# The Harmonisation of the International Sale of Goods through Principles of Law and Uniform Rules

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By

Jorge Balmaceda

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"*Profit is a blessing, if it's not stolen*"
—William Shakespeare, *The Merchant of Venice*, 1597

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# PREAMBLE

The present work, which was entrusted to the Holy Spirit, was written entirely in French and obtained maximum qualification, dated November 13, 2017, when it was defended before a commission composed of doctors Dondero, Grimaldi, Pizarro Wilson, Vernières and Dupichot. I am deeply grateful for the collaboration of Doctors Dupichot and Pizarro Wilson, and international arbitrator Jamal Chaykhouni. Also, for the patience and permanent support of my wife, Mariangela Rossi and my children, Anna and Enzo. Similarly, the collaboration and support provided by the vice-deans of Universities Mayor (Dr. Felipe Meléndez Avila) and Bernardo O'Higgins (Dr. Fernando Villamizar Lamus) and Dr. Jane Ching from Nottingham Law School (NTU).

The present translation (free from the author) develops the general aspects of contract law in the common law and civil law systems, together with the particularities of the sale of goods in those systems, and in international law.

An abundant and detailed study of arbitral and judicial jurisprudence, international and national, nourishes the development of the topic.

The study seeks to determine which system prevails in the international trade order, and in what ways. It is both a theoretical and practical work, which aims to serve as support for the drafting of international commercial contracts, and in international and domestic commercial litigation, relating to the sale of goods.

The first part analyses national laws: the legal regime for the sale of goods under the common law in England, a country chosen based on its geographical proximity to France, and given that very famous judgments, based on common law, are of English origin (chapter 1). The legal regime for the sale of goods in the civil law system is developed afterwards - France, country chosen for having been the cradle of the Napoleonic Code, the basis of continental European private law, and Chile, given that its civil code has served as a model law for many other Latin American countries (chapter 2).

The second part analyses the harmonisation movements in the international sale of goods: the general principles that inspire the civil law system, and the UNIDROIT Principles on International Commercial Contracts (chapter 1). The solutions adopted by uniform substantive rules

(the 1980 Vienna Convention on the International Sale of Goods) are then developed, justifying how it has opted for a classical technique for the elaboration of uniform instruments, consisting of adopting the solutions of one system of law as the main rules (the civil law system), associating those of another system (the *common law*) by way of exceptions - mitigation of damage, anticipatory breach, etc.- (chapter 2).

# ABSTRACT

Common law and Civil Law are the main legal systems in the world, and the sale of goods is the most important contract.

Sales of goods have been ruled either by English Law or Civil Law, which has posed problems sometimes due to different approaches regarding certain principles and institutions.

The 11th April 1980 Vienna Convention on contracts for the international sale of goods tried to harmonise these differences with a codification technique, typical of Civil Law, giving privilege to rules of Civil Law most of the time but also introducing institutions from Common Law, that are not incompatible with civil law, as we will see.

The general principles of civil law and Unidroit Principles help with this harmonisation goal, integrating the rules of the CISG and also with the interpretation phase.

The power of codification prevails over Common Law, giving certitude and sophistication to this matter, which is vital for global commerce.

**Keywords:** civil law; common law; general principles of law; goods; international; sale; Unidroit principles; Vienna Convention 1980

# MAIN ABBREVIATIONS

AC: *Appeal Cases*
All ER: *All England Law Reports*
Art.(s).: article(s)
Plen. Ass.: Plenary meeting of the Court of Cassation.
Bull. civ.: bulletin of judgments of the Court of Cassation (civil chambers)
Cass.: Cour de cassation
CCI: Chambre de Commerce International de Paris (International Chamber of Commerce of Paris, France)
c. civ. ch.: Chilean Civil Code
c. com. ch.: Chilean Commercial Code
Ch.: *Chancery division*
c. civ.: French civil code
c. com.: French Commercial Code
c.consom.: French Consumer Code
C.Ap.: Court of Appeal
CE: French Council of State
Civ.: civil chambers of the Court of Cassation
Com.: Commercial Chamber of the Court of Cassation
C. Sup.: Supreme Court
CPC ch.: Chilean Code of Civil Procedure
CP: Constitution (Chile)
CPR: *Civil Procedure Rules* (United Kingdom)
CNUDCI / UNCITRAL: United Nations Commission on International Trade Law
CISG / CISG: Vienna Convention of 11th April 1980 on Contracts for the International Sale of Goods
CLOUT: Case Law on Uncitral Texts (case law compiled by the United Nations Commission on International Trade Law)
CLR: *Commonwealth Law Reports*
*D.*: Dalloz
DLR: *Dominion Law Reports*
ed.: Edition
EWCA Civ.: *England and Wales Court of Appeal. Civil*
GATT: General Agreement on Tariffs and Trade
GAFTA: Grain and Feed Trade Association (based in London, England)

GAJC: Major civil case law decisions
Gaz. Pal.: Gazette du Palais
GATS: General Agreement on Trade and Services
Incoterms: International Commercial Terms (ICT)
I.B.M.: International Business Machinery
ICC: International Chamber of Commerce, Paris, France
JCP: Juris-classeur périodique
K.B.: King's bench division
Law Com.: English Law Commission
LCIA: London Court of International Arbitration
LR CP: Law Reports Common Pleas
Lloyd's Rep.: Lloyd’s Law Reports
N.U.: United Nations
P. U.: Unidroit Principles of International Commercial Contracts (2016)
PECL: Principles of European Contract Law.
Q.B: Queen's Bench.
G.D.R.: German Democratic Republic
Req.: Chamber of Applications of the Court of Cassation.
RTD civ / RTDC: quarterly civil law review.
S.G.A.: Sale of Goods Act (1979)
U.N.: United Nations
U.P.: Unidroit Principles of International Commercial Contracts (2016)

# INTRODUCTION

**1.** The enunciation of some prolegomena to the study of the sale of goods in the civil and *common law* systems (I) will precede a brief presentation of the subjects to be studied (II), after which we will explain the drafting plan chosen for our study (III).

## I. Prolegomena to the study of the sale of goods in the civil and *common law* systems

**2. The common mistake -** Many jurists, law professors, lawyers and magistrates believe that civil law and *common law* systems are irreconcilable. That is a mistake.

Others consider that the differences between these two legal systems, supposedly insurmountable, would be the consequence of struggles and rivalries of the past, mainly for the control of the New World (Missouri, Louisiana and Quebec, among others, were French colonies in North America and wars were fought with England for the control of certain American colonies). That is another mistake.

A thorough examination of the two most important systems of law, civil law and *common law*, on a specific subject such as the sale (international sale of goods), allows us to conclude that there are more convergences and affinities between the English and French legal traditions than differences. These legal traditions and the systems in which they are taxed are not irreconcilable, moreover. In this sense, the growing importance adopted by the written laws, *acts*, in the United Kingdom and the United States, is today well recognized.

**3. The French influence -** The influence of "French-style" coding is considerable and almost "omnipotent" Napoleon Bonaparte, at St. Helen, had a premonitory formula about it: "*My true glory is not in having won forty battles; Waterloo will erase the memory of so many victories. What nothing will erase, what will live forever, is my Civil Code. It will therefore be necessary to redo it in thirty years time*[1].

[1] Cf. Napoleon 1st at Saint Helena, Paris, Dalloz, 2004, reed. of the original civil code of 1804, commemoration of its bicentenary, back cover.

**4. Affinities -** There are also philosophical affinities between these two traditions:

So, about Voltaire's exile in England, we can read:

> *"The stay in England and its consequences (1726-1734).*
> *Voltaire's three-year stay in England (1726-1729) was very important for the development of his ideas. He had the best reception, frequented the greatest lords and befriended the most outstanding writers. He publishes his Henriada, which he dedicates to the queen, he initiates to the theories of Newton and to the theater, absolutely new for him, of Shakespeare. But, above all, he is influenced by Locke, and admires a country where the freedom to think was almost unlimited, where all forms of doubt and denial were found and tolerated*[2].

*Mutatis mutandi*, on the other side of the Atlantic, the "founding fathers" of the United States of America were francophiles. We know the famous phrase attributed to Thomas Jefferson: "*Every man has two countries: his own and France.*"

More recently, in England, Sir Winston Churchill was known to be a great francophile.

In addition, we note certain linguistic affinities between France and England. French words or words of French origin are found everywhere in the English legal vocabulary, such as bureau, clerc, justice, cour(t), jurisdiction, regime, administration, jury, etc. Even the motto of the British crown is written in French: "*Dieu et mon droit.*" Thus, the influence of French law on *common law* is indisputable.

Both *Gallia* and *Britannia* were provinces of the Roman Empire and both were marked by their civilizing culture: their law, their architecture (the Roman arch, the baths). In fact, the basic principles of Roman law, a fertile legal source, have irrigated the two legal systems that are the object of this study: good faith (with nuances, as we shall see), party autonomy, responsibility, and unjust enrichment. These principles have been transmitted by medieval canonists and glossators and have finally been included in the Napoleonic Code, which has become the favorite model of civil codes throughout the world.

**5. The importance of international trade -** The sale of goods was the cause of the greatness of the British and French empires since trade is vital for the prosperity of countries. Indeed, in the words of Professor Raymond: "*The sale of goods is at the heart of the economic questions posed by our modern society. Simplifying, we can say that our entire economy is founded*

[2] Cf. Voltaire, *Lettres Choisies*, Paris, Hachette, 1935, p. 4.

*on the sale of goods: the sale allows to give work, therefore a salary, to people who will spend this money to buy new goods. By the way, the treasury collects taxes that make it possible to finance public expenditure and redistribute income to allow, once again, the purchase of goods. In this type of economy, if there is no sale of goods, the economy falls like a house of cards*[3].

In France as in England, the freedom to trade is ancient. The famous *Le Chapelier* law of 14 June 1791 and the *Allarde* decree of 2-17 March 1792 established that trade could be freely exercised in France; unlike what happened in the former Spanish colonies (such as Chile) that were obliged to trade with the metropole, a situation that was one of the causes of independence.

## II. Presentation of the topics to be dealt with

**6. The links between civil law and *common law* -** Within the framework of this study, our aim is to highlight the connections between civil law and *common law* systems - through the study of the principles of party autonomy, good faith, and responsibility - and the way in which their differences, which are not irreconcilable, have been dealt with by the 1980 Vienna Convention on Contracts for the International Sale of Goods (CISG), most of the time privileging the civil law system of normative codification.

Some corresponding elements with the Chilean law of sale (of French inspiration) have also been proposed.

**7. Rules of Law** - We will first analyze the main rules of law relating to the sale of goods in English, French and Chilean law in order to highlight their similarities and differences. Next, we will study the influence of the general principles of the Civil Law system and Unidroit on the method used by the CISG to level these differences in various situations.

Thus we shall see, for example, how the rules of *common law* on the formation of consent are very close to those of civil law, although with some small distinctions in relation to the offer, and reflect the theory of reception arising from French law.

On the other hand, we will analyze the way in which the CISG moves away from French civil law with regard to the rules of risk transfer, but that it adheres to this system for preliminary negotiations, sanctioning the guilty

[3] Cf. RAYMOND Guy, *La vente de marchandises*, Paris, Dalloz, collection "Connaissance du droit", 1996, p. 4.

or brutal rupture of the negotiations according to a general principle of good faith present in the whole contract *iter* and that is transversal in the Vienna Convention of 1980; fact that is even recognized by authors on the other side of the English Channel. This observation is of paramount importance in order to demonstrate the basic hypothesis of this book. We will see the serious consequences that can result from parties breach of this general principle.

In addition, the rights and obligations of the parties in the CISG will be the subject of in-depth analysis in order to determine their sources in civil and *common law*. On this subject, we will show how the CISG has been adjusted to an old notion, which mixes latent defects and lack of conformity.

We will consider the *standard* related to the examination and the quality required of the goods, the evolution of the *caveat emptor* and the primacy of the *de minimis non curat lex* rules in the CISG. We will see in particular the importance of timely delivery for certain goods, as well as the existing subtleties in relation to civil law concerning the determination of the selling price in the CISG.

The mechanism of interpretation of the CISG and contracts for the international sale of goods will be studied in order to determine whether they approximate the *parol evidence rule* of *common law*, whether they constitute an original mechanism or whether they are closer to the subjective and objective rules of civil law. The standard of the prudent family man will be approached on this particular.

The forced execution of the contract will be analyzed in relation to the remedies/sanctions for the breach of contract (in this work we will speak indistinctly of remedies or sanctions for such breach). We will see how the *nachfrist* of German law is picked up by the CISG, in order to grant grace periods to the parties with a view to avoiding a too rapid termination of the contract. We shall also see that the resolution mentioned in the Vienna Convention of 1980 is a sort of *ultima ratio*, which punishes only serious infringements, as is the case in French civil law and Chilean law in recent years.

The *anticipatory breach* of *common law* will be confronted with the unilateral resolution present in the French Civil Code since the reform of the law of obligations and contracts in 2016[4], in order to elucidate the similarities and differences with the anticipated resolution enshrined in article 72 of the CISG.

Price reduction (almost unknown by the *common law*) will be analyzed in the French and Chilean civil law. This would show its proximity with the CISG provisions.

[4] Art. 1226, new, c.civ.

In addition, we will observe that specific performance is the privileged remedy/sanction against non-performance in the CISG, which avoids the need to procure replacement goods, a fact recognized by *common law* doctrine.

Furthermore, even though the Vienna Convention of 1980 privileges the contract preservation and specific performance, we will demonstrate that it nevertheless does not forget the granting of compensation for complementary or autonomous damages, with the sole exception of the exemption provided for in article 79.

Always in relation to execution by equivalence, we will see how the CISG has taken the criterion of the Napoleonic Code on the foreseeability of harm (precursor of its English equivalent with almost half a century of progress), with some nuances regarding the extent of the compensation, in the case of a willful or grossly negligent contractual infringement.

The obligation to mitigate damages and the principle of full compensation will also be considered. We will analyse the possible compatibility of the former with the general principle of good faith of civil law and the possibility of compensation for moral damages, not considered by the CISG.

The exemption provided for in Article 79 CISG will be analysed in detail in order to determine whether it is limited to *force majeure* of civil law or whether it extends to *imprévision*/hardship. We will see at this point the originality of the CISG, the particular effects of the rule and the practical problems that this innovation has posed to its interpreters.

The loopholes in the 1980 Vienna Convention will be highlighted in order to find the best system to fill them.

**8. The Primacy of civil law** - We will observe in this way that most of CISG's solutions find their origin in civil law and that its core institutions are closer to continental law than to *common law*.

In short, we will seek to give a new, comparative view of the CISG, analyzing the two systems that inspire it (considering three countries), in order to be able to criticise them, within the framework of solutions practiced by the Convention.

We hope that by the end of the reading of this book the reader will reach the same conclusion as we do: in order to harmonise two inspiring legal systems, the CISG has for the most part favoured civil law, in consideration of the pre-existence of its institutions in relation to those of *common law* and the force of "French-style" codification (civil codification gives certainty, generality and clarity to the application of a treaty of this type). In the words

of Professor René David, "*the rule of English law (legal rule), closely conditioned by the procedure, does not have the character of generality that a rule of law formulated by doctrine or by legislators has in France*"[5].

**9. Sources -** The bibliography used is multilingual: French, Spanish and English.

All translations are free by the author.

Difficulties were sometimes encountered, as an equivalent word in the target language was missing. However, we have tried to maintain the original meaning of the English, French and Chilean primary texts.

As far as the Unidroit Principles are concerned, the 2010 and 2016 versions have been used. The 2016 version is the last available to date.

Finally, it should be pointed out that we have used recent examples and a vast body of case law to illustrate our analysis as well as possible.

## III. Drafting plan

10. In the first part, we will identify the differences between English, French and Chilean law concerning the regimes for the sale of goods.

In a second part, we will analyse the movement of harmonisation of the international sale of goods, carried out from the general principles of the civil law system, the Unidroit Principles, and also the solutions proposed by the Vienna Convention of 1980, which are more often than not inspired by civil law.

It is therefore through the study of the rules of law relating to the sale of goods in English, French and Chilean law, its principles, and the harmonisation mechanisms established by the CISG that we will seek to demonstrate the supremacy of the civil law system in relation to *common law* in the 1980 Vienna Convention.

[5] Cf. DAVID René*, Le droit anglais*, 2nd edition, collection "Que sais-je" nº1162, Presses Universitaires de France, Paris, France, 1969, p. 9.

# PART 1 –

# THE DIFFERENTIATION OF THE LAW OF SALE OF GOODS UNDER COMMON LAW AND CIVIL LAW SYSTEMS

**11.** ***Leitmotiv*** **-** The main theme of this work can be summarised as follows: CISG, when choosing a practical solution to harmonise the differences that exist between two systems of law, most often privileges civil law, i.e., "French-style" codification. In order to understand how and why this phenomenon occurs, it is necessary to know and understand these differences with a particular interest in the sale of goods.

Thus, we will first study the legal regime of the sale of goods in *common law* in England (chapter 1); before analysing, in a second time, the legal regime of the sale of goods in civil law in France and Chile (chapter 2).

# CHAPTER 1

# COMMON LAW: ENGLISH LAW

Two preliminary general observations on *common law* are imposed:

12. On the one hand, *common law* is a legal system that undoubtedly extends beyond the United Kingdom. However, we will analyse it only within the framework of this country, because of its geographical proximity to France, with whom it shares a history; but above all given that the historical origins of *common law* are to be found in England. Famous judgments in the basis of the *common law* system have an English origin, as it is the case with *Hadley v Baxendale*[6] and *Dunlop Pneumatic Tyre Co. Ltd. v New Garage Motor*[7], among many others.

13. On the other hand, it should be noted that we will not speak of "British law" since a country that is part of the United Kingdom, Scotland, has a mixed legal system (*common law* and civil law); a characteristic that is essentially derived from the 1979 Sale of Goods Act.

The fundamentals of English contract law will be analysed first (Section 1), before studying the legal regime of the contract of sale of goods in England (Section 2), with reference to case law and the most important rules of law.

## SECTION 1 - ASPECTS COMMON TO ALL CONTRACTS IN *COMMON LAW*

14. In this section, we will observe, on the one hand, that English law has French (Norman) origins and that therefore, we can affirm that *common law* comes from the *norman rule*. At the same time, it should be noted that

[6] (1854), EWHC J70.
[7] (1915) A.C. 79.

the worldwide geographical distribution of *common law* on the planet rivals that of civil law; each system applies to a similar number of countries (§ 1).

On the other hand, we will seek to analyze the importance of jurisprudence for *common law* (*case law*) by enquiring how legal interpretation employs reasoning, as an inductive method.

In addition, we will see how the force of facts has prevailed in England, forcing parliament to legislate. We have indeed seen the multiplication of laws (*acts*) within which the 1979 *Sale of Goods Act* appears as the most revealing example for our object of study. From this point of view, we will demonstrate that codification, in principle characteristic of the civil law system has a great utility in matters of sale of goods in both systems (§ 2).

Finally, we will highlight certain similar notions between the two systems, but where nuances are of paramount importance for the validity of contracts, such as the English *consideration*. The study of the validity of contracts in English law will consider the essential differences that exist with civil law, especially when it comes to the offer and the moment of the formation of the consent (§ 3).

## § 1 - The fundamentals of English contract law

### *A. The formation of English contract law*

**15. Origins -** After the fall of the Roman Empire, Germanic tribes, Saxons and English successfully invaded the British Isles. These peoples did not properly have a legal tradition, like Rome, but rather secular customs, of Celtic origin, the first known populations of the British Isles. The "new" Anglo-Saxon kings respected their tradition, which resulted in the law to apply in the post-empire era.

On the other hand, the Vikings[8], in the various places where they settled, brought their traditions (ordeals), sometimes very "barbaric" and cruel.

However, the most significant contribution will come later, from the northern border of present-day France, from a former territory of Roman *Gallia*, Normandy. It is indeed after the victory of William the Conqueror at the Battle of *Hastings*, in 1066, that the foundations of the English legal system will be laid.

The Norman King decides to appoint judges in the conquered territories. *Common law* is thus born of a mixture of local traditions and judicial decisions:

[8] The Vikings settled from the eighth century north of the River Thames in northeastern England, and progressively mingled with the local population and nobility.

> *"What was common practice among judges became a system thanks to the principle of* ***stare decisis,*** *according to which judges must follow the decisions made by their ancestors. The law was created by the decisions of judges who recognized certain customs and not others"*[9].

It is therefore at this time that a unified system has seen the light of day, for the first time since the fall of the Roman Empire, in the ancient province of *Britannia*.

In the beginning, this system worked on the basis of a ***writ*** (formal demand that exposed the facts) which had to emanate from judicial precedents, according to the *"ubi remedium ubi ius"* rule ("where there is is a right there is a remedy"). Clearly, this was not always fair and, on the other hand, limited the application of justice to known cases. It is for this reason that the English kings allowed the introduction of ***equity***. To this end, the ***Lord Chancellor*** was authorized by the kings to decide in equity (*ex aequo et bono*). This dualism persists[10]. Indeed, *common law* was originally a mixture of ***case law*** (according to the *stare decisis*) and ***equity***.

The system has received its name from the following rule:

> *"The common law is so called because it has formed* ***a common law for the whole kingdom****, when the King of England has appointed the judges who have established it*[11].

### *B. Dissemination of English contract law*

**16. Countries and territories -** Today, *common law is* widespread in various countries and territories (mostly former British colonies): Antigua and Barbuda, Australia, Bahamas, Bangladesh, Barbados, Belize, Bermuda, Bhutan, Botswana, Brunei, Cameroon, Canada (with the exception of Quebec), Cayman Islands, Cyprus, Dominica, **England**, Fiji, Gambia, Ghana, Gibraltar, English Grenada, Guyana, Hong Kong, India, Ireland, Jamaica, Kenya, Kiribati, Liberia, Malawi, Malaysia, Maldives, Malta, Marshall Islands, Micronesia, Myanmar, Nauru, Nepal, New Zealand, Niger, Pakistan, Palau, Papua New Guinea, Saint Kitts and Nevis, Saint Lucia, Saint Vincent and the Grenadines, Samoa, Sierra Leone, Singapore, Solomon Islands, Sri Lanka, Tanzania, Tonga, Trinidad and Tobago, Tuvalu, Uganda, United States of America (except Louisiana), Zambia and

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[9] See BRANAA Jean-Éric, BRUNON-ERNST A., CHAUDOIR N., et al., *The English of Law: England and Wales*, Belin, Paris, 2006, p. 8.

[10] Complemented by numerous laws (*acts*).

[11] See BRANAA, J-É., BRUNON-ERNST, A., CHAUDOIR, N., et al., op. cit. p. 48.

Zimbabwe. Other countries have a "mixed" system (common law and civil law): Israel, Lesotho, Namibia, Scotland, South Africa, Swaziland, Vanuatu, Mauritius, Philippines, Puerto Rico[12].

For its part, civil law governs territories that were former French or Spanish colonies, and is also present in other countries that introduced it voluntarily, namely: Angola, Argentina, Belgium, Benin, Bolivia, Brazil, Burkina Faso, Burundi, Cameroon, Canada (Quebec), Cape Verde, Central African Republic, Chad, **Chile**, Colombia, Comoros Islands, Republic of Congo (Brazzaville), Democratic Republic of Congo (Zaire), East Timor, Ecuador, El Salvador, Equatorial Guinea, **France**, Gabon, Guatemala, Guinea, Guinea-Bissau, Haiti, Honduras, Indonesia, Italy, Ivory Coast, Lebanon, United States of America (Louisiana), Luxembourg, Macao, Madagascar, Mexico, Monaco, Mozambique, Nicaragua, Niger, Panama, Paraguay, Peru, Portugal, Rwanda, San Marino, Sao Tome and Principe, Senegal, Seychelles, Spain, Suriname, Togo, Uruguay, Spain and Venezuela[13].

## § 2- The basics of the English system

**17. Composition -** Today, English legislation is composed of a richer mix of sources: *case law*, equity, acts and European legislation (at least until its exit from the European Union, foreseen as a consequence of the referendum on the "Brexit" of 2016). The latter is imposed on English law, just as equity is imported into *case law*[14].

### *A. The case law*

**18. The case law** - *case law* is the centerpiece of English law.

It is composed, as far as private law is concerned, of the decisions of the British *Supreme Court* (former *House of Lords*[15]), the *Court of Appeal*, the *High Court*, the *County Courts*, as well as the decisions of other Commonwealth jurisdictions. Certain judgments have become famous because they have established principles to follow in order to grant a decision in specific hypotheses. We will analyze the most important,

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[12] Cf. AZZOUZ Saliha, Contract Law, *Les Points Essentiels du Droit des Contrats Internationaux*, ed. Ophrys, Paris, 2015, pp. 165-166.

[13] Ibidem.

[14] *Enel*, 1964, ECR 585 (6/64).

[15] The *Supreme Court* is still composed of members of the former *House of Lords*, in order to make a "smooth" judicial transition, which seeks to harmonise the system with the *Human Rights Act, 1998*.

regarding each element of the "English" sale of goods (Dunlop, Hadley, Romalpa, etc.), and others that mention Chile and France, since they are the two countries that interest us, especially for the present work.

It should be noted, however, that the Supreme Court is not bound by its previous rulings and is therefore perfectly free to make jurisprudential changes, as in France, although in practice it rarely does. The other judicial jurisdictions are not free and are therefore subject to their own previous decisions, as well as to decisions emanating from the higher-order jurisdictions.

**19. Structure of judgments -** Judicial decisions granted under a *common law* system are composed of three parts: the description of facts; the enunciation of principles and the manner in which they are to be applied (***ratio decidendi***); the decision of the court (***obiter dicta***). Only the *ratio decidendi*, the part that creates the law, is imposed on the lower jurisdictions (although the *obiter dicta* have persuasive force)[16]. The *ratio decidendi* extracts general principles of law from particular cases. That is why it is said that English law operates inductively (from individual to general) and that civil law operates deductively (from general to particular).[17]

**20. The Flexibility of the English system -** Some elements, however, make the system described above more flexible: ***overruling***, ***distinguishing*** (a judge may, if he finds some material differences with a precedent, apply other principles to resolve a dispute) and ***departing*** (an appellate court may not apply an erroneous precedent). As for the Supreme Court, it is not bound by its earlier decisions, as indicated above.

### *B. The equity*

**21. Equity -** Is at the top of the system. The *Black's Law* dictionary defines equity as: *"Law administered in accordance with justice, as opposed to the strictly formulated rules of customary law"*[18].

**22. The contribution of equity -** For a system that could not pronounce jurisprudential "reversals," and that had to conform to *writs* strictly, equity emerged as a solution before an extremely rigid justice.

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[16] See BRANAA, J-É., BRUNON-ERNST, A., CHAUDOIR, N., et al., op. cit. p. 11.
[17] Ibid, p. 231.
[18] Cf. BRANAA, J-É., *English Law Made Simple*, le droit anglais facile, Ellipses, Paris, 2013, p. 88.

On the other hand, equity has allowed the introduction of justice solutions, such as ***specific performance***; ***rescission***; ***injunctions***; trusts[19]; and vices of consent[20].

### *C. The acts*

**23. Laws -** Within laws, several are fundamental (*European Communities Act*, 1972; *Human Rights Act*, 1998; *Habeas Corpus Act*, 1679; *Bill of Rights Act*, 1689). There is one that is particularly interesting for the present study, the 1979 *Sale of Goods Act* (hereinafter, s.g.a.), and, subsidiarily, those that have a relationship or link with it, such as: the *Supply of Goods and Services Act*, 1982; the *Factors Act*, 1889; the *Unfair Contract Terms Act*, 1977; the *Misrepresentation Act*, 1967.

## § 3 - Validity of contracts

### *A. Basic notions*

**24. Importance of the contract of sale of goods -** Sale has always been the most important property contract in all legal systems. *Common law* is no exception to this economic and legal rule: it is regulated in English law by the Sale of Goods Act, 1979, cited above (*Sale of Goods Act*; s.g.a. ). Also others who came to bring clarifications[21]. In order to understand its particular regulation, it is necessary to study certain general concepts of English contract law, which have a supplementary relationship with the sale of goods contract.

**25. Concept of contract -** According to English law, a contract is a legally binding promise. This definition, derived from contract law, was raised by Sir Jack Beatson in the book *Anson's Law of Contract* (28th edition, Oxford University Press, 2002, p. 1), where he states precisely: *« Contract law is the branch of law that determines that a promise is legally binding on the person who has made this promise »*[22].

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[19] Cf. BRANAA, J-É., BRUNON-ERNST, A., CHAUDOIR, N., et al., op. cit. p. 10.
[20] Cf. FROMONT Michel, *Grands systèmes de droit étrangers*, 7th ed., Dalloz, Paris, 2013, p. 117.
[21] See supra.
[22] Cf. BRANAA, J-É., BRUNON-ERNST, A., CHAUDOIR, N., et al., op. cit, p. 231.

**26. Consensualism:** as a general rule, contracts are consensual (with the exception of payment mandates, building management contracts, prenuptial contracts, contracts for the purchase of future buildings, credit contracts, insurance contracts and contracts for the purchase of vehicles[23]) and bilateral. In most cases, as in civil law, its foundation lies in the party autonomy principle[24].

**27. Types of provisions in a contract -** Contracts in English law include three categories of provisions: *conditions*, *warranties* and *innominate terms*[25].

*Conditions* are provisions of fundamental importance; their breach authorises the diligent contractor to seek *avoidance* and to claim damages in the event of culpable breach by the other party. For example, in relation to the obligation to deliver on time in the case of commercial sales, perishables or raw materials.

*Warranties* are less important or non-essential provisions. In case of infringement, the diligent party may only claim damages. For example, the obligation to deliver the goods in proper condition and in accordance with their usual or intended function.

*Innominate terms,* or *intermediate terms*, are obtained by excluding the two previous categories (what is not a condition nor a warranty is an innominate or intermediate provision). The remedies (sanctions for non-performance) are diverse and depend on the nature of the breach of contract: "*the sanction for breach of an intermediate provision depends on the nature of the breach. If the plaintiff has lost all benefit of the contract, he shall be entitled to consider the contract as repudiated and to claim damages. Otherwise, he can only claim damages*"[26].

Consequently, if the breach is crucial and deprives the contract of any interest for one of the parties, we speak of *fundamental breach*[27].

**28. Classification of contracts under English law -** Contracts may be solemn (*deed, under seal or covenant*) and simple or consensual (*simple contracts*); bilateral or unilateral; *express* or *implied* or quasi-contracts; valid, void, voidable, and illegal.

As in civil law, consensual contracts are the general rule. *Deeds* are required, exceptionally, in the sale of real estate and donations or charities.

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[23] Cf. AZZOUZ, S., op. cit, pp. 48-49.
[24] With the exception of consumer and employment contracts, among others.
[25] Cf. AZZOUZ, S., op. cit. p. 34.
[26] Ibidem.
[27] Fundamental Infringement (non-compliance).

Bilateral contracts are those in which the two parties bind each other since the formation of the convention. In unilateral contracts, on the other hand, only one of the parties is obligated from the outset and, subsequently, the other party may eventually become obligated at a later stage (in the sale of a property, for example, the real estate agent is obligated to show the property and to look for potential buyers -not to sell it- but if he sells it, the seller is obligated to pay him a commission)[28].

Express is a contract in which its provisions are mentioned in writing by the parties; implicit, on the other hand, is the one deduced from their relationships or actions.

Quasi-contracts, as in civil law, are acts that are not contracts but are recognized by law, in order to avoid unjust enrichment.

Lawful contracts are those that normally produce all their effects.

Null contracts are those that have been declared ineffective in legal proceedings, for example, due to a vice (or defect) in consent. Voidable, those who have a vice or other cause of nullity.

Illegal contracts are those that violate public order, morality or may constitute a criminal offense.

**29. The importance of *consideration* in *common law* -** To be valid contracts must have ***consideration***, i.e. a pecuniary counterpart - *money consideration* - (normally[29]), present or future[30] or something of interest to the other party[31]. Preterite *considerations*, and also those that are not subject to economic evaluation, are not valid in English law[32].

It should be pointed out that *consideration* is a different notion from civil law's *cause*. It imports a *quid pro quo.* In this way, liberalities do not have sufficient *consideration*[33] and must obey specific form conditions ***(deeds)***.

> *"Amount of consideration.*
> *The amount of the consideration matters little; in fact its amount is not a condition of validity. Anything that one person might consent to change against another's promise may serve as consideration for this promise. Courts do not require that there be equality of value between the consideration of one side and the promise or injury of the other. The fact*

[28] Cf. BRANAA, J-É., BRUNON-ERNST, A., CHAUDOIR, N., et al., op. cit, p. 235.

[29] A guarantee at the time of contracting would be a sufficient *consideration*, *Roscorla v Thomas*, (1842) EWHC J74.

[30] *Currie v Mass*, (1875) LR 10 Ex 153.

[31] *Dickinson v Dodds*, (1876) 2 Ch D 463.

[32] *Roscorla v Thomas*, (1842) EWHC J74.

[33] *Bret v JS*, (1600) Cro Eliz 756.

*that the consideration is adequate or sufficient does not mean that it should have sufficient economic value. The courts see in a "simple peppercorn"[34] a sufficient consideration*[35] *».*

**30. Capacity -** It is also necessary that the parties have ***contractual capacity*** (minors[36], the mentally ill and persons without discernment - alcoholics, drug addicts - declared bankrupt, prisoners, and those who contract on behalf of legal persons without having sufficient powers of attorney are excluded[37]) and that there is also ***the intention to create a legal relationship*** (according to the definition of contract). This intention is presumed in commercial and civil contracts, if they are onerous, and is often discarded in relationships between relatives[38].

Finally, an ***agreement of wills*** (offer and acceptance) is necessary.

**31. Privity of contract -** Contracts in *common law*, as a general rule, as in civil law, do not produce effects in relation to third parties. However, under the *Contracts -Rights of Third Parties- Act* 1999, it is possible for third parties to claim rights in certain cases, for example, where the buyer has made it clear to the supplier that he was buying products for a third party[39].

*"Traditionally, the contract had no effect on third parties: it did not create any obligation or right in respect of them. This rule, to which the legislator had made numerous exceptions, was abandoned in 1999 (Contracts (Right of Third Parties) Act, 1999).*

*Since then, the third party has the right to require the promisor to respect the clause granting him rights and may object to both parties modifying this clause to his detriment*"[40].

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[34] This explains the fact that large companies are often offered and/or sold for only £1. See on this point (last consulted on 30 September 2016):
http://news.bbc.co.uk/2/hi/uk_news/magazine/5262616.stm
https://www.theguardian.com/business/2008/nov/19/woolworths-highstreetretailers

[35] Cf. LEVASSEUR Alain A., *Le contrat en droit américain*, Dalloz, Paris, 1996, pp 43-44.

[36] With the exception of contracts necessary for the maintenance of the life of the incapacitated person (food, housing, medicines). This rule is laid down in article 3 of the 1979 Sale of Goods Act.

[37] See AZZOUZ, S., op. cit, p. 46.

[38] *Balfour v Balfour* (1919) 2 KB 571; *Jones v Padavatton*, (1968) EWCA Civ 4.

[39] Cf. BRANAA, J-É., BRUNON-ERNST, A., CHAUDOIR, N., et al., op. cit. pp. 233-234.

[40] Cf. FROMONT, M., op. cit., pp. 120-121.