

## **Introduction to the Civil Law System**

**Hiroshi Matsuo, Professor of Law, Law School, Keio University**

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\* The yellow highlighted part is the narrated text.

**Abbreviations:**

**CCC-D:** The Draft of the Cambodian Civil Code (2003)

**CISG:** United Nations Convention on Contracts for the International Sale of Goods  
(1980)

**ECC-D:** The Draft of the European Civil Code (by the Study Group on a European Civil  
Code)

**FCC:** French Civil Code

**GCC:** German Civil Code

**JCC:** Japanese Civil Code

**PECL:** The Principles of European Contract Law (Commission on European Contract  
Law, completed and revised version 1998)

**PICC:** Principles of International Commercial Contracts (International Institute for  
the Unification of Private Law: UNIDROIT, 1994)

**TCC:** Thai Civil and Commercial Code

## I Introduction

### 1 Civil Law as a “Constitution of Civil Society”

**Civilaw:** Hello Civilee. Today let us talk about civil law. How does it function in our society? Why do we need it? First of all, what do you think civil law is?

**Civilee:** According to the standard textbooks, civil law <sup>1</sup> is a set of rules which defines the **basic rights of citizens** called “**private rights**” such as personality rights, property rights, in other words real rights and claim rights, and rights of family members, [\[Table 1\]](#) among others, and provides the subjects, objects, transformations and effects of those basic rights. As they are the most basic rules in civil society, they are called a “**constitution of civil society**”.

But what is the difference between those basic rights of citizens and the fundamental human rights which are provided by the constitution of the state?

**Civilaw:** The constitution of the state provides for basic rules to establish a **good government**. That is, we need a **strong and efficient government** to realize the basic rights of citizens mentioned above, and, at the same time, we need a **righteous and democratic government** to control the misuse of powers by such a strong government. Fundamental human rights called “**public rights**” are given to the nations primarily to control the governmental powers and to establish a good government, especially the righteous and democratic government. This means public rights are (indirect) instruments to realize the basic rights of citizens (private rights) [\[Table 2\]](#)

**Civilee:** Now I understand why civil law is called a “constitution of civil society” and it is a foundation of the whole legal system in our society.

## 2 Functions of the Civil Law System

**Civilaw:** Then what do you think is the primary function of civil law?

**Civilee:** The most primary function of civil law is to provide for basic rules applied to family relations such as those between husband and wife, parents and children, among heirs of the deceased and other members of the family.

**Civilaw:** Not only the rules within family relations but the rules applied to various activities performed outside the family are also provided by civil law. For instance, provisions for the establishment of associations, the conclusion and effects of contracts and the protection of property rights are included in civil law. This is the reason why civil law is regarded as the basis of a market system.

**Civilee:** For that purpose civil law provides the legal capacity of the parties, defines the property rights to be transacted, and makes regulations on transactions made by contracts and other activities of citizens.

**Civilaw:** The introduction of a market system does not mean the removal of regulations. Rather it needs certain efficient institutions to facilitate market transactions such as those to regulate rights and duties of the parties, to stipulate the way to transfer property rights, to protect the parties’ reliance on the validity of transaction, and so on. This is the reason why the civil law provisions were first created in the Roman Republic and Empire where market transactions highly developed in the cities.

## II Historical Development of the Civil Law Systems

### 1 Roman Law

**Civilee:** The history of civil law can be traced back to Roman law ranging from 5<sup>th</sup> century B.C. to 6<sup>th</sup> century A.D. [\[Table 3\]](#) The sources of Roman law include various decisions made by the senate and the committee of commons, the Imperial ordinances, edicts by the praetor, etc. However, the most important part of Roman law, called *Digesta*, is a collection of legal doctrines made by the legal scholars who were qualified by the Emperor to respond to his inquiries in legal matters. But how did Roman law manage to survive for more than two thousand years?

### 2 Reception of Roman Law and Medieval Roman Jurisprudence

**Civilaw:** The main reason may be the superiority of Roman law in its political, economic and scientific value. In the Medieval Ages it was received by the ambitious monarchs and lords to strengthen their rule and to establish a stable government. It was also received by the merchants to facilitate market transactions. Further it became the main object of the Medieval Roman Jurisprudence. <sup>2</sup>

### 3 Natural Law Theory

**Civilee:** I see. However, Roman law was a collection of doctrines accumulated in more than one thousand years, so that it lacked the transparency and consistency among such a huge body of rules.

**Civilaw:** That's right. This shortage was complimented by the natural law theorists. They systematized the Roman law materials by using Aristotelian and Scholastic logic. They regarded a legal rule as a proposition that can be proved true or false by logical reasoning. Natural law theorists in the 17th century reconstructed the legal materials as a system of rights. They formulated the concept of right and made a clear distinction between the right and the law. It



became the theoretical foundation of the codification projects which began at the end of the 18<sup>th</sup> century.

#### 4 Codification Movements

**Civilee:** The codification projects started in the European countries in the age of nationalization of law. [Table 4] The unified codes of the main fields of law such as the civil code, commercial code, criminal code, and the code of civil procedure and criminal procedure were written in the national language instead of Latin which had been the common language of law. The codification of national laws was a symbol of national unity and the modernization of their legal system.<sup>3</sup> However, the codification movement did not spread to the United Kingdom where the industrial revolution occurred at the end of the 18<sup>th</sup> century.

**Civilaw:** In England, the law was conceived as not to be made at a particular date by any particular individuals or groups but to be *found* as principles from the precedents accumulated by the courts. Judges were trained not in the universities but in the Inns of Courts by the professional jurists. As a result, the main source of law is the **case law** in the common law system. It has the advantages of **stability** and **flexibility** of law, but it is inevitably short of transparency and consistency of law.

**Civilee:** How about the advantages and disadvantages of the civil law system?

**Civilaw:** In the codification projects of the civil law countries the law was believed to be *enacted* by the deliberation of legislators based on legal science. Consequently the main source of law was the **statute law**. In this legal system there are advantages of **transparency** and **consistency** of law. But it lacks stability when the law is frequently made, amended or repealed, and it lacks flexibility when the interpretation of law by judges is restricted.

However, if we look into the contents of the rules, especially those of private law such as property, contracts, torts, restitution and other rules of obligation, quite a few provisions are becoming common between common law and civil law countries.

## 5 Reception of the Western Civil Law Systems into the Non-Western Countries

**Civilee:** Then it is ideal to combine the advantages of both legal systems, isn't it?

**Civilaw:** Exactly. And this has been the challenge in the course of the introduction for non-European nations (such as the Latin-American, African and Asian countries) of Western civil law systems. The civil law systems have provided a consistent theory of civil law as a system of rights and thus a consistent and transparent order of provisions. In contrast, the common law systems have emphasized the stability of law which is guaranteed by the rule of law principle and the flexibility of law which is realized through the construction by the court.

**Civilee:** But I am afraid there may be **cultural gaps** between the Western and the non-Western countries that may affect the reception of the Western civil law systems into the non-Western nations.

**Civilaw:** Yes, that may be the problem. On the one hand, we can not ignore the **informal rules** which have been developed indigenously within the country. But on the other hand, we must be positive in adopting the international standards through the formal legislation if the traditional and indigenous rules are incompatible with the humanity and they prevent the people to develop themselves as they want.

**Civilee:** But it seems quite difficult to combine the informal rules and formal rules at a time.

**Civilaw:** I agree. When we introduce the new rules, we should take the incremental approach by considering the cultural variance and balancing the traditional rules and the new standards.

### III Basic Principles of the Civil Law System

#### 1 Individualism as a Fundamental Principle

**Civilee:** I understand there are common elements as well as indigenous elements in the civil law system. But I wonder what can be the common principles which should be contained as a core in every civil law system.

**Civilaw:** The civil law system in the modern period is based on the principle of **individualism**. It recognizes that the personality of each individual must be respected as the highest value. The state and other organizations are the instruments to realize that value. This fundamental principle is expressed in such a way that everyone is to be respected as an individual and equal enjoyment of legal capacity is to be guaranteed in the legal system (the principle of **the equality of legal capacity**).

#### 2 Protection of Private Property and Guarantee of Private Autonomy

**Civilee:** But individualism is a highly abstract principle. How is it actualized?

**Civilaw:** In order to actualize it, civil law adopts two more basic rules. One is **the protection of private property** and the other is **the guarantee of private autonomy**. The right to private property is a symbol of the basic rights of citizens, in other words private rights, and is inviolable. Certainly a private property of an individual may be limited for the purpose of **public welfare** and may be taken for public use. But in that case **just compensation** for the property must be paid to the owner in advance. **On the basis of the protection of private property, citizens are able to exchange their properties with each other and thus freely create their lives as they like. Such free**

transactions are guaranteed by the principle of private autonomy. It includes **the freedom of contract** and **the freedom of association**. Thus the protection of private property and the guarantee of private autonomy are the strong basis of freedom which can not be denied both in the capitalist state and socialist state.

#### IV Types of the Civil Law System

##### 1 Institutiones System

**Civilee:** The next step is to embody these principles by composing the civil code. I know there are two types of compilation of civil codes. The first type, called the **“Institutiones System”**, is based on the composition of the introductory textbook called *“Institutiones”* written by Gaius between the first and second centuries A.D. It consists of (1) Law of Person, (2) Law of Things, (3) Law of Transaction and Obligation and (4) Law of Action. [Table 5] It was followed by Justinian’s *Institutiones* in the 6<sup>th</sup> century. The Prussian Civil Code (1794), the French Civil Code (1804), and the Austrian Civil Code (1811) [Table 3] were also modeled on it. For example, the French Civil Code is composed of (1) Book of Persons, (2) Book of Things and Various Kinds of Property and (3) Book of Various Measures to Acquire Property. These parts correspond to (a) the subject of rights, (b) the object of rights and (c) the transformation of rights respectively.

##### 2 Pandekten System

**Civilaw:** What is the second type?

**Civilee:** The second type, called the **“Pandekten System”**, is a product of German legal science developed in the 18<sup>th</sup> century and which flourished in the 19<sup>th</sup> century.<sup>4</sup> Its most characteristic feature is the arrangement of rules **from general provisions to specific provisions**. As a result, it begins with (1) General Provisions, which is followed by (2) Law of Claim Rights (or Law of

Real Rights), (3) Law of Real Rights (or Law of Claim Rights), (4) Law of Family Relations and (5) Law of Succession. [Table 6](#) The German Civil Code, Japanese Civil Code, Thai Civil and Commercial Code, etc. are based on the Pandekten Style. Recently it has also been adopted by the Russian Civil Code, Vietnamese Civil Code, the Draft of Cambodian Civil Code, etc.

### 3 Common Features

**Civilaw:** Are these two types of civil code completely different?

**Civilee:** I don't think so, because we can find some common features.

- (1) First, both types are composed as a system of private rights such as real rights, claim rights, and rights of parents, guardians, children and other members of the family.
  - (2) Second, Part I of the Pandekten System is composed of the subject of rights, object of rights and transformation of rights, which are similar to the composition of the Institutiones System.
  - (3) Third, Part II and Part III of the Pandekten are provisions of real rights and claim rights which are included in Book III of the Institutiones. But Book III of the Institutiones is so big (e. g. [Art. 711-Art. 2281 FCC](#)) compared to Book I (e. g. [Art. 1-Art. 515 FCC](#)) and II (e. g. [Art. 516-Art. 710 FCC](#)) (see above [Table 5](#)) that one could divide it into Part II, III and V of the Pandekten.
  - (4) Fourth, Part IV of the Pandekten treats the law of person which is corresponding to Book I of the Institutiones.
  - (5) Fifth, Part V of the Pandekten, the law of succession, is a part of the transfer of property rights, which is also included in Book III of the Institutiones.
  - (6) Sixth, there are sections of general provisions even in the Institutiones.
- So I can conclude these two types of civil code should not be seen as completely different systems. Rather, the Pandekten System may be

regarded as a developed style of the Institutiones System.

## V Outline of the Civil Law System

### 1 General Part

#### (1) Basic Principles

**Civilee:** Then let us confirm the outline of the civil law system according to the composition of the Pandekten system. The role of the General Part is to provide for the general principles of civil law such as the general character of law, right and duty, the catalogue of rights contained in the civil code. In addition there are the general rules on the subject of rights, object of rights, transformation of rights, and effect of rights. [Art. 1-6 FCC](#) provide how laws in general are published, are effective concerning time, space and person, and are applied by judges to person (see also [Art. 2-7 RCC](#)).

**Civilaw:** Concerned with the relationship between the law, right and duty, it is controversial whether the state's law gives birth to the right, or the right preexists before the law and the law exists to protect the right. Anyway we can not ignore the fact that legislators and judges recourse to the preexistence of a "right" when they recognize new rules of law and duties which have not been recognized so far.

**Civilee:** Then how about the catalogue of private rights that should be recognized in the civil code?

**Civilaw:** As indicated, the modern civil law is a system of rights such as (1) personality rights, (2) real rights, (3) claim rights, and (4) rights of spouses, parents, guardians, children and other members of the family. (See [Table 1](#) above) The effect of rights may be provided in the General Part together with the definition of each right. However, the definition and effect of real rights, claim rights and rights of family members may be provided in Part

II, III and IV respectively.

## (2) Subject of Rights

**Civilee:** Generally speaking, a natural person and a juristic person are recognized as the subject of rights. They are given the legal qualification as a subject of rights called “legal capacity” or “rights capacity”. As for a natural person, the acquisition and the loss of legal capacity should be defined. The legal capacity of a natural person may be obtained by birth and lost by death, though it is not easy to define “birth” and “death”. The recognition of a brain death may be provided by civil law.

**Civilaw:** In addition, a person’s residence needs to be stipulated to define a “missing” person and to deal with the property and the family relations of a missing person who may be declared to be absent and finally presumed to be dead. And the treatment and status of foreigners must be made clear in the General Part. How about the juristic person?

**Civilee:** The legal capacity of a juristic person may be created by law on the basis of legal policy on how to facilitate the activities by associations and foundations. Provisions on the acquisition and the loss of legal capacity, the way of acquisition of rights and obligations, the way of a supervision, etc. can be the basis of other special laws on the particular types of juristic person such as companies. The scope of legal capacity of a juristic person may be limited within the purpose of association or foundation. The legal capacity of a foreign juristic person may be determined by civil law.

### (3) Object of Rights

**Civilaw:** Modern civil codes make clear distinction between the right and its object. The objects of rights can be divided into **corporeal things** and **incorporeal things**<sup>5</sup>, **immovable property** and **movable property**<sup>6</sup>, **principal things** and **accessories**<sup>7</sup>, and **capital things** and **fruits**<sup>8</sup>. These distinctions are useful to mark the scope which the effect of right may reach.

**Civilee:** What do you mean by that?

**Civilaw:** For instance, A borrowed an amount of money from B and took out a mortgage on his house. When there is no specific agreement on the scope of B's right of mortgage, it reaches not only A's house but also its accessories such as a shed or storage. Some special things such as **intellectual property**, **money**, **animals**, (cf. [Art. 90a](#), [903 Sent. 2 GCC](#)) and so on, need special treatment by special provisions or by interpretation.

### (4) Transformation of Rights

**Civilaw:** The transformation of rights means the creation, alteration, transfer or extinction of rights. The General Part should provide basic rules for the typical types of transformation of rights such as caused by juristic acts and prescriptions.

**Civilee:** I know the concept of "**juristic act**." It means the act of transformation of rights just as desired and declared by the persons of their free will. It consists of the declaration of will of the persons and includes (1) the unilateral acts such as testament, avoidance, dissolution of contract, (2) the bilateral acts such as contract, and (3) the multilateral acts such as incorporation of association and foundation, agreements of partnership, and so on.



**Civilaw:** Yes, it is a strong instrument to establish private autonomy including the freedom of contract and the freedom of association. By using the concept of a juristic act, we can provide comprehensively for the rules of (a) the mental capacity and disposing capacity of a person, (b) defects of the declaration of will, (c) conditions, terms and interpretation of legal acts, and (d) requirements for the validity of legal acts.

For example, if A sold his property to B at an extremely low price due to a fraudulent act of B, then A can avoid his juristic act for the reason of fraud. ([Art. 1116-1117 FCC](#); [Art. 123 GCC](#); [Art. 96 I JCC](#)) However, when B sold the property to C who was innocent of the fraud and paid the price or took possession of the property, then A can not avoid the juristic act. ([Art. 96 III JCC](#)) [[Figure 1](#)]

**Civilee:** Juristic acts may be made by the agency for the principal. In that case, transformation of rights takes place not by way of the agency but directly between the principal and the other party. [[Figure 2](#)] In addition, if A made a certain declaration that can be misunderstood as if he authorized X to act as an agent for A, and X made a contract with B in the name of the agent for A, then A has to perform the duty to be generated from the juristic act made between X and B. [[Figure 3](#)] This is called the **apparent agency** or **apparent authority** which keeps the credibility of the transaction made by the agency.

**Civilaw:** On the other hand, prescription is another typical cause of transformation of rights not based on the will of persons but on the passage of a certain period of time. It is classified into the acquisitive prescription and extinctive prescription. Requirements for the acquisition and extinction of rights may be provided in the General Part.

## 2 Real Rights

### (1) General Provisions of Real Rights

**Civilaw:** What do you think is a real right and how would you define it?

**Civilee:** A real right is defined as a right to directly use, take profits of and dispose of the object of the right. Benefits generated from a real right directly belong to the right-holder, not by way of another person as is the case of claim rights.

**Civilaw:** Correct. In order to facilitate the transaction of such real rights, it is desirable to regulate clearly and simply the categories and contents of real rights by the provisions of law. This is the reason why the principle of “**numerus clausus**” is recognized for real rights. It means that no real rights can be created unless they are recognized by law. ([Art. 175 JCC](#); [Art. 131 CCC-D](#)) It will reduce the transaction costs of property transaction. However, it can not exclude the possibility to recognize the real rights created by the **customary law**. ([Art. 131 CCC-D](#))

### (2) Ownership

#### (a) Definition and Contents of Ownership

**Civilee:** Ownership is a right to use, make profits from and dispose of the thing most freely under the regulation by law. ([Art. 544 FCC](#); [Art. 903 GCC](#); [Art. 206 JCC](#); [Art. 137 CCC-D](#); etc.) On the other hand, owners take the final responsibility for the damages generated from the property owned. ([Art. 717 I, II JCC](#)) Ownership may be classified into several types according to its subjects, objects and contents. However, if types of ownership are so many and complicated, it would badly affect the transactions of ownership.

## (b) Effects of Ownership

### (i) Protection of Ownership

**Civilaw:** What would you do if your property was infringed by someone else who had no right to your property?

**Civilee:** There are three kinds of protection of ownership according to the state of violation of ownership. They are 1) **the claim for recovery**, 2) **the claim for removal of disturbance**, and 3) **the claim for prevention of possible disturbance**. The owner A can exercise these claims against B who violates the ownership even if B is in good faith or B is not negligent for the violation of the ownership. However, if A would claim B for compensation for damages caused by B who violates the right of A, then A has to prove the intention or negligence on the part of B, because this claim is based on the law of torts<sup>9</sup>.

### (ii) Compensation for Takings

**Civilaw:** How about the case where A's property was taken by the government B as a compulsory purchase to promote public interests, for example takings or an eminent domain? In this case is it unreasonable for the owner A to require compensation for the takings?

**Civilee:** No. A's right to property must be protected even against the government for the **protection of private property** is one of the fundamental principles of civil law. ([III. 2 above](#)) Consequently, the requirements for compulsory purchase must be provided **by legislation**, not by ordinances or other lesser regulations, and **appropriate compensation** must be paid to the owner of the property in advance. ([Art. 545 FCC](#), etc.)

### (iii) Neighbourhood Relations

**Civilee:** Most civil codes provide specific rules on the effects of the right to land to regulate neighbourhood relations.

**Civilaw:** Yes. Such regulations would facilitate reasonable land use between adjacent land owners and thus conform with the promotion of mutual interests and social economy. Those provisions are concerned with (i) **the use of adjacent land** owned by the other party around the boarder, (ii) **the treatment of water** which flows through the adjacent lands owned by the different owners, and (iii) **the regulations of the use of one's own land** around the boarder.

### (c) Joint Ownership

**Civilaw:** We also need special ownership rules on joint ownership.

**Civilee:** I can identify three types of joint ownership such as (1) **collective joint ownership**<sup>10</sup>, (2) **indivisible joint ownership**<sup>11</sup> and (3) **divisible joint ownership**. [\[Table 7\]](#) In the divisible joint ownership relation, (1) each co-owner can **use** the whole property according to the amount of share; (2) in order to **alter** the property, however, all the co-owners must reach the unanimous agreement; (3) as to **the administration** of property other than the alteration, the majority rule according to the amount of share should apply; (4) each co-owner can **dispose** the share; and (5) claim the **partition** of property at any time unless there are specific agreements to restrict the division<sup>12</sup>.

## (d) Acquisition of Ownership

### (i) Introduction

**Civilaw:** The next topic is the acquisition of ownership and it is classified into the initial acquisition and the transfer of ownership. [\[Table 8\]](#)

**Civilee:** Yes. **The initial acquisition** (below (ii)) means that the acquirer obtains the new ownership of the property which is irrelevant to the ownership of the former owner and free from any encumbrances on the property. On the other hand, **the transfer of ownership** ([below \(iii\)](#)) means that the acquirer obtains the same ownership as has been held by the former owner together with the encumbrances on that property.

### (ii) Initial Acquisition of Ownership

**Civilaw:** What types of initial acquisition have you learned so far?

**Civilee:** I know (1) **occupancy**<sup>13</sup>, (2) **lost property**<sup>14</sup>, (3) **treasure-trove**<sup>15</sup>, (4) **accession** which includes (a) **adjunction**<sup>16</sup>, (b) **mixture**<sup>17</sup> (c) **specification**<sup>18</sup>, and (5) **immediate acquisition**. I am interested in the immediate acquisition in particular, because it is one of the basic institutions that support a market system.

**Civilaw:** Yes. You know it is an institution by which the transferee B can acquire ownership of a thing not owned by the transferor A but owned by the third party X if B got the thing bona fide. [\[Figure 4\]](#) It has been developed to facilitate the transactions of property by protecting the reliance of the bona fide acquirer on the security of transaction. However, there are several ways to arrange the immediate acquisition. What requirements are necessary for B to be protected against X's claim for recovery?

**Civilee:** First, B must acquire possession of the thing **in good faith**, in other words, **bona fide**. It means B did not know the property did not belong to A from whom he acquired the possession. Second, B must acquire the thing **through a transaction** such as a contract of sale, an exchange, and so on, ([Art. 2279 Para. 1 FCC](#); [Art. 932 Para. 1 GCC](#); [Art. 192 JCC](#)) because the immediate acquisition aims to promote the security of a transaction.

**Civilaw:** How about when B was in good faith but negligent in believing the property belonged to A?

**Civilee:** In France and Japan, B must be in good faith **without negligence**, while in Germany B can acquire ownership even if B was negligent unless he was not in good faith, in other words, **mala fide** or in good faith owing to **gross negligence**. [[Figure 5](#)] ([Art. 932 Para. 2 GCC](#)) Germany seems more advantageous for B than France or Japan in this point.

**Civilaw:** Can B acquire ownership when he took possession of the thing by way of a gift, that is, without charge?

**Civilee:** It is controversial. Generally B can acquire ownership of the thing delivered gratuitously. However, in Germany the original owner X is entitled to claim B for the value of the property on the basis of unjust enrichment ([Art. 816 Para. 1 Sent. 2 GCC](#)).

**Civilaw:** In this case, the original owner X is given priority against the acquirer B in German law, isn't it? The next question is whether or not B can acquire ownership of the thing when it was stolen from or lost by X by A or anyone other than B.

**Civilee:** In general, there are exceptional provisions on **the stolen or lost property**. They allow the stolen or lost property's original owner X to claim for recovery against the possessor B, [\[Figure 6\]](#) because the property was deprived from the original owner X without his voluntary act and in this case the protection of X's ownership prevails over the security of transaction. This is the difference between the case of [\[Figure 5\]](#) and that of [\[Figure 6\]](#). However, X has to make a claim for recovery of the thing within a certain period of time such as three years ([Art. 2280 FCC](#)) or two years ([Art. 193 JCC](#)) after it was stolen or lost, while GCC makes no limitation for the recovery of the stolen or lost property ([Art. 935 Para. 1 GCC](#)).

**Civilaw:** However, if the stolen or lost property was acquired **from a merchant, at a market or by public auction**, the acquirer B is given the right to claim for reimbursement from X of what it cost him. ([Art. 2280 FCC](#), [Art. 194 JCC](#)) [\[Figure 7\]](#) Further, in Germany, the application of special provision for the stolen or lost property is excluded when the property had been acquired by public auction ([Art. 935 Para. 2 GCC](#)). That is, the acquirer B who has bought the property at a public auction can acquire ownership even if it turns out to be the stolen or lost property.

**Civilee:** It is very interesting to see that there are various patterns which rearrange the balance between the protection of ownership and the security of transaction, and it must be one of the points how to establish the institutional basis of market mechanism.

**Civilaw:** Yes. In this context, we should take note that the immediate acquisition is primarily recognized in the transaction of movable property. However, in some countries it is extended to the **immovable property** ([Art. 892 GCC](#)).

### (iii) Transfer of Ownership

**Civilee:** From the viewpoint of a market system, the transfer of ownership is more popular. What kind of rules do we need for it?

**Civilaw:** First, we should determine the fundamental principle of what legal act causes the transfer of ownership. On the one hand, the **principle of delivery** requires the transfer of possession of the property (or the registration of immovable property) in addition to the effective cause of it. (e.g., Art. 873, 925, 929 GCC)<sup>19</sup> On the other hand, the **principle of agreement** only requires the agreement between the transferor and transferee. (Art. 711, 1138, 1583, 1599 FCC; Art. 176 JCC)

**Civilee:** But I wonder what would be the result under the principle of agreement when A sold the property to B and then sold the same property to C?

**Civilaw:** Under the principle of agreement, it is hard to identify which was first between the agreement of A and B or that of A and C, so that this principle must be complemented by the delivery as an **opposability requirement**. This means that B can not assert the preference over C and claim the recovery from C unless B had acquired the delivery from A. (Art. 178 JCC; B needs the registration for the immovable property. Art. 177 JCC) [Figure 8]

**Civilee:** Does the agreement between the transferor and transferee mean a contract such as sale, gift or exchange?

**Civilaw:** You can choose either the **principle of unity** according to which the agreement to transfer ownership is the same as contract of sale, gift or exchange, or the **principle of separation** which requires another agreement just to cause the transfer of ownership called a **real agreement** which must be conceptually distinct from the contract of sale, gift or exchange which only causes the claim right and obligation to transfer the ownership.



[\[Figure 9\]](#)

**Civilee:** If I choose the principle of separation, do I need to make the real agreement by a specific form or does just an agreement suffice?

**Civilaw:** It also depends on the decision of legislators. They often require a certain form or procedure, for example, before the notary or the court to transfer ownership. This is called **formalism**. (e.g., [Art. 925 GCC](#)) While in some countries no specific form is required. This is called **voluntarism**. (e.g., [Art. 176 JCC](#))<sup>20</sup>

**Civilee:** If I choose the principle of separation, and the contract of sale, gift or exchange comes to be invalid as a result of avoidance, dissolution of contract, and others, then does the real agreement also come to be invalid or is it still valid?

**Civilaw:** If you choose the **principle causality**, the real agreement comes to be invalid together with avoidance or dissolution of the contract of sale, gift or exchange and the ownership belongs to the transferor. On the contrary, if you choose the **principle of abstraction**, the ownership remains tentatively under the transferee and he has an obligation to return it to the transferor.

**Civilee:** It is very interesting to see that there is room to choose from different principles to establish the rules on the transfer of ownership. [\[Table 9\]](#)

#### (e) Termination of Ownership

**Civilee:** As for the termination of ownership, it seems to be controversial whether the **limitation period** or the **extinctive prescription** of ownership or claims based on ownership should be recognized or not. On the one hand, GCC recognizes it, and FCC and JCC recognize neither the limitation period nor the

extinctive prescription of ownership and claims based on the ownership.

**Civilaw:** There is no “true” answer to this question. The answer may depend on the notion of ownership held by the general citizens in each country.

### (3) Real Rights Other Than the Ownership

**Civilee:** The civil code has provisions on real rights other than ownership. [\[Table 10\]](#) For instance, the real right is recognized for using another’s property for the purpose of construction, administration of business, residence, tree planting, agriculture, and so on. However, those purposes seem to be accomplished by another way of establishing the title such as a contract of lease.

**Civilaw:** Certainly. However, if such activities need a stable title, long duration and strong protection against violation, and if they accord with the legal policy of nations, then civil law can provide certain types of real rights to be established on the land and other properties owned by another.

**Civilee:** I see. Now I can understand the various social functions of real rights such as **superficies** [21](#), habitation [22](#), emphyteusis, servitude [23](#), usufruct [24](#), commonage<sup>25</sup>, etc.

**Civilaw:** Another types of real rights for the purpose of collaterals are to be treated in the law of security (secured transaction).

### (4) Merger of Real Rights

**Civilee:** As a type of transformation of real rights I have also learned the extinction of real rights which occurs as a result of **merger**<sup>26</sup>.

**Civilaw:** Yes. But the right of possession is an exception. It has a special meaning different from other types of real rights as we will see in the next section.

## (5) Right of Possession

**Civilee:** The **right of possession** is defined as a right to keep possession of a property even though the possessor has no legal title to possess the property<sup>27</sup> and it is characterized as “provisional right”. [\[Table 1\]](#) For example, if A has the possession of B’s property without any title to possess it and B took it back by using force, or self-help, then A can claim for recovery of the property against B by way of the possessory action based on the right of possession. [\[Figure 10\]](#)

**Civilaw:** What is the purpose of the right of possession?

**Civilee:** It aims to keep the peaceful state of possession and social order by restricting self-help. In this case B has to return the property back to A temporarily and then bring a lawsuit against A to claim for recovery on the basis of ownership.

**Civilaw:** Yes. It is one of the functions of the right of possession. It is a basis of **possessory actions** which can be brought to the court when possession is deprived, disturbed or put at risk of possible disturbance.

**Civilee:** On the other hand, the possessor of a property is presumed to be the owner or to have any legal title according to the state of possession. Thus the right of possession may reduce the burden of proof of ownership or any other legal title for the benefit of the owner or any other right-holder.

**Civilaw:** In addition, the possession may be one of requirements for the acquisition of ownership such as the immediate acquisition, occupancy, lost property, acquisitive prescription, etc.

### 3 Claim Rights

#### (1) General Provisions of Claim Rights

##### (a) Nature of Claim Rights

**Civilaw:** Now let us turn to claim rights. What is a claim right?

**Civilee:** A claim right is a right of obligee to claim obligor to give something or to do something. For instance, if A, the seller, made a contract of sale with B, the buyer, has a right to claim the transfer of the property rights and the delivery of the thing. [\[Figure 11\]](#) In this context, B is the obligee and A is the obligor. On the other hand, A has a right to claim the purchase price and B has an obligation to pay it. In this context, A is the obligee and B is the obligor. Thus the same person can be an obligee as well as an obligor depending on the particular claim right.

**Civilaw:** Are claim rights always generated from the contracts?

**Civilee:** The contract is one of the causes of claim rights. Claim rights may be generated not only from contracts, ([below \(2\)](#)), but also from agency of necessity (management of affairs without mandate, [below \(3\)](#)), unjust enrichment ([below \(4\)](#)), and torts ([below \(5\)](#)) [\[Table 1\]](#), [\[Figure 12\]](#).

## (b) Effects of Claim Rights in General

**Civilaw:** What are the effects of claim rights?

**Civilee:** The most important effect is to take remedies for the non-performance of obligation. (cf. [Art. 7.1.1-7.4.13 PICC](#); [Art. 1:301 \(4\)](#), [8:101-8:109](#), [9:101-9:510 PECL](#); [Art. 412-422 JCC](#);) <sup>28</sup> The obligee has (1) the right to performance, (2) the right to withhold performance on the part of himself, and (3) the right to compensation for damages.

### (i) Right to Performance

**Civilaw:** What is the right to performance?

**Civilee:** It is a right of obligee to require obligor to give something or to do something in accordance with the contents of the claim rights. It includes the payment of money, the delivery of specified and unspecified thing, the performance of specified act, and so on. Additional period for performance is required before the obligee exercises the right to performance. ([Art. 7.1.5 PICC](#); [Art. 8:106 PECL](#))

**Civilaw:** Does it include the specific performance? The **specific performance** is the delivery of specified thing or the performance of specified act. It includes the right to require the **repair, replacement** or the other **cure of defective performance** ([Art. 7.2.2-7.2.3 PICC](#); [Art. 9:102 PECL](#)).

**Civilee:** Specific performance can not be obtained where (a) performance would be **unlawful** or **impossible**, (b) performance would cause the obligor **unreasonable effort or expense**, (c) the performance consists in the provision of services or work of a personal character or it depends upon a personal relationship, or (d) the aggrieved party may reasonably obtain performance from another source. In addition, (e) the aggrieved party will lose the right

to specific performance, if he fails to seek it within a reasonable time after he has or ought to have become aware of the non-performance ([Art. 46 CISG](#)).

**Civilee:** Can the obligee require the substitute goods?

**Civilaw:** The obligee (e.g. the buyer) may require delivery of *substitute goods* only if (a) the goods do not conform with the contract, (b) the lack of conformity constitutes a fundamental breach of contract, and (c) a request for substitute goods is made either within a certain period of time<sup>29</sup> or within a reasonable time thereafter.

#### **(ii) Right to Withhold Performance**

**Civilaw:** The obligor can withhold his performance, if the obligor is in the situation of non-performance, such as the delayed and defective performance ([Art. 7.1.3 PICC](#); [Art. 9:201 PECL](#); [Art. 533 JCC](#)).

#### **(iii) Right to Compensation for Damages**

**Civilee:** The third remedy for the non-performance is the claim for damages. ([Art. 74-78 CISG](#); [3.18, 7.4.1-7.4.13 PICC](#); [Art. 4:117-4:118, 9:501-9:510 PECL](#); [Art. 415-422 JCC](#))

**Civilaw:** How about the scope of compensation?

**Civilee:** Generally the non-performing party is liable for “harm which it **foresaw or could reasonably have foreseen** at the time of the conclusion of the contract”. ([Art. 7.4.4 PICC](#)) Or “full compensation for harm sustained as a result of the non-performance” ([Art. 7.4.2 PICC](#)) or “a sum equal to the loss” ([Art. 74 CISG](#)) is required.

**Civilaw:** Then how is the compensation made?

**Civilee:** As for the manner of compensation, compensation is, in principle, assessed and paid in money ([Art. 7.4.11](#), [7.4.12 PICC](#); [Art.9:510 PECL](#); [Art. 417 JCC](#))<sup>30</sup>.

**Civilaw:** Is an agreement for the payment of compensation in advance also valid?

**Civilee:** Yes. In this case, the specified sum of agreed payment can exceed the actual loss suffered by the obligee. However, it can not exceed the reasonable amount. ([Art. 7.4.13 PICC](#); [Art.9:509 PECL](#); [Art. 420, 421 JCC](#))

**Civilaw:** In addition, **penalty money** can also be stipulated in advance. It is a kind of sanction against non-performance and is distinct from the agreed payment of compensation for damages. ([Art. 7.2.4 PICC](#)) However, if there is no stipulation to that effect, the agreed payment is presumed to be that of compensation.

**Civilee:** If the damage is due in part to act or omission of the aggrieved party (obligee), the obligor can require the reduction of compensation for damage ([Art. 80 CISG](#); [7.4.7 PICC](#); [Art. 9:504 PECL](#); [Art. 418 JCC](#)).

**Civilaw:** The obligee should take effort to mitigate the loss so as to prevent the extension of the damages. If he fails to do so, the amount of compensation should be reduced corresponding to the failure. This is referred to as the duty of **mitigation of harm**. ([Art. 77 CISG](#); [Art. 7.4.8 PICC](#); [Art. 9:505 PECL](#)) Concerned with this duty [Art. 85 to 88 CISG](#) provides for the duty of the obligee to preserve the goods. For example, A sold a certain amount of meat to B, and they agreed the price to be paid at the delivery of the object, but B did not provide the price even if A finished preparing the

delivery of the object. Then A can refuse the delivery but he must take a reasonable measure to preserve the meat. A can require the additional cost which he spent to preserve the meat and retain the meat until his expenses are reimbursed by B.

**Civilee:** If the obligor should pay the compensation for damages, the **interest** must also be paid ([Art. 7.4.9 PICC](#); [Art. 9:508 PECL](#)). For the failure to pay money, the interest is calculated “from the time when payment is due to the time of payment whether or not the non-payment is excused ([Art. 7.4.9 \(1\) PICC](#)). The interest of “non-monetary obligations accrues as from the time of non-performance” ([Art. 7.4.10 PICC](#)). On the other hand, the interest on damages due to unlawful act is calculated from the time of unlawful act.

**Civilaw:** If the obligee exercised a right to damages, then does he lose the other remedies for non-performance?

**Civilee:** No. Remedies for the non-performance may be cumulated unless they are not incompatible. ([Art. 8:102 PECL](#)).

**Civilaw:** If the obligee agreed with the obligor to stipulate exemption clauses, are they valid?

**Civilee:** Yes, they are.<sup>31</sup> Besides, the obligor may also be exempted when the non-performance is due to **force majeure**, that is, an impediment beyond the control of obligor, except for performing the obligation to pay money. ([Art. 7.1.7 PICC](#); [Art. 8:108 PECL](#))

**Civilaw:** Other than the effects discussed above, obligee (A) may have a right to exercise the obligor (B)'s right against the third party (C) by **subrogation** where there is no other remedies ([Art. 423 JCC](#)) [[Figure 13](#)]. Further,



obligee (A) may have a **right to avoid** the contract concluded between the obligor (B) and the third party (C) and thus may prevent the outflow of property from obligor [\[Figure 14\]](#).

### (c) Claim Rights and Obligations in Plural Parties

**Civilee:** How about the effects of claim rights where plural obligees or obligors exist in respect of one obligation.

**Civilaw:** In principle, plural obligees have rights in equal proportion and plural obligors assume duties in equal proportion. ([Art. 427 JCC](#)) However, exceptions may be recognized by way of a specific agreement, from the nature of the cause of obligation, or by the special provisions of law. [\[Figure 15\]](#), [\[Figure 16\]](#)

### (d) Assignment of Claim Rights, Assumption of Obligation and Transfer of Contract

**Civilaw:** Is an obligee able to transfer the claim right to another person?

**Civilee:** Yes. The claim right of A against X can be transferred or assigned from the former obligee A to the new obligee B by the agreement between A and B. B needs to have A make a notice to X or to have recognition by X. ([Art. 467 JCC](#); [Art. 9.1.1-9.1.15 PICC](#)) [\[Figure 17\]](#)

**Civilaw:** On the contrary, obligation of obligor X owed to obligee A may also be transferred to or assumed by the new obligor Y when A agrees to it, because Y's solvency may seriously affect A's interest so that A would not be indifferent to who is the obligor. ([Art. 9.2.1-9.2.8 PICC](#)) [\[Figure 18\]](#)

**Civilee:** Further, A's legal status as a contractual party with X may be comprehensively transferred to B, if B and the other contractual party X agrees to it. This is because the transfer of the legal status as a contractual

party may include several rights and duties so that it is necessary to satisfy the requirements for assignment of claim rights and assumption of obligation. ([Art. 9.3.1-9.3.7 PICC](#)) [[Figure 19](#)]<sup>32</sup>

### (e) Extinction of Claim Rights

**Civilaw:** What are the causes of extinction of claim rights?

**Civilee:** Claim rights may be extinguished not only (1) by **performance** made by the obligor B, but also (2) by **set-off** made by the obligor B when B has a counter-claim right against A. ([Art. 8.1-8.5 PICC](#)) [[Figure 20](#)] A's claim right may be offset by the third party. For instance, if C has a claim right against A and owes an obligation to B, then C can offset A's claim right against B by C's claim right against A. [[Figure 21](#)] Or if C is a guarantor for B's obligation against A and A requires C the performance of B's obligation, then C can offset A's claim by B's counter-claim against A. (3) **Novation** concluded between the parties and (4) **release** made by the obligee for the obligor have an effect to extinguish the claim right. Further, (5) a claim right may be extinguished by **merger**. For example, when the obligee A assigned the claim right to the obligor B, then A's claim right would extinguish as a result of merger. [[Figure 22](#)] The same will apply when the obligor B succeeded the claim right of the deceased obligee A, when a company A, the obligee, merged with a company B, the obligor, or if the lessee A acquired the ownership of the property which had been owned by the lesser B. In these cases B does not need to give notice of set-off to A.

## (2) Contracts

### (a) Fundamental Principles of Contract

**Civilee:** The primary source of claim rights may be contract. It is a concordance of declaration of intention made between the parties such as the seller and buyer, lesser and lessee, employer and employee, and so on. [[Figure 23](#)]

**Civilaw:** The leading principle of contract law is the **freedom of contract** ([Art. 6, 29 CISG](#); [Art. 1.1, 1.5, 7.1.6 PICC](#); [Art. 1:102 PECL](#); [Art. 91 JCC](#))<sup>33</sup>. This principle contains the freedom of negotiation, conclusion, contents, and form of contract<sup>34</sup>. It also implies that once a contract is concluded, it has a binding force between the parties ([Art. 1.3 PICC](#)) as the proverb goes “**pacta sunt servanda**” (agreements shall be observed)<sup>35</sup>. A Contract is a powerful instrument to create human relationships, accomplish enterprises, and actualize the private autonomy.

**Civilee:** As the contractual relationship is rested on the mutual reliance between the parties, they are also required to observe the principle of **good faith** in the process of negotiation, formation and performance of a contract ([Art. 7 \(16 \(2\) \(b\), 29 \(2\); 18 \(3\), 19 \(2\), 21 \(2\), 39 \(1\), 48 \(2\), 65 \(2\), 68; 54, 60 \(a\), 77, 85, 86\) CISG](#); [Art. 1.7 PICC](#); [Art. 1:201 PECL](#); [Art. 1 \(2\) JCC](#)).

**Civilaw:** Besides, the freedom of contract does not exclude their limitation based on the **public welfare** ([Art. 90 JCC](#); [Art. 1.4 PICC](#); [Art. 1.102 PECL](#)).

## (b) Formation of Contract

**Civilaw:** What is the typical pattern of formation of contract?

**Civilee:** A contract is formed through the process of (1) the **negotiation** between the interested parties,<sup>36</sup> (2) the **offer** made by one of the parties, and (3) the **acceptance** made by another party by which an agreement is created.  
[\[Figure 24\]](#)

**Civilaw:** An offer ([Art. 14 \(1\) CISG](#); [Art. 2.1.2 PICC](#); [Art. 2:201 PECL](#)) is a kind of the declaration of intention, which must be distinguished from an invitation to make offers ([Art. 14 \(2\) CISG](#)), and it becomes effective when it reaches the other party ([Art. 15 \(1\) CISG](#); [Art. 2.1.3 PICC](#); [Art. 97 JCC](#)).

**Civilee:** May a party who made an offer **withdraw** it before it reaches the other party?  
([Art. 15 \(2\) CISG](#); [Art. 2.1.3 \(2\) PICC](#))

**Civilaw:** Yes, he may. However, even if the withdrawal of an offer reached after the offer had reached the other party B and A has a good reason to believe that the withdrawal reached before the offer would reach B, then B should make a notice of the late withdrawal of an offer.

**Civilee:** Is the **withdrawal** of an offer the same as the **revocation** of an offer?

**Civilaw:** No, it isn't. The revocation of an offer is made **after** the offer reached the other party. ([Art. 16 CISG](#); [Art. 2.1.4 PICC](#); [Art. 2:202 PECL](#); [Art. 521, 524 JCC](#))  
For instance, [Article.16 CISG](#) provides to the effect that an offer may be revoked if the revocation reaches the offeree before he has dispatched the acceptance and before a contract is concluded. However, an offer can not be revoked if it indicates, whether by stating a fixed time for acceptance or otherwise, that it is irrevocable; or if it was reasonable for the offeree to rely on the offer as being irrevocable and the offeree has acted in reliance on the offer.

**Civilee:** On the other hand, an acceptance of the offer is a declaration of intention by which a contract is concluded ([Art. 18 \(1\) CISG](#); [Art. 2.1.6 \(1\) PICC](#); [Art. 2:204 PECL](#)). A declaration of intention which is made as an answer to the offer but contains modifications of the offer can not be the acceptance. Instead it is regarded as a new offer made by the other party ([Art. 19 CISG](#); [Art. 2.1.11 \(1\) PICC](#); [Art. 2.208 PECL](#); [Art. 528 JCC](#)).

**Civilaw:** An acceptance becomes effective when it reaches the other party who made the offer ([Art. 18 \(2\) CISG](#); [Art. 2.1.6 \(2\) PICC](#)).

**Civilee:** Then a withdrawal of an acceptance is also effective, if it is made before the acceptance reaches the offeror, isn't it?

**Civilaw:** Yes, it is ([Art. 23 CISG](#)). The offeror may make a time limitation for an acceptance ([Art. 18 \(2\) CISG](#); [Art. 2.1.7, 2.1.8 PICC](#); [Art. 2:206 PECL](#); [Art. 521 \(2\), 524 JCC](#)). However, the offeror A should make a notice of the **late acceptance** to B when the acceptance made by B reached after the time for acceptance had been over but B has a good reason to believe the acceptance would reach before the time for acceptance is over ([Art. 21 CISG](#); [Art. 2.1.9 PICC](#); [Art. 2:207 PECL](#); [Art. 522, 523 JCC](#)).

**Civilee:** Is the contract formed just when the acceptance reaches the offeror?

**Civilaw:** The timing at which a contract is concluded is controversial. ([Art. 23, 18 \(3\) CISG](#); [Art. 2.1.1, 2.1.13, 2.1.14 PICC](#); [Art. 2:101, 2:103, 2:107, 2:205 2:211 PECL](#); [Art. 526 JCC](#)) For example, CISG provides "A contract is concluded at the moment when an acceptance of an offer becomes effective in accordance with the provisions of this Convention" ([Art. 23 CISG](#)) and "An acceptance of an offer becomes effective at the moment the indication of assent reaches the offeror". ([Art. 18 \(2\) CISG](#)) JCC, however, provides "A contract inter absentes comes into existence at the time when notice of acceptance is dispatched". ([Art. 526 \(1\) JCC](#)) This provision means that the acceptance is valid and the contract is regarded as concluded even if the offeree died or lost the disposing capacity to conclude a valid contract, or the revocation of an offer reached the offeree after he had dispatched the acceptance and before the acceptance reached the offeror.

**Civilee:** This is the reason why the offeree is required to give notice of the delayed arrival of the revocation of offer to the offeror without delay when the

offeree could have known that the revocation should have reached the offeree under the normal circumstances before the offeree dispatched the acceptance ([Art. 527 JCC](#)).

### (c) Validity of Contract

**Civilaw:** As for the validity of contract, provisions may be included in the General Part as a part of the validity of juristic acts such as (i) lack of capacity, (ii) mistake, (iii) fraud, (iv) threat, (v) incorrect information, (vi) illegality, (vii) immorality, (viii) gross disparity (excessive benefit or unfair advantage)<sup>37</sup>, etc. ([Art. 138 \(2\) GCC](#); [Art. 3.10 PICC](#); [4:109 PECL](#)).

**Civilee:** It is controversial whether the **initial impossibility** can be a cause of invalidity of contract, isn't it?

**Civilaw:** Yes, it is. Recent trends of legal theory seem to deny the initial impossibility as the cause of invalidity of contract ([Art. 3.3 PICC](#); [Art. 4:102 PECL](#)). For instance, [Art. 3.3 PICC](#) provides “(1) The mere fact that at the time of the conclusion of the contract the performance of the obligation assumed was impossible does not affect the validity of the contract; (2) The mere fact that at the time of the conclusion of the contract a party was not entitled to dispose of the assets to which the contract relates does not affect the validity of the contract”.

### (d) Effects of Contract

#### (i) Performance

**Civilaw:** Let me confirm the time, place, quality, and cost of performance.

**Civilee:** All right. If a time of performance is fixed by the contract or determinable from it, that is the time of performance. If a period of time is fixed by the contract or determinable from it, the obligor can perform his obligation at

any time within that period. If neither the time nor the period is fixed or determinable in the contract, then the obligor should perform his duty “**within a reasonable time** after the conclusion of the contract”. ([Art. 6.1.1, 6.1.4, 7.1.3 PICC](#); [Art. 7:102; 104, 9:201 PECL](#))

**Civilaw:** How about the place of performance?

**Civilee:** If the **place of performance** is not fixed or determinable in the contract, a **monetary obligation** should be performed at the **obligee’s place of business**. An **obligation to deliver the specified thing** should be performed **where the thing is placed at the conclusion of the contract**. ([Art. 6.1.6 \(1\) \(a\) PICC](#)) **Any other obligation** must be performed at the **obligor’s place of business**. A party must bear any increase of expenses caused by a change of the place of business after the conclusion of the contract. ([Art. 6.1.6 \(2\) PICC](#); [Art. 7:101 PECL](#))

**Civilaw:** Obligee should cooperate with obligor when such co-operation may reasonably be expected for the performance of obligations ([Art. 5.1.3 PICC](#); [Art. 1:102 PECL](#)).

**Civilee:** Where the **quality** of performance is neither fixed by, nor determinable from, the contract, a party is bound to render a performance of a quality that is **reasonable and not less than average** in the circumstances ([Art. 5.1.6 PICC](#)). And It may be the general rule that an **obligor** shall bear the **costs** of performance of its obligation ([Art. 6.1.11 PICC](#); [Art. 7:112 PECL](#)).

## **(ii) Remedies for the Lack of Conformity**

**Civilaw:** As remedies for the lack of conformity, obligee has the right to performance and the right to compensation for damages, as we have already discussed ([above \(1\) \(b\) \(i\), \(iii\)](#)).

### (iii) Passing of Risk

**Civilaw:** After the conclusion of contract, if the performance of obligation, for example, the delivery of goods sold, became impossible without negligence of the obligor B, for example the seller, it must be determined whether the counter-obligation of the obligee A, for example the buyer, would still continue to exist or not. ([Art. 66-70 CISG](#); [Art. 534-536 JCC](#)) [[Figure 25](#)]

**Civilee:** As one of the possible solutions, CISG provides to the effect that the loss of goods or the damage to goods after the risk has passed to the obligee, such as the buyer who can claim the delivery of the object, does not discharge him from his counter-obligation such as the payment of the price unless the loss or the damage is due to an act or omission of the obligor such as the seller. ([Art. 66 CISG](#)) In this case the risk should pass to the obligee such as the buyer **when he takes over the goods** or, if he does not do so in due time, from the time **when the goods are placed at his disposal** and he commits a breach of contract by failing to take delivery. ([Art. 69 \(1\) CISG](#))

**Civilaw:** If the contract such as the sale involves **carriage of the goods** and the obligor (e.g. the seller) is not bound to hand them over at a particular place, the risk passes to the obligee (e.g. the buyer) when the goods are handed over to the first carrier for transmission to the obligee (e.g. the buyer) in accordance with the contract of sale. On the other hand, if the obligor (e.g. as the seller) is bound to hand the goods over to a carrier at a particular place, the risk does not pass to the obligee (e.g. the buyer) until the goods are handed over to the carrier at that place ([Art. 67 \(1\) CISG](#)).

**Civilee:** The risk in respect of **goods sold in transit** passes to the buyer **from the time of the conclusion of the contract**. However, if the circumstances so indicate, the risk is assumed by the buyer **from the time the goods were handed over to the carrier who issued the documents** embodying the contract of carriage. Nevertheless, if at the time of the conclusion of the contract of sale the seller



knew or ought to have known that the goods had been lost or damaged and did not disclose this to the buyer, the loss or damage is at the risk of the seller ([Art. 68 CISG](#)).

**Civilaw:** Besides, if the obligor (e.g. the seller) has committed **a fundamental breach of contract**, the risk does not pass to the obligee and the obligee can enjoy the remedies available on account of the breach of contract ([Art. 70 CISG](#)).

#### **(e) Contract in Favour of the Third Party**

**Civilaw:** Contract in favour of the third party (contract for the benefit of a third person) may be concluded between the parties who are called the promisee (A) and the promisor (B) ([Art. 5.2.1-5.2.6 PICC](#); [Art. 6:110 PECL](#); [Art. 537-539 JCC](#)) [[Figure 26](#)].

**Civilee:** The parties called promisor (A) and promisee (B) may confer by express or implied agreement a right on a third party called the beneficiary (C). The existence and content of the beneficiary (C)'s right against the promisor (A) are determined by the agreement of the parties and are subject to any conditions or other limitations under the agreement ([Art. 5.2.1 PICC](#)). The beneficiary (C) must be identifiable with adequate certainty by the contract but need not be in existence at the time the contract is made ([Art. 5.2.2 PICC](#)). The conferment of rights in the beneficiary (C) includes the right to invoke a clause in the contract which excludes or limits the liability of the beneficiary (C) ([Art. 5.2.3 PICC](#)). The promisor (A) may assert against the beneficiary (C) all defenses which the promisor (A) could assert against the promisee (B) ([Art. 5.2.4 PICC](#)). The parties (A and B) may modify or revoke the rights conferred by the contract on the beneficiary (C) until the beneficiary (C) has accepted them or reasonably acted in reliance on them ([Art. 5.2.5 PICC](#)). The beneficiary (C) may renounce a right conferred on him ([Art. 5.2.6 PICC](#)).

#### **(f) Termination of Contract**

**Civilaw:** What does the termination of contract mean?

**Civilee:** Once a contract is concluded the parties are bound by the contract and can not deviate from it without the consent of the other party. ([Art. 1.3 PICC](#)) If both parties agree to alter or terminate the original contract, the contract may be changed or terminated, because they can be regarded as the formation of new contracts. ([Art. 29 CISG](#)) However, the **termination of contract** in its proper sense means that one of the contracting parties may terminate the contract even if the other party would not agree to it when he is in breach of contract. [[Figure 27](#)] In this case the party who can terminate the contract is vested with a **right to terminate the contract**. ([Art. 25, 49, 51, 64, 72, 81-84 CISG](#); [Art. 7.3.1-7.3.6 PICC](#); [Art. 8:103, 9:301-9:309 PECL](#))

This is the exception to the binding force of contract, called *pacta sunt servanda*.

**Civilaw:** Then what is the requirement for the termination of contract?

**Civilee:** In order to terminate the contract, the **lack of conformity** must be so serious that it can be regarded as the **fundamental breach of contract**. ([Art. 49, 64 CISG](#))

**Civilaw:** Can I confirm the difference between the termination of contract and the avoidance of declaration of intention which we have discussed in the General Part?

**Civilee:** The termination of contract is due to the lack of conformity that arises after the conclusion of contract, whereas the avoidance of contract is due to the initial lack of requirements for the validity of the juristic acts. ([Art. 49, 64, 81-84 CISG](#))

**Civilaw:** What are the effects of the termination of contract?

**Civilee:** When the contract is terminated, 1) the parties are released from obligations which had been assumed but not yet performed. 2) They have to return the goods or money which had been received from the other party (restitution of the goods or money received) together with the interest of money received and the benefits derived from the goods. 3) In addition, they have to compensate for the damages which were caused by them with negligence ([Art. 81, 84 CISG](#)).

**Civilaw:** What would happen to the party who lost the object which had been received from the other party so that it became impossible for him to

return it the other party (impossibility of making restitution of the goods)?

**Civilee:** [Art. 82 \(2\) CISG](#) provides to the effect that the buyer, for example, loses the right to terminate the contract or to require the seller to deliver substitute goods if it is impossible for him to make restitution of the goods substantially in the condition in which he received them. However, this provision does not apply 1) if the impossibility of making restitution of the goods or of making restitution of the goods substantially in the condition in which the buyer received them is not due to his act or omission; 2) if the goods or part of the goods have perished or deteriorated as a result of the examination provided for in [Art. 38 CISG](#); 3) if the goods or part of the goods have been sold in the normal course of business or have been consumed or transformed by the buyer in the course of normal use before he discovered or ought to have discovered the lack of conformity.

### **(g) Hardship**

**Civilaw:** There is another exception to the binding force of contract called **hardship**. It may be recognized due to the unexpected change of the circumstances after the conclusion of contract ([Art. 79 CISG](#); [Art. 6.2.1-6.2.3 PICC](#); [Art. 6:111 PECL](#)). In principle, each party is still bound by the contract to fulfill its obligations even if performance has become more onerous as a result of the increase of the cost of performance or the decrease of the value of the counter-performance. However, if performance of the contract becomes **excessively onerous** because of the change of circumstances which occurred **after the conclusion of the contract** and which **could not be reasonably foreseen at the conclusion of contract**, the parties may be bound to enter into negotiations with a view to adapting the contract or terminating it. If the parties fail to reach the agreement within a reasonable period, the court 1) may **terminate** the contract at a date and on terms to be determined by the court, or 2) **adapt the contract** so as to distribute in a just and equitable manner the losses and gains resulting from the change of circumstances

between the parties.

**(h) Exemption for the Reason of Impediments beyond the Control of the Obligor**

**Civilaw:** Are there any other causes which may exempt the obligor from its obligation?

**Civilee:** Exemption of the obligation for the reasons of impediments which are beyond the control of the obligor may be recognized. It is also the exception to the principle of the binding force of contract. For example, CISG provides to the effect that a contracting party is not liable for a non-performance of obligation “if he proves that the failure was due to an **impediment beyond his control** and that he **could not reasonably be expected** to have taken the impediment into account at the time of the conclusion of the contract or to have avoided or overcome it or its consequences” ([Art. 79 \(1\) CISG](#)).

**(i) Particular Regulations of Various Types of Contracts**

**(i) Contracts for the Transfer of Property Rights**

**Civilaw:** Various types of contract are created by the parties on the basis of freedom of contract. However, they need regulations by provisions of law to complement the agreements of the parties. How can you classify those regulations according to typical types of contract?

**Civilee:** I can classify them, for instance, according to the purpose of the contract. [\[Table 11\]](#) The first type is for the transfer of property rights. It includes the contracts of (1) gifts [\[Figure 28\]](#), (2) sales [\[Figure 29\]](#), (3) exchanges [\[Figure 30\]](#), (4) life annuities, (5) contest prizes, and so on.

## 1) Gift Contract

**Civilee:** It is controversial whether the gift contract can be formed only by the agreement between the donor and the donee (consensual contract, *contrat consensuel*, *Konsensualvertrag*) or it must be formed by the **delivery** of the object (real contract, *contrat réel*, *Realvertrag*) or by the **prescribed form** such as a notarized documents.

**Civilaw:** From the viewpoint of the freedom of contract, the consensual contract would be the rule. However, there may be room to allow a donor to revoke the agreement of gift before the object is delivered and the agreement is not made by a certain form but is just an oral one.

**Civilee:** In addition, a donor can revoke the declaration of intention to give when a donee is found to be seriously **ingratitude** to the donor or the donor becomes **extremely poor**. This may also be the exception to the binding force of contract.

## 2) Sales Contract

**Civilaw:** Sales contract may be one of the most popular contracts. It is created by the mere agreement between the seller and the buyer (**consensual contract**) [[Figure 29](#)].

**Civilee:** In the formation process of sales contract, the contents must be determined by the parties like any other contracts. However, isn't it hard for the parties to agree all the matters they need?

**Civilaw:** Yes, it is. Some matters may be filled up by the provisions of law and the interpretation of contract clauses. Even the **price determination** may be complemented by the provisions of law ([Art. 5.1.7 PICC](#); [Art. 6:104-6:106 PECL](#)). For instance, PICC recognizes that if the parties do not fix or make

provision for determining the price, they are considered, in the absence of any indication to the contrary, to have made reference to the **price generally charged** at the time of the conclusion of the contract for such performance **in comparable circumstances in the trade concerned** or, if no such price is available, to a **reasonable price** ([Art. 5.1.7 PICC](#)).

**Civilaw:** Once the contract of sale is concluded, the seller has a **duty to transfer the property rights** ([Art. 30 CISG](#)) and **to deliver the goods** ([Art. 31-34 CISG](#)). Duty to deliver the goods would also include the duty to hand over **documents** relating to the object ([Art. 34 CISG](#)) and **to register the title** if it is to be registered.

**Civilee:** The seller also has a **duty to make the object to conform with the contract** ([Art. 35-44 CISG](#)). This means that the object of the contract must have the quantity and quality, and be fit for the purposes for which goods of the same description would ordinarily be used and for any particular purpose expressly or impliedly made known to the seller at the time of the conclusion of the contract ([Art. 35 CISG](#)) The existence of rights of the third party in the object of the contract may be regarded as a kind of the lack of conformity ([Art. 41-42 CISG](#)).

**Civilaw:** It is a seller's **right to remedy** at his own expense any failure to perform his obligations ([Art. 48 \(1\) CISG](#)). In order to exercise this right 1) the seller can remedy "without unreasonable delay"; and 2) "without causing the buyer unreasonable inconvenience or uncertainty of reimbursement by the seller of expenses advanced by the buyer" ([Art. 49 CISG](#)).

**Civilee:** On the other hand, the primary duty of the buyer is to pay the price. Concerned with this duty civil law will provide for the **place of payment** ([Art. 57 CISG](#)), **time of payment** ([Art. 58 CISG](#)), **reduction of the price** ([Art. 50](#)

[CISG; Art. 9:401 PECL](#)), etc. It may provide for how to deal with the case of excess quantity ([Art. 52 \(2\) CISG](#)). The buyer assumes a duty to examine the goods and to notice the nature of the lack of conformity ([Art. 38 \(1\), 39 CISG](#)). The buyer also has an obligation to take delivery ([Art. 60, 85 CISG](#)).

## (ii) Contracts for the Use of Another Person's Property

**Civilee:** The second type of contract is for the use of another person's property. It includes (1) loan for consumption, [\[Figure 31\]](#) (2) loan for use, [\[Figure 32\]](#) and (3) lease. [\[Figure 33\]](#)

### 1) Loan for Consumption

**Civilaw:** Loan for consumption may be either onerous or gratuitous. However, it is traditionally recognized as one of the real contracts (contrat réel, Realvertrag) which must be **formed by the delivery of the object**.

### 2) Loan for Use

**Civilee:** Loan for consumption is a gratuitous contract so that it may be formed not by the mere oral agreement but by the delivery of the object of contract.

### 3) Lease

**Civilaw:** On the other hand, the contract of lease is generally recognized to be formed by the consensual contract. However, there may be room for the civil code or special law to require the party to make the leasing contract especially of immovable property by the formal contract such as notarized documents.

## (iii) Contracts for the Use of Another Person's Labour

**Civilee:** The third type of contract is for the use of another person's labour such as (1) the labour contract, or contract of employment, [\[Figure 34\]](#) (2) contract for work, [\[Figure 35\]](#) (3) mandate, [\[Figure 36\]](#) (4) bailment, [\[Figure 37\]](#) and so on. In addition, as a special type of contract for work, the tour contract,



contract of transportation and intermediary contract are becoming popular. However, they may be included in the commercial code, if most of them are made by the merchant as a commercial transaction.

#### (iv) Contract for the Dispute Resolution

**Civilee:** The fourth type of contract is for the purpose of dispute resolution. It includes (1) compromise, [\[Figure 38\]](#) and (2) arbitration contract, [\[Figure 39\]](#)

#### (3) Management of Affairs without Mandate (Agency of Necessity, *Negotiorum Gestio*)

**Civilaw:** Are there any causes of claim rights other than contracts?

**Civilee:** Yes. As a quasi contract, the management of affairs without mandate may be recognized. It is traditionally called the **agency of necessity, *negotiorum gestio***. For instance, if a person A begins to take care of some matters for the benefit of another person B without any mandate from B, the civil law may well give A certain **obligations to continue the management** of matters for the benefit of B on the one hand, and give A the **claim right to reimburse certain expenses** which A spent to take care of B's matters in accordance with B's benefits and wishes, on the other hand. ([Art. 1371-1381 FCC](#); [Art. 677-687 GCC](#); [Art. 697-702 JCC](#)) [\[Figure 40\]](#)

#### (4) Unjust Enrichment

**Civilaw:** Claim rights may also be generated where B receives benefits at the expense of A **without any legal ground**. In that case B is obliged to return the benefits to A and A acquires the claim right to recover it from B. ([Art. 1376-1381 FCC](#); [Art. 812-822 GCC](#); [Art. 703-704 JCC](#)) [\[Figure 41\]](#), [\[Figure 42\]](#), [\[Figure 43\]](#), [\[Figure 44\]](#) For instance, where A sold a property to B under a fraudulent act committed by B and A avoided the contract for the reason of B's fraud, then A acquires the claim right against B to return the

property as an unjust enrichment. On the other hand, A is also obliged to return the purchase money to B as an unjust enrichment and B acquires the claim right for that money. [\[Figure 41\]](#)

#### (5) Torts

**Civilee:** Torts are also important cause of claim rights to compensation for damages. If a person B, intentionally or negligently, injures unlawfully the life, body, health, liberty, property or any other right of another person A, then B bears an obligation to make compensation for any loss arising from B's unlawful act, and A acquires a **claim right to require the compensation for damages** against B. ([Art. 1382-1386 FCC](#); [Art. 823-853 GCC](#); [Art. 709-724 JCC](#)) [\[Figure 45\]](#)

**Civilaw:** This is a sanction against the **infringement of a right**. In addition, the law of tort may give a sanction against the **bad behaviour** for itself. For instance, when A willfully causes damages to another person B in a manner which is contrary to public policy, then A may be imposed an obligation to compensate for B's damage even if B's interest is not recognized as a right ([Art. 826 GCC](#)).

**Civilee:** Further, civil law may give A an obligation to make compensation for B's damages which are caused by A's act but without negligence. This is a special liability established by law to promote a particular legal policy such as to protect life, body, health and other precious human interests. Strict liability such as product liability is one of the typical examples.

**Civilaw:** In addition, civil law provides other types of special tort liability such as responsibility of supervisor, responsibility of employer, responsibility of the central and local governments for the tort committed by their public officials, responsibility of the person who placed order, responsibility of the possessor

of structure, responsibility of the possessor of animal, etc.

## (6) Security Transactions

**Civilaw:** We have discussed the causes and effects of claim rights. As they are different from real rights which are allowed the direct control of objects, claim rights need to be accompanied by measures to secure the performance of the corresponding obligation. What kind of measures are there in civil law for that purpose?

**Civilee:** The civil law provides certain types of security rights to make sure of the realization of claim rights. [\[Table 12\]](#) The first type is based on the **personal credit** of a third person other than the obligor such as a **guarantor**. This is a **security by person** or a **personal security**. For instance, if obligee A has a claim right against obligor B, A can make a contract of guaranty, or suretyship, with C. In this case A becomes a guarantee and C becomes a guarantor.

**Civilaw:** Besides, plural obligors agreed among the parties or appointed by the law play a role of security for the obligee. (above (1) (c))

**Civilee:** The second type is based on the **certain property**, or collateral, owned by the obligor or by the third person. This is a **security with assets** or a **real security**. It includes various types such as (1) a right of retention, (2) a right of lien, (3) a right of pledge, (4) a right of hypothec, (5) a right of mortgage, (6) a title retention, and so on. Among them (3) the right of pledge and (4) the right of hypothec may be most typical and popular. While the **right of pledge** is to be established by delivering the collateral to the obligee, the **right of hypothec** is to be provided only by the agreement and registration without the delivery of the collateral, so that its provider may keep the possession and the use of the collateral.

## 4 Family Relations

### (1) Marriage

**Civilaw:** Now let us enter into family law. Although it is placed in the Final Parts of the Pandekten system, its primary importance must not be overlooked.

**Civilee:** Certainly. Rules on family relations regulate the most familiar relationship between the persons and they actually constitute the basis of the civil law system. There is a good reason that the Institutiones system begins with the Law of Persons.

**Civilaw:** Family law also includes the rules on succession and they are regarded as a part of transformation of rights. From what rules we should start in family law?

**Civilee:** In most civil codes the family law begins with a marriage. A marriage is formed by **an agreement** between the parties to enter into a conjugal community and acquire rights and duties as spouses. Most civil codes require the marriage agreement to be made with a certain formal act such as registration at a competent office.

**Civilaw:** The marriage agreement must be distinguished from the **engagement**, that is, **an agreement to be married in the future**. However, the engagement may have a legal effect as a kind of contract. If an engaged person A withdraws the engagement without any rational reasons, the other party B has a claim right to compensation for the losses which B suffered in expectation of marriage ([Art. 1298 GCC](#)).

**Civilee:** The civil code provides with not only the formation of marriage but with the effects of marriage such as rights and duties of spouses including marital property rights and with the requirements for divorce and its effects.

## (2) Parents and Children

**Civilaw:** The next topic of family law is the rights and duties of parents and their children. A child may be (1) a **child by birth** or (2) an **adopted child**. A child by birth may be (a) a **legitimate child** or (b) an **illegitimate child**. Parents bear a duty of maintenance and have a **parental authority** to take care of their children while they are minors.

## (3) Guardianship

**Civilee:** For a minor whose parents have died, a guardian is appointed by the will of the parents or by the court and he or she has the same rights and duties as those of the parents. The same applies to a minor whose parents are unable to take care of their own affairs wholly or partly for the reason of physical, mental or psychological impediment.

## (4) Support

**Civilaw:** Not only a husband and his wife and parents and their children but also other relatives may have mutual rights and duties to support their lives. Civil law provides for the scope of relatives, subjects and contents of the **right to support**.

**Civilee:** They may largely vary depending on the customary rules which have been historically developed in each society and on the legal policy concerning the relationship between **public support** and **private support**.

## 5 Successions

### (1) Testamentary Succession

**Civilaw:** Succession is one of the causes of transfer of rights and obligations from the deceased to the heirs. It is divided into testamentary succession and intestate succession.

**Civilee:** If the deceased left a testament, the succession is guided by it. However, detailed regulations may be necessary concerning (1) the forms of testament, (2) effects of testament including the possibility of its revocation, (3) execution of testament by the executor and administrator, and so on.

**Civilaw:** Besides, most civil codes provide for (4) the **legally secured portion**, or compulsory portion for a certain successor who is unfavorably treated in the testament. It aims to secure minimum equality among the successors and marks a limit of freedom of testament. ([Art. 2303-2338a GCC](#); [Art. 1028-1044 JCC](#))

### (2) Intestate Successions

**Civilee:** Matters which are not covered by the valid testament must be regulated by the civil law. It provides (1) the scope and order of heirs, (2) shares of heirs, (3) acceptance and renunciation of succession, (4) separation of the inheritance and the property of successors, and (5) partition of the inheritance.

**Civilaw:** In addition, civil law should provide regulations to deal with the inheritance for which no successors exist.

## VI Conclusion

**Civilaw:** Now let us consider again the role of civil law in our society. What benefits will it bring to us?

**Civilee:** The most salient function of it seems to provide the **basic rights of citizens** such as personality rights, real rights, claim rights, and rights of spouses, parents, children, and other relatives. On the basis of those private rights, the **private autonomy** may be established where the **public spirit** of citizens could be born and fostered.

**Civilaw:** That is the reason why civil law is said to be the constitution of a civil society. Further, in our globalized and multicultural societies the civil law provisions should be constantly checked against international standards as well as the indigenous rules. In this context, the theoretical analysis through comparative law, sociology of law, and law and development study, and practical law reform through international cooperation by sharing experiences, is indispensable.



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## Corrections

- 1) [V Outline of the Civil Law System > 3 General Part > 4 Transformation of Rights(2)]

The final part of the narration "... then A can not avoid the juristic act" is to be corrected as "**... then A can not claim against C for recovery of the thing even if A avoided the juristic act.**"

See the corresponding part of the full PDF document.

- 2) [V Outline of the Civil Law System > 3 Claim Rights > Contracts 1: General Rules (d-3) Effects of Contract (3): Passing of Risk]

In the narration "the obligor B" is to be corrected as "**the obligor A**" and "the obligee A" is to be corrected as "**the obligee B.**"

See the corresponding part of the full PDF document.