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  - Pascal Mallien, international partner Antwerp
  - Jean-François Vandenberghe, international partner Brussels
  - Mario Deketelaere, associate Antwerp
  - Dries Vanpaemel, associate Brussels
  - Richard Weatherhogg, associate London
  - Richard Allen, associate London
- NICOLE Secretariat
NICOLE

NICOLE (Network for Contaminated Land in Europe) was set up in 1995 as a result of the CEFIC “SUSTECH” programme which promotes co-operation between industry and academia on the development of sustainable technologies. NICOLE is the principal forum that European business uses to develop and influence the state of the art in contaminated land management in Europe. NICOLE was created to bring together problem holders and researchers throughout Europe who are interested in all aspects of contaminated land. It is open to public and private sector organisations. NICOLE was initiated as a Concerted Action within the European Commission’s Environment and Climate RTD Programme in 1996. It has been self-funding since February 1999.

NICOLE’s overall objectives are to:

- Provide a European forum for the dissemination and exchange of knowledge and ideas about contaminated land arising from industrial and commercial activities;
- Identify research needs and promote collaborative research that will enable European industry to identify, assess and manage contaminated sites more efficiently and cost-effectively; and
- Collaborate with other international networks inside and outside Europe and encompass the views of a wide a range of interest groups and stakeholders (for example, land developers, local/regional authorities and the insurance/financial investment community).

NICOLE currently has 112 members. Membership fees are used to support and further the aims of the network, including: technical exchanges, network conferences, special interest meetings, brokerage of research and research contacts and information dissemination via a web site, newsletter and journal publications. NICOLE includes an Industry Subgroup (ISG) – with 25 members; a Service Providers Subgroup (SPG) with 41 members; 31 individual members from the academic sector/research community; and 15 members from other organisations, including research planners, non profit making organisations, other networks, funding organisations. Some members are involved in both the ISG and the SPG. For further general information, further meeting reports, network information and links to contaminated land related web sites, please visit NICOLE's web site: www.nicole.org.

Membership fees are currently 3,500 EURO per year for companies (1,750 EURO for smes), and 150 EURO per year for academic institutions. For membership requests please contact:

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1 Executive Summary

Most of European environmental legislation is introduced by Directives. The Member States are obliged to implement these in their national legislation. In Federal countries like Canada and the United States of America, individual states apply Federal Law to their existing civil law and common law systems. The European Union approach, that the Member States are responsible for nationally implementing European legislation, is unique. Also unique is the Court of Justice of the European Union, where if necessary, the European Commission will start a procedure against Member States when implementation does not take place or is not sufficient.

Within each Member State European Law has to be integrated with existing civil and common law, as these are the basis on which legal actions within countries are brought. NICOLE members are often confronted with legal terminology, as well as with legal systems that seem to be different depending on whether you find yourself in an Anglo-Saxon setting or a continental European one. This occurs because of the historic basic differences between both systems. The differences between these systems also explain why the enforcement of the European (environmental) legislation is a matter of the Member State, and why penal sanctions are applied nationally rather than at a European level.

There has been a flurry of new legislative initiatives at an EU level related to soil contamination in recent years: the proposed Soil Framework Directive, the Environmental Liability Directive, the revision of the IPPC Directive, and the recently published Environmental Crime Directive.

NICOLE therefore decided to organise its first seminar to provide its members with a background to the emerging EU-Level legislation and the two broad legal frameworks pertaining to Member States, and how these impact the implementation of environmental law. Its goal was both to provide information, and to promote mutual understanding between professionals who normally work under different legal systems.

The seminar was structured in two broad sections:

- A background to and comparison of common and civil law principles, that exist in the Anglo-Saxon and continental European contexts
- An illustration of the effects of these contexts based on analysis of the implementation of two Directives: the Environmental Liability Directive and the Environmental Crime Directive.

Each context is explored using the same framework:

- sources of law:
  - case law
  - legislation
  - equity / general principles of law
  - constitutional law
  - the role of academics
  - relation with the European law
  - legal procedure
- legal procedure
  - causes of action
  - the court system
  - the adversarial approach
  - legal practitioners

Speakers were provided by the international law firm of Baker & McKenzie LLP. The seminar concluded with a wide ranging question and answer session.

Declaimer: This seminar is intended to provide a very brief overview of some key principles. This text is by no means a comprehensive overview of civil, common or European law.
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1. Introduction

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Speakers were provided by the international law firm of Baker & McKenzie LLP. The seminar concluded with a wide ranging question and answer session.

While this was NICOLE’s first “experiment” with a seminar, and a successful experiment; NICOLE has workshops twice a year, and also publishes Position Papers and a newsletter. Recent outputs are listed in Table 1, below.
Table 1  Selected NICOLE Publications from 2005 Onwards

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<th>Year</th>
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<td>and groundwater monitoring under the proposed new IPPC Directive</td>
<td>Land Contamination and Reclamation, 16 (4) 381-403</td>
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<td>what do upcoming Directives require from us? Brussels, Belgium.</td>
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<td>industrial perspective, Akersloot, the Netherlands. See <a href="http://www.nicole.org/publications/library.asp?listing=1">www.nicole.org/publications/library.asp?listing=1</a> and Land Contamination and Reclamation, 16 (1) 50-75</td>
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<td>of the European Parliament and of the Council on Waste. NICOLE, TNO,</td>
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<td>Making Management of Contaminated Land an Obsolete Business -</td>
<td>Contamination and Reclamation, 15 (2) 261-287</td>
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<td>Challenges for the Future. 5 to October 2006, Leuven, Belgium.</td>
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<td>2006</td>
<td>Report of the NICOLE Workshop: Data Acquisition for a Good Conceptual</td>
<td>See <a href="http://www.nicole.org/publications/library.asp?listing=1">www.nicole.org/publications/library.asp?listing=1</a>, and Land</td>
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<td>Site Model 10 – 12 May 2006, Carcassonne, France. See <a href="http://www.nicole.org/publications/library.asp?listing=1">www.nicole.org/publications/library.asp?listing=1</a>, and Land Contamination and Reclamation, 15 (1) 94-144</td>
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<td>management of contaminated land, 1-2 December 2005, Cagliari, Sardinia,</td>
<td>Contamination and Reclamation, 14 (4) 855-887</td>
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<td>2004, Sofia, Bulgaria see <a href="http://www.nicole.org/publications/library.asp?listing=1">www.nicole.org/publications/library.asp?listing=1</a> and Land Contamination and Reclamation 14 (1) 137-164</td>
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2. The Civil Law System (speaker: Dries Vanpaemel)

2.1. Overview

2.1.1. Preliminary remark

The following information comprises the reference text used at the presentation given by Baker & McKenzie LLP to NICOLE members on March 31, 2009. This text is intended to provide a very brief overview of some key principles of civil law systems for comparison with the equivalent memo on the common law system. This text by no means a comprehensive overview of civil law.

The generally accepted way of dividing and classifying the law in civil law jurisdictions is quite different from that in common law jurisdictions; the fundamental division in civil law systems is between ‘public’ and ‘private’ law.

Private law is the area of law which determines the relationship between private persons. This includes real estate law, contract law, commercial law and law governing matrimonial property rights.

Public law is the area of law which defines the relationship between a government and the public. It comprises a set of rules concerning the organisation and functioning of the state, the relationship between the different state powers and the relationship between those powers and the public. It includes constitutional law, administrative law, criminal law, social security law and international law, etc.

The public-private distinction influences many of the basic features of legal practice in civil law systems.

2.1.2. What is 'civil law'?

'Civil law' derives from 'jus civile', the civil law of the Roman Republic and the Roman Empire and today's system has as its bedrock the written law and legal institutions of Rome. Regions that use the civil law system today comprise most of Europe, Central and South America, parts of Asia and Africa and even some areas of the common law world (e.g. Louisiana and Quebec). It should be noted that there are other types of legal systems in addition to common and civil law systems, for example Islamic and Hindu law systems, etc.

The term 'civil law' is used at two levels to describe different legal principles:

(i) 'Civil law' as distinct from 'common law'; a legal system based on codified legislation as opposed to a system that places emphasis on legal 'precedent'.

   In the context of this memo, the term 'civil law' is used in this sense: the legal system found in most continental European countries, which have codified constitutions or statutes passed by the legislature as their primary source of law.

   In contrast to common law, precedents are not formally binding under civil law. However, they serve an important element of the interpretation of existing law and must be considered when applying the law. Even if precedents are not formally binding on later cases, decisions of the higher courts have great influence on the interpretation of the laws and lower courts generally apply such interpretation to their cases.

(ii) Within civil law jurisdictions, the term 'civil law' is used to distinguish between sets of regulations, e.g. 'civil law' being the law governing non-commercial matters as opposed to 'commercial law', or 'civil law' with respect to the relations between individuals (also called 'private' law), as opposed to 'public law' involving relations with public authorities.
2.2. Sources of Law

2.2.1. Case Law

Case law does not have such a prominent role in civil law systems as it does in common law systems. In civil law jurisdictions, case law is a secondary source of law and legislation is the primary source.

**(a) Historic background:** backlash against pre-revolution legal system. Examples of medieval justice given during presentation:

(ii) Mosquitoes on trial in Mayenne (France);

(iii) Pigs on trial in Kortrijk/Courtrai - 1562 (Belgium): Two pigs had broken out and had eaten a baby child of three months old. The pigs were owned by the father of the child. The two pigs were arrested, beheaded, and one of pigs’ heads was publicly displayed on a stake;

(iv) Witch on trial in Heestert - 1664 (Belgium): A 65 year old lady was condemned by a judge because she had allegedly made a pact with the devil 17 years earlier. The lady was sentenced to be burned alive and all her property was taken from her.

**(b) Overview**

Since judgments are not treated as being legally binding for later cases under the civil law system, civil law has no principles akin to the application of judicial precedent that arises under common law. In civil law systems, general principles are embodied in national codes and statutes; doctrine thereby provides guidance in interpretation, leaving judges with the task of applying the law (see: Montesquieu: judges as ‘la bouche de la loi’; the legislators’ mouth). Judges are not meant to create law, but should simply apply existing law as set out in the legislation. Although judgments are not binding precedents, they can be used as a source of authoritative guidance.

This said, lower courts will generally consider the rulings of the higher courts and especially the decisions of the Supreme Court since these courts consider cases on appeal and are likely to follow their own prior interpretation of the legislation. Moreover, civil law contains examples of ‘judge’s law’, where decisions with no clear basis in legislation have resulted from creative interpretation by the judges.

The style of civil law judgments is quite formalistic. The decisions are shorter than common law decisions, and are separated into two parts – the *motifs* (reasons) and the *dispositif* (order).

Contrary to the common law system, there is generally no place in civil law for ‘dissenting opinions’ by judges (exceptions exist e.g. in Spain). However, proposals have been made in Belgium to introduce this system of dissenting opinions for the decisions of the Supreme Court and the Council of State.

2.2.2. Legislation

**(a) History**

Codified law is not only found in post-French Revolution continental Europe. There are historic examples of the codification of laws throughout the world. For instance, in 1760 B.C. laws were codified under the kings of Babylon (roughly the current Iraq) and around 600 B.C. ancient China was governed under the Tang Code.

Civil law has been subject to many influences over the centuries including the following:
A cornerstone was the Corpus Juris Civilis of emperor Justinianus, which was later referred to by scholars in continental Europe and beyond as a source of inspiration. Other examples of early codes include the Salic Law of the Salian Franks.

With the arrival of the Renaissance, Roman law again began to play a strong role, and later, legal scholars known as the Pandectists revived Roman Law as set by Justinianus in the Corpus Iuris Civilis.

Following the ideas of the Enlightenment, the concept of codification was revived as a means to create certainty of law.

(b) Overview

'Legislation' comprises constitutional law, legislative deeds, administrative rulings, regulations and guidance documents.

Legislation is the main source of law in civil law countries and can cover any matter which the Parliament or Government considers to be appropriate and in need of regulation. Thus, legislative deeds can be enacted to regulate an area where no laws exist, to adjust existing laws to reflect a technical or social development, or to implement EC law.

The civil law system is well-known for its codifications. A Code is a set of legal rules which comprehensively deal with a core area of law. The difference between a regular act/law or statute and a code is that a code addresses a core area of law whilst an act or a statute targets a specific subject. Codes are therefore more comprehensive than acts/laws or statutes.

Administrative rulings and regulations have their basis in an act/law/statute and are issued by the Government in order to fine-tune acts/laws/statutes. They are used for many areas of law and in particular for matters that require detailed technical provisions, frequent alteration or regular updating. Administrative rulings allow the legislator a degree of discretion. The administrative ruling must be based on a legislative deed and must be consistent with its provisions.

In Germany, such administrative rulings are called 'Ordinances'. Whereas in France 'ordinances' are one type of administrative ruling, the others being decrees and ministerial orders. In Belgium there are also several types of administrative rulings, which, in hierarchical order, are: Royal Decrees and resolutions of the regional governments, Ministerial Decrees, provincial and municipal regulations (containing police regulations).

The legislative deed is a guidance document which is only binding for the administration (e.g. in Belgium: 'ministerial circulars').

(c) Key principles

As mentioned above, the main source of civil law is legislation. There is a rather strict hierarchy between the different types of legislative deeds. In Belgium, for example, judges must disregard decrees and ordinances of any administrative authorities if these do not comply with higher acts and rules of law.

Several civil law systems, (e.g. Germany, France, Belgium, etc.) have established Constitutional Courts which have as their principal task the job of verifying whether a legislative deed complies with the constitution. If not, such legislative deed can be annulled.

For the interpretation of law, several methods can be applied, e.g.:

Following the strict meaning of the words of the law (linguistic interpretation);

(i) Referring to the context of the rule;
Finding and referring to the purpose of the law (teleological interpretation), or the intention of the historic legislator; and

Interpretation in accordance with higher applicable laws, e.g. constitutional law or international law.

2.2.3. Equity - General principles of law

(a) Equity

The Law of Equity has no equivalent in civil law. Generally, courts in civil law systems are bound by the written law and must apply such law to render their judgments. However, the legislation does sometimes expressly refer to equity or good faith:

(i) In France and Belgium: good faith (équité article 1134 C.C.);

(ii) In Germany: references to equity (Sittenwidrigkeit (bonos mores), see Section 138 BGB), the standard of loyalty and good faith (Treu und Glauben, see Section 242 BGB).

Legislation also reflects the principles of the Law of Equity, e.g. to allow for sufficient actions and fair remedies.

Sometimes customary law is applied. This is a set of rules which become binding as a result of a group of people treating those rules as standard and thereby considering them to be law. This goes against the spirit of codification. However, customary laws can be codified and therefore become codes.

Customary law has some influence in business dealings (e.g. in Belgium, Germany). In Germany, reference is made to certain usages of customary law in the German Commercial Code (see Section 346 German Commercial Code – Handelsgesetzbuch, “HGB”). This allows flexibility and consideration of certain 'basic principles' of law.

Contrary to common law areas such as trusts, wills and probate are regulated through written laws.

Trust, wills, probates: Parallel with German system

The legal mechanism of a trust does exist under German law. It can be used for different legal constructions and in different areas of law. A basic form is the transfer of the legal title in property from the trustor to the trustee who is then obliged to deal with the property as the trustor instructs.

All trusts are based on a contractual relationship between the participants. The so called trusteeship agreement (Treuhandvertrag) can either be in written or oral form. The written form is only required if the particular legal transaction requires a written contract (e.g. if land is transferred).

The law of succession is part of German private law and is laid down in Sections 1922 et seq. BGB. Fundamental principles of the German law of succession are the right for private succession (Privaterbfolge), testamentary freedom (Testierfreiheit), succession by the next of kin (Familienerbfolge) and the principle of universal succession (Gesamtrechtsnachfolge).

By executing a will, an individual (the testator) can indicate what he wants to be done with his possessions after his death (see Section 1937 BGB). The pool of assets subject to the will is called the ‘Estate’ (see Section 1922 para 1 BGB). The valid execution of a will generally requires that the testator must possess testamentary capacity (Testierfähigkeit) at the time of the execution and that the formal requirements for the making of wills have been observed (see Sections 2229 et seq. BGB). In his will, the testator may also bestow a benefit upon a person without appointing the person as heir by making a testamentary bequest (Vermächtnis, see Section 1939 BGB) or appoint an executor to carry out the will upon death (Testamentsvollstrecker, see Section 2197 BGB).
For the most part, the testator has freedom to dispose of the estate and to appoint heirs (testamentary freedom, see above). However, the law protects the surviving spouse and close relative by granting them a mandatory share (Pflichtteil).

Where an individual dies without having made a will, the intestacy rules apply. These generally divide the deceased's estate among immediate blood relatives according to a system of classes (Erbfolge nach Ordnungen). Also in this case, the surviving spouse is automatically entitled to a share.

Regarding equitable Maxims:
German law provides for similar maxims which are either explicitly laid down in the respective statutes or are considered as an integral part of the written law. For example, the owner of an object could only claim the object if the defendant is not entitled to immediately reclaim the object (so called dolo agit plea); performance of a contractual duty can only be enforced if the claimant himself has rendered his performance (see with regard to reciprocal contracts Section 320 BGB).

(b) General principles of law

General principles of law are legal standards which are directly or indirectly derived by the judge from principles which form the basis of the entire legal order and which are for that reason regarded as fundamental. General principles of law are not written down in any text and are not issued by the government. General principles of law are mandatory and cannot be deviated from.

According to article 6 of the Belgian Judicial Code it is forbidden for judges to enunciate general principles in the cases which come before them. But article 5 of the same code stipulates that a judge may not refuse to exercise his powers. Therefore a judge is considered to act within the scope of his powers, when he derives main legal standards from constitutional or legal provisions or regulations.

For example:
(i) Right of defence;
(ii) The objectivity and impartiality of the judge;
(iii) Principle of proportionality.

The importance of general principles of law is that they allow judges to complete any incomplete, dark or silent acts. The recognition and application of general principles of law allows for more flexible application of the law which results in a better consistency between the different branches of law.

Legislation is more authoritative than general principles of law. However, legislation is still bound by the European General Principles of Law (see below).

2.2.4. Constitutional law

A constitution is a set of regulations for which the approval procedure is stricter than for common legislative deeds and for which a specific amendment procedure must be followed.

Typically, a constitution regulates fundamental rights, such as the right of privacy, and contains fundamental provisions on the organisation of the state. Constitutions are more authoritative than regular legislative deeds.

2.2.5. The role of academics

Academics are not an official source of law and the courts are not bound by them. Historically, the civil law codes have been greatly influenced by the work of academics and judges are guided by academics.
to form their definitive views on the law. Academic research plays an important role in the interpretation and development of civil law.

The function of doctrine is often to provide the courts and the practitioners with a guide to assist them to determine particular cases in the future.

Academic research and opinions are often considered within the law-making process (e.g. during hearings in the parliament or its committees) and many of the leading commentaries on German law are (co-)published by academic researchers and are used by courts if a legal question arises. Some judgments by the Federal Court of Justice or the Federal Constitutional Court (Bundesverfassungsgericht) even cite academic opinions and sometimes follow the opinion.

2.2.6. Relationship with European Law

(a) Legislation

The following European Union (EU) legislation is either directly applicable in Member States or must be implemented to the law of the Member State:

(i) Regulations.

(ii) Directives.

(iii) Decisions.

(b) Courts of the European Community:

(i) European Court of Justice.

(ii) Court of First Instance.

(c) Principles of European law:

The European Court of Justice (ECJ) has greatly influenced the development of EU law through the elaboration of unwritten general principles of law. The general principles derive from the fundamental values underlying the national legal systems. The jurisprudence of the Court, together with that of the courts of the member states, has established and defined a number of principles of EU law, which bind EU institutions and member states.

General principles of law are found in every legal system in Europe. The ECJ has amalgamated them into a legal order to supplement the written sources of law, the treaties, and to be used as an aid to interpretation. This is because the court cannot rule on all issues through applying laws and treaties from the past. Therefore, over the years the rules of Community Law were derived from general principles of law in addition to treaties and EC legislation. The ECJ will try to find a source for the general principles in EU laws, but may also rely on principles of law that are found in most member states, despite the fact that there might be a minority state that does not apply these principles.

- **Principle of conferred powers**: According to the principle of conferred powers, the EU only has those powers which are conferred on it by the member states. It has no inherent or residual powers. All powers which the member states enjoy by virtue of their sovereignty, and which they have not conferred on the EU, remain within the exclusive competence of the member states.

- **Principle of subsidiarity**: The principle of subsidiarity requires that powers be located and exercised at the level of the member states, except in areas falling within the exclusive competence of the EU, or where a clear common advantage can be discerned in acting at the level of the EU.

The principle of subsidiarity is defined in Article 5 of the EU Treaty establishing the European Community. It is intended to ensure that decisions are taken as closely as possible to the citizen
and that constant checks are made as to whether action at Community level is justified in the light of the possibilities available at national, regional or local level. Specifically, it is the principle whereby the EU does not take action (except in the areas which fall within its exclusive competence) unless it is more effective than action taken at national, regional or local level. It is closely bound up with the principles of proportionality and necessity, which require that any action by the EU should not go beyond what is necessary to achieve the objectives of the Treaty.

- **Principle of proportionality:** Like the principle of subsidiarity, the principle of proportionality regulates the exercise of powers by the EU, seeking to set specified boundaries for the action taken by its institutions. Under this rule, the institutions' involvement must be limited to what is necessary to achieve the objectives of the Treaties. In other words, the extent of the action must be in keeping with the aim pursued. This means that when various forms of intervention are available to the EU, it must, where the effect is the same, opt for the approach which leaves the greatest freedom to the member states and individuals.

  The principle of proportionality essentially comprises two tests: a test of suitability and a test of necessity. The first (suitability) refers to the relationship between the means and the ends: the means employed by the test must be suitable (or adequate or proportionate). The second test (necessity) is one of weighing competing interests: the court assesses the adverse consequences that the measure has on an interest worthy of legal protection and determines whether those consequences are justified in view of the importance of the objective pursued.

- **Institutional balance:** The principle of Community institutional balance implies that each institution has to act in accordance with the powers conferred on it by the Treaties, in accordance with the division of powers. The principle itself is not set out in the Treaties, but derives from a judgment by the Court of Justice of the European Communities (Meroni judgment of 1958). The principle of Community institutional balance thus prohibits any encroachment by one institution on the powers conferred on another. It is the Court's responsibility to ensure that this principle is respected.

  The relationship between the European Commission, the Council of the EU and the European Parliament is governed by the concept of the "institutional triangle". Their relationship and the powers conferred on them by the Treaties have changed radically over the years, particularly in the case of Parliament, whose influence has increased considerably. Despite the progress made through the Treaty on EU and the Treaty of Amsterdam, there is still an imbalance between the legislative powers of the Council and those of Parliament, since legislative power is only really shared by the two institutions in the areas covered by the co-decision procedure.

- **Sincere cooperation of Member States:** Member States have a duty to cooperate with the Community institutions. Accordingly, they are asked to support Community activities and not to hinder their proper functioning. This involves, for example:
  
  (i) punishing infringements of Community law as strictly as infringements of national law;

  (ii) cooperating with the Commission in procedures linked to the monitoring of compliance with Community law, e.g. by sending any documents required in accordance with applicable rules;

  (iii) making good any damage caused by infringements of Community law;

  (iv) not unnecessarily hindering the internal operation of the Community institutions (for example, by taxing reimbursements of the transport costs of MEPs travelling to Brussels and Strasbourg); and

  (v) cooperating with the Commission in the event of inaction on the part of the Council, so as to enable the Community to fulfill its responsibilities (for example, to fulfill urgent needs concerning the conservation of certain fish stocks).

- Equivalent and non-discriminating application of EC law in the Member States.
Equality: The general principle of equal opportunities contains two key elements: one is the ban on discrimination on grounds of nationality, and the other is equality for men and women. This is intended to apply to all types of discrimination, particularly relating to economic, social, cultural and family-life status.

The Treaty of Amsterdam introduced another discrimination provision which reinforces the principle of non-discrimination and is closely linked to equal opportunities. Under this new provision, the Council has the power to take appropriate action to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation. Moreover, through its programme to combat discrimination (2001-2006), the EU has been encouraging and complementing the activities of the member states to combat all forms of discrimination.

Adopted in December 2000, the Charter of Fundamental Rights of the EU includes a chapter entitled "Equality" which sets out the principles of non-discrimination, equality between men and women, and cultural, religious and linguistic diversity. It also covers the rights of the child, the elderly and persons with disabilities.

Legitimate expectation: This principle requires that executive bodies fulfill legitimate expectations wherever possible. This principle is of particular relevance to the expectations created by promises and policy rules. The concept requires the encouragement of reasonable expectations, a reliance on that expectation and a loss resulting from the breach of that expectation. Nevertheless, the expectation must be legitimate.

2.3. Legal Procedure

2.3.1. Causes of Action

(a) In most civil law countries (e.g. France, Italy, etc.) no specific causes of action are required to start civil proceedings. Civil proceedings are commenced by explaining the facts of the case and by stating which articles of law (or general principles of law) have been breached. There is no need to state a specific cause of action. Moreover, it is possible to change the initial 'cause of action' in the course of the procedure. It is even possible to rely on several 'causes of action' at the same time.

(b) Causes of action are, however, relevant in Germany. Under German civil procedure law (laid down in the Code of Civil Procedure – Zivilprozessordnung), there are three classes of actions:

(i) If the plaintiff seeks an order for performance or injunction, he will file a so called 'action for performance' (Leistungsklage). This action is available, for example, if the plaintiff asks for performance of a contractual obligation (e.g., payment of money, delivery of personal or real property), claims damages, or demands that the defendant refrains from committing a wrongful act. If the plaintiff is successful the judgment may be enforced against the defendant.

(ii) An action for a declaratory judgment (Feststellungsklage), seeks to obtain a judicial declaration that an alleged legal relationship between a plaintiff and a defendant or an alleged right of one of the parties with regard to personal or real property does not exist. Since a declaratory judgment cannot be enforced, actions for such judgments are only subsidiary. Thus, in order to file a Feststellungsklage the plaintiff must proof the existence of a so called special 'legitimate interest' (Rechtsschutzinteresse).

(iii) The third class of action is a petition for a judicial modification of rights or legal relationships (Gestaltungsklagen). This form of action is only available if statutory provisions require a court order to terminate, resolve or modify a legal relationship. Important examples are the expulsion of a partner from a general partnership or the petition for divorce.
The German Code for Administrative Procedure (Verwaltungsgerichtsordnung) provides for the same actions with regard to administrative matters. Depending on the plaintiff's aim, he either must file an action for performance (Leistungsklage), an action for a declaratory judgment (Feststellungsklage) or an action for judicial modification of rights or legal relationships (Gestaltungsklage).

(c) The law of torts is laid down in Sections 823 et seq. BGB. In addition, some statutes such as the Road Traffic Act (Straßenverkehrsgesetz – “StVG”) contain claims for specific areas of life.

German tort law can be divided into three types of torts:

(i) The basic principle and most common category is traditional fault liability, i.e. intention or negligence is required. This category includes the fundamental provision of Section 823 BGB.

(ii) The second category of tort liability is based on the rebuttable presumption of fault by the wrongdoer. Sections 831, 832, 833 para 2, 834, 836 - 838 BGB are part of that category.

(iii) The final category is strict liability, i.e. liability without fault. An example for this category is Section 7 StVG which imposes the liability for damages caused during the operation of an automobile on the registered keeper regardless of his fault.

Claims based on tort can either lead to the repair of the damage in kind (Section 249 BGB) or to compensatory damages in monetary form (see Section 251 BGB). With regard to procedure, the law of torts does not require a single category of action but a tort can be claimed with one of the above-mentioned classes of actions. Generally, a claim based on tort is often filed under the action for performance (Leistungsklage).

(d) It is not clear if other civil law countries will evolve to the German system. However, the recent reform of the Belgian Procedural Code, which introduced the need to specify the cause(s) of action, certainly illustrates a move in that direction.

For administrative procedures, it is clear that the cause(s) of action must be specified.

2.3.2. The Court System

Many civil law judicial systems can be considered to be a set of two or more distinct structures with no bridge between those structures. 'Ordinary' courts adjudicate the vast majority of civil and criminal cases. The ordinary courts apply the law found in the civil, commercial and penal codes and in legislation supplementing those codes.

The first level of ordinary courts consists of general civil and criminal trial courts and several specialized courts. Cases arising under the commercial code are, for example, first heard in commercial courts. Similarly, employment disputes are heard by a labour court. Appeals from the trial level courts proceed to a court of appeal within the territorial jurisdiction of the lower court.

Administrative matters are dealt with by separate administrative courts (sometimes not totally independent of the executive power in first instance).

2.3.3. The Adversarial Approach

Judicial proceedings are, in principle, public and are controlled by the parties: judges must decide within the limits of the case as set by the parties and they generally have a rather passive role.

However, party control is somewhat tempered by the extensive power that the civil law judge has to supervise and shape the fact-finding process and also by the role of the public prosecutor.
In general, the German procedural law also provides for an adversarial approach. However, in recent years German judges are more and more likely to mediate towards a consensual outcome (see exemplary Section 278 para 1 ZPO).

(a) Civil procedure

Civil trials involve a plaintiff and a defendant. The burden of proof lies on the party who claims a fact to be true. Generally, the plaintiff must prove all controversial facts that are pre-conditions to his claim. The defendant must prove facts which constitute a plea against the claim. The civil process is often largely conducted in writing through the exchange ofbriefs and petitions between parties.

(b) Criminal procedure

Criminal proceedings in a civil law court are typically divided into two phases, namely the investigative phase and the examining phase.

(i) During the investigative phase, a government official (public prosecutor) collects evidence and decides whether the evidence is sufficient to warrant formal charges. This stage is primarily conducted in writing and an examining judge completes and reviews the written record and decides whether the case should proceed to trial.

(ii) A record of the case is made in advance and is available to the defence and the prosecution well in advance of trial. The main function of a criminal trial is to present the case to the trial judge and, in certain cases, the jury, and to allow the lawyers to present oral arguments in public.

A trial by jury is exceptional even in criminal matters, though for the most serious offences (e.g. murder), a jury sometimes decides.

2.3.4. Legal Practitioners

(a) Lawyers

In order to become a lawyer, an individual must follow several steps. They must first obtain a law degree, followed by an apprenticeship (generally three years). During this apprenticeship the lawyer-trainee, must complete courses, take exams, fulfil pro deo duties, etc. Exceptionally, in Spain, students can start working as a lawyer after completing their law studies without any apprenticeship. This position will soon change after the entry into force of the Bologna plan.

Lawyers must be a member of the bar association. This is a professional organisation of lawyers. The association imposes and enforces the rules of the profession on its members.

Lawyers also enjoy a monopoly to plead before the courts: a person can only be represented by a lawyer. There are, however, some exceptions to this rule.

In general, there is no distinction between barristers and solicitors in civil law systems. In the Netherlands it is still required to have the co-operation of a lawyer of the local bar, called “procureur”.

In-house lawyers work for a single company and provide advice on legal matters related to its business activities. There is some protection for in-house lawyers, for example the client-attorney privilege, but this position varies from country to country. In some jurisdictions it is not possible for a company to retain a lawyer as an employee.

(b) Judiciary

(i) Required qualification for a judge
Several Civil Law countries require judges to pass qualifying examinations. In France there is a special school which trains judges. In Germany, however, no training is required over and above the legal traineeship which every legal practitioner must pass. A judge need not have practiced as a lawyer.

In Belgium and France, there are also lay judges for commercial and labour cases. A lay judge is a non-professional judge who assists the professional judge in assessing the legal case.

The career of a judge starts at a low level and they are promoted on the basis of seniority and merit.

(ii) Appointment procedures for judges

Judges’ appointment procedures vary from country to country.

In Germany, as a rule, each decision on the initial employment, lifetime tenure or promotion of a judge is taken by the department of justice. Yet in some Federal States a parliamentary body must first be heard or at least help to decide on the careers of individual judges (Richterwahlaußschuss). Federal judges are picked through an ‘in-camera-procedure’ by a body composed of the competent Ministers of the Federal States and members elected by the German Parliament (Bundestag).

3. The Common Law System (speakers: Richard Weatherhogg and Richard Allen)

3.1. Overview

3.1.1. Preliminary remark

The following is intended to provide a very brief overview of some key principles of the common law system, with particular focus on the law in England and Wales. This is not a commentary on all aspects of common law systems, but rather a short summary for comparison with the other memo on civil law systems.

3.1.2. What is 'common law'?

The common law system originated in the mediaeval kingdom of England and developed into a comprehensive legal framework that was exported throughout the British Empire. Countries that use the system today therefore largely comprise English speaking former colonies, including Canada, Australia, New Zealand and much of the United States.

The term 'common law' is used at different levels to describe several legal principles:

(i) In general, the term is used to refer to the legal system that places emphasis on legal 'precedent' rather than the codification of law that is favoured in 'civil law' jurisdictions.

(ii) Within common law jurisdictions, the term is used to describe case law and precedents in contrast to the laws contained in statutes and subordinate legislation.

(iii) Historically, the term has also been used to describe the branch of the courts that was traditionally only able to offer financial compensation ("damages"), in contrast to the courts of equity that were able to offer equitable remedies (such as injunctive relief) and recognise 'trusts' of property.
3.2. Sources of Law

3.2.1. Case Law

(a) History

The common law system evolved from a desire to create a ‘common’ law across all of England to replace a diverse range of local customs. Historically, there was no central legislative assembly that created laws and so the laws that did exist were either customary, canonical or royal edicts. King Henry II (1154-89) sought to consolidate these laws and create a uniform system of justice across his kingdom. In order to do this, he sent royal judges around the country to hear legal cases and pronounce judgments based on their interpretation of the law as it existed. These decisions were then recorded centrally so that judges could refer to them in the future when considering new cases.

Parliament was later established as the sovereign legislative assembly. Whilst statutes laid before Parliament are largely intended to enhance rather than replace the existing body of case law, it is important to note that such statutes and subordinate legislation take priority over common law principles in circumstances where they conflict.

(b) Overview

Most legal principles under a common law system arise from the cases that courts previously decided. Historically, the first such cases were based on customary law and these formulated legal reasoning which led to judgments. These judgments were recorded and reported centrally and if a similar set of facts re-occurred, a judge could refer to the previous judgment when making his later decision. The process of creating legal ‘precedents’ has refined over the centuries and certain key elements can be identified:

‘Ratio Decidendi’ - This is the name for the legal rationale applied by a judge to reach a decision. It describes the way existing law is applied to the important facts of the case. Any future court considers this when deciding if it should follow an earlier precedent. When a case is recorded in one of the official Law Reports, this rationale is reported alongside any dissenting opinions from other judges in the case. Such dissenting opinions do not form part of the precedent.

(i) ‘Stare Decisis’ - This means ‘Let the decision stand’. The phrase describes how judges should treat precedents, unless they can distinguish between the facts of the current case and those of the precedent. Generally, courts of the same and lower hierarchical level must follow judgments, provided the judgment is relevant to the case being heard.

(ii) Persuasive judgments - Some judgments are merely persuasive upon subsequent cases and do not have the status of precedent, such as cases from foreign common law jurisdictions. These judgments are not binding on the presiding court but may be of interest. For example, a judge may adopt a decision or legal rationale from other common law jurisdictions, although there is no obligation to do so.

(iii) While judicial precedent is a fundamental aspect of the common law system, judges have the power to overrule precedents from the lower courts and also to distinguish the facts of their case from those of past judgments, in which case there will be no requirement to follow a particular earlier decision.
3.2.2. Legislation

(a) Overview

In common law systems, legislation forms a complementary but very different type of law to case law that arises through the courts. There are many different reasons for introducing legislation on a particular matter. Sometimes the government introduces legislation to overturn existing case law since, for example, it may deem this to be in the interests of public policy. This was the case in its creation of the offence of corporate manslaughter through the Corporate Manslaughter and Corporate Homicide Act 2007. Alternatively, the government may wish to introduce legislation to clarify and consolidate different areas of law or to create new law in an area where little or none exists, in response to technological advances for example. This was the case for the Human Fertilisation and Embryology Act 1990 and the subsequent amendments to that Act passed in 2008.

The term 'legislation' is used to describe a number of sources of law, with the common theme that all are fully codified.

‘Statutes’, which are also called Acts of Parliament in the UK, can be drafted by the government or on occasion, specific interested parties. They are enacted into law by the Queen after having gone through a rigorous process of debate, amendment and voting procedures in the two houses of parliament (the Commons and Lords). In the US, Acts are passed by the two houses of Congress and enacted into law by the President.

'Subordinate legislation' is produced by governmental departments and agencies and takes the form of regulations. In the UK, these are contained in documents called Statutory Instruments (“SI's”). Statutory Instruments are usually produced pursuant to particular powers granted by Statute. Statutory Instruments are used for many areas of law and in particular for matters that require detailed technical provisions, frequent alteration or which must allow the legislator a degree of discretion, depending on the circumstances. Examples of SIs include the Contaminated Land (England) Regulations 2006, issued pursuant to the Environmental Protection Act 1990 and the new Environmental Damage (Prevention and Remediation) Regulations 2009, which implement Directive 2004/35/EC on environmental liability (the "ELD").

Guidance documents are produced by governmental departments to provide guidance on how to comply with legislation. In the UK, guidance documents can have a particular legal status depending on the powers pursuant to which they were produced and the exact nature of the document. Some guidance documents simply explain the purpose of legislation, while others set out what steps could be taken to comply with the law and adherence to these requirements can provide evidence that sufficient action was taken to comply with the legislation. However, in almost all cases, guidance documents do not stipulate exactly what must be done to comply; it is usually open to the parties to choose alternative methods to ensure compliance.

(b) Key principles

It is important to note that legislation always takes priority over case law, such that the courts must apply legislative requirements over any relevant precedent. Judges must interpret statutes in line with several well established principles:

(i) The 'Golden Rule' is that the wording of legislation should be given its natural meaning, unless there is doubt, in which case the judge should look to the context of the statute as a whole.

(ii) Where there is ambiguity as to the meaning of the text, the judge may look to the intentions of the draftsmen at the time they were creating the statute. This is known as the 'Purposive Approach'.
Finally, judges are becoming more willing to consider overriding legal principles such as the general principles of European Law and the European Convention on Human Rights when interpreting existing statutes. These are discussed in more detail below.

While the term 'rule' is used to describe some of the above principles, they are in practice general concepts that judges rely upon when necessary.

3.2.3. The Law of Equity

(a) History

Historically, 'Equity' formed an alternative legal system that existed in parallel with the common law courts. One of the main differences between the two parallel systems was that the common law courts were able to require financial compensation in the form of damages, while the courts of equity were able to provide more equitable (or fair) outcomes, such as injunctions.

This divided system inevitably gave rise to certain conflicts. The source of these conflicts was addressed in the 1870s, when the Judicature Acts merged the two branches together to form a single, united legal system. Today, where a conflict exists between the two sources of law, there is a well-established principle that 'Equity Prevails'.

Note, however, that this merger between the two systems has not occurred across all common law jurisdictions. For instance, the state of Delaware in the USA still has separate courts of common law and equity.

(b) Overview

The law of equity is unique in many ways, but as mentioned before, one of the main differences is the type of remedies that are available. In general, judges only resort to the law of equity when they feel that common law principles will cause an injustice, or that financial compensation would not be an appropriate remedy.

Unlike the award of damages, there is no automatic right to an equitable remedy just because fault has been established. Such remedies lie purely at the discretion of the court. Some examples of the remedies available include:

(i) Injunctions - The prohibition of an action or requirement to carry out an act. It is used in many different contexts, for example, where an individual opposes the publication of information in the press.

(ii) Specific Performance - The enforcement of a promise. This is used where damages would not be sufficient to compensate for a failure to perform contractual obligations.

(iii) Rectification - The correction of an agreement or contract, where both parties acknowledge that their intentions are not properly reflected in the current agreement.

(iv) Subrogation - The assignment of rights, whereby a third party steps into the shoes of an existing party to an agreement. This is used, for example, in connection with insurance contracts.

(c) Key Principles

The law of equity relies on several key principles or 'equitable maxims' to ensure that a fair ('equitable') outcome is achieved. Some important maxims include:
(i) ‘Equity regards as done what ought to be done’ – This is the overriding principle of fairness.

(ii) ‘One who seeks equity must come with clean hands’ – This prevents individuals from seeking equitable remedies when they are in breach themselves.

(iii) ‘One who seeks equity must do equity’ – This prevents individuals from seeking equitable remedies, but acting inequitably themselves, for instance by committing fraud.

(iv) ‘Delay defeats equity’ – Which means that unnecessary delay will lessen the chances of obtaining an equitable remedy.

The following two sections consider two very widely used legal instruments that have their origins in the law of equity.

(d) The Trust

The 'trust' is a legal mechanism which originated in the law of equity. It can be used in a number of ways, in particular to achieve the separation of the legal and beneficial ownership of property. For instance, the trust mechanism can allow land to be owned by one individual but for the benefit of someone else and in certain circumstances the trust deed will place an obligation on the legal owner to deal with the land in a specific manner that is to benefit of the beneficiary. There are several key elements to any trust:

(i) The 'trust property' could be real estate, money, antiques or almost anything, provided that it is identifiable. The trust mechanism separates the legal and beneficial ownership of this property so that it may be legally owned by one person, but held for the benefit of another.

(ii) The 'settlor' is the original owner of the trust property. They pass on legal title of the property to the 'trustee'.

(iii) The 'trustee' is the legal owner of the trust property, who holds it for the benefit of the 'beneficiary'.

(iv) The 'beneficiary' is the individual who receives some benefit from the trust property, such as income earned from it.

(v) A ‘deed of trust’ may be entered into between the settlor and trustee which places obligations on the trustee to deal with the property in a certain manner. For example, the trustee must pass on all income from a piece of real estate to the beneficiary.

An individual may fulfil more than one of these roles and there may be more than one individual fulfilling each. The law of equity will recognise expressly created trusts and can infer that a trust exists in some circumstances where no express deed has been created. Further, the courts may create trusts where such a mechanism is considered to provide an appropriate legal remedy, for instance where property has been obtained dishonestly (i.e. the owner that gained the property through deception is construed to hold it on trust for the rightful owner). This is known as a 'constructive trust'. Trusts have become more sophisticated over time and are now widespread, with applications in the fields of pension funds, charities and in corporate law, among others.

(e) The Will

The 'will' is another mechanism that is largely unique to common law systems and has its roots in the law of equity.

A will is a document in which an individual (the 'testator') indicates what they would like to be done with their possessions after their death. For the most part, they have the freedom to dispose of their assets
as they see fit, including setting up trusts if they choose. The pool of assets subject to the will is called
the ‘estate’. If the will appoints an individual to implement its requirements upon death, that person is
called the 'executor'. If no executor is expressly appointed, an individual will often be appointed by the
courts and this person is known as the 'administrator'.

In order for a will to be enforceable, the author must be of sound mind and the document must be
witnessed by two people who are not beneficiaries under the will.

In England and Wales, the estate must be used to pay outstanding debts before any remaining assets
can be divided amongst the beneficiaries. The executors will often use their discretion to choose which
assets are used to pay these debts and which are to be retained.

One of the only restrictions placed on a testator to deal with their assets in a will is contained in the
Inheritance (Provision for Family and Dependents) Act 1975. This allows the individual’s spouse,
cohabitee, child or dependent to apply to the court for an allowance from the estate where the testator
has not made reasonable provision for them. This is an example of a situation where the government
has sought to pass legislation in the interests of public policy.

Where an individual dies without having made a will, intestacy rules apply. These generally divide the
deceased’s estate among immediate blood relatives according to specific principles.

3.2.4. Constitutional law

Another source of law in common law jurisdictions is constitutional law. This generally deals with the
relationship between the State and its citizens and is therefore of fundamental importance to the
operation of the legal system. While most countries have now adopted a consolidated written
constitution, this has not happened in a few countries such as the UK and New Zealand.

This means that in England and Wales, the relationship between the State and its citizens is regulated
through a variety of means. Many are written, such as the Magna Carta (1215), which was one of the
first documents to limit the powers of the monarch, or the English Bill of Rights 1689, which was a
result of a largely bloodless rebellion, known as the ‘Glorious Revolution’, and which established several
fundamental freedoms for individuals.

The rest of the constitution is contained in ‘conventions’. These are traditions that have been followed,
often for centuries. An important example is the convention that the monarch will always give ‘Royal
Assent’ to legislation passed by Parliament. Without this convention, the monarch could technically
reject any laws with which they did not agree.

Two important aspects of the British constitution are:

(i) The Rule of Law, a convention whereby everyone must be treated equally before the law and
no laws should be passed that are draconian in nature.

(ii) Parliamentary Sovereignty, a convention whereby parliament is the supreme law-making
body and can overrule any laws previously passed or created.

The principle of the separation of powers advocates a separation between the legislative, judiciary and
executive branches of government. Whilst this principle is observed in the UK, currently the House of
Lords provides both judiciary and legislative functions. With the creation of a Supreme Court to replace
the judiciary function of the House of Lords, the separation between the legislature and judiciary will be
made more distinct. Similarly, the increasing use of independent commissions has lessened the scope
for executive interference in the judiciary.

Note that in the USA, a common law jurisdiction, the constitution is fully codified within the US
Constitution of 1787 and the US Bill of Rights of 1791.
3.2.5. The role of academics

Under the common law system, academics only have a very limited role in the interpretation and formation of law. While some litigators may refer to academic sources in the legal arguments that they make at trial, the importance of these resources are limited in the eyes of the judiciary. In England and Wales there are some exceptions to this generalisation.

‘Halsbury’s Laws’, which has been in publication for over 100 years, is treated as an authoritative source of commentary on the law and is sometimes considered by judges during their cases. Each chapter is written by experts in their particular field of law, including practicing lawyers, judges and academics. The publication is currently edited by a former head of the judiciary, Lord Mackay of Clashfern and published by LexisNexis Butterworths.

The lack of a codified constitution in the UK has also meant that academic interpretation of constitutional law is sometimes given a higher regard by the courts. Authors such as Albert Venn Dicey and Walter Bagehot have particular authority.

Further, academics can be instrumental in assisting the government to formulate policy and advise how best to translate such policy into legislation in a wide range of policy areas.

3.2.6. Relationship with European Law

(a) Overview

European law permeates through to the domestic legal framework in England and Wales in a variety of ways. The various types of European law are defined in Article 288 of the consolidated Treaty on the European Union (note that this was formerly Article 249):

(i) Regulations have general application. They are binding in their entirety and are directly applicable in all Member States.

(ii) Directives are binding as to the result to be achieved upon each Member State to which they are addressed, but implementation is left to the national authorities.

(iii) Decisions are binding in their entirety. A decision that specifies the person to whom it is addressed is only binding on that person.

English courts may refer points that relate to European law to the European Court of Justice for interpretation or clarification. This may occur when, for example, an English court must give regard to a European Directive when deciding how to interpret domestic legislation. The ECJ would usually pass judgement on the point referred to it and the domestic court should then consider the ECJ decision when it resumes its hearing.

(b) Key principles

As mentioned above, judges in England and Wales increasingly refer to general principles of European law when hearing cases. These principles include:

(i) Conferring powers - The EU will only act where it has been given the power to do so.

(ii) Subsidiarity - The EU will only act to create laws where the actions of individual countries would be insufficient to achieve the purpose.

(iii) Proportionality - The punishment or remedy must fit the wrong committed.

(iv) Institutional balance - Related to the concept of separation of powers, mentioned above.
(v) Sincere cooperation of Member States - Member states will cooperate with each other and will not hinder the efficient functioning of the EU.

(vi) Equivalent and non-discriminating application - The law should be applied uniformly, without discrimination.

(vii) Equality - There should be no discrimination in the content of the law on grounds of nationality, sex, race or any other factor.

(viii) Legitimate expectation - There must be certainty and uniformity in the application of the law.

3.3. Legal Procedure

3.3.1. Causes of Action

Historically, the appropriate court procedure depended on the category of claim or 'form of action'. When the court system was streamlined in the nineteenth century, these categories became less rigid, but they must still be satisfied if they are to form the basis for a successful legal claim. The 'causes of action', as they are now called, can be categorised into four distinct types, although it is possible to commence a single claim alleging several different causes of action:

(i) Contractual claims rely on the claimant proving that a contract existed and identifying the relevant contractual terms. The claimant must show that a breach of those terms has occurred and that he has suffered loss as a result of the breach (in England and Wales, this can also include indirect or ‘consequential’ loss to a certain extent).

(ii) Actions in statute rely on the provisions of the specific legislation and the criteria set out within that legislation.

(iii) Claims in equity include a number of residual causes of action that have their roots in the old courts of equity. Again, the cause of action depends on the specific claim and is focussed on the equitable remedy sought. An example is ‘Quantum Meruit’, where work was done or a service provided that deserved some payment, but no valid contract exists to enforce compensation. Equity seeks to correct this ‘unjust enrichment’ of the person who benefited from the work.

(iv) Claims in tort cover civil wrongs arising from non-contractual obligations. They often involve instances where a duty of care is owed in some form to another person. Examples of tortious claims include negligence, defamation and nuisance.

As an example, a claim for public nuisance requires an act or omission on the part of the defendant that causes injury or inconvenience to the public at large. The claimant must then show that he has suffered some special damage above and beyond the rest of the population that entitles him to claim. Also, in contrast to a claim in private nuisance, public nuisance does not require the claimant to own an interest in land affected by the alleged act or omission.

Note that there is also a criminal offence of statutory nuisance set out in the Environmental Protection Act 1990 and this is an example of the codification of case law into legislation.

3.3.2. The Court System

The structure of the court system varies between common law jurisdictions. In England and Wales, there are three main tiers of courts:
Administrative tribunals - These are specialist bodies that deal with specific types of claims, such as employment, immigration and pension issues. They are usually set up because the claims involve unique and complex areas of law.

Trial courts - These are courts of first instance. There are separate courts for criminal cases ("Magistrates and Crown Courts"), simple civil cases ("County Courts") and complex civil cases (the "High Court"). The High Court is further sub-divided into four specialist courts:

- Family Division - This deals with matrimonial cases and child custody.
- Chancery Division - This deals with property, corporate and tax matters and includes a special Companies Court and Patents Court.
- Queen's Bench Division - This deals with contractual and tortious claims and includes a special Admiralty Court and Commercial Court.
- Technology and Construction Court - This deals with information technology, building and engineering disputes.

Appellate courts - These courts receive appeals from the lower courts:

- Crown Court - The first point of appeal for criminal cases.
- County Court - Also serves an appellate function for cases heard at first instance in the County Court, but with more senior judges presiding.
- High Court - Also serves an appellate function for cases heard at first instance in the High Court, but with two or three judges presiding.
- Court of Appeal - Has both a civil and criminal division and receives further appeals from the Crown, County and High Courts.
- House of Lords - Hears appeals from the Court of Appeal or exceptionally, directly from the High Court. It is the final court of appeal within England and Wales. The House of Lords currently serves the dual function of the upper legislative assembly and the highest court of appeal but this is due to be reconstituted as the 'Supreme Court' in October 2009.

In the USA, a similar structure exists with District Courts (trial courts), Appellate Courts and the Supreme Court as the highest court of appeal.

Within this framework, in appeal proceedings (so not at first instance) there is also the possibility that the judge may make a reference to the ECJ on a point of European Law and suspend proceedings until a decision has been passed down. Since the ECJ acts as the highest authority on all matters of European law, the national court will follow the guidance passed down when reaching its own decision.

Finally, where the case involves Human Rights issues, an additional and final appeal may go to the European Court of Human Rights, but only if it is deemed that adequate remedies in the domestic courts have been exhausted.

3.3.3. The Adversarial Approach

Common law court cases follow a procedure that is heavily based on the presumption that judges are merely overseeing the legal process, rather than taking an active part in the case. This means that the lawyers for each party are the main participants in the case and will call witnesses, submit evidence and largely structure their argument as they believe best suits their client. The lawyers are also under an obligation to bring any relevant legal precedents and statutes to the attention of the judge.
The judge's role is to hear the evidence, adduce the law from the submissions given and apply the law to the facts to reach a decision. This means that many court cases are analogous to a battle between the parties to persuade the judge, rather than a meeting of minds.

The court system in the UK is divided into criminal and civil branches. The use of the term 'civil' here simply means non-criminal and is entirely different from the civil law system as being a distinct system from the common law system.

(a) Civil procedure

Civil trials involve a claimant and a defendant, with the burden of proof lying on the claimant. The standard of proof is on the balance of probabilities. This means that the claimant must prove that it is more likely than not that the defendant is in the wrong.

(b) Criminal procedure

In criminal cases, rather than having a claimant and defendant, there is a prosecutor and defendant. The prosecution is generally carried out in the name of the Crown on behalf of the public and so the term ‘Regina’ or ‘R’ is used. The actual prosecutor may either be the Crown Prosecution Service for cases referred by the police, or one of several other government bodies, such as the Serious Fraud Office or the Environment Agency. Here, the burden of proof lies on the prosecution, but they must prove beyond a reasonable doubt that the defendant is guilty of an offence.

Within the criminal law, there is also a distinction between different types of crime. Some, such as minor driving offences, are ‘summary only’ offences. This means that they are subject to trial by a Magistrate in the Magistrate’s Court. Others, such as murder, are ‘indictable only’ offences and must be tried in the Crown Court by judge and jury. Finally, some offences, such as theft, are called ‘either way’ because the defendant has the right to request the court in which the case will be heard.

3.3.4. Legal Practitioners

(a) Lawyers

In many common law systems (although notably not in the USA) the legal profession is divided into two distinct roles:

(i) 'Barristers' primarily perform an advocacy role in the courts. This means that they stand before the judge or magistrate and submit their client’s case. In England and Wales, they are regulated by the Bar Standards Board. Having obtained a qualifying law degree, they must pass the Bar Vocational Course and are then 'called to the bar' to become barristers. Before practising independently, they must also undertake a 'pupillage', where they shadow existing barristers for one year.

A select few senior barristers are appointed to the position of 'Queen’s Counsel'. The appointment is made by the Lord Chancellor acting in his capacity as head of the judiciary and following recommendations made by an independent selection panel. The selection not only represents seniority but should also reflect integrity and ability.

(ii) 'Solicitors' act as attorneys. This means that they carry out the more bureaucratic side of the law, by drafting agreements, advising on matters of law and where necessary, conducting litigation by making applications to the court and corresponding with their client’s opponent. Solicitors are directly instructed by members of the public, whereas barristers are normally instructed by solicitors on behalf of their client when a trial is contemplated or when an opinion is required from a barrister on a particular point. In England and Wales, they are regulated by the Solicitors Regulation Authority and must
obtain a qualifying law degree, followed by the Legal Practice Course and a two-year 'training contract' at a firm of solicitors in order to qualify. They are also required to hold a practising certificate that must be renewed each year.

The distinction between these two roles has started to fade in England and Wales, with the opportunity for solicitors to undertake additional training and obtain permission to practice as advocates on behalf of their clients in the higher courts. These professionals are known as 'solicitor advocates'.

(b) Judiciary

There is no standard procedure for training judges that is the same across the common law system. In England and Wales, magistrates do not need to be legal practitioners, but undergo a programme of training to become judges. All other judges must come from the legal profession, but do not require further formal training.

As regards the appointment of judges, the procedure also varies across common law jurisdictions. In places such as the USA, many non-federal judges are elected by the public. Others may be nominated by politicians, as is the case with federal judges in the USA, who are nominated by the President and approved by Congress. Finally, the most common appointment procedure is through independent appointment panels. In England and Wales, the Judicial Appointments Commission makes recommendations and the Lord Chancellor approves the appointments.

4. Analysis of Environmental Liability and Environmental Crime Directives (speaker: Mario Deketelaere)

The European Environmental Liability Directive and the Environmental Crime Directive are good examples of how the European legislator continues to respect the civil / common law distinction and subsidiarity on behalf of the Member States.

4.1. Environmental Liability Directive

In the beginning, it was expected that the European Environmental Liability Directive (ELD) would provide for a means of direct action from citizens against the polluters, following a European tort system. The fundamental differences between the civil and common law system, made this impossible. Hence the Directive provides a different type of remedy. A citizen can start a procedure against the competent authority of the Member State, if the citizen believes that the environmental liability issue is not taken seriously enough by the competent authority.

On the other hand, the Directive requires that prevention and action measures are provided for Member States to prevent or remediate environmental damage in the soil, air and biodiversity. If the competent authority has to intervene ex officio, the Directive stipulates how damages can be recuperated from the polluter. Causality between damage and action / omission of the polluter is always required.

This was an elegant way to avoid the European legislator having to find an new European tort system, divided between civil law and common law system.

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Directive 2004/35/EC of the European Parliament and of the Council of 21 April 2004 on environmental liability with regard to the prevention and remedying of environmental damage (ELD) establishes a framework based on the "polluter pays" principle, according to which the polluter pays when environmental damage occurs. This principle also set out in the Treaty establishing the European Community (Article 174(2) TEC). The ELD deals with the "pure ecological damage", and is based on the powers and duties of public authorities ("administrative approach"), clearly distinct from a civil liability
system which is more appropriate for "traditional damage" (damage to property, economic loss, personal injury).

The pre-history of the ELD started some thirty years ago in the field of civil liability for dangerous waste, but preparatory work in the 90’s considered for the first time a general environmental liability instrument. This included the Green book on remediating environmental damage of 1993, which was followed by the White Paper on Environmental Liability (published in February 2000) The purpose was to examine how the polluter pays principle could be applied with a view to implementing Community environment policy. The conclusion was that a Directive would be the best way to establish a Community environmental liability scheme. The ELD is the result of discussions held after publication of the White Paper, when a public consultation was carried out.

The ELD’s main objective is to prevent and remedy "environmental damage". Environmental damage is defined as damage to protected species and habitats (nature), damage to water and damage to soil. The liable party is in principle the "operator", i.e. the one (natural or legal person) who carries out an occupational activity. The operator, who carries out certain dangerous activities as listed in the Directive, is strictly liable (i.e. without fault) for the environmental damage he caused. S/he might though benefit from certain exceptions and defences allowed by the ELD (for example force majeure, armed conflict, third party intervention) or by the Member States in their transposing legislation (for example regulatory compliance defence, state of the art defence). All operators carrying out occupational activities are liable for fault-based damage they cause to nature as defined by the ELD.

Operators have to take the necessary preventive action in case of immediate threat of environmental damage. They are equally under the obligation to remedy the environmental damage once it has occurred ("polluter pays"). In specific cases where the operators fail to do so or are not identifiable, the competent authority may step in and carry out the necessary preventive or remedial measures. Remediation has to consist basically in the restoration of the damaged natural resources (nature, water, soil) either in kind or by recreation of similar resources.

The ELD leaves significant discretion to the Member States which may not only decide on the use of optional defences but also on other optional choices (e.g. the scope regarding damage to nature, as regards the "operator"-definition, the type of multi-party causation, the forms and measures regarding financial security, etc.), and may moreover take or maintain stricter measures than prescribed by the Directive. This characterises the ELD as a so-called framework Directive.

Also civil society plays an important part, especially when it comes to necessary preventive and remedial action. Affected natural or legal persons, including environmental NGOs, have the right to request the competent authority for action if they deem it necessary. If the entitled persons consider that the competent authority, which has to inform them about the decision to accede or to refuse the request for action, has failed to take the appropriate decision, they even have the right to appeal before a court or other independent public body to review the decision.

The Environmental Liability Directive entered into force on 30 April 2004. The EU Member States had three years to transpose the Directive in domestic law. By the end of summer 2009, all but three Member States have notified complete transposition of the ELD into domestic law.

The Commission has to report by April 2010 on the effectiveness of the Directive in terms of actual remediation of environmental damages and on the availability at reasonable costs and on conditions of insurance and other types of financial security. In view of this reporting obligation, a first exploratory study was cried out by a consultant in 2008 which is being followed-up by a more comprehensive study in 2009.

The ELD was already amended twice through Directive 2006/21/EC on the management of waste from extractive industries and through Directive 2009/31/EC on the geological storage of carbon dioxide and amending several Directives. Directive 2006/21/EC broadened the scope of strict liability by adding one more dangerous activity ("management of extractive waste") to the list of dangerous occupational activities in Annex III of the ELD. Directive 2009/31/EC adds another dangerous activity ("operation of storage sites pursuant to Directive 2009/31/EC") but includes also genuine responsibility and financial security provisions separate from the ELD.
4.2. Environmental Crime Directive

Directive 2008/99/EC on the protection of the environment through criminal law was adopted by the European Parliament and the Council on 19 November 2008. It entered into force on 26 December 2008 and will have to be transposed by Member States by December 2010. The Directive requires Member States to treat as criminal offences certain activities that breach EU environmental legislation. Member States will have to subject these offences to effective, dissuasive and proportionate criminal penalties.


The Commission challenged the Framework Decision before the European Court of Justice on the grounds that it had been adopted on the wrong legal basis. On 15 September 2005 the European Court of Justice annulled the Framework Decision and confirmed that the Community had the competence to adopt criminal law measures related to the protection of the environment if this is necessary to ensure the efficient implementation of its environmental policy.

In order to take into account both the Court's judgment and the latest developments in environmental legislation, the Commission decided to withdraw its earlier proposal of 2001 for a Directive and make a new one (which replaced both its own proposal for a Directive of 2001 and the Council's Framework Decision of 2003).

Whereas a Framework Decision is adopted only by the Council, a proposed Directive goes through both Council and the European Parliament as part of the Community co-decision making process. Furthermore, once a Directive is adopted, its implementation by the Member States is controlled by the European Commission and the European Court of Justice, which is not the case with Framework Decisions.

The EU considers criminal law as a necessary instrument in the fight for an effective protection of the environment. Environmental crimes cover a large range of acts or omissions that damage or endanger the environment, such as the illegal emission of hazardous substances into the air, water or soil, the illegal shipment of waste or the illegal trade in endangered species. These offences can have devastating effects on the environment and human health. They also undermine the effective implementation of the legislation adopted by the Community to protect the environment and human health. Thus it must be ensured that such offences are subject to effective sanctions, including, in serious cases, criminal sanctions.

As mentioned, the Directive covers a list of environmental offences that must be considered criminal offences by all Member States, when unlawful and committed intentionally or with at least out serious negligence. The Directive does not create a list of new illegal acts (existing law already provides for these prohibitions). The list includes the illegal shipment of waste, trade in endangered species or in ozone-depleting substances, and the significant deterioration of wildlife habitats forming part of the Natura 2000 network of protected sites. Furthermore, significant damage to the environment caused by unlawful emissions to the air, water or soil, the unlawful operation of dangerous activities (including manufacture or handling of nuclear materials) or the unlawful treatment of waste will also be considered criminal offences. The majority of the offences are made conditional on whether or not they cause or are likely to cause serious harm to persons or the environment.

For example, illegal discharging of hazardous substances into surface water is covered if it causes or is likely to cause death or injury to persons or significant damage to the environment. Illegal shipment of waste from the European Union is covered but only if a significant quantity of waste is involved and if there is a clear intention to make a profit out of it.

In August 2006, a ship called the Probo Koala offloaded up to 500 tons of toxic waste in Abidjan, Ivory Coast. The waste was then dumped at several sites around the city. Several people died as a result and
hundreds were affected by respiratory problems, nausea, dizziness, vomiting, burns and irritation from the toxic waste. The Probo Koala case would have been covered by the Directive, as it was presumably a case of illegal shipment of waste.

If the chemical explosion in Seveso, Italy, in 1976, when people living nearby suffered from skin problems after having been exposed to huge amounts of dioxin, was caused by serious negligence or intentional breach of legislation, then it would also come under the Directive.

They Member States must ensure that the commission of the offences is subject to effective, proportionate and dissuasive criminal penalties (for legal persons the sanctions can be of a non criminal nature). They will also have to ensure that companies can be held liable for offences carried out by individuals but from which they benefit.

The Directive does not contain specific penalties. The Commission’s goal for the Directive was that minimum fines and imprisonment would be determined at a European level. This was not acceptable to the Council and Court of Justice. Their view was that, following the principles of subsidiarity, the Member States will decide what the appropriate penalties are.

The Directive also does not lay down measures concerning the procedural part of criminal law nor does it touch upon the powers of prosecutor and judges.

Finally, it is also important to mention that crime enforcement does not mean that a criminal court, stricto sensu, has to intervene. As this is the case in many jurisdictions, a shared competence between the public attorney and the administration is possible. When the public attorney decides not to start a criminal litigation, administrative fines can be inflicted by the administrative bodies.

Following the jurisprudence of the European Court of Human Rights it’s still necessary to be able to appeal before an independent and impartial judge. As such it’s still very important to know the civil and common law system, but also the tradition in both legal systems how to enforce environmental legislation: via a single criminal procedure or via a mixture of criminal and administrative procedures.

5. Question and Answer Session (moderator: Jean-François Vandenberghe)

5.1. Background - Common Law

5.1.1. Question: What is customary law?

Customary law is a term which is now only of historical relevance since it relates to the way the common law system developed. Historically, there was no central legislative assembly in England. The "laws" which existed comprised canonical laws, royal edicts and "customary law" which had arisen over time as a result of local customs or practices. In the 12th century, King Henry II sought to create a uniform system of justice across his kingdom and he sent royal judges around the country to hear legal cases and pronounce judgments based on their interpretation of the law as it then existed. These judges took account of any "customary law" which existed at the time when they pronounced their judgements. The decisions were then recorded centrally so that other judges could refer back to the precedents when considering new cases. Therefore "customary law", to the extent it still exists, has been subsumed into the general principles of today's common law.

5.1.2. Question: In the UK there are "civil" courts. Is there any link with the civil law system?

In the UK, the term "civil" is used to refer to courts which deal with non-criminal matters. There is no link between the term "civil" in this context and the term "civil" that is used to describe the legal system in most of Continental Europe.
5.2. Sources of law - Common law - Case law

5.2.1. Question: What is the influence of a dissenting opinion in appeals?

In common law systems, a number of judges may preside in the higher courts. For example, in the UK, the Court of Appeal may have three judges and up to five judges may sit in the House of Lords. This can result in one or more of the judges giving an opinion which dissents from the majority view reflected in the judgement actually handed down in the case.

There is no formal mechanism under which a dissenting opinion in a particular case may "influence" any subsequent court ruling. However, dissenting opinions are recorded in the official law reports and are available for review by other judges. Dissenting opinions do not form part of the "ratio" of the case nor do they form part of the precedent which must generally be followed by lower or equivalent courts. However, judges may choose to refer to, or develop, a dissenting opinion when forming their own judgement on appeal or in an entirely different case. Importantly, there is no obligation for a judge to take any dissenting opinion into consideration at appeal or in subsequent hearings.

Dissenting opinions can sometimes indicate potential areas of debate in the judicial community where an area of law is particularly uncertain or where the law may be open to different interpretations. Over the longer term, such "grey" areas of law can give rise to future developments or refinements in the law.

5.2.2. Question: How can you anticipate a judgment in a common law system without the advice of a lawyer?

Due to the common law system of precedent, there is often a very large volume of historic case law which may be relevant to the matter before the court. There could also be a high degree of complexity to the case such that interpreting and applying the case law to the facts of the particular case proves to be difficult (e.g. deciding whether the facts of the new case are distinguishable from, or identical to, the facts on which the precedent was based). Judicial decisions can also often depend on the personnel involved and the nature of the submissions made at the hearing. For all these reasons, it can be extremely difficult to predict exactly how a court will respond to a specific set of circumstances. Lawyers with many years of experience in their specialist area and a strong understanding court procedures are sometimes unable to forecast a particular outcome with any degree of certainty. Even relatively simple cases can often give rise to surprising or unexpected issues and outcomes.

For all these reasons, a lawyer is the most appropriate person to advise on the most likely course that a trial will take and on the possible outcome.

5.2.3. Question: Is there case law for the Environmental Liability Directive (2004/35/EC)?

The Directive was transposed into UK domestic law through the Environmental Damage (Prevention and Remediation) Regulations 2009, which came into force on 1 March 2009. These UK regulations are relatively new and there has not yet been any UK case law on this regulation. It is possible that related court cases will arise in the future to test the scope of the regulation.

5.3. Sources of law - Common law - Legislation

5.3.1. Question: Is the interpretation of the law in common law systems not different from civil law systems?

Yes, there are differences in the approach to interpretation under common law and civil law systems.

Under common law systems, a number of rules apply to statutory interpretation. Judges will apply these rules when seeking to interpret the meaning of a statute. These rules include concepts such as the
"literal rule" under which the words in the statute will generally be construed according to their usual meaning, the "mischief rule" which allows a judge to refer to the purpose for which a particular statute was introduced and the "golden rule" which states that an interpretation which renders the meaning of a statute absurd should not be adopted.

There are also linguistic rules of interpretation which indicate how individual words and phrases might be interpreted (to determine, for example, whether the terms in a list are exhaustive or how particular items in a list relate one to the other, etc.).

Internal tools of construction include the ability to refer to the preamble and title of a piece of legislation for additional guidance on its interpretation. External tools to interpretation include, for example, to ability to refer to other statutes or debates on the introduction of the Bill.

There are generally considered to be two over-arching approaches to statutory interpretation: the literal and the purposive approach. The "literal" approach requires that a judge look at the words in the statute rather than outside the statute to find the meaning. In contrast, the "purposive" approach favours the judge looking beyond the words of the statute to discover its intended meaning. The literal approach has historically dominated in the English common law system, whereas judges in civil law jurisdictions are often regarded as leaning towards a more purposive approach. However, particularly with the increasing influence of European law on the English legal system, the purposive approach is seen as becoming more important for statutory interpretation in the English courts.

All these various tools are available to common law judges in order to interpret legislation.

5.3.2. Question: Is there an evolution to more legislation in common law systems?

Although much of the common law system is based on precedent (also called "case law"), one must not forget that a common law system also contains a vast amount of legislation and legislation takes precedence over case law. The volume of legislation will continue to increase with time, as will the volume of case law.

Over recent years, it has certainly been the case that an increasing number of legislative instruments have been introduced into the common law system. Many people see this as a by-product of the need for increased levels of regulation on society. Other relevant factors include the need to implement European legislation, the rapid development of new technology, systems of work and social changes that require new legislative frameworks. In a number of instances, existing common law has been codified for ease of reference, an example being the provisions detailing the duties of company directors under the Companies Act 2006.

However, there is no long-term plan to consolidate case law into statute and the precedent system will remain a key element of the common law system, certainly for the foreseeable future. Alongside this, the volume of codified legislation is also likely to continue to increase.

5.3.3. Question: What is the difference between statutory and non-statutory guidance?

Statutory guidance is guidance which is produced pursuant to powers contained in legislation. For example, in English law, an Act will often require the Secretary of State to issue more detailed guidance on how a particular process or rule will operate in practice. Such statutory guidance can have force of law.

Non-statutory guidance is issued by governmental departments or other relevant bodies to assist parties to understand what is required of them and to help them ensure that they achieve compliance with the legislative requirements. Typical examples of non-statutory guidance include guidance on best practice and guidance on how governmental bodies will interpret statutory rules, etc. Non-statutory guidance does not have force of law. It is not compulsory to follow non-statutory guidance and people may take whatever alternative action they choose. However, adopting the advice contained in guidance
notes is usually sufficient to ensure compliance with the relevant law, although this is not guaranteed. In the event of a breach of law, evidence that the relevant guidance has been followed may assist with the defence. However, following non-statutory guidance is usually sufficient to achieve compliance with the relevant legislation and may assist a party in demonstrating that it took reasonable steps to comply with its obligations.

5.4. Sources of law - Common law - Equity

5.4.1. Question: How can you know that the person seeking equity has “clean hands”?

In common law systems, the equitable maxim “he who seeks equity must come with clean hands” refers to the principle that a discretionary equitable remedy (rather than a common law remedy such as damages) should not be available to a person who has acted inequitably or improperly in relation to the subject matter of their claim. For example, if a claimant claims the equitable remedy of “specific performance” in a contract of sale (i.e. requesting that the court force the other party to conclude the sale), the claimant may not be granted the remedy if he is found to have misrepresented certain facts to the defendant when agreeing the original sale.

There is no particular mechanism to identify whether a person seeking equity has "clean hands". Evidence that a claimant has acted inequitably and should not be allowed an equitable remedy should be adduced as evidence by the defendant in court. The burden of proof is on the defendant to show that the claimant "does not come with clean hands".

The concept of "clean hands" is limited to matters that directly affect the matter that the court is considering. General inequitable behaviour by the claimant in the past is not relevant unless the conduct relates to the issue before the court.

A similar concept exists in civil law systems. A person who has done wrong cannot bring a claim against another person for the same behaviour.

5.5. Sources of law - Civil law – Case Law

5.5.1. Question: How strong is a precedent in civil law?

Supreme Court decisions have an impact on setting precedents. Precedents also exist in an informal way as judges do not want their decisions to be overturned by a higher court.

Lower courts will generally consider the rulings of the higher courts and especially the decisions of the Supreme Court since these courts are competent for appellation and are likely to follow their earlier interpretation. Moreover, there are examples of “judge’s law”: decisions with no clear-cut basis in legislation, resulting from creative interpretation.

5.6. Sources of law - Civil law – Legislation

5.6.1. Question: If there is a contradiction between two laws, which law prevails?

The most recent statute takes precedence, or more specialised statute for a particular context will take precedence. The type of statute is also important: overarching law will take precedence.
5.6.2. **Question: Can you set out binding environmental management targets in a lease agreement?**

Under common law, it is possible to include binding environmental management obligations in a lease agreement. Environmental covenants contained in a lease can be drafted to impose such obligations on the landlord or the tenant or both.

The concept of a “green” lease is developing in many common law jurisdictions such as the US and the UK. A “green lease” is a lease of a commercial or public building which incorporates an agreement between the landlord and tenant as to how the building is to be improved, managed and occupied in a sustainable way. Green leases include a schedule containing specific provisions for monitoring and improving energy performance, achieving efficiency targets (e.g. energy, water, waste) and minimising the environmental impacts of the building. The provisions represent a binding agreement between the landlord and the tenant to adopt procedures to ensure that that a building operates to an agreed standard.

Under civil law systems, because of the freedom to contract it is possible to include binding management targets in a lease agreement.

5.6.3. **Question: When is free will in contracts illegal?**

Under common law systems, the courts will usually take the view that parties may contract on whatever terms they see fit provided the parties are acting voluntarily, even if these terms do not appear at first to be fair or evenly balanced. This is often referred to as “contractual freedom”.

There are, however, a number of exceptions to this basic principle of contractual freedom. Such exceptions are often intended to protect, amongst others, more vulnerable contracting parties. As an example, in English law, statute restricts the inclusion of unfair contract terms in certain types of contract, particularly those that involve a consumer. Statutory provisions may also imply standard terms into certain contracts, such as implied terms of “fitness for purpose” in contracts for the sale of goods. In addition, some contract clauses are unenforceable. Under English law, these include clauses which seek to exclude liability for death and personal injury, which impose penalties for non-performance, or which are excessive relative to any loss which may be incurred by the other party.

In civil law systems, practically the same principles as set out above apply. Contracting parties are also free to contract on whatever terms they see fit provided the parties are acting voluntary.

However, some contracting parties are protected. In Belgium for instance, the Unfair Trade Practices Act gives an enumeration of clauses which are prohibited.

5.6.4. **Question: Is there a limit to deviate from private contracts provided for in the code civil?**

Certain contracts such as sale, lease, exchange etc. are defined in the Code Civil. The general rule is that the provisions of the Code Civil which are applicable to such specific agreements are applicable if the parties do not deviate from them. However, some provisions are mandatory or of public order (e.g. term of a shop lease agreement). Parties cannot deviate from mandatory provisions.

5.7. **Sources of law - Civil law – Equity / general principles of law**

5.7.1. **Question: Are the general principles of law the same as "l'esprit de la loi"?**

Yes, indeed.
5.8. Legal procedure - Common law - Causes of action

5.8.1. Question: Can you introduce different causes of action in one trial in the UK?

It is possible to claim several different "heads" (or "causes") of action for a civil claim in relation to a single set of circumstances. For example, if one party fails to perform services for which it has been paid, the other party might choose to bring a claim under contract, under the tort of negligence or even under equity for restitution for monies paid to the other party. Multiple causes of action may also be relevant where a claim can be brought under statute and common law. For example, in product liability matters or misrepresentation, there may be a choice between a statutory and a tortious remedy. This situation also applies to contaminated land issues where claims may be brought under statute or, in certain circumstances, under the tort of nuisance.

Note, however, that where a civil claim is brought in respect of a criminal act, the civil claim will be dealt with by a different court to the criminal trial. For example, where a person is convicted of assault, the victim may then seek to recover civil damages from the attacker. As the burden of proof in criminal matters is higher than in civil matters, a criminal conviction will give an indication of likely success in a related civil claim based on the same facts. Conversely, where evidence is not sufficient to secure a criminal conviction "beyond reasonable doubt", an aggrieved party could seek instead to bring a separate civil action which only needs to be proven on "the balance of probabilities".

5.9. Legal procedure - Common law - Court system

5.9.1. Question: Which court is competent in the UK when you have toxic damage to the health?

This will depend on the type of law (and "cause of action") under which the action is being brought.

It is possible that the damage to health could have resulted from a criminal act. In the UK, for example, such acts might include offences by an employer under health and safety regulations, corporate manslaughter offences or certain offences under the Environmental Protection Act 1990. These matters would be dealt with by a criminal court. Less serious offences would usually be heard in a Magistrates' Court, although in some cases the defendant may have the option to choose trial by jury in the Crown Court. More serious cases would be referred by the Magistrates' Court to the Crown Court.

A claim for personal injury that results from exposure to toxic substances would, however, be a civil claim. Such a claim might include, for example, an action by the injured party based on statutory product liability law or the common law of negligence. For small value claims, matters may be heard in the County Court but, for higher value claims or in cases of group litigation, claims are more likely to be heard in the High Court. For example, a recent claim by consumers injured by leather furniture containing the biocide, dimethylfumarate, was recently heard in the High Court. Cases which turn on detailed and complex scientific evidence may be referred to a specialist court within the High Court, such as the Technology and Construction Court.

5.10. Legal procedure - Common law - Adversarial approach

5.10.1. Question: Can the court apply a law that is not submitted by the solicitor/barrister?

When bringing an action in court, the claimant will plead (or submit) his claim based on one or more causes of action (see III.1.1 above). If a particular cause of action has not been pleaded then the judge is not then able to consider the merits of an alternate cause of action and he must only base his decision on those causes of action that were actually presented to him.

However, where a particular cause of action has been pleaded and the judge is aware of a precedent or legislation which is relevant to the issue but has not been cited by the advocates in court, the judge may still refer to this law in reaching a decision on the merits of a claim under that particular cause of action.
5.11. Legal procedure - Common law - Legal practitioners

5.11.1. Question: How can the advice of a lawyer who is also an expert in another field such as engineering be used?

In general, lawyers will not be in position to advise in other specialist fields unless they ensure that they may do so outside their role as a lawyer and in accordance with all the rules that apply to the other professional bodies that are relevant to the specialist advice offered.

Lawyers that are also qualified in other specialist areas such as engineering, must exercise extreme caution in offering any non-legal advice. They must first establish whether they can offer non-legal advice and if so, the exact scope of the advice they can give. Clearly, lawyers are governed by their professional bodies and it is unlikely that their professional indemnity insurance will extend to cover advice that is given outside their role as a legal professional. Further, should a lawyer also advise a client on non-legal matters, they should exercise care since legal privilege which applies to confidential communications between a lawyer and his client will only extend to documents which constitute principally legal advice.

It would be highly unusual for a Court to hear both legal and scientific or engineering submissions from the same advocate. In cases where specialist expert knowledge is relevant to the proceedings, technical submissions will take the form of an “expert witness” testimony. Experts can be called to give oral or written testimony. Evidence given by an "expert" comprises an exception to the general rule that "opinion" is not admissible as evidence. The courts encourage the parties to agree a single independent expert, rather than calling separate expert witnesses to give conflicting evidence.

A lawyer is able to identify technical information relevant to his submissions by way of an examination-in-chief of the expert witness (provided the expert appears in person) but the lawyer would not seek to give such expert opinion himself. Similarly, the opposing advocate would also have an opportunity to cross-examine the expert to support his own submissions.

5.12. Legal procedure - Civil law - Causes of action

5.12.1. Question: Is there a rule of causes of action in continental administrative law?

In continental administrative law, the higher administrative courts procedure requires that the cause of action is mentioned. Most of the time this is not the case for the first degree appeal before political bodies.

5.13. Legal procedure - Civil law - Court system

5.13.1. Questions: Are there juries in the civil law system? And Explain the difference between civil and public law, taking into consideration the court system.

In civil law systems, jury trial is exceptional even in criminal matters, though for the most egregious offences (e.g. murder), a jury sometimes decides, depending on the chosen judiciary system. This shall be the case in France, Belgium...

Civil law is that area of law which defines the relationship between private persons. This includes contract law, commercial law, law governing matrimonial property rights.

Public law is that area of law which defines the relationship between the government and the citizens. It is a set of rules concerning the organization and functioning of the state, the relationship between the different powers and the relationship between the powers and the citizens. This includes constitutional law, administrative law, criminal law, social security law, international law etc.
“Ordinary” courts adjudicate the vast majority of civil and criminal cases. The ordinary courts apply the law found in the civil, commercial and penal codes and in legislation supplementing those codes. The first level of ordinary courts consists of general civil and criminal trial courts and several specialized courts. An example can illustrate it for Belgium: cases arising under the commercial code are for example first heard in commercial courts. Similarly, employment disputes are heard by a labour court. Appeals from the trial level courts proceed to a court of appeal within the territorial jurisdiction of the lower court. The apex of the ordinary court structure is the Supreme Court of Cassation. The court reviews on a discretionary basis only questions of statutory interpretation.

Apart from the ordinary courts, there are also administrative courts that exercise independent jurisdiction. Most of the time, the Council of State is the Supreme Court of the administrative courts. In theory, ordinary court and administrative court jurisdiction is separate and exclusive, but disputes arise.

A separate Constitutional Court is mainly established for judicial review of constitutional questions.

5.14. Legal procedure - Civil law - Legal practitioners

5.14.1. Question: Explain the client privilege differences in the different civil law countries.

As regards common law, in the UK, the courts will allow certain documents to remain confidential or "privileged". Privileged documents are not subject to disclosure to the opposing side in litigation and may not be used as evidence at trial. There are two types of legal professional privilege:

"Legal advice privilege" applies to confidential communications between the lawyer and their client that came into existence for the purpose of giving or receiving legal advice. Legal advice privilege generally also extends to communications between an in-house lawyer and their employer provided that the communications are primarily concerned with the giving of "legal advice", rather than the provision of general commercial advice.

It is important to note that the courts take a restrictive interpretation of the definition of "client" for the purposes of claiming legal advice privilege. For example, within an organisation, only those staff who directly instructed external lawyers may be regarded as the "client" for the purposes of legal advice privilege. Accordingly, if privileged external advice is used in preparing additional commentary and analysis for internal review and the package of compiled documents is circulated within the organisation, those new documents may not be privileged. If the original privileged advice document was to be circulated without comment or amendment then privilege would be maintained.

"Litigation privilege" applies to confidential communications between a lawyer and a client or third party, or between a client and a third party where such communications are made for the dominant purpose of an actual, pending or contemplated litigation. Litigation includes proceedings in the High Court, County Court, employment tribunals and arbitration which is subject to English procedural law. Other tribunals and public or statutory enquiries may not be treated as litigation for these purposes. Specific advice should usually be sought where an organisation is subject to such an enquiry.

From a civil code perspective, in some jurisdictions it is not possible for a company to retain a lawyer as an employee. Where this is possible, the situation as regards privilege is generally similar to that which applies in common law systems such as the UK. From a European law perspective, there is no acceptance that legal professional privilege extends to in-house lawyers for actions in the European Court of Justice (ECJ).
5.15. General - Environmental

5.15.1. Question: Explain the transfer of liability for clean up of contamination in civil and common law.

In common law systems, statutory provisions will often determine which person has liability for the remediation of contaminated land. In the UK, there is a statutory regime that sets out the basic legal position for contaminated land but this regime also leaves it open to parties to contract in whatever way they see fit to allocate responsibility between themselves for contamination. Provided such contracts can be validly enforced, they can modify the basic liability position between the parties that would otherwise be set out under the statutory regime. Such contractual modification can take whatever form the parties may agree.

By way of a very brief summary, in the UK, Part IIA of the Environmental Protection Act 1990 places primary responsibility for the remediation of contaminated land on the person who "caused or knowingly permitted" the contamination (the "polluter"). However, if the polluter has ceased to exist or cannot be found, then the current owners and occupiers of the land can be responsible for remediation, even if they did not themselves cause any contamination. If there is more than one owner or occupier then liability should usually be apportioned between them according to their relative interests in the capital value of the land. For this reason, buyers of potentially contaminated land often take steps to protect themselves by, conducting investigations, obtaining contractual protection from the seller, requiring remediation before the sale, obtaining suitable insurance or negotiating a suitable reduction in the purchase price. Most importantly, as mentioned above, the parties to the sale can agree and enter into binding contracts that allocate liability for contamination between themselves in whatever way they may agree.

As in common law, statutory provisions will also often determine which person is liable for the remediation of contaminated land in civil law systems. A distinction has to be made between an obligation to clean-up the contaminated land as public duty and the liability vis-à-vis third parties. This is the case in France, Belgium...

5.16. General - Comparing and contrasting common law and civil law systems

5.16.1. Question: Will both systems ever merge?

This seems unlikely considering the deep-rooted cultural and historical backgrounds to the two systems and the fact that each system is embedded in their respective jurisdictions. It would not seem to be practical for countries to move to a different system of law. One would expect the two systems to continue to develop in parallel, with European law being implemented into both systems as necessary.

5.16.2. Question: Which system is considered the best? What are the advantages and disadvantages of both systems?

Each system offers advantages and disadvantages. One view is that civil law often provides a greater degree of certainty since judgements may be more readily re-produced on a consistent footing and most of the law derives from statute. Civil law may also be more accessible to the public at large since the majority of the law is compiled and printed in statutes.

The common law system is arguably more flexible in adapting to meet changing social needs since it allows the courts to react to deficiencies or nuances in legislation by generating common law to supplement the legislation. However, it is often more difficult for a member of the public to analyse the common law precedents due to the volume of historic case law that exists. In addition, where legislation has not yet been tested in the courts, there can be some degree of uncertainty as to how certain provisions would be interpreted by the courts.
In most civil and common law jurisdictions environmental law is primarily statute-based, even though many of the legal concepts from which the statutes derive may have arisen under common law. Note that under the common law system there is an acceptance that parties to land transfers may contractually transfer environmental liabilities in certain cases (see IV.1 above).

5.16.3. Question: What kind of legal system should be applied in contracts?

It is difficult to recommend a particular legal system as a basis for all contracts. The decision of the parties as regards choice of jurisdiction will depend entirely on the circumstances. The choice of governing law will depend on a range of factors such as:

- the subject matter of the contract;
- familiarity of the parties with the legal system concerned;
- the certainty and stability of the chosen legal system;
- the choice of forum for disputes;
- the likelihood of obtaining impartial, informed and/or enforceable judgements;
- language issues, etc.

5.17. General - Liability

5.17.1. Question: What is the relationship between tort and strict liability?

In order to prove an action in tort, a claimant must generally show that:

- the defendant owed him a duty of care;
- the defendant breached that duty;
- the claimant suffered loss or damage;
- which was caused by the breach.

Therefore, the validity of an action in tort will often depend whether a breach of duty occurred. As regards the extent of the duty, the standard of care is generally based on whether the defendant took all reasonable steps to prevent loss to the claimant.

Contrast this with the concept of 'strict liability' which means there is no need for a claimant to show that a defendant failed to take reasonable steps to prevent the damage. The fact that the damage occurred and was caused by the defendant is enough. For example, in a claim of negligence relating to a faulty product, a claimant bringing a claim under tort would need to show that the product manufacturer did not take reasonable steps to ensure the product was safe. Where strict liability applies, if the product was faulty and caused damage, the manufacturer would be strictly liable to the person who had suffered the relevant damage.

The application of strict liability is generally limited because it is often not in the public interest to hold someone liable for something that did not result from their "fault". However, in certain areas such as product liability and environmental protection, there is an overriding need to "protect" and this often takes precedence. Strict liability can be particularly relevant in the context of contaminated land. For example, in English law, under Part IIA of the Environmental Protection Act 1990, strict liability for remediation costs will apply to a polluter of contaminated land. It is worth noting however, that depending on the basis under which strict liability applies, only certain parties may be able to take
advantage of the strict liability principles. For example, actions under the Part IIA of the Environmental Protection Act 1990 are usually only available to regulators.
## Annex 1 List of Participants

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