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Continental Civil Law v Common Law in International Contractual Disputes

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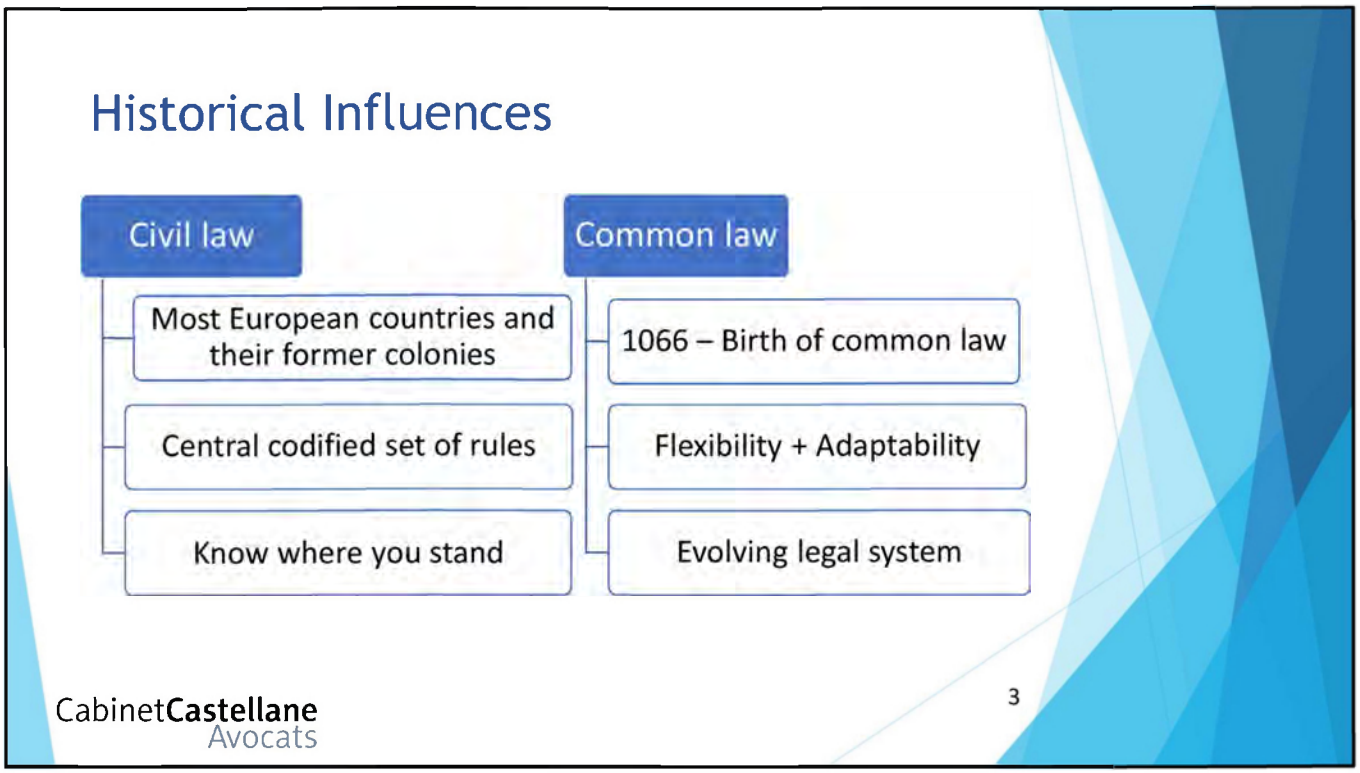
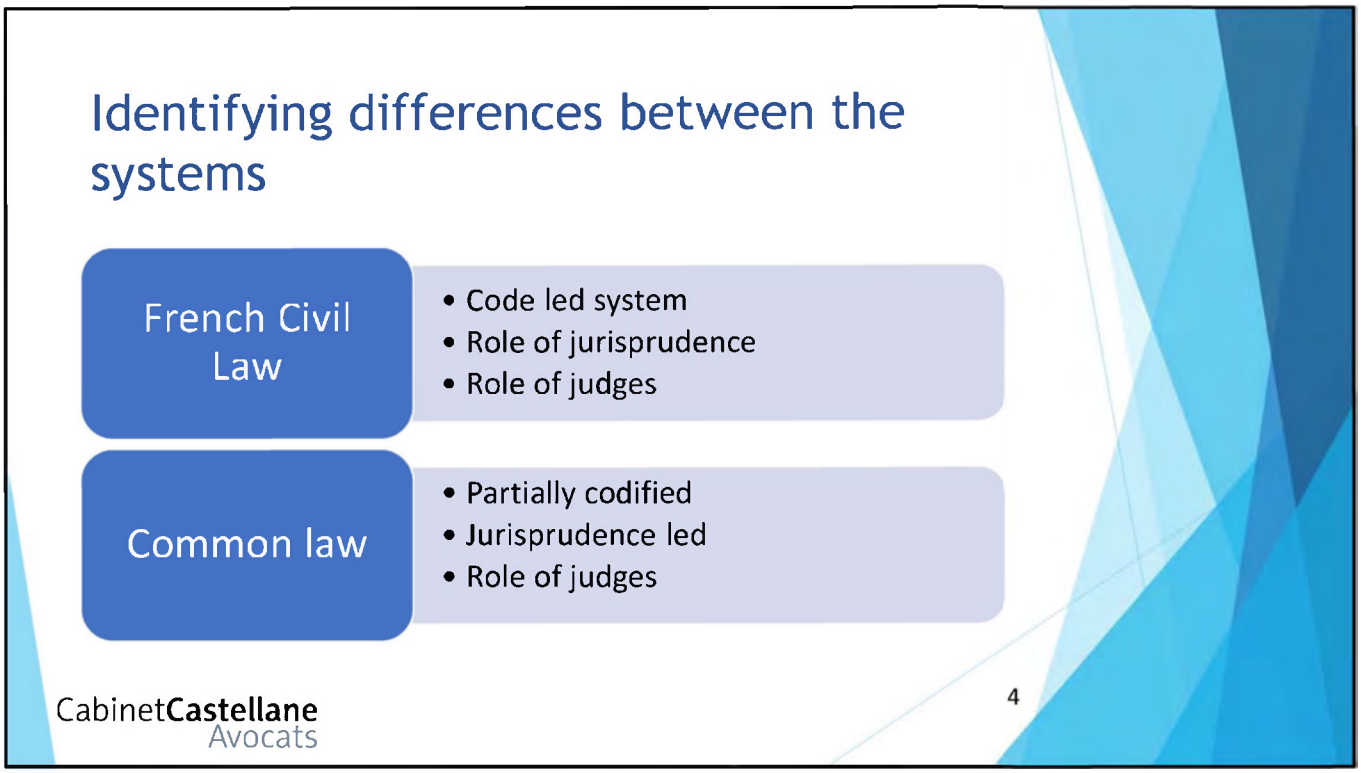


Often perceived as comparing unfavourably to common law regimes when it comes to the choice of law in international commercial contracts, French civil law (i.e. French contract law) has undergone significant modernisation following a number of reforms in 2016. While the World Bank's annual "Doing Business" report has long emphasised the superiority of the common law system over the French civil law tradition, it seems this rather artificial vision of civil law versus common law is overstated and fails to see the many overlaps of both systems.

Historical influences

Most European countries have based their legal systems on Roman law (e.g. Germany, France, Holland, Spain and Portugal) with such continental countries producing legal codes to regroup the various rules, legal texts and key jurisprudence. In the United Kingdom however, different rules and customs were applied all over until in 1066 it was

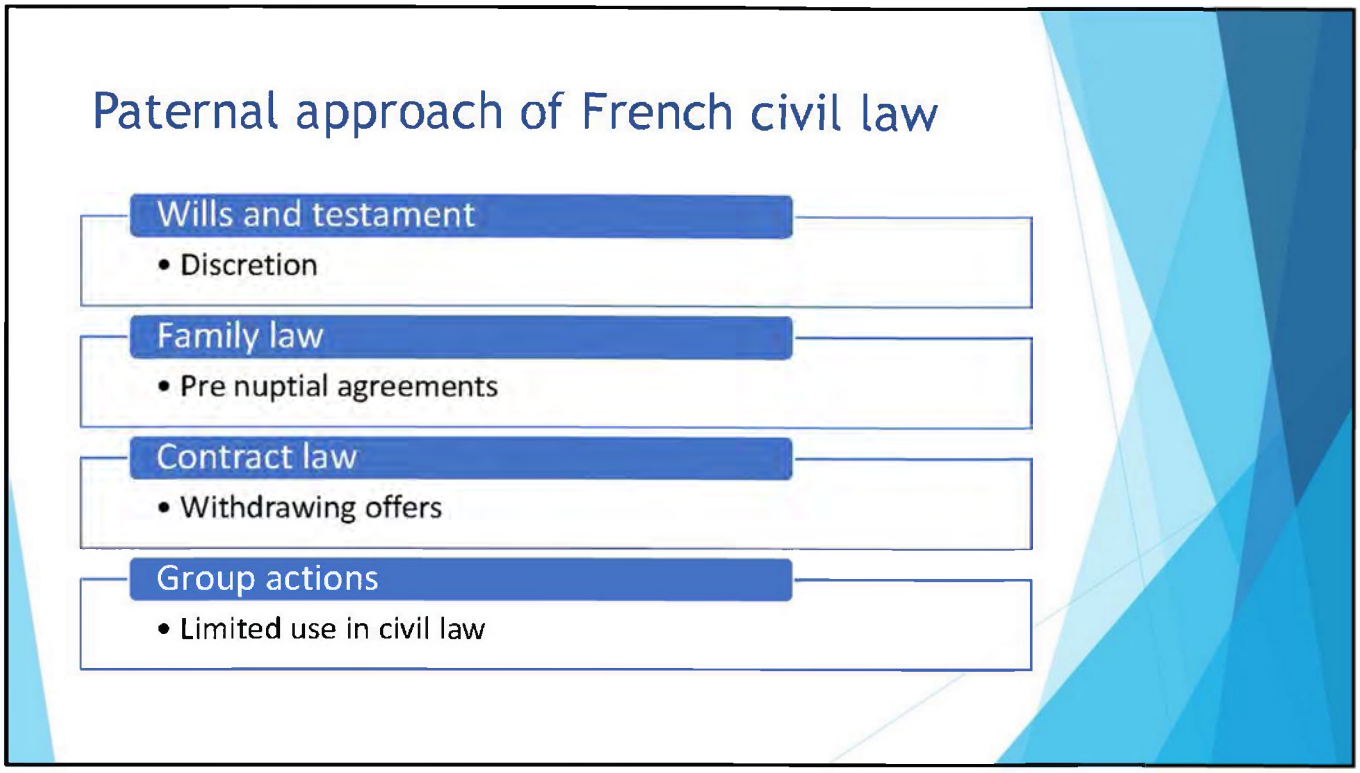
decided that the country and its laws should be united. A common law was thus created and applied throughout the country. These rules evolved continuously and were seldom written.



Today, those who practice in civil law jurisdictions greatly appreciate the legal certainty that comes with having a central codified set of rules. Everyone knows where they stand...Conversely, common law countries pride themselves on their perceived ability to be flexible and adaptable which, they say, results in a legal system which regularly evolves to continuously meet the needs of society. The reality in many common law jurisdictions today is that there is some codification.

Civil law systems are largely codified, with minimal scope for development of pure jurisprudence. Civil law aims to provide for as many eventualities as possible in codes which judges then interpret in light of the facts before them. Rules are fixed and lawyers must work on flexible interpretations. Conversely, common law is a partially codified, jurisprudence led system which, as you all know, exists in countries such as Great Britain, the United States and Australia. In contrast to civil law, judicial decisions are binding and can only be reversed by new legislation or by new jurisprudence.

In common law jurisdictions, such as in French civil law, judges are not lawyers but individuals who are appointed after obtaining a specific degree. Such judges have limited scope to create or interpret law.

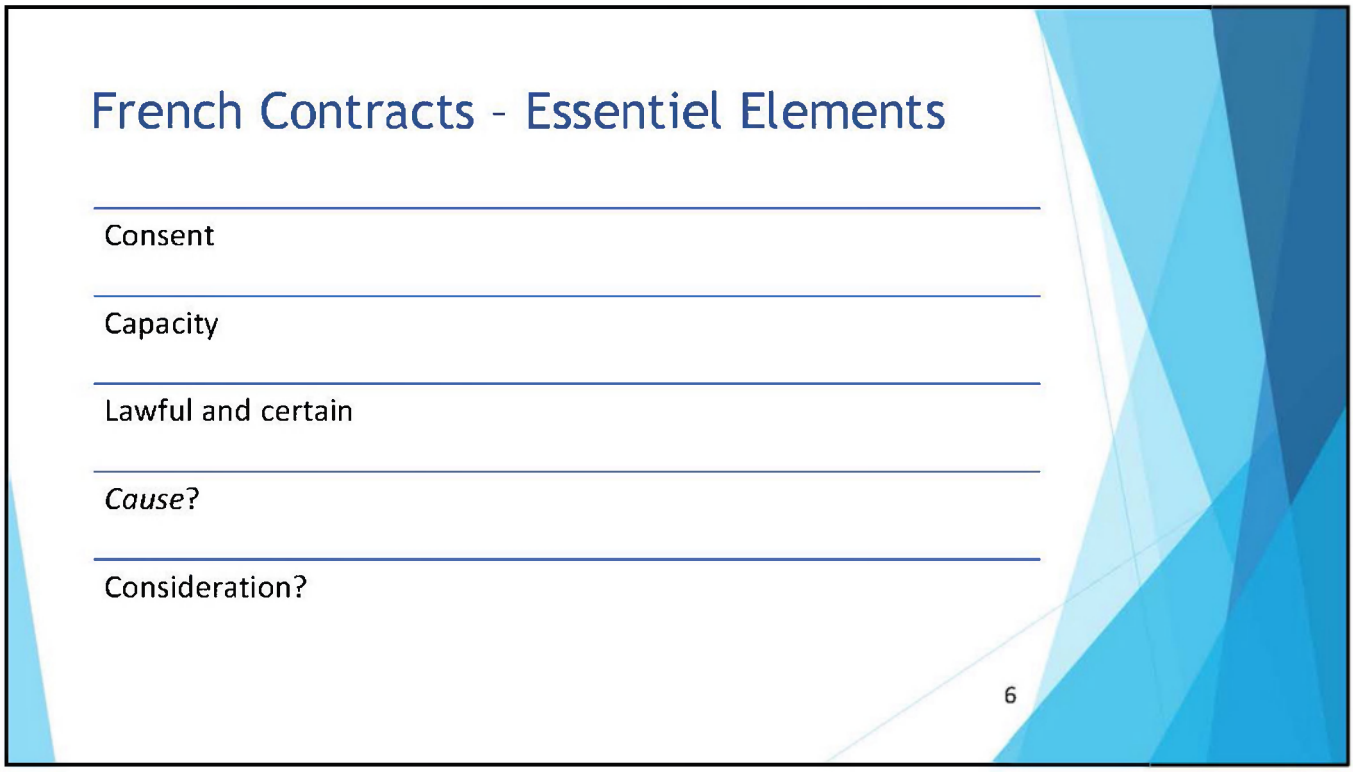


Wills and testaments – In civil law, certain beneficiaries cannot be cut out of the estate (e.g. children according to the French code). In common law, each person is free to leave their estate to whoever they wish.

Contract law – in French contract law, offers cannot generally be withdrawn in comparison to common law countries.

Family law – In civil law, couples must decide prior to their wedding whether their estates will be kept separate for the duration of their marital life (and death) or whether to join their estates together. In some common law countries, prenuptial agreements exist, although not in the UK (albeit they may have some persuasive value).

Group actions – in civil law, these are only permitted in limited circumstances e.g. in France, in relation to consumer disputes. However, these are used much more widely in common law regimes e.g. in product liability claims, environmental claims, commercial claims.



Article 1128 of the new French civil code sets out three conditions which must be met in order for a contract to exist:

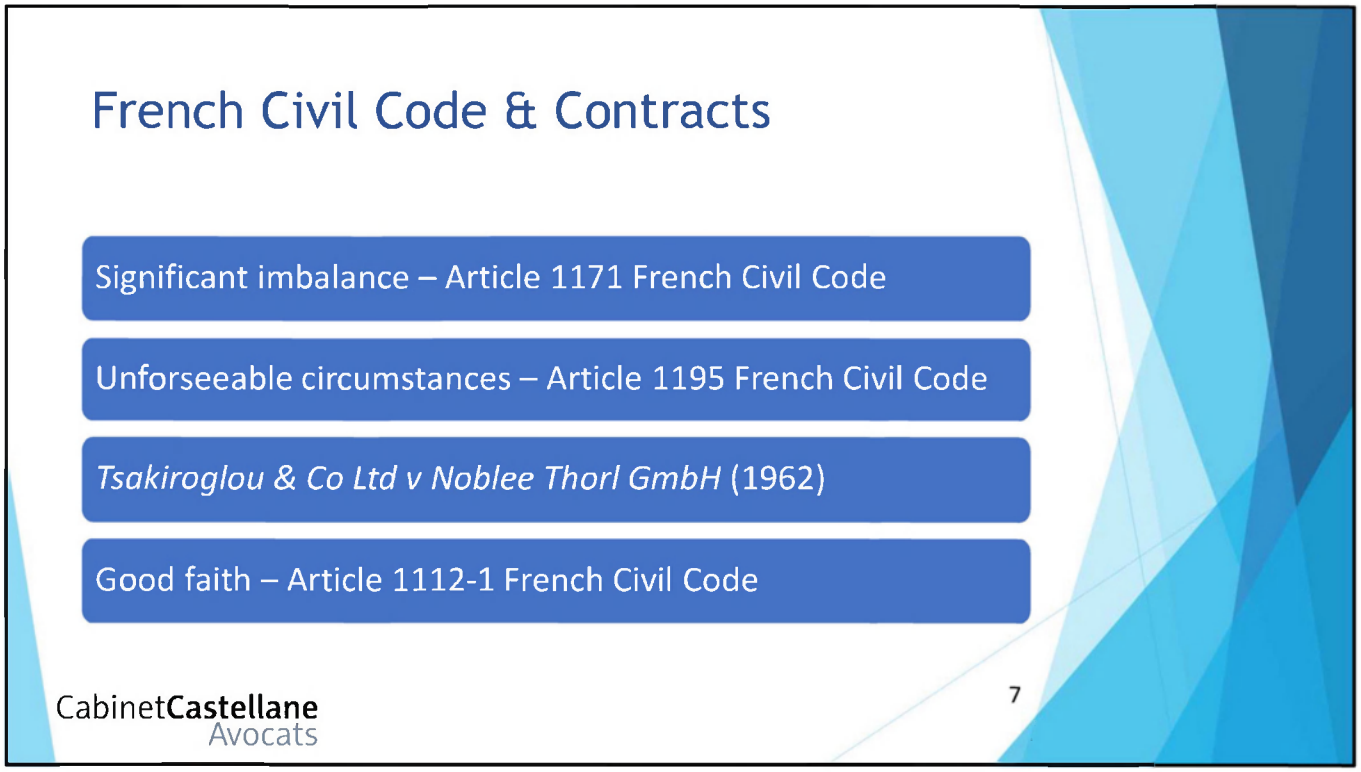
- consent;
- capacity to contract; and
- content which is lawful and certain.

Until 2016, a further condition was required in order to conclude a contract, that of "*cause*" or the object of the contract, which was abandoned in the 2016 reforms. The doctrine of *cause* was said to be the legal basis for rebalancing contracts or annulling contracts with unfair terms. In a leading French case, a contract to create a video rental shop between the lessor and lessee in a rural community was voided for lack of *cause*, as it became apparent that the venture was doomed to fail as the shop was to be based in a rural community and thus was not economically viable*. Arguably a common law court would ultimately not have reached the same result as there is little room for a

judge to impinge upon parties' contractual autonomy to spare them from what turns out to be a bad bargain. Such unfettered judicial discretion and intrusion is very much frowned upon at common law in comparison to the protective approach traditionally taken in French law.

Whilst both common law and civil legal systems provide that, in order for a valid agreement to exist, there must be an offer and a corresponding acceptance, there is a stark difference when it comes to consideration. Indeed, French law does not require consideration; thus, one party may confer a benefit on another without necessarily obtaining a reciprocal benefit i.e. unilateral or gratuitous contracts are perfectly valid.

**1st Civil chamber of the Cour de Cassation on 3 July 1996 (Cour de Cassation, Chambre civile 1, du 3 juillet 1996, 94-14.800, Publié au bulletin)*



Pursuant to Article 1171 of the civil code, any standard form contract terms which create a "*significant imbalance*" between the parties may be deemed to be of no effect by the courts. However, the core purpose of the contract as well as the price for the contractual benefit conferred on the paying party are excluded from sanction under Article 1171. In a similar approach to common law jurisdictions, French law also considers that duress constitutes grounds for annulment of a contract and any such contract may be annulled pursuant to Article 1143.

Like the common law notion of *frustration*, pursuant to Article 1195, if a change of circumstances that was unforeseeable at the time of contracting, renders performance excessively onerous for a party and that party had not accepted to bear such risk, such party may ask its counterparty to renegotiate the contract. Should the other party refuse, or should the renegotiation fail, a judge may intervene at the initiative of one or both of the parties, to revise the contract or fix the date and conditions for its

termination. By contrast, English judges do not have the flexibility to rewrite the contract for the parties, and the Courts will generally do nothing to help the parties get out of a bad bargain. For example, note the English case of *Tsakiroglou & Co Ltd v Noblee Thorl GmbH* (1962). In that case, the closure of the Suez Canal owing to a war did not frustrate a shipment contract of goods to Hamburg because the contractor could have shipped the goods via an alternative route, even if the detour rendered performance unduly costly. If the English judge was not inclined to help the shipping company in the Suez Canal case, it was precisely because the company could have helped itself by inserting a specific routing clause in the contract.

French civil law considers that negotiations must satisfy the requirements of good faith, with article 1112-1 imposing a general duty to provide information (*devoir d'information*) when such information is of decisive importance to the other's consent. Under French law, therefore, strong protection is given to contracting parties during pre-contractual negotiations in order to ensure fairness and balance in contractual relations. As such, French civil law is not concerned merely with supporting contracts already concluded but also limiting the parties' freedom to make contracts in the first place for reasons of public policy, namely, that parties should deal fairly and honestly with one another.

This contrasts sharply with the approach in some common law jurisdictions, for example in England & Wales where there is no general duty of good faith, nor of disclosure during pre-contractual negotiations: "*silence is golden, for where there is no obligation to speak, silence gives no hostages to fortune*", as Rix LJ affirmed in *ING Bank NV v Ros Roca SA*. Common law jurisdictions, such as England & Wales, have largely resisted the continental concept of good faith as a doctrine capable of overriding the parties' bargain in favour of freedom of contract and the binding force of contract. Although some common law jurisdictions have begun to recognise a duty of good faith (such as Canada), in England, there is no general duty of good faith when negotiating or performing a contract, although recent case law shows a move towards implied obligations of good faith.

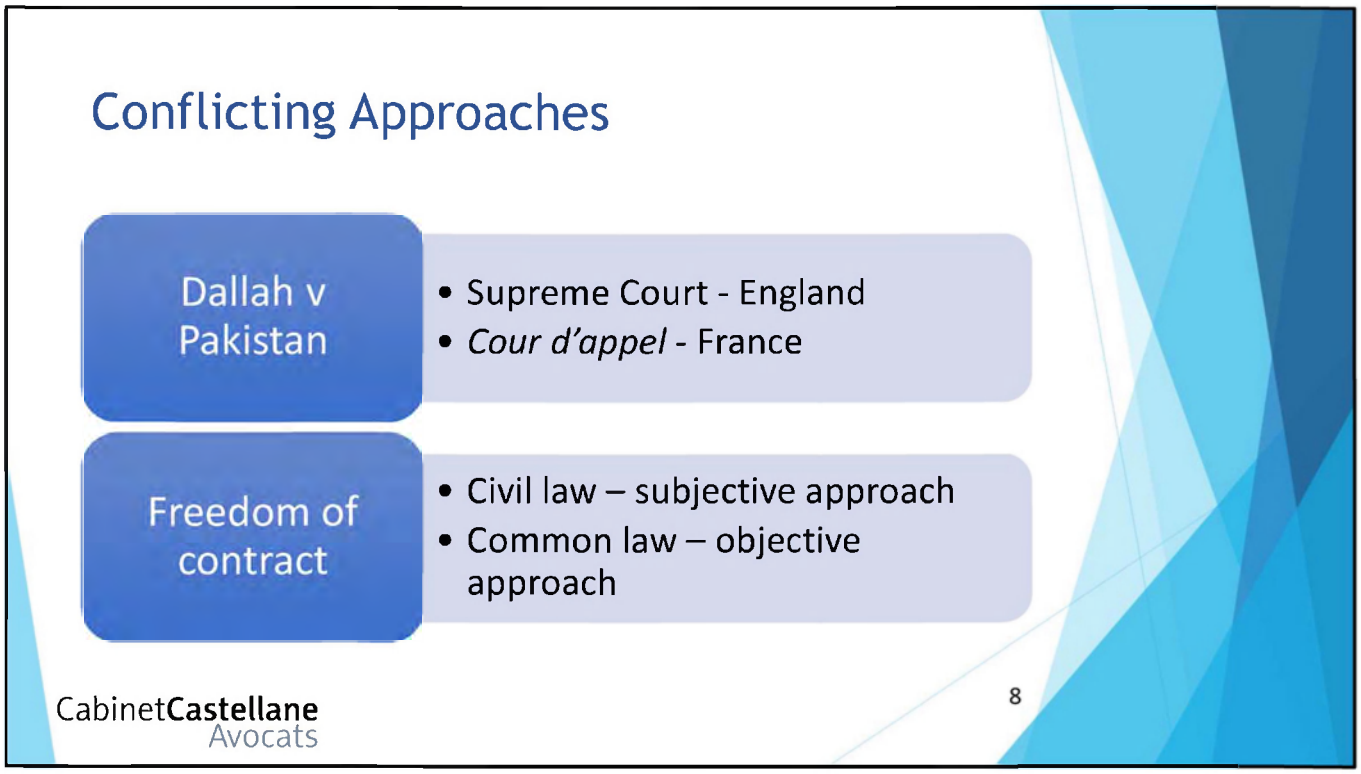
While both English and French law attach paramount importance to freedom of contract,

as enshrined in Article 1102 of the French Civil Code and recently elevated to constitutional status by a decision of the French Constitutional Council (*Conseil constitutionnel*)*, they appear to assign it different weights in function of the value attached to either commercial certainty or contractual fairness and morality. Indeed, the underlying aim of the common law conception of good faith is to give effect to the parties' intentions by supporting their bargain, and not to restrict their freedom of contract in the interests of broader public policy**. English law for example recognises and will enforce a contractual duty of good faith, particularly when embodied in express terms of the contract and necessary to give business efficacy. Certain categories of contracts also exist (namely, insurance contracts) for which a duty of good faith is implied, and such a duty will only be implied into other types of contract when that contract would lack commercial or practical coherence without it. Otherwise, if the parties want to impose a duty of good faith, they must do so expressly***.

* « la liberté contractuelle découle de l'article 4 de la Déclaration » (Cons. const., 19 déc. 2000, n° 2000-437 DC, D. 2001, p. 1766, obs. D. Ribes ; RDSS 2001, p. 89, obs. P.-Y. Verkindt ; RTD civ. 2001, p. 229, obs. N. Molfessis and « il est loisible au législateur d'apporter à la liberté d'entreprendre et à la liberté contractuelle qui découlent de l'article 4 de la DDH des limitations liées à des exigences constitutionnelles ou justifiées par l'intérêt général, à condition qu'il n'en résulte pas d'atteinte disproportionnées au regard de l'objectif poursuivi » (Cons. Const., 13 juin 2013, JCP 2013, éd. G, 929, note J. Ghesthin; JCP 2013, éd. G, 974, n° 1, obs. M. Mekki; RDC 2013, p. 1285, obs. C. Pérès; RTD. civ. 2013, p. 832, obs. H. Barbier

** https://www.judiciary.gov.uk/wp-content/uploads/2016/10/mr-justice-leggatt-lecture-contractual-duties-of-faith.pdf

*** *Mid Essex Hospital Services NHS Trust v Compass Group UK (Medirest)* [2013]



From this perspective, the **Dallah v. Pakistan case** illustrates starkly the difference between French and English legal cultures in the application of good faith*. Dallah (a Saudi Arabian company which provided pilgrimage services) signed a memorandum of understanding regarding a construction project with the government of Pakistan. The contract was, however, eventually concluded between Dallah and the Awami Hajj Trust (AHT), a government-controlled entity. The contract provided for an ICC arbitration in Paris for all disputes. The Pakistani government was not a signatory to the contract but was referred to in the contract (e.g. the AHT could assign some of its rights and obligations to the government). When the AHT ceased to exist as a legal entity and the housing construction project never saw the light of day, Dallah subsequently commenced ICC proceedings in Paris against the government of Pakistan on the basis of the ICC arbitration clause.

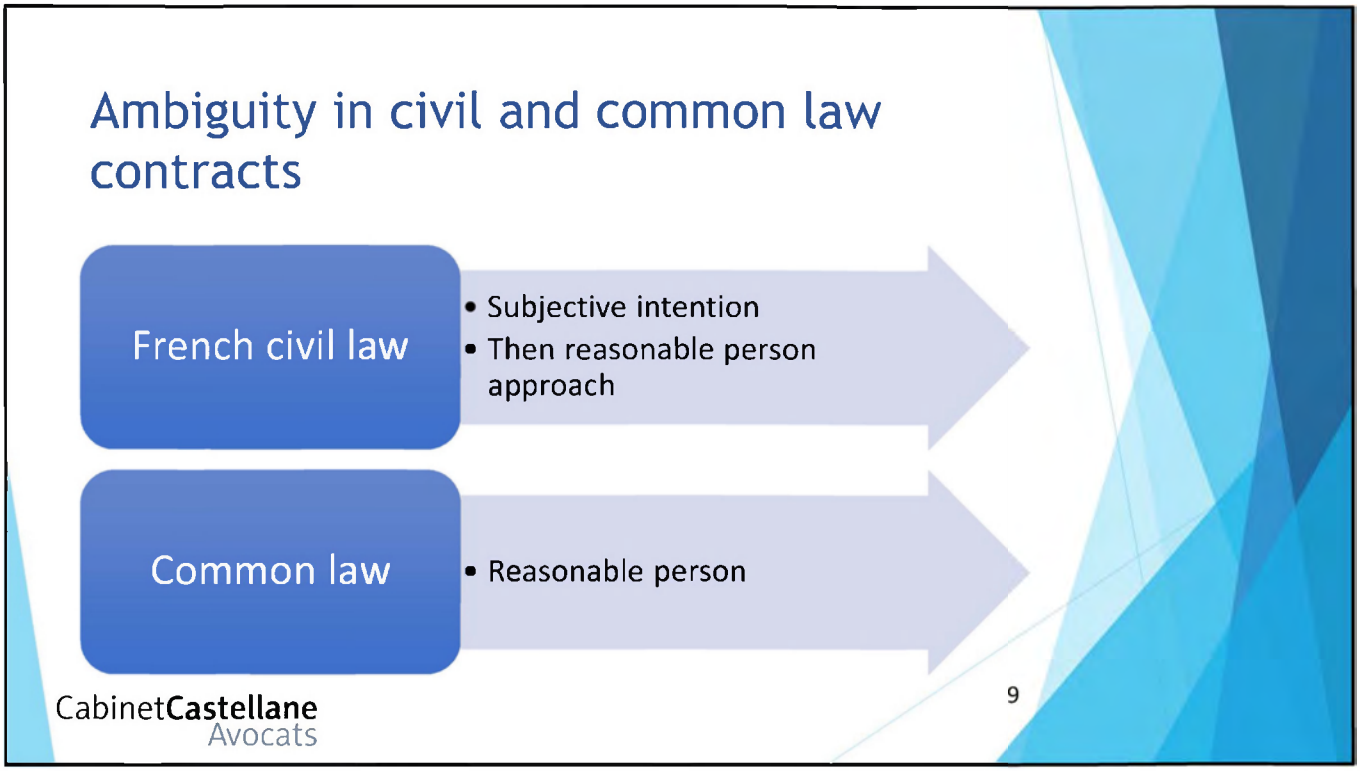
The arbitral tribunal ordered the Pakistani government to pay approximately US$20.5

million to Dallah, who then sought enforcement of the award in England. In trying to enforce the awards in the UK, the Supreme Court in applying the same French legal test of good faith, analysed the common intention of the Parties but from an English perspective. The Supreme Court concluded that the there was no evidence that the Pakistani government was a party to the arbitration agreement and refused to enforce the awards, taking the opposite view therefore from French arbitrators. Pakistan then sought to set aside the awards in Paris. In a decision of 17 February 2011, the Paris *Cour d'appel* (Paris Appeal Court) rejected the application brought by Pakistan, holding that the arbitral tribunal was correct in finding that the government was bound by the arbitration agreement and that it had jurisdiction over the government as the Pakistani government had been involved in pre-contractual negotiations and had acted as a party. This case exemplifies the different approaches of the civil law and common law systems. The case illustrates that whilst English courts are much more concerned with upholding the bargain struck by the parties to the letter, French courts tend to adopt a more holistic approach in the interests of justice.

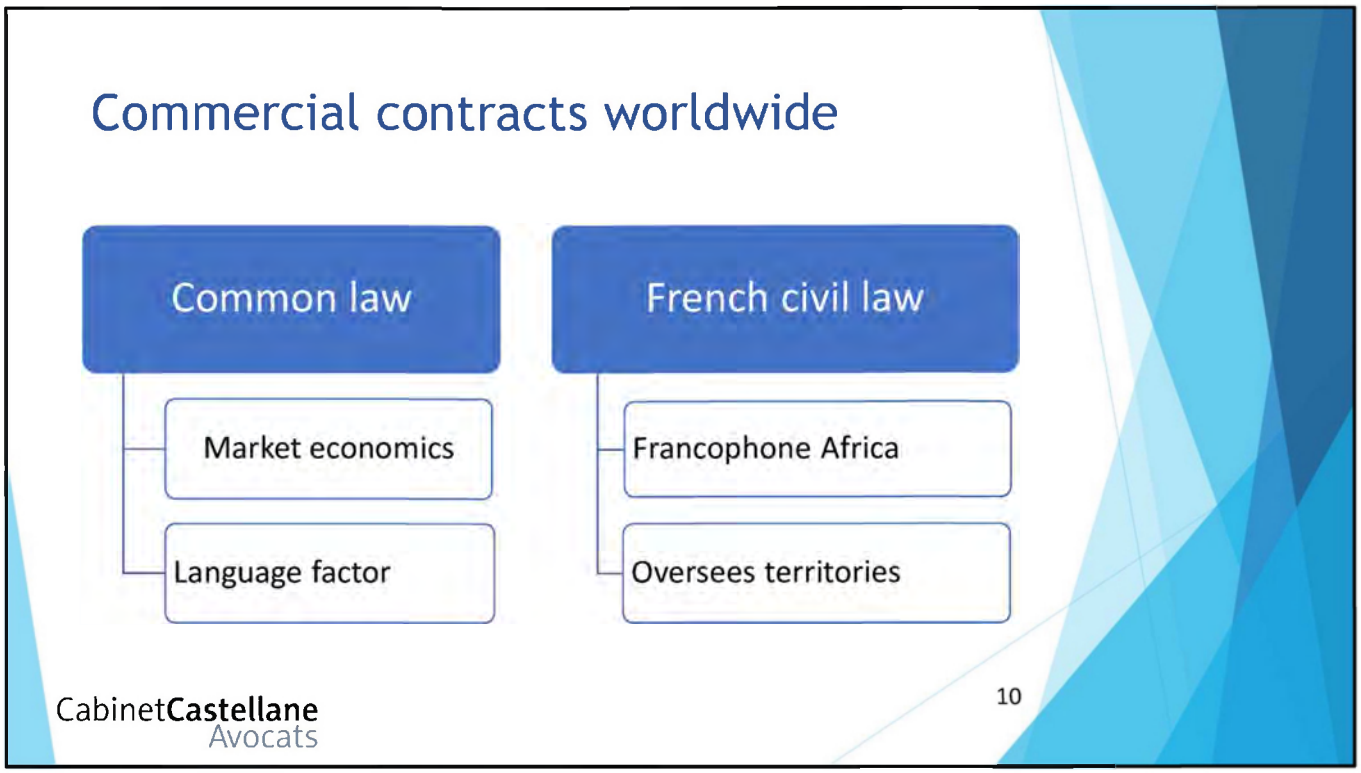
As illustrated by the Dallah case, English law, in which the notion of freedom of contract is central, considers pre-contractual negotiations, declarations of subjective intention and subsequent conduct of contractual parties inadmissible as an aid to the interpretation of the written contract with many contracts containing an express contractual provision to that effect. It is considered to be inconsistent with the intention of the parties, ascertained objectively, in reaching a bargain and choosing to record that bargain in writing for the courts to nevertheless resort to the prior history of exchanges and negotiations in order to deduce the meaning of that recorded bargain. Whereas in English law an objective agreement suffices, for a contract to exist in French law there must be a subjective agreement as to its terms**.

* GRIERSON, J., & TAOK, M. (2011). Dallah: Conflicting Judgments from the U. K. Supreme Court and the Paris Cour d'Appel. *Journal of International Arbitration.* 28, 418.

** DE MOOR, A. (1986). Contract and Agreement in English and French Law. Oxford Journal of Legal Studies. 6, 279.



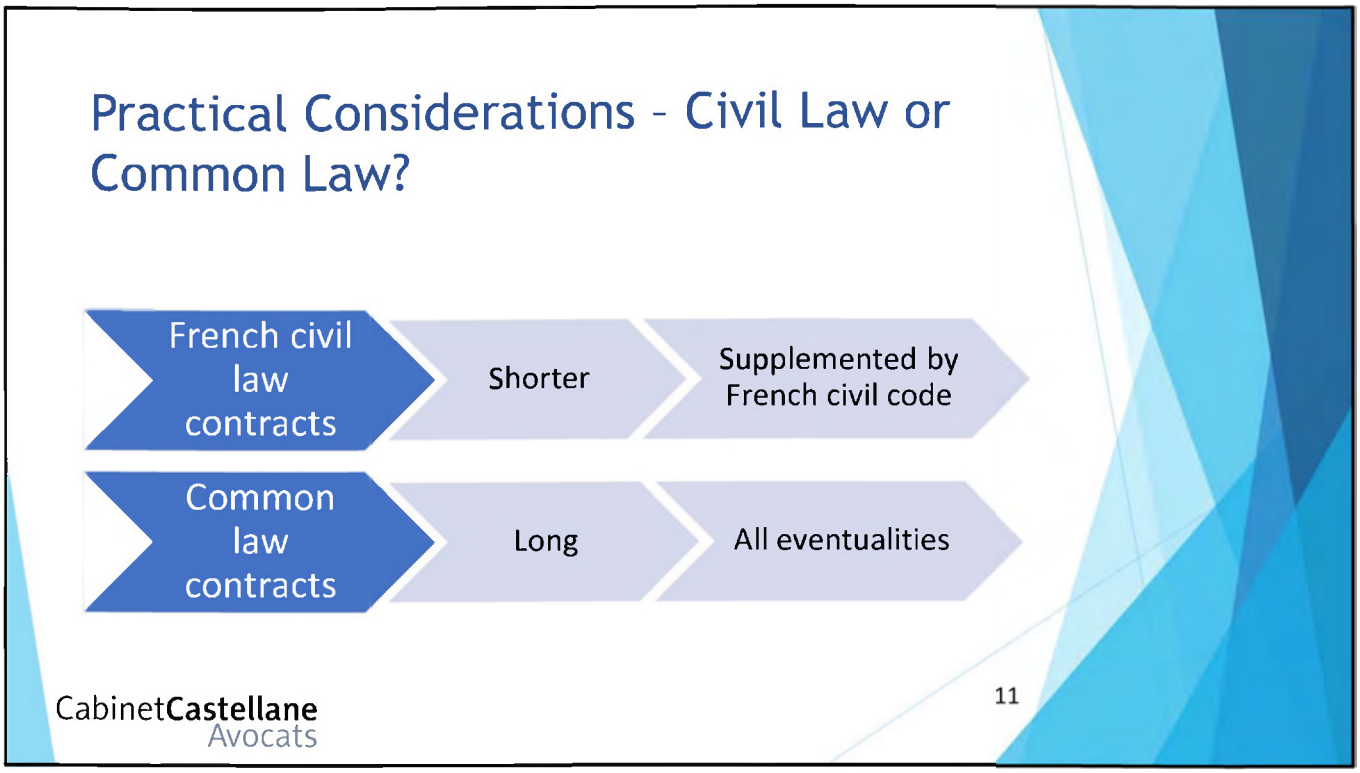
Historically, French law has stipulated that a court interpreting an ambiguous contractual provision must determine the parties' actual subjective intention rather than simply construe the simple words of the contract objectively. Pursuant to the new Article 1188, if the common intention of the parties cannot be determined, the contract is to be interpreted according to the interpretation of a reasonable person in the parties' shoes. This has been contrasted with the common law principle of interpreting ambiguous provisions only in the manner a "reasonable person" would understand them.



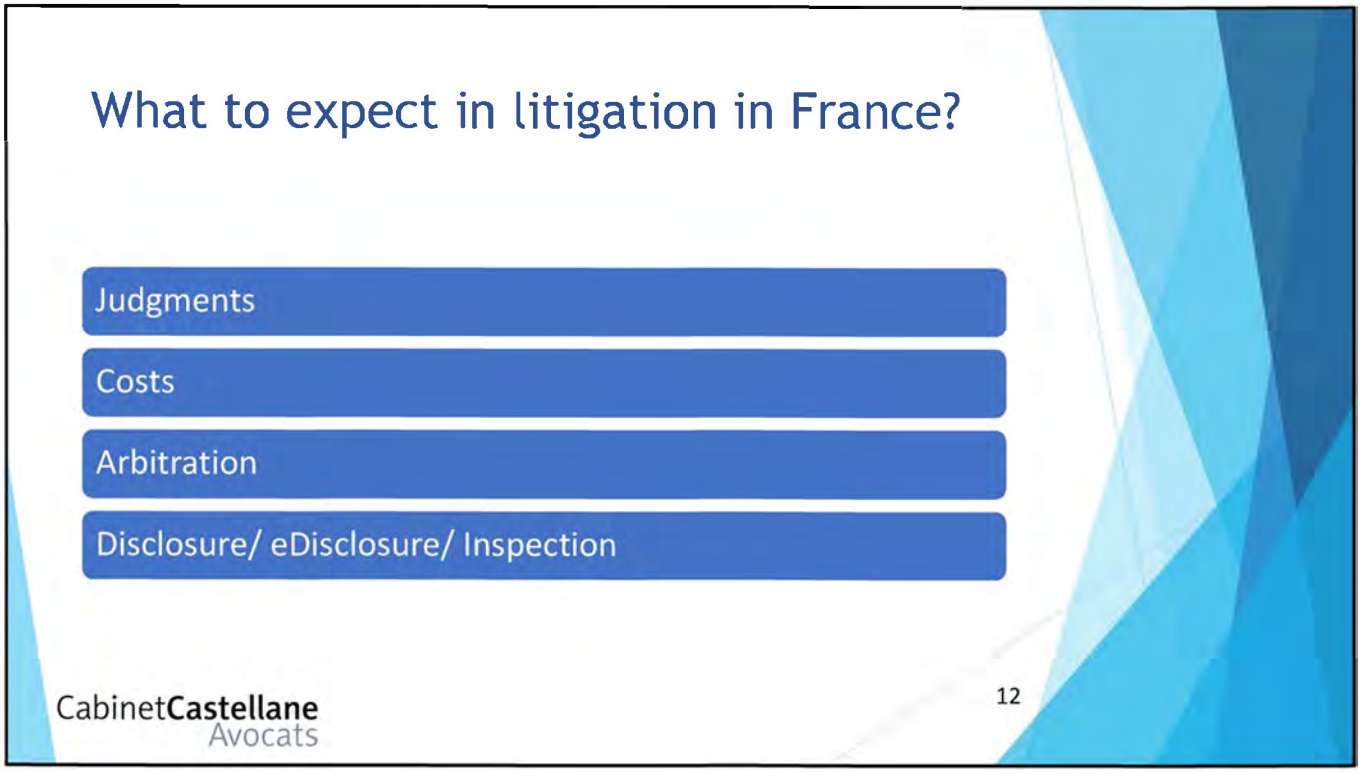
In reality, it seems that the dominance of common law in commercial contracts can probably be explained by other extrinsic, sociological factors: the liberalism of the American/English economy, the popularity of the English language worldwide and the success of global common law firms*. Nevertheless, the global use of French contracts is often underestimated. Indeed, in some French speaking African nations, market factors, an increase in political stability, and the extent to which international business becomes more accessible have favoured an increasing trend of using French contracts. Furthermore, French law serves as the basis of much of francophone Africa's contract law. Culturally, in francophone Africa where access to legal materials may be limited, many companies and indeed practitioners prefer French civil law which is seen to be simple, codified and easy to access. Moreover, French overseas territories are also subject to French law including Guadeloupe, Guyana, Martinique, French Polynesia, La Reunion, Saint Martin, Saint Barthelemy, Mayotte and New Caledonia and thus contracts

concluded in such locations tend to also be based on French law.

*FAUVARQUE-COSSON B., & KERHUEL A.-J. (2009). Is law an economic contest? French reactions to the Doing Business world bank reports and economic analysis of the law. *American Journal of Comparative Law*. 57, 822.



Owing to the extensive codification of contract law provisions in France, contracts tend to be significantly shorter than their common law counterparts as standardised solutions and definitions can be readily incorporated into contracts from codified provisions. In minimising the transactional costs of contracting, French law can thus be considered more economically efficient when compared to common law regimes where contracts are, in comparison, long and all-encompassing. The French civil code is optimised to remedy contractual gaps rather than exploit them as common law does.

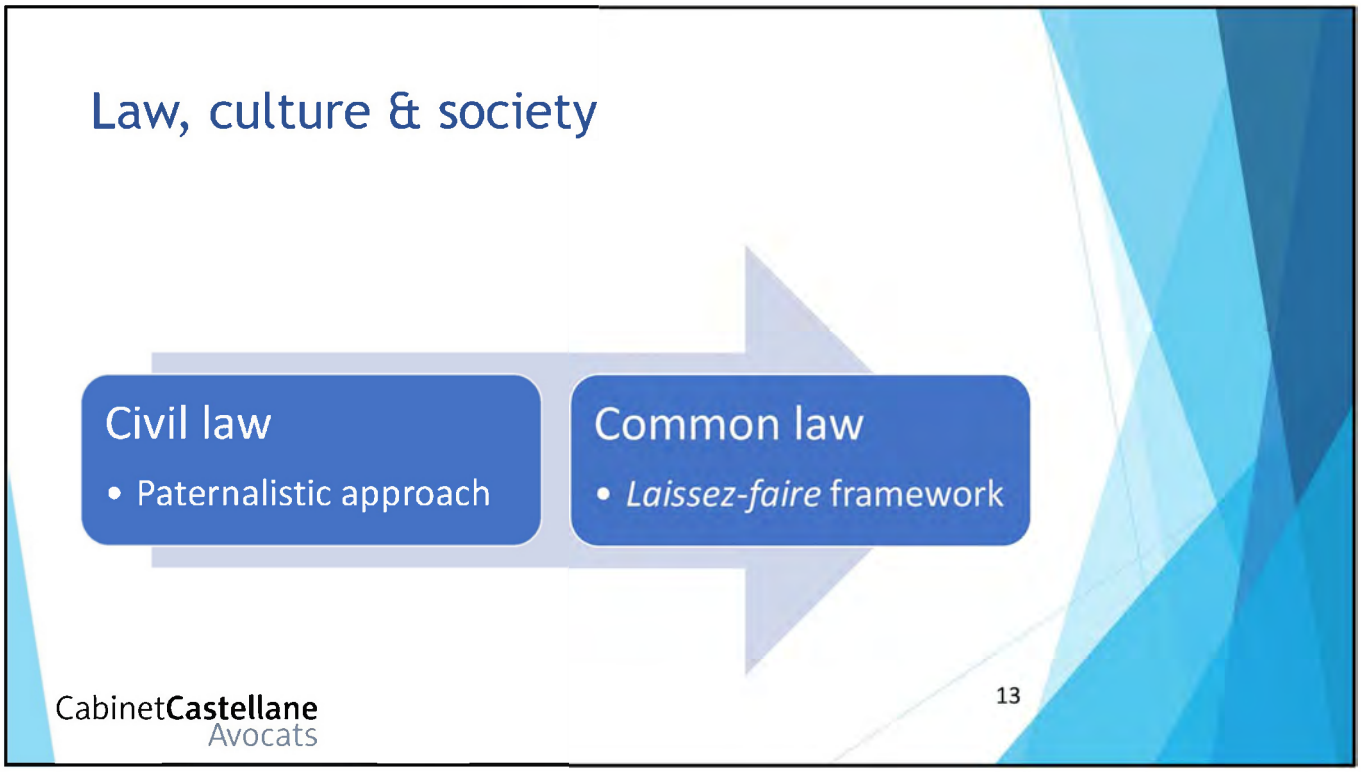


From a procedural perspective, France has specific commercial courts and court fees are non-existent – indeed it is free to issue a case albeit the court has powers to award punitive costs against the losing party pursuant to Article 700 (although such fees tend to be relatively low). There are no cost budgeting requirements and overall, French litigation is often significantly cheaper than its common law counterparts. Indeed, the French courts place great emphasis on accessible and reasonably priced lawyers. The French justice system also places great emphasis on cases being resolved as speedily as possible and cases typically take a year to conclude at first instance. Arbitration in France is incredibly popular. According to the official ICC figures, 966 new cases administered by the Court were filed in 2016 – involving 3,099 parties from 137 countries – with Paris being the most popular seat.

Turning to the disclosure phase of proceedings, whether in arbitration or litigation, France does not routinely see disclosure orders made in the same terms as common law

jurisdictions. The duty for disclosure/ e-disclosure/ inspection as enshrined in some common law jurisdictions does not therefore exist in the same stringent fashion and is not a regular feature of commercial litigation. Indeed, disclosure in France is more of a voluntary process rather than a mandatory one and parties rarely exchange documents which are unhelpful to their case. Moving on to the examination of witnesses and experts, again there is a significant difference in the approach. French courts favour an inquisitorial judge-led manner of questioning in comparison with the adversarial cross-examination routinely used in many common law jurisdictions such as the US.

The French justice system finally places great emphasis on cases being resolved as speedily as possible and cases typically take a year to conclude at first instance. Once a judgment is handed down to the parties to the dispute, the onus is on the winning party to notify the decision "*signification*" by *huissier* to its adversary.



Civil and common law systems reflect the countries in which they are found. Yet, not only is English the primary language of international contractual disputes worldwide, common law is also the preferred choice of law. In civil law jurisdictions, the law tells individuals what they can and cannot do, while in common law areas, the law provides a framework for restraint, where the freedoms of an individual exist until the breach of the law. However, in civil law systems, because it is understood and desired that the government take steps for the presumed benefit of all society, individuals are subject to legal codes. The result is another layer of distinction between both legal systems, where the paternalism of civil law further contrasts with common law's system of individualism. These patterns occur even in international contracts.

When drafting a contract, the French civil codes provide a starting point complete with all permissions and limitations for the parties involved. However, with an English contract, anything is possible under an agreement, until a point when the law proves

itself an obstacle. Though the results may be the same, the thought process that guides each is unique to the culture and this must be borne in mind particularly, when negotiating deals involving the two cultures.

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