



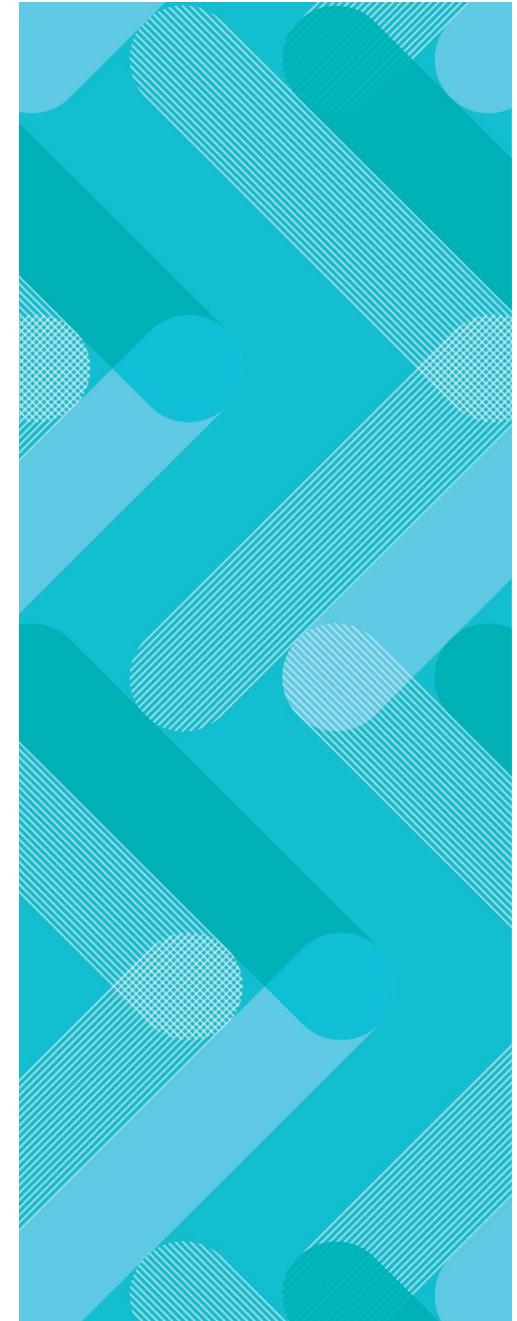
HERBERT
SMITH
FREEHILLS

Contemporary Legal Knowledge and Practice

Comparative Laws - Singapore Institute of Legal Education

Session 1

Gitta Satryani, Warathorn Wongsawangsiri, Debby Sulaiman, Reshma Nair



Introduction to Civil Law and the Civil Code

1. Introduction to the Common Law and Civil Law traditions
2. The Civil Code in Indonesia
3. The Civil and Commercial Code in Thailand
4. Minimal stare decisis: the practical significance

Introduction to the Common Law and Civil Law traditions

Some key differences to keep in mind:

- Common law relies on statutes, it is largely based on precedent and development of case law.
- Civil law is codified. The main source of law is to be found in different codes.
- Civil law systems offer a formalised framework for contract law laying out the rules governing the agreements.

Fact Pattern

You have been approached for advice by Sophie Publishing Limited ("SP"), based in Jakarta.

SP publishes a very successful women's monthly magazine, (Her)Story, which was launched three years ago by founder and CEO Sophie Ahmad as a more intelligent alternative to the usual titles. It combines fashion and lifestyle with more thought-provoking articles. (Her)Story's success is largely credited to its forward-thinking editor, Veronique Moreau, who will shortly be leaving the magazine to work for a rival publisher. Her departure was announced publicly on 28 June 2024.

Ms Moreau's departure has provoked anger on the part of a major new advertiser, Suey Mak Mak ("SMM"), a Thai-based designer leather goods brand which has become a household name in Thailand, Singapore, and Malaysia, and is now trying to break into the Indonesian market. Advertising in publications that appeal to its target market of young, upwardly mobile professionals is crucial to its strategy.

SMM entered into a one-year advertising contract with SP on 1 June 2024. The first edition containing SMM's advertising has already gone to print, but SMM is threatening to pull out from the remaining editions. SMM is demanding to know when Ms Moreau gave SP the notice of her resignation.

In a phone call received by Ms Ahmad shortly after the announcement of Ms Moreau's departure, SMM's owner and creative director (Madeleine Zhang) claimed she made it clear from the outset that SMM was interested in advertising in (Her)Story because of Ms Moreau's sophisticated editorial style, which was closely aligned to SMM's own sophisticated brand image, and she saw Ms Moreau as essential to the deal. She is particularly angry because Ms Moreau was closely involved in the discussions with SMM and gave presentations about her plans for the magazine over the next 12 months. Ms Zhang says that if SP had known that Ms Moreau was leaving, as it must have known by the time the contract was signed, SMM should have been told. Ms Zhang says that SP and Sophie Ahmad have deliberately tricked and cheated her and they should not be allowed to get away with such terrible behaviour.

Sophie Ahmad agrees that Ms Zhang referred to having been attracted to Ms Moreau's reputation and editorial style, but she doesn't recall anything about Ms Moreau being essential to the deal. She tells you that editors frequently move magazines after a couple of years or so, and SMM's experienced marketing team would have been well aware of this.

Ms Moreau did not give formal notice of her resignation until shortly after the contract with SMM was signed. However, she sent an email to Mr Wijaya (the lawyer), copied to Sophie Ahmad, two weeks beforehand, which said she intended to leave but recognised that news of her departure would not help the negotiations with SMM, and so she was planning to hold back giving formal notice until after the deal was concluded. She said she was letting SP know in advance so that Sophie Ahmad would have maximum time to think about continuity planning.

Mr Wijaya tells you that on receipt of this email he received a WhatsApp message from Ms Ahmad asking him as to what she should do and he immediately replied to Ms Ahmad advising her not to respond to Ms Moreau, so he does not believe there was any further email discussion on the issue.

Based on these facts, Mr Wijaya would like your initial advice both generally and in particular on the questions listed below. However, he is concerned about costs so does not want at this stage to provide you with a full copy of the agreement. He would just like you to advise at the moment based on the information and the extracts from the agreement reproduced below.

You should assume that Mr Wijaya has no familiarity with Indonesian law and no previous experience of disputes.

- (1) Will SMM be able to unilaterally terminate the agreement on its own?
 - a. If yes, would your answer be different if the agreement is governed by Indonesian law?
 - b. If not, what other grounds could SMM use to get out of the agreement? Can SMM invalidate the contract?
- (2) If SMM decides to bring a formal claim against SP, what is the likely basis on which it will formulate its claims?
- (3) Is SP entitled to payment of the monthly fees even if SMM does not place further ads? If the answer is yes:
 - a. on what basis and how should SP claim it in any proceedings if SMM refuses to pay?
 - b. would your answer be different if the agreement is governed by Singapore law?
- (4) SMM commenced proceedings against SP in the Central Jakarta District Court seeking, amongst others, termination of the agreement, and for any other relief in accordance with the principles of fairness and justice (*ex aequo et bono*). However, SMM had identified SP wrongly in the claim forms. The Court bailiff nonetheless served the claim forms on SP.
 - a. Should SP challenge the Court's jurisdiction on the basis that the wrong party was identified, and if your answer is yes, why? If not, what steps should SP take in the Central Jakarta District Court or anywhere else?
 - b. Suppose SP brings a counterclaim for the monthly fees, could the Court refuse to award that claim even if it finds the agreement to be valid and binding, and if so, on what basis?
 - c. In the proceedings before the Central Jakarta District Court, can SMM demand or compel SP to produce the communications (i) sent by Ms Moreau to Mr Wijaya and Ms Ahmad, and (ii) the WhatsApp messages between Mr Wijaya and Ms Ahmad?
 - i. Would your answer be different if the request was made in the HK seated ICC arbitration?
 - ii. Suppose the Central Jakarta District Court ordered / directed SP to produce these communications. Can SP refuse to produce them and on what grounds?
 - d. Can SP claim for its legal costs in the proceedings?

CIVIL CODE for Indonesia

Burgelijk Wetboek

(Proclaimed by the Publication of April 30 1847 S.No. 23)

RAHMANATA
ANDJAR PACHTA



LEMBAGA PENERBIT
FAKULTAS EKONOMI UNIVERSITAS INDONESIA

2. The Civil Code in Indonesia

BOOK ONE - INDIVIDUAL

Contents

Chapter I - Concerning the enjoyment and the loss of civil rights
 Chapter II - Concerning assets and the distinctions between them
 Chapter III - Concerning residence or domicile
 Chapter IV - Concerning matrimony
 Chapter V - Concerning the rights and obligation of the spouses
 Chapter VI - Concerning legal community property and management thereof
 Chapter VII - Concerning prenuptial agreements
 Chapter VIII - Concerning community property or prenuptial agreements in the event of second or further marriages
 Chapter IX - Concerning the division of assets
 Chapter X - Concerning the dissolution of marriage
 Chapter XI - Concerning separation from bed and board
 Chapter XII - Concerning fatherhood and the descent of children
 Chapter XIII - Concerning the relationship by blood and marriage
 Chapter XIV - Concerning parental authority
 Chapter XIV A - Concerning the stipulation, amendment and revocation of support payments
 Chapter XV - Concerning minority and guardianship
 Chapter XVI - Concerning emancipation
 Chapter XVII - Concerning conservatorship
 Chapter XVIII - Concerning absence

BOOK TWO - ASSETS

Contents

Chapter I - Concerning assets and the distinctions between them
 Chapter II - Concerning possession and the rights resulting therefrom
 Chapter III - Concerning ownership
 Chapter IV - Concerning the rights and obligations among owners of neighboring plots of land
 Chapter V - Concerning the rights and obligation of the spouses
 Chapter VI - Concerning servitude
 Chapter VII - Concerning the right of building
 Chapter VIII - Concerning right of tenure by long lease
 Chapter IX - Concerning ground rents and one tenth
 Chapter X - Concerning use of proceeds
 Chapter XI - Concerning use and occupation
 Chapter XII - Concerning succession by demise
 Chapter XIII - Concerning last wills
 Chapter XIV - Concerning executors of last wills and managers
 Chapter XV - Concerning the right of deliberation and the privilege of estate description
 Chapter XVI - Concerning the acceptance and rejection of inheritances
 Chapter XVII - Concerning estate division
 Chapter XVIII - Concerning ungoverned inheritances
 Chapter XIX - Concerning priority of debts
 Chapter XX - Concerning pledges
 Chapter XXI - Concerning mortgages

BOOK THREE - CONTRACTS

Contents

Chapter I - Concerning contracts in general
 Chapter II - Commitments arising from contracts or agreements
 Chapter III - Contracts arising by force of law
 Chapter IV - Concerning the nullification of contracts
 Chapter V - Concerning sale and purchase
 Chapter VI - Concerning exchange
 Chapter VII - Concerning granting on lease and taking on lease
 Chapter VII A - Concerning agreements regarding the performance of services
 Chapter VIII - Concerning partnerships
 Chapter IX - Concerning legal entities
 Chapter X - Concerning gifts
 Chapter XI - Concerning deposits
 Chapter XII - Concerning lending for use
 Chapter XIII - Concerning loans for consumption
 Chapter XIV - Fixed or perpetual interest
 Chapter XV - Concerning aleatory agreements
 Chapter XVI - Concerning the issuance of mandates
 Chapter XVII - Concerning guarantees
 Chapter XVIII - Concerning settlement

BOOK FOUR - CONCERNING EVIDENCE AND PRESCRIPTION

Contents

Chapter I - Concerning evidence in general
 Chapter II - Concerning evidence
 Chapter III - Concerning evidence by witnesses
 Chapter IV - Concerning inferences
 Chapter V - Concerning confessions
 Chapter VI - Concerning the legal oath
 Chapter VII - Concerning Prescription
 Chapter I - Concerning evidence in general

Indonesia's New Government Regulation on Toll Road

Law No 38 of 2004 on Roads was amended on 12 January 2022 by Law Number of 2022 (“Law No. 2/2022”).

Three other grounds for tariff adjustment were introduced:

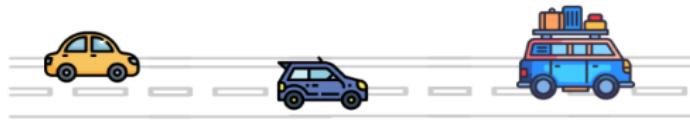
- i. there is a procurement of traffic services in the toll road network system in certain regions;
- ii. there is an expansion of scope in the business plan of BUJT that impacts investment viability; and/or
- iii. there is a central government policy that affects investment viability.

Government Regulation Number 23 of 2024 on Toll Roads ("GR No. 23/2024") has been enacted on 20 May 2024 as the replacement of Government Regulation Number 15 of 2005 on Toll Roads ("GR No. 15/2005").

Purpose of GR No. 23/2024 Enactment

GR No. 23/2024 enacted as the implementing regulation related to Article 35H, Article 45 paragraph (7), Article 48 paragraph (8), Article 49 paragraph (2), Article 50 paragraph (16), Article 51 paragraph (4), Article 51A paragraph (7), Article 51B paragraph (2), Article 52 paragraph (5), Article 52A paragraph (2), Article 55 paragraph (5), Article 56A paragraph (3), Article 57 paragraph (4), and Article 61 Law Number 38 of 2004 on Roads, as amended several times, most recently by Law Number 6 of 2023 on the Stipulation of Government Regulation in Lieu of Law Number 2 of 2022 on Job Creation into Law ("Law No. 38/2004").

Consideration of GR No. 23/2024



GR No. 23/2024 contains total of 114 (one hundred and fourteen) articles, which are categorized in 9 (nine) chapters, as follows:

- | | |
|-------------------------|--|
| a General Provision | f Toll Road Supervision |
| b Toll Road Management | g Fund Management Unit |
| c Toll Road Regulation | h Toll Road Regulatory Agency |
| d Toll Road Development | i Rights and Obligation of Toll Road Business Entity |
| e Toll Road Business | |

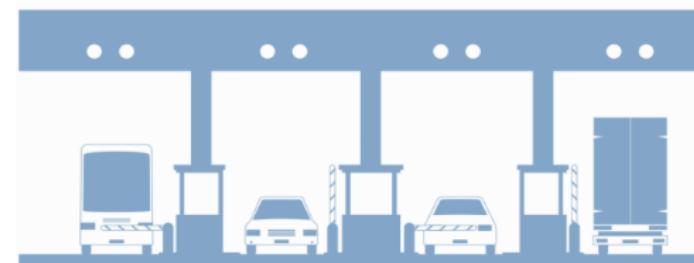
History of GR No. 23/2024

Over more than a decade, there have been various new developments and legal needs in the administration of toll road that have not been accommodated by Law Number 38 of 2004 on Roads. On 12 January 2022, Law Number 2 of 2022 on the Second Amendment to Law Number 38 of 2004 on Roads ("Law No. 2/2022") was enacted in order to meet current legal needs and align with the increasingly dynamic developments of the times.

Further implementation of the regulation on toll road in the Law No. 38/2004 requires a Government Regulation that is in accordance with the mandate of Law No. 38/2004.

Based on Article 67A paragraph (1) Law No. 38/2004, the implementing regulation of Law No. 2/2022 shall be established no later than 1 (one) year from the date of Law No. 2/2022 is enacted.

Before the enactment of GR No. 23/2024, regulations regarding toll roads were set out in GR No. 15/2005. Basically, GR No. 23/2024 has several provisions that are similar to the GR No. 15/2005. However, the Government deemed that the changes required were massive, and thus it was decided to establish a new government regulation concerning toll road.



GR No. 23/2024 provision elaborated in this Publication

- | | |
|-----------------------------------|---|
| Electronic Toll Collection System | Supervision by Government Agency |
| Excess Profit Sharing / Clawback | Land Acquisition Funding in Unsolicited Project |
| Tariff Adjustment | Land Value Capture |
| Minimum Service Standard | Government Actions for Terminated Concession |

Periodic Tariff Adjustment

In relation to toll tariff, BPJT will conduct an evaluation and adjustment once in 2 (two) years. The result of the evaluation will be recommended to the MoPWH, and then the MoPWH will issue a stipulation of tariff adjustment based on the evaluation in question. Below are the basis for stipulating a tariff adjustment under GR No. 23/2024.

Art. 83 (1) and (4) of GR No. 23/2024

- a Influence of Inflation Rate

Art. 83 (1) (a) of GR No. 23/2024

- New Rate = Previous Rate (1 + Inflation)

Art. 83 (2) of GR No. 23/2024

- b Evaluation over the Minimum Service Standard of Toll Road

Art. 83 (1) (b) of GR No. 23/2024

- Fulfilment of Minimum Service Standard of Toll Road for the Last 2 (two) Years

Art. 83 (3) of GR No. 23/2024

Special Tariff Adjustment

Beside the Periodic Tarif Adjustment, GR No. 23/2024 is also regulating the special tariff adjustment. The Special Tariff Adjustment may be implemented under the following conditions:

Art. 84 (1) of GR No. 23/2024

- a Fulfilment of traffic services on the Toll Road network system in certain areas by taking into account the capacity of the Toll Road.

- ▶ 1. implementation of area-based tariff system; or
2. implementation of time-based tariff system.

Art. 84 (2) of GR No. 23/2024

In the event that the MoPWH conducts an evaluation and adjustment if toll tariff considering this condition, the toll revenue difference shall be designated as non-tax state revenue used for the development of the toll road network.

Art. 84 (2) of GR No. 23/2024

- b There is an additional scope outside the business plan that affects the feasibility of the investment.

- ▶ addition of scopes that were not previously included in the business plan and resulted in the decrement of the of the Toll Road investment feasibility rate.

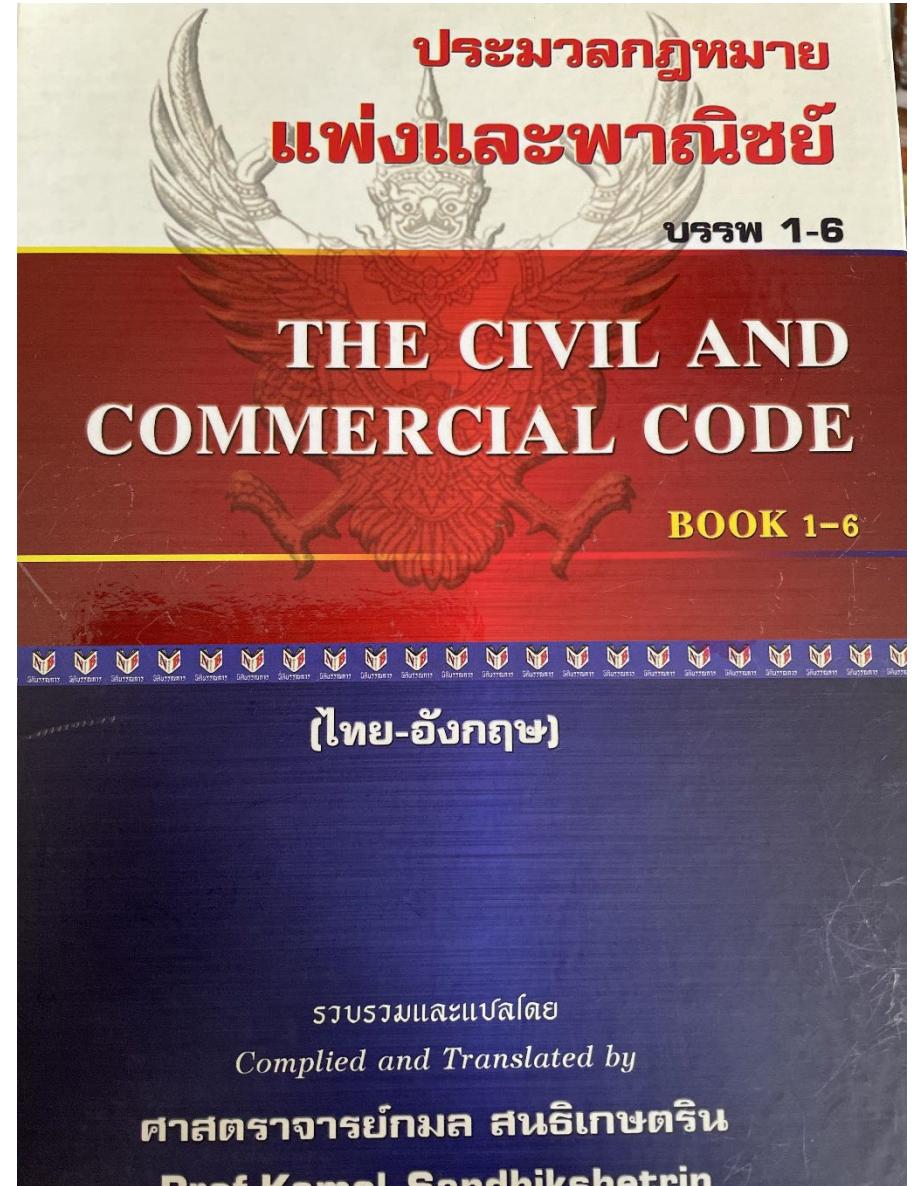
Art. 85 (3) of GR No. 23/2024

- c There are central government policies that affect the feasibility of Toll Road investment.

- ▶ Central Government policies that cause a decrease in Toll Road income.

Art. 85 (5) of GR No. 23/2024

3. The Civil Code and Commercial Code in Thailand



3. The Civil and Commercial Code in Thailand

- Book 1 General Principles

Book 1 Title 1	General Provisions
Book 1 Title 2	Persons <ul style="list-style-type: none">• Chapter 1 Natural Persons• Chapter 2 Juristic Persons
Book 1 Title 3	Things
Book 1 Title 4	Juristic Acts
Book 1 Title 5	Periods of time
Book 1 Title 6	Prescription

- Book 2 Obligations

Book 2 Title 1	General Provisions <ul style="list-style-type: none">• Chapter 1 Subject of Obligations• Chapter 2 Effects of Obligation• Chapter 3 Plurality of Debtors and Creditors• Chapter 4 Transfers of Claims• Chapter 5 Extinction of Obligations
Book 2 Title 2	Contracts
Book 2 Title 3	Management of Affairs Without Mandate
Book 2 Title 4	Unjust Enrichment
Book 2 Title 5	Torts

3. The Civil and Commercial Code in Thailand

- Book 3 Specific Contracts

Book 3 Title 1	Sale
Book 3 Title 2	Exchange
Book 3 Title 3	Gift
Book 3 Title 4	Hire of Property
Book 3 Title 5	Hire-Purchase
Book 3 Title 6	Hire of Services
Book 3 Title 7	Hire of Work
Book 3 Title 8	Carriage
Book 3 Title 9	Loan
Book 3 Title 10	Deposit

Book 3 Title 11	Suretyship
Book 3 Title 12	Mortgage
Book 3 Title 13	Pledge
Book 3 Title 14	Warehousing
Book 3 Title 15	Agency
Book 3 Title 16	Brokerage
Book 3 Title 17	Compromise
Book 3 Title 18	Gambling and Betting
Book 3 Title 19	Current Account
Book 3 Title 20	Insurance
Book 3 Title 21	Bills
Book 3 Title 22	Partnerships and Companies
Book 3 Title 23	Associations (Repealed)

- Book 4 Property
- Book 5 Family
- Book 6 Succession

3. The Civil and Commercial Code in Thailand

• Book 2 Obligations – Examples of Obligations

Title 5 Chapter 1 Liability for Torts

Liability for a person's own actions

Direct Liability

Section 420. Any person who, intentionally or negligently, has unlawfully injured the life, body, health, freedom, property or any right of another person is said to commit a tortious act and shall be obligated to pay compensation for such act.

Liability for another person's actions or objects

Indirect Liability

- **Section 425.** The employer shall be jointly liable with his or her employee for the consequences of a tortious act committed by such employee in the course of his or her employment. This is similar to Section 427. (principal and agent), and Section 428. (employer and contractor)
- Owners or controller of vehicle shall be responsible for injury arising from such vehicle, unless it can be proven that the injury results from force majeure or fault of the injured person. (Section 437.), etc.

Compensations for Wrongful Acts

- **Section 438.** A court shall decide on the manner and the extent of compensation according to the circumstances and the severity of the tortious act.
Compensation shall include restitution of the property of which the injured person has been deprived by a tort or its value, including compensation to be granted for any damage arising.

Prescription

- **Section 448.** The right to claim compensation for damages in tort shall be barred by prescription after one year has elapsed from the date on which the injured person comes to know of the tortious act and the identity of the person bound to pay compensation, or ten years have elapsed from the date of the tortious act.
- However, if the damages are claimed based on an act punishable under the criminal law for which a longer prescription is provided, such longer prescription shall apply.



4. Minimal Stare Decisis: The Practical Significance

4. Minimal Stare Decisis: The Practical Significance

- Civil law jurisdictions do not adopt a stare decisis in adjudication. No single decision binds a court.
- Once uniform case law develops, courts treat precedents as a persuasive source of law, taking them into account when reaching a decision.
- Principle of *jurisprudence constante* deriving from French Civil law.