to consider in Chapter 5 regarding matters for making international convergence, keeping pace legal profession with technology evolution and economic markets, and increasing the global dialogue and cooperation.

The last point is that the direction of commercial law's development is towards uniformity and simplicity when the economy becomes homogeneous and integrated. There are some arguments for this comment. Firstly, law is a human product or a tool aiming at regulating human relations. Hence law is the manifestation of the human will. Moreover, law is associated with society and necessitates to be developed consistently with the society. In part 1, we observe that the two legal traditions started from the systematization of dispute resolution procedures. Secondly, many scholars recently have attempted to apply Charles Darwin's theory of evolution in the natural science and biology in the 1859 acclaimed work "on the origin of species", to explain general patterns of continuity and change in law, for example, Luhmann[181] introduced an "evolutionary approach to the law".[182] The core of the evolutionary approach is that changes in law take place through natural

[181] Niklas Luhmann, a German sociologist.

[182] Zumbansen, P., Calliess, G. (2011). *Law, Economics and Evolutionary Theory*. Edward Elgar, p5.

selection.[183] However, these efforts are a bit ambitious. Because law is of institutions, and as argued above, sometimes it is strongly driven by the human will while animal species follow the rule of nature. Besides, there are also some other notable differences between the branches of law. Commercial contract law differs from other branches of law, for example, administrative law, and it is influenced largely by objective rules of the economic market (for example, a market price is determined by the availability of supply and demand; the market economy operates with the interference of an "invisible hand"; the economies of scale and scope; the harmful effects of monopolies on economic markets, etc.). If lawmakers uphold their subjective will in law-making, the efficient operation of the economic market may not be guaranteed. For instance, the delay in reforming the centrally planned economy is one of the economic causes (apart from political reasons, multi-parties request, etc.) that had led to the collapse of the socialist countries in Eastern Europe and the Soviet Union in the early 1990s.[184] In contrast, Vietnam had reformed earlier; in fact, the change began from 1984,[185] and officially was approved by the authority in the 6th Congress of the Communist Party of Vietnam in 1986 to direct the economy to a model of the economic market.[186] This suggests that, for commercial contract law, particularly international commercial contract law, some conclusions reached by the evolutionary approach may be of a

[183] Zumbansen, P., Calliess, G. (2011). *Law, Economics and Evolutionary Theory*. Edward Elgar, p272.

[184] *Vietnam in Ho Chi Minh age*, 1984 (Việt Nam thời đại Hồ Chí Minh - Năm 1989), available at: https://www.youtube.com/watch?v=GPsr9VFuiEg&list=PLXgK7xsVpqvRAPl9w6Qm2HnZAbs6AVIXt&index=56, accessed 28 November 2020.

[185] *Vietnam in Ho Chi Minh age*, 1984 (Việt Nam thời đại Hồ Chí Minh - Năm 1986), available at: https://www.youtube.com/watch?v=Q9a7R3m_60Q&list=PLXgK7xsVpqvRAPl9w6Qm2HnZAbs6AVIXt&index=50 , accessed 28 November 2020.

[186] *Vietnam in Ho Chi Minh age*, 1986 (Việt Nam thời đại Hồ Chí Minh - Năm 1986), available at: https://www.youtube.com/watch?v=i4lMkPMtOLE&list=PLXgK7xsVpqvRAPl9w6Qm2HnZAbs6AVIXt&index=53, accessed 28 November 2020.

reference value. They emphasize the impact of endogenous and exogenous factors on the development and the direction towards unity when the environment becomes unified.[187] We observe this trend in the practice of legal development, for example, the formation of *jus commune* in the Middle Ages in the EU, or CISG, PICC, PECL in the era of international cooperation, etc. In the following chapters, although PECL has made certain progress, it will not be analysed in this thesis. Instead, the thesis chooses PICC and CISG to analyse because the harmonization of commercial law on the international scale will avoid increasing the fragmentation of law, and align with the direction towards uniformity and simplicity that this section has found. Moreover, a contract bases still on the consent of parties. Therefore, in my view, it is not preferred to build too many separate laws or principles for international commerce in each community.

[187] Zumbansen, P., Calliess, G. (2011). *Law, Economics and Evolutionary Theory*. Edward Elgar, p329.

CHAPTER 2: INTERESTS-PROTECTION-CHANGING CONCEPTS IN CONTRACT LAW

A full account of all contract law concepts is beyond the capacity of the writer. Instead of analyzing the aspect of contract formation (such as matters regarding “offer”, “acceptance”, and legal intention of parties), in this Chapter, some other concepts relating to the protection of parties’ interests which associated with the theory of breach of contract and remedy for that breach will be the main points to focus on (to continuously keep them in line with the contents of Chapter 1 and Chapter 3, i.e. concerning remedies for breach of contract). Related economic factors of a transaction such as transaction cost and economic surplus are also going to be introduced due to their causal effects on parties’ behaviors, and therefore on the evolution of contract law concepts.

Modern contract law is fundamentally a product of the nineteenth century onwards.[1] The development of contract law concepts corresponds to the development of economic and legal institutions of exchange (from instantaneous exchange to executor exchange).[2] The changes in contract law were necessary to meet the needs of emerging markets. In primitive societies, cooperation and exchange would be very immediate and short-term. With the industrial revolution, production becomes more complex and interdependent. Long-range planning and coordination require the ability to rely on long-term promises.[3] This situation led to a need for a

[1] Horwitz, J. (1974). *The Historical Foundations of Modern Contract Law*. Harvard Law Review, vol.87, no.5, p917-918.

[2] Ibid, p919.

[3] Williamson, O. (1995). *Transaction Cost Economics: How It Works; Where It is Headed*. De Economist 146, No.1, 1998, p40. Available at https://www.researchgate.net/publication/4803664/ accessed 05 October 2020.

theory of contract. This chapter aims to introduce several key ideas that will help make sense of how contract law works and evolves.

1. Pre-Modern Contractual Concepts

"Contract" is a concept that has evolved in a long time and which, from a comparative point of view, does not take the form of a uniform model.[4] A contract under common law is not the same as a contract under civil law. In searching for definitions of contract, which differ according to the particular legal system in which they appear, we need to look at legislation, case law, and academic legal literature. It also means something different to an economist than to a lawyer. If we wish to understand contract law, we also must think about exchange and such things first, and law second.[5]

One of the definitions we may accept is that contract includes any relation among people in which exchange occurs or is expected to occur.[6] Alternatively, a contract is [7] "a tentative relationship made by a mutual agreement between independent persons who are giving commitments to each other for the realization of the project of exchange towards the future so as to produce mutual surplus-value efficiently and to share such surplus fairly". Specialization of labor occurs whenever different people in a society perform different tasks.[8] Exchange is just the way the products of such specialists are distributed among themselves in reciprocal ways, thereby

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[4] Beale, H., Cosson, B., Rutgers, J., and Vogenauer, S. (2019). *Cases, Materials and Text on Contract Law*. Third Edition. Oxford, the UK; Portland, Oregon: Hart Publishing, p93.

[5] Campbell, D. (2001). *Relational Theory of Contract: Selected Works of Ian Macneil*. London: Sweet&Maxwell, p130.

[6] Ibid, p366.

[7] Saito, A. (2008). *Legal Education for Value Creative Business Lawyers: A Multidisciplinary Perspective Towards Globalising Market Societies*. CDAMS (Centre for Legal Dynamics of Advanced Market Societies, Kobe University): Legal Dynamics Series, LexisNexis, p138.

[8] McBride, N. (2017). *Key Ideas in Contract Law*. Oxford and Portland, Oregon: Hart Publishing, p3.

permitting continued specialization.[9] So people have to trade with each other. In doing so, they need to be able to enjoy:[10] (1) secure legal control (private ownership), and (2) the ability to transfer that secure legal control to one another. This then enables people to trade with each other. But, people need a third element to act as though we trust each other: (3) "artificial trust".[11] This is where contract law comes in. It enables people trading in the marketplace to act as though they trust each other by making the promises they made to each other legally enforceable.[12] In other words, contract law exists to facilitate exchanges of goods and services in the marketplace by fostering artificial trust among the people engaged in making those exchanges.[13] Contract law may be defined as "a contract between two parties where consensus ad idem exits (mutual agreement), and is legally enforceable and recognizable".[14]

The actual term "contract" was of great antiquity. In the Middle Ages, it equated with a covenant.[15] By the end of the eighteenth century, the term "contract" was started to be used as a tool of classification more generally.[16] The eighteenth-century also saw the first flowering of contract theory in England.[17] The work "*Of the Law of Nature and Nations*" of Samuel Pufendorf was first translated into English in 1703, built on the

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[9] McBride, N. (2017). *Key Ideas in Contract Law*. Oxford and Portland, Oregon: Hart Publishing, p3.

[10] Ibid.

[11] Ibid.

[12] Ibid, p4.

[13] Ibid, p5.

[14] LawTeacher. (2013). *What Principles Governed "Classical Contract Law"? [online]* available at https://www.lawteacher.net/free-law-essays/contract-law/is-classical-contract-relevant-to-modern-contract-law-law-essay.php , accessed 05 October 2020.

[15] Swain, W. (2010). *The classical model of contract: The product of revolution in legal thought*. Legal Studies, 30(4), p516.

[16] Ibid.

[17] Ibid, p517.

premise that the binding force of contracts was derived from the binding force of promises, a valid contract required the assent of both parties.[18] In the mid-1760s, Adam Smith and the English clergyman William Paley stated that it was not the promise or consent that generated a binding obligation, but the expectations both engendered.[19] However, contract law doctrine did not get a significant achievement in the medieval period across the world. Before the nineteenth century, "the common lawyers did not think in terms of contracts, let alone in terms of contract theory. They thought in terms of writs or forms of actions".[20] Later, there was a fundamental revolution in contract doctrine and literature in the nineteenth century,[21] so we will study contract law from the nineteenth century began with classical contract law. Classical contract theory was closely related to the beginnings of the industrial revolution, and also to the intellectual ideas associated with the classical economic theorists.[22]

Classical contract theory has the following characteristics:[23] (1) It is based on an exchange of promises. (2) The transaction is discrete rather than being part of a continuing relationship. (3) The idea of "promise" is central to the classical law of contract. However, there are some limitations. In the first place, although some contracts are clearly made by the exchange of promises, there are many that do not easily fit this model, such as buying goods in a shop or travelling by bus,[24] it is not necessary to use the language of "promises" to explain this aspect of the transaction. A

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[18] Swain, W. (2010). *The classical model of contract: The product of revolution in legal thought*. Legal Studies, 30(4), p517.

[19] Ibid, p518.

[20] Ibid, p514.

[21] Ibid, p513.

[22] Harris, D., Tallon, D. (1989). *Contract Law Today.* Oxford: Clarendon Press, p28.

[23] Stone, R. (2002). *The Modern Law of Contract*. Fifth Edition. Great Britain: Cavendish Publishing Limited, p4.

[24] Ibid.

promise is not a sufficient condition since there are situations in which clear and explicit promises are not enforced. For example, promises which are not supported by consideration will not be treated as binding on the promisor.[25] In the second place, the assumption of classical economics, which underpinned classical contract concepts that transaction cost is trivial when this problem is at the core of modern law and economics, has been heavily criticized.[26] Even without considering the role played by social and economic factors, the formation of the classical model of contract cannot be explained by legal literature alone.[27] Within the thesis' scope, we can choose some of the classical contract law concepts to study below.

a. Will theory

With the emergence of commodities markets began to develop in England and America during the second half of the eighteenth century, the function of contracts correspondingly shifted from that of simply transferring title to a specific item to that of ensuring an expected return.[28] The will theory stated that the extent of contractual obligation depends upon the convergence of individual desires.[29] It appeared when the spread of markets forced jurists to attack equitable conceptions of exchange[30] as inimical to emerging contract principles such as those allowing recovery of

[25] Stone, R. (2002). *The Modern Law of Contract*. Fifth Edition. Great Britain: Cavendish Publishing Limited, p5.

[26] Morgan, J. (2013). *Contract Law Minimalism*. Cambridge: Cambridge University Press, p43.

[27] Swain, W. (2010). *The classical model of contract: The product of revolution in legal thought*. Legal Studies, 30(4), p529.

[28] Horwitz, J. (1974). *The Historical Foundations of Modern Contract Law*. Harvard Law Review, vol.87, no.5, p918.

[29] Ibid, p923.

[30] The equitable conception of exchange: Justification of contractual obligation is derived from the inherent justice or fairness of an exchange.

expectation damages.[31] Through knowing about the will theory, we find the conceptual change from protecting equitable exchange to protecting expectation damages.

b. Consideration and Promissory Estoppel

Though it is clearly impossible here to provide an in-depth analysis of all extremely complex aspects of the concepts of consideration and promissory estoppel in detail, we still hope to single out the conceptual change, from protecting promises to protecting reliance interests in this part.

The doctrine of consideration is a characteristic and indispensable feature of English contract law.[32] What does the word "consideration" mean? There is no precise or agreed definition of consideration.[33] Each definition, whether by academic writers or by courts, places emphasis on particular aspects of the doctrine.[34] However, at least, it is important that it does not have its ordinary meaning. It is used in a technical sense.[35] It refers to what one party to an agreement is giving, or promising, in exchange for what is being given or promised from the other side. For example, in a contract where A is selling B 100 pieces of pens for $100, what is the consideration? A is transferring the ownership of the pens to B. In consideration of this, B is paying $100. Alternatively, to look at it the other way round: B is paying $100 to A. In consideration for this, A is transferring to B the ownership of the pens. From this example, it will be

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[31] Horwitz, M.J. (1974). *The Historical Foundations of Modern Contract Law*. *Harvard Law Review*, vol.87, no.5, p917.

[32] Kötz, H. (2017). *European Contract Law.* 2nd Edition. Oxford: Oxford University Press, p69.

[33] Beale, H., Cosson, B., Rutgers, J., and Vogenauer, S. (2019). *Cases, Materials and Text on Contract Law*. Third Edition. Oxford, the UK; Portland, Oregon: Hart Publishing, p345.

[34] Ibid.

[35] Stone, R. (2002). *The Modern Law of Contract*. Fifth Edition. Great Britain: Cavendish Publishing Limited, p74.

seen that there is a consideration on both sides of the agreement. It is this mutuality that makes the agreement enforceable. If B simply agreed to pay A $100, or A agreed to give B the pens, there would be no contract. The transaction would be a gift and not legally enforceable.[36] A promise (or consent of parties) is only enforceable if it is "supported by" consideration.[37] Therefore, consideration can be anything of value (such as goods, money, services, or promises of any of these),[38] which each party gives as an exchange to support their side of the bargain. Mutual promises constitute consideration for each other.[39] If only one party offers consideration, the agreement is a "bare promise" and is unenforceable.[40] Where there was an exchange of promises,[41] but one promise was void, it could be argued that the other promise must also fail because there was now no consideration.[42]

It is important to note that consideration applies only to simple contracts, that is to say, contracts that are oral or in an informal writing.[43] Consideration is not necessary in the case of contracts made by deed.[44] The requirement of consideration means that English contract law disregards gratuitous promises which are not in the form of a deed, since by definition, they are unsupported by consideration.[45] However, there are

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[36] Stone, R. (2002). *The Modern Law of Contract*. Fifth Edition. Great Britain: Cavendish Publishing Limited, p74-75.

[37] Harris, D., Tallon, D. (1989). *Contract Law Today.* Oxford: Clarendon Press, p21.

[38] Ibid, p21: The exchange of promises came to be regarded as paradigmatic in the law of contract, particularly during the late eighteenth and first part of the nineteenth centuries.

[39] Consideration in English law, https://en.wikipedia.org/wiki/Consideration_in_English_law

[40] Ibid.

[41] Ibid, n 38.

[42] Ibid, n 37.

[43] Beale, H., Cosson, B., Rutgers, J., and Vogenauer, S. (2019). *Cases, Materials and Text on Contract Law*. Third Edition. Oxford, the UK; Portland, Oregon: Hart Publishing, p351.

[44] Ibid.

[45] Ibid.

criticisms of the doctrine. One of them is that the doctrine is a mere encumbrance. English law would lose nothing if the doctrine of consideration were to be abolished.[46] In England today, there is general agreement that these outposts of the doctrine should be quietly abandoned, since they can no longer be authoritatively defended.[47] In the case of civil law systems, they have been able to develop a perfectly adequate law of contract without consideration.[48] They used an equivalent concept called "*cause*" like the doctrine of consideration instead. The doctrine of *cause*, with its Roman law origin,[49] which means the reason for the undertaking of an obligation, was generally accepted in the *ius commune*.[50] *Cause* had been used in French law as an important and even characteristic feature of French contract law and in a few other systems influenced by French law, for example, the Netherlands. Cause in the 1804 French Civil Code was explicitly regulated in the Art 1131:[51] "*An obligation without cause or with a false cause, or with an unlawful cause, may not have any effect*". Nonetheless, since 2016, the Reform of the French Code Civil does not apply *cause* to contracts concluded after 1 October 2016,[52] and the Netherlands which borrowed the French doctrine of cause for its 1838 Civil Code, also has abandoned *cause* with the 1992 Civil Code[53]. The same stories can be found in Italy[54], Quebec.[55] And now

[46] Kötz, H. (2017). *European Contract Law.* 2nd Edition. Oxford: Oxford University Press, p70.

[47] Ibid.

[48] Ibid.

[49] Beale, H., Cosson, B., Rutgers, J., and Vogenauer, S. (2019). *Cases, Materials and Text on Contract Law*. Third Edition. Oxford, the UK; Portland, Oregon: Hart Publishing, p390.

[50] Jansen, N. Zimmermann, R. (2017). *Commentaries on European Contract Laws*. Oxford: Oxford University Press, p1888, ¶2.

[51] Ibid, n 49, p375.

[52] Ibid, n 49, p377.

[53] Ibid, n 49, p373, 392.

[54] Ibid.

neither PECL nor PICC refers to *cause*.[56] *Cause* also plays no role in German law or the systems of law that have been strongly influenced by German law, for example, Swiss law.[57]

The force of the consideration doctrine is diminished by a further rule now known as "*promissory estoppel*" that was first laid down in 1947.[58] Promissory estoppel has evolved as an alternative to contract law's doctrine of consideration,[59] providing an avenue for enforcing promises on the basis of reliance. In 1936, Professor Fuller published his famous article *"The Reliance Interest in Contract Damages".* Three major points in this article have proved influential, both on the development of the law and on contract theory:[60] Firstly, the doctrine of consideration was not just an ancient technicality or curiosity of English law, as it had been regarded since the late eighteenth century. He identified three different "interests" protected by contract law: (1) *expectancy interest* - the claim to have the contract or promise performed in full, or to receive damages to that value instead; (2) *reliance interest* - the claim to protection in respect of loss incurred through reliance on the promise (including losses incurred through the loss of an opportunity); (3) *restitution interest* - the claim to be reimbursed the value of benefits rendered to the other party. Secondly, there is some interrelation between these three ideas conceived as substantive grounds of liability and as ways of measuring the damages or compensation which can be awarded. Thirdly, the enforcement of promises was not the principal purpose or justification of contractual

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[55] Ibid.

[56] Ibid, p389.

[57] Ibid, p390.

[58] Kötz, H. (2017). *European Contract Law.* 2nd Edition. Oxford: Oxford University Press, p64.

[59] Gan, O. (2013). Promissory estoppel: call for more inclusive contract law. Journal of Gender, Race & Justice, 16(1), p48.

[60] Harris, D., Tallon, D. (1989). *Contract Law Today.* Oxford: Clarendon Press, p24.

obligation. On the contrary, the prevention of unjust enrichment and the protection of reliance interests were actually more important and central to contract law, in particular the protection of reliance.[61] The concept of estoppel originates in the law of evidence[62] and is substantially based on the idea of reliance.[63] It prevents a party from going back on what he has said or done, and some systems phrase it in terms of "good faith".[64] For example, A wanted to open and operate a supermarket under the brand name of B. During the course of the negotiations, A was persuaded to do various acts in preparation for the contract. However, B several times changed, and eventually, A was unable to enter into the contract. Under the traditional common-law reasoning, A would have had no redress (no contract was made, and there was no actual deceit). Nevertheless, the court held that A was entitled to recover for his reliance losses.[65]

Jay Feinman[66] suggests that contract law should go beyond the protecting-reliance/enforcing-promises debate as to the rationale behind promissory estoppel and instead focus on relations:[67] "I propose that contract law should.., embrace a truly relational analysis. This relational approach would constitute revolutionary science, rather than a further attempt to refine the normal science of neoclassical law... this move would replace the neoclassical elements of a focus on promise…Furthermore,

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[61] Harris, D., Tallon, D. (1989). *Contract Law Today.* Oxford: Clarendon Press, p25.

[62] McBride, N. (2017). *Key Ideas in Contract Law*. Oxford and Portland, Oregon: Hart Publishing, p112.

[63] Ibid, n 61, p30.

[64] Beale, H., Cosson, B., Rutgers, J., and Vogenauer, S. (2019). *Cases, Materials and Text on Contract Law*. Third Edition. Oxford, the UK; Portland, Oregon: Hart Publishing, p366.

[65] Ibid, n 61, p26-27.

[66] Jay Feinman's profile https://law.rutgers.edu/directory/view/feinman

[67] Gan, O. (2013). *Promissory estoppel: call for more inclusive contract law*. Journal of Gender, Race & Justice, 16(1), p63.

relationships necessarily involve obligations".[68] The relational theory of contract emphasizes the relations between the two parties rather than the bargain itself,[69] it will be introduced in the latter part of this chapter.

2. Transaction Cost Economics

There is certain analytical complexity in the literature of the two Nobel Prize laureates who are Ronald H. Coase[70] and Oliver E. Williamson[71]. However, as far as the writer's understanding, in terms of legal exploration, "transaction costs" is the key concept to explain why the assistance of law and lawyers is required for promoting transactions in the real world. Thus, this section will give some introductions to the concept.

The concept of transaction costs was initially introduced by Ronald Coase in his article "The Nature of the Firm" [72] in 1937 (Williamson also affirmed this).[73] However, the exact term was actually absent from Coase's early works up to the 1970s. Coase did not coin the specific term. Instead, he discussed the "costs of using the price mechanism". In this article, he described the complicated relationship among markets, firms, and decision-makers from the perspective of costs and revenue. It offered an economic account of why people choose to establish companies and other business entities rather than trade in a market. Coase argued that firms emerge because they are better equipped to deal with the transaction

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[68] Feinman, J. M. (1992). *The Last Promissory Estoppel Article*, 61 FORDHAM L. REv. 303, 311.

[69] Gan, O. (2013). *Promissory estoppel: call for more inclusive contract law*. Journal of Gender, Race & Justice, 16(1), p64.

[70] About Ronald Coase, https://www.coase.org/aboutronaldcoase.htm, accessed 03 Jan 2021.

[71] About Oliver E. Williamson https://www.nobelprize.org/prizes/economic-sciences/2009/williamson/facts/, accessed 03 Jan 2021.

[72] Coase, R. H. (1937). *The Nature of the Firm, New Series*, Vol. 4, No. 16 (Nov., 1937), available at: https://www.jstor.org/stable/pdf/2626876.pdf?refreqid=excelsior%3A10b12bc4c56fa14f88c31693f32fbe31, accessed 03 Jan 2021

[73] Williamson, O. E. (1993). *Transaction Cost Economics Meets Posnerian Law and Economics*. Journal of Institutional and Theoretical Economics (JITE) 149/1 (1993), p100.

costs inherent in production and exchange than individuals: "*The operation of a market costs something, and by forming an organization and allowing some authority (an "entrepreneur") to direct the resources, certain marketing costs are saved*".[74]

Coase Theorem corrects neoclassical theory by adding transaction costs to the analytic framework.[75] Coase's transaction cost theory is based on his theory of opportunity cost. He argued that the size of a firm is a result of finding an optimal balance between the competing tendencies of the costs: "*A firm will tend to expand until the costs of organising an extra transaction within the firm become equal to the costs of carrying out the same transaction by means of an exchange on the open market or the costs of organising in another firm*".[76] Coase consistently views transaction costs as actual costs confronting relevant agents. He shows that such opportunity costs are embedded in the process of choosing a course of action among alternatives. Though he did not define what is "transaction costs", he determined that "*the costs of negotiating and concluding a separate contract for each exchange transaction which takes place on a market must also be taken into account*".[77]

This is the first time that the concept of transaction costs has been introduced into the study of enterprises and market organizations, but "transaction cost" as a formal theory started in the late 1960s and early

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[74] Coase, R. H. (1937). *The Nature of the Firm, New Series*, Vol. 4, No. 16 (Nov., 1937), p392, available at https://www.jstor.org/stable/pdf/2626876.pdf?refreqid=excelsior%3A10b12bc4c56fa14f88c31693f32fbe31, accessed 03 Jan 2021.

[75] Posner, R. A. (1993). *The New Institutional Economics Meets Law and Economics*. Journal of Institutional and Theoretical Economics (JITE) 149/1 (1993), p78.

[76] Ibid, n 74, p395.

[77] Ibid, n 74, p391.

1970s[78] and became most widely known through Oliver Williamson's Transaction Cost Economics. Transaction cost economics became well systematized after Oliver Williamson published the book "Markets and Hierarchies" (1975). This was affirmed by Coase: "*in a real sense, transaction cost economics, through his writing and teaching, is his creation*".[79] Transaction Cost Economics is an interdisciplinary project in which law, economics, and organization are joined [80] and overlaps extensively with contract law.[81]

Oliver Williamson defined "transaction costs" as: "*The ex-ante costs of drafting, negotiating and safeguarding an agreement and more especially, the ex-post costs of mal-adaptation and adjustment that arise when contract execution is misaligned as a result of gaps, errors, omissions and anticipated disturbances; the cost of running economic system (Williamson 1996, 379)*".[82] Unlike production costs, transaction costs are the total costs of making a transaction, including the cost of planning, deciding, changing plans, resolving disputes, and after-sales. Therefore, the transaction cost is one of the most significant factors in business operation and management.[83] It is the economic equivalent of friction in physical systems:[84] "*Engineering makes express provision for friction when designing, constructing and operating actual projects whereas, rather than*

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[78] Transaction Cost, Wikipedia, https://en.wikipedia.org/wiki/Transaction_cost#cite_note-2, accessed 03 January 2021.

[79] Coase, R. H. (1993). *Coase on Posner on Coase*. Journal of Institutional and Theoretical Economics (JITE) 149/1 (1993), p98.

[80] Williamson, O. (2013). *The Transaction Cost Economics Project-The Theory and Practice of the Governance of Contractual Relations.* The UK: Edward Elgar Publishing Limited, introduction, ix.

[81] Ibid, p47.

[82] Saito, A. (2008). *Legal Education for Value Creative Business Lawyers: A Multidisciplinary Perspective Towards Globalising Market Societies*. CDAMS (Centre for Legal Dynamics of Advanced Market Societies, Kobe University): Legal Dynamics Series, LexisNexis, p137.

[83] Ibid, n 78.

[84] Ibid, n 80.

admit to positive transaction costs as a form of friction in economics, the practice in economics prior to the 1960s was to assume that transaction costs were zero - which assumes the absence of friction".[85] Williamson uses the metaphor merely as an analytical instrument for economists to identify where problems (frictions) reside, and later shifts his analytical focus to agents' opportunistic behavior. In contrast, Coase interprets transaction costs as real costs confronting relevant agents, and his main concern has been how agents' recognition of such costs leads to institutional structuring. Williamson is interested in types of contracts that are remote from spot contracts, in other words, in contractual settings.[86]

Opportunism is a core concept in studying transaction costs.[87] Thereby, the theory answers when activities would occur within the market or the firm.[88] Williamson argued that when transaction costs were high, internalizing the transaction within a hierarchy was appropriate. Conversely, when transaction costs were low, buying the good or service on the market was a preferred option. This reveals that transaction cost affects the possibility of exchange and the choices of business people. Based on this finding, in the next parts, we will turn back to utilize the concept of transaction costs in upholding law and lawyers' role in business transactions.

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[85] Williamson, O. (2013). *The Transaction Cost Economics Project-The Theory and Practice of the Governance of Contractual Relations.* The UK: Edward Elgar Publishing Limited, introduction, ix-x.

[86] Posner, R. A. (1993). *The New Institutional Economics Meets Law and Economics*. Journal of Institutional and Theoretical Economics (JITE) 149/1 (1993), p79.

[87] Ibid, n 85, p20.

[88] Transaction cost economics regards the firm not as a production function but as a governance structure.

3. Relational Contract Theory

In this part, we are going to situate Ian Macneil's relational contract theory within the story of the development of contract law and draw out some implications of the theory to the policy of remedy for breach of contract. Relational contract theory, which is "*a most substantial contribution to the economic and social theory of the capitalist economy*" (David Campbell),[89] has had much influence on legal scholarship over the past fifty years.[90] When one wishes to understand and properly evaluate the contract remedies system, it is absolutely vital to study the relational theory of contract. It is the towering achievement as recognised in a symposium that "people should not attempt to write about contracts until they have studied Ian Macneil".[91]

The theory was originally developed mainly by Ian Macneil (along with Stewart Macaulay). It was firstly introduced at the Association of American Law Professors' annual conference in late 1967 [92] and was printed in Macneil's article "Whither Contracts?" in 1969.[93] However, the really substantial ground of the theory appeared in 1974 in "Restatement (Second) of Contracts and Presentiation" [94] and "The Many Futures of

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[89] Campbell, D. (2004). *Ian Macneil and the Relational Theory of Contract*. Kobe University Reposiroty: Kernel, p18, available at http://www.lib.kobe-u.ac.jp/infolib/meta_pub/G0000003kernel_80100023 / accessed 05 May 2020.

[90] Baker, S., & Choi, A. (2015). *Contract's role in relational contract*. Virginia Law Review, 101(3), p561.

[91] Campbell, D., Mulcahy, L., and Wheeler, S. (2013). *Changing Concepts of Contract - Essays in honour of Ian Macneil*. London: Palgrave Macmillan, foreword: ix, Stewart Macaulay.

[92] Ian Roderick Macneil, Scholarship, available at https://en.wikipedia.org/wiki/Ian_Roderick_Macneil#cite_ref-restatement_7-1, accessed 05 October 2020.

[93] MacNeil, I. R. (1968). *Whither contracts*. Journal of Legal Education, 21(4), 403-418, available at https://heinonline.org/HOL/Page?public=true&handle=hein.journals/jled21&div=45&start_page=403&collection=journals&set_as_cursor=0&men_tab=srchresults, accessed 1 August 2020.

[94] Macneil, I. R. (1974). *Restatement (second) of contracts and presentation*. Virginia Law Review, 60(3), 589-610, available at

Contracts".[95] Macneil wrote more on the theory after 1980, mainly concerned with explaining and defending the theory due to many misunderstandings of academic commentators.[96]

One of Macneil's core insights was that classical contract theory had made the mistake of pretending that contracts were made and carried out in isolation from their social context.[97] His relational theory placed contracts firmly back in the social context by a view of contracts as relations rather than as discrete transactions in classical or neo-classical contract theory. It is the latest step in the scholarly project of responding to the inadequacies of classical contract (Eisenberg; Feinman).[98] Classical contract theory was motivated by an image of the isolated bargain between independent, self-interested individuals,[99] in which contracts "simply set ground rules for self-maximizing private ordering".[100] Classical contract was the realm of consensual relations,[101] posited consent or promise as the essence of contract. We also have neo-classical contract. It is "neo-classical" because it addresses the shortcomings of classical contract rather than offering a wholly different conception.[102] The

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https://heinonline.org/HOL/Page?handle=hein.journals/valr60&collection=journals&id=601&startid=601&endid=622, accessed 1 August 2020.

[95] MacNeil, I. R. (1974). *The many futures of contracts*. Southern California Law Review, 47(3), 691-816. available at https://heinonline.org/HOL/Page?handle=hein.journals/scal47&id=695&collection=journals&index= , accessed 1 August 2020.

[96] Ian Roderick Macneil, Scholarship, available at https://en.wikipedia.org/wiki/Ian_Roderick_Macneil#cite_ref-restatement_7-1, accessed 05 October 2020.

[97] Campbell, D., Mulcahy, L., and Wheeler, S. (2013). *Changing Concepts of Contract - Essays in honour of Ian Macneil*. London: Palgrave Macmillan, xviii.

[98] Campbell, D. (2001). *The Relational Theory of Contract-Selected Works of Ian Macneil*. London: Sweet & Maxwell, p59.

[99] Ibid.

[100] Feinman, J. M. (2000). *Relational contract theory in context*. Northwestern University Law Review, 94(3), p738.

[101] Ibid.

[102] Ibid.

substantive core of neoclassical contract is based on the assumption that parties act out of self-interest, set within a context of trade custom, and balanced by social values.[103] Relational theory contrasts with traditional theory (classical and neo-classical); it focuses on the necessity and desirability of trust, mutual responsibility, and connection.[104] The reason the relational theory is superior to the classical contract theory is that all contracts can be fully understood only when their relational dimension is made explicit,[105] in the way that it is built upon the recognition of co-operation.[106] The relational theory can deal with complex contracts far better than classical contract theory.[107]

Ian Macneil began to develop his account of relational contract around *co-operation* and *exchange*. Co-operation was the most important common characteristic of a contract.[108] An exchange was defined as "*the giving up of something in return for receiving something else*".[109] Parties make an exchange for producing exchange-surplus which constitutes their wealth. He has argued that discrete exchanges and relational contracts form an axis,[110] and along this axis runs a spectrum of contractual phenomena. At one pole is a discrete transaction, and at the other is a relational transaction with long-term commercial relations between parties. Macneil has claimed that different contract theories are found at various

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[103] Ibid, p739.

[104] Ibid, p748.

[105] Campbell, D., Mulcahy, L., and Wheeler, S. (2013). *Changing Concepts of Contract - Essays in honour of Ian Macneil*. London: Palgrave Macmillan, p138.

[106] Campbell, D. (2005). *The Relational Constitution of Remedy: Co-Operation as the Implicit Second Principle of Remedies for Breach of Contract*. Texas Wesleyan Law Review, Vol.11, p480.

[107] Ibid.

[108] Campbell, D. (2001). *Relational Theory of Contract: Selected Works of Ian Macneil*. London: Sweet&Maxwell, p10.

[109] Ibid, p47.

[110] Ibid, p28.

points along the spectrum:[111] At the extremely discrete end of the spectrum is the classical contract, at the extremely relational end is the relational contract.

Ian Macneil has told us that a discrete contract is a contract made without social relations. Still, he also suggests that all contracts are relational in that they are embedded in some social relations, however minimal.[112] Even the most discrete contract is encircled by relations facilitating that exchange.[113] Every contract involves relations apart from the exchange of goods itself. Thus every contract is partially a relational contract.[114] Every type of contract has both discrete and relational elements and cannot function without both.[115] The classical contract focused on particular aspects of contractual relations such as the written terms of the agreement, but frequently seemed blind to other relational aspects or implicit dimensions, such as expectations of co-operation and adaptation to changing circumstances, which are often key ingredients of a successfully functioning business transaction, especially in long-term business relations.[116]

Because the theory had been invented half a century ago, it is useful to illustrate how a relational factor should be evaluated in a new type of contract which recently becomes popular but was not present at the time the theory was created. In our digital world today, there are contracts made in e-commerce using the websites of companies. One is able to enter into a wide range of transactions with a click. Such transactions

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[111] Ibid.

[112] Campbell, D., Mulcahy, L., and Wheeler, S. (2013). *Changing Concepts of Contract - Essays in honour of Ian Macneil*. London: Palgrave Macmillan, p38.

[113] Ibid, p39.

[114] Ibid, p47.

[115] Ibid, p66.

[116] Ibid, p67.

seem to be concluded with the very minimum of social relations. We might say it resembles the discrete transaction that Macneil describes:[117] "*Discrete contracts are characterized by short duration, limited personal interactions…They require a minimum of future cooperation between the parties*". However, the feedback system is being used to generate trust based on the views of other users.[118] Feedback very quickly provides information from one buyer to millions of potential buyers.[119] It has the effect of creating social relations between strangers, so these kinds of contracts are relational contracts.[120]

One thing we should be aware of is that the relational theory is a theory of contract. We should distinguish further between contract and contract law due to our theme of the thesis is about contract law. Based on that awareness, relational contract theory is expected to contribute something beneficial to the development of contract law. The question is not whether contracts are relational but whether contract law is relational.[121] How much of the context does the law take into account when fixing the rights and obligations of the parties? A contract may be relational, firmly embedded in a particular context, but the law may still treat it as discrete by ignoring the context.[122] Relational theory suggests that contract law should take the context into account unless the parties have agreed that the contract should be treated discretely.[123] We can properly understand and analyze contracts, contract law, and contractual

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[117] Campbell, D., Mulcahy, L., and Wheeler, S. (2013). *Changing Concepts of Contract - Essays in honour of Ian Macneil*. London: Palgrave Macmillan, p45.

[118] Ibid, p57.

[119] Ibid, p58.

[120] Ibid, p57.

[121] Ibid, p117.

[122] Ibid.

[123] Ibid, p118.

disputes only when we look beyond discrete transactions and the express terms of agreements to examine the relationships involved.[124] Most contractual matters involve dynamic relationships that evolve over time rather than discrete transactions agreed upon and conducted entirely at an isolated moment.[125] The law should not concern itself so much with principles designed to regulate agreements governing discrete transactions, such as rules about offer and acceptance or consideration. Rather, the law should incorporate norms derived from both the historical context that gave rise to the particular association between the parties and the circumstances that developed over time to produce whatever question or problem they face at a given point. These norms would, according to this doctrine, be more important than express terms of the original agreement when circumstances occur that the parties did not or could not have planned for at the time they crafted their formal agreement.[126] Commercial parties in long-term relationships rarely relied on, or even looked at, the written agreement. Instead, they performed obligations out of the need to preserve a reputation as a good business partner, as someone who could be trusted with future deals.[127] Although the suggestions of relational contract theory to contract law seem good, not all legal systems tend to be influenced, for example in the UK, the theory of relational contract seems to have had little impact on the law of England and Wales.[128] English law still often seems to start at the other end: the

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[124] MacNeil, I. R. (2000). *Relational contract theory: Challenges and queries*. Northwestern University Law Review, 94(3), 877-908.

[125] Circo, C. J. (2012). *The evolving role of relational contract in construction law*. Construction Lawyer, 32(4), p17.

[126] Ibid.

[127] Baker, S., & Choi, A. (2015). *Contract's role in relational contract*. Virginia Law Review, 101(3), p561.

[128] Campbell, D., Mulcahy, L., and Wheeler, S. (2013). *Changing Concepts of Contract - Essays in honour of Ian Macneil*. London: Palgrave Macmillan, p116.

context should be ignored unless the parties have provided for it to be taken into account.[129]

One of the significant findings that the relational theory of contract has revealed is that if an economy was dependent on the discrete contracts as its primary method of facilitating exchange, productivity would be very low, and transaction costs would be very high.[130] From this perspective, it seems better for business parties to maintain their good relationship with each other, even in disputing cases, and seek a solution to remedy any unexpected or intentional breach. The relational theory, therefore, can be said that it supports the specific performance remedy, which is the primary method in civil law systems as having studied in Chapter 1. In fact, in dispute resolution, the vast majority of disputes are settled by direct negotiations between the parties.[131] The relational theory also appears to be appropriate to the rise of mediation across the world recently. The increasing use of mediation might provide new opportunities for lawyers to re-emphasize the relational aspects of disputes.[132] In recent years there is evidence of more widespread use of mediation.[133] The increasing popularity of mediation in the commercial sphere means that a new generation of lawyers is more likely to be exposed to and presented with relational tales about contracts.[134] Mediation is much more likely than trial or arbitration to force lawyers to familiarize themselves with the context in

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[129] Campbell, D., Mulcahy, L., and Wheeler, S. (2013). *Changing Concepts of Contract - Essays in honour of Ian Macneil*. London: Palgrave Macmillan, p118.

[130] Ibid, p47.

[131] Campbell, D. (2005). *The Relational Constitution of Remedy: Co-Operation as the Implicit Second Principle of Remedies for Breach of Contract*. *Texas Wesleyan Law Review*, Vol.11, p470.

[132] Ibid, n 129, p211.

[133] Ibid, p210.

[134] Ibid, p211.

which commercial disputes arise and attune themselves to the importance of the extra-legal norms which might govern it.[135]

4. Relational Constitution of Remedy

The first statement of the theory of efficient breach appears to have been made in 1970 in a law review article by Robert L. Birmingham in "Breach of Contract, Damage Measures, and Economic Efficiency".[136] The theory was named seven years later by Charles Goetz and Robert Scott in the Columbia Law Review "Liquidated damages, penalties and the just compensation principle: Some notes on an enforcement model and theory of efficient breach".[137] It is also commonly associated with Richard Posner's discussions,[138] [139] and many other scholars, such as Ian Macneil in "Efficient Breach of Contract: Circles in the Sky"[140], David Campbell in "The Relational Constitution of Remedy: Co-Operation as the Implicit

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[135] Ibid, p211.

[136] Birmingham, R. L. (1970). *Breach of Contract, Damage Measures, and Economic Efficiency*. Articles by Maurer Faculty, 1705, available at https://www.repository.law.indiana.edu/cgi/viewcontent.cgi?article=2703&context=facpub, accessed 1 January 2021;
Refer more to: Efficient breach, Wikipedia, https://en.wikipedia.org/wiki/Efficient_breach, accessed 1 January 2021.

[137] Goetz, C. J., & Scott, R. E. (1977). *Liquidated damages, penalties and the just compensation principle: Some notes on an enforcement model and theory of efficient breach*. Columbia Law Review, 77(4), 554-594, available at: https://heinonline.org/HOL/Page?public=true&handle=hein.journals/clr77&div=36&start_page=554&collection=journals&set_as_cursor=0&men_tab=srchresults, accessed 1 January 2021.
Refer more to: Efficient breach, Wikipedia, https://en.wikipedia.org/wiki/Efficient_breach, accessed 1 January 2021.

[138] Posner explains his views in his majority opinion in Lake River Corp. v. Carborundum Co., 769 F.2d 1284 (7th Cir. 1985). Efficient breach, Wikipedia, https://en.wikipedia.org/wiki/Efficient_breach, accessed 1 January 2021.

[139] Posner, R. A., & Rosenfield, A. M. (1977). *Impossibility and related doctrines in contract law: An economic analysis*. Journal of Legal Studies, 6(1), 83-118, available at: https://heinonline.org/HOL/Page?public=true&handle=hein.journals/legstud6&div=9&start_page=83&collection=journals&set_as_cursor=0&men_tab=srchresults, accessed 1 January 2021.

[140] Macneil, I. R. (1982). *Efficient breach of contract: Circles in the sky*. Virginia Law Review, 68(5), 947-970. Available at https://heinonline.org/HOL/Page?handle=hein.journals/valr68&collection=journals&id=957&startid=&endid=980, accessed 1 January 2021.

Second Principle of Remedies for Breach of Contract".[141] This section will mainly introduce the opinions and analyses of David Campbell, as the latest and easily understandable literature for use.

David Campbell connected the efficient breach theory with the relational contract theory by emphasizing the co-operation nature along the relational axis of contracts to point out conditions of remedy for the breach. He called it the "relational constitution of remedy". In detail, from contracts at the discrete end of Macneil's spectrum towards the other end, there is a much more developed awareness of the necessity of co-operation between the parties.[142] Co-operation is the essential product of the relations of good faith parties.[143] Prof. David Campbell supported this theory and went further to develop his opinion on the efficient breach theory. According to Prof. David Campbell, whilst protecting the claimant's expectation is the first principle of remedies for breach of contract, co-operation in keeping the defendant's costs of furnishing that protection as low as possible is the second principle.[144] Using both principles reveals the co-operative nature of the breach.

We examine quickly some main arguments he has used. In his view, when costs of performance exceed costs of a breach, or upon learning of a sufficiently superior opportunity, the defendant's incentive to breach a contract is rational.[145] So long as the defendant adequately compensates

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[141] Campbell, D. (2005). *The Relational Constitution of Remedy: Co-Operation as the Implicit Second Principle of Remedies for Breach of Contract*. Texas Wesleyan Law Review, Vol.11. available at: https://heinonline.org/HOL/Page?public=true&handle=hein.journals/twlr11&div=28&start_page=455&collection=journals&set_as_cursor=0&men_tab=srchresults, accessed 1 August 2020.

[142] Ibid, p472.

[143] Ibid, p476.

[144] Ibid, p457.

[145] Ibid, p461.

the claimant, it will be efficient to allow him to do so.[146] The net result will be identical for the claimant and superior for the defendant.[147] The breach is called efficient because it minimizes the defendant's loss.[148] One point that needs to be noted here is that breaches under the guise of an efficient breach are not efficient because the claimant is not adequately compensated.[149] Compensation is the key to decide whether a beach is efficient or not.

An efficient breach requires some conditions to happen. The costs of the breach can be lower than the costs of performance only if damages are normally quantified on a compensatory basis, and there is an incentive to mitigate so that the claimant is compensated only for lost net profit.[150] Allowing the defendant to breach and placing the burden of mitigation on the claimant enlists the claimant's co-operation in dealing with the defendant's problems. One aspect of this co-operation is that it makes legal action unnecessary in cases where compensation is adequate.[151]

As to the oppositional opinions, the predominant attitude towards breach is that the breach represents an immoral failure by the breaching party.[152] However, Prof. David Campbell proved that the function of the

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[146] Ibid.

[147] Ibid.

[148] Ibid, p469.

[149] Ibid, p462.

[150] Ibid, p464.

[151] Ibid, p469.

[152] Ibid, p456; Fried, C. (1981). *Contract as Promise: A Theory of Contractual Obligation*. Cambridge, Mass: Harvard University Press; Fried, C. (2012). *Contract as promise thirty years on*. Suffolk University Law Review, 45(3), 961-978 (available at: https://heinonline.org/HOL/Page?handle=hein.journals/sufflr45&collection=journals&id=969&startid=&endid=986, accessed 1 August 2020); Atiyah, P. P. (1981). *Contract as promise: theory of contractual obligation*. Harvard Law Review 95(2), 509-527, available at https://heinonline.org/HOL/Page?handle=hein.journals/hlr95&id=527&collection=journals&index=, accessed 1 August 2020).

contract law is to make breach possible.[153] This function is central to the efficient working of the market economy.[154] Another argument was that the foundations of modern computing and game theory also showed that error could not be eliminated.[155] So we should not put excessive faith in one's results and then try to manage the inevitable failure.[156] On the other hand, it is the economic exchange, and particularly the surplus is essential.[157] The actual performance of the contract is incidental to obtaining the surplus.[158]

Determining the correct policy towards efficient breach is the most important issue in the law of contract remedies. The efficient breach theory provides a new reference for evaluating contractual behaviour on the basis of cost-benefit analysis and setting policies regarding legal remedies in a wider perspective. Besides, the theory highlights the importance of remedies which not only decides whether a breach is efficient or not, but also influences many aspects of the transaction, such as transaction costs, and deal-making decision. Furthermore, the efficient breach is in line with and has a positive effect on the freedom of contract, and singles out the area of contract law from general law by diminishing mandatory rules unnecessary for parties' choosing (for example, the principle "*Pacta Sunt Servanda*", which has its modern statement as the performance interest[159]).

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[153] Campbell, D. (2005). *The Relational Constitution of Remedy: Co-Operation as the Implicit Second Principle of Remedies for Breach of Contract*. Texas Wesleyan Law Review, Vol.11, p456.

[154] Ibid.

[155] Ibid, p467.

[156] Ibid.

[157] Ibid, p465.

[158] Ibid.

[159] Ibid, p11.

The applications of the efficient breach theory can be observed differently in common law and civil law systems. For example, in England, "damages" is still the primary kind of remedies, as we have seen in Chapter 1. In the US, Judges often refer to the efficient breach theory, particularly when approving full compensation to the victim.[160] In Vietnamese Law, the contract remedy system plays a limited role in avoiding inefficient performance. It seems to be performance-oriented. Although the new Vietnamese law has provided specific performance and monetary damages, specific performance is still considered the primary remedy. In this sense, the Vietnamese law remedy system is generally not in favour of the efficient breach theory. Instead, Vietnamese Law provides special rules, including force majeure, change of circumstances, and impossibility.

Though the efficient breach theory was proved advanced and rational, in fact, it is not easy to apply fully for complex contracts in international deals. The theory is grounded on the assumption that parties are economically rational and motivated primarily by profit. On that assumption, parties' actions are to a large degree driven by economic concerns. However, economic analysis has been criticized for basing people's decision-making completely on financial incentives.[161] In a real business environment, sometimes it is not simple on matters of economics. Parties' decision is influenced by more factors than just financial benefits, such as the elements of a long-term relationship. Therefore, in balance, both the efficient breach theory and relational theory have influenced policies towards remedies for breach of contract in

[160] Barnes, D. W. (1998). *The anatomy of contract damages and efficient breach theory*. Southern California Interdisciplinary Law Journal, 6(3), p399.

[161] Wilkinson, T. & Ryan. (2014). *Demand for Breach*. U of Penn, Inst for Law & Econ Research Paper No. 14-19, p30-36, available at http://ssrn.com/abstract=2428775, accessed 4 October 2020.

individual legal systems. Rather, rules of remedy are also affected by legal traditions as a consequence of path-dependence in legal development. In sum, studying this part will facilitate us in reaching a sound understanding of the next chapters, particularly Chapter 3 on damages under CISG and PICC.

CHAPTER 3: HARMONISATION OF CONTRACT LAW

In the early nineteen-twenties, American Law Institute started the project of restatements to remedy the deficiencies (uncertainty and complexity, reported in 1923)[1] which in those days were becoming apparent in the development of the law of the United States.[2] Each state (of forty-eight states) was an independent source of law and had different jurisdictions. This needed to be solved in a systematic manner to make certain, to simplify unnecessary complexities, and to adapt the laws to the needs of life.[3] Inspired by this initiative, the two following instruments had been created with the same vision but in a different context, on the international level with increasingly integrated markets for international transactions. One is in the type of a convention with its coercive nature, while the other is principles with flexible character. However, all they are successful, and through learning their contents, we may see how evolutionary and innovative they are, or in other words, how the international commercial law develops over some recent decades.

1. CISG (United Nations Convention on Contracts for the International Sale of Goods, Vienna, 1980)

The adoption of CISG in 1980 was the result of some fifty years' work, which started back in 1929 when UNIDROIT decided to undertake the necessary studies to elaborate a uniform law for international sales

[1] Bonell, M. J. (1997). *An International Restatement of Contract Law: The UNIDROIT Principles of International Commercial Contracts*. 2nd Enlarged Edition. New York: Transnational Publishers, p7.

[2] Ibid.

[3] Ibid, p7-8.

contracts.[4] In 1964, in the Netherlands at The Hague, the adoption of two Conventions (Uniform Law on the International Sale of Goods (ULIS) and Uniform Law on the Formation of Contracts for the International Sale of Goods (ULFC) had little success. Then, in 1968 the newly-established United Nations Commission on International Trade Law (UNCITRAL) decided to make a fresh start using the Hague Conventions as a basis.[5] Due to this inheritance, CISG can be regarded as a contemporary manifestation of a genuinely European tradition[6]. In 1980, delegates from 62 nations deliberated CISG at the famous Vienna Conference. The Convention entered into force on 1 January 1988.[7] Now it has 93 member States.[8]

CISG is a binding instrument agreed upon by States at an international level and which they subsequently had to introduce into their domestic legal systems.[9] At the time of drafting the Convention, the socialist countries of Eastern Europe and the newly independent nations had strictly centralized and planned economies.[10] If they wanted to participate in international commerce, they had to provide special rules for their foreign trade relationships by granting their economic organisations basically the same freedom of contract enjoyed by their competitors from

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[4] Bonell, M. J. (1997). *An International Restatement of Contract Law: The UNIDROIT Principles of International Commercial Contracts*. 2nd Enlarged Edition. New York: Transnational Publishers, p61.

[5] Schwenzer, I., Hachem, P. (2009). *The CISG – A Story of Worldwide Success*. CISG Part II Conference, Sweden, Stockholm, 119-140, p121-122, available at https://78c4eede-15fd-4d4e-983d-f2b4b86af685.filesusr.com/ugd/00630e_f2e9895ab7964801aa73496376995786.pdf, accessed 4 October 2020.

[6] Jansen, N. Zimmermann, R. (2017). *Commentaries on European Contract Laws.* Oxford: Oxford University Press, p5, ¶11.

[7] Ibid.

[8] Status CISG https://uncitral.un.org/en/texts/salegoods/conventions/sale_of_goods/cisg/status

[9] Ibid, n 4, p62.

[10] Ibid, p63.

countries with market economies.[11] Such a special legal regime could only be established through legislation agreed upon at the international level.[12] Although there may be other reasons for participating countries' deliberations of choosing a binding form (42 of 62 countries voted in favour of the Convention[13]), I find this circumstance, from my experience as a citizen of a Socialist country, understandable. Under the Soviet law and Marxist-Leninist social-economic theory, before transforming to free markets, the centralised and planned economy-driven policy had imposed strict rules on the capability of doing business privately; for example, communist party members cannot own their own business, and many types of fields are restricted to ordinary companies. In this case of international trade, the limitation even was more severe, with only assigned entities can get involved in export or import activities.

CISG has been one of the success stories in the field of the international unification of private law.[14] Though promulgated from 1980 in an entirely different socio-economic and political environment, it remains a landmark in the international unification process.[15] However, some issues remain limited in its scope and its nature of binding force. Because of the considerable differences in the legal traditions and the states' socio-economic structures participating in the negotiations, some issues had to be excluded from the scope of CISG at the outset.[16] CISG does not cover the conclusion of the sales contract through an agent, set-off, assignment

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[11] Bonell, M. J. (1997). *An International Restatement of Contract Law: The UNIDROIT Principles of International Commercial Contracts*. 2nd Enlarged Edition. New York: Transnational Publishers, p63.

[12] Ibid.

[13] Ibid, n 5.

[14] Huber, P., Mullis, A. (2007). *The CISG – A New Textbook for Students and Practitioners*. Germany: European Law Publishers, p1.

[15] Bonell, M. (2008). *CISG, European Contract law and the development of world contract law*, the American Journal of Comparative Law, 56(1), p1.

[16] Ibid, p3.

of rights, or using electronic communications, which was virtually unknown at the time of the preparation of CISG.[17]

After its adoption, CISG was taken as a model by individual States, or groups of States, for the purpose of reforming their domestic sales laws.[18] For example, Dutch law in 1992, German sales law in German Civil Code amended in 2002, the Sale of Goods Acts of the Scandinavian countries (Finland, in 1988; Norway, in 1989; Sweden, in 1991), and the Consumer Sales Directive in Europe.[19]

2. PICC (UNIDROIT Principles of International Commercial Contracts)

CISG had amply demonstrated that this Convention was the maximum that could be achieved at the legislative level, which caused UNIDROIT to abandon the idea of a binding instrument and take another road for its own project.[20] Besides, certain disadvantages of harmonisation by way of international treaties are widely recognized.[21] Such treaties are negotiated by the representatives of governments who have to reach unanimity.[22] This does not always lead to an optimal outcome because negotiators have a strong incentive to promote the solutions in their home countries' laws[23] or offer diplomatic compromise solutions.

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[17] Bonell, M. (2008). *CISG, European Contract law and the development of world contract law*, the American Journal of Comparative Law, 56(1), p3.

[18] Ibid, p5.

[19] Ibid, p6-9.

[20] Bonell, M. J. (1997). *An International Restatement of Contract Law: The UNIDROIT Principles of International Commercial Contracts*. 2nd Enlarged Edition. New York: Transnational Publishers, p65.

[21] Vogenauer, S., Kleinheisterkamp, J. (2009). *Commentary on the UNIDROIT Principles of International Commercial Contracts (PICC)*. United States: Oxford University Press, p3, ¶8.

[22] Ibid.

[23] Ibid.

PICC had been made with the vision of becoming a more general legal framework - a sort of modern *ius commune.*[24] The first steps towards a "restatement" of international commercial contract law were initiated by the Secretary General of UNIDROIT, Mario Matteucci, at a conference on 23rd April 1968 in Rome.[25] He suggested creating a non-binding body of rules reflecting the common principles that can be extracted from the case law of the various countries and which then constitute the first step towards a uniform code, possibly to be transformed into a Convention at a later stage.[26] In May 1994, PICC was started distributing in practice.[27] And it had three times of amending subsequently in 2004, 2010, 2016.

CISG was one of the important sources of PICC, as stated: "[…] CISG was, of course, an obligatory point of reference".[28] The scope of PICC is within "international" contracts only.[29] It excludes cases where all the relevant elements of the contract are connected with only one country. This gives a broader interpretation than a reference to parties' nationalities or domicile or residence or places of business (for example, the place of arbitration will be excluded from this conventional reference).[30] And the application is restricted to "commercial" contracts,[31] does not include the so-called "consumer transactions" (i.e., transactions entered into by a

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[24] Bonell, M. J. (1997). *An International Restatement of Contract Law: The UNIDROIT Principles of International Commercial Contracts*. 2nd Enlarged Edition. New York: Transnational Publishers, p3. The ancient *ius commune* had constituted a uniform legal framework in medieval Europe between the twelfth and the eighteenth centuries, to share a common understanding over the various local laws.

[25] Vogenauer, S., Kleinheisterkamp, J. (2009). *Commentary on the UNIDROIT Principles of International Commercial Contracts (PICC)*. United States: Oxford University Press, p7, ¶16.

[26] Ibid.

[27] Bonell, M. J. (1997). *An International Restatement of Contract Law: The UNIDROIT Principles of International Commercial Contracts*. 2nd Enlarged Edition. New York: Transnational Publishers, p28-29.

[28] Ibid, p32.

[29] Ibid, p48.

[30] Ibid, p53.

[31] Ibid, p50.

person who acquires goods, services primarily for personal, family, household use other than for an organization). In this respect, the approach is basically the same as that adopted in CISG.[32] (The differences in scopes of CISG and PICC will be shown in the next part).

The fact that the UNIDROIT Principles are the product of a group of independent experts without direct involvement of governments undoubtedly has its advantages.[33] It permits wider discretion in their preparation and renders them more flexible and capable of rapid adaptation to the changing conditions in international trade practice.[34] The non-binding nature of PICC makes it even more attractive. Users can amend provisions and tailor the principles to their circumstances: “It is free to amend the principles from time to time to take care of problems”.[35] In addition, it is not needed to be ratified for use, so PICC provides timely options for businesses.

However, the non-binding nature of PICC has its own shortcomings. They are binding only where parties choose to apply. Sometimes this limits its reach (only applied if parties find favour in). In addition, though a number of national legislatures have taken PICC as a source of inspiration for the reform of their domestic contract laws,[36] many said the restatement is nothing more than declarations by private bodies of scholars who have no legitimacy to engage in lawmaking, the acceptance of a restatement

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[32] Bonell, M. J. (1997). *An International Restatement of Contract Law: The UNIDROIT Principles of International Commercial Contracts*. 2nd Enlarged Edition. New York: Transnational Publishers, p51.

[33] Bonell, M. J. (unknown). *Symposium Paper: The UNIDROIT Principles of International Commercial Contracts: Achievements in Practice and Prospects for the future.* [pdf]. Australian International Law Journal, p180.

[34] Ibid, n 32, p17.

[35] Ibid.

[36] Ibid, n 33, p178.

depends solely on its persuasive authority.[37] Hence, there have been repeated calls for a transformation of PICC into a binding instrument.[38] This matter will be turned back in our examination in part 5.3 of this Chapter.

3. Comparisons between two Instruments

Despite their lack of binding force, PICC provides a complete and coherent set of rules for the area of general contract law. Each black letter rule is followed by one or more Official Comments, which is absent in the case of CISG. It makes PICC perfectly understandable with backgrounds, reasons explained for the adoption of the rule, and illustrations to show how the rule operates in practice.

As to attitudes towards matters of acting in good faith, which is traditionally required in international commercial transactions, PICC imposes upon parties a duty to act in good faith throughout the life of the contract, including the negotiation process,[39] Art 1.7 PICC 2016 (Good faith and fair dealing)[40] - *"(1) Each party must act in accordance with good faith and fair dealing in international trade; (2) The parties may not exclude or limit this duty"*. In this respect, PICC follows an approach familiar to the generality of civil law systems.[41] That approach falls short in case of CISG, in contrast, expressly refers to good faith only in the context and for the

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[37] Vogenauer, S., Kleinheisterkamp, J. (2009). *Commentary on the UNIDROIT Principles of International Commercial Contracts (PICC)*. United States: Oxford University Press, p6, ¶13.

[38] Bonell, M. J. (unknown). *Symposium Paper: The UNIDROIT Principles of International Commercial Contracts: Achievements in Practice and Prospects for the future.* [pdf]. Australian International Law Journal, p181.

[39] Bonell, M. J. (1997). *An International Restatement of Contract Law: The UNIDROIT Principles of International Commercial Contracts*. 2nd Enlarged Edition. New York: Transnational Publishers, p66.

[40] Unidroit.org, (2016). *International Institute for The Unification of Private Law*. [online] available at: https://www.unidroit.org/instruments/commercial-contracts/unidroit-principles-2016, accessed 08 August 2020.

[41] Ibid, n 39, p137.

purpose of the interpretation of the Convention as regulated in Art 7 (1) CISG[42] - *"In the interpretation of this Convention, regard is to be had to its international character and to the need to promote uniformity in its application and the observance of good faith in international trade"*.

Regarding the primary remedy for breach of contract, there is a contrast between the two instruments. While under Art 28 CISG, a court is not bound to render a judgment for specific performance[43] unless it would do so under its own domestic law.[44] According to Art 7.2.2 PICC 2016, specific performance is not a discretionary remedy,[45] i.e., a court must order performance[46], unless one of the exceptions set in Art 7.2.2 PICC 2016 (*Performance of non-monetary obligation*) applies.[47]

Concerning the scope of application, PICC is more comprehensive than CISG. The scope of PICC is not limited to sales contracts but also encompasses other kinds of transactions, above all service contracts.[48] Meanwhile, CISG only covers sales contracts, not includes service contracts. PICC can deal with additional matters not covered by CISG. *For example*, on the determination of the quality of performance, according to Art 5.1.6 PICC 2016: "*Where the quality of performance is neither fixed by,*

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[42] Uncitral.un.org, (2010). *United Nations Commission on International Trade Law*. [online] available at: https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/19-09951_e_ebook.pdf, accessed 08 August 2020.

[43] This approach corresponds to the position generally taken by common law systems, where specific performance is traditionally considered to be the exceptional remedy to be granted only where the normal remedy of damages affords "inadequate" protection to the aggrieved party (except for the US and Australia).

[44] Art 28 CISG: "If, one party is entitled to require performance of any obligation by the other party, a court is not bound to enter a judgment for specific performance unless the court would do so under its own law in respect of similar contracts of sale not governed by this Convention".

[45] Comment No.2 of Art 7.2.2 PICC 2016, p244.

[46] This approach corresponds to the position generally taken by the civil law systems. It may seem to be in contrast with the common law systems.

[47] Bonell, M. J. (1997). *An International Restatement of Contract Law: The UNIDROIT Principles of International Commercial Contracts*. 2nd Enlarged Edition. New York: Transnational Publishers, p68-69.

[48] Ibid, p72.

nor determinable from, the contract a party is bound to render a performance of a quality that is reasonable and not less than average in the circumstances". *Or*, on the order of performance, according to Art 6.1.4 PICC 2016: "*(1) To the extent that the performances of the parties can be rendered simultaneously, the parties are bound to render them simultaneously unless the circumstances indicate otherwise. (2) To the extent that the performance of only one party requires a period of time, that party is bound to render its performance first, unless the circumstances indicate otherwise*". *Or*, on termination of a contract for an indefinite period, according to Art 5.1.8 PICC 2016: "*A contract … may be terminated by either party by giving notice a reasonable time in advance*". O*r*, whereas CISG denies the buyer the right to terminate the contract if it is impossible for him to make restitution of the goods (with the sole exception of Art. 82(2) CISG), PICC does not contain such a restriction but instead provide that upon the termination of the contract both parties must make restitution. If restitution in kind is not possible or appropriate, allowance should be made in money whenever reasonable.[49] Art 7.3.6 PICC 2016 (*Restitution with respect to contracts to be performed at one time*) provides:[50] "*(1) On termination of a contract to be performed at one time either party may claim restitution of whatever it has supplied under the contract, provided that such party concurrently makes restitution of whatever it has received under the contract; (2) If restitution in kind is not possible or appropriate, an allowance has to be made in money whenever reasonable*".

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[49] Bonell, M. J. (1997). *An International Restatement of Contract Law: The UNIDROIT Principles of International Commercial Contracts*. 2nd Enlarged Edition. New York: Transnational Publishers, p72-73.

[50] Unidroit.org. (2016). *International Institute for The Unification of Private Law*. [online] available at: https://www.unidroit.org/instruments/commercial-contracts/unidroit-principles-2016, accessed 08 August 2020.

In respect of sales contracts, PICC does not compete or claim to displace CISG. The use of the restatement form avoids confrontation between them, and it enables them to supplement each other:[51] A sales contract is entered into between two parties not situated in Contracting States to CISG: There could be a room for applying PICC as an alternative set of internationally uniform rules if parties choose (or even by corresponding provisions of domestic laws of one of the countries of the parties or a third country); A sales contract is entered into between two parties situated in Contracting States to CISG: CISG will normally take precedence over PICC in view of its binding character. However, there may be cases where parties choose to replace individual articles of CISG by the corresponding provisions of PICC that they consider to be more appropriate (or even by corresponding provisions of the domestic law of one of the countries of the parties or a third country). Because, under the Art 6 CISG, the parties can do that: "*The parties may exclude the application of this Convention or, subject to Article 12, derogate from or vary the effect of any of its provisions*".[52]

Even if the parties, either because they are not aware of the existence of CISG or because they do not know that their contract falls within the scope of application of CISG, refer to PICC as the applicable law without expressly excluding CISG. CISG will continue to govern the individual contract as the applicable law.[53] When an international sale contract is governed by CISG, PICC may serve an important purpose of

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[51] Bonell, M. J. (1997). *An International Restatement of Contract Law: The UNIDROIT Principles of International Commercial Contracts*. 2nd Enlarged Edition. New York: Transnational Publishers, p73-74.

[52] Uncitral.un.org, (2010). *United Nations Commission on International Trade Law*. [online] available at: https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/19-09951_e_ebook.pdf, accessed 08 August 2020.

[53] Ibid, n 51, p74-75.

interpretation.[54] According to Art 7(1) CISG: "*In the interpretation of this Convention regard is to be had to its international character and to the need to promote uniformity in its application*", and Art 7(2) CISG: "*Questions concerning matters governed by this Convention which are not expressly settled in it are to be settled in conformity with the general principles on which it is based or, in the absence of such principles, in conformity with the law applicable by virtue of the rules of private international law"*. This opens a chance for PICC to fill in gaps found in CISG. For example, Art 6.1.7 *("Payment by cheque or other instruments"),* Art *6.1.8 ("Payment by funds transfer")* and Art 6.1.9 *("Currency of payment")* of PICC may provide an answer to the questions not expressly settled in CISG.[55] Justice Thomas in the Court of Appeal of New Zealand went even so far as to describe PICC as "a restatement of the commercial contract law of the world which refines and expands the principles contained in CISG".[56]

One of the great innovations of PICC is that they provide standards for conducting negotiations.[57] According to Art 2.1.16 PICC 2016 ("Duty of confidentiality"): "*Where information is given as confidential by one party in the course of negotiations, the other party is under a duty not to disclose that information or to use it improperly for its own purposes, whether or not a contract is subsequently concluded. Where appropriate, the remedy for breach of that duty may include compensation based on the benefit received by the other party*". Or, Art 2.1.15(2) PICC 2016 ("Negotiations in

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[54] Ibid, p75.

[55] Ibid, p77.

[56] Bonell, M. J. (unknown). *Symposium Paper: The UNIDROIT Principles of International Commercial Contracts: Achievements in Practice and Prospects for the future*. [pdf]. Australian International Law Journal, p182.

[57] Bonell, M. J. (1997). *An International Restatement of Contract Law: The UNIDROIT Principles of International Commercial Contracts*. 2nd Enlarged Edition. New York: Transnational Publishers, p141, footnote 90.

bad faith"): "*…a party who negotiates or breaks off negotiations in bad faith is liable for the losses caused to the other party*". Or, Art 2.1.15(3) PICC 2016 ("Negotiations in bad faith"): "*It is bad faith, in particular, for a party to enter into or continue negotiations when intending not to reach an agreement with the other party*". Pre-contractual liability for negotiating in good faith and fair dealing in the bargaining process is a well-known principle only in the civil law systems,[58] where entering into negotiations with no serious intention to contract is generally viewed as instances of negotiating in bad faith. By contrast, common law systems are traditionally reluctant to restrict the freedom of negotiation and favour an "aleatory" view of negotiations according to which parties are at risk until a contract is actually formed.[59]

Though PICC represents a significant step towards the globalization of legal thinking,[60] it is limited in practical application. Only in the context of international commercial arbitration, parties are permitted to choose a soft law instrument like PICC as the law governing their contract instead of a particular domestic law.[61] As far as court proceedings are concerned, the traditional and still prevailing view is that the parties' freedom of choice is limited to a particular domestic law. [62] It may be worth considering adopting PICC in the form of a Model Law. The direct involvement of governments

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[58] Bonell, M. J. (1997). *An International Restatement of Contract Law: The UNIDROIT Principles of International Commercial Contracts*. 2nd Enlarged Edition. New York: Transnational Publishers, p141, footnote 91.

[59] Ibid, p141.

[60] Ibid, p230.

[61] Bonell, M. J. (unknown). *Symposium Paper: The UNIDROIT Principles of International Commercial Contracts: Achievements in Practice and Prospects for the future*. [pdf]. Australian International Law Journal, p183.

[62] Ibid.

would certainly enhance the authority of PICC.[63] The risk that PICC might lose much of their innovative character and be reduced to the lowest common denominator among existing domestic laws is certainly less acute given the non-binding nature of the instrument.[64] Prof Bonell suggested a solution: A formal recommendation by UNCITRAL is expected to promote the legal status of PICC for use as a means of interpreting and supplementing CISG. The basis for this solution lies in the Art 7 CISG. It provides that the Conventions should be interpreted and supplemented autonomously, i.e., according to internationally uniform principles and rules, whereas recourse to domestic law is admitted only as a last resort.[65]

4. United Approach on Interests Protection

While all business depends on trust, goodwill, and good intentions, economic conditions and intentions may change. Businesses should be aware that "without specific contractual protection, their business may suffer in consequence". Issue of remedies for breach of contract is the core element of every sales law.[66] In this part, first of all, we will study the general picture of remedies available under CISG and PICC. Then some detailed focuses will be given to damages as one type of remedy, which is the most popular solution in dealing with the breach of contract.

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[63] Bonell, M. J. (unknown). *Symposium Paper: The UNIDROIT Principles of International Commercial Contracts: Achievements in Practice and Prospects for the future*. [pdf]. Australian International Law Journal, p184.

[64] Ibid.

[65] Ibid, p181.

[66] Huber, P., Mullis, A. (2007). *The CISG – A New Textbook for Students and Practitioners*. Germany: European Law Publishers, p4.

4.1 Damages under CISG

CISG potentially covers more than 80% of world trade.[67] Amongst 93 member states to the Convention,[68] they have different statuses in economic conditions. To make sure that CISG can accommodate the interests of each party from different member states, the Convention must play the role of a fair balance. If not, the Convention may not exist until now from the date in force in 1988 (Date of adoption:[69] 11 April 1980; Entry into force: 1 January 1988). We will show how it can do that through an analysis of damages for breach of contract.

The starting point to study remedies for breach of contract is the concepts "fundamental breach" under CISG or "fundamental non-performance" under PICC, because what kind of remedies given to an aggrieved party varies on the nature of the breach, whether the breach is fundamental, or just minor. According to Art 25: "*A breach of contract committed by one of the parties is fundamental if it results in such detriment to the other party as substantially to deprive him of what he is entitled to expect under the contract, unless the party in breach did not foresee and a reasonable person of the same kind in the same circumstances would not have foreseen such a result*". The provision sets up two criteria for assessing the fundamental breach: the substantial deprivation and the foreseeability. Firstly, as to the substantial deprivation, the contractual agreement will be of paramount importance to define the general purpose of the contract. It is less important how badly the promisor disregarded his duties, but important on how a proper performance would

[67] Schwenzer, I. (2016). *The CISG – a fair balance of the interests of the seller and the buyer*, p79, available at: https://www.ingeborgschwenzer.com/contract-commercial-arbitration, accessed 25 June 2020.

[68] Status CISG https://uncitral.un.org/en/texts/salegoods/conventions/sale_of_goods/cisg/status

[69] CISG Convention https://uncitral.un.org/en/texts/salegoods/conventions/sale_of_goods/cisg

have been for the promisee.[70] It does not mean that the promisee must actually have suffered a loss or damage as a result of the breach.[71] As long as the breach substantially deprived the buyer of what he was entitled to expect under the contract, it will be a fundamental breach. It does not really matter what the promisee actually expected, but what he was entitled to expect, i.e., what a reasonable third party would have expected under the circumstances.[72] Secondly, as to foreseeability, the breach will not be fundamental if it was not foreseeable at the time of the conclusion of the contract.[73] The foreseeability criterion is both subjective and objective because it bases not only upon whether the party in breach foresaw the result, but on whether a reasonable person of the same kind in the same circumstances would have foreseen it.[74]

The next point that we should learn about is the overview of possible remedies. CISG provides remedies accordingly to who commits the breach, i.e., buyers or sellers. In the first place, if a seller makes a fault, according to Art 45 (1), a buyer can require performance (in Art 46), avoid the contract (in Art 49), reduce the purchase price (in Art 50), or claim damages (in Art 74): "*If the seller fails to perform any of his obligations under the contract or this Convention, the buyer may: (a) exercise the rights provided in articles 46 to 52; (b) claim damages as provided in articles 74 to 77*". In the second place, if a buyer makes a fault, according to Art 61 (1), a seller can have three choices to require performance (in Art 62), avoid the contract (in Art 64), or claim damages (in Art 74): "*If the*

[70] Huber, P., Mullis, A. (2007). *The CISG – A New Textbook for Students and Practitioners*. Germany: European Law Publishers, p214-215.

[71] Ibid, p214.

[72] Ibid, p215.

[73] Ibid, p215, 216.

[74] Ibid, p215.

buyer fails to perform any of his obligations under the contract or this Convention, the seller may: (a) exercise the rights provided in articles 62 to 65; (b) claim damages as provided in articles 74 to 77". We will focus on damages as a remedy of parties. Art 45 and Art 61 are the bases for the claim of damages. The measure and the calculation of damages are governed by Art 74 to Art 77. Besides, there are certain grounds of exemption in Art 79, 80 (impediments beyond the seller's control, failure caused by the buyer himself), but we don't analyze to keep focusing on damages matters.

To begin with, we will examine the policy towards damages of buyer. Art 45 (2) is the basis for the buyer's claim of damages: "*The buyer is not deprived of any right he may have to claim damages by exercising his right to other remedies*". It means the buyer may, for example, claim damages and avoid the contract or request repair of default. In connection with Art 45 (2), Art 74 explains how damages can be measured: *"Damages for breach of contract by one party consist of a sum equal to the loss, including loss of profit, suffered by the other party as a consequence of the breach. Such damages may not exceed the loss which the party in breach foresaw or ought to have foreseen at the time of the conclusion of the contract, in the light of the facts and matters of which he then knew or ought to have known, as a possible consequence of the breach of contract".* This means compensation is for loss, not for sanction or punishment. Every type of loss is compensable (if it meets all the requirements) because the provision does not exclude any specific type of loss. This principle is often called the ***principle of full compensation***.[75] Even the loss of "goodwill" or reputation of the buyer, as a result of having

[75] Huber, P., Mullis, A. (2007). *The CISG – A New Textbook for Students and Practitioners*. Germany: European Law Publishers, p268.

distributed the non-conforming products supplied by the seller to third parties, may be recoverable if it can be measured in money (and it was foreseeable).[76] Because the Article defines the damages to be awarded as a "sum equal to the loss", so a mere loss of reputation which has not led to any measurable financial consequences will therefore hardly be compensable.[77] Although all type of loss is compensable, the principle of full compensation has to accompany by the ***foreseeability rule*** (sometimes it is called "contemplation rule") which has its roots in English and American law,[78] aiming at limiting the risk of liability to the extent that the party in breach ought to have taken into account at the conclusion of the contract.[79] This standard will rarely come into application in practice as it will not be easy for the injured party to prove that the party in breach actually foresaw that type of loss.[80] The solution is that the parties should explicitly warn of the risk of these types of loss before the contract was concluded.[81]

Through the theoretic study in Chapter 1, we know that there are two methods of calculating damages: concrete and abstract. CISG also offers two such kinds in Art 75 and Art 76. We have a chance here to experiment with the two methods. **Firstly**, Art 75 (Concrete calculation of damages): "*If the contract is avoided and if, in a reasonable manner and within a reasonable time after avoidance, the buyer has bought goods in replacement or the seller has resold the goods, the party claiming damages may recover the difference between the contract price and the*

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[76] Huber, P., Mullis, A. (2007). *The CISG – A New Textbook for Students and Practitioners*. Germany: European Law Publishers, p270.

[77] Ibid, p279.

[78] Ibid, p271.

[79] Ibid, p272.

[80] Ibid.

[81] Ibid, p273.

price in the substitute transaction as well as any further damages recoverable under article 74". So, this method only applies where the contract has been avoided, and the buyer must have purchased goods in replacement in a reasonable manner. If the buyer produces the goods himself, this will not be regarded as a cover purchase under Art 75, so that the buyer will have to rely on Art 74 for the reimbursement of his production cost[82] "in a reasonable manner", i.e., at reasonable conditions (e.g., price, modality of performance).[83] The buyer should try to reach conditions which are similar to the original contract with the seller.[84] A substitute transaction may be reasonable, notwithstanding that the price may not have been the lowest possible.[85] The buyer needs only to take reasonable steps to ascertain the best price, which does not necessarily require him to conduct a detailed market analysis.[86] If the cover purchase has not been made in a reasonable manner, for instance, at too high a price, it is submitted that Art 75 will not apply, and the buyer's claim will fall to be assessed under Art 76 or Art 74.[87] The requirement "*within a reasonable time after avoidance"* aims at preventing the buyer from speculating on the market to the disadvantage of the seller.[88] The precise duration will have to be determined according to the circumstances of each case.[89] There is case law granted a period of two weeks, also others which

[82] Huber, P., Mullis, A. (2007). *The CISG – A New Textbook for Students and Practitioners*. Germany: European Law Publishers, p285.
[83] Ibid.
[84] Ibid, p286.
[85] Ibid.
[86] Ibid.
[87] Ibid.
[88] Ibid.
[89] Ibid.

granted a longer period.[90] In addition, the buyer may also claim damages for any additional loss suffered under Art 74, for example, costs incurred in procuring the substitute transaction or costs for inspection, storage, or transport of the goods.[91] **Secondly**, Art 76 (Abstract calculation of damages): *"(1) If the contract is avoided and there is a current price for the goods, the party claiming damages may if he has not made a purchase or resale under article 75, recover the difference between the price fixed by the contract and the current price at the time of avoidance as well as any further damages recoverable under article 74. If, however, the party claiming damages has avoided the contract after taking over the goods, the current price at the time of such taking over shall be applied instead of the current price at the time of avoidance. (2) For the purposes of the preceding paragraph, the current price is the price prevailing at the place where delivery of the goods should have been made or, if there is no current price at that place, the price at such other place as serves as a reasonable substitute, making due allowance for differences in the cost of transporting the goods."* The time and place for determining the current price are clear enough in the provision. Only one matter should be said is that the buyer did not conclude a cover purchase may violate the duty to mitigate damages under Art 77, for instance, where a suitable cover purchase would have been easily possible at a lower cost than the current price. In that case, the amount of damages may be reduced under Art 77.[92]

CISG also makes clear on matters relating to mitigation duty as described in common law where we have studied in Chapter 1. The

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[90] Huber, P., Mullis, A. (2007). *The CISG – A New Textbook for Students and Practitioners*. Germany: European Law Publishers, p286.

[91] Ibid, p287.

[92] Ibid, p289.

aggrieved party is required to mitigate the loss, according to Art 77 (Mitigation of loss): "*A party who relies on a breach of contract must take such measures as are reasonable in the circumstances to mitigate the loss, including loss of profit, resulting from the breach. If he fails to take such measures, the party in breach may claim a reduction in the damages in the amount by which the loss should have been mitigated*". This Article is an expression of the general principle of good faith in international commerce.[93] Failure to take measures does not result in a liability on the injured party to pay damages but precludes recovery of any loss which could have been prevented.[94] The injured party is not obliged to undertake measures which involve extraordinary, unreasonable costs.[95] But, it may be required to make a substitute transaction in order to prevent or mitigate the loss.[96] This is especially the case where a substitute transaction would avoid consequential losses following the non-or defective performance of the contract.

As a businessman, the aggrieved party always cares about how much he could get from compensation for the breach manifested in damages. Their capital in business seems to be utilized and circulated as their expectation to earn as much profit as possible. Hence, it is fair to charge interest on the belated amount in the event of late payment. CISG stipulates on matters of interest, according to Art 78: "*If a party fails to pay the price or any other sum that is in arrears, the other party is entitled to interest on it, without prejudice to any claim for damages recoverable under article 74*". Although Art 78 does not expressly prohibit compound

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[93] Schlechtriem, P., Schwenzer, I. (2005). *Commentary on the UN Convention on the International Sale of Goods (CISG).* Second Edition. New York: Oxford University Press, p787, ¶1.

[94] Ibid, p788, ¶2.

[95] Ibid, p790, ¶7.

[96] Ibid, p791, ¶9.

interest, this Article does not apply to the duty to pay interest itself.[97] It means only a single interest is accepted to pay. Moreover, compound interest is unusual in international sales law.[98] Granting compound interest in the application of domestic law would be in contradiction with the purposes of Art 78.[99] One question may arise, whether the aggrieved party has a duty to give notice like in most cases of breach of contract for telling the breaching party that he has committed a breach of contract? The answer departs from that formal approach. The creditor does not have to give notice to the debtor or to alert him in any other way to the fact that payment has become due.[100] The debtor would not be released from his obligation to pay interest even if he was exempted.[101] Although containing fair protection when recognizing the right to interest, the Article itself contains some shortcomings. It does not determine the rate, the place, and the currency of the payment of interest. This matter is left open to commentators, they said: "The rate should be determined by the domestic law applicable".[102] As to the place and the currency of the payment of interest, they may follow the underlying payment on which it is based,[103] [104] because it seems inappropriate to refer to domestic law for that issue.[105] What is more, how about the interest on damages? The Article also leaves this matter open. According to commentators, interest on damages is

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[97] Huber, P., Mullis, A. (2007). *The CISG – A New Textbook for Students and Practitioners*. Germany: European Law Publishers, p356.

[98] Schlechtriem, P., Schwenzer, I. (2005). *Commentary on the UN Convention on the International Sale of Goods (CISG).* Second Edition. New York: Oxford University Press, p804, ¶40.

[99] Ibid.

[100] Ibid, n 97, p357.

[101] Ibid.

[102] Ibid, n 98, p800, ¶27.

[103] Ibid, n 97, p360.

[104] Ibid, n 98, p799, ¶25.

[105] Ibid.

payable.[106] If damages are calculated according to Art 75, the obligation to pay interest should begin on the date of the replacement contract. If damages are calculated according to Art 76, the time of avoidance of the contract or the time of taking over the goods should be relevant for the obligation to pay interest.[107]

To conclude, we will examine the policy towards damages of the seller. Art 61 (2) is the basis for the seller's claim of damages: "*The seller is not deprived of any right he may have to claim damages by exercising his right to other remedies*". In connection with Art 61 (2), Art 74 explains how damages can be measured. Art 74 has been explored about damages of the buyer. The general principles are similar and still valid for damages of the seller.[108] Nevertheless, the buyer's breach relates to some new matters, for example, matters of payment or taking the delivery. Therefore, in practice, we need to consider further problems. First, in the case of late payment, the loss resulting from a depreciation of the contract currency between the agreed date of payment and the actual date of payment is recoverable under Art 74 if it is foreseeable.[109] Second, concerning the lost volume seller phenomenon, a cover sale would not reduce the lost volume damage suffered by the seller because the seller has an unlimited supply. For this reason, if the buyer invokes the duty of mitigating under Art 77, arguing that the seller should have conducted a cover sale, the defence will usually fail.[110]

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[106] Schlechtriem, P., Schwenzer, I. (2005). *Commentary on the UN Convention on the International Sale of Goods (CISG).* Second Edition. New York: Oxford University Press, p797, ¶14.

[107] Ibid, p797, ¶16.

[108] Huber, P., Mullis, A. (2007). *The CISG – A New Textbook for Students and Practitioners*. Germany: European Law Publishers, p334.

[109] Ibid.

[110] Ibid, p336.

4.2 Damages under PICC

As the introduction in part 4.1, we start analyzing damages under PICC with the concept "fundamental non-performance". Art 7.3.1 (2) provides five criteria to determine whether a non-performance is fundamental. However, Art 7.3.1 does not attempt to give an exhaustive definition of "fundamental non-performance".[111] The Official Comment also declines to define the concept:[112] "regard shall be had to whether: *(a) the non-performance substantially deprives the aggrieved party of what it was entitled to expect under the contract unless the other party did not foresee and could not reasonably have foreseen such result; (b) strict compliance with the obligation which has not been performed is of essence under the contract; (c) the non-performance is intentional or reckless; (d) the non-performance gives the aggrieved party reason to believe that it cannot rely on the other party's future performance; (e) the non-performing party will suffer disproportionate loss as a result of the preparation or performance if the contract is terminated"*. As it is apparent from the word of the provision, we find that the first criterion, i.e. (a), resembles Art 25 CISG. Therefore, PICC includes four more criteria (b), (c), (d), and (e) than CISG in determining whether a non-performance is fundamental. It means the concept under PICC is stricter than that under CISG.

The factor strict compliance, i.e. (b), emphasizes the nature of the breached contractual obligation. Parties may define in the contract which requirements are fundamental then a breach leads to a right of termination.[113] The factor intention, i.e. (c), concentrates on the conduct of the non-performance party. However, it may be contrary to good faith to

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[111] Vogenauer, S., Kleinheisterkamp, J. (2009). *Commentary on the UNIDROIT Principles of International Commercial Contracts (PICC)*. United States: Oxford University Press, p821, ¶12.

[112] Ibid.

[113] Ibid, n 111, p827, ¶40.

terminate a contract if the non-performance is insignificant even though committed intentionally.[114] The factor (d) reflects the "loss of reliance"[115] of the aggrieved party on the future performance by the non-performing party. The factor (e) takes into account the interest of the non-performing party if the contract is terminated. The non-performing party has prepared, relied on the contract, or has tendered with certain expenses. Regard is to be had to the extent to which that party suffers disproportionate loss if the non-performance is treated as fundamental.[116]

After knowing the concept of "fundamental non-performance", we will together explore the overview of remedies under PICC. Parties may deal with problems arising from their contract first by cure by non-performance party (Art 7.1.4); by fixing of an additional period of time for performance (Art 7.1.5).[117] In this part, those kinds of cure are not subject matters of writing. So, let move on to the three main kinds of remedies apart from them that parties can resort to. PICC provides three main remedies: Right to performance (section 7.2), right to terminate the contract (section 7.3), and right to damages (section 7.4). The aggrieved party may choose a type of remedies based on the facts of the case and the satisfaction of respective certain conditions of each remedy. *For example*, performance may always be invoked for the payment of money (*Art 7.2.1 - Performance of monetary obligation*). In contrast, the performance of non-monetary obligations, if it causes an unreasonable burden to the performing party, will normally not be requested (*Art 7.2.2 - Performance of non-monetary obligation*). On the other hand, to invoke the right to terminate the contract,

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[114] The Official Comment to Art 7.3.1 PICC 2016, p255.

[115] Vogenauer, S., Kleinheisterkamp, J. (2009). *Commentary on the UNIDROIT Principles of International Commercial Contracts (PICC)*. United States: Oxford University Press, p821, ¶13.

[116] The Official Comment to Art 7.3.1 PICC 2016, p256.

[117] Vogenauer, S., Kleinheisterkamp, J. (2009). *Commentary on the UNIDROIT Principles of International Commercial Contracts (PICC)*. United States: Oxford University Press, p779, ¶1.

there must be a fundamental non-performance arose (*Art 7.3.1 - Right to terminate the contract*). However, the right to damages does not depend on the degree of seriousness of the non-performance (*Art 7.4.1 - Right to damages*).[118]

On the compatibility of different kinds of remedies, it is stated that all remedies that are not logically inconsistent may be accumulated.[119] So, a request for performance is excluded once the right to terminate the contract has been exercised.[120] A party may request performance under Art 7.2.1, 7.2.2, after the expiry of at least a reasonable period of time[121] it is still entitled to terminate the contract if the requirements for termination are met under Art 7.3.1. That party also is entitled to claim damages if it suffered any harm under Art 7.4.1.[122] Furthermore, an action for performance is incompatible with a claim for full damages because full damages replace performance.[123] However, an action for performance is consistent with damages for delay or other consequential damages due to delay, as well as with partial termination of the contract.[124] A claim for damages for non-performance is not precluded by termination.[125]

The basis for claiming damages is Art 7.4.1 (*Right to damages*): "*Any non-performance gives the aggrieved party a right to damages either exclusively or in conjunction with any other remedies except where the non-performance is excused under these Principles"*. In that basis, "non-

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[118] Vogenauer, S., Kleinheisterkamp, J. (2009). *Commentary on the UNIDROIT Principles of International Commercial Contracts (PICC)*. United States: Oxford University Press, p728, ¶1, 2.

[119] The Official Comment to Art 7.1.1 PICC 2016, p238.

[120] Vogenauer, S., Kleinheisterkamp, J. (2009). *Commentary on the UNIDROIT Principles of International Commercial Contracts (PICC)*. United States: Oxford University Press, p729, ¶3.

[121] Ibid.

[122] Ibid, p729, ¶5.

[123] Ibid, p729, ¶7.

[124] Ibid, p729, ¶7.

[125] Ibid, p729, ¶8.

performance" is defined in Art 7.1.1 as a "f*ailure by a party to perform any of its obligations under the contract*", including defective performance or late performance. The right to damages may be exercised in conjunction with any other remedy, including with specific performance, according to Art 7.2.2: "*Where a party who owes an obligation other than one to pay money does not perform, the other party may require performance*". However, damages cannot be recovered where the non-performance is excused. There are two principal situations[126] in which non-performance is excused. The first arises in the case of force majeure.[127] The second is where the contract contains a valid exemption clause.[128]

Apart from damages for "non-performance" in Art 7.4.1, PICC provides damages in respect of a **pre-contractual liability**[129] where a party negotiates in bad faith (Art 2.1.15(2))[130], where a party is given confidential information and in breach of duty to disclose that information or use it improperly for its own purposed (Art 2.1.16)[131], and in the case where a party knew or ought to have known of the ground for avoidance of the contract (Art 3.2.16): "*Irrespective of whether or not the contract has been avoided, the party who knew or ought to have known of the ground for*

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[126] Vogenauer, S., Kleinheisterkamp, J. (2009). *Commentary on the UNIDROIT Principles of International Commercial Contracts (PICC)*. United States: Oxford University Press, p869, ¶6.

[127] Art 7.1.7 PICC 2016: "Non-performance by a party is excused if that party proves that the non-performance was due to an impediment beyond its control and that it could not reasonably be expected to have taken the impediment into account at the time of the conclusion of the contract or to have avoided or overcome it or its consequences".

[128] Art 7.1.6 PICC 2016: "A clause which limits or excludes one party's liability for non-performance…"

[129] Ibid, n 126, p870, ¶7.

[130] Art 2.1.15(2) PICC 2016: "…a party who negotiates or breaks off negotiations in bad faith is liable for the losses caused to the other party". In other words, the aggrieved party may recover the expenses incurred in the negotiations and may also be compensated for the lost opportunity to conclude another contract with a third person (so-called reliance or negative interest), but may generally not recover the profit which would have resulted had the original contract been concluded (so-called expectation or positive interest).

[131] Art 2.1.16 PICC 2016: "…The remedy for breach of that duty may include compensation based on the benefit received by the other party".

avoidance is liable for damages so as to put the other party in the same position in which it would have been if it had not concluded the contract". The compensation here is limited to the negative interest (or reliance interest).[132] The profit that would have made under the contract may not recover. [133] However, if the claimant's loss of profit results from the fact that, in reliance on the contract with the respondent, it chose not to conclude a contract with a third party, the lost profit that would have arisen from the latter transaction may be recoverable.[134] For example, Company A sells software to company B and could not have been unaware of B's mistake as to its appropriateness for the use intended by B. Irrespective of whether or not B avoids the contract, A is liable to B for all the expenses incurred by B in training its personnel in the use of the software, but not for the loss suffered by B as a consequence of the impossibility to use the software for the intended purpose (*illustration - Art 3.2.16 PICC 2016*).

PICC also has the full compensation principle, according to Art 7.4.2 (*Full compensation*): "*(1) The aggrieved party is entitled to full compensation for harm sustained as a result of the non-performance. Such harm includes both any loss which it suffered and any gain of which it was deprived, taking into account any gain to the aggrieved party resulting from its avoidance of cost or harm. (2) Such harm may be non-pecuniary and includes, for instance, physical suffering or emotional distress*". Although the aggrieved party is entitled to full compensation, it is not possible to recover punitive damages.[135] Further, the Article requires the tribunal to take into account "any gain to the aggrieved party resulting

[132] Vogenauer, S., Kleinheisterkamp, J. (2009). *Commentary on the UNIDROIT Principles of International Commercial Contracts (PICC)*. United States: Oxford University Press, p484, ¶6.
[133] Ibid.
[134] Ibid, p484, ¶7.
[135] Ibid, p874, ¶5.

from its avoidance of cost or harm". The aim is to avoid the unjust enrichment of the aggrieved party.[136] For example, income received from a substitute contract entered into by the aggrieved party must be brought into account.[137] For the case of emotional distress, such as anxiety[138], loss of reputation[139] (or attacks on honor or reputation)[140], "the court may not only award damages but also order other forms of redress such as the publication of a notice in newspapers designated by it".[141] It is necessary to make clear whether the financial loss suffered as a result of a loss of reputation will be covered in this Article. It is not stated in the Art 7.4.2 (2), but in the illustration of the Official Comment, it seems to be covered: "the court may not only award damages".[142] In a commentary book, it again is affirmed that the financial consequences of a loss of reputation may be recoverable where the loss is a foreseeable consequence of the breach of contract.[143] These cases can be found in regard to contracts concluded by artists, outstanding experts, consultants...who engaged by a company or an organization[144] to enter into that contract which falls within the scope of PICC.

While PICC doesn't use the terminology "buyer" or "seller" instead they use the neutral language to not divide damages for buyer or seller, there is

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[136] Vogenauer, S., Kleinheisterkamp, J. (2009). *Commentary on the UNIDROIT Principles of International Commercial Contracts (PICC)*. United States: Oxford University Press, p876, ¶12.

[137] Illustration 5, the Official Comment to Art 7.4.2 PICC 2016, p273.

[138] Ibid, n 136, p877, ¶17.

[139] Ibid, p878, ¶19.

[140] The Official Comment to Art 7.4.2 PICC 2016, p273.

[141] Ibid, p274.

[142] Ibid.

[143] Vogenauer, S., Kleinheisterkamp, J. (2009). *Commentary on the UNIDROIT Principles of International Commercial Contracts (PICC)*. United States: Oxford University Press, p878, ¶19.

[144] The Official Comment to Art 7.4.2 PICC 2016, p274.

a substantial similarity[145] between Art 7.4.4 PICC and the second sentence of Art 74 CISG, between Art 7.4.5 PICC and Art 75 CISG, and between Art 7.4.8 PICC and Art 77 CISG.[146] In a similar fashion with CISG, PICC also has the foreseeability requirement, according to Art 7.4.4 (Foreseeability of harm): "*The non-performing party is liable only for harm which it foresaw or could reasonably have foreseen at the time of the conclusion of the contract as being likely to result from its non-performance"*. This provision corresponds to the solution adopted in Art 74 CISG.[147] However, they still are not identical: The harm must have been "*likely to result*" from the non-performance. This is different from the phrase used in Art 74 CISG, where the loss must have been a "*possible consequence*" of the breach. "*Likely to result*" seems to be a higher degree of probability than a mere possibility. Thus the scope of liability under PICC may be more restrictive than in the case under CISG.[148]

In calculating damages, PICC uses two methods under the names, which are different from the names used in CISG. **Firstly**, corresponding to the concrete method in CISG, PICC provides the method "proof of harm in case of replacement transaction", according to Art 7.4.5 PICC 2016: "*Where the aggrieved party has terminated the contract and has made a replacement transaction…it may recover the difference between the contract price and the price of the replacement transaction as well as damages for any further harm".* This Article resembles Art 75 CISG. The replacement transaction must generally have been entered into after the

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[145] Vogenauer, S., Kleinheisterkamp, J. (2009). *Commentary on the UNIDROIT Principles of International Commercial Contracts (PICC)*. United States: Oxford University Press, p865, ¶3.

[146] Ibid, p865, ¶4.

[147] The Official Comment to Art 7.4.4 PICC 2016, p276.

[148] Ibid, n 145, p888, ¶8.

contract has been terminated.[149] That transaction must have been concluded with another party,[150] but there is no requirement that the transaction has actually been performed.[151] In addition to the difference between the contract price and the price of the replacement transaction, the aggrieved party may recover "damages for any further harm*".* These damages may be awarded to cover the cost of entering into the replacement transaction, any loss caused by the delay in procuring the replacement transaction, and any other incidental losses.[152] **Secondly**, corresponding to the abstract method in CISG, PICC provides the method "proof of harm by current price", according to Art 7.4.6 PICC 2016: "*(1) Where the aggrieved party has terminated the contract and has not made a replacement transaction but there is a current price for the performance contracted for, it may recover the difference between the contract price and the price current at the time the contract is terminated as well as damages for any further harm. (2) Current price is the price generally charged for goods delivered or services rendered in comparable circumstances at the place where the contract should have been performed or, if there is no current price at that place, the current price at such other place that appears reasonable to take as a reference".* The measure is employed in the case where the aggrieved party has not entered into a substitute transaction. This Article resembles Art 76 CISG. The current price will often be the price on an organized market. Evidence

[149] Vogenauer, S., Kleinheisterkamp, J. (2009). *Commentary on the UNIDROIT Principles of International Commercial Contracts (PICC)*. United States: Oxford University Press, p890, ¶4.
[150] Ibid, p890, ¶5.
[151] Ibid, p891, ¶6.
[152] Ibid, p893, ¶11.

of the current price may be obtained from professional organizations, chambers of commerce, etc.[153]

PICC also hold the same approach as that of CISG on matters relating to mitigation of loss or harm, according to Art 7.4.8 (Mitigation of harm): "*(1) The non-performing party is not liable for harm suffered by the aggrieved party to the extent that the harm could have been reduced by the latter party's taking reasonable steps. (2) The aggrieved party is entitled to recover any expenses reasonably incurred in attempting to reduce the harm".* In common law systems, this principle is sometimes referred to as the "duty to mitigate". But the terms "duty" is misleading insofar as it suggests that the aggrieved party who fails to mitigate incurs liability in respect of its breach of duty.[154] Art 7.4.8 avoids the misleading language of "duty" and instead describes the effect of a failure to mitigate on the liability of the non-performing party.[155] The aggrieved party must take "reasonable steps" to reduce the harm, but is not required to "take time-consuming and costly measures".[156] Otherwise, reasonable steps may require an aggrieved party to consider an offer of settlement from the non-performing party.[157]

Concerning interest for late payment, PICC has complete and detailed provisions, not only on interest for payment but on interest for damages. Firstly, we see Art 7.4.9 (Interest for failure to pay money): "*(1) If a party does not pay a sum of money when it falls due the aggrieved party is entitled to interest upon that sum from the time when payment is due to the*

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[153] The Official Comment to Art 7.4.6 PICC 2016, p279.

[154] Vogenauer, S., Kleinheisterkamp, J. (2009). *Commentary on the UNIDROIT Principles of International Commercial Contracts (PICC)*. United States: Oxford University Press, p901, ¶1.

[155] Ibid, p901, ¶1.

[156] The Official Comment to Art 7.4.8 PICC 2016, p282.

[157] Ibid, n 154, p902, ¶4.

time of payment whether or not the non-payment is excused. (2) The rate of interest shall be the average bank short-term lending rate to prime borrowers prevailing for the currency of payment at the place for payment, or where no such rate exists at that place, then the same rate in the State of the currency of payment. In the absence of such a rate at either place the rate of interest shall be the appropriate rate fixed by the law of the State of the currency of payment. (3) The aggrieved party is entitled to additional damages if the non-payment caused it a greater harm. This Article has been very popular in practice and has been used to supplement Art 78 CISG,[158] because Art 78 CISG has no provision for the rate at which interest is payable. Art 7.4.9 is much more complete than Art 78 CISG, in that it stipulates the time, the rate at which it is payable. There is no need for the aggrieved party to give notice of the default in order to start counting the time.[159] Even in the event of force majeure causing the delay in payment of the sum of money by the non-performing party, the aggrieved party still has the right to recover the interest.[160] It is to prevent the unjust enrichment of the non-performing party.[161] In case the parties make their own provision for the payment of interest, the rate of interest agreed is recoverable, regardless of whether its value is lower or higher than that which would be awarded under Art 7.4.9(2).[162] In Art 7.4.9(3), the aggrieved party may recover damages in respect of a greater harm if the

[158] Vogenauer, S., Kleinheisterkamp, J. (2009). *Commentary on the UNIDROIT Principles of International Commercial Contracts (PICC)*. United States: Oxford University Press, p905, ¶1.

[159] The Official Comment to Art 7.4.9 PICC 2016, p284.

[160] Ibid.

[161] Ibid, n 158, p908, ¶10.

[162] Ibid, p910, ¶16.

harm can be established with a reasonable degree of certainty and is foreseeable at the time of entry into the contract.[163]

PICC even goes further than CISG when determining the interest of damages under Art 7.4.10 (Interest on damages): "*Unless otherwise agreed, interest on damages for non-performance of non-monetary obligations accrues as from the time of non-performance".* There is no equivalent provision in CISG. This Article determines the time from which interest on damages accrues in cases of non-performance of obligations other than monetary obligations.[164] However, it does not identify the rate at which the interest is payable.[165] It is necessary to resort to the applicable law for the purpose of identifying the rate at which interest is payable.[166] Moreover, where the non-performance is excused, it is not clear whether there is a right to recover the interest. This issue should have been resolved expressly and not left open.[167] As to the time at which the right to accrue the interest, it is the time of the non-performance. In most cases, it is defined in the terms of the contract.[168] If the contract is silent on the time of performance, the obligor has to perform "within a reasonable time after the conclusion of the contract" under Art 6.1.1(c).[169] The length of the period of "reasonable time" differs from case to case and depends on circumstances.[170] This default solution is known mainly in common law countries, while some civil law countries order the obligor to perform

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[163] Vogenauer, S., Kleinheisterkamp, J. (2009). *Commentary on the UNIDROIT Principles of International Commercial Contracts (PICC)*. United States: Oxford University Press, p910, ¶17.

[164] The Official Comment to Art 7.4.10 PICC 2016, p286.

[165] Ibid, n 163, p912, ¶1.

[166] Ibid, p913, ¶5.

[167] Ibid, p913, ¶2.

[168] Ibid, p913, ¶3.

[169] Ibid, p619, ¶17.

[170] Ibid, p619, ¶18.

immediately.[171] Another unclear point in the Article is that the Article takes no stand on the question of compound interest.[172] The issue must be resolved by reference to the applicable law.[173] As usual, many national laws include rules of public policy that limit the availability of compound interest to protect the non-performing party.[174]

In addition, continuously PICC provides a more solution for determining the currency in assessing damages, according to Art 7.4.12 (Currency in which to assess damages): "*Damages are to be assessed either in the currency in which the monetary obligation was expressed or in the currency in which the harm was suffered, whichever is more appropriate*". The subject matter is the currency in which damages are to be assessed. CISG has no corresponding provision for this issue.[175] This Article provides two options for the choice of currency. The first option is the currency in which the monetary obligation was expressed. The monetary obligation covers not only the primary obligation to pay the contractual price but also to pay sums arising from any secondary obligations (such as interest or damages).[176] The reference to "monetary obligation" suggests that the currency in which damages are to be assessed is of the contractual currency itself.[177] The second option is the currency in which the harm was suffered. For example, the aggrieved party has incurred expenses in a particular currency to repair the damage that it

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[171] Vogenauer, S., Kleinheisterkamp, J. (2009). *Commentary on the UNIDROIT Principles of International Commercial Contracts (PICC)*. United States: Oxford University Press, p619, ¶17.

[172] The Official Comment to Art 7.4.10 PICC 2016, p286.

[173] Ibid, n 171, p913-914, ¶6.

[174] Ibid, p914, ¶6.

[175] Ibid, p917, ¶1.

[176] Ibid, p781, ¶4.

[177] Ibid, p917, ¶2.

has sustained.[178] In this case, it may be more appropriate to assess damages in that currency than in the currency of the contract.[179] The choice between the two currencies is left to the aggrieved party, provided that the principle of full compensation is respected.[180]

Remedies for breach of contract are strongly influenced by the legal traditions and general principles of the individual legal systems.[181] That is true even after the world having the two instruments. Nevertheless, CISG and PICC have provided united and basic understanding for international business people at least. Of course, based on the general principle of freedom of contract, parties to an international contract can design and choose their own contract clauses as long as they find them appropriate. The common acknowledgment of matters relating to damages introduced in this part will benefit and facilitate parties in their contract drafting process. This is an important contribution in terms of harmonisation. I agree with the opinion of Prof. Saito that PICC is more advanced and more innovative than CISG and that we should not pursue the terms “unification” because both parties can shape their contract individually and mutually with their autonomous power; instead, the terms “harmonisation” seems better put in the context of international commercial contract law.

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[178] The Official Comment to Art 7.4.12 PICC 2016, p288.

[179] Vogenauer, S., Kleinheisterkamp, J. (2009). *Commentary on the UNIDROIT Principles of International Commercial Contracts (PICC)*. United States: Oxford University Press, p918, ¶3.

[180] Ibid, n 178.

[181] Schwenzer, I. (2016). *The CISG – a fair balance of the interests of the seller and the buyer*, p85, available at: https://www.ingeborgschwenzer.com/contract-commercial-arbitration, accessed 25 June 2020.

5. Lessons for the Legal Development

5.1 Meeting with The Need of International Trade

For more than a century, particularly since the end of the Second World War, the volume of international trade has grown spectacularly.[182] At the same time, most cross-border transactions are still governed by domestic contract law. It is widely believed that this is undesirable for at least two reasons:[183] First, the divergence of domestic laws potentially leads to an increase in the parties' transaction costs.[184] Second, the inadequacy of domestic contract laws for international transactions is widely acknowledged.[185] National contract laws are first and foremost designed for internal contracts. Only rarely they provide specific rules for the particularities of international contracts.[186] They do not normally contain solutions for specific types of contracts or instruments commonly used in international trade, such as letters of intent or similar.[187] There are other deficiencies: national limitation periods might be inappropriately short for international trade, domestic formal requirements might impede the desired speed of international transactions.[188] This fact once was stressed by the General Assembly of the UN, when establishing the United Nations Commission on International Trade Law (UNCITRAL) in 1966, they pointed out the basis of "its conviction that divergences arising from the laws of different states in matters relating to international trade constitute

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[182] Vogenauer, S., Kleinheisterkamp, J. (2009). *Commentary on the UNIDROIT Principles of International Commercial Contracts (PICC)*. United States: Oxford University Press, p1, ¶2.
[183] Ibid.
[184] Ibid, p1, ¶3.
[185] Ibid, p2, ¶5.
[186] Ibid, p2, ¶5.
[187] Ibid, p2, ¶5.
[188] Ibid, p2, ¶5.

one of the **obstacles to the development of world trade**"[189] [emphasis added].

CISG has presented to tackle with such shortcomings, or in other words, in meeting with the need of the international trade. The first activity leading to the constitution of CISG is that: "On 3 September 1926 the International Institute for the Unification of Private Law (UNIDROIT) was founded in Rome and inaugurated on 30 May 1928. In the same year, Ernst Rabel suggested pursuing the **unification of international sales law**"[190] [emphasis added]. CISG was expected not only to help resolve disputes, get a common understanding of key legal concepts but also facilitate negotiating and drafting sales contracts. This, in turn, considerably helps in limiting transaction costs.[191] In contrast to most domestic legislation in this field at the time, CISG was not only concerned with the rights and duties of buyer and seller arising from the sales contract but also addresses important aspects, such as contract formation, interpretation, the right to suspend performance, damages and exemption from liability for non-performance, etc.[192]

However, from the perspective of harmonization of contract law, the major drawback of such convention is that it usually confined to specific types of contracts, do not contain the necessary general background rules,[193] and normally is fragmentary in character,[194] such as questions

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[189] Ibid, p3, ¶6.

[190] Schwenzer, I., Hachem, P. (2009). *The CISG – A Story of Worldwide Success*. CISG Part II Conference, Sweden, Stockholm, 119-140, p121, available at https://78c4eede-15fd-4d4e-983d-f2b4b86af685.filesusr.com/ugd/00630e_f2e9895ab7964801aa73496376995786.pdf, accessed 20 August 2020.

[191] Ibid, p140.

[192] Bonell, M. (2008). *CISG, European Contract law and the development of world contract law*, the American Journal of Comparative Law, 56(1), p4.

[193] Vogenauer, S., Kleinheisterkamp, J. (2009). *Commentary on the UNIDROIT Principles of International Commercial Contracts (PICC)*. United States: Oxford University Press, p5, ¶11.

concerning the validity of the contract. CISG presents significant gaps. Some categories of sale - such as sales of shares and other securities, of negotiable instruments and money, of ships and aircraft - are expressly excluded from its scope.[195] It also does not cover the conclusion of the sales contract through an agent, set-off, assignment of rights.[196] Furthermore, being a convention often risks remaining a dead letter,[197] with an over-crowded legislative timetable to come into force. It is said that "as times change and the law does not, codification becomes the enemy of substantive reform".[198]

As a reaction to the weaknesses of a convention, intergovernmental and private organizations have promoted the use of restatement for the harmonization of international trade law.[199] PICC is a non-legislative means of harmonization, namely "restatements of private law" at the international level.[200] By way of a restatement, PICC avoids "tortuous" negotiations[201] and ratification process of international treaties, and they can be flexibly adapted to the changing conditions of international commercial practice.[202] It does not need to be ratified. Users can make any amendments that are appropriate for their interests. And the scope of PICC has filled well the gaps of CISG, including services contracts.

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194 Bonell, M. J. (1997). *An International Restatement of Contract Law: The UNIDROIT Principles of International Commercial Contracts*. 2nd Enlarged Edition. New York: Transnational Publishers, p11.

195 Bonell, M. J. (1997). *An International Restatement of Contract Law: The UNIDROIT Principles of International Commercial Contracts*. 2nd Enlarged Edition. New York: Transnational Publishers, p63-64.

196 Bonell, M. (2008). *CISG, European Contract law and the development of world contract law*, the American Journal of Comparative Law, 56(1), p3.

197 Ibid, n 195, p10.

198 Ibid, n 195, p12.

199 Vogenauer, S., Kleinheisterkamp, J. (2009). *Commentary on the UNIDROIT Principles of International Commercial Contracts (PICC)*. United States: Oxford University Press, p4, ¶9.

200 Ibid, p5, ¶12.

201 Ibid, p5, ¶13.

202 Ibid, p6, ¶13.

Although, it does not mean CISG will lose its role. CISG still keeps its position in international trade with the big advantage of being a binding convention ratified by a large number of contracting States. PICC and CISG both serve together for international sales contracts and complement each other in accommodating the need of international trade.

5.2 Good Case Law Databases

Unlike at the domestic level, there is no supreme court in international commercial contract law to give a uniform interpretation of CISG and PICC (apart from the Official Comments of UNIDROIT for the black letter of PICC). UNCITRAL, other institutions, and universities have endeavoured to reduce the problem by providing databases of case law. Their aim is to promote the uniform application of CISG and PICC. This has been affirmed that: “much-feared danger of sharp differences in its interpretation by the various domestic courts seems to have been avoided to a large extent, thanks to the vast information on the decisions rendered world wide provided by specialized and easily accessible databases”.[203]

We may agree that the number of decisions or awards referring to CISG or PICC is, in fact, greater than those recorded because most of them are not published due to the reasons of confidentiality. Although the following databases are still very useful:

Firstly, we can find an extremely well-developed system, Pace CISG (www.cisg.law.pace.edu), one of the largest databases and academic literature with structured information on case law, literature, and commentaries. Operated by Pace University, it lists over 10,000 bibliography citations, over 3,000 cases, and over 1,600 full texts of commentaries, monographs, and books on CISG and related subjects.

[203] Bonell, M. (2008). *CISG, European Contract law and the development of world contract law*, the American Journal of Comparative Law, 56(1), p5.

Secondly, CISG-online (http://www.cisg-online.org) offers a unique multiple search mechanism on case law, decisions, and scholarly writings.

Thirdly, that is the official system of UNCITRAL. UNCITRAL Database (https://uncitral.un.org/en/case_law) provides abstracts of decisions. A handy tool for finding relevant case law on CISG is the UNCITRAL Digest,[204] which presents an overview of relevant case law on every article of CISG.

Finally, we cannot ignore the contribution of UNILEX Database, (http://www.unilex.info/), the one is a joint project of UNIDROIT, the Italian Research Council, and the University of Rome I, which attempts to cover all decisions and awards referring to PICC.

The meaning of providing databases of case law is not confined to the interpretation aspect. They also push and facilitate the reception of the Convention and Principles, as stated: "*After an initial rejection of CISG, business people seem more and more willing to accept the new regime*". This is also due to the fact that there is now an increasing body of case law relating to CISG.[205] Furthermore, though not having an official authority due to the private nature, but in my opinion, the active operation of the CISG Advisory Council also offers a useful source for referring.[206] The important factor is that it has the same aim to promote the uniform application of CISG by issuing opinions relating to the interpretation and application of the Convention.

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[204] UNCITRAL Digest, https://uncitral.un.org/en/case_law/digests

[205] Bonell, M. (2008). *CISG, European Contract law and the development of world contract law*, the American Journal of Comparative Law, 56(1), p5.

[206] CISG Advisory Council, http://www.cisgac.com/home/

5.3 Legitimacy of Organizations

UNIDROIT is an independent intergovernmental organization founded in Rome in 1926. At the time of writing, 63 States have been its members.[207] The member states are from all five continents and represent a variety of political, economic, and legal backgrounds. They are represented in the General Assembly, the ultimate decision-making body of the Institute that determines the Institute's budget and approves its work program.[208] The purposes of UNIDROIT are "to examine ways of harmonizing and coordinating the private law of States and of group of States, and to prepare gradually for the adoption by the various States of uniform rules of private law".[209] UNIDROIT involved in the early stage of the preparation of a uniform sales law that led to the 1964 Hague Sales Laws (ULIS and ULFC) and ultimately developed into CISG.[210]

CISG is the result of a rather long process which started in the 1920s and was initially guided by the International Institute for the Unification of Private Law (UNIDROIT) and the Hague Conference for Private International Law, then by the United Nations Commission on International Trade Law (UNCITRAL).[211] Thanks to the authority and legitimacy of an international organisation like UNCITRAL,[212] CISG has received the widespread adoption, becoming one of the successful Conventions with 93 Contracting States mostly among 193 states[213] that already have been

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[207] Membership of UNIDROIT, https://www.unidroit.org/about-unidroit/membership

[208] Vogenauer, S., Kleinheisterkamp, J. (2009). *Commentary on the UNIDROIT Principles of International Commercial Contracts (PICC)*. United States: Oxford University Press, p7, ¶14.

[209] Ibid, p7, ¶15.

[210] Ibid, n 208.

[211] Huber, P., Mullis, A. (2007). *The CISG – A New Textbook for Students and Practitioners*. Germany: European Law Publishers, p2.

[212] UNCITRAL, https://uncitral.un.org/

[213] United Nations membership, https://www.un.org/en/sections/member-states/growth-united-nations-membership-1945-present/index.html

United Nations' members. Although one may say that, because of the diplomatic character of the United Nations, it is advantageous in terms of getting more contracting states as a Convention, but it does not always correspondingly reflect the scholarly academic capacity in building a harmonisation instrument. With our analyses and comparisons in the previous parts, we also see the more complete and more detailed content in the provisions of PICC rather than those of CISG. This may attribute partly to the historical circumstance in the 1980s of CISG and to the efficiency of the Working Groups of both instruments. The Working Group of PICC has, to some extent, more facilitation when possibly gather its members uninterruptedly during the drafting process and also has been inspired by CISG and other sources. This matter will be, in turn, examined in the next part (2.5).

Recently, there are voices to raise the opinion of transferring the non-binding nature of PICC into a convention or a global commercial code under the approval of the United Nations.[214] We also see the success of the 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the New York Convention) in the past. Another apparent illustration for taking the most of the legitimacy of the United Nations is that the United Nations Convention on International Settlement Agreements Resulting from Mediation (New York, 2018) (the "Singapore Convention on Mediation")[215] adopted by UN with the expectation to bring certainty and stability to the international framework on mediation. These facts affirm the statement that the legitimacy of the organisation in which a legal instrument is approved is important.

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[214] Herrmann, G. (2001). A Vision for UNCITRAL: Global Commerce Needs a Global Uniform Law, 2001 Bus. L. Int'l 249.

[215] The Singapore Convention on Mediation https://uncitral.un.org/en/texts/mediation/conventions/international_settlement_agreements

5.4 Comparative Studies, Inheritance and Innovations

When drawing up a code, it is very challenging to begin afresh.[216] Comparative study plays an important role in reviewing existing legal texts, especially for building an instrument at an international level expected to accommodate the needs of businesses from different cultural socio-economies. Both PICC and CISG were created initially by the same method (but with different working groups), comparative studies so that they not only inherited advanced ideas, structures, or concepts from previous achievements but also innovated solutions to do the good works in the challenging tasks of the law harmonization process. For CISG, ULIS and ULFC influenced not only the basis structures and key concepts in CISG, but also many of its detailed solutions.[217] For PICC, the drafters of PICC analyzed the contract laws of the major jurisdictions of the world, mainly of Western countries, such as the US, the UK, France, Germany, Italy, the Netherlands, and Canada (Quebec).[218] Particular attention was also paid to various socialist countries' statutes on international trade law.[219] PICC Working Group paid particular attention to CISG, and the influence of CISG on PICC has been described as "substantial, even pervasive".[220] The basic structures of PICC are strongly influenced by CISG.[221] In addition, there was a constant exchange of ideas between the Working Group with the Commission on European Contract Law, which drafted and published the PECL at the first version in 1995, because of the

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[216] Warren, S. (2012). *Codification of Contract Law: Some Lessons from History*. [pdf]. University of Queensland Law Journal, Vol 31(1), p51.

[217] Schlechtriem, P., Schwenzer, I. (2005). *Commentary on the UN Convention on the International Sale of Goods (CISG).* Second Edition. New York: Oxford University Press, p2.

[218] Vogenauer, S., Kleinheisterkamp, J. (2009). *Commentary on the UNIDROIT Principles of International Commercial Contracts (PICC)*. United States: Oxford University Press, p9, ¶21.

[219] Ibid, p9, ¶21.

[220] Ibid, p10, ¶22.

[221] Ibid, n 217, p10.

common use of human resources with five scholars who were members of both PICC Working Group and the PECL Commission: Professor Bonell (the chairman of PICC Working Group), Professor Ole Lando (the chairman of PECL Commission), Professors Drobnig, Hartkamp, and Tallon.[222] At this point, we can see the role of cooperation in developing a legal instrument. It leads to a suggestion of global dialogue and cooperation in Chapter 6.

On the other hand, the innovation of the PICC Working Group was also shown in other aspects. Firstly, PICC was drafted with the aim of enabling "any educated person, even if not a trained lawyer, easily to understand them".[223] The brevity of the Official Comments on each article keeps PICC in a readable, easily-used form. The language is simple and highly readable. In most cases, the texts have a single meaning, and they facilitate the understanding of readers and limit the risk of deviation from the original intention in interpretation. The legal terminology used is deliberately neutral. Where possible, the drafters avoided using terms of art that are peculiar to any given legal system.[224] This was meant to facilitate the uniform and autonomous interpretation of PICC throughout the world.[225] Secondly, PICC provides some new solutions at the time of drafting. For example, the problem addressed by Art 7.4.9(2) is the absence of an average short term lending rate from banks to prime borrowers that could be used in determining the rate of interest for failure to pay money. PICC also contains specific rules concerning the negotiation process, which are absent in most domestic contract law and CISG. Other

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[222] Vogenauer, S., Kleinheisterkamp, J. (2009). *Commentary on the UNIDROIT Principles of International Commercial Contracts (PICC)*. United States: Oxford University Press, p10, ¶22.

[223] Ibid, p14, ¶30.

[224] Ibid, p14, ¶31.

[225] Ibid, p15, ¶31.

examples of the innovatory character of PICC include the provisions on hardship,[226] on payment by cheque,[227] and by funds transfer.[228] [229]

5.5 Efficient Working Group and Outstanding Personnel

After the work program of UNIDROIT was approved in 1971 on the unification of contract law, a Steering Committee was established.[230] It consisted of three Professors representing the Civil law, Common law, and the Socialist legal traditions (Rene David: Paris, Clive M Schmitthoff: London, and Tudor Popescu: Bucharest).[231] Nevertheless, the progress was very slow [232] until a special Working Group was established in 1980. The Working Group was composed of twenty-one distinguished lawyers and academics representing the major legal systems of the world from fourteen different countries, but all sitting in their personal capacity and not expressing or representing the views of their respective governments.[233] The Chairman of the Working Group was Professor Michael Joachim Bonell,[234] an expert in commercial and comparative law. His appointment as Chairman gave a tremendous boost to the project, and PICC are very much the product of his tireless efforts.[235]

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[226] Art (s) 6.2.1 - 6.2.2 - 6.2.3, PICC 2016.

[227] Art 6.1.7, PICC 2016.

[228] Art 6.1.8, PICC 2016.

[229] Vogenauer, S., Kleinheisterkamp, J. (2009). *Commentary on the UNIDROIT Principles of International Commercial Contracts (PICC)*. United States: Oxford University Press, p15, ¶35;

[230] Ibid, p8, ¶17.

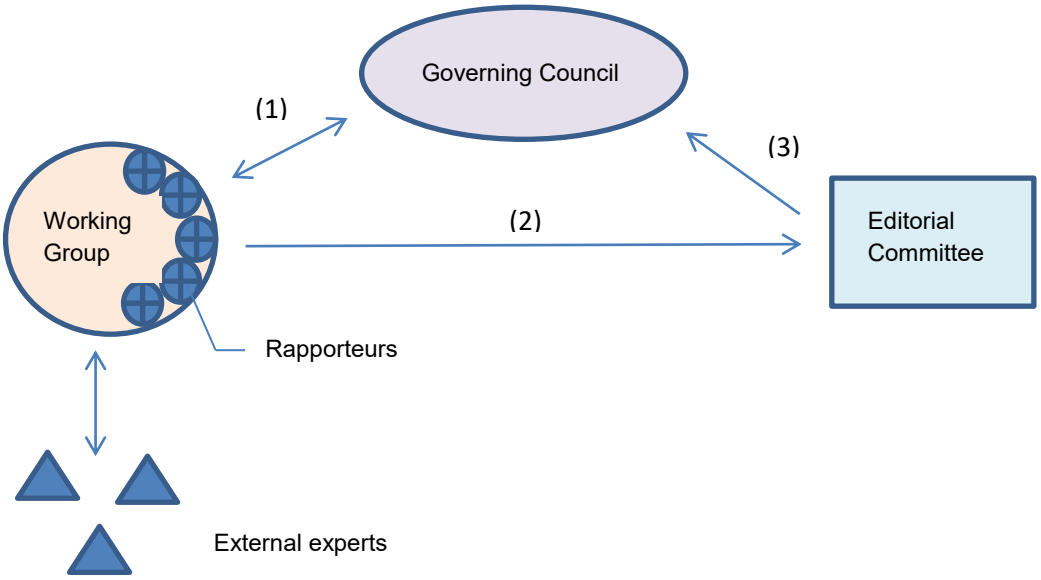
[231] Ibid.

[232] Ibid, p8, ¶18.

[233] Ibid.

[234] His curriculum vitae is available at: https://www.unidroit.org/overview-principles-2010/309-instruments/commercial-contracts/unidroit-principles-2010/unidroit-principles-2010-history/780-michael-joachim-bonell-curriculum-vitae

[235] Ibid, n 229, p8, ¶19.



The operating model of the first Working Group of PICC

The Group appointed rapporteurs who were its members and took over responsibility for one of the topics.[236] The rapporteurs conducted preliminary comparative studies and prepared drafts of the black letter rules and the Official Comments. The drafts were discussed in the Working Group, were revised by the rapporteurs again, and after a second reading, the Group solicited advice on individual points from external experts, most law professors.[237] One strange mechanism here is that the Working Group did not consult interest groups, lobbyists, or other stakeholders.[238] Furthermore, the procedure even was skipped to submit to a committee of government experts.[239] Governments were not involved at all in the preparation.[240] Some issues which were difficult to reach consensus were

[236] Vogenauer, S., Kleinheisterkamp, J. (2009). *Commentary on the UNIDROIT Principles of International Commercial Contracts (PICC)*. United States: Oxford University Press, p9, ¶20.
[237] Ibid.
[238] Ibid.
[239] Ibid.
[240] Ibid.

submitted for a decision of the Governing Council.[241] After a third and final reading by the Working Group, the text was forwarded to the Editorial Committee in February 1994, where it was streamlined and finalized.[242]

This working pattern was kept close to that of the new Working Group of the second edition of PICC.[243] The components of the new Working Group were added with a number of observers who were representatives of international organizations with interests in the unification of commercial law, such as ICC International Court of Arbitration, the Swiss Arbitration Association, and the Milan Chamber of National and International Arbitration.[244] What is more, in the new Working Group of the third edition, the circle of invited observers even had been considerably enlarged from more organizations, such as London Court of International Arbitration, Germany Arbitration Institution, Cairo Regional Center for International Commercial Arbitration, the Milan Chamber of National and International Arbitration, the New York City Bar, the National Law Center for Inter-American Free Trade, the Brazilian Branch of the International Law Association, the Emirates International Law Center, the Outer Space Group of the International Bar Association, the Study Group for a European Civil Code, and the Institute for Transnational Arbitration of the Center for American and International Law.[245] The methodology employed by the Working Group throughout the project is certainly open to criticism.[246] As a result, their work had been gotten widespread

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[241] Vogenauer, S., Kleinheisterkamp, J. (2009). *Commentary on the UNIDROIT Principles of International Commercial Contracts (PICC)*. United States: Oxford University Press, p9, ¶20.
[242] Ibid.
[243] Ibid, p12, ¶26.
[244] Ibid.
[245] Ibid, p20, ¶44.
[246] Ibid, p10, ¶23.

satisfaction.[247] Furthermore, they can conclude the first official book by spending almost two decades of working. That period is not too long for an international instrument to be finalized.

As to CISG, in 1928, Ernst Rabel suggested to the newly established (1926) UNIDROIT Institute the unification of the law of international sales of goods as one of its first projects.[248] In 1929, Rabel submitted a preliminary report to UNIDROIT, and in 1930 UNIDROIT set up a committee consisting of representatives from different legal systems charged with the elaboration of a uniform law for international sales.[249] The first preliminary draft was produced in 1934, and a revised version was adopted in 1939.[250] The II World War interrupted the work, but in 1951 the government of the Netherlands appointed a special Sales Commission which had Ernst Rabel as its member. He contributed a considerable impact on the work until he died in 1955.[251] The Sales Commission produced two drafts adopted in 1964 to be two Conventions: the Convention on a Uniform Law of International Sales (ULIS) and the Convention on a Uniform Law on the Formation of Contracts for the International Sale of Goods (ULFC). Both Conventions entered into force in 1972 but were not widely applied in international trade as only a very limited number of states ratified.[252] UNCITRAL (the United Nations Commission on International Trade Law) was established in 1966.[253] Its Working Group in 1978 submitted a Draft Convention (the "New York

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[247] Vogenauer, S., Kleinheisterkamp, J. (2009). *Commentary on the UNIDROIT Principles of International Commercial Contracts (PICC)*. United States: Oxford University Press, p11, ¶25.

[248] Huber, P., Mullis, A. (2007). *The CISG – A New Textbook for Students and Practitioners*. Germany: European Law Publishers, p2.

[249] Ibid.

[250] Ibid.

[251] Ibid, p3.

[252] Ibid, p3.

[253] About UNCITRAL, https://uncitral.un.org/en/about

Draft") which covered both ULIS and ULFC. In 1980, in Vienna, the New York Draft after modifications was adopted to be the 1980 UN Convention on Contracts for the International Sale of Goods (CISG, often called Vienna Convention). CISG entered into force in 1988.[254]

We see from the stories that it is essential to employ the right personnel. In the case of CISG, Professor Ernst Rabel not only gave his contribution to drafting the Convention, but he also was the person who initiated the process of worldwide harmonisation of the law of sales.[255] He even endeavoured to keep working regardless of the vast changing environment after the Second World War until his death. In the case of PICC, as showed on page 11, Professor Michael Joachim Bonell also played a key role with his "tireless efforts" to produce PICC. At this aspect, if we step back to Chapter 2 of this thesis, we also see the vital roles of Professor Ian MacNeil, Professor David Campbell in forming the modern contract law concepts. The important contributions of these giants suggest us to lift the role of legal education for the development of the law.

[254] Huber, P., Mullis, A. (2007). *The CISG – A New Textbook for Students and Practitioners*. Germany: European Law Publishers, p3.
[255] Ibid, p2.

CHAPTER 4: THE RISING DYNAMISM OF DISPUTE RESOLUTION

In this Chapter, we will switch our attention to the practice in dispute resolution, to be noticed that the dispute resolution industry as an important dynamic is not pulling but pushing the development of contract law and the law in general. In Chapter 1 (on page 9), when studying legal traditions, we have known that the systematization of dispute resolution procedures was the starting point of both civil and common legal systems. Moreover, the area, in part, seems like the output of a producing process. Errors or disputes are inevitable,[1] if the industry is immobilized, contract law would be useless. Meanwhile, their common function is to secure the normal operation of the business market and the interests of parties. In addition, movements in dispute resolution also change not only substantive law but procedural law. Procedure law is as central to the delivery of justice as the content of substantive law.[2] Procedure affects access to justice, costs of obtaining justice, proceedings time, enforceability of outcomes, and incidental matters such as the employment of lawyers.[3]

The vast majority of disputes are settled by direct negotiations between the parties in which compromises are reached in consideration of all relevant factors, such as the value of a continuing relationship, or possible future business, or of a commercial reputation, etc. However, this Chapter

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[1] Campbell, D. (2005). *The Relational Constitution of Remedy: Co-Operation as the Implicit Second Principle of Remedies for Breach of Contract*. Texas Wesleyan Law Review, Vol.11, p457.

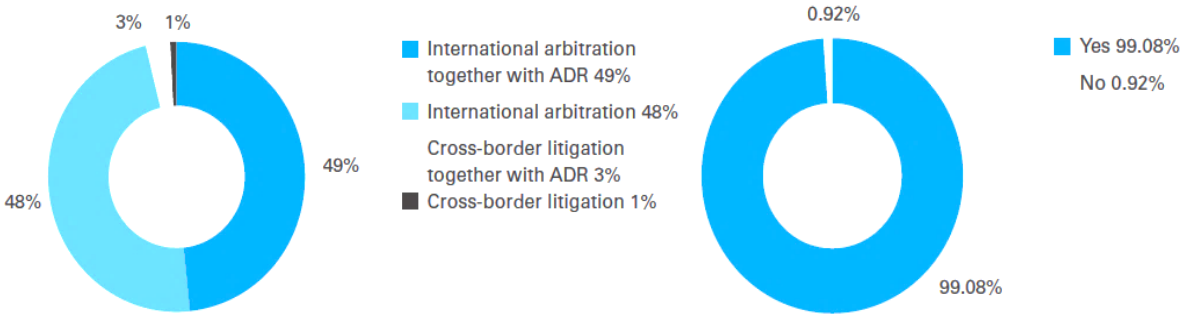
[2] Thomas, J. L. (2016). (Lord Chief Justice of England and Wales). *Cutting the Cloth to Fit the Dispute: Steps Towards Better Procedures Across the Jurisdictions.* [pdf]. Singapore Academy of Law, p1, ¶2. Available at https://www.judiciary.uk/wp-content/uploads/2016/10/lcj-speech-singapore-academy-of-law.pdf, accessed 20 August 2020.

[3] Ibid.

will consider cases in which parties solve their disputes by other types of settlements rather than negotiation by themselves.

1. The Rise of Arbitration, Commercial Courts and ODR

A full history and description of the development in the field of dispute resolution are beyond the scope of the thesis. First of all, we examine the evolvement of arbitration, starting with the question, "*What is your preferred method of resolving cross-border disputes?*" This was the question for the survey[4] conducted in 2018 by Queen Marry University of London (QMUL). The result reveals the predominance of arbitration in resolving cross-border disputes:[5] 97% of respondents said they used arbitration rather than other kinds.



2018 Survey - Queen Marry University of London (QMUL)

Even for future choices, on the second question: "*Are you likely to choose or recommend international arbitration to resolve cross-border disputes in the future?*" only less than one in hundred respondents said "no".[6] Furthermore, not just shown in the surveys, in fact, these affirmations also are illustrated by the statistic of caseloads in major and leading arbitral institutions around the world as below:

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[4] 2018 International Arbitration Survey: *The Evolution of International Arbitration*, p5, available at http://www.arbitration.qmul.ac.uk/media/arbitration/docs/2018-International-Arbitration-Survey---The-Evolution-of-International-Arbitration-(2).PDF, accessed 20 August 2020.

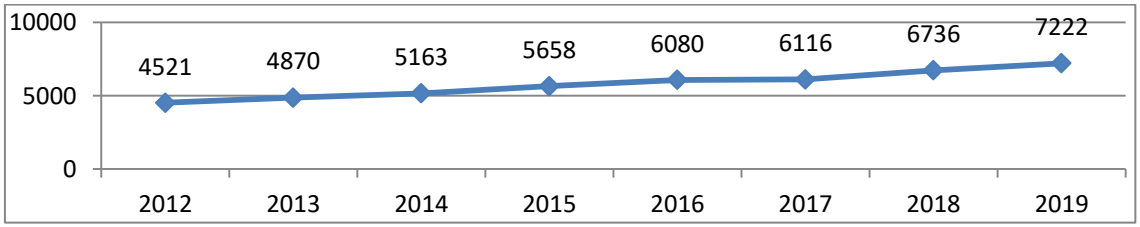
[5] Ibid.

[6] Ibid, p8.

Arbitration Cases in the Leading Institutions from 2012 to 2019 *

Name of institution	2012	2013	2014	2015	2016	2017	2018	2019
ICC (International Chamber of Commerce)	759	767	791	801	966	810	842	869
ICSID (International Centre for Settlement of Investment Disputes)	50	40	38	52	48	53	56	39
SCC (Stockholm Chamber of Commerce)	177	203	183	181	199	200	152	175
LCIA (London Court of International Arbitration)	277	301	300	326	303	285	317	395
SIAC (Singapore International Arbitration Centre)	235	259	222	271	343	452	402	479
HKIAC (Hong Kong International Arbitration Centre)	293	260	252	271	262	297	265	308
DIS (German Arbitration Institute)	125	121	132	134	166	152	153	110
VIAC (Vienna International Arbitration Centre)	70	56	56	40	60	43	64	45
SCAI (Swiss Chambers' Arbitration Institution)	92	69	106	96	81	74	81	95
ICDR (International Centre for Dispute Resolution)	996	1165	1052	1063	1050	1026	993	882
CIETAC (China International Economic and Trade Arbitration Commission)	1060	1256	1610	1968	2181	2298	2962	3333
PCA (Permanent Court of Arbitration)	27	35	39	42	40	41	56	49
KCAB (Korean Commercial Arbitration Board)	360	338	382	413	381	385	393	443
TOTAL	4521	4870	5163	5658	6080	6116	6736	7222

* Conducted by Dr. Markus Altenkirch and Dr. Jan Frohloff, *Global Arbitration News, Arbitration Statistics 2019- How did arbitration institutions fare in 2019,* available at https://globalarbitrationnews.com/how-did-arbitration-institutions-fare-in-2019/ (accessed 20 August 2020).



Arbitration has taken the leading position in dispute resolution. There are few contracts in international commercial transactions that do not provide arbitration as the preferred mode of dispute resolution,[1] or "disputes in international trade are primarily a matter for arbitral tribunals".[2] Indeed, arbitration still keeps its predominant position in the near future.

Concerning international commercial courts, despite the fact that arbitration remains the preferred option in the view of its users, international arbitration as a system is not without its flaws. The advantages and disadvantages of arbitration had been analyzed in my master's thesis,[3] along with the reason why international commercial courts have a chance to fill the gap and deficiency of arbitration so that to attune to the needs and realities of international commerce. In this part, we do not need to direct our focus to such an analysis. Instead, we focus on the rise of international commercial courts. International commercial courts have been emerged recently and evolve rapidly around the world. From the time of writing the master's thesis to the present time, the number of international commercial courts has increased from eleven[4] to fifteen institutions by opening more four courts in Belgium[5] [6] (the Brussels

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[1] Karrer, P. A. (2017). *The Powers and Duties of an Arbitrator*. Kluwer Law Intl, p1.

[2] Hayward, B. (2017). *Conflict of Laws and Arbitral Discretion*. Oxford: Oxford University Press, p9, ¶1.15.

[3] Dang, Q. (2018). *International Commercial Courts–Partners and Potential Rivals of Arbitration*. Kobe University. Master's Thesis, p47-67, available at https://app.box.com/s/piywkfomxwfxe8aarxoqvfidpps84l7k , accessed 31 August 2020.

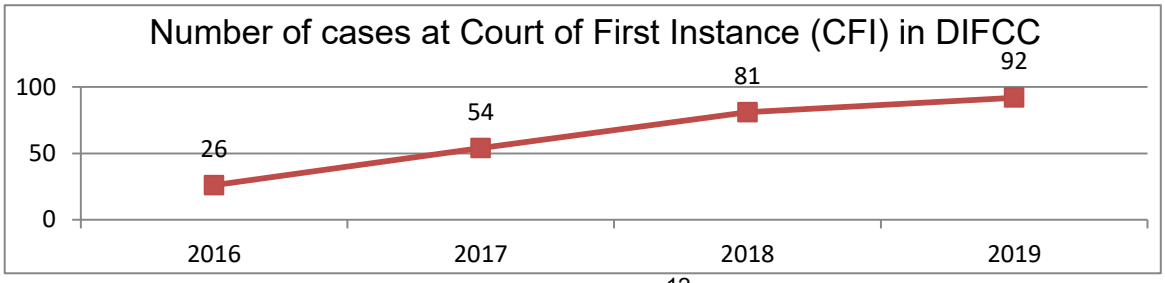
[4] Ibid, p39-40.

[5] Brussels International Business Court, BIBC, https://www.lexgo.be/en/papers/public-administrative-law/administrative-law/brussels-international-business-court-parliament-adopts-amending-bill,126608.html, accessed 31 August 2020.

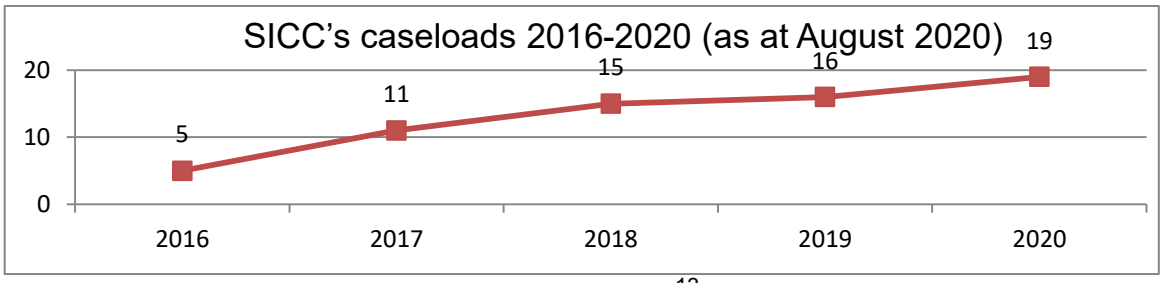
[6] The Article "The European and Singapore International Commercial Courts: Several Movements, a Single Symphony", http://arbitrationblog.kluwerarbitration.com/2019/03/06/the-european-and-singapore-international-commercial-courts-several-movements-a-single-symphony/?doing_wp_cron=1597974187.0442750453948974609375, accessed 31 August 2020.

International Business Court, BIBC, 2020), Germany[7] (The Chamber for International Commercial Disputes of the District Court of Frankfurt/Main, 2018), India[8], Kazakhstan[9] (Astana International Financial Centre Court, AIFC Court, 2018).

In addition, in terms of caseloads, the cases dealt with by commercial courts have been increasing gradually, such as in the newly established courts - China Commercial Courts [10] - the first five cases [11] were decided, or in SICC and DIFCC the lines illustrating the caseloads go up as described by the charts below.



*) This data excerpted from DIFC Courts [12] Annual Review 2016-2019



*) This data excerpted from case summaries,[13] so in fact the number may be higher (but not easy to find it available for use).

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[7] Germany Commercial Court, https://ordentliche-gerichtsbarkeit.hessen.de/ordentliche-gerichte/lgb-frankfurt-am-main/lg-frankfurt-am-main/chamber-international, accessed 31 August 2020.

[8] India Courts, https://www.in.gov/judiciary/iocs/2944.htm, accessed 31 August 2020.

[9] Astana International Financial Centre Court (Kazakhstan), https://aifc.kz/, accessed 31 August 2020.

[10] China Commercial Courts, http://cicc.court.gov.cn/html/1/219/index.html, accessed 31 August 2020.

[11] The first five cases of China Commercial Courts, http://cicc.court.gov.cn/html/1/219/208/209/1547.html, accessed 31 August 2020.

[12] DIFC Courts Annual Review 2016-2019, https://www.difccourts.ae/media-centre/publications/, accessed 31 August 2020.

A 2018 study commissioned by the European Parliament's Committee on Legal Affairs concluded that the EU should seek to establish a "European Commercial Court" at the EU level to provide commercial parties with an alternative to both the courts of the Member States and international commercial arbitration.[14] This recommendation echoes the global competition that has arisen in the past years to resolve international disputes and promises to push further on the development of international commercial courts. In short, the establishment of new international commercial courts over the past few years has been a major development, which brings a new perspective to the adjudication of international commercial disputes.[15] In my master's thesis, I have come up with the conclusion that "international commercial courts have become new partners and competitors of arbitration".[16]

Regarding online dispute resolution (ODR), ODR refers to dispute resolution, which occurs in part or whole through online communications or proceedings.[17] Whereas neutral parties are referred to as the "third party", in the world of ODR, technology is referred to as the "fourth party".[18] Forms of technology that have relevance to ODR applications and contexts

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[13] SICC's case summaries, https://www.sicc.gov.sg/media/case-summaries, accessed 31 August 2020.

[14] Rühl, G. (2018). Study for the European Parliament's Committee on Legal Affairs (JURI Committee), Building Competence in Commercial Law in the Member States. [pdf]. Available at https://www.europarl.europa.eu/RegData/etudes/STUD/2018/604980/IPOL_STU(2018)604980_EN.pdf, accessed 31 August 2020.

[15] Sir Blair, W. (2019).*The New Litigation Landscape: International Commercial Courts and Procedural Innovations*. [pdf]. The UK: International Journal of Procedural Law, p213. Available at https://sifocc.org/app/uploads/2020/04/The-New-Litigation-Landscape-International-Commercial-Courts-and-Procedural-Innovations.pdf, accessed 20 August 2020.

[16] Dang, Q. (2018). *International Commercial Courts–Partners and Potential Rivals of Arbitration.* Kobe University. Master's Thesis, [pdf], p83. available at https://app.box.com/s/piywkfomxwfxe8aarxoqvfidpps84l7k, accessed 31 August 2020.

[17] Alexander, N. (2019). Ten trends in international commercial mediation. Singapore Academy of Law Journal, 31(Special Issue), 405-447, p436, ¶59.

[18] Ibid, p436, ¶60.

include e-mail, web forums, instant messaging, chat rooms, video conferencing, mobile and smartphone technology, artificial legal intelligence, blogs, voice over Internet Protocol, avatars, social networking sites, wikis, web maps, and robotics.[19] Therefore, ODR can make dispute resolution more accessible to people in the community.

In 2016, the UNCITRAL adopted a non-binding document at its forty-ninth session, namely the UNCITRAL Technical Notes on Online Dispute Resolution, aiming to enhance ODR development; and to support ODR platforms, ODR administrators, neutrals, and the parties of the relevant ODR proceedings.[20] The Technical Notes intend to assist the structure and framework of an ODR system for resolving disputes arising from the online cross-border purchase of low-value products. Moreover, UNCITRAL has recognized the use of ODR in international mediation practice in its drafting of Art 2(2) of the Singapore Convention. This provision establishes that the writing requirement for an international mediated settlement agreement may be met by electronic communication, provided the information in the electronic communication is accessible for subsequent reference.[21] This shall facilitate the enforcement of an international mediated settlement agreement being electronic in nature. ODR systems have been available for at least twenty years.[22] Not only used in mediation, but a rapidly expanding number of court systems have adopted, or are

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[19] Alexander, N. (2019). *Ten trends in international commercial mediation*. Singapore Academy of Law Journal, 31(Special Issue), 405-447, p436, ¶60.

[20] UNCITRAL Technical Notes on Online Dispute Resolution, [pdf], available at https://www.uncitral.org/pdf/english/texts/odr/V1700382_English_Technical_Notes_on_ODR.pdf , accessed 09 September 2020.

[21] Ibid, n 19, p438, ¶66.

[22] James C. Melamed. (2019). *Chapter 41 – Online Dispute Resolution*, [pdf], p26. Available at https://www.mediate.com/pdf/ODRforLawyers.pdf, accessed 09 September 2020.

designing, court-integrated ODR processes.[23] However, there is a conventional claim in which parties may be less positional when they are negotiating via e-mail or online chatting compared to face-to-face scenarios,[24] because face-to-face problem-solving under the conventional views is the most effective way to dealing with conflict, to uncover diverse interests and to address relational aspects of the conflict. This is true to some extent, but in my view, it should not be exaggerated and because the elasticity of human habits and the adaptation of working styles over time can support not only individuals but even business people in conditioning the shortfalls of lacking face-to-face contact to get through their problem towards tradeoff acceptable interests. In addition, in cross-border settings, ODR is considered to be affordable and convenient because it minimizes, and in some cases, eliminates the need for participants to travel and reduces the costs associated with using physical meeting rooms.[25] The relative affordability of ODR compared to traditional forms of cross-border dispute resolution presents a valuable opportunity to expand access to commercial justice for micro, small, and medium enterprises in cross-border disputes.[26] In practice, we find some leading examples of using ODR for online transaction disputes. First of all, that is the use in eBay, which resolves over 60 million disputes per year using ODR methodology.[27] In the EU,[28] through the European platform[29] parties

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[23] Larson, D. (2019). *Digital Accessibility and Disability Accommodations in Online Dispute Resolution: ODR for everyone*. Ohio State Journal on Dispute Resolution, 34(3), p433: New York State Unified Court System, and 46 other courts around the world.

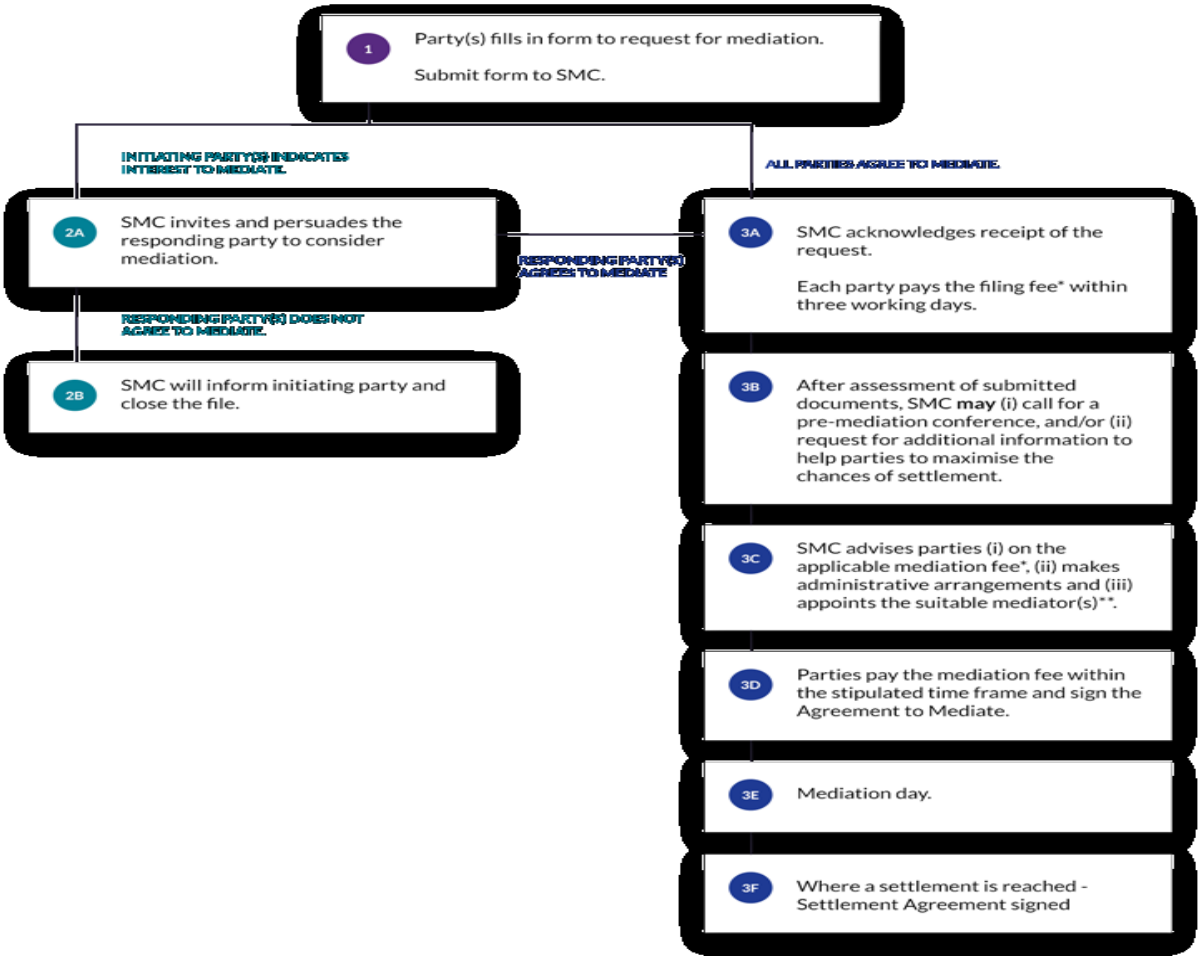
[24] Alexander, N. (2019). *Ten trends in international commercial mediation*. Singapore Academy of Law Journal, 31(Special Issue), 405-447, p437, ¶61.

[25] Ibid, ¶63.

[26] Ibid, ¶64.

[27] Cashman, P., & Ginnivan, E. (2019). *Digital Justice: Online Resolution of Minor Civil Disputes and the Use of Digital Technology in Complex Litigation and Class Actions*. Macquarie Law Journal, 19, p40.

can solve disputes arising from online purchases. In Asia,[30] member economies of the Asia Pacific Economic Cooperation are working towards the adoption of a regional ODR platform for resolving commercial cross-border disputes.[31] In Singapore, the Singapore Mediation Centre ("SMC") also offers a range of services for ODR.[32]



Application process for ODR in Singapore Mediation Centre

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[28] Alexander, N. (2019). Ten trends in international commercial mediation. Singapore Academy of Law Journal, 31(Special Issue), 405-447, p438, ¶67.

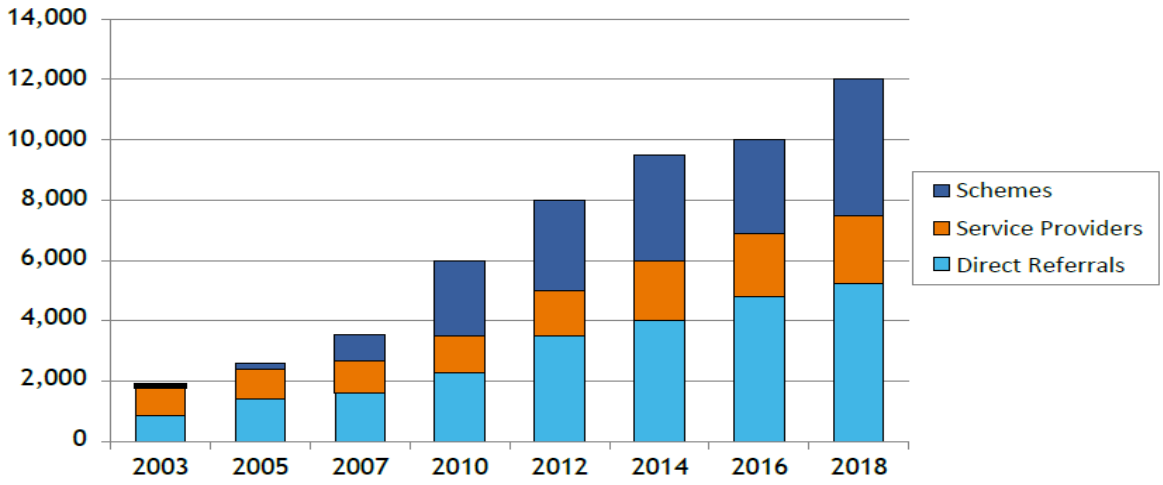
[29] ODR European's platform, http://www.alternativaeuropea.eu/en/uncategorized/eucom-available-now-the-odr-online-dispute-resolution-platform-for-problems-with-online-shopping, accessed 09 September 2020.

[30] Ibid, n 28, p438, ¶68.

[31] Asia Pacific Economic Cooperation Draft Collaborative Framework for Online Dispute Resolution of Cross-Border E-Commerce Business to Business Disputes (2018).

[32] Services of the Singapore Mediation Centre (SMC), available at https://www.mediation.com.sg/our-services/overview-of-services/mediation/ accessed 09 September 2020.

Finally, about mediation, we need to mention a little bit. There have been some opinions stating that "*If the 20th century was the arbitration century then the 21st century, without a doubt, is the mediation century*".[33] Although making this kind of statement is adventurous, it is quite soon to say that, especially when putting mediation in the ready serving of other kinds such as international commercial courts. However, it reveals the confidence in the future of mediation of the scholarly views. One example data for a reference, the estimated size of the civil and commercial mediation market in 2018 in the UK, was in the order of 12,000 cases per annum, 20% more than the 10,000 cases estimated in 2016. The overall success rate remains very high, with an aggregate settlement rate of 89% (2016: 86%); meanwhile, negotiations are becoming tougher at 10%.[34] Furthermore, we also see the burgeoning of mediation institutes in Asia and across the world. This all suggests that there has been an acceleration of growth in both the quality and quantity of mediation.[35]



The size of the civil and commercial mediation market in England & Wales

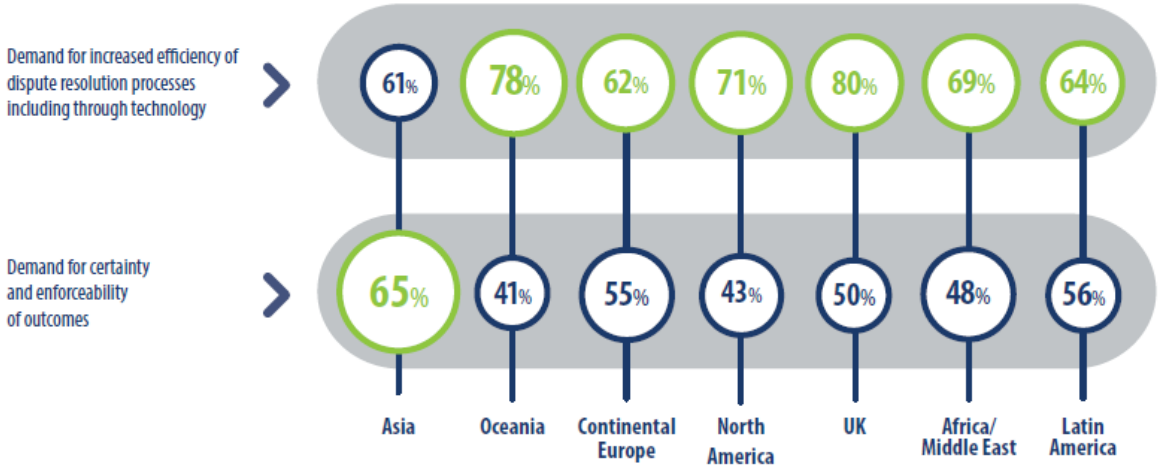
[33] Alexander, N. (2019). Ten trends in international commercial mediation. Singapore Academy of Law Journal, 31(Special Issue), 405-447, p446, ¶88.

[34] CEDR, "The Eighth Mediation Audit: A Survey of Commercial Mediator Attitudes and Experience in the United Kingdom" (10 July 2018), p10. Available at https://www.cedr.com/wp-content/uploads/2019/10/The_Eighth_Mediation_Audit_2018.pdf, accessed 31 August 2020.

[35] Ibid, p3.

2. Increasing Potency of Recognition and Enforcement

According to the Survey of Global Pound Conference Series,[36] Global Data Trends and Regional Differences (2017) conducted by IMI (International Mediation Institute), two major demands will have the most significant impact on future policy-making in commercial dispute resolution.



The Survey of Global Pound Conference Series - Global Data Trends and Regional Differences

Firstly, as to the demand for increased efficiency of dispute resolution processes, including technology, all regions except Asia chose efficiency as their top demand and by a significant margin. This included the common law regions (the UK, North America, and Oceania) and the civil law region of Continental Europe. Secondly, as to the demand for certainty and enforceability of outcomes, Asia chose this as their top priority except for all regions. It seems that Asia needs something authoritative and legislative for enforceability of outcomes, and a convention may be welcomed in Asia rather than other regions. Although comments are given to Asia as such, it does not mean that it is wrong in other regions. Just by

[36] The Survey of Global Pound Conference Series, Global Data Trends and Regional Differences (2017), [pdf], p21, available at https://www.imimediation.org/research/gpc/series-data-and-reports/ accessed 05 September 2020.

lower rating, the other religions still keep their attitude not against the necessity of such a convention. We have a chance to navigate the issues introduced above in this part and the next part.

In this part, we focus on the recognition and enforcement of outcomes. Generally, recognition and enforcement of outcomes can take place through three levels of legal cooperation. **First of all**, between organizations, they sign reciprocal agreements, mutual memoranda to foster their mutual recognition and enforcement of outcomes in different jurisdictions. *For example*, DIFCC has concluded twelve cooperation agreements with the overseas courts in the US, the UK, Kenya, Zambia, Kazakhstan, China, Korea, Singapore, Australia, and Malaysia.[37] Alternatively, SICC has concluded at least seven cooperation agreements with the overseas courts in China, Myanmar, Australia, Bermuda, Abu Dhabi, Qatar, and Dubai.[38] Alternatively, DIFCC and LCIA (the London Court of International Arbitration)[39] concluded a new memorandum creating a new mechanism which is called "Judgment-Converted-Award".[40] This is the highly creative innovation converting a court judgment into an arbitral award in order to take advantage of the recognition and enforcement system based on the New York Convention for a smooth recognition and enforcement in jurisdictions that may not be covered by existing litigation agreements. Furthermore, there are multilateral agreements, such as the "*Note on Enforcement of SICC Judgments*"

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[37] DIFCC annual reviews, https://www.difccourts.ae/annual-review/ , accessed 10 September 2020.

[38] SICC, Enforcement of Money Judgments, https://www.sicc.gov.sg/guide-to-the-sicc/enforcement-of-money-judgments, accessed 10 September 2020.

[39] London Court of International Arbitration, https://www.lcia.org/ , accessed 10 September 2020.

[40] Saito, A. (2017). *The Rise of International Commercial Courts.* Hanyang Journal of Law, Vol. 6, p132.

January 2017,[41] the Reciprocal Enforcement of Commonwealth Judgments Act,[42] and the Reciprocal Enforcement of Foreign Judgments Act.[43] Once joined, a member court's judgment can be expected to be enforced directly by the foreign court as if it were its own jurisdiction judgment. Such memoranda and agreements will greatly assist parties and lawyers in providing certainty if enforcement does become necessary.[44] **In the second place**, between state judiciaries they sign agreements, or between members states of regional unions, they adopt the common regulations or principles such as agreements between Singapore and other Anglo Commonwealth jurisdictions[45], Gulf Cooperation Council (GCC) (in the UEA)[46], EU Mediation Directive on Civil and Commercial Aspects of Mediation (2008) (EU Directive on Mediation)[47], Brussels Ia Regulation[48]…to create the free movements of outcomes which are

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[41] Note on Enforcement of SICC Judgments, available at https://perma.cc/56VB-YESB / accessed 10 September 2020.

[42] Which covers the United Kingdom, Singapore, Australia (the federal jurisdiction of Australia, New South Wales, Queensland, South Australia, Tasmania, Victoria, Western Australia, Australian Capital Territory, Norfolk Island, and Northern Territory), New Zealand, Sri Lanka, Malaysia, Windward Islands, Pakistan, Brunei Darussalam, Papua New Guinea and India (except the State of Jammu and Kashmir).

[43] Which covers Hong Kong, Singapore.

[44] Ramesh, K. (2018). (Judge, Supreme Court of Singapore). *International Commercial Courts: Unicorns on a Journey of a Thousand Miles*. Conference on the Rise of International Commercial Courts (Doha, Qatar), p21, ¶36. Available at https://www.sicc.gov.sg/docs/default-source/modules-document/news-and-article/international-commercial-courts-unicorns_23108490-e290-422f-9da8-1e0d1e59ace5.pdf/ accessed 20 August 2020.

[45] Saito, A. (2017). *The Rise of International Commercial Courts.* Hanyang Journal of Law, Vol. 6, p125; If one wished to enforce a judgment from the superior courts of the UK and other Commonwealth countries in Singapore, including Malaysia, Brunei, India (except the State of Jammu and Kashmir), the Commonwealth of Australia, and the states of New South Wales, Queensland, South Australia, Tasmania, Victoria, and Western Australia, the Australian Capital Territory, Norfolk Island and the Northern Territory, one could rely on Singapore's Reciprocal Enforcement of Commonwealth Judgments Act.

[46] Saito, A. (2017). *The Rise of International Commercial Courts.* Hanyang Journal of Law, Vol. 6, p126.

[47] Directive 2008/52/EC of the European Parliament and of the Council, On Certain Aspects of Mediation in Civil and Commercial Matters, available at https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32008L0052&from=EN / accessed 10 September 2020.

[48] Brussels Ia Regulation, available at https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32012R1215&from=EN / accessed 10 September 2020.

mutually recognized and enforced within the member states. **In the third place**, between member states of intergovernmental organizations, such as the United Nations, they unanimously adopt conventions or international treaties. Due to the importance and international influence of this kind of agreements, the research will examine the three significant legal instruments: The 1958 United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention), the two Hague Conventions of the Hague Conference on Private International Law (two Hague Conventions) and the United Nations Convention on International Settlement Agreements Resulting from Mediation (Singapore Convention) which correspond to the recognition and enforcement of outcomes in arbitration, litigation and mediation.

a. New York Convention

The New York Convention is the world's most significant legislative instrument relating to international commercial arbitration.[49] The first draft of the Convention was prepared in 1953 by the International Chamber of Commerce (ICC).[50] Under the New York Convention, arbitral awards enjoy the same protection as domestic court decisions,[51] and the Convention comprehensively deals with all major elements of the arbitral process-from arbitration agreement to the arbitral award.[52]

Since the promulgation, the Convention has been ratified by 165 countries around the world and has been described as the single most

[49] Born, G. B. (2018). *The New York Convention: self-executing treaty*. Michigan Journal of International Law, 40(1), p115.
[50] Ibid, p117.
[51] Hioureas, C. G. (2019). *The Singapore Convention on international settlement agreements resulting from mediation: new way forward*. Berkeley Journal of International Law, 37(2), 215-224, p219.
[52] Ibid, n 49, p118.

important pillar for international arbitration.[53] It creates the apparent ease of enforcing an arbitral award, and this is one of the main reasons why arbitration remains a popular way of resolving international commercial disputes. We can say the success of arbitration is associated with the widespread of the New York Convention. From the time in 2018 when the author wrote the master's thesis[54] for the graduation from Kobe University, the number of member states of the Convention has increased from 159 to 165 even in the situation that its development seems to get stable after six decades. This continuously benefits arbitration which still keeps its dominant position in dispute settlement.

b. Two Hague Conventions

The enforcement of foreign judgments is an area where international commercial courts should work together to promote greater legal certainty for cross-border litigation.[55] One of the best ways to do so is by acceding to the two Hague Conventions of the Hague Conference on Private International Law. Firstly, the 2005 Hague Convention on Choice of Court Agreements,[56] as of 10th September 2020, there are 36 States bound by

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[53] Status Table of The New York Convention, available at, https://uncitral.un.org/en/texts/arbitration/conventions/foreign_arbitral_awards/status2 / accessed 10 September 2020.

[54] Dang, Q. (2018). *International Commercial Courts–Partners and Potential Rivals of Arbitration.* Kobe University. Master's Thesis, p24. available at https://app.box.com/s/piywkfomxwfxe8aarxoqvfidpps84l7k / accessed 10 September 2020.

[55] Ramesh, K. (2018). (Judge, Supreme Court of Singapore). *International Commercial Courts: Unicorns on a Journey of a Thousand Miles*. Conference on the Rise of International Commercial Courts (Doha, Qatar), p20, ¶35. Available at https://www.sicc.gov.sg/docs/default-source/modules-document/news-and-article/international-commercial-courts-unicorns_23108490-e290-422f-9da8-1e0d1e59ace5.pdf/ accessed 20 August 2020.

[56] *Full text of the 2005 Hague Convention on Choice of Court Agreements*, available at https://www.hcch.net/en/instruments/conventions/full-text/?cid=98 / accessed 10 September 2020.

the Convention.[57] Secondly, the 2019 Hague Convention on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters,[58] which is complementary to the 2005 Hague Convention on Choice of Court Agreements. However, it is not yet in force,[59] and it merely has two contracting States (Ukraine and Uruguay have signed but not yet ratified). The 2005 Hague Convention on Choice of Court Agreements applies[60] in cases where the parties have agreed to a particular jurisdiction, the court judgments will be enforceable in all members' jurisdiction, in a way that is akin to how the New York Convention has enhanced the enforceability of arbitral awards. Meanwhile, the 2019 Hague Convention applies independently of the party agreement.

By furnishing with the two Conventions, foreign judgments are expected to get smoothly recognition and enforcement, which will support the growth of international commercial courts around the world.

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[57] Status Table of the 2005 Hague Convention on Choice of Court Agreements, available at https://www.hcch.net/en/instruments/conventions/status-table/?cid=98 / accessed 10 September 2020.

[58] Full text of the 2019 Hague Convention on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters, available at https://www.hcch.net/en/instruments/conventions/full-text/?cid=137 / accessed 10 September 2020.

[59] Status Table of the 2019 Hague Convention on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters, available at https://www.hcch.net/en/instruments/conventions/status-table/?cid=137 / accessed 10 September 2020.

[60] More detailed analyses of the 2005 Hague Convention can be found in my Master's Thesis, p33-39: Dang, Q. (2018). *International Commercial Courts–Partners and Potential Rivals of Arbitration.* Kobe University. available at https://app.box.com/s/piywkfomxwfxe8aarxoqvfidpps84l7k / accessed 10 September 2020.

c. Singapore Convention

In 1980, UNCITRAL introduced Conciliation Rules.[61] The UNCITRAL Conciliation Rules provide a comprehensive set of procedural rules covering all aspects of the conciliation process. Recently, we have the UN Convention on International Settlement Agreements Resulting from Mediation (Singapore Convention)[62] and the UNCITRAL Model Law on International Commercial Mediation and International Settlement Agreements Resulting from Mediation (2018 Mediation Model Law).[63] The Singapore Convention is the first UN multilateral treaty focused on mediation,[64] establishing a minimalist and efficient framework to recognize and enforce a mediation settlement agreement internationally.[65] It aims to do what the New York Convention has done for international arbitration - the recognition and enforcement of commercial arbitration awards - for international mediation: recognition and enforcement of mediated settlement agreements. The terms "mediation" and "conciliation" are used interchangeably.[66] UNCITRAL's earlier work uses the term "conciliation", but in the Singapore Convention (and the 2018 Mediation Model Law), the

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61 UNCITRAL Conciliation Rules (1980), available at https://uncitral.un.org/en/texts/mediation/contractualtexts/conciliation/ accessed 23 August 2020.

62 Singapore Convention on Mediation, available at https://uncitral.un.org/en/texts/mediation/conventions/international_settlement_agreements/ accessed 23 August 2020.

63 UNCITRAL Model Law on International Commercial Mediation and International Settlement Agreements Resulting from Mediation (2018) (the 2018 Mediation Model Law), available at https://uncitral.un.org/en/texts/mediation/modellaw/commercial_conciliation/ accessed 23 August 2020.

64 Alexander, N. (2019). *Ten trends in international commercial mediation*. Singapore Academy of Law Journal, 31(Special Issue), 405-447, p415, ¶19.

65 Art (s) 1 and 3 of the Singapore Convention on Mediation.

66 Ibid, n 63; See more: Morris-Sharma, N. Y. (2019). *Constructing the Convention on Mediation: The Chairperson's perspective.* Singapore Academy of Law Journal, 31(Special Issue), p490, ¶5.

term “mediation” is used, as it was assessed that it was the more widely used term internationally.[67]

Proposed by the Government of the United States of America [68] in 2014, on 09 February 2018, after more than three years of negotiations in New York and Vienna, the UNCITRAL Working Group II concluded [69] negotiations. The Convention embarked with a large number of signatories. It was signed by forty-six States[70] on 07 August 2019 and entered into force on 12 September 2020.[71] This marks an important development in international dispute resolution, both in creating a legal framework for recognition and enforcement and promoting the use of mediation at an international level.

Some may concern the necessity of the Singapore Convention because mediated settlement agreements are voluntarily entered by the parties instead of imposed on them by a third-party ruling. They have a higher chance of performance compared with court decisions.[72] However, life, especially business itself, contains unpredictable changes in circumstances that could affect the performance of business people. The need to enforce the settlement only became apparent later when one party refused to live up to its part of the deal. A number of delegations of the UN Working Group II expressed their preference for a convention so as to

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[67] Ibid.

[68] Morris-Sharma, N. Y. (2019). *Constructing the Convention on Mediation: The Chairperson’s perspective.* Singapore Academy of Law Journal, 31(Special Issue), p488, ¶3. (Although over a decade ago, UNCITRAL had considered the question of enforcement of settlement agreements when preparing its Model Law on International Commercial Conciliation).

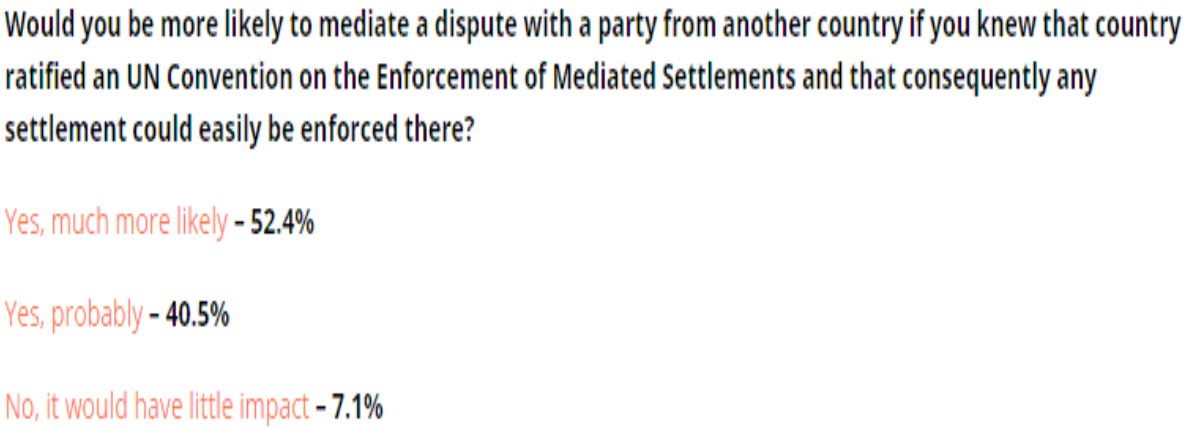
[69] Introduction to the Singapore Convention on Mediation, https://www.singaporeconvention.org/convention/about-convention/ accessed 23 August 2020.

[70] Singapore Convention Signing Ceremony, https://www.singaporeconvention.org/, accessed 04 September 2020.

[71] Entry into Force Celebration, https://www.singaporeconvention.org/events/scm2020, accessed 04 September 2020.

[72] Chua, E. (2019). *Enforcement of international mediated settlements without the Singapore Convention on mediation*. Singapore Academy of Law Journal, 31(Special Issue), 572, ¶1.

contribute more efficiently to the promotion and harmonization of mediation.[73] For these delegations, a binding international convention would bring certainty to the cross border enforcement process[74] and increase the attractiveness of conciliation or mediation.[75] This view is supported by a large number of empirical research studies. In 2014, IMI conducted a short survey of internal counsel and business managers to assess the extent to which a mediation enforcement convention was desired.[76] The result shows a potential impetus that that convention can make to promote mediation. 93% of respondents indicated they would be likely to mediate a dispute with a party from a country that ratified an international convention on the enforcement of mediated settlements.[77]



The question in the IMI survey in 2014

[73] UNCITRAL, Report of Working Group II (Arbitration and Conciliation) on the Work of Its Sixty-third Session (Vienna, 7-11 September 2015) (A/CN.9/861), p19-20, [pdf], available at https://undocs.org/en/A/CN.9/861, accessed 04 September 2020.

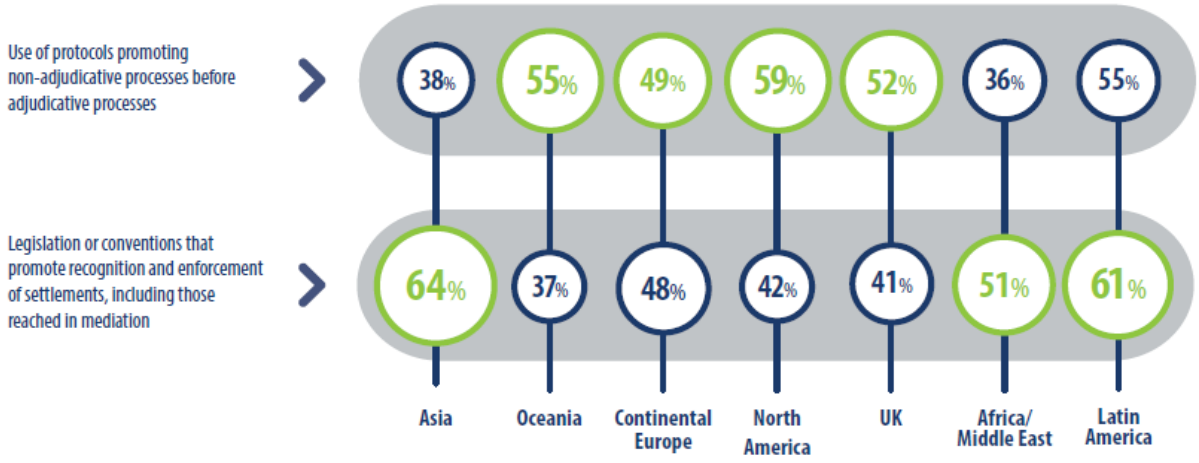
[74] Morris-Sharma, N. Y. (2019). *Constructing the Convention on Mediation: The Chairperson's perspective.* Singapore Academy of Law Journal, 31(Special Issue), p516, ¶69.

[75] UNCITRAL, Report of the Working Group on Arbitration on the Work of Its Thirty-Second Session (Vienna, 20 31 March 2000) (A/CN.9/468), p9, [pdf], available at https://undocs.org/en/A/CN.9/468, accessed 04 September 2020.

[76] IMI Survey Results Overview: *How Users View the Proposal for a UN Convention on the Enforcement of Mediated Settlements*, available at https://www.imimediation.org/2017/01/16/users-view-proposal-un-convention-enforcement-mediated-settlements, accessed 10 September 2020.

[77] Ibid.

From 2016-2017, the Survey "Global Data Trends and Regional Difference" of Global Pound Conference Series[78] revealed the regional differences in rating the weight of legislation or conventions and the use of protocols promoting non-adjudicative processes.



Global Data Trends and Regional Differences (2016-2017 Survey)

Asia, Africa/Middle East, and Latin America favor legislation or conventions to promote enforcement of settlements while lowering the use of protocols promoting non-adjudicative processes. The remaining regions show a different picture, with the use of protocols strongly preferred to legislation.[79] This suggests the diversity in viewing things between regions, and it may affect the adoption process of the Convention.

These views in the surveys, and experiences witnessed through the adoption process of the New York Convention, seem to make UNCITRAL aware of problems that may arise in the adoption process of the mediation instruments to different legal systems. Then, they develop two parallel instruments, the 2018 Mediation Model Law and the Singapore Convention at the same time. This is the first time in the history of UNCITRAL that a

[78] The Survey of Global Pound Conference Series, Global Data Trends and Regional Differences (2017), [pdf], p20, available at https://www.imimediation.org/research/gpc/series-data-and-reports/ accessed 05 September 2020.
[79] Ibid.

working group developed two legal instruments in parallel,[80] thereby giving states a choice to sign on to the Convention with its associated-treaty obligations or adopt Model Law provisions. One note should be taken at this point that the same fashion had been chosen for arbitration with the adoption of the 1958 New York Convention and the UNCITRAL Model Law on International Commercial Arbitration (1985), with amendments adopted in 2006 (the 2006 Arbitration Model Law)[81]. However, they were not developed at the same time.[82]

The Singapore Convention focuses on recognizing and enforcing mediated settlement agreements. It does not provide a full legal framework for mediation and enforcement procedures. Meanwhile, the 2018 Mediation Model Law focuses more broadly, not only on mediated settlement agreements (section 3 - international settlement agreements) [83] but on procedural respects of the mediation process (including the commencement of mediation proceedings,[84] the appointment of mediators,[85] conduct of mediation,[86] communication between the mediator

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[80] Alexander, N. (2019). *Ten trends in international commercial mediation.* Singapore Academy of Law Journal, 31(Special Issue), 405-44, p418, ¶22.

[81] UNCITRAL Model Law on International Commercial Arbitration (1985), with amendments as adopted in 2006, available at https://uncitral.un.org/en/texts/arbitration/modellaw/commercial_arbitration , accessed 15 January 2021.

[82] The purpose of adopting the 2006 Arbitration Model Law is "to assist States in reforming and modernizing their laws on arbitral procedure so as to take into account the particular features and needs of international commercial arbitration. It covers all stages of the arbitral process from the arbitration agreement, the composition and jurisdiction of the arbitral tribunal and the extent of court intervention through to the recognition and enforcement of the arbitral award" (according to UNCITRAL Model Law on International Commercial Arbitration (1985), with amendments as adopted in 2006, available at https://uncitral.un.org/en/texts/arbitration/modellaw/commercial_arbitration , accessed 15 January 2021).

[83] UNCITRAL Model Law on International Commercial Mediation and International Settlement Agreements Resulting from Mediation, 2018 (the 2018 Mediation Model Law), available at https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/annex_ii.pdf, accessed 15 January 2021.

[84] Art 5, the 2018 Mediation Model Law.

[85] Art 6, the 2018 Mediation Model Law.

and parties,[87] disclosure of information,[88] the confidentiality of evidence,[89] etc.). They are two separate but parallel instruments, which are complementary in nature.[90] Neither UNCITRAL nor the UN General Assembly has expressed a preference as to which instrument should be adopted.[91] The relationship between these two instruments is manifested by at least two notable points. Firstly, their contents supplement each other. For example, while the Singapore Convention leaves open on the definition of what the term "commercial" is in the essence of disputes, the 2018 Mediation Model Law clearly states the definition of that term (the commercial nature of disputes[92]). Moreover, as shown in the early part of this paragraph, the focus of the 2018 Mediation Model Law is broader that will support the understanding and interpretation of the Singapore Convention. Secondly, the 2018 Mediation Model Law plays a role of a soft instrument to facilitate the widespread adoption of the Singapore Convention by accommodating "the different levels of experience with mediation in different jurisdictions" with consistent standards on the cross-border enforcement of international settlement agreements resulting from mediation.[93] The Model Law can assist states "in reforming and

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[86] Art 7, the 2018 Mediation Model Law.

[87] Art 8, the 2018 Mediation Model Law.

[88] Art 9, the 2018 Mediation Model Law.

[89] Art 10, the 2018 Mediation Model Law.

[90] UNCITRAL, Report of Working Group II (Dispute Settlement) on the Work of Its Sixty-fifth Session (Vienna, 12-23 September 2016) (A/CN.9/896), p25, [pdf], available at https://undocs.org/en/A/CN.9/896, accessed 04 September 2020.

[91] Morris-Sharma, N. Y. (2019). *Constructing the convention on mediation: The chairperson's perspective*. Singapore Academy of Law Journal, 31(Special Issue), p515, ¶65.

[92] Footnote 1, the 2018 Mediation Model Law.

[93] UN General Assembly resolution 73/199, adopted on 20 December 2018, available at https://undocs.org/en/A/RES/73/199 , accessed 10 January 2021.

modernizing their laws on mediation procedure",[94] or "in enhancing their legislation governing the use of modern mediation techniques and in formulating such legislation where none currently exists"[95] for implementing the Singapore Convention.

Welcomed as a new development, it is suitable to become conversant with the Singapore Convention. First of all, regarding the Convention's scope, the Convention will apply to mediated settlement agreements in cases of commercial disputes, and not disputes of employment law or family law matters, nor agreements involving consumers for personal, family, or household purposes.[96] The mediation must be international in nature (parties' places of business in different states or the parties' places of business are different from the state where the settlement is to be performed or with which the settlement agreement is most closely connected).[97] In addition, a settlement agreement entered into during the course of judicial or arbitral proceedings is excluded from the scope of the Convention.[98] That agreement is enforceable as a judgment or an arbitral award. This is to avoid the concurrent application of the Singapore Convention, the New York Convention, and the 2005 Hague Convention. Furthermore, the settlement agreement can be used to prevent parties from litigating in local courts because the Convention provides parties with a right to invoke settlement agreements to prove that the matter has

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[94] Introduction of UNCITRAL Model Law on International Commercial Mediation and International Settlement Agreements Resulting from Mediation, 2018, available at https://uncitral.un.org/en/texts/mediation/modellaw/commercial_conciliation/ , accessed 20 January 2021.

[95] UN General Assembly resolution 73/199, adopted on 20 December 2018, available at https://undocs.org/en/A/RES/73/199 , accessed 10 January 2021.

[96] Art 1 (2), Singapore Convention on Mediation.

[97] Art 1 (1), Singapore Convention on Mediation.

[98] Art 1 (3), Singapore Convention on Mediation.

already been resolved.[99] Significantly, the Singapore Convention replicated but distinguished itself from the New York Convention. According to Art 1 (1), the New York Convention, the arbitral award must be "not considered as domestic awards",[100] it must be made in a different state. This requires identifying a state that the arbitration award is made at, which results in requiring a seat of arbitration. The seat gives certain jurisdiction to the domestic court of the country where the seat is located. The court shall have the right to supervise arbitration activities within that state.[101] One of the activities that can be supervised by such a court is setting aside the award.[102] However, the Singapore Convention does not require a "seat" of mediation. The settlement agreement is directly enforced, and there is no requirement for the settlement agreement to undergo a review process at the place where it was concluded (the State of origin). Court review in terms of the Convention only occurs in the State of enforcement.[103] This means that a failure to follow local mediation rules will not be a basis for refusing enforcement of a mediated settlement.[104] This feature can potentially facilitate online dispute resolution as parties do not have to concern themselves with the idea of where the mediation is actually taking place and what procedural or substantive domestic law

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[99] Art 3 (2), Singapore Convention on Mediation.

[100] Art 1 (1), New York Convention.

[101] Herisi, A., & Trachte-Huber, W. (2019). Aftermath of the Singapore Convention: Comparative Analysis between the Singapore Convention and the New York Convention. American Journal of Mediation, 12, p160, available at https://heinonline.org/HOL/Page?handle=hein.journals/amjm12&collection=journals&id=162&startid=&endid=181, accessed 05 September 2020.

[102] Ibid.

[103] Alexander, N. (2019). *Ten trends in international commercial mediation.* Singapore Academy of Law Journal, 31(Special Issue), 405-447, p417, ¶20.

[104] Ibid, n 101, p154.

might potentially affect the agreement depending on where the mediation is physically happening.[105]

Although the Singapore Convention represents an important contribution to facilitating cross-border dispute resolution through mediation, it will take time before having a larger number of signatories to make a significant impact and become a major milestone. This is because there have been at least two reasons recorded. Firstly, it relates to the matter of compatibility with domestic laws. For example, Japan is still hesitant to adopt the Convention. The country was among the participants of the 3rd Asia Pacific Mediation Conference,[106] but still takes a neutral stance, waiting to see how the Convention operates in practice.[107] There are several obstacles, which impede the implementation of the Convention in Japan.[108] One of them is that it is not compatible with the Japanese ADR regulations. Under the 2004 ADR Act,[109] settlement agreements must result from a certified mediation service. This is a problem as the Singapore Convention does not require any certification or qualification of a mediator. Secondly, it relates to the readiness of domestic enforcement procedures for mediated settlement agreements. Many domestic legal

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[105] Stewart, K., & Matthews, J. (2002). *Online arbitration of cross-border, business to consumer disputes*. University of Miami Law Review, 56(4), 1111-1146, available at https://heinonline.org/HOL/Page?public=true&handle=hein.journals/umialr56&div=47&start_page=1111&collection=journals&set_as_cursor=0&men_tab=srchresults, accessed 05 September 2020.

[106] UNCITRAL, The 3rd Asia Pacific Mediation Conference, https://uncitral.un.org/en/02.08.2019, accessed 05 September 2020.

[107] Olivia Sommerville, *Singapore Convention Series – Strategies of China, Japan, Korea and Russia,* 16 September 2019, http://mediationblog.kluwerarbitration.com/2019/09/16/singapore-convention-series-strategies-of-china-japan-korea-and-russia/?_ga=2.37569248.1784011766.1579665105-861412745.1579665105, accessed 05 September 2020.

[108] Ibid.

[109] The Japanese Act on Promotion of Use of Alternative Dispute Resolution (Act No. 151 of 2004), available at http://www.cas.go.jp/jp/seisaku/hourei/data/AOP.pdf, accessed 05 September 2020.

systems are still unfamiliar with mediation.[110] For example,[111] Iran is one of the first 46 signatories of the Convention, where mediation has not been recognized as a mechanism for settlement of disputes, so there is no legal procedure for enforcing the mediated settlement agreements. In Vietnam, the story resembles the situation in Japan. Vietnamese courts only recognize and enforce mediated settlement agreements conducted by registered mediators or registered mediation agencies[112] that meet the conditions set in the Decree 22/2017/ND-CP[113]. For dealing with these problems, on the one hand, it depends on the legal policy and approach of specific countries in balancing between the benefit and the risk of lessening the strict requirement of registration and qualification standards; on the other hand, it is a task that the 2018 Mediation Model Law needs to perform as its second function in facilitating the widespread adoption of the Convention as analyzed in page 141-143. Policy-making is usually a complicated matter because it needs much consideration on various aspects. However, from the modest perception of a contract-law learner, especially from the nature of the mediation mechanism and the confined authority of a mediator, the author would like to express a partly supportive opinion to the approach in the Singapore Convention relating to the matter of certification or registration of a mediator. It means to say that, registration of mediators or mediation agencies in a foreign country where enforces the mediated settlement agreement (like the requirement in Vietnam) is an encumbrance. The requirement of a certificate of being a

[110] Mehrabi, H. F. & Sheikhattar, H. (2019). The Singapore Mediation Convention: a promising start, an uncertain future, https://leidenlawblog.nl/articles/the-singapore-mediation-convention-a-promising-start-an-uncertain-future, accessed 15 January 2021.

[111] Ibid.

[112] The 2015 Vietnam Code of Civil Procedure, Art 416, Art 417, Chapter XXXIII, available at https://www.wipo.int/edocs/lexdocs/laws/en/vn/vn083en.pdf accessed 15 January 2021.

[113] Vietnamese Decree 22/2017/ND-CP on commercial mediation, http://vbpl.vn/botuphap/Pages/vbpqen-toanvan.aspx?ItemID=11106 , accessed 15 January 2021.

qualified mediator is mainly important to business parties when they hire the mediation service but should not be essential to the court's enforcement procedures once the settlement agreement is amicably reached by the consent of parties. Consequential problems may then arise, but the law stands there for performing its function of facilitating business activities. Tradeoff always exists and varies on different choices. If the potential risk is acceptable, the law should give more freedom in recognizing and ease in enforcing the consent of business parties, especially in international commerce. Meanwhile, the author also would like to put a constructive opinion into words that if the Singapore Convention provided an article for a reservation right of contracting states in requiring certification or registration of a mediator, it would be more flexible and easier to promote the adoption of the Convention in different cultural societies, because the prevailing goal is to increase the recognition and enforcement of mediated settlement agreements. This manner had been employed in CISG (Art 96) regarding the reservation of the form of contracts of sale (normally in writing in most jurisdictions) other than any form (including witnesses and verbal means[114]) under CISG. Saying in the two opposite opinions does not mean that the author is controversial and dubious. The approach of offering business parties more freedom rather than technical restrictions is still a priority. Overall, this is the author's partial opinion based on the current understanding. It may need more open discussions to become a more utilizable opinion. All things should be considered in context and need more analyses in a bigger paper since these problems are intricate. Besides, as a bright signal in the latest deployment of signatories, Singapore has just adopted the Singapore

[114] Art 11, CISG.

Convention on Mediation Bill (in 2020).[115] Further deployments in other signatories may be seen shortly. The author also hopes the same for Vietnam and Japan to adopt the Convention with a benefit-risk balanced consideration.

3. Innovations

As introduced in the first section of this chapter, a number of jurisdictions across the world have launched initiatives to position themselves as new hubs for the resolution of international commercial disputes by establishing specialized English-speaking courts with specific, more flexible procedural rules and technological facilities. In this part, we will explore such innovative procedural rules and technological facilities through scrutiny of three international commercial courts, namely Singapore International Commercial Court (SICC),[116] the Courts of the Dubai International Financial Centre (DIFCC),[117] and London Commercial Court (LCC).[118] Some pieces of information will share the same sources to some extent with those in the author's master's thesis[119] but are updated to the time of writing this thesis and grouped in a somewhat different structure on a summary basis according to specific themes for the new purpose of highlighting the innovations of commercial courts' services.

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[115] Singapore Convention on Mediation Bill No. 5/2020., available at https://www.parliament.gov.sg/docs/default-source/default-document-library/singapore-convention-on-mediation-bill-5-2020.pdf , accessed 15 January 2021.

[116] Singapore International Commercial Court, https://www.sicc.gov.sg/forms-and-services/use-of-technology-at-the-sicc

[117] Courts of the Dubai International Financial Centre, https://www.difccourts.ae/

[118] London Commercial Court, http://www.judiciary.gov.uk/you-and-the-judiciary/going-to-court/high-court/queens-bench-division/courts-of-the-queens-bench-division/commercial-court/

[119] Dang, Q. (2018). *International Commercial Courts–Partners and Potential Rivals of Arbitration.* Kobe University. Master's Thesis, available at https://app.box.com/s/piywkfomxwfxe8aarxoqvfidpps84l7k / accessed 10 September 2020

3.1 Neutral International Judicial Bench and Foreign Lawyers

Having an international judicial bench is not a typical character of an international commercial court. However, it is regarded as an innovation at the most important authoritative part of the commercial courts. In SICC and DIFCC, judges come from various foreign jurisdictions. The SICC's judicial bench is comprised of 25 current local judges and 17 "*international"* judges (updated on 10 September 2020) drawn from both the common law and civil law jurisdictions (The USA: 1, India: 1, Australia: 4, Canada: 1, France: 1, the UK: 7, Hong Kong: 1, and Japan: 1).[120] The DIFCC's bench comprises 10 judges[121] from Malaysia: 1, UAE: 3, the UK: 2, Singapore: 1, and Australia: 3. This diversity is important to ensure that the judicial bench has enough expertise in both common law and civil law to earn trust from the international business community.

In addition, the general principle is that foreign lawyers do not have a right to represent their clients (or they must satisfy an extremely restricted requirement) in national courts of other jurisdictions. However, before the commercial courts, they can do that. For example, in Singapore, traditionally foreign lawyers who are Queen's Counsel or who hold an appointment of equivalent distinction may be admitted to practice in the Supreme Court of Singapore on an ad-hoc basis for a specific case. However, the court must be satisfied that the foreign lawyer has special qualifications or experience relevant to the case and that the services of a foreign counsel are a "necessity". By contrast, it is much easier for foreign lawyers to represent parties to proceedings commenced in SICC. Foreign

[120] SICC Brochure August 2020, p2, available at https://www.sicc.gov.sg/docs/default-source/modules-document/media-resources/sicc-brochure-english-june-2020_47a6c710-9d83-41fa-b502-f0a76a1f77ed.pdf / accessed 10 September 2020.

[121] DIFCC Annual Review 2019, p26, available at https://www.difccourts.ae/2020/02/26/difc-courts-annual-review-2019/ accessed 10 September 2020.

lawyers must satisfy requirements to be granted registration, including being sufficiently proficient in the English language and agreeing to abide by a code of ethics. A lawyer must also have at least five years' experience[122] in advocacy to be granted full registration.

These innovations eliminate the fear of parties for resolving disputes in a foreign land before local judges who may be perceived to favor local parties and also comfort parties with their familiar lawyers.

3.2 Courts' Users' Committee

DIFCC is so open through setting up a body by which they wish to listen to complaints and advice from users. The DIFCC's Users' Committee[123] is an independent liaison body between the DIFCC and court users, the purpose of the Committee is to assist the Court to provide an efficient, economical and professional service to all users. The Committee is chaired by a chairman and consists of voting members from the DIFC Authority, Dubai Financial Services Authority and representatives from law firms within the UAE (United Arab Emirates).[124] The Committee shall advise the Chief Justice of the DIFCC about administrative issues related to the Court and any other appropriate issues which will help increase the level of users' satisfaction. The Committee shall not have any authority over the implementation of the suggestions or the advice, judicial matters and the administrative work of the Court.[125]

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[122] Legal Profession Act (Chapter 161) Legal Profession (Representation in Singapore International Commercial Court) Rules 2014, part 2, art 4(1,b), available at https://www.sicc.gov.sg/docs/default-source/registration-of-foreign-lawyers/legal-profession-(representation-in-sicc).pdf / accessed 10 September 2020.

[123] DIFCC Annual Review 2019, p31, available at https://www.difccourts.ae/2020/02/26/difc-courts-annual-review-2019/ accessed 10 September 2020.

[124] Ibid.

[125] DIFCC Charter 2013, https://www.difccourts.ae/wp-content/uploads/2019/03/DIFC-Courts-Users-Committee-Charter-2013.pdf , accessed 10 September 2020.

3.3 Efficient Procedures

a. Emergency proceeding

For emergency situations where need a quick response to protect the interests of claimants, SICC has accepted urgent applications even via telephone or email, and hearings may be conducted through teleconference or video conference:[126] Urgent applications during office hours: "*[…] the applicant may attend before the Registrar on duty […] regarding the fixing of a suitable hearing date or for directions. Alternatively, […] to arrange for a teleconference or video conference […]*"; Urgent applications after office hours, on weekends and public holidays: "*(1) […] the applicant should contact the Registrar on duty at (+65) 6332 4351 or (+65) 6332 4352. (2) […] all the necessary papers […] must be prepared […] and forwarded by way of an email to this address Supcourt_SICCRegistry@supcourt.gov.sg*".

In LCC, the Court can provide an expedited trial in cases of sufficient urgency and importance.[127] A party seeking an expedited trial should apply to the judge in charge of the Commercial Court on notice to all parties at the earliest possible opportunity. Moreover, the ability of seeking relief on an "*ex-parte"* basis[128] is considered support for the emergency proceeding.

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[126] Singapore International Commercial Court Practice Directions, 2020, ¶14,15, available at https://www.supremecourt.gov.sg/docs/default-source/default-document-library/rules/singapore-international-commercial-court-practice-directions-v2.pdf , accessed 10 September 2020.

[127] The Business and Property Courts of England & Wales, 2017, *the Commercial Court Guide*, Tenth Edition, J.1 Expedited trial.

[128] An ex parte decision is one decided by a judge without requiring all parties to the controversy to be present. In Australian, Canadian, the UK, South African, Indian, and the US legal doctrines; Ex parte means a legal proceeding brought by one person in the absence of and without representation or notification of other parties.

b. Agreed List of Issues

In SICC procedures, one crucial feature to reduce cost and delay is that the parties are obliged to prepare an Agreed List of Issues.[129] This list promises to bring more efficiency to the litigation process: "*The List of Issues is a document for use as a case management tool (e.g. to determine issues such as scope of documents to be produced, factual and expert evidence, and whether there are issues which may be summarily or preliminarily determined), and the List of Issues should identify the principal issues in a structured manner*".[130]

c. Early Neutral Evaluation

At the Business and Property Courts of England & Wales, they provide a new managerial mechanism, namely "Early Neutral Evaluation" (ENE).[131] ENE is defined in provision G2.1 "*is a without-prejudice, non-binding, evaluation of the merits of a dispute... given after time-limited consideration of core materials and having read or listened to concise argument. It is generally designed to take place at an early stage in a dispute, and in private*", and is combined with a Case Management Conference according to provision G2.2 "*At a Case Management Conference the Court may explore with the parties, through their advocates, whether early neutral evaluation may assist the parties to resolve their dispute*".

ENE may be provided by appropriate third parties. However, in appropriate cases and with the agreement of all parties, the Court will itself

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[129] Singapore International Commercial Court Practice Directions, 2020, ¶80.

[130] Ibid.

[131] The Business and Property Courts of England & Wales - *The Commercial Court Guide*, Tenth Edition (2017), G2, p63.

provide an ENE. This is one of the Court's powers for the purpose of managing the case and furthering the overriding objective.

d. Small Specialized Tribunal

DIFCC provides more efficient services with the Small Claims Tribunal (SCT),[132] the SCT's e-services, as well as the formation of a new division set up for the most complex construction and technology disputes.[133] Firstly, the new "Technology and Construction Division" (TCD) is designed to handle only the most complex cases.[134] Technology-related cases could include liability for cybercrime incidents, disputes over the ownership and use of data, and issues relating to emerging technologies such as artificial intelligence or connected cars. Secondly, the SCT can hear claims in situations where the value of a claim does not exceed AED 500.000, or where parties elect in writing that the claim will be heard by the SCT.[135] The SCT was awarded a "Top 10 Court Technology Solution Award" by the National Association of Court Management (NACM) in Washington D.C.[136]. Lastly, SCT's e-services give claimants the option to use direct and instant messages to give defendants notice. This service will also benefit defendants by offering another channel to alert them that a claim has been filed against them.[137]

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[132]DIFCC Annual Review 2019, p23, available at https://www.difccourts.ae/2020/02/26/difc-courts-annual-review-2019/ accessed 10 September 2020.

[133]Commercial claims on the rise at DIFC Courts, available at https://www.difc.ae/newsroom/news/commercial-claims-rise-difc-courts/, accessed 10 September 2020.

[134]Ibid.

[135]Ibid, n 132.

[136]DIFCC Annual Review 2017, p43, available at https://issuu.com/difccourts/docs/difc-annualreview2017_jpgs?e=29076707/58783045, accessed 10 September 2020; The NACM monitors and supports new initiatives which help courts worldwide to operate more efficiently and fairly.

[137] Ibid.

e. Case management

Case management (in LCC and SICC) includes the following key requirements:[138] A mandatory Case Management Conference will be held shortly after statements of case; Parties will be required to prepare a trial timetable for consideration by the Court; Throughout the case, there must be regular reviews of the estimated length of the trial, including how much pre-trial reading should be undertaken by the Judge.

f. Courts' Openness to ADR

There is a rising trend in support and assistance of commercial courts to alternative dispute resolution (ADR). This trend makes a constructive relationship between commercial courts and ADR in the field of dispute resolution. It is apparent to see in Business and Property Courts of England & Wales[139]: "*G1.1 Rule - the Commercial Court encourages parties to consider the use of ADR as an alternative means of resolving disputes. G1.7 Rule - the Judge may adjourn the case for a specified period of time to encourage and enable the parties to use ADR"*. By referring the matter to a mediator, parties could refine better their respective expectations, thereby leading to faster settlements. One reference is that the time to reach settlement decreases with the parties using mediation during the court proceeding (the finding based on the collection of the duration of commercial claims filed in Slovenian courts of first instance[140]).

Besides, one of the reasons that parties choose arbitration as their dispute resolution mechanism when they make their agreement is the

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[138] The Business and Property Courts of England & Wales, 2017, *the Commercial Court Guide*, Tenth Edition, D.2 Key features of case management in the Commercial Court.

[139] Ibid, G. Alternative Dispute Resolution ("ADR"), p62.

[140] Grajzl, P., Zajc, K. (2015). *Litigation and the timing of settlement: evidence from commercial disputes*. CESIFO Working Paper No. 5520, p25, conclusion. Available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2676011, accessed 10 September 2020.

support and assistance of a court.[141] A court has a power to enforce an arbitral award and support parties during the arbitration proceeding once they ask for that support. In England, the Arbitration Act 1996 established a general principle of non-intervention in arbitral proceedings ("*the court should not intervene*"),[142] but it also sets out the power of the court to support arbitration in relation to securing the attendance of witnesses in arbitral proceedings.[143] The most important things are listed in Section 43 of the Act - "*A party to arbitral proceedings may use the same court procedures as are available in relation to legal proceedings to secure the attendance before the tribunal of a witness in order to give oral testimony or to produce documents or other material evidence*". On the other hand, when a party to an arbitration agreement finds fault with the decision of the arbitral tribunal, the proper place to challenge it is before a court of the seat of the arbitration.[144] Where an arbitration application involves recognition and enforcement of an agreement to arbitrate and that application is challenged on the grounds that the parties to the application were not bound by such agreement, it will usually be necessary for the court to resolve that issue in order to determine the application.[145] Also, in SICC, the Court offers its openness to ADR, they encourage parties to settle their disputes by using ADR:[146] "*During the case management conference, the Court may: (1) assist the parties in considering and*

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[141] Thomas, J. L. (Lord Chief Justice of England and Wales). (2017). *Commercial Dispute Resolution: Courts and Arbitration*. The National Judges College, Beijing, p5, ¶19.

[142] Arbitration Act 1996, Part 1, Section 1 (c), p4, available at https://www.legislation.gov.uk/ukpga/1996/23/data.pdf, accessed 10 September 2020.

[143] Ibid, Section 43, p21.

[144] Briggs, A. (2014). *Private International Law in English Courts.* Oxford: OUP Oxford, p1025, ¶14.93.

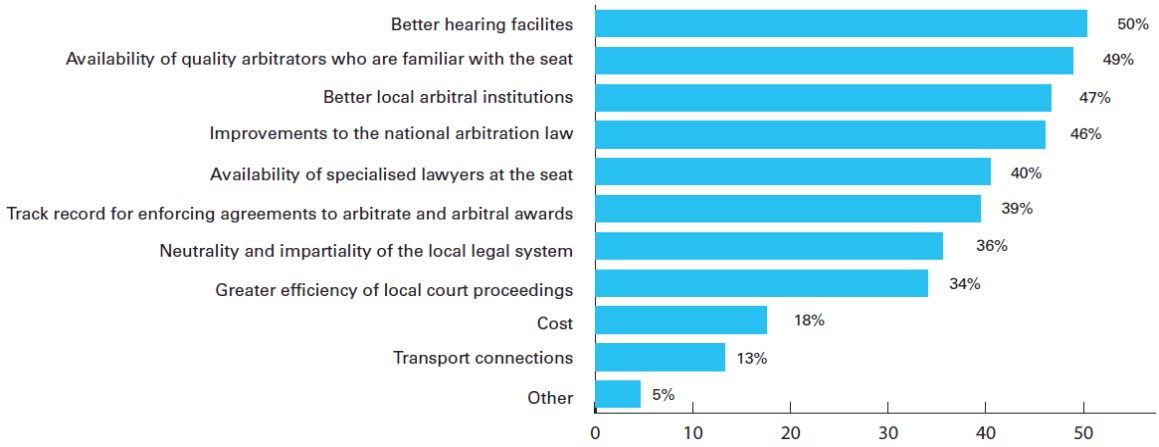
[145] The Business and Property Courts of England & Wales- *The Commercial Court Guide.* Ten[th] Edition (2017), p91, O6.6.

[146] The SICC, Rules of Court 2014, O.108, r.3.

determining whether any ADR process can be used to resolve the dispute between the parties; (2) The Court may make an order directing that a case be referred for resolution by an ADR process if the parties consent to the case being referred for resolution by the ADR process".

3.4 Technology Facilities

Though the surveys below are on arbitration, the results also reflect the litigants' common longing and the necessity of better hearing facilities in increasing the attractiveness of commercial courts, because arbitration which is mostly used in dispute resolution precedes traditional litigation in providing technologies-based services. We can use these results as a reference for knowing the demand for technology facilities in proceedings. In the 2015 Survey Improvements and Innovations in International Arbitration conducted by QMUL (Queen Mary University of London)[147], "*better hearing facilities*" was listed as the most reason which had improved the quality of the arbitration seat.

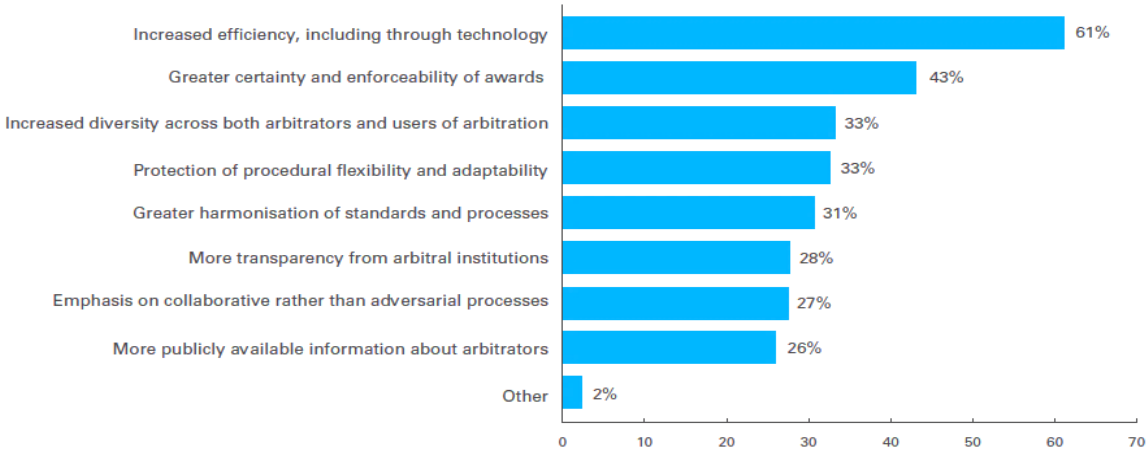


QMUL (Queen Mary University of London) 2015 Survey[148]

[147] International Arbitration Survey: Improvements and Innovations in International Arbitration, QMUL (Queen Mary University of London) 2015 Survey, [pdf], p16, available at http://www.arbitration.qmul.ac.uk/media/arbitration/docs/2015_International_Arbitration_Survey.pdf accessed 07 September 2020.

[148] Ibid.

Even for the future evolution, in the 2018 International Arbitration Survey "The Evolution of International Arbitration",[149] technology once again is one of the factors that will have the most significant impact on the future evolution of international arbitration:



QMUL (Queen Mary University of London) 2018 Survey[150]

Technology facilities, therefore, are worth writing about, especially in commercial courts which were newly established (except for LCC) and intended to compete internationally with arbitration.

We now investigate what kind of technologies should be used more often. According to the same 2018 International Arbitration Survey "The Evolution of International Arbitration", the following forms of information technology seem to be used more often in international arbitration.[151]

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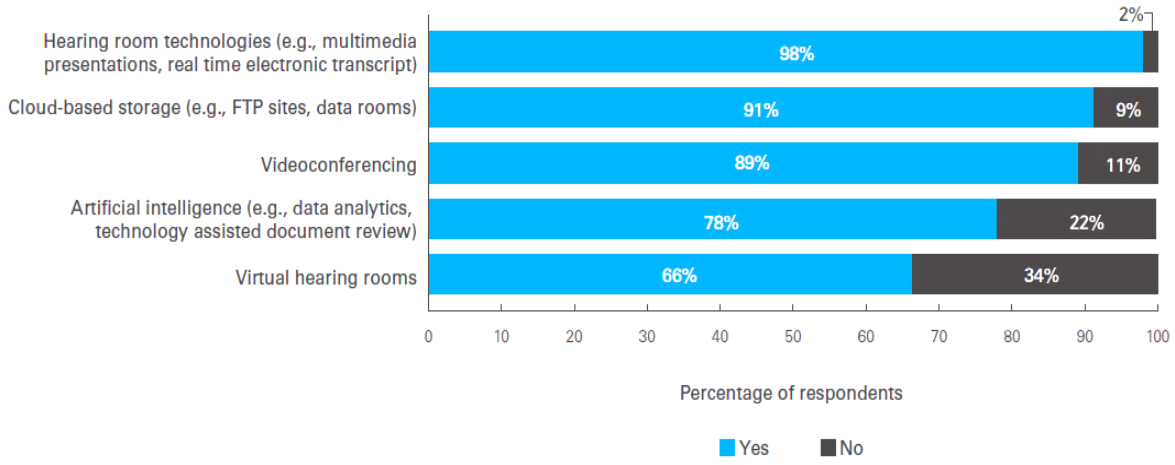
[149] 2018 International Arbitration Survey, The Evolution of International Arbitration, QMUL (Queen Mary University of London), [pdf], p38, available at http://www.arbitration.qmul.ac.uk/media/arbitration/docs/2018-International-Arbitration-Survey---The-Evolution-of-International-Arbitration-(2).PDF, accessed 07 September 2020.

[150] Ibid.

[151] 2018 International Arbitration Survey, The Evolution of International Arbitration, QMUL (Queen Mary University of London), [pdf], p33, available at http://www.arbitration.qmul.ac.uk/media/arbitration/docs/2018-International-Arbitration-Survey---The-Evolution-of-International-Arbitration-(2).PDF, accessed 07 September 2020.



We would check how they have been used in the commercial courts.

a. E-filling

In terms of technical utilization, the uses of information technology, including paperless working at trials, are strongly encouraged where they are likely to save time and cost or to increase accuracy: in LCC, "*If any party considers that it would be advantageous to make use of IT in preparation for, or at, trial, the matter should be raised at the first Case Management Conference…the parties must expect the Court to consider its use, including its use at trial*".[152] Paperless trials, in particular, are strongly encouraged, except where the cost would be too great for a party. The Court will have regard to the financial resources of the parties in deciding for the use.[153]

They also permit taking evidence from a video link on the Internet: "The party seeking permission to call evidence by video link should prepare, serve on all parties, provide to the Court a memorandum, and set out precisely what arrangements are proposed. An application for permission to call evidence by video link should be made, if possible, at the Case Management Conference, or, at the latest, at any pre-trial

[152] The Business and Property Courts of England & Wales, 2017, *the Commercial Court Guide*, Tenth Edition, J.3 Information technology at trial, including paperless trials.
[153] Ibid, J3.4.

review…Particular attention should be given to the taking of evidence by video link whenever a proposed witness will have to travel from a substantial distance abroad and evidence is likely to last no more than half a day".[154]

In addition, parties can provide or file electronically (e-filing) under the Electronic Working arrangements, which apply to the LCC.[155] Electronic Working enables parties to issue proceedings and file documents online 24 hours a day, every day all year round.[156] Submission of any document using Electronic Working will generate an automated notification acknowledging that the document has been submitted and is being reviewed by the Court prior to being accepted.[157]

b. E-hearings

SICC makes the most of technologies in deploying their works at many stages of the hearings process. Technology facilities for use during trials or hearings have been described:[158] "*Teleconference, video conference and audio-visual facilities (including the Mobile InfoComm Technology Facilities) may, at the discretion of the Registrar and subject to the payment of the appropriate fees, be used at any trial or hearing conducted in the Court*". In which, the Mobile Infocomm Technology Facilities (MIT facilities) are *"video conferencing and audio-visual equipment located on a*

[154] Ibid, H.3 Evidence by video link.

[155] The Business and Property Courts of England & Wales, 2017, *the Commercial Court Guide*, Tenth Edition, B.2 Starting a case in the Commercial Court, B2.2.

[156] Practice Direction 510 – the Electronic Working Pilot Scheme, Usage and operation of Electronic Working, 2.1, available at https://www.justice.gov.uk/courts/procedure-rules/civil/rules/part51/practice-direction-51o-the-electronic-working-pilot-scheme#1.1, accessed 07 September 2020.

[157] Ibid, 5.3.

[158] Singapore International Commercial Court Practice Directions, 2020, ¶57.

mobile cart and which may be moved from location-to-location within the Court".[159] In LCC, video conferencing is also available.[160]

c. Court Tech Lab

In 2019, DIFCC signed a cooperation agreement with the Dubai Future Foundation (DFF) to launch the world's first Court Tech Lab (CTL).[161] CTL hosts a yearly competition to raise support and capital for companies demonstrating promising technical breakthroughs in the arena of court tech. The competition will invite start-ups and innovative participants to submit and present new court tech solutions. The final chosen idea will receive financial investment, as well as a right to access to DIFCC for researching, testing, and adapting the technology solution. This is expected to reinforce the collaboration between the government, foundations, and start-ups to create an ecosystem that drives innovation. On the aspect of investing in technology, DIFCC deserves to be called a court pioneer. Technology is the critical priority of DIFCC in its development.[162]

3.5 Confidential Order

International commercial courts have power to make confidential orders on the application of a party. Court proceedings also may be confidential. Such procedural flexibility provides parties with greater autonomy and allows them to shape the court rules to the needs of their

[159] Ibid, ¶59.

[160] Available in Business and Property Courts (The Business and Property Courts of England & Wales, 2017, *the Commercial Court Guide*, Tenth Edition, F1.9, p49).

[161] DIFCC Annual Review 2019, p43, available at https://www.difccourts.ae/2020/02/26/difc-courts-annual-review-2019/ accessed 10 September 2020.

[162] H.E. Omar Al Muhairi, Deputy Chief Justice, DIFCC, Annual Review 2019, p43, available at https://www.difccourts.ae/2020/02/26/difc-courts-annual-review-2019/ accessed 10 September 2020.

particular case. At SICC, for an offshore case[163], which has no substantial connection to Singapore, and on the application of parties who desire to maintain confidentiality, these special rules will be applied. These confidentiality orders include: "*(a) that the case be heard in camera; and (b) that no person must reveal or publish any information or document relating to the case*".[164] On the other hand, if one party wishes to have confidentiality, but the other does not, confidentiality will be extended until the court has disposed of the application. In such cases, the necessary redaction and safeguards will be taken. For example, SICC may give directions for the judgment not to be published for up to 10 years after the date of the judgment.[165] Disclosure of any information or document relating to the case is prohibited, and the court file will be sealed. This option is reflective of the position available in international arbitral proceedings. In the same fashion, DIFCC also allows all or part of a hearing to be in private, if:[166] Publicity would defeat the object of the hearing; It involves matters relating to national security; It involves confidential information and publicity would damage that confidentiality; A private hearing is necessary to protect the interests of any child or patient…or the Court considers this to be necessary, in the interests of justice.

[163] An "offshore-case" is an action that has 'no substantial connection with the seat of courts (the law of the country in which the courts located is not the law applicable to the disputes and the substantive dispute concerns commercial activities outside the territory).

[164] SICC, Rules of Court 2014, O110, R30(1), https://sso.agc.gov.sg/SL/SCJA1969-R5?ProvIds=PO110-#PO110- accessed 10 September 2020.

[165] Ibid, O110, RR 31(2)-(3).

[166] DIFCC Rules, 2016, Part 35.4, https://www.difccourts.ae/court-rules/part-35-miscellaneous-provisions-relating-to-hearings/ accessed 10 September 2020.

CHAPTER 5: PROPOSALS FOR FUTURE DEVELOPMENTS OF CONTRACT LAW

This Chapter provides some suggestions for the development of contract law in the future, not to a specific jurisdiction, but for the general development of contract law. When appropriate, some proposals will be given to a specific jurisdiction, particularly to Vietnam. The origins of these suggestions mainly derive from previous Chapters' contents, assessed and chosen on the basis of their useful aspects. This Chapter does not cover a comprehensive set of suggestions on law development, but it introduces some representative suggestions. Besides, it is not avoided that some suggestions seem general, due to the objective of proposing is not a specific jurisdiction.

Proposals are arranged in order from long-term and overall matters, such as legal education, the rule of law, to technical matters such as interpretation, databases of case law, contract design, technology, markets orientation, and to the final matter related to global dialogue and cooperation to secure a robust development under the trend of globalization. Suggestions are made by a constructing attitude, not to rank a jurisdiction superior or inferior. Their common purpose is to build a good legal infrastructure for international commerce.

1. Enhancing the Role of Legal Education

As noticed in previous chapters, enhancing the role of legal education is the first and foremost proposal resulting in the most sustainable development of law in the long-term future. Moreover, there have been at least two more persuasive reasons to set the task as a priority. Firstly, the

important role of business lawyers in creating value has been proved logically in recent research activities. Secondly, a better legal education not only benefits legal actors but business parties. We will examine these reasons in the following analysis.

In the first place, as to the role of business lawyers in creating value, it is found in two processes. Firstly, in deal-making, lawyers are regarded as "transaction-cost engineers" (Prof Gilson).[1] Their role is to reduce transaction costs caused by defects in real markets that contradict the perfect market's settings where the transaction cost is assumed insignificant or zero. This matter relates to contract theory. The relational contract requires higher transaction costs,[2] for example, costs used for searching information, matching parties to each other, etc. In contrast, the discrete contract takes place in a well-developed market structure,[3] almost everything is available for use, the transaction cost is minimal, even is zero. The role of lawyers in the relational contract is to make a new transactional governance structure, such as building a contractual setting, for transactions as if they were governed by that well-developed structure of the discrete contract.[4] The term "engineer" is in the meaning of "fixing the defects" of the real market by creating a new mechanism to secure an efficient operation of the business as if the market is perfect. Secondly, in dispute settlement (and other legal services), lawyers can create value in several ways, for example, by making the process of a negotiation less

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[1] Gilson, R.J (1984). *Value creation by business lawyers: Legal skills and asset pricing*. Yale Law Journal, 239.

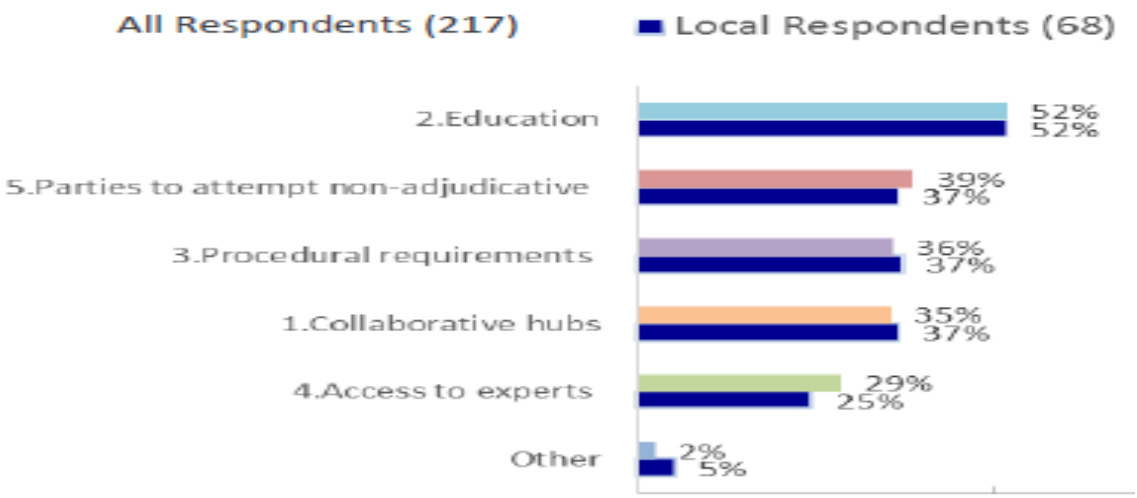
[2] Saito, A. (2008). *Legal Education for Value Creative Business Lawyers: A Multidisciplinary Perspective Towards Globalising Market Societies*. CDAMS (Centre for Legal Dynamics of Advanced Market Societies, Kobe University): Legal Dynamics Series, LexisNexis, p142.

[3] Ibid, p139.

[4] Ibid, p142.

time-consuming and costly,[5] reducing risks that parties may deceive each other, offering legal advice, representing clients in finalizing the dispute, etc. These functions of lawyers can be performed if they possess enough knowledge and skills. Legal education is one of the efficient means to furnish lawyers with knowledge and skills.

In the second place, legal education is necessary not only for legal actors but also for business parties. This is affirmed by the result of the "Survey of Global Pound Conference Series, Shaping the Future of Dispute Resolution and Improving Access to Justice". [6]

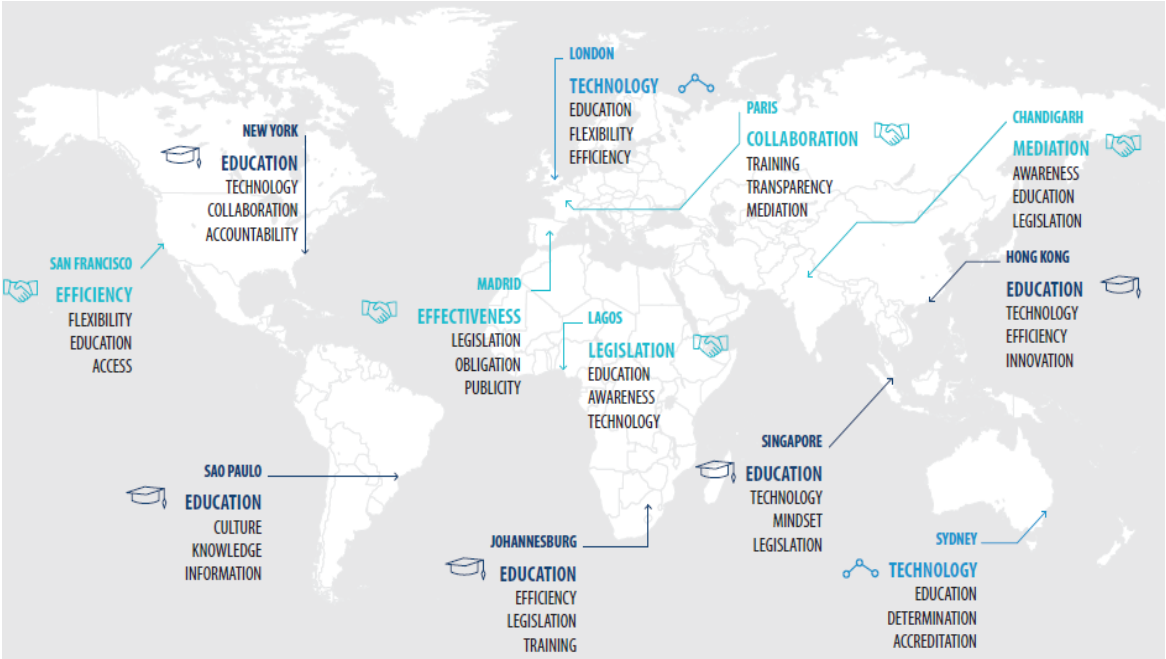


What is the most effective way to improve parties' understanding of their options for resolving commercial disputes?

[5] Robert H. Mnookin. (2000). *Beyond Winning: Negotiating to create value in deals and disputes*. Second printing. London & Massachusetts: The Belknap Press of Harvard University Press, p93-94.

[6] The Survey of Global Pound Conference Series, *Shaping the Future of Dispute Resolution and Improving Access to Justice,* [pdf], p94-95, available at https://www.imimediation.org/research/gpc/series-data-and-reports/, accessed 05 September 2020.

In addition, the "Survey of Global Pound Conference Series, Global Data Trends and Regional Differences (2017)" [7] also shows that education is a priority to focus on in the future of most regions in the world.



What words would you use to describe the changes to focus on in the future?

After recognizing the necessity of legal education, we are now going to explore some of its traits in the context of the diversity of legal traditions that have a strong influence [8] on legal education. The major difference between legal education in the civil law countries and common law countries is that civil law training tends to be general and interdisciplinary rather than professional in common law training.[9] Legal education in both systems draws its basic approach from the historical circumstances under

[7] The Survey of Global Pound Conference Series, Global Data Trends and Regional Differences (2017), [pdf], p27, available at https://www.imimediation.org/research/gpc/series-data-and-reports/ accessed 05 September 2020.

[8] Saito, A. (2008). *Legal Education for Value Creative Business Lawyers: A Multidisciplinary Perspective Towards Globalising Market Societies*. CDAMS (Centre for Legal Dynamics of Advanced Market Societies, Kobe University): Legal Dynamics Series, LexisNexis, p133.

[9] Glendon, M., Carozza, P., Picker, C. (2016). *Comparative Legal Traditions in a Nutshell. 4th Edition*. The USA: West Academic Publishing, p94.

which it developed. For example, in England, legal education from early times was in the hands of the bar. One the continental Europe, from the time of the Roman law revival, it was the province of the universities.[10] While an American law student typically spends the first days of law school reading cases, a student of civil law is provided at the outset with a systematic overview of the framework of the entire legal system.[11] However, these contrasts have been lessened in recent years. Both common law and civil law schools are seeking a better balance between theory and practice, making legal education less general and more professional in civil law schools and considering the case method only one of several useful devices in common law schools.[12] Another fact is that a common-law lawyer and a civil-law lawyer may, in important respects, be unfamiliar with the concepts and methods of each other, so they sometimes face difficulties in communicating with each other. This is because most of what trained in their education is only of one jurisdiction. Hence, recently many law schools have focused on delivering comparative law courses and creating a new environment by taking students to Vis Moot and other competitions for their exchanges of knowledge and skills from various jurisdictions. For example, the Willem C. Vis International Commercial Arbitration Moot [13] (started in Vienna in 1994) is a competition for law students to "foster the study of international commercial law and arbitration for resolution of international business disputes through its application to a concrete problem of a client and to train law leaders of

[10] Glendon, M., Carozza, P., Picker, C. (2016). *Comparative Legal Traditions in a Nutshell*. 4th Edition. The USA: West Academic Publishing, p94.

[11] Ibid, p95.

[12] Ibid, p96.

[13] Willem C. Vis International Commercial Arbitration Moot, https://vismoot.pace.edu/site/about-the-moot/willem-c-vis

tomorrow in methods of alternative dispute resolution".[14] Students from all countries are eligible (students from 84 countries participated in the 26th Vis Moot).[15] Developing a new educational environment[16] is important for law schools to train international lawyers. In the Graduate School of Law, Kobe University, Moot competitions form an integral part of curricula, and students have taken part in many international competitions. They join many Moot and Pre Moot competitions taking place in many countries, covering varied aspects of law, including investment law, comparative law, arbitration, mediation, litigation, FDI, etc. The competition of teams from civil law schools against common law schools in front of mixed common-civil-law arbitral panels helps students build complete knowledge and skills.

In a whole view, though mainly legal education is the task done in universities, bars, there are three "gatekeepers" to the legal profession that also influence legal education, they are government, educators, and market.[17] Firstly, government or state controls the number of legal professionals, for instance, the number of lawyers permitted to enter the legal profession annually, and the standard set forth for assessing the quality of qualified actors (lawyers, judges, law professors, prosecutors).[18] Secondly, educators[19] play a significant role in granting and denying access to the bar through granting or denying the entry of a law school or

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[14] Goal of the Moot, https://vismoot.pace.edu/site/about-the-moot

[15] About the Moot, https://vismoot.pace.edu/site/about-the-moot

[16] Saito, A. (2008). *Legal Education for Value Creative Business Lawyers: A Multidisciplinary Perspective Towards Globalising Market Societies.* CDAMS (Centre for Legal Dynamics of Advanced Market Societies, Kobe University): Legal Dynamics Series, LexisNexis, p134, footnote5.

[17] Steele, S., Taylor, K. (2010). *Legal Education in Asia-Globalization, change and contexts*. Routledge Law in Asia, p45.

[18] Ibid, p46-47.

[19] Ibid, p50.

law faculty, delivering lectures and law curricula to build up students' knowledge and skills. Thirdly, market or end-users of legal services[20] determine the number and quality requirements of lawyers, judges, prosecutors, and then law professors. Market is the major gatekeeper, even when other ones in three gatekeepers tend to loosen the standard or the quota of a lawyer, the market will refine the actual demand and the true accredited quality. For example, to an extent, this can be seen in the US, where any individual with funds and time to invest in their education can enter the profession.[21] Given a large number of law schools, anyone with aspirations can find a law school willing to accept them and pass the bar examination not too hard.[22] However, the major barrier to becoming a practicing lawyer remains to find employment or sufficient clients to support a practice.[23] As a result, graduates of less renowned law schools may be effectively locked out of practice by the operation of a very competitive labor market.[24] In addition, the market is also important in breathing practice into the theoretical environment of law schools,[25] by offering internship programs in law firms for law students and giving lectures given by practitioners.

We turn back to the aforementioned role of government or state for more details. From the above example, the minimalist state intervention over entry avoids distortion to the labor market, which effectively allows

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[20] Steele, S., Taylor, K. (2010). *Legal Education in Asia-Globalization, change and contexts*. Routledge Law in Asia, p48.

[21] Ibid, p49.

[22] Ibid.

[23] Ibid.

[24] Ibid.

[25] Ibid, p61.

fees to fall to an efficient equilibrium price.[26] It seems good. Nonetheless, in policy-making regarding legal education, especially in quantifying and qualifying, the government (and educators) should be aware of some unexpected consequences. The concept of "unanticipated consequences" was first introduced in 1936 by Robert K. Merton, an American sociologist.[27] To a certain extent, government or state should control the number of legal professionals and the standard set forth for assessing the quality of qualified actors because the profession may affect the public interest[28] and the judicial system, but should not control excessively. For example, one of the most serious problems in the Japanese legal education system before 2004 was the bar examination. The pass rate and the total number of successful candidates were intentionally kept at a low level (below 3 percent, and some 1200 successful candidates in 2003).[29] The bar examination had become an overly restrictive tool used to limit the number of new entrants to the legal profession because of the fear felt by the Ministry of Justice that an increase in the number of successful candidates would lower the quality of those who passed.[30] This policy resulted in a kind of memory-oriented study and an imbalance in law students' preparation for the examination. Students were trained to memorize the "right answers" to respective legal questions likely to be asked in the bar examination, stopping them from thinking about the legal problems.[31] Subjects not included in the bar examination, such as legal

[26] Steele, S., Taylor, K. (2010). *Legal Education in Asia-Globalization, change and contexts*. Routledge Law in Asia, p49.

[27] Ibid, p245.

[28] Ibid, p49.

[29] Ibid, p185.

[30] Ibid, p186.

[31] Ibid, p187.

thought, law, and sociology, were not taken seriously by most students.[32] This was not good for those who aspired to become an international lawyer whose understanding must cover a wide range of legal knowledge and skills. To change this fact, 68 new law schools were approved to be established in 2003,[33] and the pass rate intentionally was going to be higher to about 50 percent.[34] The bar examination passers had increased from only 500 people per year in the 1990s to 3000 people in 2010.[35] Many changes in law schools also happened. Almost all law schools set up "faculty development committees" in order to improve the teaching methods and skills of their professors.[36] Classes were made more interactive to encourage students to think independently and to develop analytical skills.[37] All law schools have employed practicing lawyers, legal staffs from large corporations and government officials as professors and lecturers.[38] Practical subjects such as drafting legal documents, legal clinics, internships, and negotiation also were offered. In addition, one important change was that all law schools were required to be reviewed by a qualified third-party evaluation organization every five years (such organizations approved by the Ministry of Education).[39] This evaluation makes law schools better with improvements suggested by third-party organizations and other law schools' experiences.

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[32] Steele, S., Taylor, K. (2010). *Legal Education in Asia-Globalization, change and contexts*. Routledge Law in Asia, p192.

[33] Ibid, p188.

[34] Ibid, p189.

[35] Ibid, p54.

[36] Ibid, p190.

[37] Ibid, p191.

[38] Ibid.

[39] Ibid, p194.

The certification of the accredited Graduate School of Law, Kobe University

As to the content of law curricula in most law schools, even in common law systems, it still seems to favor vindication skills rather than to furnish students with business deal-making skills, which create value for market societies.[40] Legal education, in general, has been made in a strongly litigation-centralized manner, both in the civil law and common law systems.[41] These curricula seem to be outdated with the cooperation in international economics and trading. Hence, law students today have to understand more about the importance of cooperation and successful deal-makings and have to be taught basic knowledge of economics,[42] because as future business lawyers, they have to play their roles as the promoters of global market societies.[43] Amongst many other skills, law students should be taught more about the negotiation skill (and some common psychological effects, such as *partisan perceptions,*[44] *judgmental*

[40] Saito, A. (2008). *Legal Education for Value Creative Business Lawyers: A Multidisciplinary Perspective Towards Globalising Market Societies*. CDAMS (Centre for Legal Dynamics of Advanced Market Societies, Kobe University): Legal Dynamics Series, LexisNexis, p131-132.

[41] Ibid, p135.

[42] Ibid, p132, footnote2.

[43] Ibid, p147.

[44] Robert H. Mnookin. (2000). *Beyond Winning: Negotiating to create value in deals and disputes*. Second printing. London & Massachusetts: The Belknap Press of Harvard University Press, p157.

overconfidence,[45] *loss aversion,*[46] *reactive devaluation,*[47] *etc.)*, problem-solving, legal analysis and reasoning, contract drafting, legal English, etc.

We should also pay attention to legal ethics in legal education at universities to build lawyers' characters and skills in making moral choices, even though the bar association usually has a code of conduct for legal professionals. Since one observation is that, students' views almost always stay the same as what they had been taught in law school, probably all through their lives.[48] At the same time, norms cannot help us reach an appropriate solution in every concrete situation.[49] They are sometimes outdated (even for a logical and systematic civil code, we often need it to be interpreted or be changed). It does not mean that codes of conduct are not functioning.[50] However, obeying the professional codes is not sufficient because it may prevent the right evaluation in certain circumstances (G.J.Rossouw).[51] A good lawyer should consider the purpose of the rule in every case,[52] needs not to lose sight of the legal profession's goal is to pursue justice, and to know how to make the right evaluation in real cases as a rational thinker. If we build a subject relating to ethics in law curricula, it would be a substantial change in training students to keep the professional ethics right from the time they study in universities. We can make a metaphor by comparing it with a letter

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[45] Ibid, p160.

[46] Ibid, p161.

[47] Ibid, p165.

[48] Saito, A. (2008). *Legal Education for Value Creative Business Lawyers: A Multidisciplinary Perspective Towards Globalising Market Societies.* CDAMS (Centre for Legal Dynamics of Advanced Market Societies, Kobe University): Legal Dynamics Series, LexisNexis, p131.

[49] Bustamante, T. and Onazi, O.(2012). *Global Harmony and the Rule of Law*. Germany: Franz Steiner Verlag, p53.

[50] Ibid, p59.

[51] Ibid.

[52] Ibid, p54.

alphabet for children in a kindergarten class. The course of legal ethics is fundamental, and it will play a growingly important role during the professional life of students who will become legal actors (lawyers, judges, prosecutors, etc.). Meanwhile, their professional lifespans are normally longer than those of other professions. The course of legal ethics, in my opinion, is worth considering not only some common ethical grounds excerpted from well-known codes of conduct but other sources and practices. It likes a pearl of summary wisdom and conscience of the legal profession, and with a hope that through the process of an accumulation from time to time, the course will be filled up with good instructions and ethical principles. Law has codes of conduct, and legal education has a course of legal ethics. Even the course is equivalent to one credit conferred to students, it will be regarded as a good basis for reminding their acts in the future.

Moreover, legal education should not stay within universities. Some other legal actors also need to be trained regularly, particularly persons working in court systems. Court staffs also have to take part in the most up-to-date training in responding to the rapidly changing environment. Through the training, weakness in skill and knowledge needs to be identified and rectified, and strength needs to be highlighted and built upon to strictly control the quality of court proceedings.

In Vietnam, as legal education was developed later[53] than in other developed countries, like Japan and the US, most of the matters introduced in the above analysis are useful for Vietnam to refer to. Amongst other matters, the author finds two apparent but significant

[53] Hanoi Law University, the oldest university in law education, was established in 1979, available at: https://hlu.edu.vn/News/Details/16481, accessed 20 November 2020.

points. Firstly, according to the Vietnamese Government's newest report,[54] the quality control in education at universities is the most significant shortcoming leading to the low quality of the education at the undergraduate level. In my opinion, the deployment of reviewing the education quality in universities in Japan by qualified third-party organizations is one of the models for Vietnam to refer. Moreover, as to the legal education environment in Vietnam, international activities of students such as taking part in Moot Competitions are still inactive and should be invested more to improve the capacity of law students. Of course, this depends partly on resources, but it should be considered for the increasing investment.

2. Strengthening the Rule of Law

Law creates a system for risk allocation, conflict resolution, and the distribution of gains and losses.[55] However, what is the rule of law? The rule of law is a flexible concept that can be defined in many ways and acquires a broad range of fields [56] (legal theory, law and jurisprudence, political philosophy, political science, international relations, sociology, and social theory). The rule of law aims to provide society with stable rules by which people can live, demanding that everyone follows and obeys the law. Development experts and international development donors, such as the World Bank and the Asian Development Bank, claim that the rule of

[54] Vietnam National Assembly's Meeting, broadcasted publicly, available at (in Vietnamese): https://www.youtube.com/watch?v=M9gKvp7SiME&feature=share&fbclid=IwAR0hg2w1UgpC2IqNjxhtzK_6KVhbOLRkzlIsImaDtsqjzewx9LSijyyGTsQ, accessed 20 November 2020.

[55] Lindsey, T. (2007). *Law Reform in Developing and Transitional States.* New York: Routledge, p116.

[56] Bustamante, T. and Onazi, O.(2012). *Global Harmony and the Rule of Law*. Germany: Franz Steiner Verlag, p34.

law is essential to economic growth and development.[57] Strengthening the rule of law is to develop the law, make it coherent and more accessible, and keep it up to date with changing practices and markets.

In the sense of developing the law, we will be exploring the reception of Western laws into the Japanese legal system as a typical process of reforming and creating a new code. Modern Japan began with the Meiji restoration.[58] At the time of the restoration, there was no legal profession in Japan.[59] There were no law schools, licensed lawyers, and no legal system similar to the Western model.[60] There was no idea that publication was essential to law.[61] Japan then decided to build a modern legal system, which at that time meant Western reception, in a short period of time while keeping its traditional roots and maintaining its national identity.[62] To achieve the aim of modernization, Japan looked for advice and guidance abroad. Japanese government chose two routes to create a new "Westernized" legal system: a) Western scholars were invited to Japan as advisors to the new government, and b) Japanese scholars were sent to the West to study Western legal systems.[63] The first choice needed to make was whether to adopt a common or civil law system.[64] The answer was to adopt a civil law system because of its relative ease [65] of

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[57] Lindsey, T. (2007). *Law Reform in Developing and Transitional States.* New York: Routledge, p106.

[58] Goodman, C. F. (2008). *The Rule of Law in Japan. Second Revised Edition*. The Netherlands: Kluwer Law International, p23.

[59] Ibid, p195.

[60] Ibid, p195.

[61] Hozumi, N. (1904). *Lectures on the New Japanese Civil Code*, p9, available at: https://app.box.com/s/oe7lv8echtiyoxizax2xm96o2214blqy, accessed 03 January 2021.

[62] Steele, S., Taylor, K. (2010). *Legal Education in Asia-Globalization, change and contexts*. Routledge Law in Asia, p90.

[63] Ibid, n 58, p21.

[64] Ibid, n 62.

[65] Glendon, M., Carozza, P., Picker, C. (2016). *Comparative Legal Traditions in a Nutshell*. 4th Edition. The USA: West Academic Publishing, p198.

transplantation. Unlike a common law regime based on precedents, a civil law system relies predominantly on codified laws that can be easily adapted to a country's needs.[66] Besides, Japanese scholars viewed Western codes as good vehicles to assert the new government's authority, as they appeared to control almost all conduct.[67] The reform was based on a broad comparative basis, and one of its results was the promulgation of the 1896 Japanese Civil Code. Amongst others, the 1804 French Civil Code and the 1900 German Civil Code were two major referent sources, but the 1896 Japanese Civil Code was not simply a "carbon copy" of them.[68] Along with the formation of the 1896 Japanese Civil Code, many law schools were opened. The first law faculty in Japan was established in the 1870s at the Imperial Tokyo University.[69] For purposes of this thesis, it is not necessary to detail the debate between French law schools-English law schools and then German law schools in Japan during the reception or to measure how much each Western Civil Codes had impacted the formation of the 1896 Japanese Civil Code.

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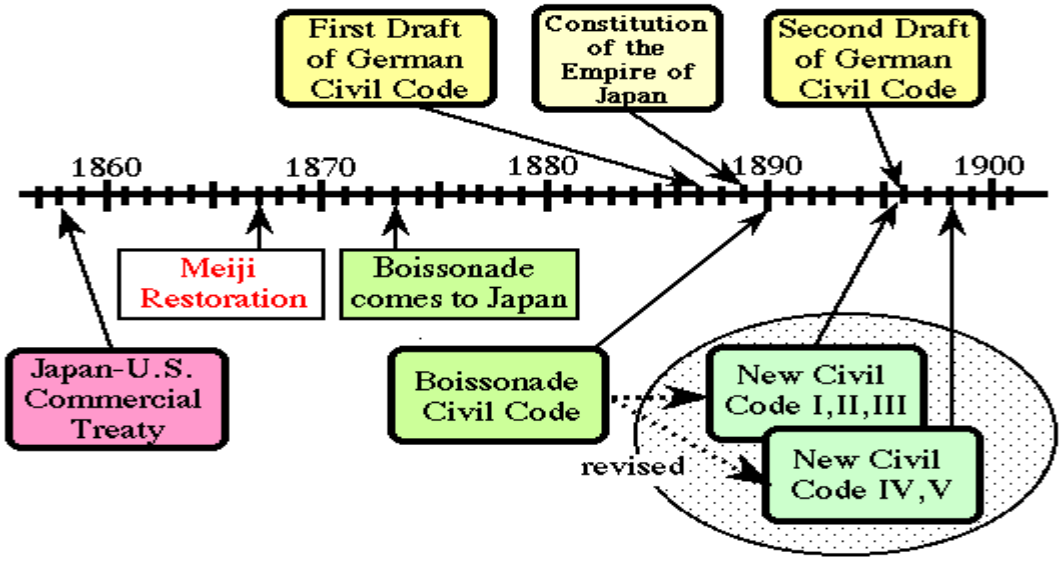
[66] Steele, S., Taylor, K. (2010). *Legal Education in Asia-Globalization, change and contexts*. Routledge Law in Asia, p90.

[67] Goodman, C. F. (2008). *The Rule of Law in Japan*. Second Revised Edition. The Netherlands: Kluwer Law International, p22.

[68] Ibid, n 66, p91.

[69] Ibid, n 67, p196.



History of the Civil Code of Japan [70]

Within just three decades, all the necessary legislative and judicial institutions had been successfully installed.[71] The impact of this process should be highlighted that the introduction of Western civilization had changed the Japanese legal system and passed Japanese Civil law from the Chinese Family to the Roman Family of law.[72]

In the sense of keeping the law coherent, clear-cut, and up-to-date, we will be examining some inappropriate points which need to be improved in Vietnamese law for other legal systems' references. Firstly, there are inconsistent terminologies regarding the "fundamental breach" concept between the 2015 Vietnam Civil Code and the 2005 Vietnam Commercial Code. The latter uses the term "substantial breach" according to Art 3 (13)

[70] History of the Civil Code of Japan and Comparison with the Uniform Law, available at: http://cyberlawschool.jp/kagayama/CivilLaw/Contract/ComparativeStudyOfContract/hist_c_civ.html, accessed 10 December 2020.

[71] Steele, S., Taylor, K. (2010). *Legal Education in Asia-Globalization, change and contexts*. Routledge Law in Asia, p90.

[72] Hozumi, N. (1904). Lectures on the New Japanese Civil Code, p9, available at: https://app.box.com/s/oe7lv8echtiyoxizax2xm96o2214blqy, accessed 03 January 2021.

(interpretation of terms):[73] "***Substantial breach*** *means a contractual breach by a party, which causes damage to the other party to an extent that the other party cannot achieve the purpose of the entry into the contract*" [emphasis added], meanwhile the former uses the term "serious violation", or "serious breach",[74] according to Art 423 (2) (cancellation of contracts): "***Serious violation*** *means the failure to fulfil obligations properly by a party leading the failure to achieve the purposes of entering into contract by the other party*" [emphasis added]; Art 423 (1b) (cancellation of contracts): "1. *A party has the right to cancel a contract and shall not be liable to compensate for damage in any of the following cases: b) The other party* ***seriously violates*** *the obligations in the contract*" [emphasis added]; Art 428 (1) (unilateral termination of performance of contracts): "*A party has the right to terminate unilaterally the performance of a contract without any compensation for damage when a party* ***violates*** *its obligations* ***seriously*** *if so agreed by the parties or so provided by law*" [emphasis added]; Art 516 (2) (rights of clients): "*Where a service provider commits a* ***serious breach*** *of its obligations, the client may terminate unilaterally performance of the contract and demand compensation for damage*" [emphasis added]; Art 545 (2) (rights of suppliers): "*Terminate unilaterally performance of the contract and demand compensation for damage if the processor commits a* ***serious breach*** *of the contract*" [emphasis added]. The existence of different terminologies in regulating the same matter causes difficulties and confusion to the law application. This issue should be amended to keep the law coherent, consistent, and clear-cut. **Secondly**, it is worth refining the definition of

[73] The 2005 Vietnam Commercial Code, available at https://vietnamlawenglish.blogspot.com/2005/06/vietnam-commercial-law-2005-law.html, accessed 15 December 2020.

[74] The 2015 Vietnam Civil Code, available at https://www.wipo.int/edocs/lexdocs/laws/en/vn/vn079en.pdf , accessed 24 Nov 2020.

"substantial breach" under Art 3 (13) (interpretation of terms), the 2005 Vietnam Commercial Code,[75] in order to remove the vague and abstract encumbrance: "*Substantial breach means a contractual breach by a party, which causes **damage** to the other party to an extent that the other party cannot achieve the **purpose of the entry into the contract***" [emphasis added], because we cannot exactly understand the true meaning of the Article without further references to Art 118 (objectives of civil transactions), the 2015 Vietnam Civil Code:[76] "*The objectives of a civil transaction are legitimate interests which the parties wish to achieve at the time when they enter into such transaction*" (to know what is the "***purpose of the entry into the contract"***), and Art 302 (2) (damages), the 2005 Vietnam Commercial Code:[77] "*The value of damages covers the value of the material and direct **loss** suffered by the aggrieved party due to the breach of the breaching party and the direct profit which the aggrieved party would have earned if such breach had not been committed"* (to know what is "damage", whether it includes expectation loss, whether the aggrieved party must actually be suffered loss). Referring to many other provisions within the code as well as to provisions of other codes makes the definition complicated and sometimes causes misunderstanding. In part 4.1, Chapter 4, we have studied the "fundamental breach" concept under Art 25 - CISG, and in part 4.2, Chapter 4, we have studied the "fundamental non-performance" concept under Art 7.3.1 (2) - PICC. Both CISG and PICC make their definitions more direct and clear to understand without additional references to other codes. Except for the foreseeability

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[75] The 2005 Vietnam Commercial Code, available at: https://vietnamlawenglish.blogspot.com/2005/06/vietnam-commercial-law-2005-law.html, accessed 15 December 2020.

[76] The 2015 Vietnam Civil Code, available at https://www.wipo.int/edocs/lexdocs/laws/en/vn/vn079en.pdf , accessed 24 Nov 2020.

[77] Ibid, n 75.

criterion, the "substantial breach" concept (in the 2005 Vietnam Commercial Code) appears to resemble the "fundamental breach" concept in CISG and the "fundamental non-performance" concept in PICC (one note at this point is that Vietnam uses Art 294 (cases of exemption from liability for breaching acts) [78] as a means to exclude cases in which the "substantial breach" is not foreseeable). Hence, based on these similarities, CISG and PICC can become referential sources for Vietnam in refining the "substantial breach" definition.

3. Facilitating the Consistent Application of Law

3.1 Enhancing the Role of Legislative Bodies in Interpretation

Words are not always understood as intended. Lawyers and academics play an important role in interpreting the law, but a legislative body's role is also important. This is a complex matter if it is generally discussed in different and unidentified jurisdictions, especially in a common law system, like the UK, or a civil law system, like Japan. It seems not to be a worthy matter for them. Therefore, to limit the sphere of discussion on this aspect, this section will dedicate to Vietnam legal system for easy detection. Among other functions, the aforementioned legislative body generally supervises the application of law, collects legal opinions, and provides official interpretations, particularly in case of non-consensus. In Vietnam, the National Assembly has the legislative power to enact the law. The Standing Committee of the National Assembly (SCNA) has the power to interpret the law according to Art 74 (2), Vietnam

[78] The 2005 Vietnam Commercial Code, available at: https://vietnamlawenglish.blogspot.com/2005/06/vietnam-commercial-law-2005-law.html, accessed 15 December 2020.

Constitution 2013.[79] Hence, this part would like to emphasize the interpreting role of such a body, like SCNA in Vietnam. Lawyers, academics still play their important roles because of their professional mission in daily continuing legal practice. However, the body can cooperate with them by supervising the judicial system's activities and facilitate them by performing their interpretation role. Normally, lawyers, academics interpret the law by themselves before courts or through academic writings. However, the legislative body has its own power and tools to facilitate the interpreting activities of legal actors by prompt responses to contesting issues or shortcomings in law or a new issue that is not regulated in existing laws (but related to the interpretation process). The legislative body's involvement also makes the law improved and advanced from time to time after recognizing the right opinions and correct interpretations. Briefly, the legislative body should actively perform its interpretation role instead of leaving it to lawyers and academics.

3.2 Building Easily Accessible Databases of Case Law

In part 5.2, Chapter 3, we have surfed some well-known case law databases relating to CISG and PICC. Building a good database of case law requires us to learn from them some creative experiences. The number of case law will increase from time to time, so the most important thing is to design a good multi-options searching mechanism to find out the exact case for use. For example, in Vietnam, the case law database seems very poor, just being a simple list of case law published on a website.[80] It lacks some advanced tools, especially for searching for case

[79] The Constitution of the Socialist Republic of Vietnam (2013), available at: https://sachsongngu.top/xem-online/luat-song-ngu/luat-khac-other-law/hien-phap-the-constitution-of-the-socialist-republic-of-viet-nam/, or https://vietnamlawmagazine.vn/the-2013-constitution-of-the-socialist-republic-of-vietnam-4847.html, accessed 15 December 2020.

[80] Vietnamese Precedents Website, https://anle.toaan.gov.vn/webcenter/portal/anle/home

law. At this point, we can refer to some good options from the databases of CISG and PICC, such as searching by word descriptor,[81] by article,[82] by date of decisions, name of the case or category of goods,[83] by court or type of contract involved.[84] Furthermore, it is useful to equip the database with an abstract of the decision [85] for each case. Making the database more easily accessible means providing users with more convenient utilities and that also means facilitating the consistent application of law.

In addition, there are some privately commercial-based companies providing case law databases, such as in Japan (Westlaw Japan,[86] LEX/DB Internet,[87] and LLI/DB Internet[88]), and privately commercial-based publishers providing law journals and reports concerning case-law reviews and collections, such as in Japan (判例時報,[89] 判例タイムズ,[90] ジュリスト,[91] 法律時報,[92] and 民商法雑[93]), in England (The Weekly Law Reports,[94] and All England Law Reports[95]). This is a new approach in providing access to case law databases and reviews that is still absent in Vietnam,

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[81] Searching by word descriptor, https://www.cisg.law.pace.edu/cisg/descriptors.html

[82] Searching by article, https://www.cisg.law.pace.edu/cisg/text/digest-cases-toc.html

[83] Searching by name of the case or category of goods, http://www.cisg-online.org/search-for-cases

[84] Searching by court or type of contract involved, http://www.unilex.info/instrument/principles

[85] For example, one abstract of decision can be found: https://www.uncitral.org/clout/clout/data/fra/clout_case_203_leg-1426.html

[86] Westlaw Japan, https://www.westlawjapan.com

[87] LEX/DB Internet, https://lex.lawlibrary.jp

[88] LLI/DB Internet, https://www.hanreihisho.com/hhi/

[89] 判例時報, https://hanreijiho.co.jp

[90] 判例タイムズ, https://www.hanta.co.jp

[91] ジュリスト, http://www.yuhikaku.co.jp/jurist

[92] 法律時報, https://www.nippyo.co.jp/dj/

[93] 民商法雑, https://www.fujisan.co.jp/product/2612/

[94] The Weekly Law Reports, https://www.iclr.co.uk/browse/26

[95] All England Law Reports, https://www.lexisnexis.co.uk/products/all-england-law-reports.html

where the government holds the unique authority in publishing case law on its website. This approach resembles the approach in the PPP mechanism (Public-Private Partnership) in the field of investment that has been deployed in most economies. It is strongly suggested for Vietnam to consider applying this new approach so as to increase access to case law databases and reviews.

4. Contracts Design

4.1 Modularity of Contract Formation

Many business contracts consist of modules of terms such as warranties, termination rights, indemnification, dispute resolution, etc., that have applicability across a wide range of transaction types. Of course, they are modular to some degree. However, even a modest degree of modularity enables the automation of contract production and promotes standardization of terms.[96]

In fact, lawyers typically reuse contract provisions from previous transactions and standardize for different types of transactions. This tradition makes modularity practical and useful. The modularity of contracts enhances collaboration in contract design. The collaboration reduces the cost of generating the contract by avoiding the duplication of effort, and thereby reduces transaction costs. Moreover, modularity makes the contract easier for the non-drafting party to read and understand, lowers the time and money spent on lawyering transactions. For example, model clauses for the use of the UNIDROIT Principles of international

[96] George G. Triantis (2013). *Improving Contract Quality: Modularity, Technology, and Innovation in Contract Design*. Stanford Journal of Law, Business & Finance, 18 Stan. J.L. Bus. & Fin. 177, p3.

commercial contracts,[97] drafting CISG contracts and documents, and compliance tips for traders-guide for managers and counsel,[98] Designing Buildings Wiki (for construction contracts: contract/payment,[99] traditional contract,[100] management contract[101]), all these produce modules rather than entire contracts, provide model clauses for making a business contract. The use of modularity is encouraged because of its advantage, but it never can replace lawyers' expertise, particularly in complex contracts.

4.2 Model Contracts

Besides modularity or model clauses for contract making, there are model contracts that are more complete, prepared by international agencies such as the ICC (International Chamber of Commerce)[102] and the ITC (International Trade Centre).[103] These model contracts cover a wide range of key trade activities (sale of goods, distribution, agency, franchising…). In the case of sales, ICC's model contracts are to complement the international legislation of CISG,[104] but users must pay a

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[97] Model Clauses for the Use of the Unidroit Principles of International Commercial Contracts, available at http://www.unilex.info/principles/modelclauses, accessed 15 December 2020.

[98] Drafting CISG Contracts and Documents, available at https://www.cisg.law.pace.edu/cisg/contracts.html#a77, accessed 15 December 2020.

[99] Designing Buildings Wiki, available at https://www.designingbuildings.co.uk/wiki/Category:Contracts_/_payment, accessed 15 December 2020.

[100] Designing Buildings Wiki, available at https://www.designingbuildings.co.uk/wiki/Traditional_contract:_outline_work_plan, accessed 15 December 2020.

[101] Ibid.

[102] ICC Model Contracts & Clauses, available at https://iccwbo.org/resources-for-business/model-contracts-clauses/, accessed 15 December 2020.

[103] About International Trade Centre, https://www.intracen.org/itc/about/

[104] Van Houtte, H. (2003). *ICC Model Contracts*. International Business Law Journal, 2003(3), 253-268, p254.

fee for a download. Meanwhile, ITC's model contracts are for most small firms[105] and free for download.[106]

The availability of model contracts is further facilitation to the contract drafting process, thereby makes contract law more accessible. These model contracts have persuasive reasons to exist, especially for new users and small firms who have not many resources to hire lawyering services at all stages of contract drafting. They should be developed more widely.

5. Some Further Suggestions

5.1 Increasing the International Convergence

The international convergence discussed here is on two aspects, substantive law and procedural law of contract. Contract law in different jurisdictions looks like a colorful patchwork. The divergence of contract law in different judicial systems makes businesses face extra costs and greater uncertainty when litigating in a foreign jurisdiction.[107] Furthermore, the international convergence would enable parties and lawyers to be confident that courts in different jurisdictions have a fair and readily understandable basic common procedure and that, when enforcement of a judgment is sought in another state, the court considering enforcement can be confident that the judgment has been rendered in familiar procedures. These pose a need to promote convergence on an international level.

On the aspect of substantive law, although contracting parties are free to choose which law will apply, and contractual provisions are based on

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[105] ITC Model Contracts, available at https://www.intracen.org/itc/exporters/model-contracts/, accessed 15 December 2020.

[106] ITC Model Contracts for Small Firms, available at https://www.intracen.org/model-contracts-for-small-firms/, accessed 15 December 2020.

[107] Thomas, J. L. (2016). (Lord Chief Justice of England and Wales). *Cutting the Cloth to Fit the Dispute: Steps Towards Better Procedures Across the Jurisdictions*. [pdf]. Singapore Academy of Law, p4, ¶5, available at https://www.judiciary.uk/wp-content/uploads/2016/10/lcj-speech-singapore-academy-of-law.pdf, accessed 20 August 2020.

parties' agreements, CISG and PICC have a certain impact on the process of promoting international convergence through the basis of widely international comparisons (in their forming method), proposing solutions for harmonization of contract law in international commerce between different jurisdictions. The application of CISG and PICC lessens the contrast between national substantive laws related to international business. Therefore, the wide adoption of these instruments means the increase in international convergence of contract law (besides, there are also other regional attempts.[108] However, it is satisfactory to use the two aforementioned international instruments to harmonize and increase the international convergence).

On the aspect of procedures, which always has a tendency towards ossification,[109] there is an increasing need for national procedural systems to be brought closer together. The idea of minimizing differences between national procedural systems and promoting fairness in judicial proceedings for civil disputes is not new.[110] It was developed by the American Law Institute (ALI) and UNIDROIT from 1997 to 2004 (Professor Geoffrey Hazard was one of the Rapporteurs). It resulted in the ALI/UNIDROIT Principles of Transnational Civil Procedure.[111] The Principles create a set of procedural rules that would be adopted globally. As recognized standards of civil justice, this work can be used in judicial proceedings and

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[108] The European Parliament had already requested to draw up a European Code of Private Law, but they have still made no real progress (according to: Kötz, H. (2017). *European Contract Law.* 2nd Edition. Oxford: Oxford University Press, p1). In addition, they built Common European Sales Law (CESL) in 2011, but this was withdrawn in 2014.

[109] Thomas, J. L. (2016). (Lord Chief Justice of England and Wales). *Cutting the Cloth to Fit the Dispute: Steps Towards Better Procedures Across the Jurisdictions.* [pdf]. Singapore Academy of Law, p2, ¶3, available at https://www.judiciary.uk/wp-content/uploads/2016/10/lcj-speech-singapore-academy-of-law.pdf, accessed 20 August 2020.

[110] Ibid, p11, ¶34.

[111] ALI / UNIDROIT Principles of Transnational Civil Procedure, available at: https://www.unidroit.org/instruments/civil-procedure/ali-unidroit-principles, accessed 25 December 2020.

arbitration. It is a significant contribution to the promotion of a universal rule of procedural law.[112] The European Law Institute (ELI) also cooperated with UNIDROIT to develop a joint project on the development of European rules of civil procedure (resulted in ELI/UNIDROIT Rules,[113] which was approved in September 2020), adapting the ALI/UNIDROIT Principles to the specificities of regional legal cultures. If countries refer to and apply these Principles, the convergence of civil procedures across the world will be increased.

5.2 Keeping pace Legal Profession with Technological Advancement and Economic Markets

The development of law is conditioned on its ability to meet the demand of economic markets. To achieve this target, the legal profession needs to be kept pace with technological advancement, and its services must adapt to practical changes in markets. In doing so, there have been many different ways, for example, digitalizing legal processes and procedures in the most effective manner as introduced in part 3.4 of Chapter 4 (with e-filling, e-hearings, Court Tech Lab), training personnel regularly with technological changes. Furthermore, they created practical links between judges and business markets at some courts, such as in England, France, and Dubai. In England, senior members of the judiciary, and particularly the judges of the Commercial Court and the Financial List, are provided with regular and well-informed updates on changing market practices and the development of new financial products through the

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[112] Transnational Civil Procedure, available at: https://www.ali.org/publications/show/transnational-civil-procedure/, accessed 25 December 2020.

[113] ELI / UNIDROIT Rules, available at: https://www.unidroit.org/cp-eli-unidroit-overview, accessed 25 December 2020.

Financial Markets Law Committee [114] (an independent body originally established by the Bank of England). In France, judges of the commercial court in Paris, for first instance hearings, are elected from the business community based on their commercial expertise (CEOs, CFOs, GCs,[115] accountants, engineers, etc.).[116] In Dubai, they set up the Courts' Users' Committee at DIFCC to listen to users' complaints and advice (as introduced in part 3.2 of Chapter 4 above). These are very open and wise policies to catch more opportunities to put new elements of expertise into the closed boundary of the legal profession that inherently has to deal with different types of transactions in complex real markets. Not every jurisdiction has the same approach. Different jurisdictions have different approaches and policies. They choose one for their own justifiable reasons, but keeping abreast of technological advancement and economic markets should be on their must-do list.

On this aspect, it is strongly suggested for Vietnam International Arbitration Center (VIAC),[117] and Vietnam Mediation Center (VMC),[118] to provide services for online mediation, e-filling, e-hearings, joint hearings, and other technical support (they are still not available at present, except for only a tag on the menu of the website [119] with nothing in content). The current fashion seems to be too classical to the modern legal industry, especially for dispute resolution and the use of international parties.

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[114] Financial Markets Law Committee: http://www.fmlc.org/

[115] Chief Executive Officer, Chief Financial Officer, General Coordinator.

[116] Paris City of Law. Paris Commercial Court. *Efficient, predictable and accessible like no other. Interesting Facts about The Paris Commercial Court*, p1, available at: https://app.box.com/s/hedi7dfg2yv90xey42q4m8hp7mf8c1z3, accessed 25 December 2020.

[117] Vietnam International Arbitration Center, https://www.viac.vn/en, accessed 29 December 2020.

[118] Vietnam Mediation Center, https://www.vmc.org.vn/en, accessed 29 December 2020.

[119] Online Mediation Rules, still does not exist, https://www.vmc.org.vn/en/online-mediation-rules, accessed 29 December 2020.

5.3 Global Dialogue and Cooperation

The movement towards harmonization of contract law had been hampered by a lack of understanding of, and misunderstandings about, fundamental concepts due to insufficient knowledge of such concepts found in the various legal systems.[120] Collaboration is regarded as enhancing knowledge-sharing. It will provide a greater impetus to pursue the harmonization of substantive commercial laws, practices, and ethics.[121] Moreover, in the context of the rise of connective technology, the integration of global markets, the legal profession cannot stand out from that trend. It is good to consider expanding the global dialogue and cooperation.

The global dialogue and cooperation can happen under several forms, such as deciding a specific point of law, making and maintaining agreements, memoranda, guidance, and building international fora. First of all, we observe the influence of several common law jurisdictions on each other in deciding particular points of law. English judges sometimes consider a case law of other jurisdictions in order to assist them to decide a particular point of law, either where there is a lack of English case law on the point or where another jurisdiction has made relevant (and often recent) developments which it might be thought that English law should follow.[122] Also, there has been a growing tendency in recent years for English judges to consider the law in European civil law jurisdictions. Nevertheless, English courts look across the major common law jurisdictions, particularly Australia, Canada, and New Zealand.[123] Similarly,

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[120] Harris, D., Tallon, D. (1989). *Contract Law Today.* Oxford: Clarendon Press, p1.

[121] Menon, S. (Chief Justice of the Supreme Court of Singapore). (2015). *International Commercial Courts: Towards a Transnational System of Dispute Resolution*. Opening Lecture for the DIFC Courts Lecture Series 2015, ¶67 (d).

[122] Cartwright, J. (2013). *Contract Law - An Introduction to the English Law of Contract for the Civil Lawyer*. Second Edition. Oxford and Portland, Oregon: Hart Publishing, p11.

[123] Ibid.

courts of these jurisdictions still look to English case law in coming to their own decisions. There have been some other extensions of collaboration in deciding a specific point of law, such as using video-conferences for joint hearings to hold simultaneously proceedings in two courts in a virtual courtroom.[124] In the second place, in making and maintaining agreements, memoranda, guidances at three levels (global, regional, individual level), we have found this form obvious in part 2 of Chapter 4. Thirdly, in building international fora, along with various memoranda of understanding and guidance, we see some fora established recently such as SIFoCC [125] (Standing International Forum of Commercial Courts, initiated by the Lord Chief Justice of England & Wales, Mr. Lord Thomas),[126] and JIN (Judicial Insolvency Network).[127] As to SIFoCC, this forum aims to increase the quality of dispute resolution services provided to the international business community through fostering and sharing of best practices and experiences (the main works of the forum are: to commence work on a multilateral memorandum for enforcement of judgments; to establish a working party to improve efficiency in litigation; to establish a structure for the exchange of judges so that they could spend time in each other's courts and better understand each other's practices; to consider issues such as practical arrangements for liaison with other bodies, including arbitral bodies, to resolve areas of difficulties). The Supreme Court of Japan is already a member of SIFoCC [128] (but Vietnam still stands out, it should consider joining soon). As to JIN, this network of insolvency worldwide judges focuses on developing best practices, providing judicial

[124] Thomas, J. L. (Lord Chief Justice of England and Wales). (2016). *Commercial Justice in the Global Village: the Role of Commercial Courts*. DIFCC Academy of Law Lecture, Dubai, ¶37, p38.

[125] SIFoCC, https://sifocc.org/, accessed 25 December 2020.

[126] Business and Property Courts the Commercial Court Report 2018-2019, p27, available at: https://www.judiciary.uk/wp-content/uploads/2020/02/6.6318_Commercial-Courts-Annual-Report_WEB1.pdf, accessed 25 December 2020.

[127] Judicial Insolvency Network, about us: http://jin-global.org/about-us.html, accessed 25 December 2020.

[128] Member courts of SIFoCC, https://sifocc.org/countries/#J, accessed 25 December 2020.

thought leadership, and facilitating communication and cooperation among national courts to resolve cross-border insolvency matters.[129] In October 2016, the inaugural meeting of the network in Singapore saw the development of a set of guidelines - the JIN Guidelines [130] (the Guidelines for Communication and Cooperation between Courts in Cross-Border Insolvency Matters) - which provide a common framework for inter-court communications and cooperation in cross-border insolvency matters on a global level, even to the extent of holding joint hearings and the issuance of joint decisions. The network has judges from the United States of America, Singapore, England and Wales, Canada, Australia, Japan, South Korea, Hong Kong, Brazil, Argentina, Bermuda, the British Virgin Islands, and the Cayman Islands.[131] The JIN Guidelines received the "Most Important Overall Development" award presented by the Global Restructuring Review (GRR) at the 2017 GRR Award ceremony held in June 2017.[132] It is expected that a number of other jurisdictions will adopt the Guidelines shortly to promote judicial cooperation. Vietnam also should join the network and adopt the Guidelines.

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[129] Judicial Insolvency Network, about us: http://jin-global.org/about-us.html#, accessed 25 December 2020.

[130] JIN Guidelines, available at: http://jin-global.org/jin-guidelines.html, accessed 25 December 2020.

[131] Members and Observers of the Judicial Insolvency Network, available at: http://jin-global.org/about-us.html, accessed 25 December 2020.

[132] JIN Guidelines, available at: http://jin-global.org/jin-guidelines.html, accessed 25 December 2020.

CONCLUSION

In conclusion, we have seen the development of contract law, which was necessary to meet market economies' needs. However, we cannot pretend that our study has discovered all relevant matters or satisfied all the curiosity on contract law. Our findings are partial and provisional, found in some snapshots of the development, especially when international contract law is still changing.

Contract law, viewed as an institution, has witnessed the influence of the past, and it correlates closely to economic doctrines, transnational commerce, global cooperation, and especially the advancement of technologies. Legal tradition and comparative law still keep important positions in the development of contract law in the future. The exchange between traditions will be greater to set up better legal mechanisms and frameworks to protect parties' interests in contractual relations. Although having other instruments, like PECL, CISG and PICC still play vital roles in harmonizing differences among jurisdictions. Besides, the dynamism in dispute resolution is partly a direct result of the development of contract law. In return, it is a practical impetus to speed up the development of contract law in a more efficient and pragmatic direction. It is a two-way effect. The emergence of legal services outside of traditional courtrooms, such as the establishment of international commercial courts, ODR, technologies-based proceedings, along with the increasing potency of recognition and enforcement, will create a smooth and more nuanced operation in each judiciary, international contract law, and international business. The practice in dispute resolution also shows that the legal profession has caught up with technological advancement in utilizing technical solutions for legal activities. A specific jurisdiction can also learn

experiences from the development of contract law for building their own legal system.

We may agree that international private law will become more convergent on both substance and procedures. There is much still to be done, but it will make the future of contract law brighter. In the final sentence, it might be acceptable to say that the most important part in the evolution of contract law is played by human resources (judges, lawyers, academics, legislators). Contract law will make great strides if it is served by excellent personnel.

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