

**TOWARDS A EUROPEAN *IUS COMMUNE* –
WHAT LESSONS CAN WE LEARN FROM
QUEBEC’S MIXED LEGAL SYSTEM?**

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August 2004

A thesis submitted to McGill University in partial fulfilment of
the requirements of the degree of Master of Laws (LL.M.)

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ISBN: 0-494-12687-6

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ISBN: 0-494-12687-6

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ACKNOWLEDGEMENTS

I wish, first and foremost, to express my sincere gratitude to my supervisor Professor Rosalie Jukier (McGill University). I am very appreciative of her for having undertaken the painstaking task of correcting my language, but most of all I am grateful to her for her enthusiasm and passion for law. It has inspired me in so many ways and it truly made me enjoy working on this thesis, to which she has been committed from the very beginning till the end.

I am also very appreciative of Professor Madeleine Cantin Cumyn (McGill University) for having shared her legal scholarship on Quebec trust law with me..

Furthermore I am grateful to the VSB Foundation, the Department of Foreign Affairs and International Trade of Canada and the International Council for Canadian Studies in Ottawa for providing generous financial support to study at McGill University.

I also wish to thank my family for having supported me morally and financially to pursue my studies in law at McGill University.

A special thanks go to Marc-André who has been a prop and stay to me ever since we met, but especially during this academic year here in Montreal.

Last but not least I would like to thank my friends Betty, Julien and Loubna for their great support and distraction.

ABSTRACTS

We are witness today, within a context of an increasingly integrated European Union, to the making of a new common legal order which is that of the European Community. This new *ius commune Europaeum* will have to be based on legal foundations that can be adhered to by all member states. In this perspective, it is indispensable to investigate whether domestic legal systems of the member states are able to adopt legal concepts of other member states without undermining their cohesive natures. Only then will it be possible to build the emerging *ius commune* on a conceptual legal framework, which is not to be perceived as a *Fremdkörper* in the participating states. The present thesis analyzes how Quebec's civilian jurisdiction adopted the common law concepts of the trust and unconscionability, in order to answer the question whether, and if so how, European civil law jurisdictions may adopt common legal concepts and yet remain cohesive.

Nous sommes aujourd'hui témoins, dans le cadre d'une Union Européenne de plus en plus intégrée, de l'élaboration d'un nouvel ordre juridique commun qui est celui de la Communauté Européenne. Ce nouvel *ius commune Europaeum* se devra d'être basé sur des fondations juridiques qui pourront être adoptées par tous les états membres. Dans cette perspective, il est primordial d'examiner si les systèmes juridiques domestiques des états membres peuvent adopter des concepts juridiques d'autres états membres et rester pourtant des systèmes cohérents. Ce n'est que dans ces circonstances qu'il sera possible de construire l'émergente *ius commune* sur un cadre juridique conceptuel, qui ne va pas être perçu comme un *Fremdkörper* dans les états participants. La présente thèse analyse comment la juridiction civiliste a adopté les concepts de *common law* du *trust* et de *unconscionability* afin de comprendre si, et si oui comment, les juridictions européennes de droit civil peuvent adopter des concepts juridiques de *common law* et tout en demeurant cohérentes.

TABLE OF CONTENTS

<i>Acknowledgements</i>	ii
<i>Abstracts</i>	
<i>Table of contents</i>	
Introduction	1
Chapter 1 Towards a common European private law	8
1.1 Why develop a European private law?	8
1.2 Current methods of creating a European private law	15
1.2.1 Centralist methods and issues of competence	15
1.2.2 Non-centralist methods towards a <i>ius commune</i>	21
1.3 The feasibility of a single European private law	24
Chapter 2 Québec's mixed legal system analyzed	28
2.1 Civil law and common law: the distinguishing features	29
2.1.1 Distinguishing features of the civil law tradition	30
2.1.2 Distinguishing features of the common law tradition	33
2.2 The civil law and common law tradition : a comparison	37
2.3 Mixed legal systems	39
2.3.1 The institutional framework	39
2.3.2 The creation of mixed jurisdictions and their characteristics	41
2.4 Québec's <i>mixité</i>	43
2.4.1 The founding of Québec's legal system	43
2.4.2 Codification of the civil law	44
2.4.3 Québec's new Civil Code (1994)	45
2.4.4 The Supreme Court of Canada and its attitude regarding bijuralism	47
2.4.5 Québec, a mixed legal system	49
2.4.6 The future of Québec's mixed legal system	51

Chapter 3	The concept of the trust	54
3.1	Introduction	54
3.2.	The common law trust and the obstacles to its replication in the civil law	57
3.2.1	Characteristics of the Anglo-American trust	57
3.2.2	Obstacles to fiduciary institutions in the civil law	60
3.3	The Québec trust.....	64
3.3.1	Introduction	64
3.3.2	The old Québec trust	65
3.3.3	The new Québec trust: the trust as a <i>patrimoine d'affectation</i>	67
3.1.3.1	The legal framework	67
3.1.3.2	The juridical regime	69
3.4	Evaluation	74
Chapter 4	The concept of lesion	77
4.1.	Introduction	77
4.2.	Historical background	81
4.3.	The common law concepts duress, undue influence and unconscionability	84
4.4.	Towards flexibility in the area of lesion	86
4.4.1.	The position of the Civil Code Revision Office	86
4.4.2.	Governmental propositions	87
4.5.	The different type of mixed lesion and the judicial interpretation thereof	91
4.6.	Evaluation	95
Conclusion		101
Bibliography		I
Primary Materials.....		I
Secondary Materials and Other Sources		IX

Voor mijn ouders met dank

INTRODUCTION

Today we witness, within the context of an increasingly integrated European Union,¹ the making of a new common legal order, which is that of the European Community.² This common legal order however, is only new to a limited extent. In his magnum opus *The Law of Obligations. Roman Foundations of the Civilian Tradition*, Professor Zimmermann points out that, due to the far-reaching impact of the civilisatory process of the Renaissance in the 12th century, the countries of Western and Central Europe had a common law and a common legal science.³ As to the place of the English common law in this context he noted that both legal systems, the European *ius commune* and the English common law, were, viewed their methodological approach and framework, not so different from each other.⁴ On the one hand the continental *ius commune* of the 16th, 17th and 18th centuries displayed many typical English features, and on the other hand, England was in connection with continental legal culture.⁵

So it is noted that the member states that had a common past before, have thus now chosen to have a common future as well. This meeting of the future with the past is highly

¹ The European Union [hereinafter: EU] was created by the *Treaty Establishing the European Union*, 7 February 1992, [1992] O.J. C 191/1 31, I.L.M. 253 (entered into force 1 November 1993) [hereinafter: Maastricht Treaty]. The treaty of Maastricht introduced the so-called "pillarstructure" (articles 1-6 and 46-53). The first pillar, the most important one because it is based on supranational competences, comprises the arrangements set out in 1) the European Coal and Steel Community, 2) the European Economic Community (which was changed by the Maastricht Treaty in the European Community) and 3) the European Atomic Energy Community. The other two pillars are based on cooperation among the governments; the second pillar comprises of a common foreign and security policy and the third pillar refers to police and judicial cooperation in criminal matters. With the *Treaty of Amsterdam*, 2 October 1997, O.J. C. 340/1, 37 I.L.M. 56 (entered into force 1 May 1999) the judicial cooperation in civil matters has been inserted in the Treaty of Rome and thus became to the legislative competence of the EC. More extensively on the latter issue see e.g. P. Craig and G. de Búrca, *EU Law, text cases and materials* (Oxford: Oxford University Press, 2002) 29-41.

² See more extensively on the European Community [hereinafter: EC] and its place within the EU *supra* note 1.

³ R. Zimmermann, *The law of obligations. Roman foundations of the civilian tradition* (Oxford: Clarendon Press, 1996) at IX of the Preface.

⁴ *Ibid.* at XI of the Preface.

⁵ *Ibid.*

challenging for legal practitioners, legislators and academics whose task it will be to establish this newly emerging *ius commune Europaeum* on legal foundations, or as Van Gerven stated it:⁶ "To uncover the legal foundations and to adapt them to the situation of an economically and politically integrated Europe that is the mission, and the challenge, to which new generations of lawyers should dedicate themselves." This task is the interesting challenge facing those involved in all layers of the legal profession in Europe and beyond.

The process of convergence of legal systems is not only a European phenomenon. Over the last decade, fashionable expressions such as globalization, internationalization, harmonization, and unification reflect similar tendencies all over the world.⁷ The mutual interdependence of various legal systems, and their influence on each other, are obviously growing, and the impact of international or transnational legal instruments is becoming ever stronger. Within the EU however, still more far-reaching processes of this kind are being advocated and are taking place. Here, "Europeanisation" of law is the catchword. As private law forms the basis of many of the great national legal cultures in Europe, the issue of the "Europeanisation" of private law has been the focus of much attention.

⁶ See W. van Gerven, "A common law for Europe: The future meeting the past" (2001) 4 E.R.P.L. 489.

⁷ The term convergence is often used, but then in a general way and not specifically linked to Community or Union law, to refer to the coming together of legal systems, concepts, principles or norms. The European debate however, is mainly characterized by reference to the terms "harmonization" and "unification". These terms however, are far from clear. In the original version of the EEC Treaty (see *supra* note 4) the concept of "harmonization" only occurred in one provision in relation to indirect taxes. With regard to other matters, the term "approximation" was used dealing with the elimination of distortions of the conditions of competition in member state laws, regulations or decisions. For these other matters, the term "harmonization" was introduced by the Single European Act (*infra* note 57) in article 95 (4) and (5) EC Treaty. From the wording of article 95 (1) EC Treaty it is clear that "harmonization" refers to Community law "measures for the approximation of the provisions laid down by law, regulation or administrative provisions of the member states as *directly affect* the establishment or functioning of the common market". Approximation and harmonization of laws are thus used in the EC Treaty as synonyms. Since, under article 95 (1) EC Treaty, approximation can also be effected through regulations, the terms approximation and harmonization in fact also encompass unification of national law. Directives namely are, according to article 249 paragraph 3 EC Treaty, only binding as to the result to be achieved and leave to the national authorities the choice of form and methods to implement the directive. Unlike regulations which are binding in their entirety and directly applicable in all Member States (article 249 paragraph 2 EC Treaty). Nevertheless, harmonization is mainly used in connections with directives which, unlike regulations, are not intended to unify national laws. See also § 1.2.1 below.

So far, the desire to achieve a European private law has resulted in an avalanche of scholarly publications,⁸ a dozen or so new journals, strong political stands by the various national and international organs, and texts which are intended to serve as a first step towards a modern European *ius commune* of private law. It thus cannot be contested that the process of "Europeanisation" of private law is very much a topical theme. And although this theme is no longer very new, it has, since the Tampere European Council⁹ developed a new dynamic which recently, with the issuance of the European Commission's Action plan on a "more coherent European contract law", was given more shape.¹⁰ This Action plan builds upon the reactions invoked by the Commission's Communication on European contract law of two years earlier.¹¹ This Communication launched a process of consultation and discussion regarding the way in which problems resulting from divergences between national contract laws in the EU should be dealt with at a European level.

The Commission's Communication of 2001 and its Action plan of 2003 are part of an ongoing process of European integration that has engaged a steadily growing number of states since the early 1950s.¹² The result of this process is that now a large body of uniform European legislation - to be found in treaties, regulations, directives, national laws and national and European court judgments - has come into existence. However, the legislation and the accompanying case law remain limited in scope as it affects only those areas of the

⁸ For an overview see e.g. E. Hondius, "General Introduction" in A.S. Hartkamp *et al.*, eds., *Towards a European civil code* (Nijmegen: Ars Aequi Libri, 2004) 3; C. Schmid, "The emergence of a transnational legal science in European private law" (1999) 19 *Oxford J. legal Stud.* 673; J. Smits, *The making of European private law* (Antwerp: Intersentia, 2002).

⁹ The Tampere summit was held on 15 and 16 October 1999. In the Presidency Conclusions of that Council "an overall study on the need to approximate Member State's legislation in civil matters in order to eliminate obstacles to the good functioning of civil proceedings" was summoned. European Council, S.I., 800/SN 200/99, *Presidency Conclusions of Tampere European Council* (1999) at 39 under VII.

¹⁰ See EC, *Communication from the Commission to the European Parliament and the Council, A more coherent European contract law: an Action plan*, No. 68 [2003] O.J.C. 63 [hereinafter: Action plan].

¹¹ See EC, *Communication from the Commission to the European Parliament and the Council on European contract law*, No. 398 [2001] O.J.C. 255 [hereinafter: 2001 Communication]. See for further discussion of the Action plan and the 2001 Communication § 1.3. below.

¹² The process started with six member states and now involves 25 member states.

national legal systems for which the member states transferred jurisdiction to the EC. Consequently, EC law is, as Van Gerven states;¹³ “very much “sector-specific” and looks like a “patchwork”, incoherent as a whole and internally inconsistent.” This is the reason why the Commission proposed bringing more coherence to existing European contract law.

The most radical method to achieve coherence and consistency obviously would be to enact comprehensive codification. This would extend the actual harmonization process that now primarily covers cross-border aspects to encompass *intra*-state aspects too. One can, for example, think of the adoption of a European Consumer Act covering the whole area of consumer legislation, regardless of whether it would have cross-border effects, or even a European Contract Law irrespective of whether it relates to *inter*-state or *intra*-state transactions. At the moment however, due to the limited transfer of competences by the member states to the EU, the EU legislature has no jurisdiction to enact such comprehensive binding legislation.¹⁴ This explains the growing amount of “soft law”¹⁵ in the field of European private law.

The problem is that enacting uniform laws at the EU level, whether in the form of “soft law” or a binding Code, is not an easy matter if one tries to do justice to all existing legal mentalities and methodologies. The differences, mainly between the common law and civil law,¹⁶ are considerable and are very evident today as a result of the codification movement in continental Europe in the 19th century.

¹³ W. van Gerven, “A common framework of reference and teaching” (2004) 1 Eur. J. L. Educ. 2.

¹⁴ On the competences the EC has in the field of the harmonization of the private laws of the member states see S. Weatherhill, “Why harmonise?” in T. Tridimas & P. Nebbia, eds., *EU law for the 21st century: rethinking the new legal order* (Oxford: Hart Publishing, 2004) [forthcoming]. See also § 1.1 below.

¹⁵ The term soft law is an umbrella term for any system of regulation other than the traditional process which involves a democratically elected legislature making laws which are then enforced through the civil or criminal procedure of the courts. See § 1.2.2. below.

¹⁶ See more extensively on the differences in legal styles R.C. van Caenegem, *Judges, legislators and professors: Chapters in European legal history* (Cambridge: Cambridge University Press, 1987). Van Caenegem distinguishes three different legal styles: the common law, the Romanistic and the German legal families and thus compares the peculiarities of English, French and German law, the first being judge-made law, the second being shaped by

If one wonders if these differences still exist one can compare for example the judgements of the House of Lords with those of the French *Cour de Cassation* and the German *Bundesgerichtshof*. Only in a common law system it is possible that a Law Lord expresses himself on “wrongful life” stating:¹⁷ “I have not consulted my fellow travellers on the London Underground but I am firmly of the view that an overwhelming number (...) would answer the question with an emphatic No.” This judicial style would be unheard of in the civilian jurisdictions of France and Germany.

Of course the legal mentalities and methodologies have changed over time, and as states from both legal traditions have become EU members, they became subject to the same body of Community legislation and jurisprudence. However, basic substantive legal differences between the common law and the civil law traditions continue to exist. Consequently, the establishment of a connection between civil law and common law should be regarded as an “important prerequisite for the development of a genuinely European private law”.¹⁸ Since it is to be expected that one of the major challenges of creating a European private law will be the “mixing” of civil law and common law elements, it is of great interest to see that such connection has already been established in a number of so-called “mixed” legal systems.¹⁹ Such systems provide a “wealth of experience of how civil law and common law may be

legislation and the third bearing the imprint of scholarly Pandectist learning. The differences are the result of deep-rooted differences between the three legal traditions embodied in case-oriented English law, rule-oriented French law and concept-oriented German law. The distinction between “civil law” and “common law” is thus far from precise and between civil law countries there exist many differences. Distinguishing features apply to varying degrees for countries adhering to a civil law system. This relative applicability of the features is also present in the common law tradition, albeit to a lesser extent, due to the leading role played by the highest English court, the House of Lords, within the British Commonwealth (with the exception of the U.S.). Despite the differences between the civil legal traditions, the use of the antithesis “common law” vs “civil law” is justified, since the general legal concepts between the civil law countries remain largely the same. See *infra* note 104 from chapter 2.

¹⁷ Lord Steyn in *Macfarlane v Tayside Health Board* 1999, [2002] 2 A.C. 59 (H.L.) excerpted in: W. van Gerven, J. Lever, P. Larouche, eds., *Cases, materials and text on national, supranational and international tort law* 2nd ed. (Oxford: Hart Publisher, 2002) 96.

¹⁸ See K. Reid & R. Zimmerman, eds., *A history of private law in Scotland* vol. 1 (Oxford: Oxford University Press, 2000) 3.

¹⁹ The term “mixed legal system” is defined in § 2.3. below.

accommodated within one legal system".²⁰ Quebec is arguably one such mixed jurisdiction, in which elements of two distinct legal systems, the common law and the civil law, co-exist with each other. Actually, in Quebec the common law and civil law do far more than statically co-exist within the same legal framework. Both legal systems consistently influence each other. In fact, the Quebec legal system, that for its private law part adheres to the civilian tradition, has in its Civil Code adopted numerous legal concepts deriving from the common law tradition.

In view of European legal developments, it is precisely the ability of a legal system to adopt substantive legal concepts of a different system which is of interest. This raises questions such as whether, and if, how, a legal system can successfully adopt legal transplants and whether the legal system, after having been exposed to legal transplants, still forms a cohesive legal system which is loyal to its original foundations. These questions are important because the European legislator, in its pursuit to adopt uniform legislation in the field of private law, will have to consider the consequences *vis-à-vis* the cohesiveness of the legal systems by imposing legal transplants on them.

In examining the Quebec legal system, this thesis will explore the question whether, and how, a civil law jurisdiction may adopt a common law concept and yet remain a cohesive legal system. This question will be examined in light of the adoption of two common law concepts by the Quebec legislator: the concept of the trust (*fiducie*) and the concept of unconscionability (*lesion*). The adoption and interpretation of both legal concepts have, with Quebec's recodification in 1994, brought about lively discussions which may be of benefit to the European legislator. The objective of this thesis is thus to analyze and assess Quebec's approach in adopting common law concepts to find an answer to the question how it has managed to remain a cohesive legal system, loyal to its civil law framework, albeit having adopted above-mentioned common law concepts.

²⁰ See K. Reid & R. Zimmerman, *supra*, note 18 at 3.

This thesis has the following structure. First, the debate on the harmonization of European private law will be captured in order to give some background information on the European legislator's intentions on the convergence of the common law and civil law (Chapter 1). Then Quebec's distinct legal system will be examined by discussing the aspects of both legal traditions of which it is made up (Chapter 2). The following chapter will assess the legal concept of the trust. More specifically Quebec's legislative approach in making the trust property a patrimony by appropriation will be analyzed as a successful method of asserting legal pitfalls for a civilian legal framework (Chapter 3). The final chapter will consider the common law doctrine of unconscionability and Quebec's struggle to accommodate this fluid legal concept in its Civil Code and in its special protective regime for consumers (Chapter 4). Throughout this thesis, Quebec's approach in the adoption of the concept of the trust and the concept of lesion will be placed within a European setting to evaluate whether Quebec's solution might serve as a model for other civil law jurisdictions. A welcome by-product of the present study would thus be to show that between the two legal traditions there is not an impassable abyss, and that what seem to be striking antinomies between the common law and the civil law may be overcome.

CHAPTER 1 TOWARDS A COMMON EUROPEAN PRIVATE LAW

Remaining on top of the current state of the academic debate, and keeping up with the fast pace of legal policy development on European private law, is a real challenge. Needless to say, it would be impossible to attempt to capture the already vast amount of literature on European private law in a single chapter. This chapter will thus be limited to setting forth some of the main issues with regard to the discussion on the harmonization of European private law. Although in many publications, the questions as to *whether* a European private law is desirable or *how* such a law could be achieved, are outweighed by the question as to *when* it will be realized, in my opinion the former questions are of much more interest than the latter. Therefore, this chapter will start by exposing some thoughts on the desirability of a European private law (§ 1.1.), before discussing methodological questions and the Community's legislative competence (§ 1.2.). This chapter will end with a preliminary exploration on the feasibility of a single European private law (§ 1.3.)

§ 1.1. Why develop a European private law?

The impetus to adopt EC legislation in the name of harmonization has historically been driven by two separate rationales. The first is the assumption that market integration is promoted by harmonised laws – that a common market requires common rules. The second is that in so far as the EC Treaty is deficient in allocating competence to act in particular areas of “non-market” regulation then the legal base authorising harmonisation may be “borrowed” to fulfill that role. From this root sprang much early EC legislative activity in the fields of consumer protection, environmental protection and labour market regulation.

The first rationale, which connects harmonization to market-building, regards a uniform private law as a necessary requirement for the coming into being of a European single market.²¹ This argument deserves some clarification.

The new designation of the Treaty of Rome as the European Community Treaty (as apposed to the European Economic Treaty)²² indicates that its objectives go beyond the creation of solely an economic Community. Occasioned by Treaty amendment operations and by developments in legal practice, the effects of the Treaty of Rome, the heart of the entire body of Community law, are today extending in ever more directions. More sensitive areas of law have come within the scope of Community law, such as social policy and the environment. As is apparent from the initial provision of the EC Treaty itself, the establishment of an internal and a common market is fundamentally important for the achievement of the goals set out in the EC Treaty. Article 14 paragraph 2 of the EC Treaty describes the internal market as an “area without internal frontiers in which the free movement of goods, persons, services and capital is ensured in accordance with the provisions of this Treaty”. It is the coming into being of this European single market that is most often referred to by legal scholars as an argument in favor of the “Europeanisation” of the private laws of the member states. This argument is based upon the assumption that legal diversity is an obstacle to interstate trade, because too many differences between the private laws of the member states of the European Union - especially the laws of contract, which is the backbone of economic activity - will lead to inconveniences, uncertainties and thus to additional costs of doing business.²³ In cross-border contractual relationships, the

²¹ This economic motive can be identified in the writings of nearly all proponents of a European private law. See e.g. O. Lando, “European contract law” in H.-L. Weyers, ed., *Europäisches Vertragsrecht* (Baden-Baden: Nomos 1997) 81, 98; U. Mattei, “Hard minimal code now – a critique of “softness” and a plea for responsibility in the European debate over codification” in S. Grundmann & J. Stuyck, eds., *An academic green paper on European contract law* (The Hague: Kluwer Law International, 2002) 227 and H. Collins, Transaction costs and subsidiarity in European contract law” in S. Grundmann & J. Stuyck, eds., *An academic green paper on European contract law* (The Hague: Kluwer Law International, 2002) 278.

²² See *supra* note 1.

²³ See e.g. L. Senden, *Soft law in European Community law* (Oxford: Hart Publishing, 2003) 5.

legal uncertainty is threefold: first, there is the uncertainty about the national set of rules that has to be applied to the contract in question which will depend on the conflicts of law rule. Secondly, there is the uncertainty about the content of the applicable law which depends on the “strangeness” of a legal system for one or both of the parties. And thirdly, there is the uncertainty about the enforceability of claims which depends on the applicable rules of procedure. Thus, it is argued, that an international business relationship that establishes connections with more than one legal system will normally lead to higher transaction costs²⁴ than a purely domestic one which in turn creates a negative impact on cross-border trade.

This economic argument in favor of a common European private law has been heavily criticized for lacking empirical data.²⁵ Although there is largely a consensus that the aforementioned raise the transaction costs for the parties, it is debatable if this effect is strong enough to have a significant influence on the behavior of the actors – in the sense that they are reluctant to enter a contract with someone resident in another country. As was made abundantly clear by the respondents to the 2001 Communication²⁶, the majority of companies in Europe is opposed to any action whatsoever in the field of contract law and is not really troubled by divergences between national contract law in the European Union. To quote from the reaction by *Orgalime*, representing 100,000 companies in the metalworking sector: “it will, of course, always to some extent be easier to trade with companies and persons from your own country. This has, however, more to do with ease of

²⁴ Transaction costs are here broadly defined meaning “all those costs which preclude or reduce the possibility of smooth market transaction”. See U. Mattei, *The European codification process* (The Hague: Kluwer Law International, 2003) 1.

²⁵ See in this sense e.g. A. Schwartze, “Design for an empirical data investigation into the impact of existing contract law harmonisation under the white paper of 1985” in S. Grundmann & J. Stuyck, eds., *An academic green paper on European contract law* (The Hague: Kluwer Law International, 2002) 60 and E. Ioratti who observes that concrete data are lacking to conclude that transaction costs influence inter-state commercial transactions. E. Ioratti, “A methodological approach for a European restatement of contract law” (2003) 3:3 article 4 Glob. Jur. Topics 4.

²⁶ See the 2001 Communication, *supra* note 11.

communication, traditions and other factors, which are not dependent on contract law".²⁷ These reactions compiled in the Action plan are striking because they undermine a commonly held belief, particularly by academics, that the main reason for establishing a uniform contract law for Europe is that the present diversity stands in the way of transfrontier trade.²⁸

Another critique of the economic rationale to adopt a European *ius commune* is the perception that in a geographically and functionally expanded EU, the establishment of common rules is not only increasingly difficult to achieve, it is also increasingly undesirable as a suppression of competitive and cultural diversity.²⁹ In addition, it is argued that economic and legal unification do not necessarily have to go hand in hand as illustrated by the United States of America, where the world's most dynamic internal market functions perfectly well despite the separate states having their own competence to legislate in the field of private law (albeit all, except Louisiana, operate in a common law system).³⁰ This raises the question as to whether a common market requires uniform law at all.

²⁷ Orgalime's position paper is available online. Orgalime, "Position paper on communication from the European Commission on European contract law" (30 October 2001), online: The European Commission <http://europa.eu.int/comm/consumers/cons_int/safe_shop/fair_bus_pract/cont_law/comments/2.1.7.pdf>.

²⁸ See *supra* note 21.

²⁹ See e.g. U. Mattei, *Comparative law and economics* (Ann Arbor: University of Michigan Press, 1997) 101; A. Ogus, "Competition between national legal systems: a contribution of economic analysis to comparative law" (1999) 48 I.C.L.Q. 405-418.

³⁰ In the United States, the federal legislator has the competence to legislate in the area of "interstate commerce" (U.S. Const. art. I § 8), which has since 1787 mentioned the power of the Congress "to regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes". This so-called "interstate commerce clause" has led to legislation in the field of security interests, insolvency law, labour law and anti-trust law. Furthermore, legal integration is also promoted by the voluntary implementation of (parts of) the Uniform Commercial Code by nearly all the states. In addition, the Supreme Court has, in principle, not the competence to unify private law. About federal uniformity of private law in the United States - which is not as extensive as is often thought see W. Gray, "Pluribus Unum? A Bicentennial report on unification of law in the United States" (1986) 50 *RabelsZ* 111-165 and P. Winship, "Unification of law in the United States: an updated sketch" (1996) 1 *Unif. L. Rev.* 633-651.

However, as Glenn argues, a comparison of the European Union with the United States does not hold completely.³¹ The European situation is quite different from the American one. The EU is mainly composed of unitary states (even in the Federal Republic of Germany where private law is unified) as opposed to the United States which constitutes a federation. In the United States, there are judicial institutions that have long arbitrated between "competing legislative units".³² The territorial reach of state legislation is necessarily limited by the national constitution. America's adherence to the common law system, with the exception of the state of Louisiana, also reduces conflicts of law either through the commonality of shared values or through the submerging of conflicts in the mass of decisional law. This bottom up approach has thus established a process of informal harmonization of private laws that lacks in the countries of the European Union.

The second rationale for harmonization in the field of private law derives from perceived deficiencies elsewhere in the EC Treaty. Whereas the EC Treaty is silent on the allocation of competence to act in particular areas of "non-market" regulation, the legal base authorising harmonization³³ may be borrowed to fulfill that role. This rationale is heavily criticized however, because it plays constitutionally fast-and-loose with the Treaty-conferred competence to harmonize national laws and, behind that, the foundational principle of attributed competence contained in article 5 (1) EC Treaty.³⁴ It threatens to damage the constitutional structure, and thus the very legitimacy of the EU settlement.

³¹ See H. P. Glenn, "Conflicting law in a common market? The NAFTA experiment" (2001) 76 Chicago-Kent L. Rev. 1789-1819. In this article Glenn compares the NAFTA, *North American Free Trade Agreement Between the Government of Canada, the Government of Mexico and the Government of the United States*, 17 December 1992, Can. T.S. 1994 No. 2, 32 I.L.M. 368 (entered into force 1 January 1994), with the European Union as examples of contemporary "regionalization".

³² *Ibid.* at 1791.

³³ Article 95 (1) EC Treaty. This article reads: "The council shall (...) adopt the measures for the approximation of the provisions laid down by law, regulation or administrative action in member states which have as their object the establishment and functioning of the internal market."

³⁴ Article 5 (1) EC Treaty reads: "The Community shall act within the limits of the powers conferred upon it by this Treaty and of the objectives assigned to it therein."

The rise of “qualified majority voting” in the Council, introduced with the Single European Act,³⁵ has in particular, provoked sceptical scrutiny by the member states. The possibility of losing legislative competence to the EU because of the predominance of other member states, has led to opponent reaction *vis-à-vis* harmonization based on this rationale. The intolerability of an unlimited competence has called for legitimacy and competence-definition. The tension between centralisation and respect for local autonomy has become ever more problematic in a geographically and functionally expanded EU that operates in many areas according to qualified majority vote amongst its members. The debate about the function of harmonization is therefore part of a wider debate about the function of the EU itself and how to generate trust and confidence that the creation of stronger central institutions will be balanced by their respect for local regulatory autonomy.³⁶

These arguments pro and con a *ius commune Europaeum* are fundamental. The technocratic approach of promoting a common European private law to reduce transaction costs and thus to increase transnational trade as the Commission recently took in its Action plan however, operates in disguised form arouses a great deal of (unnecessary) resistance. It also makes the Commission vulnerable, since nobody really seems to believe we need a European Code of Contract Law for an effective internal market. That does not imply that there are not good reasons to argue for a unification of parts of the European private laws of the member states, especially when this will be proceeded in the cautious manner as the Commission proposes in its Action plan.³⁷

The strive for unification is clearly not limited to economic realities. It is also partially built around European idealism - the ideal that in Europe we do certain things together - as opposed to keeping these activities limited to national borders.³⁸ A common European

³⁵ See *Single European Act*, *infra* note 54.

³⁶ Cf. S. Weatherhill, *supra* note 14 at 1.

³⁷ See the Commission's Actionplan, *supra* note 10 at paragraph 52-54.

³⁸ In this sense M.W. Hesselink, “Naar een coherenter Europees contractenrecht?” (2003) 40 N.J.B. 2093.

private law should thus not be marketed as something that could possibly smooth the common market, but as a consequence of the fact that “while remaining proud of their own national identities and history, the peoples of Europe are determined to transcend their ancient divisions and, united ever more closely, to forge a common destiny”³⁹.

If the Commission would plead for a European private law based on shared values, the Commission would also have to engage in the real debate with the declared opponents of a European Civil Code and deal with their arguments. Most of these arguments are reducible to one, namely that private law ought to be regulated at the national level because it is closely linked with the citizens’ preferences⁴⁰ that differ from country to country, a legal-cum-economic argument, or with the national identity, a legal-cum-cultural argument.⁴¹ However, the “shared value” rationale for harmonization might prove to be dangerously open-ended. So although there are good reasons to come to a unification or harmonization of parts of the European private laws of the member states, the actual competence to undertake such harmonization is lacking. For this reason a move towards unification measures in the form of soft law can be detected. Before discussing the latter form of legislation, the legislative methods involving official state organs will be examined.

³⁹ According to the preamble of the *Treaty Establishing a Constitution for Europe*, 18 July 2003 [2003] O.J. C. 269 (not yet in force). In addition, in recent years an urge is noted to present a model that in the moral sphere distinguishes itself from the United States. On this postmodern European idealism see R. Kagan, *Paradise and Power; America and Europe in the new world order* (New York: Alfred A. Knopf, 2003).

⁴⁰ Michael Faure, “Economic analysis of tort law and the European civil code” in A.S. Hartkamp *et al.* eds., *Towards a European civil code* (Nijmegen: Ars Aequi Libri, 2004).

⁴¹ See e.g. H. Collins, “European private law and cultural identity of states” (1995) 3 E.R.P.L. 353-365; P. Legrand, *supra* note 45. In France there is a very strong resistance to the idea of a common European private law, in particular to a European civil code. In most reactions, the link between civil law and the national culture lies at the heart of the issue. For French critics see e.g. Y. Lequette, « Quelques remarques à propos du projet de code civil européen de M. von Bar » (2002) 28 D. 2202-2014; B. Fauvarque-Cosson, « Faut-il un code civil européen? » (2002) 3 R.T.D. civ. 463-480 and É. Descheemaker, « Faut-il codifier le droit privé européen des contrats? » (2002) 47 McGill L.J. 791-853.

§ 1.2. Current methods of creating a European private law

As stated earlier, many scholars disagree on the need for and justification of the creation of a single European private law. Not surprisingly, many also disagree on the method that should be used to establish this uniformity. In reviewing the current methods that have been used, it is convenient to make a distinction between centralist (§1.2.1.) and non-centralist methods (§1.2.2.) or those methods that involve official state organs (centralist) and those which do not (non-centralist).

§ 1.2.1. Centralist methods and issues of competence

The most important attempts undertaken by states and international organizations to contribute to the development of European private law can be divided into three different categories. First, there is intervention by the EU by means of legislation (treaties, regulations and directives). Second, there is the case law of the European Court of Justice [hereinafter: ECJ] and of the European Court of Human Rights. A third method of creating a uniform law is by making a separate international treaty. Each of these methods has contributed to the formation of a European law and will now be reviewed.

Measures originating from a state or international organization must be based on a specific competence. Consequently, legislative intervention by the EU can only contribute to the formation of a European private law to the extent that this is made possible in the relevant treaties. The primary objective of the European Community is to promote economic activity in Europe. Since the 1992 Maastricht Treaty, it has become clear that the objectives are officially more far-reaching and lie in social as well as in cultural spheres.⁴² These objectives

⁴² Article 2 EC Treaty reads: "The Community shall have as its task, by establishing a common market and an economic and monetary union (...), to promote throughout the Community a harmonious, balanced and sustainable development of economic activities, a high level of employment and of social protection, equality between men and women, sustainable and non-inflationary growth, a high degree of competitiveness and convergence of economic performance, a high level of protection and improvement of the quality of the environment, the raising of the standard of living and quality of life, and economic and social cohesion and solidarity among Member States".

are being achieved by carrying out the activities listed in article 3 of the EC Treaty. Apart from the establishment of an internal market as such, activities include "the approximation of the laws of member states to the extent required for the functioning of the common market" (article 3 (h)) and making a "contribution to the strengthening of consumer protection" (article 3 (t)).

As briefly discussed earlier,⁴³ the existing legislation in the field where the Community does not have exclusive powers is governed by the principle of subsidiarity,⁴⁴ which requires the fulfillment of two conditions before the Community is competent to regulate a certain area. The conditions are 1) that the objective of the proposed action cannot be sufficiently achieved by the member state and 2) that the objective can be better achieved by the Community. The current approach, however, of the European Commission gives little meaning to both conditions. According to the Commission, there is virtually nothing that cannot be regulated more efficiently by the EC.⁴⁵ Assuming the principle of subsidiarity is satisfied, the question still remains whether a specific legal basis to intervene in the field of private law exists and, if so, which method can be used. In addition, the use of these instruments still must be proportionate, since "any action by the Community shall not go beyond what is necessary to achieve the objectives of this Treaty."⁴⁶ In the following an overview will be given of the achievements at the level of primary community law (that is the EC Treaty as amended by subsequent treaties⁴⁷) and of secondary community law (most notably directives and regulations).

⁴³ See § 1.1. above.

⁴⁴ Article 5 (2) EC Treaty reads: *"In areas which do not fall within its exclusive competence, the Community shall take action, in accordance with the principle of subsidiarity, only if and insofar as the objectives of the proposed action cannot be sufficiently achieved by the member states and can therefore, by reason of the scale or effects of the proposed action, be better achieved by the Community."*

⁴⁵ See G.A. Bermann, "Taking subsidiarity seriously: federalism in the European Community and the United States" (1994) 94 *Colom. L. Rev.* 331-356. For other critics on the principle of subsidiarity in EC law see e.g. I. Ward, *A critical introduction to European law* (London: Butterworths, 1996) 42 and H.W. Micklitz, "Perspektiven eines Europäischen Privatrechts" (1998) 2 *Z.Eu.P.* 256.

⁴⁶ Article 5 paragraph 3 EC Treaty.

⁴⁷ See *supra* note 1.

With regard to primary community law, the provisions of the EC Treaty stipulating the free movement of goods (article 23), services (article 49), persons (article 39) capital and payment (article 56 (1) and (2)) and the right to establishment (article 43) all have a central position in the Treaty and, in theory, it is possible to give these provisions a broad meaning, which would eliminate all differences between the various national contract, tort and property law.⁴⁸ However, the ECJ has given most of these provisions a restrictive interpretation in the field of the law of obligations and property.⁴⁹ Therefore primary community law has been somewhat limited in its ability to promote convergence among the European systems. This explains why to date the most far-reaching contribution to the development of a European private law has been made by secondary Community law (article 249 EC Treaty allows for the enactment of directives and regulations amongst other instruments).

The most widely used method of achieving a higher degree of uniformity between the private law systems within the EU has until now been through directives.⁵⁰ Directives are binding as to the result to be achieved by the member states, while the form and method for

⁴⁸ In *Marleasing S.A. v. La Comercial Internacional de Alimentacion S.A.*, C-106/89 [1990] E.C.R. I-4135 [hereinafter: *Marleasing*] the ECJ required national courts to interpret domestic law so as to ensure achievement of the objectives of the Directive, whether or not national provisions were enacted before or after the directive.

⁴⁹ See e.g. *Alsthom Atlantique v. Compagnie de construction mécanique Sulzer S.A.*, C-339-89 [1991] E.C.R. I-107 [hereinafter: *Alsthom Atlantique*]. In this case the ECJ considered that a mandatory rule of French contract law could not have been an undue burden in any event because the parties had had the possibility to elect another state's law to govern their contract. See *Alpine Investments B.V. v. Minister van Financiën*, C-384/93 [1995] E.C.R. I-1141. See on the influence of the judgements of the ECJ on European private law § 1.2.1. at page 21 *et seq.* below.

⁵⁰ To name but a few examples of the most important directives in the field of private law: EC, Council Directive 84/450 of 10 September 1984 relating to the approximation of the laws, regulations and administrative provisions of the Member States concerning misleading advertising [1984] O.J. L. 250/17. EC, Council Directive of 25 July 1985 on the approximation of the laws, regulations and administrative provisions of the Member States concerning liability for defective products [1985] O.J. L. 84/375. EC, Council Directive 86/563 of 18 December 1986 on the co-ordination of the laws of the Member States relating to self-employed commercial agents [1986] O.J.L. 382/86. EC, Council Directive 93/13 of 5 April 1993 on unfair terms in consumer contracts [1993] O.J.L. 95/29. EC, Council Directive 97/7 of 20 May 1997 on the protection of consumers in respect of distance contracts [1997] O.J.L. 144/19. EC, Council Directive 00/31 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market [2000] O.J. L. 178/1. All these directives are also reprinted in O. Radley-Gardner and H. Beale *et al.* eds., *Fundamental texts on European Private Law* (Oxford-Portland: Hart Publishing, 2003).

implementing can be chosen by the member state itself.⁵¹ This has the advantage that a state can introduce the directive in a responsible manner within the national legal system's terminology and structure.⁵² However, it will be more difficult to maintain uniformity, because the ECJ cannot interpret the national rules that are based on the directive.⁵³ In particular, article 94 of the EC Treaty has been used as the foundation for the promulgation of the directives to approximate the laws of the member states that "directly affect the functioning or establishment of the common market". For the most part, directives relating to general private law issued before 1987 were based on this provision. With the Single European Act⁵⁴, the present article 95 was introduced in the EC Treaty and most of the directives after 1987 have been based on the latter provision that stipulates that measures can be adopted that have as their object the establishment and functioning of the internal market.

With the gradual enlargement (geographically) and broadening (subjectwise) of the Community, uniformity of laws became less evident and as a result, the ruling paradigm became one of differentiation and flexibility. An important factor in bringing about this paradigmatic shift was the White Paper of 1985 on the completion of the internal market.⁵⁵ In that paper, the Commission, following the ECJ's judgement in *Cassis de Dijon*,⁵⁶ announced its intention to apply a new approach to harmonization directives, abandoning

⁵¹ Article 249 paragraph 3 EC Treaty.

⁵² However, the directive on Unfair Terms in Consumer Contracts, *Council Directive 93/13 of 5 April 1993 on unfair terms in consumer contracts* [1993] O.J.L. 95/29, introduced the concept of good faith into English contract law, which has been criticized by several legal scholars as being an irritant of the English legal system. See e.g. G. Teubner, "Legal irritants: good faith in British law or how unifying law ends up in new divergences" 61 M.L.R. 11-32.

⁵³ The only thing the ECJ can do is interpret the directive itself and thus create uniformity in the interpretation of concepts in the directive as is shown by *Commission v. United Kingdom*, C-300/95 [1995] E.C.R. I-2663.

⁵⁴ *Single European Act*, 17 and 28 February 1986, [1987] O.J. L. 169 (entered into force 1 July 1987).

⁵⁵ EC, *White Paper from the Commission to the European Council, Completing the Internal Market*, No. 310 [1985].

⁵⁶ *Rewe-Zentrale v. Bundesmonopolverwaltung für Branntwein*, C-120/78 [1979] E.C.R. 649 [hereinafter: *Cassis de Dijon*]. In this judgement, the Court prohibited member states, in the absence of harmonization, from imposing restrictions on the marketing of products which are lawfully produced and marketed in another member state unless such restrictions are necessary in order to protect mandatory requirements.

detailed over-regulation, and instead embracing mutual recognition of national laws. As a consequence of the new approach, a number of different harmonization methods came to be used. In the field of private law, minimum harmonization, allowing member states to provide for more stringent rules, is most often used.⁵⁷ This tendency has led to a new dimension of complexity and has certainly not been favorable for the coherence, rationality and predictability of European private law. In addition, the European directives in the field of private law are often rather vague and inconsistent with each other.⁵⁸ Furthermore, the use of directives as an instrument has led to a highly fragmented European private law. It is stated to have led to "a few Brussels bricks here and there" in the national private law system⁵⁹.

In contrast, the use of regulations is generally binding and is directly applicable, which means that a typical centralist unification takes place if this instrument is used. The subjects of the Community are immediately bound by it and can derive rights from the regulation without the intervention of the member state. This may, however, lead to a problematic relationship between Community law and the national legal system. Until the 1992 Treaty of Maastricht, unification by way of regulations could occur, in particular, by using the general provision of article 308 of the EC Treaty, which enables Community action in the interest of the common market. It should be noted, however, that very few regulations have been made in the field of the law of obligations and property; recently some were adopted

⁵⁷ However, in the area of consumer protection, there is a recent tendency to prefer maximal to minimal harmonization. See further Th. Howells & Th. Wilhelmsson "EC consumer law: has it come of age?" (2003) 28:3 E.L. Rev. 372-375.

⁵⁸ For example, the right of the consumer to withdraw from the contract, the time period within which withdrawal is possible and the information to be provided by the professional party to the consumer often differs without good reason from one directive to another. Likewise, the directives often contain abstract terms, such as "damage" or "equitable remuneration". It is also unclear whether a definition of a term in one directive can be used to clarify a similar term in another directive. This was recently denied in the *Simone Leitner* case. *Simone Leitner v. TUI Deutschland GmbH & Co*, C-168/00 [2002] E.C.R. I-2631.

⁵⁹ O. Remien, "Über den Stil des Europäischen Privatrechts" (1996) 60 RabelsZ 8.

in the field of private international law based on article 65 of the EC Treaty.⁶⁰ However, regulations can also be adopted based on article 95 of the EC Treaty.⁶¹ It has been suggested that a European Civil Code in the field of contract law could be based on this provision,⁶² since the law of contract – the most important area of private law from the perspective of the establishment of a free movement of goods, services, persons, capital and payment – fulfils the requirement that the measure has as its object “the establishment and function of the internal market”.

Another centralist method should be mentioned here, which is the contribution the European Courts make to the development of a European private law. Although in general not seen as an independent way of establishing European private law, it cannot be denied that the activities of the ECJ in Luxembourg, have contributed in the past and will probably contribute even more in the future to the development of a European private law.⁶³ While the contribution of the ECJ in interpreting the directives has up until now been rather modest,⁶⁴ it did develop the concept of the “Euro-tort”, namely the liability of a member

⁶⁰ Such as Council Regulation 1346/00 of 29 May 2000 on insolvency proceedings, [2000] O.J. L. 160/1; Council Regulation 1348/00 of 29 May 2000 on the service in the member states of judicial and extrajudicial documents in civil or commercial matters, [2000] O.J. L. 160/1 and Council Regulation 44/01 of 22 December 2000 on Jurisdiction and the Recognition and Enforcement of Judgements in Civil and Commercial matters, [2001] O.J. L.12/1.

⁶¹ Article 95 EC Treaty refers in a general way to the adoption of “measures” for the “approximation of the provisions laid down by law [...] in member states which have as their object the establishment and function of the internal market”. This includes thus the possibility to adopt directives as well as regulations. Yet the question remains what the precise ambit is of the restriction that only measures which have as their object the establishment and functioning of the internal market may be adopted.

⁶² In this sense J. Basedow, « Un droit commun des contrats pour le Marché commun » (1998) 50 R.I.D.C. 7. If it is thought that a true internal market without any obstacles will only exist once the law of obligations is entirely uniform, then the EC would be competent to adopt legislation on this subject matter. However, according to recent case law of the ECJ, article 95 does not contain a general power to regulate the internal market and that thus a mere finding of disparities between national rules and of the abstract risk of obstacles to the exercise of fundamental freedoms or of distortions was not sufficient to justify the approximation that was under review. *Germany v. Parliament and Council*, C-376/98 [2000] E.C.R. I-8419, paragraphs 83-84.

⁶³ In this sense see W. van Gerven, “ECJ Case-law as a means of unification of private law? (1997) 5 E.R.P.L. 293.

⁶⁴ The preliminary ruling procedure laid down in article 234 EC Treaty gives the ECJ the competence to contribute to a uniform interpretation of concepts in a directive. However, the interpretation of directives is of a rather contextual nature. On the other hand, the duty to interpret national law in conformity with the directive is already

state for not implementing a directive.⁶⁵ The contribution of the European Court of Human Rights is related first and foremost to family law⁶⁶ and procedural law.⁶⁷

The last centralist method is the traditional one of legal unification by way of binding international treaties. With the exception of the United Nations Convention on Contracts for the International Sale of Goods⁶⁸, this method has had little success in the field of private law. Reaching unanimity is often to blame. And if agreement is reached, the treaty often entails vague definitions. In addition, besides the fact that harmonization by treaties is time consuming, they rarely seem to establish harmonization because they often lack uniform interpretation. Furthermore, because it is open for states to decide whether to become a party to the treaty or not, treaties can lead to complex private international law problems.

§ 1.2.2. Non-centralist methods towards a *ius commune*

Of the non-centralist methods toward a European private law, mention should be made of both the “principles projects” and the case-method oriented projects. One of the most eye-catching projects in the sphere of European private law is the formulation of “principles” within a certain area of the law. It is not entirely correct to compare these with the American

incumbent on the courts after the issuing of the directive (thus even before implementation) See W. van Gerven, *supra* note 63 at 295 and 304. See also accompanying text note 40 on the Marleasing case.

⁶⁵ See *Andrea Francovich and Danila Bonifaci and others v. Italian Republic*, joined cases C-6/90 and C-9/90, [1991] E.C.R. I-5357 and *Brasserie du Pêcheur S.A. v. Bundesrepublik Deutschland and The Queen v. Secretary of State for Transport, ex parte: Factortame Ltd. and others*, joined cases C-46/93 and C-48/93 [1996] I-1029.

⁶⁶ The interpretation of article 8 of the European Convention on Human Rights or the *Convention for the protection of human rights and fundamental freedoms*, 4 November 1950, 213 U.N.T.S. 222 (entered into force 3 September 1953) [hereinafter: ECHR] (entered into force 3 September 1953, as amended by Protocols Nos 3, 5, 8, and 11 which entered into force on 21 September 1970, 20 December 1971, 1 January 1990, and 1 November 1998 respectively).

⁶⁷ The interpretation of article 6 ECHR on fair trial contributes to an approximation of laws in the field of procedural law. See on the influence of the ECHR on European private law in general the special issue of (1999) 63 *RabelsZ.*

⁶⁸ *United Nations Convention on Contracts for the International Sale of Goods*, 10 April 1980, 1489 U.N.T.S. 3, Can. T.S. 1980 No. 37, 19 I.L.M. 668 (entered into force on 1 January 1988). This treaty was created under the Auspices of the UN organization UNCITRAL and has been ratified by more than 50 countries. The treaty provides uniform rules for the formation of international contracts for the sale of moveable goods and available remedies.

restatements of the law⁶⁹, because the restatements only reproduce uniform law that already exists (but which is difficult to recognize because it is primarily formed by the courts). Uniformity in this sense does not, as yet, exist in Europe. In particular the formulation of the Principles of European Contract Law (PECL)⁷⁰ and the UNIDROIT Principles of International Commercial Contracts⁷¹ has had a large impact on the discussion of the possibility and feasibility of a European contract law. In 1999, the European Principles of Trust Law⁷² were published and work is now also underway to formulate principles in the field of tort law.⁷³ The status of these principles is clear: they can be regarded as “soft law”, an umbrella term for any system of regulation other than the traditional process which involves a democratically elected legislature making laws which are then enforced through the civil or criminal procedure of the courts. Neither the UNIDROIT Principles nor the European Principles are meant to become binding law. What then are the functions that the Principles are meant to achieve? Those functions include the following.

1. The Principles may serve as a source of inspiration for national and international courts to interpret the provisions of existing uniform law,⁷⁴ to fill gaps which it presents and to offer a background, however informal, for new law to be created.
2. The Principles may serve as a model law that could inspire legislators who strive for law reform.

⁶⁹ The restatements of the law are the work of the American Law Institute and attempt to present the basic principles of the common law in systematic fashion. The restatements are concerned chiefly with areas of the private law that, though generally codified in civilian systems, continue to be governed largely by case law in America. These areas include e.g. agency, the conflicts of law, contracts, property, restitution, torts and trusts.

⁷⁰ O. Lando & H. Beale, eds., *Principles of European Contract Law, Parts I and II Combined and Revised* (The Hague: Kluwer Law International, 2000).

⁷¹ M.J. Bonell, *An international restatement of contract law; The Unidroit Principles of International Commercial Contracts* 2nd ed. (Irvington: Transnational Publisher Inc., 1997).

⁷² D.J. Hayton, S.C.J.J. Kortmann & H.L.E. Verhagen, eds., *Principles of European Trust Law* (The Hague: Kluwer Law International, 1999).

⁷³ The accomplishments of the European Group on Tort Law are available online: European Group on Tort Law <<http://civil.udg.es/tort/Principles/text.htm>>.

⁷⁴ Many treaties require an autonomous interpretation if a provision is unclear, for example article 7 of the Vienna Sales Convention (*supra* note 68). This prohibits a court or arbitrator to fall back on the national law of one of the parties. The Principles can then play an important role as international *lex mercatoria*. The court is then no longer required to conduct comparative law research itself in order to determine what an autonomous interpretation is.

3. The Principles (and their accompanying comments) may serve to enlighten parties negotiating a contract in order to identify the problems to be resolved in their contract and, possibly, to find suitable rules to settle them. Parties may even decide to incorporate the Principles in part or as a whole in their contract.

4. Parties to an international contract could chose the Principles as the law applicable to their contract.⁷⁵

5. The principles will certainly have an important scholarly and educational value. Concerning the European legal scheme, they will encourage the emerging trend to find the common denominator of the different private law systems in Europe in order to construct a new *ius commune Europaeum*.⁷⁶

6. Finally, the Principles will, by the sheer fact of their existence, prove that a reasonable compromise between the various legal systems of Europe and beyond, can be reached.

A recent project that may be of help in developing a common European private law is the Ius Commune Casebooks for the Common Law of Europe under the leadership of Professor Van Gerven. The aim of this project is "to help to undercover common roots, notwithstanding differences in approach, of the European legal systems with a view of strengthening the common legal heritage of Europe, not to strangling its diversity".⁷⁷ In other terms, the aim is not to create uniform law, but to find similar solutions and rules in existing law. This is done by presenting cases and their solutions in various legal systems along the lines of the American casebooks.

Another project that should be mentioned in this context is the Trento Common Core Project initiated by U. Mattei and M. Bussani. Inspired by the work of Schlesinger on

⁷⁵ However, since it is rather uncertain whether a choice of law for the Principles could be upheld in proceedings before a state courts, parties are well advised to combine such a clause with an arbitration clause. See in this sense e.g. U. Drobnig "General principles of European contract law" in P. Sarcevic, ed., *International sale of goods - Dubrovnik lectures 1985* (New York, Oceana Publishers 1985) 309.

⁷⁶ See for a short survey *ibid.* 305-333.

⁷⁷ See W. van Gerven *et al.* eds., *Tort Law* (Oxford: Hart Publisher, 2003).

the formation of contract of the 1960s, a rather large group of comparative lawyers have united to seek the common core of European private law in the fields of contract, tort and property.

Lastly, the work of the Study Group on a European Civil Code under the leadership of Professor Von Bar deserves special mention. This study group consists of a network of academics, from across the EU, conducting comparative research in private law in the various legal jurisdictions of the Member States. Their aim is to produce a codified set of Principles of European Patrimonial Law, complete with commentary and annotations.⁷⁸ With regard to the general law of contracts, the Study Group will build on the PECL by the Commission on European Contract Law.⁷⁹ These projects are thus much more of a scholarly nature than the earlier mentioned Principles projects.

§ 1.3. The feasibility of a single European private law

The third and final theme that will be raised in this chapter concerns the feasibility of a single European private law. This is a question that has been widely discussed over the last years. On the one hand, adherents of the convergence thesis maintain that European legal systems have been converging over the last decades and are still growing toward each other.⁸⁰ They assert that with the current tendency towards "Europeanization" and even worldwide globalization, western countries are acquiring an increasingly identical socio-economic structure. Basedow, for example, points out that in fact, a European private law culture already exists.⁸¹ He refers to 1) the existence of the rule of law in the various European countries, 2) the recognition in Europe that law is an autonomous discipline, 3)

⁷⁸ The list of publications of the Study Group is available online: <<http://www.sgecc.net>>.

⁷⁹ The Study Group has benefited from a substantial overlap with the membership of that Commission.

⁸⁰ Among these authors are e.g. B.S. Markesinis, *The gradual convergence: foreign ideas, foreign influences, and English law on the eve of the 21st century* (Oxford: Oxford University Press, 1994); G.-R. De Groot, "European education in the 21st century" in: B. de Witte & C. Forder, eds., *The common law of Europe and the future of legal education* (The Hague: Kluwer Law International, 1992) 7-30 and J. Gordley, "Common law und civil law: eine überholte Unterscheidung" (1993) 1 Z.Eu.P. 498.

⁸¹ J. Basedow, "Rechtskultur - zwischen nationalem Mythos und europäischem Ideal" (1996) 3 Z.Eu.P. 379.

the existence of a systematized legal science, 4) the recognition of the important role law plays in the solution of conflicts and 5) the existence of generally recognised human rights and legal principles.⁸² The adherents of the convergence thesis seem to be in the majority. Others have emphasized that the convergence merely exists on the surface and that thus superficial similarities among legal systems reveal little about the underlying differences.⁸³ Inspired by cultural studies and modern philosophy and sociology, it is argued that merely drafting uniform rules does not result in uniform law. Law is, after all, much more than just formally uniformed rules; the meaning of a particular rule in a particular cultural and national context can only be established after studying that context. And this context, the legal *mentalité*, differs between the various cultures.⁸⁴ The possibility of a (European) legal mentality is thus mainly rejected because the Anglo-American view of society and law differs from the continental-European view. For example, as the reasoning in the common law occurs inductively with an emphasis on the facts, and deductively in the civil law with an emphasis on the system, it would not be possible for these two views to converge because they are fundamentally different.⁸⁵

No doubt, there are differences between the various European legal systems in the fields of history, method, legal sources, ideology, judicial style and language. Nor can it be denied that a legal rule can only be understood as part of the culture of which it is part and as long as there is no truly European (legal) culture, divergences will appear. Most legal scholars are familiar with this debate and know where they stand within it, because it is a debate that primarily focuses on the possible creation of a European Civil Code and its pros and cons.

⁸² *Ibid.* at 379-381.

⁸³ In this sense e.g. E. Özü, "An exercise on the internal logic of legal systems" (1987) 7 L.S. 310-318.

⁸⁴ These anthropological and sociological arguments have been made e.g. by H.W. Micklitz, *supra* note 48 at 256-257; F. Wieacker, "Foundations of European legal cultures" (1990) 38 Am.J.Comp.L. at 2-30 and H. Collins, "European private law and the cultural identity of states" (1995) 3 E.R.P.L. 353-365; See e.g. G. Teubner, *supra* note 55 at 11 and very strongly by P. Legrand, "European legal systems are not converging" (1996) 45 I.C.L.Q. 59 *et seq.*

⁸⁵ See on these "fundamental" differences § 2.1. and § 2.2. below.

The fact remains that the impact of European law on the development of private law will become more and more important in the imminent future. A number of directives already forces member states to harmonize part of their contract, tort law and private international law. Of course the most straightforward way to remedy the piecemeal and incremental character of Community legislation and case law is to enact comprehensive legislation covering a whole area of the law, for example contract law. A European Civil Code could provide a framework in which all earlier mentioned legislative efforts by the EU can be placed. However, it seems too early to consider the adoption of such Code especially as the Commission, in its Action Plan, has apparently for the time being, abandoned the idea of enacting a binding European Code.⁸⁶ Instead, the Commission proposes the elaboration of a common frame of reference, which would be “a publicly accessible document which should help the Community institutions in ensuring greater coherence of existing and future legislation in the area of European contract law” and should also “be taken as a point of reference by national legislatures inside the EU [...] whenever they seek to lay down new contract rules or amend existing ones”.⁸⁷ The general idea of the document is to elaborate a framework, as a result of “extensive research” and after wide consultation with “stake holders and other interested parties”,⁸⁸ which should provide for “best solutions [...] in the definition of fundamental concepts and abstract terms”. The fact that the Commission has followed this path means that many of the respondents to the Communication, and probably many people within the Commission and the Council share the opinion that one should start by improving the existing legislation in the field of European private law, before thinking of imposing new legislation.

Whatever the route Europe takes, whether it will choose for harmonization by means of a codification, a restatement or by the enactment of Principles, there will undoubtedly be further need to harmonize or unify certain aspects of European law. In any way, for both

⁸⁶ See the Commission's Actionplan, *supra* note 10 paragraph 89 – 98.

⁸⁷ *Ibid.* the Action plan paragraph 59– 60.

⁸⁸ *Ibid.* the Action plan at paragraph 63 and 65.

improving the existing legislation in the field of European private law, as well as any work on an European Civil Code, thorough comparative law research will be needed, especially with regard to the different legal cultures that exist in Europe, the common law and the civil law, and how these two legal traditions may form one cohesive system. In this perspective, inspiration can be drawn from so-called “mixed legal systems”; systems that already combine elements of both the civil law and the common law. The Canadian province of Québec has such a system. In the following chapter, the idea of taking into account the experience of Québec’s hybrid system in the field of private law will further be explored.

CHAPTER 2 QUÉBEC'S MIXED LEGAL SYSTEM ANALYZED

In the preceding chapter it was shown that an important objection to a unified European private law is the contradistinction that is alleged to exist between the civil law and the common law. Whilst it is possible to contemplate bridging the differences among the continental legal systems, this is more difficult in the case of contrasts as glaring as appear to exist between English common law and continental civil law. Given the current process of "Europeanization" of the private laws of the member states, and taking into account the Commission's intentions regarding this theme as set out in the recent Action plan,⁸⁹ the establishment of a connection between civil law and common law is a prerequisite for the development of a European private law. This is why mixed legal systems offer a very valuable source for comparative analysis.

Generally regarded as the most important mixed legal jurisdictions are Scotland,⁹⁰ South Africa,⁹¹ Québec⁹² and Louisiana.⁹³ As Québec is a jurisdiction in which private law is codified – and the chances of the creation of a European Civil Code are growing – this particular mixed legal system may provide us with useful insights on how Québec law has managed to "mix" common law elements within a civil law framework. The study of a

⁸⁹ See the Action plan *supra*, note 10.

⁹⁰ *Ibid.*, R. Evans-Jones, ed., *The civil law tradition in Scotland* (Edinburgh: Edinburgh, Stair Society, 1995) and D.L. Carey Miller & R. Zimmermann, eds., *The civilian tradition and Scots law; Aberdeen Quincentenary Essays* (Berlin: Duncker & Humblot GmbH, 1997).

⁹¹ See e.g. R. Zimmermann, *Das römisch-holländische Recht in Südafrika*, (Darmstadt: Wissenschaftliche Buchgesellschaft, 1983) and R. Zimmermann & D. Visser, eds., *Southern Cross: civil law and common law in South Africa* (Oxford: Oxford University Press, 1996).

⁹² See e.g. J.-L. Baudouin, "The impact of common law on the civilian system of Louisiana and Québec" in J. Dainow, ed., *The role of judicial decisions and doctrine in civil law and in mixed jurisdiction* (Baton Rouge: Louisiana State University Press 1974) 1-22; D. Lemieux, "The Québec civil law system in a common law world: the seven crises" (1989) *Jud. Rev.* 16 and H.P. Glenn, "Québec: Mixité and monism" in E. Ortúñ et al., eds., *Studies in legal systems: mixed and mixing* (The Hague: Kluwer Law International, 1996) 1-16.

⁹³ See e.g. A. Yiannopoulos, "Louisiana civil law: a lost cause" (1980) 54 *Tul. L. Rev.* 830 and V. V. Palmer, *Louisiana: Microcosm of a mixed jurisdiction* (Durham: Carolina Academic Press, 1999). For more general information on mixed legal systems, see V. V. Palmer's recent work *Mixed jurisdictions worldwide – The third legal family*, (Cambridge: Cambridge University Press, 2001).

mixed jurisdiction, such as Québec, requires a rigorous analysis of the two distinct systems of law of which it is made up or influenced. Therefore, in order to be able to come to a more profound study of Québec's legal system, the characteristics⁹⁴ of the "common law" and the "civil law"⁹⁵ will be defined and examined first (§ 2.1.). Then a discussion will follow as to whether, despite these particular characteristics, a convergence of these legal traditions can be detected (§ 2.2.). Next, the particular institutional framework of mixed legal systems will be viewed (§ 2.3.), of which Québec's legal system will be highlighted for a more profound study (§ 2.4.).

§ 2.1. Civil law and common law: the distinguishing features

The civil law and common law traditions are generally considered to be the two most important groupings of legal systems that still remain to be distinguished within modern private law. The civil law is predominant on the European continent, South America and South East Asia, whilst the common law is the foundation of private law in England, Wales and Ireland as well as in forty-nine U.S. States, nine Canadian provinces and in most countries which first received that law as colonies of the British Empire and which, in many cases have preserved it as independent States of the British Commonwealth.

⁹⁴ The separation of features that is given below is partly based on the five determining factors identified by Zweigert & Kötz, *Introduction to comparative law*, trans. by T. Weir, 3rd ed. (Oxford: Clarendon Press, 1998) 36.

⁹⁵ A comment concerning terminology. It should be acknowledged that the term civil law has many different meanings. For instance it can be used as a synonym for private law, as a contrast with the *ius gentium* (contrasted with *ius civile*) in Roman law, or in contrast with the canon law of the Middle Ages. However, this thesis uses the term "civil law" in the sense of the civil law tradition in contrast with the common law tradition. Consequently, the term "common law", although having different meanings as well, is in the context of this thesis used to describe the Anglo-American legal family and not as an antonym to "equity" or "statutory law". When referring to common law, or even more so, when speaking of the civil law, it is to be understood that the law in the countries of these legal traditions does not form a homogeneous body of rules. In fact, there are considerable differences, particularly, between the two branches of the civilian tradition (the Romanic and the Germanic legal family). However, the general concepts remain largely the same, and justify the use of such general terms. More elaborately on the differences between French and German legal science, M.A. Glendon, M.W. Gordon & C. Osakwe, eds., *Comparative Legal traditions in a nutshell* (St. Paul: West Publishing, 1982) 30-39.

A number of general features can be attributed to each of these traditions. First the term legal tradition or legal family should be clarified. Until the decline of the Soviet Union, there were three influential legal traditions or families in the world: civil law, common law and socialist law.⁹⁶ To these must be added other important and distinctive legal traditions, including Islamic law, Hindu Law, Jewish law, African tribal laws and the Scandinavian tradition.⁹⁷ Merryman used the very broad definition of a legal tradition to mean “a set of deeply rooted, historically conditioned attitudes about the nature of law, about the role of law in the society and the polity, about the proper organization and operation of a legal system, and about the way law is or should be made, applied, studied, perfected, and taught”⁹⁸ as opposed to being just a set of rules of law about contracts, corporations, and crimes. In addition, “the legal tradition relates the legal system⁹⁹ to the culture of which it is a partial expression and it puts the legal system into cultural perspective.”¹⁰⁰

§ 2.1.1. Distinguishing features of the civil law tradition

1. A basis in Roman law

The first distinguishing feature of the civil law tradition is that its private law is founded on Roman law, as codified in the *Corpus Juris Civilis* of Justinian (528-534 A.D.), and as subsequently received and developed in various European countries after its rediscovery in

⁹⁶ See R. David & J.E.C. Brierley, *Major legal systems in the world today – An introduction to the comparative study of law*, 3rd ed. (London: Stevens, 1985) 22-27. There is an abundance of literature on comparative law and legal traditions in general. See e.g. K. Zweigert & H. Kötz, *supra* note 94; H.P. Glenn, *Legal traditions of the world* (Oxford: Oxford University Press, 2000).

⁹⁷ See J.H. Merryman, *The civil law tradition: An introduction to the legal systems of Western Europe and Latin America* 2nd ed., (Stanford: Stanford University Press, 1985) 5.

⁹⁸ *Ibid.* at 1-2.

⁹⁹ A legal tradition can be distinguished from a legal system. According to MacQueen the term “legal system” refers to “the nature and content of the law generally, and the structures and methods whereby it is legislated upon, adjudicated upon and administered, within a given jurisdiction.” A legal system may thus govern a specific group of persons. So a Muslim student attending McGill University in Montreal might be subjected to the rules and judicial institutions of Canada, Québec, the University and the Muslim faith. See H.L. MacQueen, “Mixed jurisdictions, the future and convergence: Scotland” (paper delivered at the first worldwide congress on mixed jurisdictions, Tulane University, 9 November 2002) [unpublished].

¹⁰⁰ See J.H. Merryman, *supra* note 97 at 1-2.

Bologna in the twelfth century.¹⁰¹ Due to its superior quality and advanced development, Roman law gradually supplanted the customary law, which had developed since the collapse of the Roman Empire. The reception of Roman law did not, however, lead to a total domination of Europe by Roman law. Roman law was a secondary source and only applied to the extent that local customs and laws did not provide a solution. Nevertheless, the local rules were interpreted in light of Roman law; consequently Roman law also influenced the primary source of law.¹⁰²

2. Codification

A second feature of the civil law tradition is the extensive codification of the received Roman law in civil codes.¹⁰³ The concept of codification was developed in its most powerful form in the seventeenth and eighteenth centuries as an expression of natural law and Enlightenment. It was thought that a codification of the law would help achieve new political ideas. These ideas not only included a separation of the judicial, executive and legislative powers, but also the creation of legal certainty and uniformity, as well as the protection of property. In addition, in the nineteenth century, the newly created nation-states wanted to record the laws applicable within their boundaries. Of the early codifications, the French Code Civil of 1804 is still in force.

3. Systematization

A third feature of the civil law tradition is that it is highly systematised and structured and that it is brought within an taxonomic system. Due to the increasing study of Justinian's Institutes, rather than the casuistic Digest, general principles were developed and applied to previously more chaotic groupings of cases. As a result of deductive reasoning, a highly

¹⁰¹ More extensively on the history, culture and distribution of the civil law tradition see e.g. M.A. Glendon, M.W. Gordon & C. Osakwe, *supra* note 95, 13-51; R. David & J.E.C. Brierley, *supra* note 96, 33-101 and H.P. Glenn, *supra* note 96, 116-156.

¹⁰² For an overview see H. Coing, *European common law: historical foundations* in: M. Cappelletti & J.H. Merryman, eds., *New Perspectives for a common law of Europe* (New York: Aspen Publishers, 1978) 31-45 and P. Stein, *Roman law in European history* (Cambridge: Cambridge University Press, 1999).

¹⁰³ However, in Scotland and South Africa, both mixed legal jurisdictions, the civil law component is not codified.

systematized body of rules gradually developed in which each principle has its own place and is connected to the other principles.

4. Syllogism

The codifications and systematizations in the different continental European countries further strengthened the effect of the rationalization of law by formulating general rules. The most appropriate method of legal reasoning then is the use of a syllogism, whereby the general, rational rule can be applied to all cases. Syllogistic reasoning remains a frequently used tool in continental judgments.

5. No binding precedent

Although a judgment is binding between the parties, it does not apply to future cases. The civil law does not technically recognise the binding authority of precedent, albeit judgments have "persuasive authority" and in the interest of legal equality and legal certainty, lower courts usually follow their own judgments and those of higher courts. However, an inherent duty to follow earlier judgments does not exist.

6. (Judicial) Style

Perhaps one of the most important distinguishing features of the civil law tradition, and the most difficult to describe, is the prevailing mentality that emerges with respect to the law. If the legal mentality is limited to the judicial style, it is noticeable that this is based on the *a priori* enactment of normative principles (rather than the *ex post facto* resolution of particular disputes). In civil law judgments it is attempted as much as possible to present the correct result as flowing directly from the dogmatic or statutory system. The way this occurs differs from country to country. Common to these countries however, is that judicial reasoning is

less substantive and more formal. The justification for the judgment lies in the application of the authoritative rule. It is said that the civil law's "conciseness" is its major distinction.¹⁰⁴

7. Substantive concepts

Finally, the civil law does contain a number of characteristic substantive concepts of law which have no equivalent in the common law. Traditionally *causa* as a requirement for the formation of a contract is considered to be a typical civil law concept. Some legal institutions however are not common to all the civil law countries, but only exist in one or two of them, such as the French *fonds de commerce* and the German *Grundschuld*.

§ 2.1.2. Distinguishing features of the common law tradition¹⁰⁵

1. Basis in English customary law

Unlike European continental, the English legal system, from which the common law tradition is derived, does not have its roots in a specific text, but in tradition expressed in action.¹⁰⁶ In the Court of the King, judges settled disputes and conflicts according to customary laws that found expression in their judgements. Many other courts existed in the country and each of them administered its own customs. During Henry II's reign (1154-1189) "justices in eyre", travelling judges, were authorized to administer justice. Gradually their competencies were extended at the expense of local courts. These developments initiated the centralization of the administration of justice and the creation of a literal "common law". The King stimulated this process by the issuance of "writs". A writ is a formal document issued in the King's name to start actions and initiate procedural steps in

¹⁰⁴ On the concision of the civil law style, compared to the precision of the common law style, see L.-P. Pigeon, *Rédaction et interprétation des lois* 3e éd. (Québec: Gouvernement du Québec, Ministère des Communications, 1986) 7-8.

¹⁰⁵ More extensively on the common law tradition and its characteristics see e.g. K. Zweigert & H. Kötz, *supra* note 94, 187-285; See R. David & J.E.C. Brierley, *supra* note 96, 307-396 and H.P. Glenn, *supra* note 96, 205-251.

¹⁰⁶ See A.W.B. Simpson, *An invitation to law* (Oxford: Blackwell, 1988) at 4 and J.H. Baker, *An introduction to English legal history* 4th ed. (London: Butterworths, 2002) 97.

them.¹⁰⁷ The creation of new writs was restricted until the 13th century,¹⁰⁸ thus leading to a rigidity in the common law. This rigidity was solved by the creation of a new judge, the Lord Chancellor, which led to the development of the law of equity alongside the common law. Eventually the Judicature Acts of 1873-1875¹⁰⁹ removed the formal distinction between Common law courts and the Courts of the Equity, fusing these two jurisdictions within one judicial system.

2. Case law

A second feature of the common law tradition is the centrality of the case (rather than a text) and consequently the importance of case law. The common law consists of judge made law and is highly casuistic in character, because it has evolved practically in response to immediate problems, and not theoretically away from the scene of action as the civil law.¹¹⁰ However, in modern days, case law has lost much of its primacy through the enactment of legislation of a relatively large area of private law¹¹¹ and the activities of the Law Commission in England, established in 1965.¹¹² In the United States, the most important example of codification is the Uniform Commercial Code [hereinafter: UCC] regulating sales and securities interests that almost every State has adopted.¹¹³

¹⁰⁷ The writ system is of crucial importance to the understanding of the methodology of English private law. Whereas the civil law operates in terms of "rights" (the claim arises from the right), in the common law the "remedies" hold a central position and the principle is thus "remedies precede rights". See e.g. R. David & J.E.C. Brierley, *supra* note 96, 315-317.

¹⁰⁸ See e.g. on the writ system more extensively S.F.C. Milsom, *Historical foundations of the common law* (London: Buttersworth, 1981).

¹⁰⁹ *Court of Judicature Act, 1873* (U.K.), 36 & 37 Vict., c. 66; *Court of Judicature Act, 1875*, 38 & 39 Vict., c. 77.

¹¹⁰ See A.W.B. Simpson, *supra* note 106 at 8. Various reasons can be given why case law maintained in a time when continental Europe enacted codifications, for instance nation-building by means of codification was not necessary (the nation existed already). Furthermore, the idea of codification was also thought to be revolutionary and thus rejected by the ruling class. See J.H. Baker, *supra* note 106 at 249.

¹¹¹ Such as for example in the field of property law; *Wills Act, 1837* (U.K.), 7 Will. 4 & 1 Vict., c. 26; *Law of Property Act, 1925* (U.K.) 12 & 13 Geo. V., c. 16; *Settled Land Act, 1925*, (U.K.) 15 & 16 Geo.V. c. 18 and the *Trustee Act, 1925* (U.K.) 15 & 16 Geo. 5 c. 19.

¹¹² On the activities of the Law Commission see J.H. Smith *et al.*, eds., *Smith, Bailey and Gunn on the modern English legal system* (London Sweet & Maxwell, 2002) 25 see also <<http://www.lawcom.gov.uk>>.

¹¹³ However, article 1-103 UCC provides that the old principles of law and equity supplement the UCC to the extent that the provisions of the UCC do not expressly replace them.

3. Absence of systematization

Another feature of the common law is that rationalization of the law is considered less important. The Romanist legal system is rational and logical because its substantive rules were organised by academics in the universities and by legislators in government. English law, on the other hand, has evolved in the courts. The law therefore has never been systematized: the law was an amorphous mass of cases and individual statutes, some of which go back to the 13th century. Practitioners learned the law in practice. Consequently, the common law is highly disorderly of character and it displays a lack of a cohesive theory. It is only recently – during the last century – and with the abolition of the former procedural system, that English legal scholarship has begun to rationalize what at first seems to be a chaotic system.

4. Reasoning from case to case

Due to the absence of codification, it is impossible to reach concrete solutions in the common law on the basis of rational rules formulated in general terms. This explains why common law reasoning does not usually begin by stating a general principle or rule, but instead with an account of *all* the facts of the case (because it is not possible to know in advance which facts will be relevant). Subsequently another case with similar facts is sought. The rule that was given in that other case will then, in principle, provide the correct outcome. This inductive reasoning from case to case follows from the evolution of the common law as an *ex post facto* solution to a particular dispute.¹¹⁴ The common law is therefore rich in detail but weaker in general principles.

5. Doctrine of precedent

Although the large number of individual cases have generally not been systematised, the application of the doctrine of *stare decisis* in the common law brings to it both legal certainty

¹¹⁴ The reasoning from case to case is also to a certain extent the consequence of the writ system (there was no claim without a detailed action in the form of a writ).

and equality before the law.¹¹⁵ The doctrine of *stare decisis* provides that decisions in past cases should govern present cases which are not relevantly different from them. In short, like cases should be treated alike. Since the nineteenth century, the principle of binding precedent also included binding the highest courts (the English Court of Appeal and the House of Lords) by their own precedents and thus allowing the principle of being “an effective recipe for fatal immobility”¹¹⁶ limiting the ability to change or adapt to new insights in law. However since 1966, the House of Lords no longer regards itself as bound by its own precedents, although this is still the case for the Court of Appeal.¹¹⁷

6. (Judicial) Style¹¹⁸

The English style of judicial reasoning is based on loose argumentation. For instance, it may happen that judges discuss and balance policy considerations that underlie a particular rule. This makes the common law style substantive and detailed in character. This method of reasoning gives an insight into the reasons that have led to making the final decision. This frequently means that the judges in the House of Lords adopt a personal style, which is promoted by the possibility of writing dissenting and concurring opinions.¹¹⁹

7. Substantive concepts

The common law also has a number of legal concepts that are unknown to the civil law tradition. The English law of real property is largely dominated by rules that come from the feudal system, which is foreign to continental civil lawyers. Although concepts such as legal

¹¹⁵ See on the rule of precedent e.g. R. Cross, *Precedent in English law* (Oxford: Clarendon Press, 1991); K. Zweigert & H. Kötz, *supra* note 94, 259 and J. H. Smith *et al.*, *supra* note 112, 413.

¹¹⁶ R.C. van Caenegem, *An historical introduction to private law*, trans. by D. Johnston (Cambridge: Cambridge University Press, 1994) 160.

¹¹⁷ In theory, a lower court can still be bound by an unjust precedent of a higher court. The method used to escape such precedents is declaring the reasoning that underlies the precedent (the *ratio decidendi*) not applicable to the new case before the court. Therefore, it is not the entire judgments but rather the proposition of law that forms the basis for the judgment which is binding.

¹¹⁸ See *supra* note 104.

¹¹⁹ This judicial style is also consistent with the scepticism in common law countries concerning the proposition that there is only one outcome that can logically be considered to be correct.

estates, easements, restrictive covenants, rights of entry and settlements have comparable equivalents in the civil law, a true comparison remains difficult. The law of obligations also contains a number of typical English concepts. In this context a comparison is easier. However, the trust, agency and consideration are all examples of typical common law institutions that are only loosely related to continental concepts.

§ 2.2. The civil law and common law tradition: a comparison

Admittedly, the features discussed above are very classical ones concerning the civil law and common law respectively. This raises the question as to whether these features still exist to the full extent. If not, it may be possible to detect a convergence of the civil law and the common law, a tendency which is of interest to this thesis.¹²⁰ One must examine the extent to which these differences truly exist today.¹²¹ It can be observed that the common law and civil law tradition have more similarities than is often thought and which may overcome what seems at first to constitute unbridgeable differences. As briefly stated before, the common law has since the 19th century embraced legislation on a large scale. So today most law is, like a Code, rooted in an Act of Parliament, even those fields of law that are of a judicial origin (e.g. the law of contract). Today, statute law is of great importance in the practice of the law, although it has not reduced the importance of judge-made law. Legislation after all, needs to be interpreted.¹²² On the other hand, on the continent, the influence of the judge is no longer excluded.¹²³

¹²⁰ See on the so-called "civilisation" of the common law H.P. Glenn, "La civilisation de la common law" (1993) 45 R.I.D.C. 559.

¹²¹ The common law - civil law comparison is put into perspective by e.g. O. Kahn-Freund, "Common law and civil law - imaginary and real obstacles to assimilation" in M. Cappelletti, ed., *New Perspectives for a common law of Europe* (New York: Aspen Publishers, 1978) 178 and R.C. van Caenegem "Historical and modern confrontations between continental and English law" in B. de Witte & C. Forder, eds., *The common law of Europe and the future of legal education* (The Hague: Kluwer Law International, 1992) 621.

¹²² Legislation oftentimes is regarded as merely being a "paper rule" that must first be interpreted against the background of a case before it can become the applicable law for the case at hand.

¹²³ The 1992 Dutch Civil Code for instance contains a number of open-ended norms that give the judge a large measure of freedom to do justice according to the circumstances of the case.

In this perspective it can be noted that the authority of the judge in the civil law is becoming more similar to the common law. Due to the techniques the common law courts have at their disposal to depart from a precedent, and the fact that in the civil law judgments are followed as much as possible in the interest of legal certainty and equality before the law, it can be stated that the doctrine of *stare decisis* leads almost to the same results in the common law as are reached in practice on the civil law continent and that the differences in the extent to which a court is bound by higher, or its own judgments, are small.¹²⁴

Furthermore, it seems that the methods of applying the law are coming closer together in the civil law and common law. In the middle of the 19th century, the common law tradition abolished the forms of action and began to think in terms of substantive law directly applicable to the determination of rights and obligations of citizens. This was combined with a desire to structure private law, especially contract law. A general theory of contract came into being that negated the differences between various types of contracts and the rules were given a rational system.¹²⁵ However, notwithstanding the above assimilation of the two legal systems, the starting point for the solution-seeking common lawyer remains in case law (and accordingly allowing facts to “speak”), whereas the civilian starts to look in the codification (and thus approaches the facts from the legal norm). In addition, the judicial style does not seem to represent an unbridgeable difference either. A common law judge could of course use more formal argumentation and the civil law judge could explain more extensively the process of law finding.

This comparison has shown that all the characteristic differences between the civil law and common law could, to a smaller or a larger extent, be put into perspective. Most differences thus seem not to pose serious threats to a common European private law. Despite these convergences however, differences in substantive legal concepts continue to exist. It thus

¹²⁴ K. Zweigert & H. Kötz, *supra* note 94, 263.

¹²⁵ P.S. Atiyah, *Pragmatism and theory in English law- the Hamlyn lectures 1987* (London: Stevens & Sons, 1987).

seems that the two legal traditions seem to be irreconcilable primarily because of certain substantive concepts of law. It is in this perspective that comparative legal research is of use. In so-called mixed legal systems, elements of both legal traditions co-exist. They therefore form a valuable source of inspiration as to how one tradition can adopt substantive legal concepts of the other and yet still form part of a cohesive legal system.

§ 2.3. Mixed legal systems

§ 2.3.1. The institutional framework

It must be said at the outset that there is no consensus or accepted definition about what is meant by a “mixed legal system”. The Scottish comparatist Sir Thomas Smith described these systems in the broadest terms as being “basically a civilian system that had been under pressure from the Anglo-American common law and has in part been overlaid by that rival system of jurisprudence.”¹²⁶ A recent definition of a mixed legal system is that of Robin Evans-Jones:¹²⁷ “What I describe by the use of this term in relation to modern Scotland is a legal system which, to an extensive degree, exhibits characteristics of both the civilian and the English common law traditions.”

Mixed legal systems can be classified in many different ways.¹²⁸ The most important distinction appears to be the one between “structured mixité” and “unstructured mixité”, developed by Glenn.¹²⁹ This distinction looks to the extent to which the law coming from the civil law or common law tradition is further structured into a new legal system, in other

¹²⁶ This statement seems misleading, because the *system* is not basically civilian. The civilian part normally does not extend beyond the private-law spheres and Anglo-American public law and public institutions are not touched upon while these are essential components of the system’s mixed character. T. Smith, “The preservation of the civilian tradition in mixed jurisdictions” in A. Yiannopoulos, ed., *Civil law in the modern world* (Baton Rouge: Louisiana State University Press, 1965) 1-25.

¹²⁷ R. Evans-Jones, “Receptions of law, mixed legal systems and the myth of the genius of Scots Private Law” (1998) 114 L.Q.R. 228-249.

¹²⁸ See V.V. Palmer, *supra* note 93, 1-66 and E. Özücü, “Mixed and mixing systems: a conceptual search” in E. Özücü et al., eds., *Studies in legal systems: mixed and mixing* (The Hague: Kluwer Law International, 1996) 335-344.

¹²⁹ See H.P. Glenn, *supra* note 92 at 1-16.

terms *sui generis* as a criterion. In the case of unstructured mixité this does not occur at all; the rules of diverse origins continue to exist alongside each other without any form of systematization (and thus a complete dualist system is created). In contrast, a completely structured mixité incorporates the various elements within a new systematic framework and consequently a new, national legal system is created. This can be referred to as a completely monist system.

Neither of these types of mixed legal systems exists in practice. There is always a certain amount of systematization within a mixed legal system and none of the systems are completely autonomous either. Glenn's distinction can, however, be used in order to identify the extent to which a system is on its way to autonomy.¹³⁰ Other distinctions that are made are between "simple" and "complex" mixed systems.¹³¹ In this perspective, a system is simple if it combines systems that are equal from a socio-cultural perspective, but which come from different legal families, such as Québec. In contrast, a system is complex if the existing law is based on systems of different socio-cultural origins, such as Algeria, in which French private law, religious law and indigenous customary law co-exist. To link this distinction to Glenn's, the latter will probably lead to a new, monist system since the imported rules are likely to acquire a new meaning in the recipient's country.

¹³⁰ See e.g. E. Örüçü who distinguishes 1) mixed jurisdictions, such as Scotland, where the legal system consists of historically distinct elements but the same legal institutions (a "mixing bowl") 2) jurisdictions such as Algeria, in which both the elements of the legal system and the legal institutions are distinct, reflecting both socio-cultural and legal cultural differences (assimilated to a "salad bowl") 3) jurisdictions such as Zimbabwe, where legal dualism or pluralism exists, requiring internal conflict rules (akin to a "salad plate"); and 4) jurisdictions where the constituent legal traditions have become blended like purée, either because of legal-cultural affinity (e.g. Dutch law, blending elements of French, German, Dutch and Roman law) or because of a dominant colonial power or national elite which eliminates local custom and replaces it with a compound legal system drawn from another tradition (e.g. Turkey, blending elements of Swiss, French, German and Italian law). She also notes the existence today of "systems in transition", such as Slovenia, in which only time will determine the character of the composite system now being developed. E. Örüçü, *supra* note 128 at 335-344.

¹³¹ *Ibid.* at 345.

§ 2.3.2. The creation of mixed jurisdictions and their characteristics

In general, mixed jurisdictions originate when one culture, with its law, language and style of courts, imposes upon another culture, usually by conquest.¹³² The imposition on the French colony of New France, better known as Québec, of the English common law, together with England's administrative, judicial and legislative system, leaving the French civil law to continue unchanged is one such example. The intrusions of other cultures as seen in South Africa (by the Dutch and later by the English) and Louisiana (by the French and very shortly by the Spanish) provide further examples of how mixed jurisdictions were born.

Mixed jurisdictions may also be created by the voluntary "reception" of foreign law.¹³³ The classic example of this process may be found in Scotland. Evans-Jones¹³⁴ describes how Scottish lawyers in the 16th and 17th centuries, having been trained in Roman law in European universities, developed a preference for that law, which they brought home with them at the end of their studies. Gradually, the Roman law familiar to the foreign-trained jurists supplanted the indigenous law, and was "received" into the country, becoming Scots law.¹³⁵ A second "reception" occurred in Scotland in the 19th century (and continues today),¹³⁶ as more and more English common law began to be introduced into Scots law.

¹³² *Ibid.* at 348-349. "They [mixed jurisdictions] can be said to be the direct outcome of the British colonial policy in ceded colonies of leaving intact most of the existing legal institutions and the law already in force, only imposing common law for convenience, as apposed to the civilian colonizers who introduces codes and therefore, a way of life. When the forces behind the formation of mixed are looked at historically, it is impositions or partial impositions that are responsible for the coming into being of most mixed systems of the past."

¹³³ *Ibid.* at 341.

¹³⁴ R. Evans-Jones, *supra* note 127 at 230-231.

¹³⁵ *Ibid.* "The fundamental factor explaining why receptions occur is that a strong system of law comes up against as weak system which it then overwhelms to a greater or lesser extent. In other words, the reception of Roman law happened because it was stronger than the indigenous laws it came up against."

¹³⁶ *Ibid.* at 231-232. This second reception is explained by the fact that the Scots legal education has tended to limit the study of civil law to Roman law. Due to the limited availability of English legal literature on modern developments in the civil law, Scots jurists do not have sufficient knowledge of modern civil law.

Mixed jurisdictions, whether created by imposition or voluntary reception have, according to Palmer, three characteristic features.¹³⁷ The first concerns the specificity of the mixture. The systems are built upon "dual foundations of common law and civil law materials".¹³⁸ The second characteristic is quantitative and psychological. "There is probably a quantitative threshold to be reached before this [a mixed jurisdiction] will occur. This explains why the states of Texas and California, which indeed have *some* civil law in their legal systems are generally regarded as "common law" states, while Louisiana is regarded as a mixed jurisdiction."¹³⁹ The third characteristic is structural. "In every case the civil law will be cordoned off within the field of private law, thus creating the distinction between private continental law and public Anglo-American law. This structural allocation of content is invariable in the family. Of course the content of these respective spheres is never purely civil nor purely common, but it will be predominantly of one kind rather than the other."¹⁴⁰ As Palmer argues, if these characteristics are accepted as reliable criteria, they afford a means of differentiating mixed jurisdictions from a wide variety of pluralist systems.¹⁴¹ How predominant the civil law or the common law is within a tradition or system or jurisdiction is thus a question of judgment or what seems apparent.

¹³⁷ V.V. Palmer, *supra* note 93 at 7.

¹³⁸ *Ibid.* at 8.

¹³⁹ *Ibid.*

¹⁴⁰ *Ibid.* at 10

¹⁴¹ Palmer distinguishes a mixed legal system from pluralist systems or hybrid systems. He argues that in identifying the cultural groups in a mixed or pluralist jurisdiction "language has served as an excellent proxy to indicate legal as well as cultural identity. *Ibid.* at 41. Besides language and culture, other essential factors are the existence of two legislatures and two court systems. The existence of two nations in a single state is also a support and aid to the existence of a mixed jurisdiction. See W. Tetley, "Nationalism in a mixed jurisdiction and the importance of language" (2003) 78 Tul. L. Rev. 184-185 and § 2.4.4. below

§ 2.4. Québec's *mixité*

§ 2.4.1. The founding of Québec's legal system¹⁴²

From the inception of the French mercantilist policy in 1664 until the transfer of sovereignty to the English in 1759, French law was formally received in the French colony of New France. French sources were diverse in character and included the Custom of Paris, various royal ordonnances (usually registered in New France),¹⁴³ and the full range of jurisprudential and doctrinal sources then available in France. Local law also existed. French law was then very mixed and so was that of the colony.

Although the origins of Canadian bijuralism are generally thought to be found in the *Quebec Act* of 1774,¹⁴⁴ the duality of legal traditions existed in New France from the moment the English and the French occupied the same territory at the same time. After the Conquest by the British in 1760, the former French territory became English through the Treaty of Paris of 1763. However, the French population generally continued to settle private law disputes according to the old law (*ancien droit*)¹⁴⁵ and the duality in traditions thus in fact persisted.¹⁴⁶ In response to this situation, Governor Murray set up civil courts where judgments were to be made in accordance with the laws of England, but at the same time, judges of the lower courts were authorized to consider French laws and customs in cases between the inhabitants of the Province of Quebec.

¹⁴² See more extensively on the founding of Québec's mixed legal system and the literature mentioned there: See J.E.C. Brierley & R.A. Macdonald, *Québec civil law. An introduction to Québec private law* (Toronto: Edmond Montgomery Publications Ltd., 1993) 6-14; J.E.C. Brierley, "Country report 1 on Québec" in: V.V. Palmer, ed., *Mixed legal jurisdictions worldwide – the third legal family* (Cambridge: Cambridge University Press, 2001) 329-346 and J.-L. Baudouin, "Country report 2 on Québec" in: V.V. Palmer, ed., *ibid.* at 347-363.

¹⁴³ In the Edicts of April 1663 and May 1664, King Louis XIV explicitly held that the *loix et ordonnances* of France would apply in the French colony of New France. See *Édit d'avril 1663*, published in *Édits, Ordonnances royaux, Déclarations et Arrêts du Conseil d'état du roy concernant le Canada* vol. 1 (Québec: E.R. Fréchette, 1854) at p. 37 [*Édits*] and *Édit de mai 1664*, published in: [*Édits*] vol. I at 40.

¹⁴⁴ See *infra* note 147.

¹⁴⁵ J.E.C. Brierley & R.A. Macdonald, *supra* note 142 at 15.

¹⁴⁶ On this period, see G. Wynn, "Aux confins de l'empire 1760-1840" in: C. Brown & P.-A. Linteau, eds., *Histoire générale du Canada* (Montreal: Éditions du Boréal, 1990) 222-231.

The province of Québec became officially mixed with the enactment of the *Québec Act* of 1774¹⁴⁷ that structured Québec's legal system.¹⁴⁸ It is from this time it is said that Québec enjoys "une dualité de droit commun".¹⁴⁹ After a decade of vigorous debate, it was decided in this Act that the private laws were to be governed by the civil law (e.g. property and civil rights), whereas procedure, the administration of the government and criminal law fell under the common law. This framework for the application of the legal traditions still stands in Québec.

§ 2.4.2. Codification of the civil law

The formal division of Québec law into that of French origin *and* that of English origin was further accented by the codification of Québec private law, first effected in 1866¹⁵⁰ and successfully repeated in 1994. The preamble of the 1866 Civil code of Lower Canada [CCLC] provides four reasons for codification, namely 1) the diversity of sources of law (French law, customs, case law along with not only English law but also the newly developing Canadian law and case law); 2) the diversity of languages of the legal sources; 3) the absence of a synthesis of the various rules with the consequence that legal certainty was missing and 4) the advantages that codification had had in *inter alia* France and Louisiana.

¹⁴⁷ *An Act for making more effectual Provision for the Government of the Province of Québec in North America* [hereinafter: *Québec Act 1774*], U.K. 14 Geo. III, c. 83 (entered into force 1 May 1775). See generally H.M. Neatby, *The administration of justice under the Québec Act* (Minneapolis: University of Minnesota Press, 1937). For a historical viewpoint on the Québec Act 1774 see e.g. J.A. Lower, *Canada – An outline history* (Toronto: McGraw-Hill Ryerson Ltd., 1973) 48-49.

¹⁴⁸ Canada on the other hand became bijural only when Upper and Lower Canada were joined in the *Act of Union*, 1841. This framework was accepted and redefined in the *Constitution Act, 1867* (*Constitution Act, 1867* (U.K.), 30 & 31 Vict., c. 3) through provisions pertaining to the division of powers. Note the difference in terminology. In this theses the term bijuralism refers to the co-existence of both the civil law and the common law tradition on a national level, whereas Québec's *mixité* refers to the co-existence of both legal traditions on a provincial level.

¹⁴⁹ L.-P. Pigeon, *Rédaction et interprétation des lois* 2e éd. (Québec: Gouvernement du Québec, Ministère des Communications, 1978) at 50, as cited in J.E.C. Brierley, "Québec's "common law" (droit communs): How many are there?" in: E. Caparros et al., eds., *Mélanges Louis Philippe Pigeon* (Montreal: Wilson & Lafleur, 1989) 112. For a singular example of the co-existence of traditions in Quebec, see J.E.C. Brierley, "The co-existence of legal systems in Québec: 'Free and Common Socage' in Canada's 'pays de droit civil'" (1979) 20 C. de D. 277 et seq.

¹⁵⁰ The Civil Code of Lower Canada [hereinafter: C.C.L.C.] was enacted by *An Act respecting the Civil Code of Lower Canada*, S. Prov.C. 1865, c. 41, and came into force on 1 August 1866.

The structure and style of the CCLC was similar to that of the French Code Napoléon, albeit that the fourth book on commercial law was added and the French revolutionary ideals were rejected. Furthermore, major new elements of the French Code (e.g. divorce) were rejected, because they were considered to be socially unacceptable to most Québécois.¹⁵¹ It also added certain local elements. Brierley and Macdonald argue that the Code “superimposed elements of English and commercial law, as well as local variation on received Civil law, all woven together into a synthetic whole” and that substantively “it reflects a blending of institutions and values of the ancien droit (particularly in marriage, filiation, and inheritance) with the rationalistic and liberal values of the enlightenment (particularly in contract, civil liability, and property).”¹⁵² A distinctive feature of the Code of 1866 was that it was drafted in both French and English, with both versions official.¹⁵³ Furthermore, article 2613 (later article 2712) provided that the old law was only repealed in the event that this was provided for in a specific provision, that the old law was contrary to the code, or the code explicitly contained a provision on the problem in question. Therefore, the case law made frequent references to old sources.

§ 2.4.3. Québec’s new Civil Code (1994)¹⁵⁴

Various particular amendments were made to the Code after 1866 such as the removal of various incapacities of married women in 1964.¹⁵⁵ Finally, a major overhaul got under way when the Civil Code Revision Office (first established in 1955) was reorganized under Prof.

¹⁵¹ The CCLC reflected the conservative, family-oriented values of the largely rural (and mostly francophone) society of 19th century Québec, as well as the economic liberalism of the burgeoning commercial and industrial (and primarily Anglophone) elites concentrated in Montreal.

¹⁵² See J.E.C. Brierley & R.A. Macdonald, *supra* note 142 at 35.

¹⁵³ The original article 2615 directed the interpreter to the language version most in accord with the existing law on which the article concerned was founded. This has been recently reaffirmed by the Supreme Court of Canada in *Dore v. Verdun*. [1997] 2 S.C.R. 862.

¹⁵⁴ On the new Civil Code see generally Barreau du Québec & Chambre des notaires du Québec, *La réforme du Code Civil* vol. 1-3 (Sainte-Foy; Les Presses de l’Université Laval, 1993); P.-A. Crépeau, “La réforme du Code Civil du Québec” (1979) 31 R.I.D.C. 269 *et seq.* and J.E.C. Brierley “The renewal of Québec’s distinct legal culture: The new Civil Code of Québec” (1992) 42 U.T.L.J. 495 *et seq.*

¹⁵⁵ An Act respecting the legal capacity of married women S.Q. 1964, c. 66.

Crépeau in 1966 at the height of the “Quiet Revolution”.¹⁵⁶ The new Civil Code finally replaced the old code in 1994. The new *Code Civil du Québec*¹⁵⁷ was enacted on the basis of arguments that fit well within the civil law tradition. Crépeau mentions three reasons for re-codification:¹⁵⁸ 1) to solve existing doctrinal and practical differences; 2) the need to include the scattered legislation concerning private law that had been enacted since 1866 in a code again¹⁵⁹ and most important 3) « une réflexion critique, à la lumière de l’expérience et des leçons du droit compare, sur les raisons, les politiques législatives qui avaient présidé, au 19ième siècle, à l’élaboration du Code civil.”

The new Civil Code gives full recognition to the human person and human rights as the central focus of all private law, while also consolidating the position of the Code as the *ius commune* of Québec.¹⁶⁰ Its specific rules give expression, in more contemporary language, to the social changes in Québec society since the “Quiet Revolution”.¹⁶¹ Québec’s *mixité* is thus translated in its Code. The new Code continues to reflect the impact of certain English principles and institutions (e.g. freedom of testation, trusts and moveable hypothecs (the English chattel mortgage)), while respecting the basic structure and terminology of the civilian codification.

¹⁵⁶ See *infra* note 161.

¹⁵⁷ *Civil Code of Québec* S.Q. 1991, c. 64 [entered into force 1 January 1994].

¹⁵⁸ P.-A. Crépeau, *supra* note 154 at 272.

¹⁵⁹ Various independent law on the law of names, adoption, unjust enrichment and abuse of law are now also integrated in the new code.

¹⁶⁰ The Preliminary Disposition of the Civil Code of Québec 1994 reads as follows:

“The Civil Code of Québec, in harmony with the Charter of human rights and freedoms and the general principles of law, governs persons, relations between persons, and property.

The Civil Code comprises a body of rules, which, in all matters within the letter, spirit or object of provisions, lays down the *jus commune*, expressly or by implication. In these matters, the Code is the foundation of all other laws, although other laws may complement the Code or make exceptions to it.”

Very critical on this disposition and the argument that the Code can be regarded as the *ius commune* of Québec is Brisson who argues that the function of the Civil Code as a *ius commune* has substantively declined. See J.-M. Brisson « Le code civil, droit commun? » in: P.A. Côté, ed., *Le nouveau code civil : interprétation et application* (Montreal : Thémis, 1992) 292-315. *Contra* J.E.C. Brierley, *supra* note 149 at 109-128.

¹⁶¹ The Quiet Revolution was a process of intellectual ferment and social transformation, beginning after World War II, which saw Québec reject many of the conservative and traditional attitudes reflected in the old Code (and gave rise to a demand for a wholesale revision in the first place).

§ 2.4.4. The Supreme Court of Canada and its attitude regarding bijuralism¹⁶²

As shown above, Québec's legal system embodies both the common law and the civil law. From this it is of interest to know whether and how the Supreme Court of Canada [SCC],¹⁶³ the general court of appeal for Canada, has contributed to the relationship between these two legal traditions and how this Court has interpreted and applied both legal traditions. In this respect, two periods in the history of the SCC can be identified. In the first, civil law had to forge a path to assert its autonomy in relation to common law in order to prevent its assimilation. In the second, civil law and common law became equally recognized.¹⁶⁴ Before examining both periods, it is important to note that the SCC was created as part of the movement to establish national institutions for Canada. In general, its role was consistent with the movement for the unification of national laws at the end of the nineteenth century.¹⁶⁵ At that time, the establishment of the Court was seen as a means of developing a unified national legal system. During its early years, this unification was established by giving preference to the common law in the interpretation of the civil law. The relationship between the civil law and common law at that time was thus not a reciprocal and equal one.¹⁶⁶ One reason for this was the interpretation of Québec's Civil Code by common law

¹⁶² On the term bijuralism see *supra* note 148.

¹⁶³ The Supreme Court of Canada [hereinafter: SCC] was created in 1875 by the Parliament of Canada under the authority set out in section 101 of the *Constitution Act, 1867* (see *supra* note 152) and comprises of judges from Quebec and the other provinces. It was not until 1949 that it could exercise the role of final court of appeal in all matters, including civil matters. Appeals to the Privy Council in criminal matters were already abolished in 1933.

¹⁶⁴ See F. Allard, "The Supreme Court of Canada and its impact on the expression of bijuralism" online: [9 August 2004] Department of Justice Canada <http://canada.justice.gc.ca/en/dept/pub/hfl/fasc3/fascicule_3a.html>. Also on the interpretation of the Code see e.g. J.-L. Baudouin, "L'interprétation du Code civil québécois par la Cour Suprême du Canada" (1975) 53 Can. Bar Rev. 715 *et seq.*

¹⁶⁵ See H.P. Glenn, "Le droit comparé et la Cour suprême du Canada" in: E. Caparros *et al.*, eds., *Mélanges Louis Philippe Pigeon* (Montreal: Wilson & Lafleur, 1989) 205.

¹⁶⁶ One of the most frequently used examples to illustrate the belief in the universal common character of the civilian rules and the rules of the common law, is *Canadian Pacific Railway Co. v. Robinson* [1887] 14 S.C.R. 105. In that case it was refused award damages for *solatium doloris* pursuant to article 1056 of the CCLC, because the article 1056 could not be interpreted to include this type of prejudice given that the solution would have been different from the rule at common law.

judges as an ordinary law, a simple statute, both at the Supreme Court and at the Privy Council.¹⁶⁷

In reaction to the threat of assimilation of civil law by common law and the fact that the common law undermined the internal consistency of civil law, a movement grew to emphasize Québec's individual identity, of which civil law, language and religion formed part.¹⁶⁸ Especially in the 1960s this led to criticism regarding the "anglicizing" of Québec's civil law by the Supreme Court of Canada. The developing awareness of the conceptual autonomy of the civil law in relation to the common law led to a gradual autonomy of the civil law and the SCC set aside the idea of unifying Canadian law through the common law.¹⁶⁹ Courts began to reject common law precedents as a source of Quebec civil law and increasingly referred to French sources.¹⁷⁰ With the recognition of the autonomy and distinct identity of the civil law, the equal recognition of both civil law and common law traditions became possible, which finds expression in the confirmation of the complementary relationship between civil law and federal law given the absence of a general federal common law.

¹⁶⁷ See for a good example Lord Summer's statements about the interpretation of articles 1053 and 1054 of the CCLC in *Quebec Railway, Light, Heat and Power Co. v. Vandry*, [1920] A.C. 662, where the "statutory" character of the Code is asserted. The same reasoning can be found in *Town of Montreal West v. Hough* [1931] S.C.R. 113.

¹⁶⁸ So there was a call to abolish the availability of an appeal to the Privy Council (where Scots judges for that matter took part in an appeal from Québec) and the application of the *stare decisis* to the civil law was rejected. However, Jobin points out that this ideological movement was especially present at the universities and less in the case law. P.-G. Jobin, "L'influence de la doctrine française sur le droit civil québécois ; le rapprochement et l'éloignement de deux continents" (1992) 42 R.I.D.C. at 391. On the interpretation of the Code in general see e.g. J.-L. Baudouin, *supra* note 164 at 715-735.

¹⁶⁹ Professor Glenn describes this change as follows: "Depuis au moins le milieu du siècle, il est devenu clair que la Cour suprême a renoncé définitivement à l'idée de l'unification nationale du droit et à l'idée que la comparaison des droits doit servir à la construction de nouvelles règles, exclusives et impératives. Ce changement s'est effectué d'abord par une revalorisation des sources du droit civil, notamment de la doctrine québécoise et française, et par une reconstruction de l'impossibilité d'écarter systématiquement tout un *corpus* de règles dont la qualité et la cohérence ne souffrent en rien d'une comparaison avec la common law." See H.P. Glenn, *supra* note 165 note at 211.

¹⁷⁰ Resort to French sources was necessary, because a "true" Québec doctrine lacked at that time. In addition, there was some confusion on the formal sources of Quebec's civil law. Practitioners routinely used common law precedents and the rules set out in Quebec statutes were not consistent with, sometimes even contradicting, the CCLC, which as we have seen in § 2.4.3. led to a revision of the Civil Code.

Finally after 1970, a more autonomous source of doctrine developed in Québec, which led to a decrease in the importance of French literature. Nevertheless, French law is referred to, as are other laws including Canadian common laws. Comparative law thus has become a method to supplement the civil law.¹⁷¹ This has for instance occurred with respect to the law concerning parental rights and the liability of an owner.

It is noteworthy that the Supreme Court of Canada, the highest court of appeal in both civil and criminal cases, ordinarily has three justices from Québec who are trained and experienced in the civil law of the province of Quebec, who sit with six judges from the common law provinces. The Québec judges normally write the leading decisions in all appeals in cases involving Québec law. This is why more and more we now see the Supreme Court of Canada returning to civilian views in civil law cases.

§ 2.4.5. Québec, a mixed legal system¹⁷²

As stated earlier, since the enactment of the Québec Act of 1774, it is recognized and established that Québec has a mixed legal system. Roughly speaking, public law is governed by English derived law and private law is governed by French derived law. This categorization however, deserves some specification, since conceptual boundaries are not always clear and are sometimes even non-existent. Some major areas of Québec law do not fit well into the categorization. For example, the private character of commercial matters and the suppletive character of the civil law indicate the application of civilian sources in these matters. Québec however, never had a *code de commerce*, nor commercial tribunals. This has led to, as Glenn¹⁷³ states, "a free floating of commercial law without anchor in

¹⁷¹ On the comparative law method used by courts see e.g. H.P. Glenn, "Droit comparé et droit québécois" (1990) 24 R.J.T. at 341-351.

¹⁷² See on Québec as a mixed system e.g. H.P. Glenn, *supra* note 92; J.E.C. Brierley & R.A. Macdonald, *supra* note 142; J.E.C. Brierley, « La formation du droit national dans les pays de droit mixte » in: *La formation du droit national dans les pays de droit mixte : les systèmes juridiques de Common law et de droit civil* (Aix-Marseille: Presses Universitaires d'Aix-Marseille, 1989) 103-118 and D. Lemieux, *supra* note 95.

¹⁷³ H.P. Glenn, *supra* note 92 at 6.

major legislation, distinct institutions or articulated, mandatory *ordre public*", which resulted in a movement to commercial models most suitable for Québec in view of carrying out business with its major trading partners (mostly common law jurisdictions). Consequently, there is a dominance of common law in Quebec commercial law legislation and case law.¹⁷⁴

The conceptual categorization of English/French, public/private and Common law/Civil law does not hold completely and should be nuanced because of three factors.¹⁷⁵ First, the common law does not distinguish as clearly as does the civil law the boundaries between public law and private law. This is why both traditions have constantly interacted.¹⁷⁶ Second, although there is no established Church in Quebec and the institutional identity of the various churches is that of voluntary associations, neither Quebec nor Canada knows a formal principle of separation of Church and State.¹⁷⁷ Religious (catholic) law is well known in Quebec and it may surface in *inter alia* state legislation.¹⁷⁸ The last nuance derives from the 1867 Canadian constitution and the separation it makes between provincial law, including property and civil rights, and federal law, including federal constitutional, trade and commercial law.

From this it can be concluded that Québec's conceptual mixité is of a unique character. Different fields of law are governed by civil law and common law sources. Québec's laws display a mix of civil law and common law in relation to substantive law and to

¹⁷⁴ See generally L. Lillkoff, "La circulation du modèle juridique français et le droit commercial québécois" in H.P. Glenn ed., *Droit québécois et droit français : communauté, autonomie, concordance* (Montreal: Les Éditions Y. Blais, 1993) 399-421.

¹⁷⁵ These nuances are derived from Glenn's work on Québec's *mixité*. see H.P. Glenn, *supra* note 92, 1-15.

¹⁷⁶ For example, due to the absence of separate criteria of state liability by the (public law part of the) common law, the liability of the state is in principle governed by the Civil Code (art. 1376 C.C.Q.). Similarly, the liability of municipalities is seen as public law, yet the common law authorities of the Canadian common law provinces, reserve a large place for the application of private law criteria of responsibility, found in the Québec Civil Code. See *Laurentide Motels v. Ville de Beauport* [1989] 1 S.C.R. 705.

¹⁷⁷ Both Québec and Canada, however adhere to a constitutional principle of freedom of religion.

¹⁷⁸ For example, legislation based on section 93 of the *Constitution Act, 1867*, *supra* note 148, that provides for school authorities which are denominational in character. This has recently been changed into language based schools.

methodology. This is why Brierley and Macdonald¹⁷⁹ argue that the reason that Québec has a mixed system is not related to the fact that the Code Civil contains both the civil law and common law," but flows from the contexts within which this private law is situated. That is, the diversity of influences and juridical institutions external to the Code constitutes a primary aspect of Québec's mixed legal tradition. These institutional contexts – the constitutional division of powers in a federation of both Common law and Civil law components, and the Common law foundations of public, commercial, and penal law and procedure – generate a multiple and competing visions of law. Moreover a Common law legal and political tradition permeates the law of civil procedure, and the legislative process."

§ 2.4.6. The future of Québec's mixed legal system

As to the survival of Québec as a mixed legal system, the following can be noted. Tetley pointed out that separate languages, legislatures and courts are vital to the survival of a mixed jurisdiction.¹⁸⁰ It seems evident that the existence of two languages, each one supporting one of the two legal systems, is important in a mixed jurisdiction. As professor Örüçü stated:¹⁸¹ "racial and cultural dualism lead to legal dualism (...). The preservation of a legal tradition has been shown to be related to the growth of national and cultural consciousness (...). However, when two systems co-exist, the stronger one, demographic or otherwise, may take over, over-shadow or overthrow the other." This explains why Scotland and Louisiana are having problems maintaining their mixed legal system. The fact that English is the only official language (Scotland) and the absence of a provision on language (Louisiana) makes it much harder to secure widespread knowledge of modern (European) civil law to shore up the foundations of both distinct legal systems.¹⁸²

¹⁷⁹ J.E.C. Brierley & R.A. Macdonald, *supra* note 142 at 69.

¹⁸⁰ W. Tetley, *supra* note 141 at 722.

¹⁸¹ E. Örüçü, *supra* note 128 at 349-350.

¹⁸² On the difficulties in maintaining the mixed legal character of both of these jurisdictions due to monism in language see e.g. Tetley with further references. W. Tetley, *supra* note 141 at 724-727.

Under Canada's *Constitution Act, 1867*¹⁸³ all provincial laws and regulations of Québec, as well as all federal laws and regulations, must be adopted in both French and English. Both languages may be used in the debates and must be used in the records of both the federal Parliament and the Québec National Assembly. In addition, both languages may be used in any court of Canada. The French tradition in Québec is part of the culture itself and thus also exists beyond the law. It is, as Tetley¹⁸⁴ calls it, a "living reality" since "both languages continue to be read, understood spoken and written by Québec's legislators, judges, lawyers and scholars."¹⁸⁵ Second, Québec has had its own legislature, separate from the federal Parliament in Ottawa, from the beginning of Canadian Confederation in 1867. The fact that Québec has its own legislature has contributed to Québec's distinct cultural identity. It has safeguarded and fostered the development of the civil law tradition, most importantly by the enactment of (and later on by the amendments to) the Québec Civil Code. Third, in Canada, the administration of justice in the provinces generally falls under the jurisdiction of the provincial legislatures.¹⁸⁶ Canada is said to have a "cooperative" court system. The provincial courts (superior and inferior) adjudicate all claims within their respective monetary jurisdiction (whether those claims arise under federal or provincial law). The province of Québec has the Court of Québec, the Québec Superior Court and the Court of Appeal of Quebec. The last two courts have federally appointed judges, whereas the Court of Québec has provincially appointed judges. All these judges decide civil cases arising under both federal and provincial law, and therefore apply both civil law and common law. As stated earlier,¹⁸⁷ the Supreme Court of Canada, the highest court of appeal in both civil and criminal cases has three justices from Québec.

From this brief outline it can be concluded that in Québec, the two legal traditions thus continue not only to be applied but also continue to interact. The importance and value of

¹⁸³ See *Constitution Act, 1867*, *supra* note 148, section 133.

¹⁸⁴ See W. Tetley, *supra* note 141 at 723.

¹⁸⁵ *Ibid.*

¹⁸⁶ See the *Constitution Act, 1867*, *supra* note 148, section 92 (14).

¹⁸⁷ See § 2.4.4. above.

the preservation of Quebec's *mixité* is apparent not only for legal practitioners and judges, but also for legislators, especially the European one, in light of the development of a European private law, as previously discussed.¹⁸⁸ As Blakesley stated:¹⁸⁹ "When a lawyer, judge, scholar or legislator faces foreign or international problems from time to time, ideas from mixed jurisdictions are invaluable. Although wholesale or simplistic borrowing is wrong and actually proves often to be harmful, careful comparative study, especially comparison of how mixed jurisdictions solve similar problems is most helpful. Works from a mixed jurisdiction, therefore, naturally provide the partaker, not only with insight into the discipline of comparative law, but also into how other scholars, judges, legislators and practitioners perceive, read, think about, draft, and interpret the law."

In this thesis, the invaluable contribution of Québec's mixed legal system will be employed to bridge differences between substantive legal concepts. As advocated earlier, differences between the common law and the civil law are mostly to be found within the substantive legal concepts both traditions embody, rather than the legal mentality. A study of how Quebec's legal system has adopted common law concepts and continues to be a cohesive legal system is instructive in illustrating the feasibility of a European *ius commune* in the field of private law.

¹⁸⁸ See the introduction and first chapter of this thesis.

¹⁸⁹ C.L. Blakesley, "The impact of mixed jurisdiction on legal education, scholarship and law" in: V.V. Palmer, ed., *Louisiana microcosm of a mixed jurisdiction* (Durham: Carolina Academic Press, 1999) 68-69.

CHAPTER 3 THE CONCEPT OF THE TRUST

§ 3.1. Introduction

As briefly referred to in the previous chapter, the presence of the concept of the “trust”¹⁹⁰ in the common law is an important difference between civil law and common law systems in the field of substantive private law.¹⁹¹ In fact, there is hardly a work on comparative law that does not evoke the trust as being the distinctive characteristic of the common law¹⁹² and thus the prime example illustrating the differences between the two legal traditions.¹⁹³ Gordley goes as far as to say that today, the only remaining structural difference between civil and common law is the law of trusts.¹⁹⁴ In this context, many scholars have commented that the trust will be the common law’s most important contribution to a European private law.¹⁹⁵ It is noted that the few fiduciary institutions¹⁹⁶ that exist in the civil law tradition are

¹⁹⁰ There is an abundance of literature on the concept of the trust and the law of trusts see e.g. D.J. Hayton, *Commentary and cases on the law of trusts and equitable remedies* 11th ed. (London: Sweet & Maxwell, 1995); D.J. Hayton, *The law of trusts* (London: Sweet & Maxwell, 2003); A. Underhill & D.J. Hayton, *Underhill and Hayton law relating to trusts and trustees* 16th ed. (London: Butterworths, 2003); G.J. Virgo, ed., *Maudsley and Burn’s trusts and trustees cases and materials* 6th ed. (London: Butterworths, 2002); D.W.M. Waters, *Law of trusts in Canada* 2nd ed. (Toronto: Carswell, 1984); P.H. Petit, *Equity and the law of trusts* 9th ed. (London: Butterworths, 2001); D.W.M. Waters, ed., *Equity, fiduciary and trusts* (Scarborough: Carswell, 1993); Oosterhoff & E.E. Giesse, eds., *Text, commentary and cases on trusts* 5th ed. (Toronto: Carswell, 1998) and A. W. Scott & W.F. Fratcher, eds., *The law of trusts* vol. 1-6 4th ed. (Boston: Little, 1987) (supplemented in 1993).

¹⁹¹ See §2.1.2. under 7.

¹⁹² See e.g. F. Sonneveldt & H.L. van Mens, eds., *The trust: bridge or abyss between common and civil law jurisdiction?* (Deventer: Kluwer Law and Taxation, 1992) and M. Cantin Cumyn, ed., *La fiducie face au trust dans les rapports d'affaires* (Bruxelles: Bruylant 1999).

¹⁹³ See R. David and J. Brierley *supra* note 96 at 347; K. Zweigert and H. Kötz, *supra* note 94 at 73 and 285; W.J. Zwolve, C.Æ. Uniken Venema’s *Common law & civil law* (Deventer: W.E.J. Tjeenk Willink, 2000) 297-298; M. Cantin Cumyn, ed., *La fiducie face au trust dans les rapports d'affaires* (Bruxelles: Bruylant 1999) and M. Grimaldi & F. Barrière “Trust and fiducie” in: A.S. Hartkamp, et al., eds., *Towards a European Civil Code* 2nd ed. (Nijmegen: Ars Aequi Libri, 1998) 567 – 582.

¹⁹⁴ See J. Gordley, *supra* note 80 at 498 and 516.

¹⁹⁵ See e.g. U. Mattei, *supra* note 29 at 148.

¹⁹⁶ In the present thesis, relationships which correspond to this broad description will be referred to as “fiduciary relationships”, and the legal devices particularly designed to regulate them as “fiduciary institutions”. Consequently, although the adjective “fiduciary” has its etymological roots in the Latin word *fiducia*, in the context of this study it is not employed with a meaning which is limited to the specific notion of Roman law. However this

not supported by a comprehensive and consistent general theory of such relationships.¹⁹⁷ However, due to the popularity of the trust, especially for commercial and estate planning purposes, civil law jurisdictions have had to take cognizance of the trust and, in some cases, consequently adopted the common law concept of the trust.¹⁹⁸

The basic problem all civil law jurisdictions face is the same. What is the adequate conceptual framework for a fiduciary institution in a civilian setting? The common law has the most highly developed fiduciary institution ever designed by legal imagination, because it relies on a particularity of English law: the duality of legal and equitable title. The rules of equity permit ownership¹⁹⁹ to be split between the trustee and the beneficiary, so that the trustee holds legal title to certain property for the benefit of the beneficiary. The latter has title in equity but for most purposes the beneficiaries' rights are protected because they can force the trustees to administer the trust properly and in their interests. One of the main reasons the trust works in the common legal tradition is because this tradition permits the fragmentation of title or ownership. On the other hand, in the civil law, only one person²⁰⁰

understanding of "fiduciary relationship" does not correspond exactly to the wide meaning increasingly attributed to it in Anglo-Saxon jurisdictions, either.

¹⁹⁷ See e.g. H.J. Wieling, *Sachenrecht – Sachen, Besitz und Rechte an beweglichen Sachen* vol. 1 (Berlin: Springer 1994) 799. Only Liechtenstein and Luxembourg have codified specific trust conceptions. See M. Lupoi, *Trust law of the world – A collection of original texts* (Rome: ETI Editore 1996).

¹⁹⁸ Some countries have for example attempted to reactivate or to enlarge the fiduciary institutions known to their respective legal system in order to respond to internal needs of the legal community. This was the case for instance, in Switzerland, the Netherlands, Germany and South Africa. Other countries, for instance, Liechtenstein and a number of Latin American states, introduced entire statutes providing for fiduciary devices which were largely inspired by the common law trust. In these jurisdictions this was not only in response to internal needs but also to a large extent to stimulate foreign investment. See H. Kötz, *Trust und Treuhand* (Göttingen: Vandenhoeck & Ruprecht, 1963) 11.

¹⁹⁹ Speaking of ownership in the context of English law requires a caveat. In the common law tradition, "there has never been any desire to use the notion of ownership" as in the sense as it has developed in modern civil law. Common lawyers traditionally think in terms of interests and titles in property and not in rights. Although the juridical position of a tenant in fee simple has become in terms of powers and duties practically indistinguishable in many situations from that of an owner in the civil law, this is not true of a trustee, whose legal position has been restrictively shaped by the rules of equity. Nonetheless, the term "split ownership" may facilitate the understanding of the trust concept particularly for non-common lawyers.

²⁰⁰ This is a somewhat simplistic statement for the civil law recognizes the concept of co-ownership.

can be owner and have all the rights of ownership. Consequently, the beneficiary would be the owner having all the rights the civil law attributes to him.²⁰¹

This seems to imply that the trust is a singularly common law concept, which finds no parallel in continental European legal history, since the division between legal and equitable title is inconsistent with key elements of the Roman-based civil law systems. This raises interesting questions such as whether, and if so how, a civilian system can absorb a common law concept and yet still be a cohesive system. Would a civil legal system not be acting *contra naturam suam* if it “transplants” a legal concept which has features comparable to the common law trust. These questions have become very important in light of European legal developments.²⁰² It is in this context that the case of Québec is of particular interest, where with the reform of the Civil Code of Quebec,²⁰³ the concept of *patrimoine d'affectation* (patrimony by appropriation) was introduced, according to which neither the trustee nor the beneficiary nor the settlor have any real rights in the trust property²⁰⁴ and by which the *corpus* of a Québec trust is conceived as an “autonomous and distinct patrimony”.²⁰⁵ The experience of this civil law jurisdiction that has incorporated the trust, yet has remained

²⁰¹ However, this does not mean that the civil law does not recognize the position of a fiduciary; it does, but the term denotes something entirely different from that understood in the common law. See A.H. Oosterhoff & E.E. Gillese, *supra* note 190 at 37. The civil law for instance recognizes executorship, tutorship, curatorship and few “real rights” such as usufruct (similar to the common law life estate), but in all these cases there is only one owner, not being the “fiduciary” but rather the person who has “beneficiary interest” in the property. See e.g. W.A. Wilson, *Trusts and trust-like devices* (London: Chameleon Press, 1981).

²⁰² These developments are e.g. 1) the creation of the Principles of European Trust Law [PETL] in 1999 (See D.J. Hayton, S.C.J.J. Kortmann & H.L.E. Verhagen, *supra* note 72 2) the study the working team on trusts - as part of the study group on the European Civil Code under the direction of Professor Von Bar - currently undertakes, note 81. For further information on this working group see their website <<http://www.elsi.uos.de/privatelaw>> 3) the ratification of the Hague Trust Convention by European civil jurisdictions, Italy and the Netherlands (see the *Hague Convention on the Law Applicable to Trusts and on their Recognition*, 19 October 1984, 1664 U.N.T.S. 311, Can. T.S. 1985 No., 23 I.L.M. 1389) and 4) the work of the Trento Common Core Project initiated by U. Mattei and M. Bussani in the field of trust law, see § 1.2.2. above.

²⁰³ See *supra* note 154 and more in general see § 2.4.3. above.

²⁰⁴ Article 1261 CCQ.

²⁰⁵ Article 1260 CCQ. The official commentaries of the Code call this patrimony a “patrimoine sans titulaire”. See Ministère de la Justice, *Le Code civil du Québec – Commentaire du Ministre de la Justice* vol. 1 (Québec: Publications du gouvernement de Québec, 1993) 5.

loyal to civilian tradition and mentality, offers valuable information and may serve as an example for other civil law jurisdictions to introduce a general fiduciary institution. It also illustrates how European jurisdictions can adopt uniform legal concepts that emanate from the common law without necessarily undermining the cohesiveness of their entire legal system.

This chapter will, before examining the Québec trust, review first the common law trust, its basic functions, features and asserted obstacles to its replication in the civil law (§ 3.2). After a comprehensive assessment of the Québec trust (§ 3.3), this chapter will conclude with an examination and evaluation whether the solution of the CCQ might serve as a model for other European civil law jurisdictions to introduce a general fiduciary institution and thus whether a European trust would be feasible (§ 3.4).

§ 3.2. The common law trust and the obstacles to its replication in the civil law

§ 3.2.1. Characteristics of the Anglo-American trust

The trust is a triangular arrangement whereby one person (the settlor), places – by act *inter vivos* or on death – his property under the control of another person (the trustee), for the beneficial entitlement of a further person or for a specific purpose.²⁰⁶ In view of its complexity, it is difficult to obtain a more comprehensive definition²⁰⁷ of this institution. The trust namely has many different facets. Therefore, many definitions of the trust only

²⁰⁶ See J.E.C. Brierley, "The new Québec law of trusts: adaptation of common law thought to civil law concepts" in: H.P. Glenn, ed., *Droit québécois et droit français: communauté, autonomie, concordance* (Cowansville: Yvon Blais, 1993) 384.

²⁰⁷ In English law, some agreement has been achieved on the following definition: "A trust is an equitable obligation, binding a person (who is called a trustee) to deal with property over which he has control (which is called the trust property) either for the benefit of persons (who are called the beneficiaries or *cestuis que trust*) of whom he may himself be one, and one of whom may enforce the obligation, or for a charitable purpose, which may be enforced at the instance of the Attorney-General, or for some other purpose permitted by law". P.H. Petit, *Equity and the law of trusts* 9th ed. (London: Butterworths, 2001) 25.

consider the express private trust.²⁰⁸ Commonly cited characteristics of the trust are the institution's flexibility²⁰⁹ and the balance in the "duality" of ownership that the institution creates.

The trust is flexible primarily because of its general application.²¹⁰ A trust can be set up for a wide range of legal purposes. Even one trust set up in a single document may fulfill diverse purposes.²¹¹ In this perspective, it can be compared to a contract that can also be created in many forms and for any purpose that is not illegal or contrary to public policy.²¹² Furthermore, the "machinery of administration"²¹³ of the trust may vary. The settlor may decide whether the trustee is to be entrusted with a large degree of discretion or whether the trust is conceived as a "dog collar trust".²¹⁴ Trusts thus allow flexible arrangements regarding their internal governance.²¹⁵ Furthermore, trusts allow the creation of different

²⁰⁸ Originally, trust could only be created by the express or implied intention of the settlor. In this thesis we will focus on the express trusts, since this is the form of the trust in which most interest has been expressed in civil law jurisdictions. On the different modes of creation of a trust see e.g. B. Ziff, *Principles of Property law* (Toronto: Carswell, 1993) at 197-207; D. Hayton & A. Underhill, eds., *Underhill and Hayton law relating to trust and trustees* 15th ed. (London: Butterworths, 1995) 26 et seq.

²⁰⁹ So noted the American Supreme Court Justice B. Cardozo "equity fashions a trust with flexible adaptation to the call of the occasion" *Adams v. Champion* 294 U.S. 231 (1935) at 237. On the trust's elasticity and flexibility see e.g. A. W. Scott & W.F. Fratcher, *supra* note 190 at 2, F.W. Maitland, *Equity – A course of lectures* 2nd ed. (Cambridge: Cambridge University Press, 1936) and D.W.M. Waters, *supra* note 190 at 53.

²¹⁰ See D.W.M. Waters, *supra* note 190 at 54.

²¹¹ A long list of purposes that a trust can serve is given e.g. by D.W.M. Waters and includes estate planning and tax planning. For business applications there are e.g. investment trusts, insurance trusts, liquidation trusts and voting trusts. See D.W.M. Waters, *supra* note 190 at 103 – 119 and Oosterhoff & E.E. Giesse, *supra* note 190 at 21-24.

²¹² On the relationship of trust with the law of obligations see J. Langbein, "The contractarian basis of the law of trusts" (1995) 150 *Yale L.J.* 165 et seq. Of course the trust also display a close relationship with the law of property. On the relationship of the trust with the law of property and the law of obligations see U. Mattei, "Basic issues of private law codification in Europe: trusts" (2001) 1:1 *Glob. Jur. Frontiers* art. 5 at 4 –7.

²¹³ See T. Honoré & E. Cameron, et al., eds., *Honoré's South African law of trusts* 5th ed. (Lansdowne: Juta 2002) 8.

²¹⁴ *Ibid.* So may the trust deed provide a detailed system for the management of the trust (e.g. instructions about how to decide upon stock market investments). The trustee may even receive from the settlor the power to appoint beneficiaries or to determine their interest (a discretionary trust; see I.J. Hardingham & R. Baxt, eds., *discretionary trusts* 2nd ed. (Sydney: Butterworths, 1984)).

²¹⁵ For example, trusts do not require corporate procedures. This has been one of the great attractions of the commercial trust compared to a civilian corporation. See J.A. Langbein, "The secret life of the trust: The trust as an instrument of commerce" in: D.J. Hayton, ed., *Modern international developments in trust law* (The Hague: Kluwer Law International, 1999) 188.

types of beneficial interests. These interests do not have to be compatible with the traditional classes of corporate shares.²¹⁶ The trust is also flexible from another viewpoint. The *corpus* of the trust does not need to be fixed and is thus a fund with a variable content. The trust fund may be added to and varied. Consequently, future assets and proceeds can be included in the trust.²¹⁷

The most interesting characteristic of the trust is the duality of legal and equitable title. This is, as stated earlier, an essential feature that makes the common law trust an attractive means for the management and transfer of property. The fiduciary powers and duties of trustees established in the trust deed are governed by the principles of equity²¹⁸ and assure the protection of the beneficiary and future investor. In general, every duty imposed on the trustee represents a claim to the beneficiary.²¹⁹ By using trusts, one automatically invokes this "distinctive protective" regime.²²⁰ The trustee receives the full legal title, which endows him with considerable powers, in order to manage the property effectively for the beneficiary. The beneficiary in turn has the equitable title to guarantee his rights in the trust property. Holding the legal title, the trustee alone may deal with the property (e.g. by selling or mortgaging it). The trustee may even alienate the property, but he is not allowed to destroy it. Possible restrictions as set out in the trust deed affect what the trustee is allowed to do, but not what he juridically can do.²²¹ Consequently, a third person will acquire legal title when the trustee alienates it (regardless whether this act by the trustee constitutes a breach of his fiduciary duties or not). The beneficiary however, remains with

²¹⁶ On the creation of different types of beneficial trusts and its advantages *ibid.* 188-189.

²¹⁷ When assets are alienated from the trust corpus, the civilian principle of real subrogation applies: the value received in return for the trust assets becomes itself part of the trust. See e.g. J.E.C. Brierley, *supra* note 206 at 390 *et seq.* The management of the fund is thus secured, rather than the protection of the specific objects. See e.g. F.H. Lawson, *A common lawyer looks at the civil law* (Ann Arbor: University of Michigan Law School Press, 1953) 202.

²¹⁸ In most common law jurisdiction, statutory law is also applicable.

²¹⁹ Where the trustee acts in breach of trust, the beneficiaries may sue him personally for damages. See D.W. M. Waters, *supra* note 190 at 65 *et seq.* This may for instance be the case where the trustee, did not ensure the house in trust against fire or made some highly speculative investment with the trust assets.

²²⁰ See J.A. Langbein, *supra* note 215 at 185.

²²¹ See e.g. A. W. Scott & W.F. Fratcher, *supra* note 190 at 284 *et seq.*

the equitable title. The trustee may thus only transfer the legal title with the burden of a trust and the beneficiary may invoke a proprietary remedy against the third person. He may attempt to "trace" or "follow" the trust property to establish a claim against it or its exchange product (equitable tracing).²²² The third person, although having acquired legal title, has to render the property or to hold it as a trustee for the beneficiary (constructive trust), unless he or she is a *bona fide* purchaser for value without notice.²²³ In addition, and more important, the beneficiary is protected against the insolvency of the trustee. The trustee has two distinct estates: his own and the trust's, the assets of the trust thus form a separate fund. The principle that an insolvent trustee's property does not include trust property has been considered to be "the cornerstone of the English law of trusts" by Professor Waters.²²⁴ This feature in fact is one of the main reasons why trusts are preferred to other legal devices. Although under civil law similar results can be reached, for instance by inserting limited recourse clauses in contracts with third parties or by creating security interests, especially when one is dealing with a large number of beneficiaries or with highly volatile assets, the result achieved with a common law trust may be difficult, if not impossible, to achieve with other (civilian) legal devices.²²⁵

§ 3.2.2. Obstacles to fiduciary institutions in the civil law

Several reasons have been advanced as to why there could not be a general fiduciary institution in the civil law modeled after the common law trust.²²⁶ What follows is a brief summary of the problems most referred to in scholarly writings: 1) the duality of legal and

²²² See on equitable tracing e.g. L.D. Smith, *The law of tracing* (Oxford: Oxford University Press, 1997).

²²³ Thus in "Romanist" terms the beneficiary would have something more than a simple right in personam, but less than a right in rem in the trust property. However, there are good reasons in favor of classifying the beneficiary's interest as a right in rem. Most legal orders admit a bona fide acquisition of real rights.

²²⁴ See D.W.M. Waters, "Trusts in the settings of business, commerce and bankruptcy" (1983) 21 Alberta L.Rev. 402.

²²⁵ At least the transaction costs will be higher to achieve the same result as argued by U. Mattei, *supra* note 29 at 147-177.

²²⁶ See e.g. I. Arroyo Martinez, "Trust and the civil law" (1982) Louisiana L. Rev. 1709 et seq. and K.W. Ryan, *An introduction to the civil law* (Brisbane: The law book Co. of Australia, 1962) 220 et seq.

equitable title, and the civilian rules regarding 2) the existence of rights *in rem*, 3) publicity and 4) restraints on alienation.

The first obstacle is the absence of duality of legal and equitable title in the civil law. However, as professor Reid stated:²²⁷ "To adopt the trust is not, or not necessarily, to sink into the arms of equity."²²⁸ It seems possible for civilian systems to adopt trusts or trust-like devices consistent with the framework of a property law with Roman origins.²²⁹ In this perspective, reference can be made to civilian legal history. The concept of "double ownership" has not been completely foreign to the civil law²³⁰ and despite the absoluteness of ownership that the civil law currently embodies, ownership is open to dismemberments such as *usufruct*,²³¹ servitudes and *emphyteusis*. Titularies of a lesser real right have a direct entitlement to the thing owned by another. The complete prerogatives over a thing which *a priori* vest in the titulary of the absolute right of ownership may thus, in a second step, be distributed among various persons. This does not suggest that the civil law should, in adopting a trust, take for example recourse to the usufruct, but it does show that a civilian jurisdiction allows fragmentations of ownership. A civilian approach towards the trust could thus entail the recognition of a new real right carved out of the right of ownership which is vested in the civil law beneficiary.²³²

²²⁷ See K.G.C. Reid, "National report for Scotland" in: D.J. Hayton, S.C.J.J. Kortmann & H.L.E. Verhagen, eds., *supra* note 77 at 67.

²²⁸ See for an example § 3.3. below.

²²⁹ See K.G.C. Reid, "Patrimony not Equity: the trust in Scotland" (2000) 8 E.R.P.L. 427-437. See also the national reports for Scotland, Germany, Switzerland, France, Spain, Denmark and the Netherlands in: D.J. Hayton, S.C.J.J. Kortmann & H.L.E. Verhagen, eds., *supra* note 72 at 67-215. See also § 3.3 below.

²³⁰ One can think of the concept of *dominium utile* and *dominium directum* of the *ius commune*.

²³¹ The usufructuary, has the real right to enjoy things owned by another as a proprietor himself, he is said to have the *usus* and the *fructus*, whereas the (bare) owner has the *abusus* (however, the power of *abusus* encompasses both the power to alienate and the powers to destroy or to waste a thing. Neither the usufructuary nor the bare owner are entitled to this aspect of *abusus* in a usufruct). In both the civil law usufruct and the common law trust the powers over and entitlements to a thing are thus divided between two persons. On the other hand however, the usufructuary has a right to manage the property, whereas the beneficiary of a trust does not.

²³² As to whether civil law can create new real rights see *infra* note 236 and accompanying text.

Whereas the creation of a real right structurally resembles most closely the common law trust, functionally, the civilian concept of *fiducia cum amico* appears to be most similar to the trust.²³³ This concept allows one person to own property for the benefit of others. The fiduciary undertakes to use his right of ownership in accordance with the terms agreed upon with the original owner, who transferred the property to him. However, a crucial difference with the common law trust is that the property is not protected against the insolvency of the fiduciary.²³⁴ As professor Mattei stated,²³⁵ in the common law trust, the beneficiary is protected by a *property rule*.

Such a property rule, being a right *in rem*, appears also to conflict with the principle of a *numerus clausus* of the rights *in rem* the civil law adheres to.²³⁶ This obstacle, however seems much easier to be tackled. Beneficial interest, as briefly outlined, has two important features of a real right: *droit de préférence* (priority in insolvency) and *droit de suite* (enforceability against third parties). In some civil jurisdictions however, one may have priority without having a real right and personal rights may exist which can be invoked against third persons.²³⁷ Closed civilian systems may thus be more open than they seem to be at first sight. If the introduction of a new real right for the beneficial interest would encounter too

²³³ As appears from the national reports in D.J. Hayton, S.C.J.J. Kortmann & H.L.E. Verhagen, *supra* note 72.

²³⁴ The "beneficial interest" is nothing more than a personal non-preferred remedy against the fiduciary. See H.L.E. Verhagen, "Trusts in civil law: making use of the experience of mixed jurisdictions" in: J.M. Milo & J.M. Smits, eds., *Trusts in Mixed legal systems* (Nijmegen: Ars Aequi Libri) 102.

²³⁵ U. Mattei, *supra* note 212 at 6.

²³⁶ However, it should be noted that this principle is highly questioned by most civilians. Agreement on this principle is more unanimous in countries of the Germanic legal family. See the detailed study of M. Cantin Cumyn, "De l'existence et du régime juridique des droits réels de jouissance innomés: essai sur l'énumération limitative des droits réels" (1986) 46 Rev. du Bar. 3 *et seq.*

²³⁷ Dutch law for example knows e.g. the concept of a separate fund of a commercial partnership, the nominee account, privileged claims, kwalitatieve rechten and verplichtingen (articles 6:251 and 6:252 Dutch Civil Code), exclusive mandate, indirect agency (articles 7:420 and 7:421 Dutch Civil Code). See more extensively H.L.E. Verhagen, *supra* note 234 at 103 and S.C.J.J. Kortmann, *Vertrouwd met de trust - Trust and Trust-like Arrangements* vol. 5 Law of Business and Finance (The Hague: Kluwer Law International, 1999) 181.

much resistance, the beneficiary could be given a “protected right in personam” offering protection against insolvency of the trustee.²³⁸

In relation to the rule on the *numerus clausus*, the civilian principle of publicity is also referred to as an enemy of the common law trust.²³⁹ To protect innocent third parties, real rights in immoveables are to be registered. Hence, hidden real rights in property are thought to be precluded. However, the principle of publicity in relation to moveables is apparently given less importance in civilian systems,²⁴⁰ although as moveables become more valuable, registration of them is becoming more usual. Future statutory laws introducing trusts could for example require registration.²⁴¹

Fourth, civil law jurisdictions generally are opposed to restraints on alienation in order to prevent individuals from creating situations in which no one is able to dispose of certain rights.²⁴² However, as stated earlier,²⁴³ in a fiduciary relationship a trustee has the power to dispose of the entrusted property. Therefore, in principle the objective of the civilian principles regarding a restraint on alienation do not conflict with the concept of a trust.²⁴⁴

The objective of this discussion of the asserted obstacles to trusts in civil law has been to consider general problems of compatibility between the legal systems. For now it may be

²³⁸ This protected right would then be based on the separation of patrimony. See H.L.E. Verhagen, *supra* note 234 at 103.

²³⁹ See I. Arroyo Martinez, *supra* note 226 at 1719.

²⁴⁰ See the possibility of conditional sale with reservation of title that are unregistered proprietary interests in e.g. Germany and The Netherlands (§ 455 Bürgerliches Gesetz Buch and article 3:92 Dutch Civil Code) See J. Dalhuisen, “Conditional sales and modern financial products” in: A.S. Hartkamp, *et al.*, *Towards a European Civil Code* 2nd ed. (The Hague: Kluwer Law International, 1994) 531-534.

²⁴¹ Cf. H.L.E. Verhagen, *supra* note 234 at 100.

²⁴² See C. de Wulf, *The trust and the corresponding institutions in the civil law* (Brussels: E. Bruylant, 1965) at 138 *et seq.*

²⁴³ See § 3.2.1. above.

²⁴⁴ The civil law permits the rights and powers of an owner to be limited with real effect by the appointment of an administrator of the property. For example, most civil law jurisdictions acknowledge the power of a testator to institute a testamentary executor who may limit the power of the heir to dispose of inherited property. The testamentary executor has the power of disposition where the heir does not have such power.

concluded that all asserted obstacles can be overcome. Some aspects (e.g. the rules on the *numerus clausus* of real rights and restraints on alienation) may require legislative intervention. Whatever the method, the key is, as professor Cantin Cumyn argues, “to resort to the techniques of definition or characterization so as to place the legal transplant within the framework or the fundamental categories of the civil law.”²⁴⁵ In this perspective, it is thus the challenge for civilian jurisdictions to provide a check on the legal title of the trustee, to ensure that he exercises his rights in accordance with the intent of the settlor and the purpose of the trust without resort to the development of an equitable title for the beneficiary. In the following part of the chapter it will be examined how Québec has dealt with this challenge.

§ 3.3. The Québec trust

§ 3.3.1. Introduction

Québec, with its recodification in 1994,²⁴⁶ incarnated the trust that first appeared with the establishment of British settlers in Canada in the 19th century. As did other mixed jurisdictions, such as Louisiana and South Africa, Québec adopted a trust concept modeled after the English law model, rather than after the Roman Law *fiducia*, the latter being similar to the trust of the Anglo-American tradition.²⁴⁷

The first trust legislation was enacted in 1879²⁴⁸ and this version was incorporated in the Civil Code of Lower Canada (CCLC) in 1888. The reason why the CCLC at first did not contain a trust-device is explained by the mandate of the codifiers which was not to reform

²⁴⁵ See M. Cantin Cumyn, “The Quebec trust a civilian institution with English law roots” in: J.M. Milo & J.M. Smits, *Trusts in Mixed legal systems* (Nijmegen: Ars Aequi Libri, 2001) 74.

²⁴⁶ See § 2.4.3.

²⁴⁷ See M. Cantin Cumyn, *La fiducie face au trust dans les rapports d'affaires – trust vs fiducie in a business context* (Bruxelles: Bruylant, 1999) 173-339.

²⁴⁸ By *An Act concerning the Trust*, S.Q. 1879, c. 29.

the law, but to codify it as it was thought to be in force at that time.²⁴⁹ While this trust code has been superseded in 1994, not all the problems associated with it have been overcome. Therefore, it is useful to consider briefly the terms and the various interpretations of the “old trust”.²⁵⁰ Much has been written on the nature and application of the old Québec trust.²⁵¹ What follows is a brief overview of various views with reference to the leading cases.

§ 3.3.2. The old Québec trust

The CCLC, more specifically articles 981 (a) to 981 (n), contained the trust inspired *fiducie*. This new legal institution at the time proved, however, to be unsatisfactory in several ways. Most importantly, it was limited in its scope of application. For example, *fiducie* only existed as expressed in these articles.²⁵² Furthermore, the Code provided only partially for the juridical regime of the Québec trust. The codal text was far from clear about the conceptual framework of the new trust, and in particular, about the legal positions of the persons involved. The articles concerning the trust were brief and unclear and since they were part of the Civil Code, they had to be interpreted in its context. Although reference could be made to English law in interpreting the provisions, this was only allowed to the extent that English law was compatible with the articles.²⁵³

A more serious problem was that the old trust did not deal with the issue as to who should hold title to the trust property. Since the trustees were not personally liable to third parties, they appeared to be more like agents for the beneficiaries. Consequently it seemed that

²⁴⁹ See M. Cantin Cumyn, *supra* note 245 at 73-74.

²⁵⁰ See M. Cantin Cumyn, “Le recours à l’ancien Code pour interpréter le nouveau” in: *Le nouveau Code Civil: interprétation et application, les journées Maximilien-Caron* (Montreal: Les Editions Thémis, 1991) 161-173.

²⁵¹ See e.g. Waters, *supra* note 190 at chapter 28 with further references. See also R.H. Mankiewicz, “La fiducie Québécoise et le trust de common law” (1952) 12 R. du B. 16 *et seq*; D.N. Mattarlin, “The Quebec trust and the civil law” (1975) 21 McGill L.J. 175 *et seq*; Y. Caron, “The trust in Québec” (1980) 25 McGill L.J. 421 *et seq*; A.J. Maclean, “The common law and the Québec trusts – Some comparisons” (1967) U.B.C.L. Rev. Centennial ed. 333 *et seq* and A.J. Maclean, “The Québec trust: Role rich and principle poor?” (1984) 29 McGill L.J. 312.

²⁵² See *Laverdure v. Du Tremblay* [1937] A.C. 666 at 682 (P.C.)

²⁵³ See *Royal Trust Co. v. Tucker* [1982] 1 S.C.R. 250 at 261.

absolute ownership was vested in the latter. However, in a notable decision of the Supreme Court of Canada, *Royal Trust Co. v. Tucker*, it was decided that property was vested in the trustees for the duration of the trust. Although article 981 (b) CCLC provided that the trustees were “seized as depositaries and administrators for the benefit of the donees or legatees”, the Supreme Court of Canada determined that the title was held by the trustee as a *sui generis* property right.²⁵⁴ Despite the resemblance of this property right with the legal title of the English law trustee, the Supreme Court did not want to distinguish between legal title and equitable title as in the English legal system.

That the old Québec trust was quite different from the common law trust can also be exemplified by the fact that a fiducie could only be created for the making of testamentary and *inter vivos* gifts. Thus for example voting trusts between shareholders²⁵⁵ and real estate investment trusts²⁵⁶ were not permitted. Debenture trusts were on the other hand permitted, but only by virtue of special legislation.²⁵⁷ Furthermore, it was held that the CCLC did not permit a person to transfer property to himself or herself as trustee²⁵⁸ thereby forbidding the creation of a trust by declaration. The way in which gifts normally were made to persons in succession was by means of the *usufruct* provided for in article 443 CCLC. However, by contrast with the trust, the absolute owner is the successor, being entitled “in remainder”,

²⁵⁴ *Ibid.* at 272 - 273 where J. Beetz states that “[...] ownership cannot remain in suspense (...). The grantor is no longer the owner of property conveyed in trust: if it is a testamentary trust, he is dead, and if it is a trust created by way of gift *inter vivos*, it is essential to its validity that the grantor actually and irrevocably divested himself of the property conveyed in trust. Property cannot be both given and retained. Ownership is not vested in the beneficiary of the income, who is only a creditor of the trustee. It also is not vested during the trust in the beneficiary of the capital - in a great many cases he ranks second or third and has not even been born or conceived. When the property held in trust is finally conveyed to him, as art. 981 (l) [CCLC] expressly provides, the trust is terminated. That leaves only the trustee in whom ownership of the trust property can be vested. Clearly the right of ownership is not the traditional one, since, for example, it is temporary and includes no fructus. It is a *sui generis* property right, which the legislator implicitly but necessarily intended to create when he introduced the trust into the civil law.”

²⁵⁵ See *Birks v. Birks* [1983] 15 E.T.R. 208 (Que. C.A.). See M. Boodman, “*Royal Trust v. Tucker*. The status of the trust in the law of Québec” (1983) 43 R. du B. 801.

²⁵⁶ See *Crown Trust Co. v. Higher* [1977] 1 S.C.R. 418

²⁵⁷ See *Special Corporate Powers Act* R.S.Q. 1977, c. P-16.

²⁵⁸ See *O'Meara v. Benmet* [1922] 1 A.C. 80 (P.C.).

while the usufructuary has the right to enjoy the property, but is required to preserve the corpus for the proprietor. In addition, there was the concept of substitution (articles 925-981 CCLC) that could be used to benefit unborn persons. A substitution confers absolute property upon one person, coupled with a requirement that ownership will pass to another when the first owner dies, or upon another specified event. Additionally, article 964 CCLC made it possible to appoint either a fiduciary legatee or a legatee who is an institute. The former is obliged to administer the property and pass it on to the intended recipient. The latter is both a beneficiary and a fiduciary and a substitution occurs on his or her death or other stipulated event.²⁵⁹ It can thus be concluded that under the CCLC the trust was not that satisfactory an institution.

§ 3.3.3. The new Québec trust: the trust as a *patrimoine d'affectation*²⁶⁰

§ 3.3.3.1. The legal framework

The idea of viewing the trust as a *patrimoine d'affectation* can be traced to the French scholar Lepaulle. He saw in the common law trust an "institution juridique qui consiste en un patrimoine indépendant de tout sujet de droit et dont l'unité est constituée par une affectation".²⁶¹ "Instead of being crystallized around an individual or legal entity, [the

²⁵⁹ The relationship of these articles to the trust was not entirely clear. See D.W.M. Waters, *supra* note 136 at 1113-1115.

²⁶⁰ The literature on the Québec trust is abundant. See e.g. M. Cantin Cumyn, "The trust in a civilian context: The Quebec case" (1994) 3 *Journal of International trust and corporate planning* 69 et seq.; J.E.C. Brierley, "De certains patrimoines d'affectation. Les articles 1256-1298" in: *La réforme du Code Civil vol. 1 personnes, successions & biens* (Québec: Barreau du Québec and Chambre du Commerce du Québec, 1993) 748 et seq.; P.E. Graham, "Evolution of Quebec trust law: common law influence seen from 1962 to 1992 is likely to continue in relation to the new Civil Code of Quebec" (1994) *La Revue du notariat* 474 et seq. and A.J. McClean, "The new trust in the Civil Code of Quebec" in: *Conférences sur le nouveau Code Civil du Québec. Actes des Journées louisianaises de l'Institut canadien d'études juridiques supérieures* (Cowansville: Editions Yvon Blais, 1992) 89 et seq.

²⁶¹ P. Lepaulle, *Traité théorique et pratique des trusts en droit interne, en droit fiscal et en droit international privé* (Paris: Rousseau & Cie. 1932) 31. However, the general idea of "patrimoine d'affectation" originated first during the legal movement of the late 19th century focussing more on the specific end (finalité, Zweck) of rights. According to civil law theory, an appropriation of rights and of patrimonies constituted by these rights can take place in two ways. The first option is a separate patrimony of a person appropriated to a specific purpose. The second option is a patrimony belonging to nobody which owes its unity to the affectation to a particular purpose.

patrimony] owes its unity to the purpose to which it is devoted, *i.e.* to its appropriation.”²⁶² It took 50 years for Lepaulle’s initial proposition to influence the civil law of trusts when in 1984, the drafters of the CCQ opted for Lepaulle’s theory of trusts.²⁶³ According to article 1260 CCQ, a trust is established by a settlor through the transfer of property (*inter vivos* – by an onerous or gratuitous act²⁶⁴ – or by a will), from his own patrimony, into an autonomous and distinct “patrimony by appropriation”, which is to be managed by a trustee for a beneficiary.²⁶⁵ Consequently, only the express trust is permitted and remedial trusts are precluded. The trust patrimony consists of the property transferred in trust and the obligations arising from the realization of its purpose.²⁶⁶ Articles 1264 and 1265 provide that the trust is created when the trustee accepts the trust, and that his acceptance divests the settlor of the property, requires the trustee to appropriate the property and administer the trust according to the settlor’s terms, and confers certain rights on the beneficiaries. To ensure a real divestment, it is expressly provided that the settlor may not be the sole beneficiary of the trust.²⁶⁷

²⁶² P. Lepaulle, “Trusts and the civil law” (1933) 15:3 J. Comp. Leg. 20.

²⁶³ In doing so, previous drafts were rejected for the Quebec law of trusts. For example one of the options has been to conceive the trust as a legal person. See the publications of three members of the committee responsible for this respective draft. D.W.M. Waters, “Unification or Harmonization ? Experience with the Trust Concept” in: *Mélanges en l’honneur d’Alfred E. von Overbeck* (Fribourg: Editions Université de Fribourg, 1990) 591-609; Y. Caron & J. E.C. Brierley, “The trust in Quebec” (1980) 25 McGill L.J. 421 *et seq.*

²⁶⁴ See article 1262 CCQ. This effectively overcomes the failure of the old trust. A trust for commercial purposes is thus now made possible.

²⁶⁵ The official commentaries of the code call this a patrimoine sans titulaire. See Ministère de la Justice, *Le Code civil du Québec – Commentaire du Ministre de la Justice* vol. 1 (Québec : Publications du Gouvernement de Québec, 1993) at 5. The Code recognizes three kinds of trusts: those created for personal, private and social purposes. See article 1266 CCQ. The personal trust is the equivalent of the common law family trust. The private trust includes non-charitable purpose trusts and trusts for commercial and semi-public purposes, such as investment and pension trusts. The social trust is the equivalent of the common law charitable trust. The possibility of a trust being created by legislation is also provided for (article 1262 CCQ), of which an example is found at article 591 CCQ.

²⁶⁶ See articles 1260 and 1261 CCQ. The Quebec trust thus falls within the definition of the term “trust” in article 2 of the *Hague Convention on the Law Applicable to Trusts and on their Recognition*, 19 October 1984, 1664 U.N.T.S. 311, Can. T.S. 1985 No., 23 I.L.M. 1389.

²⁶⁷ Article 1281 CCQ permits the settlor to be either a beneficiary of income or of capital. Furthermore, he may not act as a trustee, unless it is jointly with another who is not at the same time a beneficiary of the trust (articles 1275 and 1281 CCQ). Probably, in cases where creditors claim that the trust has not been established for a legitimate purpose, but as a means to avoid their claims (thus availing themselves of the Paulian action as set out in articles

Thus the main difference between the Québec trust and the common law trust lies within the nature of the Québec trust being a patrimony by appropriation autonomous and distinct from that of the settlor, trustee or beneficiary and in which none of them has any real right. In so providing, the old debate about who “owns” the trust property was ended by declaring that there is no owner at all. Consequently, neither the trustee nor the beneficiary has title to the trust property.²⁶⁸

§ 3.3.3.2. The juridical regime

An examination of the provisions relating to the persons involved in the trust, which complement the notion of ownerless property as the basic legal framework, may provide an outline of the Quebec's conception of the trust.

1. The Settlor

When in Québec a trust is set up, the settlor as the original titular, transfers the property rights to the trust patrimony and attributes the powers over this property to the trustee (article 1260 CCQ). The will of the settlor as expressed in the constituting act is a major determinative in the tripartite relationship of a trust. Additionally, the settlor's intent is the determining factor for a court, on the application of an interested person,²⁶⁹ to terminate the trust or, in a social trust, to substitute the original purpose with another purpose.²⁷⁰

1631-1636 CCQ) the courts will be stricter than the formal test of articles 1275 and 1281 CCQ. See M. Cantin Cumyn, *supra* note 245 at 78.

²⁶⁸Article 1278 CCQ however, seems to resolve this problem by providing that “A trustee has the control and the exclusive administration of the trust patrimony, and the titles relating to the property of which it is composed are drawn up in his name; he has the exercise of all the rights pertaining to the patrimony and may take any proper measure to secure its appropriation. A trustee acts as the administrator of the property of others charged with full administration.” This section gives the trustee a title. However, its purpose is not to make him or her the effective owner, but rather to confer upon the trustee the powers necessary to permit the proper administration of the trust.

²⁶⁹It can be derived from articles 1260 *et seq.* CCQ that interested persons include the settlor and his heirs, present and future beneficiaries and the public authority supervising social trusts.

²⁷⁰Such judicial intervention is only possible when unforeseen circumstances necessitate, the trust has ceased to meet the intent of the settlor or if the first affectation is substituted, the new purpose must be one closely related to what the settlor originally intended. Court jurisdiction is also granted to modify the terms of the trust in order to better fulfill the intention of the settlor (article 1294 CCQ).

Furthermore, the settlor may set up conditions to be fulfilled by potential beneficiaries before they receive benefits from the trust property (article 1280 CCQ). Similarly, the settlor decides the modalities by which beneficiaries may demand the benefits (article 1284 CCQ). Unlike the common law, the CCQ sees settlors (or even his heirs) as having a sufficiently strong interest in the destiny of the trust that they may play a decisive role even after a trust has been fully established through their right of supervision and control of the trustee's administration.²⁷¹

2. The Trustee

According to article 1278 CCQ, the trustee, with no real right in the trust property acts as the administrator of another's property charged with full administration. This provision further refers to Title VII of the CCQ "De l'administration du bien d'autrui"²⁷² applicable to all administrators of property. Title VII distinguishes between simple and full administration, of which the latter is applicable to trustees. It allows him, in principle to perform any juridical act in relation to the property.²⁷³ The powers of the trustee are complemented by the fiduciary obligations contained in articles 1299 *et seq* CCQ. There are two sources of the trustee's duties; the trust document as determined by the settlor and the Code, which sets up a regime of fiduciary obligations.²⁷⁴ A more comprehensive regulation of the trustee's obligation is to be found in the Title on administration of property of

²⁷¹ Articles 1287 and 1290 CCQ. In addition, if provided for in the trust document, the settlor may also reserve the power to appoint beneficiaries after the trust's constitution (1282 CCQ). In common law jurisdictions, once a trust is constituted, the settlor and his heirs – unless they are co-trustees or co-beneficiaries normally will lose all rights to control the trust.

²⁷² For a complete analysis of these articles see M. Cantin Cumyn, *L'administration du bien d'autrui* (Montreal: Éditions Yvon Blais, 2000) 467 *et seq*.

²⁷³ Articles 1260, 1265, 1278 and 1307 CCQ allow the trustee to enter into any onerous contract that he deems necessary to fulfill his obligation under the trust or the purpose of the trust. He may borrow using the trust property as security and he is not legally bound to follow the list of authorized investments set in the Code for other administrators such as tutors, curators, testamentary executors.

²⁷⁴ The provisions on trust include the obligation of the trustee to deliver the beneficiary the revenue or the capital (article 1284 and 1297 CCQ), to perform any act necessary in the interest of the trust, to abstain from any action harmful to it (article 1290 (1) CCQ), to file a statement on the modalities of the trust to those entitled to supervise a private or a social trust and to make the trust records available for examination (1288 CCQ).

others.²⁷⁵ The trustee who is negligent or otherwise fails to fulfill his obligations is liable for damages and may be removed. Lastly, the trustee who acts within the limits of his powers is not personally liable towards the person with whom he contracts as trustee.²⁷⁶ It is the trust which is bound by such contract.²⁷⁷

3. The Beneficiary

Beneficiaries of the Quebec trust are entitled to require either the payment of the fruits and revenues granted to them or of the capital at the end of the trust in the measure provided for in the constitutive act.²⁷⁸ Although the beneficiary's right is exercised against the trustee, it is paid out of trust monies only, not from the personal assets of the trustee, which are protected against creditor's of the trust. Article 1261 CCQ explicitly states that the beneficiary does not have any real right. Being left with a personal right, the question is raised as to how the beneficiary is assured to receive the benefits of the trust (e.g. in case of a replacement of the trustee). Does perhaps the very nature of the trust demand for its effective function that beneficiaries have a somewhat stronger right than just a personal one? In this perspective it is of interest to see what happens to the beneficiaries right in case of improper alienation and the trustee's insolvency.

Due to the silence of articles 1260 *et seq.* CCQ, the general rules of the Code on contracts transferring ownership should be applied. Consequently, only when a trustee acts beyond

²⁷⁵ For example, article 1309 CCQ sets out the general principle that he shall act with prudence and diligence, honestly and faithfully in the best interest of the objective of the trust. Furthermore, some predictability and guidance regarding prudent behaviour, which facilitates the management by the trustee, is provided through the presumption that he acts prudently when acting in accordance with the list of rules of investment at articles 1339 *et seq.* CCQ.

²⁷⁶ Article 1319-1320 CCQ.

²⁷⁷ The legal consequences of a trustee acting beyond his powers are twofold. First, the trustee is personally liable to the trust (or to the beneficiaries in case of a termination of the trust) for any damages as a result of his fault. Second, the contract entered is annulable. However the third party may invoke the doctrine of apparent powers in order to preserve the validity of the contract.

²⁷⁸ Articles 1284 and 1297 CCQ. They may thus be divided into revenue and capital beneficiaries. A beneficiary's right to receive income is assimilated to that of a creditor (see *Laverdure v. Du Tremblay*, *supra* note 255 and article 1261 CCQ).

his powers, for example the settlor explicitly excluded alienations, the transfer may be annulled by the beneficiary or any other interested person. This nullity has retroactive effect, so that the juridical act is considered as never having existed.²⁷⁹ The property which the trustee attempted to alienate thus never ceased to pertain to the trust patrimony and consequently, it did not become part of the patrimony of the third party. If the third person has attained possession or any other prestation, both the rules on restitution of prestations and revendication apply (articles 1699 *et seq.*).

Although the beneficiary's rights resemble the exercise of a right to "trace", it is clearly not. First the power to demand restitution is primarily a prerogative of the trustee and only in case of default may the beneficiary step in. Second, there is a fundamental difference between equitable tracing (or the civilian *droit de suite*) and the right to demand the restitution of the prestation. A common law trustee's improper act of alienation is valid and not voidable although he acted in breach of trust, because he has the legal title and thus the power to dispose. The alienated property therefore has become the property of the third person provided that it was a transfer for value and that he was in good faith. Under Quebec law, by contrast, the trustee who has been denied the power to alienate is not only not allowed, but also not able to transfer the ownership to a third person. The third person, regardless of his good faith, will therefore not acquire title to property unless the beneficiary ratifies the juridical act.²⁸⁰ In consequence, in Quebec the trust patrimony loses only possession, and thus the title to the property does not need to be "traced". The beneficiary therefore need not fear that the patrimony's value is diminished, which would endanger his right to the benefits. The beneficiary thus does not need more than this personal right.

Second, it is of interest to see what happens in case of the trustee's bankruptcy. In a Quebec trust, when the trustee becomes insolvent and his bankruptcy is declared, the trust

²⁷⁹ See Ministère de la Justice, *supra* note 265 at 1055.

²⁸⁰ Article 1320 CCQ.

patrimony remains unaffected by this, because it is distinct and separate from that of the trustee. The trustee's obligation to pay the benefits may, notwithstanding his bankruptcy, be performed, because the payment is to be made from the trust patrimony and not from his patrimony which is subject to bankruptcy. There is therefore no need to attribute the beneficiary a privileged position in relation to other creditors of the trustee by conceiving his right as something other than a personal right. Where the trustee performs his obligation to pay the benefits in violation of the trust or not at all, he is – according to the general rules on obligations – liable for damages caused by his default.²⁸¹

We may thus conclude that in both cases – improper alienation and the trustee's bankruptcy – the beneficiary's right is sufficiently protected even though it is "only" a personal right. This protection, achieved in the common law by giving the beneficiary an equitable right of ownership (a real right), is accomplished in the CCQ through its particular conception of the trust as a patrimony by appropriation and the trustee as titulary of powers instead of rights.

²⁸¹ Articles 1600 *et seq.* CCQ. Such a secondary obligation to pay damages would have to be fulfilled from the trustee's personal patrimony and there is no policy reason why it should not have the same rank as any other creance of ordinary creditors of the trustee. In the trustee's bankruptcy the secondary obligation to pay damages would only be performed out of the bankrupt's patrimony proportionally, according to what is left after those who hold real rights are satisfied. This does not, however, unduly disadvantage the beneficiary. He still has his primary right to require revenue and capital, which he may claim against a new trustee (bankruptcy is a reason to demand for the trustee's substitution).

§ 3.4. Evaluation

Quebec has in its choice of a *patrimoine d'affectation*, chosen to travel a relatively new and unknown road in incorporating a trust device in a civil law system. Concepts of ownership, property or real rights are all rejected in explaining the trustee's authority to deal effectively with the assets in the trust. The trustee has instead, powers over the trust. To ensure the respect by the trustee of the purpose for which the trust is constituted, neither the settlor, nor the beneficiary have a real right in the property. The definition of the trust as a *patrimoine d'affectation* can thus be seen as a "logical consequence of a necessary separation between the trustee and title to the property in trust."²⁸²

It has been suggested that this ownerless fund fits better with the classic fundamentals of the civil law than would the doctrine of fiduciary ownership.²⁸³ The *Commentaires du Ministre du Justice* say that, contrary to the solution of endowing the trustee with a new form of *sui generis* fiduciary ownership "qui dénatur[e] complètement le droit de propriété", it "laisse ainsi intact le droit de propriété traditionnel".²⁸⁴ Quebec however, stands rather alone in its acceptance of juridical universalities without some connection to legal personality. In Europe, the Scottish approach of adopting the trust is favoured, according to which the trustee has the right of ownership of the trust assets that form a separate fund from his private assets.²⁸⁵

This raises the question with regard to the conceivability of ownerless property in civil law jurisdictions. Objections to ownerless property are primarily theoretical and find their roots

²⁸² See M. Cantin Cumyn, *supra* note 245 at 80.

²⁸³ See A.J. McClean, *supra* note 260 at 108. See in this sense also J.E.C. Brierley, *supra* note 206 at 383 and A.H. Oosterhoff, "The new Quebec trust" (1991) 10 *Estates and Trust J.* 32 *et seq.*

²⁸⁴ See *Commentaires du Ministre de Justice*, *supra* note 265 at 748.

²⁸⁵ See the National Reports in: D.J. Hayton, S.C.J.J Kortmann & H.L.E. Verhagen, eds., *Principles of European trust law* (The Hague: Kluwer Law International 1999) 67-215. See also article I PETL.

in the theory of patrimony.²⁸⁶ This theory advocates the attribution of patrimony to a person. This conception of ownership has provoked strong criticism.²⁸⁷ However, the business world would suffer in particular from the principle of the indivisibility of patrimonies, forbidding a person to separate a part of his patrimony to limit liability to only a part of his assets. In this perspective, it can be stressed that setting aside assets by creating a legal person has long been recognized in both legal traditions. In fact there are not much differences in this respect between a *société unipersonnelle* and a patrimony without titular. The interest of third parties dealing with the trust are being taken into account in the same way as that of any person contracting with an administrator.

In addition, accepting *patrimoine sans titulaire* does not necessarily interfere with the classical understanding of a patrimony as “*émanation de la personnalité*” since it does not imply that there are persons without a patrimony. Article 2 CCQ for example, states clearly that: “Every person has a patrimony”²⁸⁸ and not necessary that every patrimony has a person. The *patrimoine sans titulaire* is thus conceptually possible in the civil law. The structure that Quebec has chosen for the trust successfully circumvents asserted obstacles to its replication in a civil law jurisdiction. The Quebec solution is also compatible with civilian principles. As previously shown, all parties involved in the Quebec trust enjoy a proper protection under the CCQ. The common law technique of tracing for example found a suitable civilian counter part.²⁸⁹

²⁸⁶ See C. Aubry and C. Rau, *Cours de droit civil français d'après la méthode de Zachariae* 4th ed. (Paris: Marchal & Billard, 1873) § 335. It can be summarized in three central statements: every person has a patrimony, every patrimony is necessarily vested in a person, and the patrimony of a person is in its essence unitary.

²⁸⁷ See e.g. H. Léon & J. Mazeaud, *Leçons de droit civil - Introduction à l'étude du droit* 12th ed. (Paris: Montchrétien, 2000) 362 *et seq.* and J. Ghestin & G. Goubeaux, *Traité de droit civil - Introduction générale* (Paris: Librairie Générale de Droit et Jurisprudence, 1990) 159 *et seq.*

²⁸⁸ Even if it did interfere with some concept of civil law, it can of course be argued that an exception to the general rule must be made possible in providing a functional device for society.

²⁸⁹ See § 3.3.3.2. above.

Furthermore, the Quebec trust is also compatible with the CCQ. The general rules of administration of property of another have been made applicable to the conduct of the trustee in the exercise of his powers,²⁹⁰ which has contributed to the cohesiveness of the Quebec legal system.

What the preferred approach would be to adopt the trust in a civil law system, a reinforced Roman law *fiducia* concept as the Scots have done and is opted for in the Principles of European Trust Law, or the Quebec approach in defining a trust as a *patrimoine d'affectation* is a question to be answered by the European countries in drafting their respective statutes or in amending their Civil Codes. Many different factors will play a role in their decision. The objective of this chapter however, is not to advocate one of these approaches, but to show that civil law jurisdictions can learn from the Quebec experience in adopting a trust device. The choice for a *patrimoine d'affectation* proves not only to circumvent the pitfalls of dual ownership, *numerus clausus* of real rights and other asserted impediments,²⁹¹ but also demonstrates that it is possible to accommodate a common law concept that flourishes within a civilian system without threatening the cohesiveness of the latter.

²⁹⁰ However, for the trustee of an express trust additional rules apply. See § 3.3.3.2. above.

²⁹¹ Cf. M. Cantin Cumyn, *supra* note 245 at 81.

CHAPTER 4 THE CONCEPT OF LESION

§ 4.1. Introduction

There is a fundamental desire for certainty, predictability and stability in the law of contract, especially in commercial settings. The maintenance of security of contract promotes these desiderata. Sanctity of contract both respects the freedom and autonomy of individuals to contract with each other and protects the agreements reached between them. However at times, maintaining certainty and predictability may result in unfairness and injustice. This is why every legal system of contract law supports certain exceptions to the principle of security of contract.

For at least two hundred years, the common law, through its Courts of Equity, has refused to grant enforcement of, or has rescinded, contracts so unconscionable "as no man in his senses and not under delusion would make on the one hand, and as no honest and fair man would accept on the other".²⁹² On the other hand, the civil law's notion of *pacta sunt servanda* required courts, as well as the contracting parties, to be bound by the parties' voluntarily assumed obligations. Not surprisingly, in comparing Quebec civil law with the common law, Trudel stated: ²⁹³ "le contrat nord-américain ou de droit anglais diffère donc du nôtre: il est certainement plus humain, plus moral."

It can thus be observed that, although in the field of contract law the civil law possesses a great deal of flexibility, particularly for the protection of parties who enter into contracts with defective consent,²⁹⁴ this flexibility is not extended to the doctrine of unconscionability, or as it is known in the civil law, lesion. A flexible approach to the enforcement of contracts was thought to conflict with the traditional philosophical framework of the civil

²⁹² See *Earl of Chesterfield v. Janssen* (1750), 2 Ves. Sr. 125, 28 Eng. Rpr. 82 at 100.

²⁹³ G. Trudel, *Lésion et contrat* (Montréal: Les Presses de l'Université de Montréal, 1965) 74.

²⁹⁴ The CCQ considers lesion as a defect of consent, such as error, fraud or fear (duress) fear. Article 1399 CCQ reads: "Consent may be given only in a free and enlightened manner. It may be vitiated by error, fear or lesion."

law of obligations by jeopardizing its goal of legal certainty and its adherence to party autonomy.²⁹⁵ The civil law has therefore been much more rigid in its application of the principles of certainty, stability and the binding nature of contracts than has the common law.

A new attitude to contract law in civil law jurisdictions was only noted in 1930 by Professor Ripert when he stated:²⁹⁶ “[...] n’est-il pas curieux qu’après un siècle de libéralisme et une admiration éperdue du contract, expression de la volonté libre, on en revienne à la doctrine de nos anciens jurisconsultes qui était tout imprégnée de l’idée morale dégagée par les canonistes.” This new attitude was very much needed in the civil law, since the triumph of certainty as a contract value over the competing contract value of flexibility rendered contract law at times too rigid. The new flexibility that the concept of lesion brings to contract law has been regulated in civil law jurisdictions in various different fashions through the ages. Three principal conceptions of lesion can be distinguished. First, a purely objective measure (*laesio enormis*) originating in the Aristotelian notion of commutative justice, whereby lesion results solely from a significant imbalance between the respective obligations of the contract.²⁹⁷ Second, a subjective concept (simple lesion) was developed in order to protect incapables and minors from discomforting or embarrassing contracts rather than from contracts that can be characterised as imbalanced.²⁹⁸ Third, a mixed conception of

²⁹⁵ More extensively on the reasons for the inflexibility of contract law of Quebec civil law see R. Jukier, “Flexibility and certainty as competing contract values: A civil lawyer’s reaction to the Ontario Law Reform Commission’s Recommendations on amendments to the law of contract” (1988) 14 Can. Bus. L.J. 26-29.

²⁹⁶ G. Ripert, *La règle morale dans les obligations civiles* 4th ed. (Paris: Librairie Générale de Droit et Jurisprudence, 1949) 126-127.

²⁹⁷ For example article 1674 of the French *Code Civil* in respect of the sale of immovable property. See J. Gordley, “Equality in exchange” (1981) 69 Cal. L. Rev. 1589.

²⁹⁸ In Quebec, this is the case of lesion of the incapable, minor or protected person of age. See article 1406 para. 2 CCQ.

lesion has emerged, inspired by Germanic law,²⁹⁹ which is based on a double criteria: the objective disproportion factor and the subjective factor of exploitation.

In view of European legal developments,³⁰⁰ the member states of the EU will have to reach some agreement on this legal concept. Although in the common law the doctrine of unconscionability has also been problematic,³⁰¹ since it touches upon the classic question of how to establish a just equilibrium between contractual prestations,³⁰² it must be noted that the common law has accepted and applied this concept in a more uninhibited way than the civil law.³⁰³ In search for this just equilibrium, the evolution of lesion³⁰⁴ within Quebec's legal system offers valuable information. A comparison between the situation in 1866 at the adoption of the Civil Code of Lower Canada, with the situation today, illustrates the

²⁹⁹ See article 138 of the German *Bürgerliches Gesetzbuch*. See C. Witz, *Droit privé allemand 1. Actes juridiques, droits subjectifs* (Paris: Litec, 1992). Also, art. 2-302 of the U.S. Uniform Commercial Code regarding the rule of unconscionability:

(1) If the court as a matter of law finds the contract or any clause of the contract to have been unconscionable at the time it was made, the court may refuse to enforce the contract, or it may enforce the remainder of the contract without the unconscionable clause, or it may so limit the application of any unconscionable clause as to avoid any unconscionable result.

(2) When it is claimed or appears to the court that the contract or any clause thereof may be unconscionable the parties shall be afforded a reasonable opportunity to present evidence as to its commercial setting, purpose and effect to aid the court in making the determination.

³⁰⁰ Such as the making of the so-called common frame of reference, see § 1.3. above.

³⁰¹ So was the doctrine of unconscionability questioned by the House of Lords in *National Westminster Bank v. Morgan* [1985] 1 All. E.R. 821.

³⁰² For a thorough legal analysis on contractual justice see J. Ghestin, "L'utile et le juste dans les contrats" in: *Archives de philosophie du droit* vol. 26 (Paris: Sirey, 1981) 335-347.

³⁰³ In this context it can be noted that the concept of lesion is not a typical substantive common law concept such as the trust discussed in the previous chapter. Both legal traditions have just very differently embraced the concept of lesion, respectively, the doctrine on unconscionability, that roots in the Aristotelian notion of commutative justice. This notion operates on the principle that no one should gain by another's loss and can be retrieved in Canon law. See J. Gordley, *supra* note 297 at 1589. See from the same author more extensively on the origins of lesion *The philosophical origins of modern contract law* (Oxford: Clarendon Press, 1991).

³⁰⁴ On the evolution of the concept of lesion in Quebec law see e.g. J.-L. Baudouin & P.-G. Jobin, *Les obligations* 5th ed. (Cowansville: Les Éditions Yvon Blais, 1998) § 251 - § 302; J. Pineau & S. Gaudet, eds., *Théorie des obligations* 4th ed. (Montreal: Les Éditions Thémis, 2001) 232-260. P.-G. Jobin, "La rapide évolution de droit de la lésion en droit québécois" (1977) 29 R.I.D.C. 331 - *et seq.* More in particular on the development of the concept of lesion in the field of consumer law see C. Masse, *Loi sur la Protection du Consommateur - Analyse et commentaires* (Cowansville: Les Éditions Yvon Blais, 1999) 133-156 [hereinafter: *Analyse et commentaires*] and C. Masse, "Développements récents en matière de lésion entre majeurs et d'équité contractuelle" in: *Congrès annuel du Barreau du Québec* (Montréal: Service de la formation permanente, Barreau du Québec, 1990) 169 *et seq.*

significant evolution that has been made in the field of contract theory, and shows the increasing moralisation of contemporary contractual relations.

It is evident upon the reading of the 1994 Quebec Civil Code that it was inspired by the notion of contractual justice and has attempted to bring about more flexibility even at the cost of the sanctity of contract. With the reform of its Civil Code, Quebec's position with respect to lesion has provided an occasion for lively academic, professional and governmental debate which shows the struggle of a civil law jurisdiction in accomodating the fluid legal concept of lesion from which European legislators can benefit. Quebec's approach towards lesion is of even more interest for them because in its adoption of the concept of lesion, Quebec has openly sought connection to the common law doctrine of unconscionability. Again an answer to the question whether, and if, how, a civil law jurisdiction can adopt a common law legal concept while remaining a cohesive legal system will be sought.

The point of departure for the analysis of how Quebec has dealt with the classical question of how to establish a just equilibrium between contractual prestations and at the same time to remain faithful to the civilian legal framework, will be the Civil Code of Lower Canada (§ 4.2.). As previously stated, the Quebec legislature struggled enormously in its adoption of a concept akin to the common law notion of unconscionability. After having briefly clarified the doctrine of unconscionability in relation with other legal concepts such as duress and undue influence (§ 4.3.), Quebec's gradual move towards flexibility in the area of lesion will be described with references to *inter alia* the Civil Code Revision Office position and governmental legislation, being the Consumer Protection Act of 1971³⁰⁵ and 1978³⁰⁶ and the new dispositions in the Quebec Civil Code (§ 4.4.). Then an analytical examination and assessment of the legal framework entailing the different regimes on mixed lesion will

³⁰⁵ Consumer Protection Act, 1971, S.Q. c. 74.

³⁰⁶ Consumer Protection Act, 1978, R.S.Q. c. P-40.1.

follow (§ 4.5). Lastly, the Quebec approach will be put into a more global context with references to the UNIDROIT Principles and the Principles of European Contract law (§ 4.6).

§ 4.2. Historical Background

In the Civil Code of Lower Canada of 1866, the classical notion of lesion (objective lesion or *laesio enormis*) had been eliminated, while only retaining simple lesion (subjective lesion), a concept applicable only to minors and persons of full age under protective regimes. Article 1012 CCLC provided that “persons of the age of majority are not entitled to relief from their contracts for cause of lesion only.” The Quebec legislature had consciously not reproduced lesionary remedies for persons of the age of majority. Quebec’s approach towards lesion was even for that period of time very restrictive. France for example had a very liberal legal framework, yet limited lesionary remedies were allowed. Article 1674 of the French *Code Napoléon* provided for the annulment in favour of the seller if the purchase price is lower than 7/12 of the value of the immovable property³⁰⁷ and through legislative intervention, lesion to persons of the age of majority belonging to a certain professional group was increasingly allowed.³⁰⁸

It should be remembered that this total rejection of lesionary remedies for persons of the age of majority was coherent with the spirit of the age prevailing at that time. It fit perfectly within the era of philosophical individualism and economic liberalism. In the 19th century, classic civil law, based on the concept of the autonomy of the will, according to which contracting parties of age are fully capable to defend their own interests alone, consecrated the full force of the principle of freedom of contracts. Consequently, persons of age were not allowed to have recourse to the concept of lesion, for the sole reason of significant

³⁰⁷ See more extensively on French lesionary remedies J. Gordley, *supra* note 297 at 1589.

³⁰⁸ Farmers for example were allowed lesionary remedies if they were exploited in a purchase of fertilizers, sowing seeds or planting. See H. Mazeaud, “La lesion dans les contrats” in: *Travaux de l’association Henri Capitant* vol. 1. (Paris: Dalloz, 1946) at 183 *et seq.*

disproportion between the correlative prestations of the parties.³⁰⁹ The validity of a contract in classic civil law is only subject to the concept of *ordre public*, and as long as there is no defect of consent such as error (mistake), fraud, or violence at the point of formation of a contract, the contract will be binding on the parties and the courts, and will not be subject to review at the point of enforcement. Suprisingly, this restrictive regime remained until the new Civil Code of Quebec came into force in 1994. The restrictive rules in the CCLC³¹⁰ remained unchanged even though, for more than half a century, the legislature incorporated specific regimes³¹¹ of lesion in various statutes³¹² and even in the Civil Code,³¹³ in specific areas of socio-economic activity. In this perspective, reference can be made to the legislative enactments of article 1040c CCLC, section 118 of the Consumer Protection Act of 1971³¹⁴ and section 8 of the Consumer Protection Act of 1978.³¹⁵

Enacted in 1964, article 1040c CCLC³¹⁶ was the primary unconscionability provision in the Civil Code of Lower Canada and the major exception to the rigid principle contained in article 1012 CCLC that persons of the age of majority could not annul contracts for lesion.

³⁰⁹ See G. Trudel, *supra* note 297 at 66. Minors on the other hand were not precluded from lesionary remedies. Articles 1001-1011 CCLC.

³¹⁰ Another provision seriously restricting the flexibility of Quebec contract law is article 1135 CCLC regarding penalty clauses, which stated: "the amount of penalty cannot be reduced by the court."

³¹¹ See in particular *An Act respecting the regulation of rentals*, 1950, S.Q. c. 20, s. 11; *Consumer Protection Act*, 1971, *supra* note 309 s. 118; *Consumer Protection Act*, 1978, *supra* note 310 s. 8; *Securities Act*, 1964, R.S.Q. c.274, ss. 35 (g) and 60, carried forward in R.S.Q. 1977, c. V-1, ss. 52 (g) and 77. These articles were repealed when the Act was replaced in 1982 by the *Securities Act*, 1982, S.Q. c. 48, carried forward in R.S.Q. c. V-1.1.

³¹² See in particular article 1056b para. 4 CCLC concerning the validity of compromises relating to bodily harm; *An Act to amend the Civil Code*, 1939, S.Q., c. 95. carried forward in article 1609 CCQ; article 1040a CCLC; *An Act to protect borrowers against certain abuse and lenders against certain privileges*, 1964, S.Q. c. 67 carried forward in article 2332 CCQ.

³¹³ By reason of the diversity of criteria retained by the legislature. See in particular articles 1056b, 1040c CCLC; ss. 35 (g) and 60 *Securities Act*, 1964 carried forward in ss. 52 (g) and 77, *Securities Act*, 1977, *supra* note 311.

³¹⁴ Section 118 of the Consumer Protection Act, 1971 *supra* note 305 will be briefly examined in § 4.4.2. below.

³¹⁵ Section 8 of the Consumer Protection Act, 1978 *supra* note 306 will be examined in § 4.4.2. and § 4.5. below.

³¹⁶ Article 1040c CCLC reads: "The monetary obligations under a loan of money may be reduced or annulled by a court so far as it finds that, having regard to the risk and to all the circumstances, they make the cost of the loan excessive and the operation harsh and unconscionable."

However, the Quebec judiciary was extremely reluctant to give this article any real force.³¹⁷ Only in a limited amount of cases was lesion allowed.³¹⁸ This restrictive approach towards lesionary remedies,³¹⁹ albeit not respectful to the legislature's intention to introduce flexibility into contract law, is in harmony with the classic civil law preoccupied with the formation of a contract. Reasons for the Quebec judiciary's persistent reluctance in allowing lesionary remedies was the fear of legal uncertainty³²⁰ and erosion of the principle of freedom of contract.³²¹ These contract values were obviously so entrenched and favoured over other contract values such as equity and flexibility. More specifically, the court's application of 1040c CCLC was coherent with the Quebec legal framework of which article 1012 CCLC was still a part. Quebec, as a civil law jurisdiction, adheres to a so-called "neo-classic model", as opposed to a "judiciary model", which is employed by the common law and in which the creation of legal principles is primarily left to judges.³²² In the latter model, legislation is but suppletive. It either regulates a specific area of law or it corrects the principles evolved by the judiciary. In a jurisdiction adhering to a "neo-classic model" it is first the legislature's job to establish a just equilibrium for the contract parties. So if the Quebec legislature truly wanted to bring flexibility into contract law, it would have been better if it had placed article 1040c CCLC in the section of the Civil Code dealing with lesion

³¹⁷ For example in *Dame Marois v. Dallaire* [1970] Q.S.C. 634, J. Pelletier refused to apply article 1040c CCLC even though he acknowledged that the cost of the loan in that case was, due to misleading drafting more than stipulated and the borrower was illiterate and in financial need.

³¹⁸ See e.g. *Boutin v. Bevedere Finance Co.* [1970] Q.C.A. 389; *Canadian Acceptance Corp. v. Larochelle* [1972] R.L. 268; *Lemieux v. Fortin* [1973] Q.S.C. 25; *Drummond v. Canadian Consumers Loan and Finance Corp.* [1975] Q.S.C. 819 and *Zaor v. Thibault* [1982] Q.S.C. 843.

³¹⁹ More extensively on the strict application of article 1040c CCLC see R. Jukier, *supra* note 295 at 22-29.

³²⁰ In this sense, Professor Mayrand argued: "En permettant au juge de substituer sa volonté à celle des cocontractants, l'on affaiblit la valeur de la parole donnée et l'on rend incertains les droits respectifs des parties. La certitude des droits et la sécurité qui en découle peuvent être des nécessités de la vie juridique, plus essentielles encore que le respect constant de l'équité."

³²¹ See explicitly J. Bernier in *Roynat Ltée v. Les Restaurants La Nouvelle-Orléans Inc.* [1976] Q.C.A. 557 who stated: "La liberté des conventions est la règle; la convention est la loi des parties. Les Tribunaux ne peuvent y déroger (sauf s'il s'agit d'un cas de vice de consentement, article 991 *et seq.* Code Civil ce qui n'est pas ici le cas) que dans la mesure où une disposition spécifique de la Loi les y autorise: une telle disposition en étant une d'exception devra quant à la portée de son application recevoir une interprétation stricte."

³²² See G. Massol, *La lésion entre majeurs en droit québécois* (Cowansville: Éditions Yvon Blais, 1989) 79.

and at the same time had amended article 1012 CCLC in order to reduce the conflict of both articles.³²³ It should also be borne in mind that the civil law, unlike the common law, had not developed a general doctrine of unconscionability.³²⁴ So the legislature's choice of terminology in its drafting of article 1040c CCLC is at best unfortunate. Both the concept of unconscionability and the specific expression "harsh and unconscionable" were directly borrowed from the common law to which the Quebec judiciary was completely foreign. The concept of unconscionability, however, as any other legal concept, cannot be seen without its surrounding legal framework.

§ 4.3. The common law concepts of duress, undue influence and unconscionability

The concept of unconscionability, together with the doctrine of duress and undue influence, has been developed by the common law to protect certain groups of vulnerable contracting parties. Each of these defenses involves the exploitation of a plaintiff seeking relief from his or her contracted obligations and will be briefly examined.

Historically, the doctrine of duress could only be invoked if threats of violence or actual violence to a person were involved.³²⁵ Gradually however, this concept expanded³²⁶ to encompass the notion of economic duress.³²⁷ To counter the initial limited scope of common law physical duress, the equitable doctrine of undue influence evolved. Like duress, undue influence, is also concerned with improper pressure on the conclusion of a contract or the making of a gift. To constitute undue influence, the improper pressure must result in some

³²³ Cf. R. Jukier, *supra* note 295 at 29.

³²⁴ This is clearly illustrated in *Eiffel Construction Quebec Ltd v. Morguard Trust Co.* [1986] R.J.Q. 879 where J. Riopel states: "Mr. Feig's cry for mercy before the Court must not be answered in equity, but only in regard to the provisions of the Interest Act and those of Section 1040c of the Civil Code."

³²⁵ The earliest case involving duress is *Astley v. Reynolds* (1731), 93 E.R. 939.

³²⁶ In *Rookes v. Barnard* [1964] A.C. 1129 and *D. & C. Builders v. Rees* [1966] 2 Q.B. 617 the "gate was opened" to a wider notion of duress.

³²⁷ Economic duress involves pressure whose practical effect is that there is compulsion on, or a lack of practical choice for the victim. This pressure must be illegitimate and a significant cause inducing the victim to enter the contract. See *DSND Subsea Ltd. v. Petroleum Geo-Services ASA* (2000) [unreported] Q.B.

advantage being gained from the pressured person. The improper pressure furthermore results in actual domination of the party or amounts to the abuse of a confidential relationship.³²⁸ Widely accepted as constituting undue influence are so-called unconscionable bargains. Doctrinally however, it is preferred to place the notion of unconscionable bargains under the scope of the doctrine of unconscionability.³²⁹ The first unconscionable bargain was found in *Fry v. Lane*³³⁰ where one partly deliberately took advantage of the other's ignorance and bought property from the latter at much less than its true value. The court decided that the weaker party could have the contract set aside. The doctrine is very fluid and seems to have well adapted well to modern times. According to contemporary case law, the equivalent of "poor and ignorant" might be a "member of the lower income groups (...) the less well educated".³³¹ Depending on the factual situation, unconscionable bargains may then arise as a result of - using Lord Denning's words - an "inequality of bargaining power."³³² Denning's notion of inequality of bargaining power, as consisting of an objective and subjective notion (comparable to the concept of mixed lesion), has also been applied outside the U.K.³³³ and even though the House of Lords renounced

³²⁸ It does not need not be a personal advantage to the person wielding the pressure. See *Allcard v. Skinner* (1887), 36 Ch. D. 145.

³²⁹ See G. Massol, *supra* note 322 at 88.

³³⁰ See *Fry v. Lane* (1888), 40 Ch. D. 312.

³³¹ See J. Megarry in *Cresswell v. Potter* [1987] 1 W.L.R. 255 at 277. Recent case law applying the doctrine of unconscionability includes e.g. *Boustany v. Piggott* [1993] E.G.C.S. 85 (P.C.) and *Hart v. O' Connor* [1985] A.C. 1000 (P.C.).

³³² See *Lloyds'Bank Ltd. v. Bundy, Lloyd's Bank Ltd. v. Bundy* [1975] Q.B. 326 (C.A.) at 339 where Denning states: "I would suggest that through all these instances [duress of goods, unconscionable transactions, undue influence, undue pressure, salvage agreements] runs a single thread. They rest on "inequality of bargaining power". By virtue of it, the English law gives relief to one who, without independent advice, enters into a contract upon terms which are very unfair or transfers property for a consideration which is grossly inadequate, when his bargaining power is grievously impaired by reason of his own needs or desires, or by his own ignorance or infirmity, coupled with undue influences or pressures brought to bear on him or for he benefit of the other. When I use the word "undue" I do not mean to suggest that the principle depends on proof of any wrongdoing. One who is in extreme need may knowingly consent to a most improvident bargain solely to retrieve the straits in which he finds himself."

³³³ In Canada, in a large number of cases Denning's doctrine was followed and applied. See *McKenzie v. Bank of Montreal* (1976), 12 O.R. (2nd) 719 (C.A.); *Harry v. Kreutziger* (1978), 95 D.L.R. 3rd 231 (C.A.) and *Hunter Engineering Co. v. Syncrude Canada Ltd.* (1989) 1 S.C.R. 426.

Denning's concept of unconscionability,³³⁴ it has for a long time influenced the general theory on unconscionability. In adopting a protective regime for vulnerable parties as its neighbouring countries had done, the Quebec legislature thus had the difficult task to bring the flexible concept on lesion within its restrictive classic civilian legal framework.

§ 4.4. Towards flexibility in the area of lesion

§ 4.4.1. The position of the Civil Code Revision Office

In examining the role of lesion in the general theory of contract, the Committee on the Law of Obligations of the Civil Code Revision Office [hereinafter: CCRO] soon realized that it was essential "to reverse the decision made by the Commissioners in 1866 to exclude lesion between persons of age".³³⁵ The problem, however, was that "a legislative policy still had to be devised which will reconcile protection of citizens' contractual rights with legal stability of contracts."³³⁶ The CCRO proposed a renewed concept of lesion concerning persons of age called "mixed" lesion to be "based on the presumed weakness of the consent of the injured party (...)".³³⁷ Article V-37 of the Draft Civil Code thus reads: "Lesion vitiates consent when it results from the exploitation of one of the parties by the other, and brings about a serious disproportion between the prestations of the contract. Serious disproportion creates a presumption of exploitation."³³⁸

In this concept, lesion between persons of age was thus analyzed as a defect vitiating the integrity of consent in essentially the same way as error,³³⁹ notably that induced by fraud³⁴⁰

³³⁴ See *National Westminster Bank v. Morgan* [1985] 1 All. E.R. 821.

³³⁵ See Civil Code Revision Office - Committee on the law of obligations, *Report on obligations* (Montréal: CCRO, 1975) 77.

³³⁶ *Ibid.*

³³⁷ See Civil Code Revision Office, *Report on the Québec Civil Code – Commentaries* vol. 2 (Quebec: Éditeur officiel, 1978) 614-615.

³³⁸ *Ibid.*

³³⁹ See article 1400 CCQ.

³⁴⁰ See article 1401 CCQ.

and fear resulting from violence or threats.³⁴¹ Each case amounted to comparable situations running counter to the requirements of good faith. The sanction of lesion required a significant disproportion (*laesio enormis*) between the prestations and a significant disproportion resulting from the exploitation of one party's condition by the other.³⁴²

§ 4.4.2. Governmental propositions

At the governmental level, the debate on lesion proceeded through several stages. First, while awaiting the overall reform of the Civil Code, the Quebec legislature adopted the CCRO's concept of "mixed" lesion in the first Consumer Protection Act of 1971.³⁴³ Once again, the judiciary was very reluctant to apply this provision.³⁴⁴ To minimize the impact of section 118, the verb "exploited" was interpreted as a requirement of dishonest conduct on the part of the professional party that had to be proven.³⁴⁵ The imperfections of the protective regime in the Consumer Protection Act of 1971 were the immediate cause for a complete revision of the Act. In 1978 the second version of the Consumer Protection Act³⁴⁶ was adopted. In this new Act, the sections 8 and 9, which are to be read in connection with each other, concern the regime of lesion.

Article 8: *"The consumer may demand the nullity of a contract or a reduction in his obligations thereunder where the disproportion between the respective obligations of the*

³⁴¹ See article 1402ff CCQ.

³⁴² In this perspective Gaudet stated that what is involved is "la connaissance de la situation de l'exploité". See S. Gaudet, "L'illusion de la lésion: Commentaires sur l'introduction en droit québécois de la lésion entre majeurs" (1988) 15 R.D.U.S. 22.

³⁴³ See the Consumer Protection Act, 1971, *supra* note 305. Section 118 reads: "Every consumer whose inexperience has been exploited by a merchant may demand nullity of the contract or a reduction in his obligations if they are greatly disproportionate to those of the merchant." Although article 118 contained a general provision on lesion, the Consumer Protection Act, 1971 only applied to contracts of loan and doorstep sale. See e.g. Mr. Justice Beaudet in *Paré v. Vic Tanny Ltd.* (1976) 17 C. de D. 242 at 247 who states: "L'article 118 de la Loi de la protection du consommateur conduirait à une dangereuse instabilité des activités commerciales si une partie pouvait répudier ses obligations par simple caprice."

³⁴⁴ See e.g. Mr. Justice Beaudet in *Paré v. Vic Tanny Ltd.* (1976) 17 C. de D. 242 at 247 who states: "L'article 118 de la Loi de la protection du consommateur conduirait à une dangereuse instabilité des activités commerciales si une partie pouvait répudier ses obligations par simple caprice."

³⁴⁵ See e.g. *Neagu v. Moto Sport Rive Sud Inc.* [1978] Q.S.C. 909.

³⁴⁶ See Consumer Protection Act, 1978, *supra* note 306.

parties is so great as to amount to exploitation of the consumer or where the obligation of the consumer is excessive, harsh or unconscionable."

Article 9: *"Where the court must determine whether a consumer consented to a contract, it shall consider the condition of the parties, the circumstances in which the contract was entered into and the benefits arising from the contract for the consumer."*

It is noted that the mixed notion of lesion based on the double factual requirement of disproportion between prestations and exploitation of the consumer's inexperience has been replaced in the first paragraph by the sole requirement of a disproportion that "is so great" that the judge will infer therefrom the "exploitation of the consumer" (the traditional *laesio enormis*), whereas the second paragraph of section 8 is more subjective and allows lesionary remedies if a contract is "excessive, harsh or unconscionable"³⁴⁷ for the consumer (simple lesion). This subjective notion of lesion is further explored in article 9. This new version on lesion in section 8 moves considerably away from the CCRO's proposal by transforming mixed lesion into two distinct types of lesion: objective lesion resulting from a judicial characterization of the disproportion between the prestations of the parties and subjective lesion which need not contain economic contractual imbalance.³⁴⁸

³⁴⁷ The accumulation of qualifying terms reflects the legislature's inspiration drawn from the statutory model of the English tradition. See P.-A. Crépeau, *Les Principes d'UNIDROIT et le Code Civil du Québec: valeurs partagées? – The UNIDROIT Principles and the Civil Code of Quebec: shared values?* (Toronto: Carswell, 1998) 111. This is even more likely given the fact that article 1040c CCLC, which has been carried forward in substance in article 2332 CCQ, sought inspiration in an Ontario statute (*The Unconscionable Transactions Relief Act*, 1960, R.S.O. c 410 s. 2), which permitted cancellation of a loan of money or a reduction of obligations if the monetary obligations rendered "the loan excessive and the operation harsh and unconscionable".

³⁴⁸ The interrelation sections 8 and 9 of the Consumer Protection Act of 1978 has been clarified in *Banque canadienne impériale de commerce v. Carboneau* [1985] Prov. Ct. 65; [1989] R.J.Q. 1091 C.A. which clearly states that there are two alternative lesionary remedies.

In 1987, lesion was incorporated into the Draft Bill on the Law of Obligations.³⁴⁹ Article 1449 thereof reads:

"Lesion vitiates consent when it arises from the exploitation of one of the parties by the other and entails a considerable disproportion between the prestations of the parties; the mere fact that a considerable disproportion exists creates a presumption of exploitation."

"Lesion can only be invoked by a natural person and only if the obligation is not contracted for the purposes or the operation of an enterprise."

The first paragraph was presented in the terms proposed by the CCRO. The second paragraph limits the scope of the concept by providing that lesion could "only be invoked by a natural person and only if the obligation is not contracted for the purposes or the operation of an enterprise". As a result, the rule conceived as a rule of general law would be reduced to an instrument of "consumer" protection.³⁵⁰ So a start was being made towards harmonization of the different conceptions of lesion to be found in the Civil Code and the Consumer Protection Act respectively.

The introduction of a mixed notion of lesion was the object of proposals both in the general theory of obligations (article 1449 of the Draft Bill) and in the new title devoted to consumer protection (article 2722 of the Draft Bill).³⁵¹ In 1988, the Draft Bill was submitted to a *Consultation générale sur l'Avant-projet de loi portant réforme au Code Civil du Québec du droit des*

³⁴⁹ See *An Act to add the reformed law of obligations to the Civil Code Quebec*, 1st Sess., 33rd Leg., Quebec, 1988.

³⁵⁰ The narrowed scope of lesion is confirmed by the tenor of articles 2717 and 2722 of the Draft Bill which were placed in its Title Three dealing with "special rules governing the consumer contract".

³⁵¹ Article 2722 of the Draft Bill reads: "The consent of the consumer may be vitiated by lesion not only where the exploitation of the consumer by the professional entails a considerable disproportion between the prestations of the parties, but also where the obligation of the consumer is "excessive, harsh or unconscionable". However, notable differences between the general regime (article 1449 of the Draft Bill) and the consumer regime (article 2722 of the Draft Bill) were still to be found. The most important one is the fact that a notion of subjective lesion had been added to the special regime on lesion, since, according to 2722 of the Draft Bill, lesion could also flow from the consumer's obligation being "excessive, harsh or unconscionable". Due to this drafting, a gap occurred between the restrictive general concept of lesion and the less limited notion of lesion (subjective lesion) only applicable to consumers.

obligations.³⁵² After having discussed the Draft Bill, the Minister of Justice recommended the government not to introduce a general concept of mixed lesion for persons of age in the new Civil Code, on the grounds that a general notion of mixed lesion would render a contractual relationship more fragile and could give rise to abuses.³⁵³

Finally, with the recodification of the Civil Code of Québec in 1994, articles 1405 and 1406 were adopted which concern lesion.

Art. 1405: *"Except in the cases expressly provided by law, lesion vitiates consent only in respect of minors and persons of full age under protective supervision."*

Art. 1406: *"Lesion results from the exploitation of one of the parties by the other, which creates a serious disproportion between the prestation of the parties; the fact that there is a serious disproportion creates a presumption of exploitation."*

In cases involving a minor or a protected person of full age, lesion may also result from an obligation that is considered to be excessive in view of the patrimonial situation of the person, the advantages he gains from the contract and the general circumstances."

Article 1406 was a last-minute consensus between government and opposition.³⁵⁴ Its adoption introduced two different regimes of lesion: mixed lesion for majors where applicable³⁵⁵ and subjective lesion for minors and incapables.

³⁵² Quebec National Assembly, Subcommittee of Institutions, "Consultation générale sur l'Avant-projet de loi portant réforme au Code Civil du Québec du droit des obligations" in: *Journal des débats: Commissions parlementaires*, (25 October to 8 November, 1988) paras. 1 to 6 at sci 1-322.

³⁵³ Gouvernement du Québec, *Mémoire au Conseil des ministres* par Gil Rémillard, Ministre de la Justice, 15 octobre 1990, Objet: La réforme du Code civil, at 18.

³⁵⁴ See more extensively on this legislative process P.-A. Crépeau, *supra* note 347 at 93-103.

³⁵⁵ The major example of a "case expressly provided by law" is found in article 2332 CCQ protecting parties to contracts of loan.

§ 4.5. The different type of mixed lesion and the judicial interpretation thereof

1. A “true” mixed lesion - The regime of the general law

The first paragraph of article 1406 CCQ, albeit of a limited application,³⁵⁶ creates a regime of “true” mixed lesion that corresponds to the CCRO’s draft on lesion³⁵⁷ by requiring the *exploitation* of one of the parties by the other *and* the creation of a *serious disproportion* between the prestations of the parties. It can be noted that the legislature has chosen a regime of proof that lightens the burden on the plaintiff. The presumption can be rebutted by contrary evidence adduced by the co-contractant to the effect that the contract, notwithstanding the disproportion, did not in any way result from a will or a desire to exploit the condition or status of the co-contractant in the course of negotiations.³⁵⁸

Then in the second paragraph of this article, the Quebec legislature adopted a subjective notion of lesion for minors or protected persons of full age. This criterion is limited to the “excessive” character of the obligation, analyzed in the context of all the circumstances relevant to the minor or the person of age under protective supervision. Under the CCLC, the same protective regime applied for minors.³⁵⁹ According to paragraph 2 of article 1406, minors have recourse to lesionary remedies if they show that the concluded contract has a negative impact on their property.³⁶⁰ So minors can be relieved from their contract for lesion even without demonstrating that they have entered an objectively unfair bargain.

³⁵⁶ See article 1405 CCQ: “Except in the cases expressly provided by law, lesion vitiates consent only (...).” The cases specifically provided for in the Civil Code are: renunciation of partition of the family patrimony (article 424 CCQ), renunciation of the partnership of acquests (article 472 CCQ), renunciation of partition of succession (articles 895 and 897 CCQ) and loan of money (article 2332 CCQ). An example of another case expressly provided by law outside the scope of the CCQ is section 8 of the Consumer Protection Act of 1987. See § 4.5. under 2 below.

³⁵⁷ See article 1405 CCQ. *Supra* note 356.

³⁵⁸ See J.-L. Baudouin & Y. Renaud, *Annotated Civil Code* 7th ed. vol. 2. (Montreal: Wilson & Lafleur Ltée, 2004) 1611.

³⁵⁹ See articles 1001-1010 CCLC.

³⁶⁰ In this sense, lesion is thus more a question of (lack of) capacity to contract. See e.g. *Marcel Grenier Automobile Enrg. v. Thauvette* [1969] Q.S.C. 159; *Côté v. Larouche Auto Ltée* [1977] Q. Prov. Ct. 163; *Morin v. Dion* [1957] Q.S.C. 53 and *Ouellette v. O'Brien* [1941] Q.S.C. 472.

In applying this subjective lesion, the court enjoys wide discretionary powers to ascertain the protected person's personal situation. In establishing whether there is an excessive obligation, the disproportion between the contractual obligations and the advantage the minor derives from the contract are taken into account,³⁶¹ as well as the utility of the contract for the minor.³⁶² This regime of subjective lesion fits the historic continuity of a special regime applicable to protected persons.³⁶³

2. A "false" mixed lesion – The regime of consumer law

Article 1405 CCQ contains the possibility of other particular regimes on lesion than the one provided for in article 1406 CCQ.³⁶⁴ Section 8 of the Consumer Protection Act, provides for such a specific regime for consumers. The first part of this section in essence merely consecrates a particular form of objective lesion, since it only takes into consideration the gravity of the disproportion of the consumer.³⁶⁵ It is founded on the sole concept of a "disproportion so considerable" that the judge must determine an irrebutable presumption of exploitation. This objective lesion has harm as its sole constituent element. However, whereas the regime of the general law in the "objective" aspect of lesion (articles 1406 paragraph 1 CCQ and article 2332 CCQ) requires proof of "serious" disproportion, the legislature allows lesionary remedies for consumers only if the consumer proves harm from the disproportion if it is "so great as to amount to exploitation."³⁶⁶ It seems legitimate to question the necessity of establishing these different levels of seriousness of harm. For an outsider it appears rather odd that the legislature in the general law of lesion only requires a

³⁶¹ See e.g. *Marcel Grenier Automobile Enrg. v. Thauvette*, *supra* note 355 and *Aubin v. Daniel McAnulty Realty Co. Ltd.* [1919] 57 Q.S.C. 120.

³⁶² See e.g. *Drouin v. Lepage* [1980] Q. Prov. Ct. 146.

³⁶³ See J.L. Baudouin & J.-L. Jobin, *supra* note 304 at para. 266.

³⁶⁴ See *supra* note 356.

³⁶⁵ See C. Masse, *supra* note 304 at 169; N. L'Heureux, *Droit de la consommation* 4th ed. (Cowansville: Éditions Yvon Blais, 1993) 45-47 and L. Perret, "Une philosophie nouvelle des contrats fondée sur l'idée de justice contractuelle" (1980) R.G.D. at 557.

³⁶⁶ See e.g. where such disproportion was found *Marcotte v. Beauregard* [1986] R.J.Q. 1607 (C.P.); *Altman v. Bernard* [1991] R.J.Q. 2074. See for further references to case law in which the objective notion of lesion was applied C. Masse, *supra* note 308 *Analyse et Commentaires* at 136-141.

serious disproportion and that the consumer, precisely the one the law wants to protect, needs to prove damage "so great as to amount to exploitation." The regimes seen in connection with each other seem to be incoherent.

Then in section 8 *in fine*, the Quebec legislature introduced an alternative ground for consumers to obtain lesionary remedies. As previously stated, before the enactment of the Consumer Protection Act of 1978 only minors and incapables had recourse to this special regime of subjective lesion.³⁶⁷ Consequently, today, consumers are allowed to rescind their contract having only proved that the contract, under the specific circumstances, even if it is a fair bargain, is financially an excessive burden, a source of embarrassment, or a unnecessary and a too expensive transaction.³⁶⁸

The drafting of article 8 of the Consumer Protection Act of 1978 made the provision disjunctive, as opposed to conjunctive, and established a "false" notion of mixed lesion. Consequently, the Quebec judiciary has been able to apply section 8 less restrictively than section 118 of the Consumer Protection Act of 1971³⁶⁹ and thus more in accordance with the legislature's attempt to introduce lesionary remedies for consumers. However, the judiciary seems to have been too generously in applying there subjective lesionary remedies, that it is difficult to still speak of a just equilibrium between consumer and professional party. The decision *Banque canadienne impériale de commerce v. Carbonneau*³⁷⁰ shows how the objective

³⁶⁷ Cf. L. Perret who stated: "Cette deuxième forme de lésion consisterait pour le consommateur à avoir contracté une obligation excessive du fait qu'elle n'est pas utile et qu'elle est trop lourde pour ses moyens, de elle sorte qu'elle met en péril son patrimoine et devient pour lui une source d'embarras très sérieux. On se rapproche en fait de l'une des formes de lésion développé par la jurisprudence dans le but d'assurer la protection du mineur" L. Perret, "L'incidence de la nouvelle Loi sur la Protection du Consommateur sur le Droit Positif des Contrats et Perspectives de Réforme du Code Civil" (1985) 15 R.D.U.S. 251 at 265. The regime on lesion for minors has been left intact with the adoption of paragraph 2 of article 1406 CCQ. See § 4.5. under 2 above.

³⁶⁸ See *Gareau Auto Inc. v. Banque Canadienne Impériale de Commerce* [1989] R.J.Q. 1091. In this case the Court annulled a contract of sale of a fairly priced boat to a consumer on the ground that this consumer could not afford the purchase and did not need the boat. See also *Banque de Montréal v. Spooner* [1994] R.J.Q. 1388 and *Banque de Montréal v. Nadon* [1990] R.J.Q. 880.

³⁶⁹ See *supra* notes 343 – 345 and accompanying text.

³⁷⁰ *Banque canadienne impériale de commerce v. Carbonneau*, *supra* note 348.

(article 8 Consumer Protection Act) and subjective (article 8 and 9 Consumer Protection Act) notions of lesion are to be interpreted. Judge Chevalier stated that for the notion of objective lesion:³⁷¹ “le tribunal n’a qu’à se demander: 1) s’il y a des disproportion; 2) si cette disproportion est considérable au point de léser gravement le consommateur.” For the interpretation of subjective lesion, the condition of the parties, the circumstances under which the contract was concluded and the advantages resulting for the consumer are to be taken into account.³⁷² Judge Chevalier argued:³⁷³ “Le premier des trois éléments [la condition des parties] me paraît avoir un rapport direct avec la situation économique dans laquelle le consommateur se trouve au moment où il a contracté. Il s’agit alors de se demander si son incapacité financière d’acquies et surtout de payer le bien qu’on lui a vendu était telle que sa décision de faire entrer l’objet acquis dans son actif était manifestement injustifiée, à cause du risque évident qu’elle comportait d’entraîner sa ruine ou de lui créer des embarras majeurs à long comme à court terme.”

The result of this large interpretation of section 8 means that, when contracting with a consumer, the other party has to take into account the social circumstances of the consumer. The judiciary even requires the merchant to be cautious in case of the sale of luxurious or expensive goods. He has to take into consideration the consumer’s financial situation and even his revenue. Furthermore, if the the consumer’s economic situation renders the obligation unwise, the other party should refuse to enter the contract.

Taken these conditions together, it seems that the just equilibrium the Quebec legislature wanted to establish, ended up in constituting an imbalance at the expense of the professional party. A recent contrary decision,³⁷⁴ may leave a bit of scope for the optimistic

³⁷¹ *Ibid.* at 1096.

³⁷² *Ibid.* at 1097-1098.

³⁷³ *Ibid.*

³⁷⁴ In *Trexar Inc. v. Brosseau*, J.E. 96-1067 (C.Q.) the tribunal refused to annul, albeit reduced, the obligation of a consumer who signed a long-term lease contract of a vehicle by taking into account that the car has been of use for this family and the revenue of this family.

conclusion that the debate on subjective lesion is not yet settled.³⁷⁵ For the moment however, it seems parties contracting with consumers have to undertake a thorough inquiry about the consumer's motives of buying the good in question and his financial capacity for the purchase.

§ 4.6. Evaluation

As discussed earlier,³⁷⁶ the Quebec legislator did not adopt a lesion provision of general application as had been suggested in the Draft Bill to the CCQ. Instead, a mixed notion of lesion, only applicable in limited circumstances, and a notion of subjective lesion, applicable to minors or persons under protective supervision were introduced. In the *Commentaires du Ministre de la Justice* on the final version of the Civil Code of Quebec this choice was explained as follows:³⁷⁷ "L'extension du domaine de la lésion, non circonscrite à des cas spécifiques, paraissait susceptible de compromettre la stabilité de l'ordre contractuel, d'engendrer éventuellement certains abus et de diminuer dans une certaine mesure le sens des responsabilités des citoyens."

In the adoption of the notion of mixed lesion, albeit applicable in a limited amount of cases,³⁷⁸ the Quebec legislature placed the common law doctrine of unconscionability within a civilian legal framework. This appears most strongly by the place lesion takes within the CCQ.³⁷⁹ The CCQ considers lesion as a defect of consent, such as error and fear.³⁸⁰ By doing so, the Quebec legislature recognized that the civil law's axiom of contractual stability is not an obstacle to the adoption of the concept of mixed lesion. Contractual stability has as its

³⁷⁵ In this sense C. Masse, *Commentaires et analyses*, *supra* note 304 at 158.

³⁷⁶ See § 4.5. above.

³⁷⁷ See *Ministre de la Justice*, *supra* note 205 vol. 1 at 853.

³⁷⁸ See *supra* note 355.

³⁷⁹ Articles 1405 and 1406 CCQ are placed under Book 5, Title 1, chapter 2, section 3 under the header: "Qualities and defects of consent".

³⁸⁰ Article 1399 CCQ reads: "Consent may be given only in a free and enlightened manner. It may be vitiated by error, fear or lesion."

point of departure the validity of a contract. In turn, the validity of a contract requires the integrity of consent.³⁸¹ So stability is only established when the contract meets the requirements of validity of the contractual regime, in the civil law governed by the principle of good faith.³⁸² Therefore, the concept of mixed lesion is not likely to constitute a source of abuse, but in fact sanctions abuses by the other contracting party resulting from the exploitation of the injured party's condition or situation. In this perspective it is regrettable to note that the Quebec legislature did not adopt a general provision of mixed lesion, but preferred to adopt the notion of mixed lesion in limited circumstances.

Considering the *Commentaires du Ministre de la Justice*, it is somewhat ironic to conclude that with respect to a specific case, the group of consumers, the Quebec legislature has allowed instability of the contractual order by introducing subjective lesion. It would have been better, also in view of the coherence of the legal framework, if the legislature adopted the same notion of mixed lesion in the Consumer Protection Act 1978 as it did recently in the CCQ. In this perspective, it is of interest to see how on a European level it is envisaged to incorporate the doctrine of unconscionability in a legal framework all member states of the EU can adhere to. The legal frameworks that will be examined are the UNIDROIT Principles and the Principles of European Contract Law.

³⁸¹ Based on the Aristotelian notion of natural law and taken up by Thomas Aquinas in the Middle Ages, the principle of contractual justice has been developed. The law of nature dictates that a contract is only binding if it the contract is just. See more extensively J. Ghestin, *supra* note 302 at 341-343.

³⁸² In the spirit of contractual justice, several rules of the CCQ find their justification not only in a single value, but in any one of the values that have inspired their elaboration. Hence, defects of consent, such as fraud or threats, concepts that are generally referred to as notions that fall under the principle of good faith, can also be mentioned in the context of the search for a just equilibrium. In Quebec only recently, with the reform of the Civil Code, the principle of good faith was explicitly adopted in articles 6, 7 and 1375 CCQ.

The UNIDROIT Principles, as the Quebec Civil Code, adopted a mixed notion of lesion, which only allows relief if the double criteria of mixed lesion, that is disproportion and exploitation, are satisfied. Article 3.10 (1) of the UNIDROIT Principles reads:

"A party may avoid the contract or an individual term of it if, at the time of the conclusion of the contract, the contract or term unjustifiably gave the other party an excessive advantage. Regard is to be had, among other factors to

- (a) the fact that the other party has taken unfair advantage of the first party's dependence, economic distress or urgent needs, or of its improvidence, ignorance, inexperience or lack of bargaining skill, and*
- (b) the nature and purpose of the contract.*

The UNIDROIT Principles clearly embrace the idea of excessive disproportion between the prestations and the exploitation of one party by another. The conditions for redress of gross disparity are quite restrictive, but, when met, it is clear that a case of unfairness has arisen and a more just equilibrium between the obligations should be sought. As the UNIDROIT Principles do not apply to consumer contracts, it did not encounter the pitfalls the Quebec legislature did adopting its protective regime in the Consumer Protection Act of 1978.

The Principles of European Contract Law have also adopted the concept of lesion. As stated earlier, the drafters of the PECL see the Principles as a foundation for European legislation³⁸³. This becomes a bit problematic however, if one feels that the Principles do not embody any of the principles that have been developed and have grown in importance in European contract law during the latter half of the 20th century. The Principles, because they are soft law, do not contain many mandatory rules. They embrace freedom of contract as their main rule³⁸⁴ and include few exceptions. A European contract law based on these

³⁸³ See § 1.2.2. above.

³⁸⁴ Article 1:102 PECL reads: (1) "Parties are free to enter into a contract and to determine its contents, subject to the requirements of good faith and fair dealing, and the mandatory rules established by these Principles." (2) "The parties may exclude the application of any of the Principles or derogate from or vary their effects, except as otherwise provided by these Principles."

Principles would see few traces of consumer protection and other interventionist regulation. The few Principles that limit the principle of party autonomy are rather limited in scope. In this perspective, article 4:109 (1) that deals with excessive benefit or unfair advantage is worthy of study.³⁸⁵

Article 4:109 (1)

"A party may avoid a contract if, at the time of the conclusion of the contract:

- (a) it was dependent on or had a relationship of trust with the other party, was in economic distress or had urgent needs, was improvident, ignorant, inexperienced or lacking in bargaining skills, and*
- (b) the other party knew or ought to have known of this and, given the circumstances and purpose of the contract, took advantage of the first party's situation in a way which was grossly unfair or took an excessive benefit."*

The Principles clearly point out that contract law does not in general insist that bargains be fair in the sense that the performances exchanged are what others might consider of equal value. It is commonly held that the parties are the best judges of the relative values to be exchanged.³⁸⁶ Recourse to article 4:109 requires a) the existence of special circumstances which disturb the contractual equilibrium and b) a knowledge of these circumstances by the other party who will then take advantage of the situation in a way which is grossly unfair or takes an excessive benefit.

At first sight, the drafting of article 4:109 PECL seems far stricter in its requirements for mixed lesion than article 1406 (1) CCQ. Even if a contract is disadvantageous to a party, when there is no apparent reason why he did not look after his own interests when agreeing, relief will only be available when the party can point to some weakness, disability

³⁸⁵ Article 4:109 PECL can not be derogated of. Article 4:118 (1) PECL reads: *"Remedies for fraud, threats and excessive benefit or unfair advantage-taking and the right to avoid an unfair term which has not been individually negotiated, cannot be excluded or restricted."*

³⁸⁶ See The Commission on European Contract Law, *Principles of European Contract Law Part I and II* (The Hague, Kluwer Law International, 2000) Comment A at 261.

or need on his part to explain what happened.³⁸⁷ Furthermore, the PECL do not embody the presumption of exploitation as article 1406 CCQ does. In order to have recourse to 4:109 PECL, the weaker party will have to show that the other party knew or should have known that the other party is not in a position to safeguard his own interests and that the stronger party must have regard to the weaker party's interests.³⁸⁸ That the PECL contain stricter requirements in order to have recourse to lesion is understandable, not only because of the very nature of the PECL, but also because of the scope of the PECL. Article 4:109 PECL is a general lesion provision and is to be applied to all sorts of cases (including the ones involving consumers). The Principles thus tackle the problem of how to deal with lesion very effectively, whereas the lesion provision in the CCQ only applies in a very limited amount of cases. However, if one reads the comments of the Commission on European Contract Law, accompanying the PECL, confusion arises. In its comments, the Commission on European Contract Law states:³⁸⁹ "The article [article 4:109] may apply even if the exchange is not excessively disparate in terms of value for money, if grossly unfair advantage has been taken in other ways. For example, a contract may be unfair to a party who can ill afford it even if the price is not unreasonable." This comment, introducing a subjective notion of lesion, totally undermines the notion of mixed lesion as article 4:109 PECL sets forth.

Taking into account the experience of the Quebec jurisdiction, Europe should be careful in how it drafts any lesion provision. Introducing subjective lesion as the sole requirement to have recourse to a lesionary remedy applicable to the wide category of consumers, should be regarded as likely to jeopardize the just equilibrium between the contractual prestations of parties. Hopefully the European judiciary, in interpreting the subjective notion of lesion, will take into consideration the illustration given by the Commission on European Contract Law accompanying the comment in question. The illustration clearly smacks of exploitation

³⁸⁷ *Ibid.* Comment B at 261-262.

³⁸⁸ *Ibid.* Comment C at 262.

³⁸⁹ See The Commission on European Contract Law, *supra* note 386 Comment E at 262.

(a relationship of trust is being exploited) and thus behaviour contrary to good faith³⁹⁰ and would not allow recourse to lesion as the Quebec judiciary has done in its interpretation of article 8 Consumer Protection Act 1978. Only then the European concept of lesion envisaged by the Commission will have a more felicitous fate than the one similarly inspired in Quebec. However, it does also demonstrate that one can properly incorporate within a civilian legal system a notion of mixed lesion that is inspired by the common law notion of unconscionability.

³⁹⁰ *Ibid.* Illustration 5 at 263. The illustration is the following: "X, a widow, lives with her many children in a large but dilapidated house which Y, a neighbour, has long wanted to buy. X has come to rely on Y's advice in business matters. Y is well aware of this and manipulates it to his advantage: he persuades her to sell it to him. He offers her the market price but without pointing out to her that she will find it impossible to find anywhere else to live in the neighbourhood for that amount of money. X may avoid the contract.

CONCLUSION

In view of European developments in the field of private law, the objective of this thesis has been to find out whether, and how, a civil law jurisdiction may adopt legal concepts that originate from the common law and yet remain a cohesive system. The legal concepts that were analyzed in Quebec's civilian legal framework were the common law concept of the trust and the doctrine of unconscionability (*lesion*).

Today we witness, within a context of an increasingly integrated European Union, the making of a new common legal order. This new *ius commune Europaeum* will have to be based on legal foundations that can be adhered to by all member states. Due to the limited competences attributed by the EC Treaty to the Community legislature and the Community courts, it will not be possible to achieve that goal by means of EC legislative instruments and related case law alone, the EC legal instruments and Community Court's case law undeniably lead to some degree of harmonization. However, due to the limited attribution of competences, that harmonization will only occur in a few sectors. Consequently, in order to bring about overall convergence in those sectors of societal life which are to benefit from harmonization, it will be indispensable to investigate whether domestic legal systems of the member states are able to adopt legal concepts of other member states and yet remain cohesive systems. Only then will it be possible to build an emerging *ius commune* on a common ground; a *ius commune* that will not be perceived as a bundle of *Fremdkörper* in the member states. This involves comparative law research in the broadest sense, of which a small part was done in this thesis.

Instead of examining several European legal systems, we have looked to Quebec's legal system that has embraced several *Fremdkörper*, or better said, legal transplants. Two of them have been analyzed and have been situated within a broader perspective.

First the concept of the common law trust was analyzed. The examination of civilian concepts and principles has shown that there is no general obstacle to the introduction of a modern fiduciary institution having a vocation of general application. However, since legal systems are cultural products and are, by definition, not static, the social need for efficient fiduciary institutions cannot be fulfilled along the same lines as exists in the common law, even if, on a level of functionality, there is no better model than the Anglo-American trust. Quebec, by relying on the concept of the *patrimoine d'affectation*, has chosen a new approach to capture the trust idea within its Civil Code. It has been shown that this solution is able to emulate many of the advantageous characteristics of the common law trust and yet live well within Quebec's civil law tradition. The case of Quebec demonstrates that it is generally possible to translate successfully an idea which has found a particular expression in Anglo-American legal terms and concepts into civilian terminology and concepts. So even where legal terms and concepts are different, the ideas at work may be the same.

Having found that the trust idea is generally translatable, it is not surprising to see that the desired result of providing a modern fiduciary institution may be accomplished through several juridical constructions. The adoption of a modern fiduciary institution into a civilian jurisdiction is not merely a matter of trying to imitate as closely as possible the conceptual structure of the English trust but, more importantly, of complementing a conceptual framework with provisions which reproduce its functional qualities. Therefore, there is little persuasive value to statements which suggest, for example that the approach of a "strengthened fiducia" is the preferable conceptual grounding simply because it is "more faithful to the trust since the fiduciary is the titulaire of the trust property."³⁹¹ The trust, in particular, illustrates the delicacy with which the process of translating legal ideas from one conceptual environment has to be undertaken. The case of Quebec's innovative approach relying on "ownerless property" shows that even after an idea has been successfully

³⁹¹ K.W. Ryan, *The reception of the trust in the civil law* (D. Jur. Thesis, Cambridge University, 1959) [unpublished] 346.

translated, difficulties with fine-tuning may arise. However, the “troubles” that occur to the “body” of the CCQ do not present such great difficulties that a “cure” is to be ruled out. In particular, they do not affect the conclusion that the Quebec law of trusts constitutes an interesting model for other civil law jurisdictions to consider when attempting to introduce the concept of a general fiduciary institution into a civilian framework.

Second, the doctrine of unconscionability, for civilians better known as the concept of lesion, has been examined. Whereas the concept of the trust has proven to work very well within Quebec’s civil law system, the experience with the adoption of the concept of lesion in the Civil Code of Quebec and the Consumer Protection Act has been somewhat different. The problem of lesion poses the classical question of a just equilibrium between the contractual prestations at the moment of formation of a contract; a question which both legal traditions have answered distinctively. In Quebec, the concept of lesion, has evolved in several stages through the reforms leading to the CCQ. It is precisely with the adoption of this concept that Quebec’s law of obligations has evolved the most, but perhaps not in the most ideal way. Compared to the way the legislator introduced the trust, the adoption of lesion has been dealt with far less delicacy and success. Whereas the Quebec legislature introduced a general fiduciary institution and used civilian terminology and concepts to place it within its Civil Code, the same legislator adopted only a very restrictive notion of lesion. In addition to this notion of lesion applicable only in exceptional circumstances, the legislator introduced another regime of lesion, expressed in common law terminology rather than in civilian terms, for consumers. The legislator thus remedied the sensitive area of lesion without questioning the coherence of the diverse regimes it created.³⁹²

The regime of lesion applicable to consumers demonstrates both regrettable drafting techniques, leading to two distinct conceptions of lesion in section 8, and unfortunate choice of common law terminology (“excessive, harsh or unconscionable”). Here, the Quebec

³⁹² Cf. P.-A. Cr  peau, *supra* note 347 at 86-87.

legislator failed to provide a conceptual framework which reproduced the functional qualities the doctrine of unconscionability has in the common law, in a civilian legal framework.

In comparing Quebec's approach in its adoption of the above-mentioned concepts inspired by the common law, the main lesson we can thus learn is that successfully transplanting common law concepts into a civilian legal framework requires loyalty to the principle of coherency. The transplant should fit the surrounding legal framework in which it is placed. Contributing to this conceptual grounding of the legal transplant is translating the Anglo-American legal terms and concepts into civilian terminology and concepts. The ongoing dialogue between the two major legal traditions of the western world, the civil law and common law, and the reciprocal learning derived from this dialogue³⁹³ illustrates that asserted abyss between the two traditions can be overcome, as long legislators in their attempts to do so take into account the conceptual framework the transplant is placed in.

³⁹³ See more extensively on this ongoing dialogue in mixed legal jurisdictions N. Kasirer, "Legal education as métissage" (2003) 78 Tul. L. Rev. 481 *et seq.* In this article Kasirer *inter alia* points out that due to this ongoing dialogue of both legal traditions, mixed legal systems are not univocal or bivocal, but are instead "a model animated by the flux of "dialogical jurisprudence", where the process of interaction of sources, the experience of confrontation of legal cultures, moves to the heart of the intellectual inquiry." *Ibid.* at 488.