

Comparative Law of Contracts

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Comparative Law of Contracts

Cases and Materials

Alain A. Levasseur

Hermann Moyse, Sr. Professor of Law

Director, European Studies

LSU Law Center

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Introduction

Comparative law of contract or Comparative law of contracts? What difference does the letter “s” bring to the alternative? Actually, this single letter “s” is, to a large extent, illustrative of the different approaches of the common law system and of the civil law system to one and the same legal concept of “obligation,” or bond of law, created by human will. Whereas, on the one hand, the civil law system has developed or built a “theory of contract” and, thus, a “law of contract” in the singular, as an all encompassing legal framework elaborated on the logic of an inductive reasoning process based on a variety of existing contracts, be they to give, to do or not to do something..., on the other hand the common law system still refers to “contracts,” hence the “law of contracts.” In a way, therefore, the common law is not concerned with the possible existence of a single or universal legal concept of “contract,” as an abstract entity, responding to its own legal features which would then be common to all “contracts.”

Yet both the common law of contracts and the civil law of contract can trace their “roots” to the law of contracts in Roman law. In the course of history the two systems will part ways and adopt, here and there, different legal approaches to solving, however, the same practical issues created by the same need to regulate all sorts of transactions arising from the interactions of men whether they operate in a common law system or in a civil law system. If the civil law has taken more a legislative and regulatory approach, under the form of codification, harmonization and legislation, the common law has taken a more praetorian approach as reflected in the jurisprudence of the courts of common law. Still, there is no harmonized or uniform contract law gathering together the civil law jurisdictions, even within the European Union, under one single civil law of contract. As we shall see in the following chapters there exist differences between civil law jurisdictions and between the latter and the common law jurisdictions. Reconciliations between all these jurisdictions is still a long way in the distant future! Yet many of the solutions to the legal problems are the same.

We will attempt, first, to illustrate these two fundamentally different approaches of the civil law and the common law by comparing some identical elements required for the formation of a binding contract in both legal systems. (Part I). In a second Part, we will focus on some effects of contracts and some remedies available in the event of a breach of a contract. (Part II). However, a brief historical survey of the law of contract or contracts in Roman law, in the civil law and in the common law and a survey of the concepts of “juridical acts” and “contracts” are a necessary preliminary step in this comparative analysis.

Abbreviations

- Louisiana Civil Code: La. Civ. C. [West Publishing Company]
Louisiana Revised Statutes: La. R. S. [West Publishing Company]
Louisiana Law Review: La. L. Rev.
French Civil Code: Fr. Civ. C. [Code Dalloz]
Civil Code of Québec: C.C.Q. [Wilson & Lafleur Ltée]
German Civil Code: BGB [juris GmbH, Saarbrücken]
Restatement of the Law Second Contracts 2d: Restatement, 2d [The American Law Institute]
Uniform Commercial Code: UCC [Foundation Press]
The Unidroit Principles in Practice: UNIDROIT Principles [Transnational Publishers]
United Nations Convention on Contracts for the International Sale of Goods: CISG [Center for International Legal Education, University of Pittsburgh School of Law]
Swiss Federal Code of Obligations: Sw. Fed. C.O. [Wettstein]
Swiss Civil Code: Sw. Civ. C. [ReMaK Verlag Zürich]
Italian Civil Code: It. Civ. C. [Oceana Publications, Inc.]

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