CHAPTER

The legal framework for international business

Introduction

‘If the law supposes that, the law is an ass’ Mr Bumble once famously remarked in Charles Dickens’s *Oliver Twist*. Many people will, no doubt, agree with this sentiment, particularly if they have been on the receiving end of the law and its application. While the vast majority of us realise that law ‘exists’, the same proportion is unlikely to regard it as having an immediate impact on how we conduct our daily lives. True, some people go through their entire mortal existence without being caught up in anything remotely resembling a legal problem, but whether this is down to good fortune or a deft arrangement of their private and/or business affairs is a different matter. Whether one relishes the thought or not, there is no escaping the fact that law is part of the environment in which we live. It is not something existing merely in abstraction but is
all around us. It can and does affect many aspects of our lives. Assuming the guise of an ostrich and burying one’s head in the sand may be a tempting option, but the fact remains that the law can bite and presenting it with an easy and ill-prepared target can cause more than a few ruffled feathers.

If we are prepared to recognise that, potentially, the law affects us all in the things we do, how does this manifest itself? Most people appreciate that it is illegal to kill a fellow human being or to point a gun at someone in the street and relieve this person of his or her wallet, but these are examples of criminal law which form but one small part of the law as a whole. While few would fail to agree that such anti-social behaviour as just described should be prohibited and that it should be down to the law to do this, there are very many other situations where a failure to satisfy the requirements of the law can have serious consequences, even if the threat of imprisonment is not one of them. For example, is it widely appreciated that, under English law, a person who witnesses a will cannot take a benefit under it? So if an uncle draws up a ‘do-it-yourself’ will and bequeaths a substantial legacy to his favourite niece, would he realise that if he requested her to witness his signature, he would simultaneously be depriving her of his benevolence? Likewise, would the average man in the street appreciate that he owes certain duties to persons who may trespass on his land. He might find it strange to be ordered to pay compensation to a teenager who falls down a disused well while stealing apples from his orchard. If a village resident sends a text message to her neighbour making disparaging remarks about the chairman of the Parish Council, would she readily appreciate that this bastion of local democracy may have an action for libel against her? It is unlikely that any of the actors in the scenarios just described would consider themselves to have done anything ‘wrong’, but nevertheless their actions or, in the case of the disused well, inaction, would be judged according to the requirements stipulated by law and non-compliance with these could have the consequences described.

If the law can impact on our everyday private lives, the same is true for any business activity we may pursue. Those
who are engaged in business may be slightly more streetwise when it comes to the ‘legal stuff’ than their less commercially oriented brethren but, even so, ignorance or misunderstanding of the law and its effects is hardly a rare phenomenon and attitudes ranging from complacency to outright hostility can often be detected wafting through the corridors of business. ‘Law is for lawyers. If there is a problem, let them sort it out; after all it’s what they’re paid for.’ Such a view amongst business practitioners is not particularly uncommon and reflects an innate suspicion that the law and lawyers conspire together to obstruct entrepreneurial flair and endeavour, and that whoever may be the loser in a legal spat, it certainly won’t be the lawyers. Such is the antipathy to those versed in the law that, often, professional legal advice is only sought when a problem, which perhaps initially was avoidable, has escalated to a point where extrication at the lowest possible cost is the only option.

On the other hand, however, there are those engaged in business who recognise that law is part of the environment in which they must operate. This fraternity appreciates that, like it or not, the law does regulate, or at least affects, many aspects of business activity. They consider that, in strategic planning, it is far better to identify relevant legal issues as early as possible in the process. Taking these into account at this stage and making necessary adjustments should facilitate, not hinder, the attainments of commercial objectives. Alternatively, initially adopting a ‘head in the sand’ approach, which fails to identify legal pitfalls, can later present problems that are either insurmountable or, at the very least, expensive to address.

Nor should the law’s relationship with business always be looked at from a negative perspective, i.e. ‘it’s always there to work against us’. There are many situations where an adept use of the law can protect vital business interests; for example, an appropriately drafted contract can be employed as a vehicle for minimising, transferring or, in some circumstances, entirely excluding a variety of commercial risks; or, alternatively, the effective management and assertion of intellectual property rights can be crucial factors when seeking to maintain the integrity of a brand name; and so on.
Although business can be and very often is conducted in a purely national context, there are ever increasing possibilities for such activity to develop an international dimension. This may follow a decision of a domestic producer actively to establish a presence in a foreign market by co-operating with a local ‘partner’ in one way or another, or going it alone and establishing a branch office or legal entity in the chosen location. However, business activity can take on an international character without such formalised arrangements being involved. A home producer who supplies a single order originating from another country is engaged in an international business transaction. A sole trader who sets up his or her own website offering goods or services is conducting international business with anyone who responds from outside the country in which that trader is located.

International business of even the simplest variety can present problems that are not present in a purely domestic transaction. As in most cases, if the problems can be spotted in advance, the chances are they can be headed off or at least minimised. Slamming shut the stable door when the horse is but a speck on the horizon will provide scant comfort if appropriate safeguards could have prevented the animal’s escape in the first place.

However, whether the context is domestic or international, it would be neither realistic nor sensible to expect business practitioners to acquire specialist knowledge approximating that of the professional lawyer. The expertise of the professional is built upon more than simply knowledge of the law but includes skills of analysis and argument developed through long experience of the law in practice. The aim of this book, therefore, is not to supplant the need for appropriate professional advice but to provide the business practitioner with an introduction to the legal framework in which business and, particularly, international business operates. By acquiring an understanding of how the law can impact upon commercial activity, the modern manager should be better equipped to identify potential legal problems while they are still in early gestation. A timely realisation of what might lie ahead may offer the opportunity of taking appropriate action to prevent
the escalation of what may be a controllable situation. By adopting a proactive approach rather than merely re-acting to events, a business can better protect its essential interests which, in the heat of today’s trading environment, may constitute a vital competitive advantage.

**So what is ‘law’?**

The comments made above stress the idea that the law affects us all in the way we conduct both our private and business lives. But before this can be explored in greater depth, a basic question needs answering: what exactly is meant by the term ‘law’? The question is simple to state but not so the answer. In truth, the term ‘law’ is extremely difficult to define. If asked the question, the average respondent might very well attempt to describe the law as, say, a ‘collection of rules’ or ‘something which you must obey’. While not being ‘wrong’, such an attempt would not address the essential issue, namely defining the term by reference to its intrinsic character. While it is true to say that law has a regulatory function, the same is also true of many other types of rule and/or custom that seek to control behaviour in any given society or community but which, nevertheless, do not have the character of ‘law’ as the word is commonly understood. For example, the rules provided by religious or moral teaching may have a strong impact on the way in which people behave, as may the cultural norms observed by a particular community. The rules of etiquette or simply good manners also play a part, but none of the controlling influences just mentioned purely in themselves constitute ‘law’. So, however much we may condemn the loutish teenager who refuses to give his bus seat up to an elderly fellow passenger, he is unlikely to have to defend his conduct before a magistrate.

Many great philosophical works have grappled with the inherent problem of distinguishing law from other forms of rule producing normative behaviour, but it is beyond the scope of this book to probe deeper into this, albeit interesting, argument. For present purposes, the definition of law
provided by the Oxford English Dictionary will suffice; here law is defined as:

a rule enacted or customary in a community and recognised as demanding or prohibiting certain actions and enforced by the imposition of penalties.

The essential characteristics of a rule of law would appear to be that it:

1. has what may be described as the ‘official stamp’ of state authority, i.e. it has been created by an institution of state having legislative competence or is, otherwise, a rule recognised as having legal force by the courts responsible for the administration of the law within that state;

2. applies equally to and is binding on all members of society. In other words, no one is above the law;

3. results in certain consequences if it is contravened. Such consequences may include, say, a fine or imprisonment if a rule of criminal law is infringed but can also involve less obvious but nevertheless serious consequences. For example, a failure to comply with the law governing the transfer of property may result in the purchaser of a house later discovering that he or she does not in fact have legal title to it.

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**Chalk and cheese**

It should not require the international experience of Marco Polo for someone to realise that the law of, say, Sweden is probably different from that operating in Japan, but such a realisation is not an attribute characterising mankind as a whole. Not infrequently does a person brought up in the legal tradition of his homeland express incredulity at the suggestion that the law in other countries may be different. Such differences can and do exist and for the conduct of international business the implications can be profound. If two companies based in the same country are involved in a dispute, say, over a contract, the law governing the dispute, complex or otherwise, can at least be
identified at the outset. Introduce an international dimension, however, and problems can arise that are unlikely to be encountered in a purely domestic contract. In later chapters, some of these problems will be examined, but for present purposes consider the following scenario: company A offers to provide services for company B at a certain price. Before B responds, A, realising that the quoted price is too low, retracts the original offer and substitutes a new one incorporating a higher price. Can A do this? Leaving aside ethical considerations, A's ability to retract its offer will depend on whether the applicable legal rule permits this. If A and B are located in the same country and the services are to be provided locally, the rights or wrongs of A's action will be decided by the law of the particular country involved. However, suppose that A is located in country X and B in country Y and, furthermore, the services being offered by A are to be provided in country Z. Suppose, also, that the law of X permits A to retract its offer as does the law of Y, but only in certain circumstances. The law of Z, however, contains a rule that an offer, once made, cannot be retracted. The answer to the original question has now become somewhat less certain.

The fact is, however, that although references are frequently made to the 'global market place', there is no such thing as a 'global' legal system containing laws of universal application; instead, one finds a mosaic of different systems existing in the world today, each having its own particular characteristics. It should hardly be surprising, therefore, to find disparity in the laws of countries that have had a fundamentally different historical, cultural and political development. To compare the law of China with that of New Zealand may, indeed, be like comparing chalk and cheese.

**Family ties**

At the time of writing, there exist approximately 190 independent states in the world. Does this mean, therefore, that there also exist an equivalent number of different legal systems, all containing widely differing laws? To a certain extent this view is correct, since every sovereign state has the right to enact law and provide for its operation in the territory
concerned. However, a study of the main characteristics of the many apparently differing legal systems in the world would reveal similarities which are shared by more than one. For example, if the laws of, say, countries A and B were examined, the conclusion might be drawn that, in many ways, they are basically very similar. Equally, a comparison of the laws of countries X and Y might reveal a common ‘flavour’ shared by both. However, if one proceeded to contrast the laws of A and B with those of X and Y, fundamental differences might emerge. If this exercise were pursued on a global scale, it might be concluded that the world’s legal systems can, in fact, be reduced to a number of ‘families’ with the members of each, either by parentage or adoption, sharing a common heritage. Such a conclusion would essentially be correct.

**Civil law and common law**

Among the major legal families existing today are the *civil law* and *common law* systems. Civil law comprises those systems either based on or influenced to a greater or lesser extent by Roman law. These include the laws of most European continental countries – for example, France, Germany, Spain, Portugal, Italy, Greece, etc. Almost the entirety of South and Central America has either inherited or adopted the civil law, with French law having had a major influence. Again, if one looks towards Africa and considers countries such as Morocco, Algeria, Cameroon, Rwanda, Madagascar, etc., it can be seen that, due to their historical links with mainland Europe, they belong firmly to the civil law camp.

Common law, on the other hand, is based on English law or, more accurately, the law of England and Wales. Scotland has a separate legal system which, in the main, is based on civil law. Prior to Scotland’s union with England in 1707, the country had had close historical links with continental Europe and in particular France. This exposure to European culture had a major influence on the development of Scottish law. Although there are areas of law which apply both to Scotland and England, the innate character of Scottish law stems from the foundation of Roman law upon which it was built.
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The historical expansion of British interests throughout the world during the eighteenth and nineteenth centuries also led to the growth in the number of territories where the common law held sway. Although the British Empire disappeared long ago, the legacy lives on in the legal systems of many countries across the globe. Thus, within the common law family one would place the law of Australia, New Zealand, the USA, Canada, Kenya, Zambia, Nigeria, the Indian subcontinent, Singapore, Malaysia, etc. Although countries following the common law tradition have often developed the law to reflect differences in culture and political and social organisation, it still remains true that these systems owe many of their fundamental attributes to the law of England and Wales.

As a final point, it should be noted that some countries have a foot in both camps, operating within their borders elements of both civil and common law. Such countries are referred to as mixed jurisdictions. Two examples can be found in the laws of the USA and Canada. In the former, law-making powers exist at both federal and state levels. While federal law applies throughout the country, each of the fifty states which make up the Union enacts law for local application. While most state law is based on common law due to the historical British influence, Louisiana, being a former French colony, has bucked the trend and retained its allegiance to civil law. The French connection also holds sway north of the border in Canada, notably in Quebec which, in contrast to the common law tradition embraced by the other provinces, resolutely adheres to its civil law foundations. As explained above, Scottish law displays many civil law characteristics and to a certain extent, therefore, it could be said that the UK constitutes a mixed jurisdiction.

Distinguishing features of civil law and common law

The civil law and common law systems are fundamentally different as regards concepts, vocabulary and legal method. Thus, for example, a French lawyer may have great difficulty in understanding the way in which an English lawyer approaches the solution of a legal problem and, of course, the
reverse is probably true. However, lawyers from two different
countries but whose laws are within the same family will have
much less difficulty in terms of communication and compre-
hension. So, although the laws of France and Germany differ
in various respects, these differences are far outweighed by the
similarity existing in fundamental concepts and approach.
The same could be said of the law of England and Wales and
that of Australia. In other words, within the same family there
is a common legal language readily understood by those
trained accordingly, but which creates the potential for confu-
sion in the minds of those who are not.

If a lawyer practising in a civil law country wants to know the
legal rule applicable to a particular situation, the chances are
that the answer will lie between the covers of one of the sub-
stantial volumes lining the office bookshelves. The reason for
this is that civil law is a system giving pre-eminence to written
law. In those countries embracing the civil law tradition, great
tracts of the law are contained in codes, each containing
a myriad of legal rules but structured in a way that is both
logical and comprehensive. The cornerstone of the civil law
edifice is the civil code. The civil code is a compendium of
legal rules governing the relationship between private indivi-
duals. Typically, a civil code will be divided up into sections,
each dealing with a different issue. Consider the French civil
code (Code civil) by way of example. This code is divided into
three Books, which in turn are divided into chapters. Book
One deals with matters such as marriage, divorce, the status of
minors, guardianship, domicile, etc. Book Two deals with the
various kinds of property while Book Three covers a variety of
matters, including succession, contracts both general and par-
ticular, delict (civil wrongs), matrimonial property, etc.

The French civil code has been used as a model in many
other countries worldwide. However, some countries, while
still adhering to the civil law faith, have developed a style and
approach of their own. A good example is the German civil
code (the Burgerliches Gesetzbuch or ‘BGB’). Again, this code is
divided into a number of Books, each dealing with a particular
matter. However, the structure of the BGB is very different
from that of the Code civil, as is the style in which it is written.
The Code civil is often held up as jewel in the crown of legal
draftsmanship, embodying a clarity of exposition and eloquence of language which renders the law, theoretically at least, comprehensible to the man or woman in the street. The BGB, on the other hand, embraces a regime of almost mathematical abstraction in its endeavour to accommodate the infinite manifestations of human interaction within a rationale structure of legal rules. To the outsider, the result is as impenetrable as a hill fog.

While the civil code is at the heart of systems based on the civil law tradition, it is not the only code. Sitting alongside the civil code one will typically find other codes dealing with specific issues — for example, the commercial code, which lays down special rules for those conducting business (merchants); the criminal code; the code of criminal procedure; the code of civil procedure; and so on.

While civil law systems are essentially based on written law, English common law, on the other hand, is sometimes said to be ‘unwritten’. This does not mean to say that it exists only in the form of oral incantations, but reflects the idea that the law derives from sources other than written codes. Traditionally, common law evolved from the principles developed by judges when deciding cases before them. Over time, the concept of judicial precedent, as it is now known, became firmly established as one of the defining characteristics of the common law. Under this system a judge hearing a case will generally be bound by the legal principles underlying a previous decision of a higher court involving broadly similar facts. In the case of the common law, therefore, the courts have played a central role in developing the law. Although the bulk of ‘new’ law created today results from legislation enacted by the legislature and, in this sense, can be said to be ‘written’, it still remains true that the vast body of legal principle which forms the bedrock of common law has been the result of judicial creativity over hundreds of years. The consequence of all this, when compared with the sometimes abstract conceptualisation of civil law, is to give the common law a pragmatic flavour. Whereas the architect of a code must attempt to visualise problems which might lie ahead and provide legal rules to accommodate them, traditionally the common law judge hearing a case was faced with a problem which had already arisen.
and which required a resolution. Any principle of law that he formulated when applied to the facts had to produce a sensible and practical result.

While it is true to say that written codes do not characterise English law and other systems following the common law tradition, this is not to say that codification never plays a part. Indeed, certain areas of English law, effectively, have been codified. However, where this has happened, it represents an essentially different exercise from that found in civil law systems. Whereas the architect of a civil law code is very often designing a framework of rules virtually from scratch, the codification of English law, where this has occurred, has usually involved the draftsman collating into a structured and accessible single source the law relating to a particular subject which had previously been contained in a vast array of judicial precedents and/or statutory provisions. Although the procedure may very well include the modernisation of some of the legal principles involved, essentially it is not a process of invention. Two examples from English law are the Sale of Goods Act 1979 and the Partnership Act 1890. The former provides a comprehensive set of rules governing contracts for the sale of goods, whereas the latter effectively codifies the previous law relating to business partnerships. Similarly, in the USA, the Uniform Commercial Code consists of a uniform system of rules regulating many forms of commercial activity, such as the sale and leasing of goods, negotiable instruments, bank deposits and collections, letters of credit, bills of lading, etc. The UCC, as it is known, has been incorporated into the law of all states except Louisiana which, nevertheless, has adopted most of it. In Canada, on the other hand, the entirety of criminal law has been incorporated into a single Criminal Code.

Other legal families

Apart from the civil law and the common law, there exist other legal traditions in the world although, as will be explained, common law and/or civil law influence may very well also be present in the countries in which they are found.
Socialist law

Before the momentous events of the early 1990s, when the Berlin Wall literally came crashing down, bringing in its wake the collapse of the Soviet Union and the communist regimes of Eastern Europe, legal academics were accustomed to talk of the Socialist legal family. While not being an issue solely of historical interest, the demise of communism in the places just mentioned has certainly operated to decimate the number of family members.

Quintessentially, socialist legal systems are based on the philosophy and ideology propounded by the Marxist–Leninist school of thought. According to this, the basis of any social order is its economic foundation and in particular the relationship existing between the various forces and factors of production – for example, manpower, raw materials, machinery, etc. Everything else, whether it be spiritual, moral or philosophical thought or the more concrete manifestations of the state and its institutions, including the law, are subservient to this and are to be regarded merely as tools to be applied in pursuance of the economic order that socialism embodies.

Within the socialist society, private property in the form of capital is extinguished and is replaced by the common ownership of the means of production. According to the Marxist–Leninist philosophy, in its advance towards the utopian ideal of communism, society is in a continual state of transition in which capitalism will ultimately be replaced by a communist social order. In the classless society which will then exist, law will wither away because, as all men and women will treat each other as equals, it will simply be unnecessary.

Although, according to the dictates of Marxism–Leninism, the realisation of the communist social order is inevitable, the interim journey requires leadership of single-minded and unquestioning commitment. In the socialist tradition, the Communist Party is the sole repository of such qualities and, accordingly, is charged with the responsibility of ensuring that the road ahead is kept clear of diversions and/or obstructions which may delay arrival at the ultimate destination.
When the Soviet Union disintegrated, Russia and eleven of the former soviet republics joined together to form the Russian Federation. Since then the legal vestiges of the communist era are progressively disappearing as the Federation countries revert to their original civil law traditions.

Of the communist states still remaining, China is perhaps the most notable example. However, even in China the rigidities of the state-controlled economy are progressively being relaxed in favour of a more market-led system. Significant areas of the law are being reformed in order to encourage enterprise and foreign investment. In this process, China is borrowing heavily from other legal systems and in particular from those belonging to the civil law family. China acceded to the World Trade Organisation on 11 December 2001 and it will be interesting to see how far the ‘westernisation’ of her legal system will be allowed to develop.

**Religious law**

In addition to the ‘secular’ systems of law described above, there exist systems based on religious doctrine, a prominent example being Islamic law.

The Shariah or Islamic law is a complex set of rules as revealed by Allah (God) to his prophet, Muhammad, which govern every aspect of human life and by which every faithful Muslim must abide. The highest source of Islamic law is the Koran, which comprises of a compilation of the utterances of Muhammad accepted by Muslims to be based on divine revelation. For hundreds of years following the death of Muhammad in 632, the principles laid down in the Koran as interpreted and developed by legal scholars provided the governing law throughout the Muslim world. From the nineteenth century, however, various factors including the increasing influence of the European powers on traditional Muslim countries resulted, in many cases, in Islamic law having to adapt to or coexist with western systems. The reality of the modern world has necessitated many Muslim countries to develop legal systems which may, to a greater or lesser extent, be based on or incorporate aspects of Islamic law but which, nevertheless, reflect today’s social, political and commercial environment.
Making order out of chaos – the classification of law

Bearing in mind that in any given context tens or even hundreds of legal rules may be applicable, how can the hapless individual, when faced with something having the apparent structure and coherence of a can of worms, be expected to make sense of it all? Law is often regarded as opaque, a regulatory fog that only lawyers can penetrate. In part this may be true. Some rules of law are, technically, extremely complex and are more readily understood by the experienced professional than the man or woman in the street. For example, however adept he or she may be at solving the *Times* crossword, it is unlikely that the average citizen would make immediate sense of the legal framework governing financial derivatives.

Awesome as it may at first appear, it is possible to organise the seemingly limitless number of disparate legal rules into something resembling a structure or *legal system*. Within such a system different laws are compartmentalised according to their subject matter – for example, criminal law, property law, family law, etc. Within a legal system there will also be found rules governing the creation and operation of courts and tribunals to oversee the administration of the law as a whole, including those relating to criminal and civil procedure, the appointment of judges, the role and training of lawyers, etc.

Any system of law has to provide solutions to the problems created by human activity and the type of problem that can arise is not, as a rule, unique to any one country. Whether one is referring to Spain, Denmark, Peru or Israel, neighbours can fall out over where the boundary lies between their respective properties, business partners may disagree over how the business should be conducted, a buyer of goods may wish to reject them on the grounds that they are not of the correct quality, a consumer might be injured as a result of using a defective product, and so on. In all these cases the law contains rules for determining the rights and/or obligations of the parties involved. The main problem facing anyone attempting to solve a legal problem is knowing precisely where to look in order to find the detailed rules relevant to the situation under consideration.
The law of any country can be subdivided or classified into a number of different branches, some of which are explained below. If a lawyer is asked by a client to give advice on a particular issue, a vital first task will be to ascertain the essential facts of the matter. These will form the basis of his search for the appropriate rules of law. The process which will lead him in the right direction is known as ‘classification’, whereby the facts of a particular issue are ‘pigeon-holed’ or classified under the relevant part of the law. The difficulty is that civil law and common law systems do not always share the same method of classification. It is possible, however, to adopt a broad approach to the exercise which, although not reflecting the scientific rigour of the legal comparatist, provides a general overview of the law’s principal divisions.

Figure 1.1 illustrates some but not all of the main branches of both civil and common law. Although, at first sight, it might seem to have the complexity of an atomic structure, the explanation which follows will hopefully diffuse any such impression and show that the underlying logic is reasonably uncomplicated.
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The first major division is between public law and private law. Public law consists of those rules which regulate the relationship between the state and the individual. Within this branch of the law further subdivisions can be found – for example, constitutional law, administrative law and criminal law.

Constitutional law is concerned with defining the powers of and the relationship between the principal institutions of state. For example, in the UK constitutional law deals with such issues as the role and powers of the Monarch, the function of the House of Commons and the House of Lords (the British Parliament) and the relationship between them, the role of the executive in the form of the Prime Minister and the government, the structure of local government and the powers given to it, the status and powers of the armed forces and the police, and the role of the courts and judiciary. This part of the law is also concerned with the relationship between the state, its institutions and the individual citizen and, in particular, the civil liberties of the latter.

Unlike most other countries, the constitution of the UK is not ‘written’, i.e. there is no single document which can be said to contain the constitution. Instead, it stems from a number of different sources – for example, constitutional conventions (custom), legislation and judicial precedent. It should also be noted that, again unlike many other countries, the courts of the UK have no power to declare an Act of Parliament ‘unconstitutional’.

Administrative law is that branch of the law which deals with the operation of government as it affects the individual citizen. The increasingly active role of the government through its many departments and agencies in the control and regulation of daily life often gives rise to disputes. As a result, this has led in most countries to a rapid growth in administrative law to deal with the complaints of the individual against the decisions of administrative bodies. Again, by way of example, in the UK such issues as social security benefits (unemployment pay, housing benefit, etc.), state pensions and the National Health Service would all come within the scope of administrative law.

Criminal law deals with conduct on the part of the individual which the state regards as harmful to society generally and for
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the control of which the state assumes responsibility. Most people, when asked ‘what is a crime?’, will give examples – murder, theft, robbery, etc. – rather than attempt a definition. This is understandable because the term ‘crime’ is not easy to define. The definition does not lie in the nature of the act itself, for a particular act can constitute a crime as well as a civil wrong under private law. The following example may help to illustrate the point. Suppose that X and Y are neighbours and that X, much to the annoyance of Y, regularly takes a short cut through Y’s garden to reach the bus stop. If, in desperation, Y complains to the police, it is unlikely that they would be interested. However irritating X’s actions may be to Y, they are unlikely to threaten the well-being of society generally and therefore will not be the concern of the criminal law. Y’s remedy will lie in private law and under this he may be able to get an order from a civil court prohibiting X from repeating the conduct complained of and, in some circumstances, compensation. However, if on one occasion, Y remonstrates with X and during the argument X hits Y with a baseball bat, Y’s complaint to the police may produce dividends because such conduct, while affecting Y individually, also has wider implications for the general public good and the maintenance of social order. X’s conduct will, in addition to infringing Y’s private rights, also constitute a crime. In this case, the state might decide to prosecute X in a court having criminal jurisdiction with a view to exacting a penalty from X which will punish him and constitute a warning to others who may be similarly inclined.

_Private law_ consists of those rules of law that govern the relationship between private individuals. An ‘individual’ in this sense will also include private organisations such as limited liability companies. Private law can be subdivided into several major categories, some of which will now be briefly considered.

_Property law_ lays down the rules regulating the rights a person may enjoy in or over the various forms of property. In civil law jurisdictions, property is usually further divided into _immoveable_ and _movable_ property, the distinction roughly equating with the _real_ and _personal_ property categorisation of English law. Immovable or real property comprises land and things affixed to it, such as buildings, whereas movable or personal property
basically refers to everything else. An exception to the last point, however, exists under English law because, for mainly historical and technical reasons, leases of land are regarded as personal property. The law also recognises the concept of intangible property, with intellectual property such as patents, trademarks, copyright, etc. being a notable example.

The law of succession is concerned with the devolution of property on death. As it is not possible to journey into the hereafter accompanied by one’s worldly goods, there has to be a system of rules determining who is entitled to what from the deceased’s estate. Some systems of law, such as English, allow a person significant freedom to direct who should benefit from his or her estate by means of a will or testament. Other systems, for example French law, impose limits on such freedom, thereby guaranteeing the rights of inheritance of the deceased’s heirs to at least part of the estate irrespective of his or her specific directions.

The law of obligations deals with certain forms of legal obligation which can exist between individuals, two prominent examples being those arising under the law of contract and the law of tort, or delict as it is sometimes known.

A contract is an agreement made between two or more persons giving rise to obligations which are recognised or enforced by law. For example, if X offers to sell 100 tons of potatoes to Y for £5000 and Y accepts promising to pay the price, a contract is created imposing obligations on both of them. If either X or Y fails to honour his obligation, the other will be able to apply to the court for an appropriate remedy. The distinguishing feature of the contractual obligation is that the parties themselves create it through their agreement. If, in the example above, X and Y had not concluded the agreement they did, X would be under no obligation to deliver the potatoes to Y nor Y to pay the £5000 to X.

Important though the concept of the contract is, it would be entirely wrong to assume that a person can only owe a legal obligation to another if a contract exists between them. Thus, if X, while driving his car in a careless fashion, knocks Y off his bicycle injuring him, the fact that there was no contract between them would have no bearing on Y’s right to pursue a claim for compensation against X. The law of tort (delict)
imposes on each and every individual certain obligations, breach of which will produce legal consequences. Although the term ‘tort’ basically means a civil wrong for which the law provides a remedy, common law jurisdictions differentiate between the various categories of wrong by giving them separate names. Thus, in the illustration just given, Y could bring a claim in negligence against X for his failure to exercise reasonable care. Other examples are nuisance (unlawful interference with a person’s use of his or her property, health or comfort and convenience), trespass (wrongful interference with the person, goods or land of another), defamation (publishing false statements which damage a person’s reputation), etc. While not naming individually the various types of wrong, civil law jurisdictions would, nevertheless, recognise the essential issue involved in the torts just mentioned and provide a remedy accordingly. For instance, paragraph 823 of the German civil code (BGB) forms the basis for many claims in tort by providing that a person is obliged to pay compensation for either negligently or intentionally violating the protected right of another, the protected rights including life, body, health, freedom and ownership of property. In French law, the basic principle which governs the entire law of tort is contained in Article 1382 of the Code civil, which states that ‘any act committed by a person which causes damage to another obliges that person by whose fault it occurred to make reparation’.

Both the law of contract and the law of tort have a direct bearing on business activity. The contract is the foundation stone of many types of business relationship and for this reason alone it is advisable for any business practitioner to have an understanding of the fundamental principles of this area of the law. In various contexts the law of tort can operate to provide a basis for business liability. For example, one option for a person injured through using a defective product is to bring an action in negligence against the manufacturer. Principles relating to both the law of contract and tort will be further considered in later chapters.

Family law, as the name suggests, is concerned with matters relating to family life. Thus, the law relating to marriage and divorce, custody of children, financial support, matrimonial property, etc. would be included under this heading.
The branches of private law just considered are, of course, recognised by both common law and civil law systems, and in the case of the latter, the detailed rules are very often found in the civil code. In the common law, however, the equivalent rules are more likely to be found in a disparate collection of precedents and/or statutory provisions rather than within the framework of a code.

Employment law is that part of the law which relates to the employment of labour and matters associated with it. In most developed industrial societies this is an area of the law which is constantly growing as it seeks to balance the legitimate commercial interests of the employer with the rights and entitlements of the employee. Within the scope of employment law are found rules relating to the formation, content and termination of the employment contract, unlawful discrimination, maternity rights, health and safety, trade unions and their activities, and so on.

The term commercial law can have a different connotation depending on whether it is being viewed from a common law or civil law perspective. In the case of English law, for example, the term has no precise meaning, often being merely descriptive of those areas of law relating to the supply of goods and services. Indeed, if one examined the contents page of several textbooks bearing the title ‘Commercial Law’, there would be no guarantee that exactly the same subjects would be included. Typically, however, matters such as contracts of sale, agency, negotiable instruments, contracts of carriage, etc. would come under the heading of commercial law. Again, as in many areas of English law, the specific rules relating to the above subjects arise not from a single source but from a variety, including precedent and statute.

In civil law jurisdictions, on the other hand, the term ‘commercial law’ refers to that separate and distinct branch of the law containing special rules applying to merchants and their commercial activities. Very often this body of rules is contained in a commercial code such as the French Code de Commerce or the German Handelsgetzbuch (HGB). The content of commercial law will necessarily depend on the particular jurisdiction under consideration, but by way of illustration a brief foray into the HGB might be helpful.
The HGB consists of five books. Among the matters dealt with in Book One is the concept and status of the merchant (Kaufmann). Although certain aspects of a merchant’s activities will come within the remit of the civil code (BGB), he or she will also be subject to the special regime contained in the HGB. At the outset, therefore, it is essential to know who has the status of a merchant. Paragraph 1 defines a merchant as a person who carries on a commercial enterprise. A ‘person’ can be an individual, a commercial partnership or a company. Paragraph 2 contains a list of nine activities which constitute a commercial enterprise. These are: buying and selling goods and securities, including the manufacture of goods; processing goods received from third parties (for example, carrying on the business of a dry-cleaner); insurance; banking; the carriage of goods or persons by sea, inland waterway or land; forwarding and warehousing; commercial agency and brokerage; bookselling and publishing; printing. Any person conducting any of the above activities is, by operation of law, deemed to be a merchant.

Book One also contains the rules governing the commercial register. This register is administered by the district court (Amtsgericht) and consists of a publicly accessible record of information relating to a merchant’s business. Every merchant must register the name of the firm (Firma) and the location of the business, including branches. If the merchant has given any person powers to represent and act on behalf of the business, relevant details must be registered. The most extensive form of representation is the Prokura. According to paragraph 49 ‘a Prokura empowers the procurator (the representative) to undertake . . . all manner of transactions appertaining to the management of a commercial business’.

Book Two deals with certain forms of business organisation. While limited liability companies are essentially regulated by a separate statutory regime, the rules relating to various forms of commercial partnership are contained in the HGB – for example, the general partnership (Handelsgesellschaft, OHG), the limited partnership (Kommanditgesellschaft, KG) and the silent partnership (stille Gesellschaft).

Book Three contains detailed provisions governing the maintenance and registration of business records and accounts.
Chapter 1  The legal framework for international business

Book Four contains the general provisions which apply to commercial transactions between merchants. Commercial transactions are all those entered into by the merchant during the course of his or her business. The obligations imposed on merchants differ from those which apply in the case of ordinary non-commercial transactions.

Book Five deals with the law relating to maritime and admiralty matters.

Various aspects of commercial law will be considered in the chapters which follow, but at this stage a final point should be noted. It was stated above that as far as English law is concerned, the term commercial law does not have a precise meaning. However, this is not necessarily the case in other jurisdictions following the common law tradition. It will be recalled that all states in the USA, with the exception of Louisiana, have adopted the Uniform Commercial Code (UCC). Thus, a reference to the commercial law of, say, Carolina would likely be taken to be a reference to the UCC.

Private international law is that branch of the law which comes into play when a legal issue has an international dimension. Consider, for example, a contract concluded between parties located in different countries. If a dispute arises between them that is likely to involve court action, a number of problems can arise which would not be present in a purely domestic context. For instance, before the courts of which country (claimant’s or defendant’s) should the case be brought? What system of law should govern the contract? If the claimant succeeds in winning an award of damages, will this be recognised and enforced by the courts of the country where the defendant and his assets are located? A similar type of problem can arise in other contexts – for example, over the right of succession to a deceased’s estate. Although the deceased might have been resident all his life in one country, he may have owned land in another. A major question may arise as to whether the succession rights to this property are governed by the law of the country where the deceased spent his life or the law of the place where the land is situated.

In the examples cited above, a judge will refer to the rules of private international law in an attempt to resolve the questions posed. It should be remembered, however, that these rules
form part of the domestic legal system concerned, so a French judge will refer to the French rules of private international law, a Brazilian judge to the Brazilian rules, a Japanese judge to the Japanese rules and so on, and as is very often the case, these rules may differ significantly. Some of the practical issues flowing out of this problem will be considered in later chapters.

It should be remembered that the categories of law which have just been discussed do not represent the sum total of law existing in any given system. They are merely examples of some, but not all, of the law’s main branches. In addition, it should not be assumed that all legal systems adopt precisely the same method of classification. The intention has been to give the reader an appreciation of the general types of law which will be found in the legal system of most countries.

The sources of law

Familiarity with the main branches of the law may assist in the preliminary analysis of a legal problem, but if a more thorough evaluation is to be undertaken, precise and detailed rules will have to be identified by tracing them to their source. For example, if the seller of goods fails to deliver what has been ordered, the buyer might recognise that his entitlement, if any, to a remedy will be found in the law of contract. However, in order to pursue his complaint against the seller, the buyer will have to locate the precise rules relevant to his cause. If the dispute were taking place in England, the buyer would be well advised to refer to the Sale of Goods Act 1979.

The principal sources of law will now be considered.

Legislation

The term ‘legislation’ refers to that body of law formally enacted by the institution of state which, under the constitution, has law-making responsibility. In the UK, the Parliament at Westminster enacts legislation in the form of Statutes (Acts of Parliament). Since 1998, significant legislative powers have been devolved to the Scottish Parliament, covering many areas which formerly would have been the responsibility of the Westminster
Parliament. In the late 1990s, the National Assembly for Wales was also established. Although this body’s law-making powers are less extensive than those of the Scottish Parliament, it has responsibility for developing and implementing policies reflecting the particular needs of the people of Wales.

Statutes passed by the Westminster Parliament are referred to as *primary legislation*.

A significant amount of the law regulating business is found in this form. For example:

- The Companies Act 1985 is a major piece of legislation providing the legal framework within which limited liability companies must operate.
- The Supply of Goods and Services Act 1982 imposes strict duties on businesses supplying goods and/or services.
- The Competition Act 1998 outlaws a wide variety of anti-competitive behaviour, and provides for the imposition of severe penalties on businesses which engage in such conduct.

There are, however, many occasions where parliament delegates its general law-making powers to other persons or bodies. Such a delegation may occur when, say, the issue being addressed is far too complex and detailed to be dealt with effectively in primary legislation. Instead, Parliament may enact a statute (the *enabling Act*) so as to provide the broad framework, the details being filled in by the appropriate Minister of State by means of delegated legislation. For example, much of the detailed law on social security is found in regulations drawn up by or under the authority of the Secretary of State for Social Security. These regulations, when made in the approved manner, have the same legal force and effect as the Act of Parliament under which they were enacted.

Delegated legislation can take various forms. Most of the powers conferred on Ministers of State by modern statutes are exercisable by ministerial or departmental regulation as in the example just given. Collectively these regulations are known as *statutory instruments*. Delegated legislation can also take the form of *by-laws*. By-laws are the means whereby a local authority, for instance, can make legally binding rules for local application.
In other countries, both primary and delegated legislation will form a major source of law. As has already been explained, large areas of law in civil law countries have been formally enacted into codes. This being so, there will, however, be many occasions when a code needs amending or even replacing and in any civil law country there will be a wide variety of matters covered by legislation other than that exemplified by the various codes. In France, for example, Parliament enacts general law through *lois ordinaries* (statutes). There also exists the possibility for the executive arm of government to create law through *ordonnances* (ordinances). As *ordonnances* are only granted by authorisation of Parliament, they represent a form of delegated legislation. Delegated legislation also exists in the form of *reglements* (regulations), which are passed to facilitate the implementation of the *lois*. *Reglements* issued by the President of the Republic or the Prime Minister are known as *décrets* (decrees), while those issued by individual ministers or by such administrative authorities as the *préfet* (prefect) or *maire* (mayor) are referred to as *arrêts* (rulings).

The situation in Germany is somewhat different. As it is a federal state, legislative responsibility lies with both the federal parliament (the *Bundestag*) and the parliaments of the sixteen regional states (the *Lander*). Under the constitution (*Grundgesetz*) the *Lander* have the right to enact legislation for the region except in those areas reserved for the federal parliament by the constitution. Although the *Lander*, through their representatives, participate in various ways in the federal legislative process, their exclusive law-making competence is, in reality, limited, being restricted mainly to local government, police, educational and cultural matters.

At the both federal and regional levels, primary legislation manifests itself in the form of *Gesetze* (statutes). Included among such legislation are the several general codes – for example, the *Burgesliches Gesetzbuch* (civil code), the *Handelsgesetzbuch* (the commercial code) and the *Strafgesetzbuch* (the criminal code). As in other systems, power to legislate in Germany is also delegated to individuals and other bodies and institutions. For example, delegated legislation issued by individual government ministries or the *Lander* is termed
Verordnungen or Rechtsverordnungen (regulations) while that emanating from, say, local authorities is referred to as Satzung (by-laws).

Case law (judicial precedent)

In addition to legislation, law can derive from judgements given by courts when deciding cases brought before them. As a source of law, this is known as precedent. As has already been explained, a defining characteristic of common law systems is the role that the courts have played in creating law in this way. This is not to say that in civil law jurisdictions the courts do not fulfil an important function, but any role they perform in establishing legal principles for application in future cases differs, in theory at least, from that of their common law counterparts.

The common law doctrine of judicial precedent basically embodies the principle that, in deciding a case, a judge will be bound by the previous decision of a higher court. This idea needs further explanation.

Firstly, it must be clear what is meant by the ‘decision’ or, to be more accurate, the ‘precedent’ established in the earlier case. The precedent is not the decision itself reached by the court but the rule of law contained within that decision. This element is known as the ratio decidendi and must be distinguished from the obiter dicta (things ‘said by the way’). At the end of a case, a judge, before handing down a ruling in favour of one or other of the parties, will give his or her reasons for the decision. Collectively these comprise the judgement. In contrast to the brevity which typically characterises court judgements in civil law jurisdictions, the judgement of common law judges can be extremely lengthy and detailed. Most of the judgements given by the higher courts will be published in one or more of the series of law reports available, thus giving lawyers, academics and other interested parties the opportunity of subjecting every phrase and sentence to detailed scrutiny.

An essential task in identifying the precedent established by a previous case is to isolate the ratio from those parts of the judgement which are merely obiter. If one analyses the structure
of a typical judgement, the following basic elements will be found:

1 A summary of the facts which the judge regards as material to the case. For example, the fact that a motorist who causes an accident was, at the time, driving without lights at 80 mph in foggy conditions might all be material facts upon which to base an allegation of negligence, but the fact that he was at the time sporting a beard and moustache would not.

2 A statement of the principles of law relevant to the legal issues disclosed by the facts.

3 A decision based on the application of (2) to (1).

As far as the parties to the action are concerned, the most important part of the judgement is (3) because, subject to the possibility of an appeal, that decides the issue between them. However, as far as future cases are concerned, (1), (2) and (3) are all important because, together, they comprise the ratio. The ratio of a case can be summarised as those statements of law cited by the judge which, when applied to the legal issue posed by the facts found to be material, lead to the decision in the case.

It is important to emphasise that it is the statements of law applied to the actual facts of the case before the court that form the ratio. The theoretical reason for this, which, however, does not reflect the reality of the situation, is that judges must concern themselves with finding the law and applying it to the case before them, not making law which is the prerogative of the Legislature. In the course of a judgement, the judge might digress and state, for example: ‘If the facts had been . . . I would have decided . . .’. The judge’s words cannot be regarded as ratio because they do not relate to the actual facts of the case; they are statements which are ‘said by the way’ or obiter. It should not be assumed, however, that obiter dicta are devoid of value in future cases for, as will be explained below, in some circumstances they might have significant persuasive authority, even though they do not constitute binding precedent.

Whether a statement is ratio or obiter is not decided by the judge in the instant case because, in the course of the judgement, he or she will make no distinction between the two.
It will fall to the court in a future case to determine the *ratio* of the earlier one. Thus, depending on the level of abstraction adopted by the court in the later case, the *ratio* as found in the earlier decision can be broad or narrow. By way of illustration, take the example quoted above. Supposing the motorist, X, while driving his car at 80 mph without lights in foggy conditions collides with a car been driven by Y, injuring him. Following the accident Y sues X for compensation and the judge finds X liable. In extracting the *ratio* of this case, a later judge can restrict its significance by defining a narrow *ratio* or, on the other hand, establish a wider principle of law through a broader definition. To achieve the former, the judge may decide that most of the facts are material – for example, ‘a person who drives a car without lights at 80 mph in foggy conditions is liable to compensate any person to whom he causes injury’. A wider *ratio* would eliminate some of the facts as material – for instance, ‘a person who drives a motor vehicle negligently is liable to compensate any person injured’. This definition would extend the principle to the negligent driving of motor vehicles generally, but a further option for the judge would be to define a *ratio* establishing a general principle of liability for negligent conduct, such as ‘a person who by his negligent act injures another is liable to compensate that person for the injuries sustained’. A *ratio* so defined would, in fact, represent the essential principle underlying the law of negligence.

The above explanation stresses the fact that the precedent established by an earlier case lies in the *ratio* of the decision. But when does such a precedent become binding on a court hearing a case raising a similar issue in the future? The answer basically depends on which court decided the earlier case. The courts of most jurisdictions are structured within a hierarchy. For example, in England and Wales, except for questions relating to European law (see below), the *Judicial Committee of the House of Lords* is the final court of appeal. Below this is the *Court of Appeal*, followed by the *High Court* and other courts of equivalent status. There are additional courts below the level of the High Court, but for the purposes of binding precedent, they can be ignored.

All lower courts must apply a precedent set by the House of Lords. The House of Lords can, and occasionally does, depart
from its own previous decisions, but due to the uncertainty and inconvenience which may result from overturning hitherto apparently settled law, it uses this power sparingly. Precedents established by the Court of Appeal bind the High Court and courts coming below it. The Court of Appeal is also bound by its own previous decisions, although there are a number of exceptions to this rule. Decisions of the High Court bind all courts below but do not bind the High Court itself. It should be stated, however, that a court does not always slavishly follow precedent and that there are a number of devices at its disposal should it wish to avoid following an otherwise binding precedent. For example, a court, while acknowledging the precedent, may nevertheless ‘distinguish’ the present case on its facts. As was explained above, an integral part of the precedent are the facts to which the stated principle of law was applied. This, therefore, provides the judge in the later case with an opportunity to find essential differences in the facts of the case before him as compared with those in the earlier one. Some precedents are distinguished so often that effectively they are shunted off into a siding and rarely followed subsequently.

The above discussion concerned precedents which are binding on a court when reaching its decision. Not all precedents are of this nature. A precedent can be merely ‘persuasive’, which means a court has an option whether to follow it or not. This may occur, for example, when a case raises a legal problem which is not covered by an established binding precedent. The judge hearing the case may look to other sources having persuasive authority, some of which may be more persuasive than others. *Obiter dicta* from courts at all levels can be influential, particularly those originating from the House of Lords or Court of Appeal. The decisions of lower courts might have persuasive authority so far as higher courts are concerned. For example, the Court of Appeal may decide to follow an earlier decision of the High Court where there is no precedent set by either the Court of Appeal or the House of Lords. Where no ‘home grown’ precedent exists, an English court might look to decisions arrived at by courts in other common law jurisdictions or even decisions of courts administering civil law.

The concept of judicial precedent as described above broadly applies in other countries following the common law tradition,
although its precise operation will differ according to the court structure and other governing factors applicable in the jurisdiction concerned. The same cannot be said as regards civil law countries. In France, for example, there is no fundamental axiom of French law that a judicial determination, even by the highest court in the land, the *Cour de cassation*, has binding effect in any other case. The function of the courts is not to make law but to interpret the law and apply it to individual cases. Indeed, Article 5 of the *Code civil* states that ‘the courts shall be prohibited from issuing rules which take the form of general and binding decisions on those cases which are submitted to them’. Although this may represent the theoretical position, practical reality is somewhat different. It would be a mistake to suppose that the decisions of French courts (*jurisprudence*) have no authority beyond the individual case in hand. They are widely cited by lawyers and by textbook writers. Indeed, it would be difficult to express an opinion as to the meaning of a provision of, say, a code without knowing how it had been interpreted by the courts. Many of the decisions of the higher courts appear in law reports, much like in England. These are accepted as having persuasive weight, which only increases as the courts progressively settle down to a uniform and consistent attitude on any particular point. The result is that an undeviating line of reasoning – for example, of the *Cour de cassation* – has an authority, judged from a practical point of view, barely distinguishable from a decision of the House of Lords.

Again, in Germany, precedent (*Prajudizien*), in theory at least, is not regarded as a source of law. As in the case of France, however, the formal decisions of the higher courts and in particular those of last resort – for example, the *Budesgerichtshof* – have great persuasive authority and are never lightly disregarded. In some areas, the courts have been so active in interpreting legislative provisions or ‘gap-filling’, where necessary, that labelling their function in this respect as either interpretative or creative becomes somewhat semantic. For example, in competition law, paragraph 1 of the Unfair Competition Act 1909 (*Gesetz gegen unlauteren Wettbewerb*, UWG) provides that ‘A person who in the course of business and for the purpose of competition conducts himself in a manner which offends against good morals may be enjoined and held liable in damages.’ To say that this
provision is a little generalised would be something of an understatement but, nevertheless, it represents a major plank in German competition law. Over the years the courts have given it detailed consideration and, as a result of the numerous decisions as to its true interpretation, it is possible to specify with reasonable precision the type of conduct which will fall foul of the prohibition.

**Academic writing**

In many civil law jurisdictions, academics have had a significant influence on the interpretation and development of the law. While not representing a formal source of law in the same sense as legislation, for example, the opinions of leading academics and commentators are, nevertheless, given substantial weight by the legal profession and judiciary alike. Both in France and Germany, the works of highly reputable university professors have great persuasive authority and are regularly quoted by lawyers when presenting cases and, indeed, referred to by judges in court decisions. In England, on the other hand, it is comparatively rare for a lawyer to cite the opinions of even leading academics when presenting a case before a court. At one time, an author would have had to be dead before any credence was given to his work! Over the years, judicial attitudes have gradually changed to the point now where the views of modern-day eminent academics are given due consideration when the court thinks it appropriate.

**European community law**

The European Union (EU) is a supranational organisation presently consisting of twenty-five Member States. In the coming years this number is set to increase. At the time of writing, a proposed European constitution is provoking a heated debate within and between Member States. Before it comes into force, the treaty embodying the constitution must be ratified by the parliament of each Member State. In addition, a number of countries are submitting the treaty to a referendum, through which the electorate can voice its opinion. The treaty’s proponents argue that it merely operates to create a
more streamlined decision-making process which, in the light of the EU’s recent enlargement from fifteen to twenty-five Member States, is vital if it is to work efficiently. Those taking a more ‘eurosceptic’ line insist that the constitution, if implemented, would represent yet a further step in the relentless march towards the creation of a European ‘super state’. Who is right, only time will tell.

Whatever the future may hold for the development of the EU, it has not as yet achieved statehood in its own right. This said, however, there is no escaping the fact that, in the context of the present world order, the EU represents a powerful source of political and economic influence. As a source of law its importance cannot be overestimated, as an increasing number of matters, traditionally the preserve of national legislatures, are now being dealt with by the law-making institutions of the EU.

It should not be assumed that EU law applies only to businesses located within the EU itself. Even though operating from a non-Member State, a company will be subject to the EU’s regulatory regime in respect of business activity conducted within its borders. The American giant, Microsoft, has discovered this the hard way. In 2004, after a five-year investigation, the competition authorities of the EU came to the conclusion that Microsoft was abusing its market power within the EU to the detriment of its competitors and consumers alike. The company was fined €497 million! Four years earlier, the Japanese electronics company, Nintendo, had felt the full wrath of the EU competition regime when it was found guilty, along with its seven European distributors, of running a cartel. The corporate wallets of the various participants were somewhat lightened as a result.

It is not only in the field of competition law that business can be affected by EU rules. As will be explained in later chapters, employing labour, appointing agents, the exercise of intellectual property rights and liability for defective products are examples of other areas where the impact of EU law can be felt.

EU law takes various forms. Primary sources include the various Constitutional treaties which bind the Member States together. Prominent among these is the Treaty of Rome 1957, which established the original European Economic Community (EEC) and out of which the EU developed. Within its
structure the Treaty of Rome establishes the ‘four freedoms’ (the right to free movement of goods, persons, services and capital), which together form the foundation stones of the single European market.

Apart from the Constitutional treaties, an ever-increasing volume of law originates from secondary sources such as regulations and directives. A regulation is of general application and binding on all Member States in its entirety. Unlike a directive, it is self-executing in the sense that it becomes law without the necessity of national implementing legislation. A directive, on the other hand, is binding on each Member State as to the result to be achieved. Provided that the aims and objectives of a directive are implemented locally, the precise method of achieving this is left to the state concerned. Whereas regulations are used primarily to achieve uniform legal rules throughout the EU, directives, in practice, are used mainly to effect approximation or harmonisation of the national laws of Member States.

EU law, of whatever form, takes precedence over national law. Where there is a conflict between the domestic law of a Member State and EU law, the latter prevails and the courts of that state must give effect to it in preference to national law. The European Court of Justice (ECJ) in Luxembourg is responsible for ensuring that EU law is correctly interpreted and applied. Its decisions are binding throughout the EU and must be followed by the national courts of Member States.

In some contexts, EU law has direct effect. This means that it creates rights that can be enforced by individual citizens of Member States. This entitlement also extends to companies and their businesses. So, for example, should a competitor of Microsoft wish to seek compensation for loss suffered as a result of Microsoft’s anti-competitive behaviour, it would be able to invoke EU competition rules as a basis for its claim.

**Court systems**

In every jurisdiction, courts of one form or another will play a major role in the administration of the law. In any system, courts will exist at different levels, some dealing with cases when they are originally presented (courts of first instance) and others hearing
appeals from the decisions of those courts (appellate courts). A court may have jurisdiction over a wide variety of legal issues or, alternatively, be restricted to certain specialist matters. To illustrate the above points, a general overview of the court systems of England and Wales, France and Germany follows.

**England and Wales**

**The House of Lords**

At the apex of the court system is the House of Lords. This court exercises both civil and criminal jurisdiction and, except for matters relating to European law, is the final court of appeal not only for England and Wales, but in some instances Scotland and Northern Ireland as well.

Exercising its civil jurisdiction, the House of Lords hears appeals from the Court of Appeal (Civil Division), the Court of Session in Scotland and the Supreme Court of Northern Ireland. Appeals to the House of Lords are only allowed when a point of law of general public importance is involved. Leave to appeal must be granted either by the lower court against whose decision an appeal is being made or by the Appeal Committee of the House of Lords itself.

In criminal matters, the House of Lords hears appeals from the Court of Appeal (Criminal Division) and, in some instances, the High Court. While the House of Lords hears criminal appeals from the Court of Appeal in Northern Ireland, the Scottish Court of Criminal Appeal is the final court of appeal for Scotland.

**The Court of Appeal**

The Court of Appeal is divided into Civil and Criminal Divisions. The Court of Appeal (Civil Division) hears appeals on matters of both law and fact from the High Court and the County Court (local court). The court can uphold or reverse the decision of a lower court or substitute a new judgement. Occasionally it may order a new trial.

The Court of Appeal (Criminal Division) hears appeals from the Crown Court against conviction and/or sentence and may dismiss or allow the appeal or order a new trial.
The High Court of Justice

The High Court acts both as a trial court, i.e. hearing cases for the first time, and an appeal court. It sits in London and in twenty-seven regional centres. For essentially administrative reasons, it is divided into three divisions: the Queen’s Bench Division (QBD), the Family Division and the Chancery Division. All three divisions can sit as a trial court where one judge sitting alone, having determined both the law and facts of a case, will pronounce a verdict. In addition, each division can sit as an appeal court hearing appeals from certain lower courts. When exercising its appellate jurisdiction, the court normally consists of three judges.

QBD is the largest division. Its workload mainly consists of matters relating to contract and tort, commercial law and admiralty. The court also hears appeals on points of law from the Magistrates’ Court and Crown Court through a process known as ‘case stated’. This involves an appeal from the lower court on the grounds that the decision of the lower court was wrong in law. The court concerned must state a case for the opinion of the QBD. Such a ruling will then determine the success or otherwise of the appeal.

The Family Division has jurisdiction over matters relating to divorce, nullity, children, financial support and matrimonial property. As an appeal court, it hears appeals from the Magistrates’ Court and County Court in matrimonial and family matters.

The Chancery Division has jurisdiction over matters relating to land, mortgages, trusts, revenue, companies and partnerships, administration of estates, insolvency and intellectual property. The court also hears appeals from the County Court in such matters as insolvency and land registration.

The Crown Court

The Crown Court sits both as a trial court and an appeal court in criminal matters. As a trial court it deals with the more serious criminal offences. Cases are heard by a single judge sitting with a jury. As an appeal court, the Crown Court hears appeals against conviction and/or sentence from the Magistrates’ Court.
County Court

The County Court exercises exclusively civil jurisdiction. It is essentially a local court, there being over 200 throughout England and Wales. Although it deals with broadly the same subject matter as the High Court, cases coming before the County Court tend to be less complex and involve smaller sums of money than those dealt with by the High Court.

Magistrates’ Court

There are over 1000 Magistrates’ Courts throughout England and Wales. Most magistrates are appointed from members of the general public and are termed ‘lay’ magistrates. Normally magistrates sit in benches of three and will be assisted by a legally qualified clerk to advise them as necessary on legal matters.

A Magistrates’ Court exercises both criminal and civil jurisdiction. In the context of the former, it tries cases involving less serious offences. However, even the more serious criminal cases are begun in the Magistrates’ Court before being transferred to the Crown Court for trial.

The civil jurisdiction of the Magistrates’ Court covers such matters as recovery of certain civil debts – for example, income tax and national insurance contributions, the granting and revocation of liquor licences, etc. It also exercises jurisdiction in a variety of family-related proceedings such as those involving domestic violence and/or occupation of the matrimonial home.

France

Since the revolution, a strict demarcation line has been drawn between the those institutions of state responsible for the administration of the country and the judiciary. It was long ago decided that legal issues involving the former should not fall within the jurisdiction of the ordinary courts but should instead be decided by a system of administrative courts. This separation of powers is still firmly in place today, with the result that France has two systems of courts: the courts of the ordre judiciaire (the ordinary courts), which deal
with civil disputes between private individuals and also criminal matters; and the ordre administratif (the administrative courts), which have exclusive jurisdiction in all public law matters. What follows is an overview of the ordinary court system.

**Tribunal d’instance**

The Tribunal d’instance, of which there are 450 throughout France, has jurisdiction over all litigation involving civil claims not exceeding approximately £3000 and not within the competence of courts of special jurisdiction (see below). A decision of a Tribunal d’instance involving a sum less than £1300 is final and cannot be appealed. The only exception to this is the right to appeal direct to the Cour de cassation on a point of law. Where the amount in dispute exceeds £1300, appeal lies to the Cour d’appel. Unlike other courts, whose decisions are collegiate, a Tribunal d’instance is presided over by a single judge.

**Tribunal de grande instance**

The Tribunal de grande instance, of which there are 175 throughout France, has jurisdiction over all matters exceeding the jurisdictional threshold of the Tribunal d’instance and which have not been specifically allocated to another court. The Tribunal de grande instance has two divisions: the chambre civil and the chambre correctional. The former has general jurisdiction over any private law matter except those specifically allocated to special courts – for example, commercial and employment-related disputes. However, it enjoys exclusive jurisdiction over a variety of issues, such as marriage, divorce and separation, patents, land, road accidents, etc. Cases are heard by three judges who deliver a collective judgement. Unlike the decisions of English courts, there are no dissenting judgements.

When exercising its criminal jurisdiction, the Tribunal de grande instance deals with major offences (delits). The court normally consists of three judges.

Appeals in both civil and criminal matters lie to the Cour d’appel.
Courts of special jurisdiction

**Tribunal de commerce (commercial court)**

There are approximately 200 commercial courts throughout France. They exercise jurisdiction over commercial disputes and bankruptcies involving merchants and commercial entities. They are staffed by lay judges who must be over thirty years of age and have been engaged in business for at least five years. Judges are elected for terms of two years by and from among businessmen and women whose names appear on the local commercial register. Disputes involving less than £1300 are final; otherwise appeal lies to the **Cour d’appel**.

**Conseil de prud’hommes (labour court)**

Individual disputes arising between employer and employee are brought before one of the 300 labour courts. As with the commercial court, the labour court is staffed by lay judges elected from the ranks of local employers and employees. A court consists of four judges, with employers and employees being represented equally.

**Tribunal des affaires de securite sociale (social security court)**

This court deals with disputes arising out of the social security system. It consists of a judge of the local **Tribunal de grande instance** and one employer and one employee representative.

**Cour d’appel**

There are thirty **Cour d’appel** situated throughout the country, each hearing appeals for the courts of first instance described above. An appeal involves a complete re-hearing of the case and the court can substitute its view of either facts or law for that of the lower court.

To accommodate the wide variety and often specialised subject matter of appeals, each **Cour d’appel** is divided into a number of divisions or ‘chambres’. In addition to those **chambres** dealing with general civil and criminal appeals, there are specialist **chambres** responsible for hearing appeals from labour courts and social security courts.
Cour de cassation

The Cour de cassation is the highest court in France for non-administrative appeals. Situated in Paris, the court, strictly speaking, is not a court of appeal. Its principal function is to ensure that the law is interpreted uniformly throughout the country and to this end restricts itself to reviewing findings of law, not fact. It can only quash a decision of a lower court of which it disapproves. Unlike a Cour d'appel, it cannot substitute its own decision. The only recourse to the Cour de cassation is on the basis that the judgement of the court below reveals a ‘violation de la loi’, i.e. an incorrect foundation of law. Where the Cour de cassation finds this to have happened, the case is remitted for further consideration not to the original court but to another court of equal jurisdiction. This court is not bound by the view of the Cour de cassation and if it takes the same view of the law as the original court, the matter is referred to the ‘Assemblée plenière’ of the Cour de cassation, where all five chambers of the court are represented. If the issues are the same as in the original hearing, the Assemblée can enter a final judgement, otherwise the case is remitted to a third court of equal jurisdiction to the original court. This court is bound to apply the law as stated by the Cour de cassation.

Finally, it should be noted that, unlike decisions of the House of Lords, judgements of the Cour de cassation are not binding on courts hearing similar cases in the future. However, a court which fails to apply the law as declared by the Cour de cassation runs the risk of having its decision appealed and successive judgements of the Cour de cassation affirming a particular point of view will be strong persuasive evidence of the law and its correct interpretation.

Germany

As compared with the English court system and even that of France, the system found in Germany places great emphasis on courts of special jurisdiction. Thus, alongside the ordinary courts (Ordenliche Gerichte) there exist a variety of specialist
courts, each having its own separate appeal structure, culmi-
nating in a court of last resort. These courts are: revenue or
finance courts (Finanzgerichte); administrative courts (Verwal-
tungsgerichte); labour courts (Arbeitsgerichte) and social security
courts (Sozialgerichte).

The ordinary courts handle the bulk of the legal work in
Germany and comprise the largest hierarchy. A brief overview
of the courts found in this system follows.

Amstgericht (local court)

There are 718 local courts throughout Germany. They have
jurisdiction in civil disputes where the amount involved does
not exceed approximately £3000. However, regardless of the
sum in question, the local court will also deal with landlord
and tenant disputes and various family matters. Providing the
amount involved is more than £500, appeal lies to the district
court (Landgericht). The local court also has jurisdiction to
handle cases involving minor criminal offences.

Landgerichte (district court)

The district court has jurisdiction in all civil litigation
involving amounts over £3000 and also deals with the more
serious criminal offences. As stated above, the district court
hears appeals in civil and criminal matters from the local
court.

Cases are heard before a court consisting of three judges.
However, if the litigation is between merchants, the court sits
as a commercial court in which the presiding judge is the only
legally qualified member, the other two judges being experi-
enced businessmen or women.

Oberlandesgericht (appeal court)

The court of appeal is mainly concerned with hearing civil
and criminal appeals from the district court. Except in the lim-
ited circumstances where leave is granted for a further appeal
to the Bundesgerichtshof (see below), the decision of the court
of appeal is final.
The court of appeal also acts as a court of first instance for the hearing of the most serious criminal offences, such as treason.

The courts just described are the courts of the Lander. Above these in the hierarchy are the federal courts. These comprise the various federal courts of appeal for courts exercising ordinary and special jurisdiction and the federal constitutional court.

The Bundesgerichtshof (BHG; federal court of appeal)

The BGH is the final court of appeal from courts exercising ordinary jurisdiction. Sitting at Karlsruhe, it hears appeals from the court of appeal but only if that court has given its consent. Such consent will normally be forthcoming only in those cases involving a novel and important point of law or where the decision of the lower court has deviated from a previous ruling of the BGH. Appeals in civil cases normally concern disputes where the sum involved exceeds £20 000.

Specialist federal courts of appeal

As mentioned above, alongside the ordinary courts, there exist a number of specialist courts, each with their own appeal structure, at the apex of which is a federal court of appeal. At the same level as the BGH, therefore, are also to be found the Bundesarbeitsgericht (federal labour court), the Bundesverwaltungsgericht (federal administrative court), the Bundessozialgericht (the federal social court) and the Bundesfinanzhof (federal tax court).

The Bundesverfassungsgericht (BverfG; the federal constitutional court)

The German constitution (Grundgesetz) provides for an independent court to hear cases of a constitutional nature. Thus, the BverfG decides disputes between the Federation and the Lander or between different Lander. It also resolves questions concerning the relationship between the federal parliament (Bundestag), the Lander’s representative body (Bundesrat), the federal government, the federal President and certain other institutions having a constitutional role.
International co-operation and the harmonisation of business law

Mention has already been made of the fact that laws can and do differ between countries. In the next chapter and those following it, specific examples will be given of the significant divergences that can exist. Suffice it to say at this point that, for the practitioner conducting business on an international scale, such variations can present certain risks. These can arise not only from exposure to differing levels of potential liability, but also from the threat to business interests resulting from the varying degrees of protection afforded by different jurisdictions. This said, however, it must be recognised that, in many areas, co-operative effort both by governments and non-governmental bodies has resulted in a harmonised approach to many issues faced by international business. A number of such initiatives will be examined in their appropriate context in later chapters but, by way of example, mention can be made of the following organisations which, to the present day, have played a major role in smoothing the path along which international business is conducted and, no doubt, will continue to do so in the future.

The International Institute for the Unification of Private Law (UNIDROIT)

UNIDROIT is an international intergovernmental organisation based in Rome. Originally set up as an auxiliary organ of the League of Nations, it is now governed by the terms of the UNIDROIT Statute, a multilateral agreement signed in 1940. UNIDROIT was established to study the needs and methods for modernising, harmonising and co-ordinating between states’ private law and particularly commercial law. Its membership currently consists of fifty-nine states.

The instruments employed by UNIDROIT to achieve its mission of harmonisation are several. At its most formal, proposals for change might be the subject of an international Convention. Such an instrument is intended to supersede the domestic law of those states which adopt the Convention and
take the necessary legal steps to incorporate it into domestic law of the country concerned. Two such examples are the 1988 Conventions on International Factoring and International Financing. Conventions traditionally tend to be given low priority by national governments when compared with other more pressing business. This, coupled with the fact that a considerable time usually elapses before they come into force, has prompted the frequent use of alternative forms of UNIDROIT instrument. Examples include *model laws* and *general principles*. The former, as the name suggests, represent a model set of laws on a particular subject which states can take into consideration when drafting national legislation on the topic concerned, the model Franchise Disclosure Law (2002) being an example. General principles, on the other hand, are addressed directly to judges, arbitrators and contracting parties who are left free to decide for themselves whether to use them or not. Prominent among these are the *Principles of International Commercial Contracts*, which represent a codified statement of the law governing such contracts.

**The United Nations Commission on International Trade Law (UNCITRAL)**

UNCITRAL was established by the General Assembly of the United Nations in 1966, its mandate being to further the progressive harmonisation and unification of the law of international trade. It has, to date, a considerable number of documents to its credit, including Conventions and model laws spanning a wide range of issues affecting international business. UNCITRAL has been active in areas as varied as the international sale of goods, the international transport of goods, commercial arbitration, electronic commerce, negotiable instruments, project finance, insolvency, counter trade, letters of credit and construction contracts.

**The International Chamber of Commerce (ICC)**

The ICC is a non-governmental organisation based in Paris but having representative offices in many countries throughout the world. It was founded in 1919 with the aim of serving
world business through the promotion of trade and investment and the opening up of markets for goods and services. It plays a vital role in setting standards for the conduct of business that have global recognition. Although not compelled to do so, parties to international business transactions frequently incorporate one or other of the ICC’s standard sets of business terms into their contracts. For example, most banks in the world operate on the ICC’s Uniform Customs and Practice for Documentary Credits when financing exports through letters of credit (see Chapter 7). ICC Incoterms provide a standard definition of trade terms such as f.a.s., f.o.b., c.i.f., etc., upon which countless export contracts are concluded every day (again, see Chapter 7). It produces a wide variety of model contracts upon which parties can base their relationship. Among the model forms available are those relating to international sales, commercial agency, distributorships and franchising. The ICC also facilitates the solution of business disputes through its arbitration and conciliation services, with the ICC International Court of Arbitration having a worldwide reputation in this field (see Chapter 8).

The World Trade Organisation (WTO)

Having its headquarters in Geneva, Switzerland, the WTO seeks to provide a means for addressing the problems associated with international trade. Above all, it provides a forum in which governments can discuss and, through negotiation, reach consensus on how to tackle the difficulties that often hinder the free flow of trade between countries. It also provides an institutional framework within which countries can seek to settle differences that can arise from the pursuit of conflicting national interests.

The WTO was born on 1 January 1995, the offspring of the General Agreement on Tariffs and Trade (GATT) which, since 1948, had provided the rule book for the conduct of international trade. At the heart of the WTO are the various agreements signed by the majority of the world’s trading nations. Frequently embodying social and/or environmental objectives, they lay down the limits within which each signatory government must conduct its trade policies. Although the agreements
have been concluded between states and essentially operate at that level, a principal aim is to assist the ground players who produce and trade in goods and services in the conduct of their business.

The WTO agreements cover a wide variety of issues ranging from agriculture, textiles and clothing, banking, to telecommunications, industrial standards and product safety, intellectual property and much more. However, a number of basic tenets underlie each of the agreements no matter what their individual content. For example, trade without discrimination is a fundamental axiom of the entire system. Each country should abide by the Most-Favoured-Nation (MFN) principle. Thus, as a general rule, it is not permissible for a country to discriminate between its trading partners by, for example, lowering customs duties for one but not others. Nor should it discriminate between its own and foreign products, services or nationals. Therefore, once foreign goods have entered a particular market, they should be treated no differently from those produced locally. Such equality of treatment should also apply to foreign and domestic services and intellectual property rights such as patents, copyright and trademarks.

The promotion of freer trade based on fair competition also forms a thread running through the WTO agreements. The lowering trade barriers, such as tariffs, quota restrictions and import bans, are generally seen as a way of nurturing greater trade between countries and therefore frequently appear on the negotiating agenda. While increased trade should be encouraged, this should be done on a basis of open, fair and undistorted competition. Preventing or hindering imports through protective measures or gaining an unfair advantage in an export market through, say, ‘dumping’ represent the kind of activity that could offend against this principle.

The WTO recognises that the implementation of the agreements might cause difficulties for less developed countries and particularly for the poorest. Accordingly, a flexible approach has been adopted and in many cases a period of transition has been allowed to enable the countries concerned to adjust to the implications of having their markets opened up to foreign competition, which the WTO’s trade liberalisation programmes require.
Summary

The following issues were dealt with in this chapter:

1. The importance of being able to identify potential legal problems sooner rather than later.
2. The distinguishing characteristics of common law and civil law legal systems.
3. The classification of law into its various branches and how this relates to the solution of legal problems.
4. The role of legislation and case law as sources of law.
5. The relevance and potential impact of EU law on international business.
6. The court structures existing in England and Wales, France and Germany.
7. International organisations involved in the attempt to harmonise law as it affects the conduct of international business.