Enforced performance of commercial sales contracts in the Netherlands, Singapore and China

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2 Historical and contemporary fundaments of sales law

2.1 Introduction

22. Parties to a commercial sales contract are subject to various obligations, which may follow from contractual stipulations and the law governing the contract. An assessment of these legal sources is, however, not a straightforward undertaking when comparing legal systems rooted in the civil and common law traditions. This is because these major legal systems are structured in a completely different way. When determining the obligations of the parties to a commercial sales contract governed by a contract law based on the civil law tradition, such as the Dutch or Chinese contract law, it is necessary to assess the general contract law principles and the law on sales contracts in a comprehensive way. This is because the obligations of the parties and the consequences of a failure in performance can found in the sales law provisions, but also in the general contract law. The contract law of Singapore is based on the common law tradition and, therefore, is structured in a different way in the sense that the obligations of the parties to a commercial sales contract are fitted in the Sale of Goods Act. Nonetheless, as Singapore is a common law jurisdiction, it is also necessary to take into account the general contract law principles in order to understand the precise nature and availability of the obligations laid down in the Sale of Goods Act. In view of the above, the present section delves into the historical development of the general contract law principles and sales law provisions adopted by the three subject jurisdictions. The central focal point is to provide a discussion of the development of the historical legal infrastructure on which the current principles underlying the availability of enforced performance are built. The 'high-level' aim of this brief undertaking is to enhance the understanding of the theories and the different legal approaches analysed in the following chapters.

2.2 Civil Code in the Netherlands

23. In the area of commercial sales law, there are in the statutory legal history of the Netherlands a number of important milestones. Three of them are discussed in the section below. These milestones concern the introduction of the Dutch Civil Code in 1838, the enactment of the recodified Dutch Civil Code in 1992 and, in the same year, the adoption of the CISG. To begin with the first milestone, at the end of the 18th century, the preparation

of the first centralised Dutch legal code aimed to replace the then existing variety of local laws, which had been based on Roman law and indigenous law.[80] A few years later, the efforts to codify and centralise regional law resulted in the promulgation of the Legal Code Napoleon (1809).[81] Somewhat later, the Kingdom of the Netherlands became part of the French empire and, as a result, the Legal Code Napoleon was replaced by the French Code Civil Napoleon and the French Code de Commerce.[82] In 1813, sovereignty was restored in the Netherlands and efforts were made to bring about a codification of Dutch law. Consequently, the French Code Civil Napoleon and the French Code de Commerce were both succeeded by the Dutch Civil Code and the Dutch Commercial Code (at least for the greater part of the Kingdom of the Netherlands) in 1838.[83] Although the names of these legal codes might suggest otherwise, the French Code Civil Napoleon was a major source of inspiration for the drafters of both legal codes.[84] Aside from some modifications due to changing social relations,[85] the Dutch Civil Code 1838 remained in force until, in 1992, recodified statutes were enacted.[86] This turning point can be traced back to a programme of revision that had begun as early as 1947.[87] The Dutch Civil Code of 1992 (hereinafter the Dutch Civil Code) shows many similarities with the forerunners of the CISG (*i.e.* the

80 The year 1798; Janwillem Oosterhuis, *Specific Performance in German, French and Dutch Law in the Nineteenth Century: remedies in an age of fundamental rights and industrialisation* (Brill Academic Publishers 2011) 198; YMI Greuter-Vreeburg and MJEG van Gessel-de Roo (eds), *Verbintenissenrecht, 1798–1814* (Werken der Stichting tot uitgaaf der bronnen van het oud-vaderlandse recht no 2002) pp XI–XIII; TJH Veen, *En voor berisping is hier ruime stof: over codificatie van het burgerlijk recht, legistische rechtsbeschouwing en herziening van het Nederlandse privaatrecht in de 19de en de 20ste eeuw* (Cabeljauwpers 2001) 7, 9; EOHP Florijn, 'Ontstaan en ontwikkeling van het nieuwe Burgerlijk Wetboek' (Dphil thesis, Universitaire Pers Maastricht 1994) 9; Arthur S Hartkamp, Marianne MM Tillema and Annemarie EB ter Heide, 'Contract Law in the Netherlands' (Kluwer Law International 2011) para 21; P Scholten, *Mr. C. Assers Handleiding tot de beoefening van het Nederlands Burgerlijk Recht. Algemeen Deel* (W.E.J. Tjeenk Willink 1974) Ch III, para 2.

81 The year 1809; Oosterhuis 2011 (n 80) 204; 15 februari 1808 in Greuter-Vreeburg 2002 (n 80) 162–163; 30 mei 1808 in Greuter-Vreeburg 2002 (n 80) 165–166.

82 The year 1811; Scholten, *Asser Algemeen deel* 1974* (n 80) Ch III, para 3; Oosterhuis 2011 (n 80) 208; E Holthöfer, 'Niederlande' in H Coing, *Handbuch der Quellen und Literatur der neueren europäischen Privatrechtsgeschichte* 3: Das 19 Jahrhundert 1: Gesetzgebung zum allgemeinen Privatrecht (C.H. Beck Verlag 1982) 1200–1202; Veen 2001 (n 80) 12.

83 Also called Burgerlijk Wetboek and Wetboek van Koophandel respectively; The Dutch Civil Code 1938 was promulgated in 1842 in the province of Limburg. See Oosterhuis 2011 (n 80) 216; Holthöfer 1982 (n 82) 12–13; Scholten, *Asser Algemeen deel* 1974* (n 80) Ch III, para 4.

84 Scholten, *Asser Algemeen deel* 1974* (n 80) Ch III, para 4; LC Hofmann and SN van Opstall, *Het Nederlands verbintenissenrecht: De algemene leer van de verbintenissen: Eerste gedeelte* (9th edn, Tjeenk Willink 1976) 1, 3.

85 Scholten, *Asser Algemeen deel* 1974* (n 80) Ch III.

86 Hartkamp 2011 (n 80) para 20.

87 Hartkamp 2011 (n 80) para 22.

ULFC and ULIS),[88] and enhances a layered structure of statutes. Consequently, the general overarching principles are first set out in the Dutch Civil Code and more specific principles follow in the subsequent parts. The present research is focussed on statutory provisions as laid down in Book 3 (Patrimonial Law in General), Book 6 (Law of Obligations) and Book 7 (Specific Contracts) of the Dutch Civil Code.

The principles mentioned above apply to contracts between Dutch parties, if the parties to a contract have explicitly chosen Dutch law (on the condition that the subject matter allows a choice of law) and if the principles of domestic private international law appoint Dutch law as the legal principles governing the contract. However, a sale of goods between a Dutch company and a party whose place of business is not in the Netherlands is governed by the principles of the CISG if the latter has its place of business in a member state or when the rules of private international law lead to the application of the law of a member state.[89] These principles are to be disregarded if the contracting parties have opted-out of the CISG by contract. In contrast to Singapore and China, the Netherlands has made no exception for the application of the CISG if one of the parties to the agreement is from a non-member state.[90] This means that the CISG also applies if only one of the contracting parties has its place of business in a member state and the private international law of the court adjudicating the dispute (the forum) calls for the application of the Convention.[91]

24. The Dutch Civil Code stipulates that obligations can only arise on the basis of the law.[92] This does not mean that every obligation has to be based on a statutory provision; it merely requires that an obligation must fit within the framework of the law.[93] Although this statutory framework is the starting point, judge-made law (*i.e.* legal precedents), viewpoints of scholars, considerations of relevant trade treaties) also play an important role in interpretation of contested and unclear statute(s) and filling any gaps through, for example, the doctrine of reasonableness and fairness.[94] In this respect, it may be noted that in the

88 Kruisinga 2009 (n 19); Convention relating to a Uniform Law on the Formation of Contracts for the International Sale of Goods (The Hague, 1964); Convention relating to a Uniform Law on the International Sale of Goods (The Hague, July 1, 1964).

89 Art 1(1)(a)(b) CISG.

90 Art 1(1)(b) CISG.

91 Ingeborg H Schwenzer (ed), *Commentary on the UN Convention on the International Sale of Goods (CISG)* (4th edn, Oxford University Press 2016) 39.

92 Art 6:1 DCC.

93 Dutch Parliamentary History Book 6 (Kluwer 1981) 42.

94 Hartkamp 2011 (n 80) paras 4, 5; C *Asser* and JBM Vranken, *Mr. C. Assers handleiding tot de beoefening van het Nederlands burgerlijk recht: Algemeen deel 2.* (W.E.J. Tjeenk Willink 1995) paras 83, 106, 116; 169 *ff*; Scholten, *Asser Algemeen deel* 1974* (n 80) Ch I para 1, and Ch III paras 19–28; The doctrine of reasonableness and fairness entails the requirement to act in accordance with reasonable standards of fair dealing, *i.e.*, to act in good faith and fair dealing. It must be noted that the concept of reasonableness and fairness marks a fundamental difference between the civil and common law tradition. Whereas the Dutch contract law employs a broad general standard of reasonableness and fairness, the English common law

past, the hierarchical status and usage of these instruments by the courts could not be determined by empirical research because legal precedents and academic works, which were taken into consideration by the court during deliberation, were generally not cited in the written ruling.[95] However, in recent decades, the Dutch Supreme Court began citing principles from earlier case law in its judgements.[96] A court can even provide a comprehensive overview of applicable judicial precedents in its ruling in order to prevent any misunderstanding of its decision.[97] There is, however, no formal rule of precedent under Dutch law. Nonetheless, it appears that the courts are bound by an informal restricted *stare decisis* principle in the vertical and horizontal sense when this is required in view of legal equality and legal certainty.[98] This means in effect that a court is bound by previous decisions, unless developments in society, the specific circumstances of the given case or unexpected consequences justify a deviation from decided cases.[99] Aside from the concordance of jurisprudence, vague principles such as the standards of reasonableness and fairness[100] may compel a court to take the applicable parliamentary history and the opinion of academic scholars into consideration if the rules laid down in the Dutch Civil Code do not provide adequate guidance for the specific circumstance of the case presented to the court.[101] See in this regard Figure 1 for an illustration of the influence of international and European contract law principles on Dutch contract law.

2.3 English common law roots in Singapore

25. In the statutory legal history of Singapore, there are also three major milestones for determining the basic framework of the written laws governing commercial sales contracts, namely the promulgation of the Second Charter of Justice in 1826, the passing of the

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has taken the approach that the standard of reasonableness and fairness plays a role in identifying specific duties on a case-by-case basis. See for a detailed discussions John Cartwright, 'Redelijkheid en billijkheid: a view from English law', <https://openaccess.leidenuniv.nl/bitstream/handle/1887/42938/02-Cartwright_bwkj_30.pdf?sequence=1> accessed on 19 February 2019.

95 Vranken, *Asser Algemeen deel** 1995* (n 94) 169.

96 *Stierkalf arrest* Dutch Supreme Court 7 March 1980, ECLI:NL:PHR:1980:AB7443, NJ 1980, 353.

97 *Gerritse v Ontvanger* Dutch Supreme Court 12 May 1989 para 3.1, ECLI:NL:HR:2000:AA5863, NJ 1990, 130; *Staat v Shell* Dutch Supreme Court 30 September 1994, ECLI:NL:HR:1994:ZC1460, RvdW 1994, 18; Vranken, *Asser Algemeen deel** 1995* (n 94) 170.

98 This approach stands in stark constract with the English common law system, because the latter entails the rule that lower courts are obliged to follow the decisions of superior courts; See for the principle of *stare decisis* in a horizontal sense, OA Haazen, 'Precedent in the Netherlands' (2019) 11(1) Electronic Journal Of Comparative Law <http://www.ejcl.org/111/article111-12.pdf> accessed on 2 March 2019.

99 Vranken, *Asser Algemeen deel** 1995* (n 94) 189; Hartkamp 2011 (n 80) para 4; Haazen 2019 (n 98).

100 Art 6:162(2) DCC.

101 Vranken, *Asser Algemeen deel** 1995* (n 94) 172.

Application of the English Law in 1993,[102] and the adoption of the CISG by Singapore in 1996. The present section starts with the reasons behind the application of Western legal principles in Singapore and the role of England and the Netherlands in this regard. The political history of Singapore goes back to 1795 and is inseparably linked with the so-called Malay Peninsula.[103] Between 1795 and 1818, England and the Netherlands competed aggressively in this part of the world since the region was of great commercial interest to both countries.[104] In 1818, the British lost Malacca (a trading post in Malay) to the Netherlands, making England realise that it needed an alternative in the region to secure its trading interests.[105] On 28 January 1819, the Englishman Stamford Raffles arrived in Singapore to establish a trading post by concluding a treaty with the Sultan of Johore.[106] The Netherlands regarded this action as an infringement of their own alleged treaty with the representative of the Sultan of Johore in Singapore and negotiations over several years were, therefore, necessary before the Netherlands formally recognised England as the 'established power' in Singapore.[107] In return, England recognised the rights of the Netherlands in the rest of southeast Asia.[108] These acknowledgements on both sides were laid down in the Anglo-Dutch Treaty of London of 1824.[109]

Reverting to the 1819 arrival of Stamford Raffles in Singapore, an old English common law rule prescribed that if an uninhabited country is discovered by an Englishman, the English common law in being at that time is immediately there in force.[110] The English Second Charter of Justice of 1826 embodied this principle by formally introducing English common law in Singapore.[111] This was also the starting point for many difficulties in the

102 Statutes of the Republic of Singapore, Application of English Law Act (Cap 7A Rev Ed 1994).

103 The Malay Peninsula lies between the Andaman Sea of the Indian Ocean and the Strait of Malacca on the west and the Gulf of Thailand and the South China Sea on the east. It stretches south for c.700 mi (1,100 km) from the Isthmus of Kra, where it is narrowest, to Singapore. The northern part of the peninsula forms a part of Thailand; the southern part constitutes West Malaysia, the Malayan part of Malaysia. The peninsula forms a physical and cultural link between the mainland of Asia and the islands of Indonesia. Malay Peninsula; *The Columbia Encyclopedia* (Columbia University Press, 2015).

104 Anthony Webster, *The Richest East India Merchant: The life and business of John Palmer of Calcutta 1767–1836* (The Boydell Press 2007) 97.

105 Webster 2007 (n 104) 97.

106 Webster 2007 (n 104) 102; Shenoy and Loo 2013 (n 13) para 2.6.

107 Webster 2007 (n 104) 102; Shenoy and Loo 2013 (n 13) para 2.7.

108 Webster 2007 (n 104) 103.

109 Webster 2007 (n 104) 102, 103.

110 *AG of Bengal v Ranee Surnomoye Dossee* [1863] 15 E.R. 811 at 824.

111 Statutes of the Republic of Singapore, Application of English Law Act (Cap 7A Rev Ed 1994); In *Regina v Willans* [1858] 3 Ky 16 at 37 it was held that 'a direction in an English Charter to decide according to justice and right, without expressly stating by what known body of law they shall be dispensed and so to decide in a country which has not already an established body of law, is plainly a direction to decide according to the law of England'. Therefore, as a result of the Second Charter of Justice, Singapore received a court system on the prevailing English model; Helena HM Chan, *The Legal System of Singapore* (Butterworths Asia 1995) 4.

area of contract law. For example, it was not clear to what extent English commercial law was adopted in Singapore and whether the concepts of severability and suitability applied.[112]

In 1942, the development of a Singapore law system was put on hold by the Japanese occupation of Singapore, which lasted until the end of the Second World War.[113] After 1945, Singapore became a British Crown Colony. Nonetheless, the end of the war was also the beginning of the quest of Singapore for self-government, which in 1959 eventually led to a fully elected legislative assembly and a new state constitution.[114] However, this step did not result in an independent domestic administration. In order to achieve independence from England and for economic reasons, Singapore and Malaysia merged in 1963.[115] For various reasons, this merger only lasted until 1965,[116] when the current Republic of Singapore was established, and the development of an autochthonous legal system started.[117] An important aspect in this regard is the introduction of the so-called 'cut-off date', which means that from 1993 onwards the common law of England (including principles and rules of equity) remain a part of the law of Singapore, and shall continue to be in force, so far as they are applicable to the circumstances of Singapore and its inhabitants and subject to such modifications as those circumstances may require.[118] The introduction of the 'cut-off date' is the starting point of the development of an autochthonous Singapore legal system which is said to have resulted in an independent legal framework appropriate to

112 This uncertainty derives from the unclear wording of s 5 of the Civil Law Act (Cap 43, 1988 Rev Ed) which is believed to be the foundation of Singaporean commercial law. See for a detailed discussion of this topic Goh Yihan and Tan Paul, 'An Empirical study on the development of Singapore Law' (2011) 28 Singapore Academy of Law Journal 176, 184; Goh Yihan, Pearlie Koh, Lee Pey Woan, Andrew Phang Boon Leong and Tham Chee Ho, *The Law of Contract in Singapore* (Andrew Phang Boon Leong (ed) Academy Publishing 2012) paras 02.022–02.040; Andrew Phang Boon Leong, *From Foundation to Legacy: The Second Charter of Justice* (Singapore Academy of Law 2006) 27–35.

113 Shenoy and Loo 2013 (n 13) para 2.15.

114 Shenoy and Loo 2013 (n 13) para 2.20.

115 Shenoy and Loo 2013 (n 13) paras 2.22–2.25.

116 See for a detailed discussion Andrew Phang Boon Leong, *The Development of Singapore Law Historical and Socio-Legal Perspectives* (Butterworths 1990).

117 Shenoy and Loo 2013 (n 13) paras 2.26–2.35.

118 Statutes of the Republic of Singapore, Application of English Law Act (Cap 7A Rev Ed 1994), s 3 (1) (2) (hereinafter AELA 1993). The AELA 1993 clarified the application of English law in Singapore. For sales contracts this meant that the UK Sale of Goods Act (which was first adopted in 1993 and modified in 1979) continued to be a part of the law of Singapore in the form of the Sale of Goods Act (Cap 393, 1994 Rev Ed). Before the AELA 1993, the reception of English commercial law appears to derive from section 5, Civil Law Act (Cap 43, 1988 Rev Ed). Section 5 is repealed, but it should be noted that it was not clear as to whether the provision entailed the reception of the common law as well. See: Phang et al 2012 (n 112) Chapter 2; Phang 2006 (n 112) 27-35; Geoffrey Chevalier Cheshire, Micheal Philip Furmston, Cecil Herbert Stuart Fifoot, Andrew Phang Boon Leong, *Cheshire, Fifoot and Furmston's Law of Contract: Singapore and Malaysian Ed.* (Buttersworths Asia 1994) 6-16; Chan Sek Keong, 'A New Charter of Justice' in Goh Yihan, Paul Tan (eds), *Singapore Law, 50 Years in the Making*, Part A, Chapter 2.

Singapore's emphasis on international trade.[119] This proposition is reflected in the following viewpoint.[120]

> *The development of a uniquely Singaporean corpus of contract law continues apace. In addition, however, (…) broader factors and considerations are also important and it is very encouraging to note that the Singapore courts themselves are actively canvassing such issues which underscore, in turn, the integrated and holistic relationship between the universal and the particular, between theory and practice.*

26. Domestic sales transactions in Singapore are governed by the Sale of Goods Act and the principles of common law.[121] The Sale of Goods Act was amended in 1996 and 2014, which led to the adoption of the requirement (implied at law) that goods supplied under a sales contract be of satisfactory quality.[122] Further, a buyer of unascertained bulk goods (*i.e.* not properly defined goods), who has paid the purchase price, became at law entitled to acquire an undivided share in the bulk.[123] Lastly, a distinction was made between the right of a consumer buyer and a non-consumer buyer to reject goods which are delivered by the seller.[124] Aside from the Sale of Goods Act, the Singapore common law of contracts is of paramount importance for the present research because it provides insights into the essential fundaments of enforceable (sale) contracts, such as the interpretation of contractual terms and the default remedial scheme for contracts.[125]

27. Turning to international sales, in contrast to the UK, Singapore has adopted the CISG for the non-domestic sale of goods.[126] The general rule is that the CISG applies to agreements between parties whose places of business are in the territory of states which are a member of the CISG, or when the rules of private international law lead to the application of the law of a member state.[127] In the view of Singapore scholars, this could result in the unintended application of the CISG between a party from Singapore and a party from a

119 Phang et al 2012 (n 112) paras 02.075–02.079.
120 Andrew Phang Boon Leong, Contract Law (2003) *Singapore Academy of Law Annual Review of Singapore Cases* 4, 127.
121 SGA, s 62(2).
122 SGA, ss 14(2), (6); Sale of Goods (Amendment) Act 1996, s 3, 4.
123 SGA, s 20A; Sale of Goods (Amendment) Act 1996, 6–8.
124 SGA, s 30.
125 Steven Chong, Cavinder Bull SC (eds) and a team of expert contributors, *Law Relating to Specific Contracts in Singapore* (2nd edn, Sweet & Maxwell 2016) 1043.
126 Effective date: 1 March 1996; the CISG was implemented by the Sale of Goods (United Nations Convention) Act (Cap 283A, 2013 ED).
127 Art 1 (a)(b) CISG.

non-member state.[128] Therefore, Singapore declared that the CISG only applies between parties whose places of business are in member states.[129] It is further noted that (in contrast to Dutch and Chinese contract and sales law) the influence of international contract and sales law does not extend to national legal provisions for commercial sales contracts.

28. In addition, sources of legal principles mentioned above, case law and academic legal works, such as textbooks and academic journal articles, should also be considered when discussing the intricacies of the performance remedial scheme of Singapore.[130] With respect to case law, Singapore courts adhere to the common law tradition that legal precedents must be taken into account by the court when adjudicating a legal dispute.[131] In this respect, a Singapore court is bound by the *ratio decidendi* of a superior court if the facts of the case do not materially differ and it does not concern an *obiter dictum* of the court (a statement of the court which does not affect the final ruling).[132] In contrast to *obiter dicta,* the operative reason of decisions of the Singapore Court of Appeal (*ratio decidendi*) are binding on the Singapore High Court, the District Court and the Magistrate's Courts, unless the court can distinguish the material facts of the case from those in the prior case.[133] The Court of Appeal does not have to follow its own previous decisions because its task is to develop the law.[134] The operative reasons of judicial decisions from other common law jurisdictions are not binding on Singapore courts.[135]

2.4 A mixture of legal and cultural traditions in China

29. In the development of contract law principles of the People's Republic of China for commercial business transactions there are also three important milestones: the introduction

128 Chong et al 2016 (n 125) 1042.

129 Read art 95 CISG in conjunction with Sale of Goods (United Nations Convention) Act (Cap 283A, 2013 ED), s 3(2).

130 Wui Ling Cheah and Goh Yihan, 'An Empirical Study on the Singapore Courts of Appeal's Citation of Academic Works: Reflections on the Relationship between Singapore's Judiciary and Academia' (2017) 3 Singapore Academy of Law Journal <http://academypublishing.org.sg/Journals/Singapore-Academy-of-Law-Journal/e-First/ctl/eFirstPDFPage/mid/519/ArticleId/1090/Citation/eFirstPDF> accessed on 21 June 2017.

131 Shenoy and Loo 2013 (n 13) para 3.20.

132 Shenoy and Loo 2013 (n 13) paras 3.24, 3.42.

133 Cheah and Goh 2017 (n 130); <http://www.singaporelaw.sg/sglaw/laws-of-singapore/overview/chapter-1> accessed 14 June 2017.

134 *Ibid.*

135 *Ibid.*

of a set of special regulations for economic contracts in the 1980s,[136] the enactment of the PRC Contract Law principles, in 1999 and the accession of China to the CISG in 1986 (effective from 1 January 1988). The first steps towards a civil code for China were taken by the Qing Dynasty,[137] which aimed to introduce a civil code of China based on the German Civil Code (*Bürgerliches Gesetzbuch*).[138] It is argued that the proposed civil law structure was readily accepted because the ancient law of China already entailed a strong structured written code and moreover, the traditional Chinese mindset shared comparable principles with civil law traditions.[139] Nonetheless, it is held that the two prime reasons for the adoption of a German civil law framework in China, instead of the French Civil Code for example, is that young Chinese scholars conducted extensive research in Japan, which had already incorporated the German civil law structure into its existing law, and second, that Japanese legal experts supported the Qing legal reformers.[140] However, this civil code, the *Da Qing Min Lü Cao'an*, or Draft Civil Code of the Great Qing,[141] never came into force due to the fall of the Qing Dynasty in 1911.[142] The Chinese Republic assumed power and started in the same year with the second draft of the Civil Code of China, which was based on the framework of the first Japanese and German civil law inspired draft and introduced elements of the civil code of France, Italy and Switzerland.[143] Regarding western influences, the Civil Code of China did not deny the important role of

136 More particularly the later discussed General Principles of Civil Law of the People's Republic of China (1986); Lei Chen and Larry A DiMatteo, 'History of Chinese Contract Law' in DiMatteo and Chen 2017 (n 19) 5.

137 Lei Chen, 'The Historical Development of the Civil Law Tradition in China: A Private Law Perspective' (2010) 78 Tijdschrift voor Rechtsgeschiedenis, 159, 160–162; Lei Chen and Larry A DiMatteo, 'History of Chinese Contract Law' in DiMatteo and Chen 2017 (n 19) 4.

138 Chang Hanchu, *The Legal History of Contemporary China* (*Zhongguo Jindai Fazhishi*) (The Commercial Press 1973), 283; Yao Hui, 'The Modernization of Chinese Civil Law and the Contemporary Tasks', 3 Gansu Social Science (Gansu shehui kexue) (2008) 127; Zhang 2006 (n 41) 28, 29.

139 Chen 2010 (n 137) 475.

140 Consult He Qinhua, *Chinese Legal History* (3rd edn, Legal Press China 2002); W Jones, 'Some Questions Regarding the Significance of the General Provisions of Civil Law of the People's Republic of China' (1987) 28 Harvard International Law Journal 313; Wang Limin, 'The Reception of German Civil Law via Japan in Late Qing Period' (1997) 1 Law Science (faxue); Jianming Shen, 'The Remedy of Requiring Performance under the CISG and the Relevance of Domestic Rules [particulary in the context of China-related sales transactions]' (1996) *Arizona Journal of International & Comparative Law* 253–306 <https://www.cisg.law.pace.edu/cisg/biblio/shen1.html> accessed on 4 August 2017.

141 Zhang Jinfan, *On the Qing Civil Law* (Qingdai minfa zonglun) (Chinese University of Political Science and Law Press 1998) 249; D Reynolds, *China, 1898–1912: the Xinzheng Revolution and Japan* (Harvard University Press for the Council on East Asia Studies 1993).

142 M Schmiegelow and H Schmiegelow (eds), *Institutional Competition between Common Law and Civil Law, Theory and Policy* (Springer 2014) 58, 332; Guodong Xu, 'An Introduction to the Structures of Three Major Civil Code Projects in Nowadays China' (2004) 19 Tulane European and Civil Law Forum 37, 54 <http://biblio.juridicas.unam.mx/libros/4/1943/33.pdf> accessed 9 May 2017; Chen 2010 (n 137) 162; Shen 1996 (n 140).

143 Schmiegelow 2014 (n 142) 332; Chen 2010 (n 137) 169; Zhang 2006 (n 41) 29.

ancient Chinese civil law customs by starting from the premises that *'if there is no provision of law applicable to a civil case, the case shall be decided according to custom. If there is no such custom, the case shall be decided in accordance with the general principles of law*'.[144] Before the Civil Code of China was promulgated, some civil law principles, which later formed the general law of China,[145] had already been adopted by the Supreme Court.[146] The Civil Code of China eventually became a binding law in 1930, but it still used the ancient term of *Qi Yue* (agreement) instead of contract (*He Tong*).[147] An agreement was (and is) seen as an act of promise making (meeting of minds), and only the *Qi Yue* is subject to performance remedies.[148]

30. In 1949, the People's Republic of China (hereinafter China) was established by the new communist government.[149] This government replaced the civil code with a socialist system based on the Soviet model,[150] which was historically influenced by the French civil law tradition.[151] This indirect French influence also explains that, although the system of the new communist government was characterised by legal nihilism (a negative attitude toward law),[152] a form of codification of contract law could be found in the Provisions and Rules Regarding Contracts among Government Organisations, State-Owned Enterprises, and Collective Units.[153] However, contractual promises in the area of consumer transactions lacked any formal legal context and were subject to principles deriving from established customs.[154] In the following years, a number of contract law instruments were adopted to serve the planned economy, yet they were all discarded during the Cultural Revolution of the period 1966–1976.[155] From 1976 onwards, after the death of Mao Zedong, China's economic policy started to shift from a centrally planned economy towards a market economy.[156] In the 1980s, this development resulted in the introduction of the General Principles of Civil Law for non-economic contracts and a number of special regulations

144 Art 1 CCL.
145 Chen 2010 (n 137) 169.
146 Chen 2010 (n 137) 169.
147 Zhang 2006 (n 41) 30.
148 Zhang 2006 (n 41) 30.
149 Schmiegelow 2014 (n 142) 332; Chen 2010 (n 137) 173; Zhang 2006 (n 41) 30.
150 Schmiegelow 2014 (n 142) 58; Xu 2004 (n 142).
151 Zhang 2006 (n 41) 30.
152 Schmiegelow 2014 (n 142) 58.
153 Jianhua Zhong and Guanghua Yu, 'China's Uniform Contract Law: Progress and Problems' (1999) 17(1) UCLA Pacific Basin Law Journal 3 <http://escholarship.org/uc/item/97t9s6th> accessed on 9 May 2016.
154 Zhong and Yu 1999 (n 153).
155 Zhong and Yu 1999 (n 153).
156 Schmiegelow 2014 (n 142) 58; Chen 2010 (n 137) 175; Zhang 2006 (n 41) 36; Han Shiyuan, 'The Performance Interest in Chinese Contract Law' in Mindy Chen-Wishart, Alexander Loke and Burtong Ong (eds), *Remedies for Breach of Contract: Studies in the Contract Law of China* (Oxford University Press 2016) 41.

for economic contracts,[157] which eventually formed the basis of the complete Chinese Civil Code.[158] The special regulations for economic contracts were the Economic Contract Law of China (ECL),[159] the Foreign Economic Contract Law of China (hereinafter the FECL),[160] which excluded transport contracts,[161] Patent Law, Trademark Law and Succession Law, and the Law on Technology Contracts (LTC).[162] These three pillars were governed by the General Principles of Civil Law (GPCL).[163] However, contracts based on these particular regulations remained subject to intense state intervention because of their economic characteristics, which were inextricably linked with the state plan of China.[164] In this period, the status of the three laws also deteriorated due to overlapping and conflicting principles.[165] For example, the statutory right to terminate a contract only if the performance of the contract was rendered unnecessary by the other's party breach was removed from the ECL, but never from the LTC, which resulted in conflicting provisions for (domestic) economic contracts.[166]

31. In 1999, the aforementioned special regulations for contracts (ECL, FECL and the TCL) were combined into the Contract Law of the People's Republic of China (hereinafter the CCL).[167] The drafters of the CCL drew inspiration from international treaties and other legal systems, such as the German Civil Code. The adoption of the CCL abolished the distinction between civil contracts, economic contracts, domestic contracts and foreign contracts. Furthermore, the contractual capacity of individuals was accepted. This has strengthened the principle of freedom of contracting, which is reflected in the concept of

157 General Principles of Civil Law of the People's Republic of China (1986).

158 Xu 2004 (n 142).

159 Adopted at the Fourth Session of the Fifth National People's Congress and promulgated by Order No. 12 of the Chairman of the Standing Committee of the National People's Congress on December 13, 1981, and effective as of 1 July 1982 [expired].

160 Adopted at the Tenth Session of the Standing Committee of the Sixth National People's Congress and promulgated by Order No. 22 of the President of the People's Republic of China on 21 March 1985, and effective as of 1 July 1985 [expired].

161 Art 2 FECL.

162 Chen 2010 (n 137) 176; Chuan Feng 2016 (n 38) 129.

163 Adopted at the Fourth Session of the Sixth National People's Congress, and promulgated by Order No. 37 of the president of the People's Republic of China on 12 April 1986, and effective as of 1 January 1987. The current version was adopted at the Fifth Session of the Twelfth National People's Congress of the People's Republic of China on 15 March 2017, and come into force on 1 October 2017; Chuan Feng 2016 (n 38) 129.

164 Zhong and Yu 1999 (n 153).

165 Chuan Feng 2016 (n 38) 129.

166 Chuan Feng 2016 (n 38) 130; Lei Chen and Larry A DiMatteo, 'History of Chinese Contract Law' in DiMatteo and Chen 2017 (n 19) 6.

167 Contract Law of the People's Republic of China Order [1999] No.15 of the President of the People's Republic of China Contract Law of the People's Republic of China has been adopted at the Second Session of the Ninth National People's Congress on 15 March 1999, effective of 1 October 1999; Xu 2004 (n 142); Zhong and Yu 1999 (n 153) 130.

party autonomy.[168] The notion of freedom of contracting should, however, not be interpreted from a Western (European) perspective. Under the latter, the principle of freedom of contracting is paramount, although its impact may be affected where the contract is substantively unfair to one of the parties.[169] By contrast, under Chinese contract law, the principle of freedom of contracting is limited where the interests of the state are affected. It is held that this restriction entails a broad scope of concepts, such as public interest, market order, collective interests and interest of the Communist Party.[170] It is also said that the principle of freedom of contracting can be misused to justify unfair contract terms in commercial contracts between the state or a state owned enterprise and private (foreign) party, where a bad bargain affects the state's financial interest.[171] It is furthermore noted that contracts remain subject to the successor of the GPCL (the new General Provisions of the Civil Law of the People's Republic of China),[172] and specific pieces of separate legislation where appropriate. Furthermore, the CCL should be interpreted in view of the judicial interpretations of the Supreme People's Court concerning the application of the contract law of China.[173] These interpretations include opinions and answers on questions concerning the specific application of contract law principles and serve as a source of law for contractual issues (also called quasi-legislation).[174] The judicial interpretations clarify how the law should be applied in case of a failure in performance of the contract. Authoritative commentary and the judicial decisions published in the

168 Art 4 CCL stipulates that that the parties to a contract shall comply with the principles of voluntary participation; no party shall compel others to accept its will and no individuals or organisations shall unlawfully intervene; Zhong and Yu 1999 (n 153) 2, 9, 10; See for the proposition that party autonomy includes freedom of contract: Meng Zhaohua, 'Party Autonomy, Private Autonomy, and Freedom of Contract' (2014) 10(6) Canadian Social Science 212–216 <http://www.cscanada.net/index.php/css/article/view/5155 DOI: http://dx.doi.org/10.3968/5155> accessed on 22 February 2019.

169 Junwei Fu, *Modern European and Chinese Contract Law, A Comparative Study of Party Autonomy* (Wolters Kluwer Law & Business 2011) 170.

170 Fu 2011 (n 169) 171.

171 Hao Jiang, 'Freedom of Contract under State Supervision' (2015) SSRN Electronic Journal 253; Hao Jiang, 'Enlarged State Power to Declare Nullity, The Hidden State Interest in the Chinese Contract Law' (2014) 7(1) Journal of Civil Law Studies.

172 The General Provisions of the Civil Law of the People's Republic of China, as adopted at the Fifth Session of the Twelfth National People's Congress of the People's Republic of China on 15 March 2017, has come into force on 1 October 2017 (General Provisions 2017).

173 Interpretation I of the Supreme People's Court of Several Issues concerning the Application of the Contract Law of the People's Republic of China (Judicial Interpretation, 1 December 1999 (Judicial Interpretation (I) Contact Law); Interpretation II of the Supreme People's Court of Several Issues concerning the Application of the Contract Law of the People's Republic of China (Judicial Interpretation, 9 February 2009 (Judicial Interpretation (II) Contract Law); The English translation of both interpretations are published on http://en.pkulaw.cn/ (http://en.pkulaw.cn/).

174 Schmiegelow 2014 (n 142) 331; Judicial Interpretation I and II Contract Law (n 173); Interpretation on Issues Concerning the Application of Law for the Trial of Cases of Disputes over Sales Contracts, 31 March 2012 (Judicial Interpretation of Sales Contracts); Zhang 2006 (n 41) 31; Chuan Feng 2016 (n 38) 131.

Gazette of China also play an important role.[175] However, there is currently no central system which includes all relevant case law of China. Only a selection of important cases is published in the Gazette of the Supreme People's Court of China.[176] To solve this issue, the Supreme People's Court is working on a common law inspired guiding-case system, which in the future is intended to serve as a source of law.[177] That being said, decisions of the Supreme People's Court are currently not cited by lower courts unless the merits of the proceeding concerns a procedural matter,[178] which makes it difficult to ascertain the actual grounds of a ruling. Furthermore, it is worth noting that the words of the English translation of Chinese laws and case law are subsidiary to the original Chinese text. Regarding the sale of goods between a party from China and a foreign party, the CISG applies if both contracting parties have their relevant places of business in member states.[179] However, China (similar to Singapore) excluded the principle that the CISG also applies when the rules of private international law lead to the application of the law of a member state.[180] All told, the fact that China is a signatory country to the CISG limits the applicability of the contract law of China to domestic sale agreements and to international sale agreements between parties from China and non-member states. See in this regard Figure 1 for an illustration of the influence of international and European contract law principles on Chinese contract law.

2.5 Conclusions

32. This chapter has sought to lay out some of the historical and contemporary fundaments of the Dutch, Singapore and Chinese sales law principles. The starting point is that the respective contract law systems in the investigated jurisdictions were all extensively reformed between 1990 and 1999.[181] The contract law system of the Netherlands underwent a complete recodification in 1992, in order to keep pace with developments in society.[182] This means that, from a historical perspective, the examined statutory principles are new,

175 The Supreme's People's Court of the People's Republic of China.

176 Wei Luo and Joan Liu, *A Complete Research Guide to the Laws of the People's Republic of China (PRC)* (2003) Law Library Resource Xchange <http://en.pkulaw.cn.ezproxy.leidenuniv.nl:2048/Article/Article1.aspx> accessed 12 September 2017.

177 Schmiegelow 2014 (n 142) 334; Lei Chen, 'Availability of Specific Remedies in Chinese Contract Law' in Chen-Wishart, Loke and Ong 2016 (n 156) 26.

178 Zhang 2006 (n 41) 31; Lei Chen, 'Availability of Specific Remedies in Chinese Contract Law' in Chen-Wishart, Loke and Ong 2016 (n 156) 26.

179 <https://www.cisg.law.pace.edu/cisg/countries/cntries-China.html> accessed on 4 August 2017.

180 Arts 1(1)(b), 95 CISG.

181 EH Hondius in C Mak in Schelhaas 2002 (n 19) 20, 21, Shenoy and Loo 2013 (n 13) para 2.35 and <http://www.singaporelaw.sg/sglaw/laws-of-singapore/overview/chapter-1/> accessed on 19 October 2015.

182 EH Hondius in C Mak in Schelhaas 2002 (n 19) 20, 21.

albeit certain elements have been kept in place. The same applies to the contract law of Singapore, which inherited English common law principles, but in 1994 started to reform its legal framework. The reformation of the Singapore legal system is based on the premise that future Singapore law should align with the country's domestic, social and economic fundamentals. Further, it is held that ambitions to customise the Singapore law system stem from the growing maturity and international standing of Singapore's legal system and the historical links between Britain and the European Union, which could make English law incompatible with Singapore's local developments and aspirations,[183] although Singapore's suppositions pre-date the outcome of the recent 'Brexit' referendum. China started its reforms a couple of years earlier with the introduction of the ECL (1981), but the complete transformation of the law on contracts only commenced in 1990 and resulted in the enactment of the Contract Law of the People's Republic of China in 1999. The contract law of China transplanted principles from the German civil law tradition, the CISG,[184] as well as the PICC.[185] It is the case, therefore, that the contract law of China shows an interesting combination of civil and common law elements.

33. It is obvious that the Netherlands, Singapore and China have been actively working on structuring a legal framework which is appropriate in light of their historical roots, but which also facilitates the evolving different interests in a balanced contract law mechanism. It may also seem fair to say that the three investigated jurisdictions have overcome significant barriers for commercial businesses involved in cross-border trade by becoming a signatory to the CISG. This international treaty for commercial sales, however, entails a significant exception to the rules on the enforceability of non-monetary obligations under a commercial sales contract, which reveals the dangers of relying on the efforts of the drafters to bridge the gap between the civil and common law traditions. This applies directly to the contract law of the Netherlands, Singapore and China as these legal frameworks have strong roots in the two major legal traditions, although influenced by domestic notions of the law. Nonetheless, on a general note, it may be said that the contract law of the Netherlands and China transplanted principles from the French and German civil law legal families respectively. The contract law of Singapore is, in essence, a codification of English law, although its principles are subject to revision by Singapore courts where this

183 Shenoy and Loo 2013 (n 13) para 2.35 and <http://www.singaporelaw.sg/sglaw/laws-of-singapore/overview/chapter-1/> accessed on 19 October 2015.

184 See United Nations Convention on Contracts for the International Sale of Goods, 11 April 1980, 1489 UNTS 3 (entered into force 1 January 1988) <http://www.uncitral.org/pdf/english/texts/sales/cisg/V1056997-CISG-e-book.pdf> accessed on 10 May 2016.

185 International Institute for the Unification of Private Law (UNIDROIT), Principles of International Commercial Contracts (2010 ed), <http://www.unidroit.org/english/principles/contracts/main.htm> accessed on 10 May 2016; Xu 2004 (n 142) 633; Schmiegelow 2014 (n 142) 58.

is appropriate in view of the domestic circumstances. These historical roots explain (partially) the marked differences between the thresholds to enforced performance of non-monetary obligations under a commercial sales contract, as discussed in the following chapters.